
CANADA / JUDGMENT

Walls v. Walls

2014 BCSC 586

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 586 Walls v. Walls

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walls v. Walls,

2014 BCSC 586

Date: 20140407

Docket: 85232

Registry: Kelowna

Between:

Marie Lucille Walls

Claimant

And

Christopher Maurice Clayton Walls

Respondent

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Claimant:

R.J. Smith Q.C.

Counsel for the Respondent:

G. Malinovsky

Place and Date of Hearing:

Kelowna, B.C.

July 9, 2013

Place and Date of Judgment:

Kelowna, B.C.

April 7, 2014

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Introduction

- [1] These reasons for judgment address each party's applications for relief regarding parenting arrangements, child support, and spousal support.
- [2] The parties were married in August 1991 and divorced on November 29, 2010. The respondent is age 43, and the claimant is age 42.
- [3] The parties have two children, K.L. and J.M. K.L. was born in December 1997, and J.M. was born in March 2002. When the parties divorced on November 29, 2010, they entered into a consent order ("the order") that provided for joint custody and guardianship of their children. At this time, the children are living with the respondent.
- [4] In about July 2009, some family assets were divided, but the terms of their agreement, if one existed, were not put into evidence.
- [5] The order also provided that the respondent would pay the claimant:
 - a. child support of \$1,740 per month; this order was to be reviewed on May 1, 2011 and annually thereafter;
 - b. if child support was not reviewed by the parties on May 1, 2011, the respondent must pay child support of \$1,740 per month until child support was reviewed;
 - c. the parties agreed to share extraordinary expenses under part seven of the Child Support Guidelines with the respondent paying 70% and the claimant paying 30%;

- d. the children's activities and the parties' obligations to pay portions of the extraordinary expenses were to be agreed upon and, if no agreement was reached, the issue would be referred to mediation or to a parenting coordinator for a decision; and
- e. spousal support of \$280 per month: "The quantum of spousal support will be reviewed on July 1, 2012, and biannually after that. The parties shall exchange their full income tax returns each year in May of each year."

[6] The issues to be addressed on these applications are:

- a. ongoing parenting arrangements;
- b. each party's financial circumstances and Guideline income;
- c. ongoing child support;
- d. ongoing spousal support; and
- e. arrears of child support and spousal support.

Facts

Separation Date

[7] Neither party deposed to a separation date, nor did they say if they cohabitated before marriage.

Distribution of Family Assets

[8] The respondent said he paid the claimant for her interest in the family assets in July 2009.

[9] I inferred that the parties reached an agreement regarding a division of family assets sometime before July 2009. Under the agreement, the respondent received a greater share of the family debt, and the claimant a greater share of the family property.

[10] The respondent purchased the claimant's interest in the family home for \$100,000. The respondent said that after this payment, he retained \$114,000 in the house equity. Neither party provided details of actual division of other family assets or debt that may have occurred and the respondent did not set out the value of any other assets divided between the parties. In the absence of better evidence I assume that, when the respondent paid the claimant for her one half interest in the home, her share was worth \$57,000. Thus when he paid \$100,000, she received \$43,000 more than her one half interest in the house.

The November 29, 2010 Order

[11] When the order was made, the respondent's Guideline income was \$123,662 per year and the claimant's income was \$16,875 without child support. This amount formed the basis for his obligation to pay \$1,740 per month for child support and \$260 per month for spousal support.

- [12] Child support was to be reviewed on May 1, 2011 and annually thereafter. If the order was not reviewed, then the respondent agreed to continue paying support in the amount specified in the order.
- [13] The spousal support quantum was to be reviewed on July 1, 2012 and bi-annually thereafter.
- [14] No reviews of spousal or child support obligations were initiated by either party before these applications.

Parenting

- [15] The children resided with the claimant in Kelowna at the time of separation and after the order. The parties continue to live in Kelowna although the parties did not provide many details regarding their circumstances.
- [16] The order does not identify which parent would have primary care of the children, but because the claimant was to receive child support, I assume the parties had agreed that the children would reside with her.
- [17] The claimant deposed that K.L. lived in her home until February 2011 when she began living with the respondent.
- [18] The respondent says that K.L. resided full-time in his home from January 2011 until June 2011.
- [19] Between June 2011 and August 2012, K.L. resided in both parents homes on an equal basis. The claimant said K.L. was splitting her time 50/50 in each parent's home by June 2011.
- [20] K.L. was a promising competitive hockey player. She had a history of concussions, and the claimant was concerned that hockey would not be in her best interests.
- [21] K.L. also experienced some emotional difficulties in August 2012 that resulted in an attempted suicide. She was treated for her emotional issues and recommended to attend counseling.
- [22] The claimant was afraid that K.L. was too immature to be away from home and away from her parents' control. And she believed K.L. was running away from school issues.
- [23] In August 2012, K.L. was invited to play with a woman's AAA midget hockey team in Prince George, BC. Initially the claimant opposed this plan, but she eventually gave consent because she was concerned that K.L. would blame her for missing the opportunity if she persisted in her opposition.
- [24] She was billeted in Prince George and attended high school until March 2013 when she returned to Kelowna. Except for K.L.'s time in Prince George, K.L. and J.M. have resided with him on a full-time basis since October 2012.

- [25] The respondent believes that the claimant is not suited to caring for either of the children, so they should reside in his home. He relies on two October 2012 e-mails from the children to their mother where each of them expressed their wish to reside with the respondent. K.L. also signed an affidavit addressing issues she has with the claimant.
- [26] The claimant questions the reliability of e-mails to reflect the children's true sentiments. The claimant's concerns are valid because these communications reflect the children's views many months before the hearing.
- [27] I will consider the children's comments when I decide the issue of their primary residences.
- [28] The claimant's affidavit number five contains information outlining her communications with the children since March 2013. These communications seem to reflect that the relationship between the children and their mother was improving but was not restored.
- [29] K.L. is intending to pursue a hockey program in Richmond, BC in the upcoming season, and apparently, both parties accept that this plan might be appropriate. The claimant does not abandon her concerns regarding K.L.'s history of concussions and concerns for her scholastic performance, but she accepts that hockey is an important component of K.L.'s life at this time.
- [30] J.M. resided with both parents until October 2012 when she moved to the respondent's home on a full time basis. The respondent was critical of the claimant's attention to some of the health problems J.M. experienced during the fall. He said J.M. was unhappy living with the claimant and quoted concerns regarding the quality of food, the attention she receives, and not being allowed to sleep with the lights on.
- [31] There was little other evidence helpful in analyzing where the children should live.

Analysis

Parenting Arrangements

Applicable Law

- [32] Both parties' addressed the issues of parenting in their arguments. These applications rely solely on the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), but the claimant's reply to the respondent's motion refers to the Family Law Act, S.B.C. 2011, c. 25 and the Family Relations Act, R.S.B.C. 1996, c. 128 in addition to the Divorce Act.
- [33] Section 16 of the Divorce Act sets out the factors to be considered in making a custody order:

Factors

- (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.

Past conduct

- (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.

Maximum contact

- (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.
- [34] Section 17(5) of the Divorce Act outlines the factors to be considered in varying a custody order:

Factors for custody order

- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
- [35] The parties are joint custodians and guardians of the children.
- [36] The claimant seeks an order varying the consent order to include a term that the respondent take all steps necessary to ensure that J.M. spends equal time with the claimant and respondent. If necessary, she wants the parties to retain and attend child counseling with J.M. She also wants to restrict the respondent from changing K.L.'s recreational activities without consultation and consent.
- [37] The respondent wishes to have sole custody of the children.
- [38] The issues concerning these children turn on what parenting arrangements will advance their best interests. On this point, no practical distinction exists between the Divorce Act and the Family Law Act.
- [39] Overall, the affidavit material contained contradictory assertions regarding the children's activities and their relationship to the claimant and neither party presented an independent report regarding the children or their views regarding a parenting regime that would be in their best interests.

- [40] I accept that, from October 2012 to the present, the children have principally resided with the respondent with the exception of the time K.L. was involved in her hockey program and has not resided with either parent.

Discussion

K.L.

- [41] The claimant does not seek an order changing K.L.'s residence, and she accepts that K.L. will remain resident with the respondent on a full-time basis.
- [42] The respondent relied on K.L.'s affidavit, obtained when she was 15 years of age. In my view, this reliance is quite unfortunate. Although it is important to consider the views of a child whose care is in issue, introducing affidavit evidence from that child places the other parent in invidious position. When discord is present between parents and children, it is not helpful or reasonable to put a parent into a position where it may be necessary to cross-examine the child on an affidavit in a dispute. The potential for irreparable harm to the relationship between the child and the parent is unfortunate.
- [43] Nonetheless, I am satisfied that the evidence regarding K.L.'s ongoing care and parenting establishes that she will be best served by remaining primarily resident with the respondent subject to absences for her hockey involvement.
- [44] The claimant does not oppose that position, but she wishes to be consulted regarding K.L.'s hockey plans and other important decisions. She has expressed concern over K.L.'s involvement in high level competitive hockey.
- [45] I order that the respondent consult the claimant regarding K.L.'s hockey plans and other important decisions at least 60 days before making a decision regarding the proposed activity. However the claimant's views on these questions will not constitute a veto, and the ultimate decisions regarding her activity will rest with the respondent. Additionally, K.L. needs to be encouraged to maintain and rekindle her relationship with her mother and the respondent must do his best to advance this process.

J.M.

- [46] The claimant wants the respondent to actively promote an equal division of parenting for both parents with J.M.
- [47] J.M. is 11 years old and has had some fractious times with her mother. I am unable to discern any substantial reason why J.M. could not return to live with her mother for at least half the time. The evidence of differences between them relates to things such as: discipline; the claimant's failure to attend events; allegations about inadequate food; and, J.M.'s perception that the claimant prefers K.L.

- [48] I do not accept the claimant's assertion that the respondent alienated either child from their mother. The evidence is simply insufficient to satisfy me that the respondent engaged in that type of activity.
- [49] I have some concern about the content and nature of the e-mail J.M. wrote to her mother. Some of these exchanges reflect J.M.'s views almost one year before the hearing; I accept that J.M. felt stressed when in her mother's care. Her short note did not convince me that it would be unsuitable for her to reside with her mother for more than weekend visits. I am not satisfied that it would not be in her best interest to reside with her mother for some portion of each week. The respondent must provide some leadership in settling the rules for this child's day-to-day care that will promote her relationship with the claimant.
- [50] Counseling and better communication between J.M. and the claimant may ameliorate differences that were cited in the evidence. I have considered the claimant's evidence of her relationship with J.M. during spring 2013, and I do not accept that a total breakdown in the relationship between an 11 year old child and her mother has occurred in the context of the family's history. In my view, J.M. and the claimant have good prospects of resuming a healthy mother/daughter relationship. The parties must work to salvage and improve this relationship.
- [51] I find that a material change in J.M.'s needs and circumstances has occurred. Shared parenting is in her best interests, as it will facilitate as much contact with both parents as is practical and consistent with her interests. J.M. will reside with each parent on alternating weeks, and each parent will continue to be subject to the previous order that outlined the joint custody and guardianship terms for these children.
- [52] The claimant must engage in a counseling program with J.M. If the child's views do not change or the relationship between J.M. and the claimant adversely influences J.M.'s well-being, then the parenting arrangements may need to be readjusted. After consulting with the counselor, either party may apply to review the parenting arrangements set out in this order.

Finances

Line 150 Incomes

- [53] The parties argued that I should adjust their Line 150 incomes because neither party took vacations. They each argued I should find that their incomes were artificially high due to pay received in lieu of vacation time.
- [54] I accept that some amount for pay in lieu of vacation should be removed from the respondent's Line 150 income. The respondent's three-year Line 150 income varied from \$132,000 in 2010 to \$150,537 in 2012.

- [55] I have concluded that the respondent's 2012 Line 150 income of \$150,577 should be reduced by 6% which is the statutory minimum vacation allowance set out in the Employment Standards Act, R.S.B.C. 1996, c. 113 (ESA) resulting in an income for support purposes of \$141,500. That amount will be used to address spousal and child support obligations subject to my comments concerning s. 7 expenses.
- [56] Similarly, the claimant's income for support purposes will be reduced by 4% - the prescribed amount for new employees.

The Claimant's Financial Circumstances and Guideline Income

- [57] During the marriage, the parties agreed the claimant would not work outside of the home for income until J.M. entered primary school. J.M. entered primary school in 2009 and until then, the claimant remained at home and was the primary caregiver, but she reported between \$1,807 and \$4,244 in income from 2006 to 2008.
- [58] On December 13, 2009, the claimant said her annual income was \$16,875 in addition to \$13,200 in child support. She reported earned income of \$19,698 on her 2009 tax return. At that time, the claimant said her annual expenses were \$53,467. In her financial statement she did not include ownership of real property at that time.
- [59] In 2009, the claimant began working as an instructor at Vancouver Career College and worked on a part-time basis until she quit that position on March 28, 2013. Previously she was a pharmacy technician.
- [60] She said she left the college position because the preparation and instruction work demanded as many as ten hours per day whereas she was paid for only four hours. Additionally, she said that the college discontinued the program, and she was not qualified to assume the position to teach medical office assistants. She supplied no supporting evidence for these assertions and I was unable to reconcile the two reasons given for her resignation.
- [61] She said that the qualifications to return to work as a pharmacy assistant had changed, and she would require a \$4,000 upgrading course to resume working in a pharmacy. She neither identified the source of this information nor provided any supporting evidence.

- [62] The claimant's Line 150 income was:

2010

\$47,150

2011

\$39,285

2012

\$30,034

- [63] The claimant says she obtained employment in Kelowna where she now works 35 hours per week earning \$15 per hour. This position was subject to a three-month probationary period. The claimant did not describe her employment, the prospects for future promotion, or any other details relating to her work.
- [64] In her 2012 financial statement, the claimant deposed to annual income of \$33,106 including day care benefits. Her income for spousal support purposes was \$30,034. She set out annual expenses totaling \$65,187 per year.
- [65] The claimant's financial statement reveals that she owns real property in Kelowna. I presume that property is her home address, but the affidavit material is unclear about where she actually lives.
- [66] The claimant valued her current assets at \$333,371 and debts at \$287,035.
- [67] The respondent seeks an order imputing income to the claimant based on her history of earning \$47,000 per annum. The respondent argues that her college instructor's position was deliberately abandoned and this fact should disentitle her to spousal support based on a lower income.
- [68] The claimant's evidence regarding her skills, ability, training and other job prospects including efforts she has made to improve her income was not fulsome.
- [69] She did not describe her employment circumstances before the birth of the children or any opportunities that may have escaped her because of remaining in the home and caring for the children.
- [70] The claimant provided very little detail regarding her past, present and future career prospects, but the limited evidence she gave on these points was not challenged.
- [71] For reasons set out in para. 181 I impute income to the claimant for support purposes at \$35,000 after allowing for the impact of vacation time that was historically paid in lieu of holidays.

The Respondent's Financial Circumstances and Guideline Income

- [72] The respondent is a senior manager with BC Hydro in Kelowna.
- [73] The respondent's 2012 T4 income was \$150,577 and \$146,746 for 2011.
- [74] The respondent's 2010 Line 150 income was \$123,663.
- [75] He said that the over-time hours available to him have declined since 2010. He did not provide corroborative evidence on this point nor any details about his expectations to inform the analysis of financial expectations.

- [76] The respondent's 2010 financial statement disclosed assets of \$562,595 and debt of \$594,000. In his 2013 financial statement, he disclosed assets, including real estate, of \$550,125 and debts of \$545,540.
- [77] The respondent lists his monthly expenses at \$32,672. This sum includes a \$1,000 monthly contribution to his RRSP and \$3,387 payroll deductions.
- [78] For the reasons set out in para. 55 I have imputed the respondent's income for support purposes to be \$141,500.

Child Support

- [79] The issue of arrears and retroactive child support is to be decided under the terms of the order, the subsequent agreement the parties made, and the changes in the children's residence since the order was made.
- [80] I will deal with this application regarding child support as a review of the order. For the reasons that follow, I have concluded:
- for the period October 2011 to September 2012, the respondent is not required to pay child support arrears;
 - for the period October 2012 to December 2012, the respondent's monthly child support obligation is \$697 after set off of the claimant's responsibility to support K.L.; the respondent's arrears owing are \$396;
 - from January 1, 2013 to the present and continuing until the next review contemplated by the order, the respondent will pay child support on an ongoing basis to the claimant of \$718 per month.
- [81] I will first address the arrears issue before turning to a review of retroactive and ongoing support obligations.
- [82] The 2010 order required the respondent to pay child support of \$1,740 per month commencing August 1, 2010 subject to the specific condition that "if child support is not reviewed by the parties, then, until such time as it is reviewed, the respondent's obligation to pay child support shall be pursuant to the terms of this order".
- [83] The claimant approached her application on the basis that there should have been reviews of child support conducted annually and spousal support every two years after 2010.
- [84] The respondent deposes that the children resided with the claimant from December 2010 to January 2011.
- [85] From January 2011 to June 2011, he claims that K.L. resided with him on a full-time basis, and J.M. resided with the claimant.

- [86] From June 2011 to August 2012, K.L. resided 50% of the time with the claimant and 50% with the respondent.
- [87] In September 2012, K.L. began living in Prince George to study and pursue her hockey career. In spring 2013, that arrangement ended.
- [88] In October 2012, J.M. began residing with the respondent on a full time basis, and before that time, she resided with the claimant.
- [89] My analysis of the parties' positions regarding ongoing child support, arrears of child and spousal support is complicated by the unwritten agreement the respondent alleges varied his support obligations - i.e., support payments would fall to \$1,130 per month in October 2011.
- [90] The respondent alleges that he made this agreement with the claimant in October 2011 to reduce his payment to \$1,130 per month as child support and he would pay all of K.L.'s special and extraordinary expenses. In exchange the claimant accepted the lesser sum for child support and waived her right to spousal support. He maintains that under this agreement he paid the reduced child support until October 2012 when he further reduced child support to \$565 per month.
- [91] The claimant disputes the respondent's interpretation of these events; she said he unilaterally imposed the payment changes in October 2011 without her consent or affirmation. The respondent again unilaterally reduced his support payments in March 2011 without her agreement.
- [92] I accept that the respondent and claimant agreed to reduce the amounts of child support and spousal support until August 2012. She did not object to changes in support in October 2011 and took no steps to initiate a review before the current application was made; this is inconsistent with her position that she did not agree to support changes in October 2011. The respondent has not proved that the claimant accepted his proposed change to his support obligations after October 2012. That arrangement remained in force and to that extent that the claimant was entitled to spousal support of \$260 per month. Child support for the time between October 2012 to January 1, 2013 will be subject to my findings regarding variation in child support obligations.
- [93] I made findings that impute income to both parties at amounts that are not reflected in their Line 150 incomes. Those imputed incomes will be used to establish ongoing support obligations after January 2013.
- [94] This application was commenced in February 2013, and I adopt that date as the date to review ongoing support.
- [95] I now turn to reviewing retroactive and ongoing support.
- [96] The claimant made three requests regarding retroactive and ongoing support:

- First, retroactive child support for J.M. from May 1, 2011 to December 31, 2012 totaling \$5,253;
- Second, retroactive child support from January 2, 2013 to June 1, 2013 totaling \$5,178;
- Third, continuing child support for J.M. at \$863 per month because she is in the claimant's care 50% of the time. This sum reflects the set off amounts that include her obligation to pay the respondent child support for K.L.

[97] From October 2012 to January 2013, the respondent paid \$565 per month child support and nothing for spousal support.

[98] From February 2013 forward, the respondent should have paid child support to the claimant for J.M. at the Guideline rate after considering the set-off. The claimant is required to pay child support to the respondent for K.L. also at the Guideline rate.

[99] Accordingly, the respondent with a Guideline income of \$141,500 will pay the claimant \$718 for J.M. from February 2013 on an ongoing basis.

[100] She argued that the respondent's obligation to pay child support from May 2011 to April 2012 was \$1,210 per month and not the \$1,130 he actually paid, so the difference is \$960. This figure is derived from his actual payment and the child support she would have received if the review had occurred.

[101] I have indicated above that I do not accept the claimant's evidence on this point. In 2011, the claimant did not record any spousal support on her income tax return. She did not seek a review of child support, nor does any evidence demonstrate she complained to the respondent about the amount of support paid.

[102] I do not accept the respondent's assertion that the claimant agreed to continue the support reduction for the children and waiver of her support after October 2012.

[103] K.L. lived full-time with the respondent after March 2013 and before lived with her billet in Prince George. In my view, it is appropriate to address the issue of child support based on the fact that one child resided with the respondent full-time and the other resided with the parties equally until December 31, 2012. J.M. did not change residences with consent of the claimant and it is not reasonable to conclude that she was not required to maintain a place for J.M. until this hearing was concluded.

[104] In the circumstances, the order obliged the respondent to pay the claimant child support until the review occurred. No review occurred before 2013 and, in my view, the circumstances prevailing when J.M. began living with the respondent were not sufficient to warrant a change in his support obligations for her.

[105] The claimant provided Advisory Guideline calculations for the period October 2012 to December 2012 with the parties 2012 earnings of \$146,764 and \$39,285 respectively. This calculation indicates that the respondent should have paid \$697 per month as opposed to \$565. I accept that those calculations should apply to her application; this difference for

child support is \$132 and the arrears are \$396. From February 1, 2013 to the present, the amount of child support payable by the respondent is \$718. During this time, the respondent has not paid child support.

Spousal Support

Claimant's Argument

- [106] The claimant seeks spousal support at \$260 per month from February 1, 2011 to June 30, 2012; she claims that \$4,160 has accrued to her for spousal support during this time.
- [107] She seeks \$2,484 of additional retroactive spousal support from July 1, 2012 and ongoing support of \$3,084 per month.
- [108] She says as of June 2013 the respondent owes \$38,171 in spousal support arrears.
- [109] She also seeks ongoing spousal support of \$3,084 per month based on the Spousal Support Advisory Guidelines (Advisory Guidelines).
- [110] Earlier, I rejected the claimant's argument that the respondent's Line 150 Advisory Guideline income for 2012 should be \$150,577, and her corresponding Advisory Guideline income is \$30,034.
- [111] The claimant submits that their income inequality, compensatory considerations and their pre-separation standard of living support her claim for ongoing indefinite spousal support. She relies on *Tedham v. Tedham*, 2005 BCCA 502 [Tedham]; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.
- [112] The claimant framed her notice of application seeking a variation of the order; in fact, she seeks a review of the order as to quantum. She responds to the respondent's allegation that her circumstances have changed disentitling her to continued spousal support. His application to cancel her support will be dealt with as a variation of spousal support requiring him to prove there has been a material change in circumstances.
- [113] She argues that because this is a review, she does not need to prove a material change in her circumstances to justify an increase in her support award: *Schmidt v. Schmidt*, 1999 BCCA 701.
- [114] She argued that the following considerations apply to her application:
- a. the Divorce Act promotes "self-sufficiency" insofar as practicable;
 - b. the Court should consider the economic disadvantages experienced by a stay-at-home parent;
 - c. the support models include compensatory, contractual and non-contractual (need-based);
 - d. self-sufficiency must be considered in the context of the standard of living enjoyed by the parties;

- e. compensatory support should continue until adequate compensation has been made; and
- f. The quantum of spousal support depends on the measure of reapportionment, if any, occurring when the parties divided assets; this requirement ensures that if reapportionment adequately addresses economic disadvantage flowing from the marriage, then spousal support need not address that issue.

Respondent's Argument

- [115] The respondent argues that the claimant was compensated for any disadvantage she experienced from the marriage and its breakdown.
- [116] He claims that the claimant received a disproportionate share of the family assets in 2009 because she received almost \$100,000 more than he received when they divided their family assets. He argues that this discrepancy should be reflected in this review of her entitlement to continued spousal support.
- [117] The respondent submits that the claimant is currently in better financial circumstances than she was when they divided their assets four years ago. He claims to be at an economic disadvantage resulting from the breakup of the marriage in part because the value of his assets is less the claimant's current assets.
- [118] He submits that if an order for spousal support is made, that order will not be in the children's best interests because it will impinge on his ability to pay for all of their expenses and needs. He believes that he cannot afford K.L.'s hockey expenses and pay spousal support. I note that the respondent's 2012 contribution of \$12,000 to an RRSP belies his claim that he cannot pay spousal support and for K.L.'s extraordinary expenses.
- [119] The respondent argues that the claimant has the capacity to earn \$47,000 per year and that she voluntarily left her position as a pharmacy technician instructor that would have continued to pay her income at that level.
- [120] He argues that s. 8.9 of the Advisory Guidelines require that the Court reduce the respondent's Guideline income by the grossed up amount for child support and s. 7 expenses paid by him. He estimates this amount is \$13,905 for 2012 and \$5,310 to date for 2013.
- [121] Although the respondent opposes continuing any amount of spousal support, if an order is made, he argues it should be limited to four to five years after separation.

Applicable Law

[122] I intend to address the claimant's application as a review of the quantum of spousal support as contemplated by the order. I will consider the respondent's application as a claim to vary the order by canceling the claimant's spousal support entitlement. I do not want to conflate the two issues, but some facts relating to the quantum of support are also germane to the respondent's claim that the claimant's entitlement should end.

[123] The order provides for a review of the quantum of spousal support but not duration. This language is unfortunate as it leads to some uncertainty about the process. The Supreme Court of Canada noted this point in *Leskun v. Leskun*, 2006 SCC 25 [Leskun] at para. 39:

Willick and Choquette establish that a trial court should resist making temporary orders (or orders subject to "review") under s. 15.2. See also: *Keller v. Black*, [2000] O.J. No. 79 (QL) (S.C.J.). Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change of circumstances. If the s. 15.2 court considers it essential (as here) to identify an issue for future review, the issue should be tightly delimited in the s. 15.2 order. This is because on a "review" nobody bears an onus to show changed circumstances. Failure to tightly circumscribe the issue will inevitably be seen by one or other of the parties as an invitation simply to reargue their case. That is what happened here. The more precise condition stated in the reasons of the trial judge was excessively broadened in the formal order. This resulted in a measure of avoidable confusion in the subsequent proceedings.

[124] There is a qualitative difference between this review of the quantum of spousal support and the respondent's application to vary the order to include a limit to the duration of her support. Because this is a review and variation proceeding there is a blending of the applicable principles; this does not affect the outcome.

[125] Neither party raised a concern about this issue, but I will address the respondent's application as a variation of the consent order rather than a simple review: *Domirti v. Domirti*, 2010 BCCA 472 at para. 38.

[126] In *Leskun*, the Supreme Court of Canada said at para. 37:

Review orders, where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances: *Choquette v. Choquette* 1998 CanLII 5760 (ON CA), (1998), 39 R.F.L. (4th) 384 (Ont. C.A.). Otherwise, as the amicus curiae fairly points out, the applicant may have his or her application dismissed on the basis that the circumstances at the time of the variation application were contemplated at the time of the original order and, therefore, that there had been no change in circumstances. The test for variation is a strict one: *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, at pp. 688-90.

[127] In *Willick v. Willick*, [1994] 3 S.C.R. 670 the Supreme Court of Canada said at para. 91:

The variation of a support order, be it spousal or child support, is governed by s. 17(4) of the Divorce Act, which requires that a court be satisfied "that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage". The appellant argues that s. 17(4) operates where any one of the enumerated changes is demonstrated.

[128] And at para. 103, the Supreme Court of Canada went on to say:

A proper variation would have demanded inquiry into this matter. It would have considered the needs of the children as well as the increased income of the mother and could very well have concluded that, although the amount of spousal support should be reduced, the amount of child support should be commensurately raised in order to address realistically the situation of the family and the fact that child support had theretofore been understated because of its interrelationship with the means of the payor. In *Gillis v. Gillis* 1994 CanLII 4517 (NS SC), (1994), 3 R.F.L. (4th) 128 (N.S.S.C.), a similar recognition underlay the court's refusal to reduce maintenance notwithstanding the fact that the two youngest children had left the home. See also *Ryan v. Ryan* (1992), 114 N.S.R. (2d) 255 (T.D.).

[129] In *Westergard v. Buttress*, 2012 BCCA 38 the Court addressed the importance of narrowing the issues subject to review prescribed in the order. In the absence of clear direction in the order, a review should address only entitlement issues and not quantum.

[130] The Divorce Act sets out the parameters for spousal support and variation applications:

Spousal support order

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

Terms and conditions

(3) The court may make an order under subsection (1) . . . for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

(4) In making an order under subsection (1) . . . the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

...

Objectives of a spousal support order

(6) An order made under subsection (1) . . . that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as is practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision thereof on application by either or both former spouses;

...

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[131] The claimant's application concerns the quantum of her support and the issue does not turn on proof of changes in her circumstances. The duration of the award is not at issue under review but will engage a consideration of changes in the claimant's circumstances. The respondent argues the claimant is not entitled to continuing support and he is entitled to a variation of the order cancelling spousal support.

[132] I will deal the both parties' claims without distinguishing between the review issues and variation test.

[133] In Tedham, the Court considered time limited spousal support orders and retroactive entitlement to spousal support.

[134] In Tedham, the parties were married 16 years. Their children were adults but still lived with their mother. She was age 52, and Mr. Tedham was age 47. She worked part-time in retail positions earning \$25,000 per year, and Mr. Tedham earned over \$300,000 per year in a sales

position. The chambers judge accepted that the applicant had not made all reasonable efforts to become independent, but it was not clear if she would have become independent if she had acted reasonably. Ms. Tedham received more 65% of the family assets when they were divided.

[135] In *Tedham*, the Court assessed the relationship between self-sufficiency and compensatory support arising under s. 15.2(6)(d) and the other listed circumstances in s. 15.2(4). At para. 46, the Court said:

In summary, after reviewing the factors and objectives relevant to a spousal support order set forth in ss. 15.2(4) and (6) of the Act in the context of the evidence in this case, I am satisfied that Tysoe J. erred by focusing almost exclusively on the objective of self-sufficiency in making his order and in failing to give effect to the fact that the obligation of a spouse to become self-supporting is limited by the words "in so far as practicable". I am also satisfied that a consideration of all of the objectives of a spousal support order and the factors to be considered in making such an order militated against a limited-term order in all of the circumstances.

[136] The Court's comments at para. 46 were premised on earlier comments made at para. 37 regarding the relationship between self-sufficiency and practicality:

Thus, even accepting that Ms. Tedham's efforts to obtain employment were less than reasonable in the circumstances, this fact alone could not justify the time-limited order with a three-year termination date. The other objectives of a support order, which were significant in this case, were overshadowed by the objective of self-sufficiency and the failure to fully recognize that the objective of self-sufficiency is qualified by the words, "in so far as is practicable".

[137] At para. 60, the Court said that when a spousal support award is made on a compensatory basis, the award should continue until adequate compensation has been made notwithstanding a spouse achieving a degree of self-sufficiency:

While *Allaire* is what I will refer to as a "non-interference" case, it makes the point that an order of spousal support which is based on compensatory principles should continue until adequate compensation has been made, even if the spouse has achieved a degree of self-sufficiency. It also reinforces the point that self-sufficiency must be viewed in the context of the marital standard of living. In this case, the marital standard of living was, and is, considerably higher than Ms. Tedham is able to achieve on her own and is more akin to that currently enjoyed by Mr. Tedham.

[138] Finally, at para. 64, the Court addressed the relationship between reapportionment and spousal support:

Another potential pitfall arising from the interaction of these sections is that the court could mistakenly conclude that by reapportioning property under s. 65 of the FRA, it had necessarily addressed the full extent of the economically disadvantaged spouse's claim for support under s. 15.2 of the Act (or its equivalent under the FRA). The fact that there has been a reapportionment does not mean that there should not be an award of spousal support. That decision will turn on the extent to which the reapportionment has adequately compensated for the economic

dislocation caused to a spouse flowing from the marriage or its breakdown, and any continuing need the spouse may have for support arising from other factors and objectives set forth in s. 15.2 (and the equivalent provision of the FRA).

[139] In summary, the principles set out in Tedham are informative:

- a. the equitable sharing of the economic consequences of the marriage breakdown must recognize the disadvantages incurred by the spouse who sacrifices by staying home and caring for the home and children and the economic advantages conferred on the other spouse which may be long term considerations;
- b. a failed marriage's financial consequences extend beyond simple loss of future earning power or losses directly related to raising children;
- c. losses may encompass loss of seniority, missed promotions, and lack of fringe benefits;
- d. self-sufficiency is not the governing factor in making a spousal support order;
- e. time-limited support orders often fail to reflect the compensatory aspects of support;
- f. support orders compensate for the permanent economic consequences of postponing education or entry into the job market;
- g. spousal support based on compensatory principles should continue until adequate compensation has been made even if self-sufficiency has been achieved; and,
- h. self-sufficiency is to be reviewed in the context of the marital standard of living, needs and compensatory principles. I will address the various issues raised in making these spousal support findings.

Economic Disadvantage

[140] First, the respondent argued that the claimant suffered no disadvantage from the marriage or its breakdown: *Munro v. Munro*, 2006 BCSC 1758. *Munro* was a case in involving review of support entitlement. There, the Court pointed out that it did not need to consider the material change in circumstances test because it was free to assess the application without, as if dealing with a claim in the first instance. The respondent argued that the claimant is not entitled to support that will produce an equalized standard of living: *Elias v. Elias*, 2006 BCSC 124.

[141] The claimant deposed that before the parties separated, they agreed she would not work until J.M. entered Grade one; J.M. entered Grade one in 2009. The claimant's income was \$1,807 for 2006, \$4,244 for 2007, \$2,150 for 2008 and \$19,698 for 2009. I will infer that her income was lower due to her obligations to remain at home and care for her children in the years before they attended school.

- [142] It appears that the claimant was fortunate to obtain a teaching position in her field shortly before or after J.M. started school. She was a trained pharmacist's assistant and earned a significant income between 2009 and 2013.
- [143] After she left her employment with the Vancouver Career College, the pharmacy assistant program was discontinued and replaced with a medical office assistants program. She said she was not qualified for that work. She alleges she fails to meet current market standards to resume that type of work as a pharmacy technician. Her explanation was not clear, but I accept that she was faced with some limitations impeding her return to work as a pharmacy technician. Nevertheless, the claimant found work, but she is not self-sufficient.
- [144] I am satisfied that the claimant suffered some disadvantages due to the marriage and the breakup insofar as she did not work outside the home until J.M. was in primary school. Although I am satisfied that the claimant's childcare responsibilities and absence from the workplace would reasonably impair her ability to pursue her a previous vocation, the true measure of this impairment was not fully canvassed in the evidence and the impact is difficult to assess.

Self-Sufficiency

- [145] Second, the respondent argues that the claimant failed to take reasonable steps to becoming employed given her age, education, and skill and work history: *Van Gool v. Van Gool*, [1998] B.C.J. No. 2513 (C.A.). In other words, she has not made adequate effort to become self-sufficient, and she is intentionally underemployed.
- [146] The respondent argues the test is whether the claimant is capable of earning more income not whether the claimant is intentionally under employed: *Barker v. Barker*, 2005 BCCA 177 at para. 19. But *Barker* is a case concerned with child support and not spousal support.
- [147] The respondent argues that I should impute a higher income to the claimant for spousal support purposes because of her deliberate decision to leave her Vancouver Career College position to pursue the less remunerative assistance work she is currently doing.
- [148] He argues that she is able to earn income exceeding \$47,000 per year, and I should impute that income to the claimant.
- [149] Curiously, the claimant deposed that she was paid for 20 hours per week at \$25.50 per hour when she worked for Vancouver Career College.
- [150] In 2010, her income was \$47,150, and at the same rate of pay, she would have worked 1779 hours or 35.5 hours per week for 52 weeks. And in 2011, the claimant's tax return records her income as \$39,285. To earn \$39,285, she would have worked 1540 hours or 30 hours per week for 52 weeks.
- [151] This work schedule does not accord with her description in affidavit #5 where she claimed to be instructing four hours a day with unpaid duties taking up as many as 10 hours a day.

- [152] While I do not fully understand or accept the claimant's explanation for abandoning her work with Vancouver Career College without having found another job, she may have acted reasonably in accepting a new position earning \$15 per hour over 35 hours per week.
- [153] I was concerned about the claimant's assertions regarding the amount of work and compensation she received when she was instructing. It is unclear to me whether her decision to leave the college occurred solely because the program was discontinued or whether she elected to resign due to the hours of work and pay.
- [154] She said that her income before ending her teaching position in February 2013 was \$33,159 per year. I have concluded that when she left her teaching position she intentionally became underemployed.
- [155] I have concluded that the claimant has not discharged her duty to establish that she made reasonable efforts to become more self-sufficient. The claimant's evidence regarding her employment and prospects is deficient for the purposes of assessing her abilities and entitlement to spousal support.
- [156] She did not give detailed information about her current standard of living, employment or future prospects. In my view, the claimant failed to provide sufficient evidence to satisfy me that she is not capable of earning an improved salary. It is also curious that the claimant did not disclose where she lives or details about her accommodation. She did not provide evidence detail about where she lives in relation to local schools, hospitals, or the town centre. The picture of her spending patterns in her financial statement reveal that she spends more money than she receives from all sources. In 2010 her monthly expenses were \$4,451 and in December 2012 \$5,432 per month. By contrast, the respondent's expenses in 2010 were \$11,545 per month and in 2012 \$32,672 per month, including \$1,300 per month for children's activities. The respondent's 2013 estimate of monthly expenses contains several anomalies that were not addressed during the hearing.
- [157] The claimant has demonstrated a history of earning more than \$15 per hour in the past; the evidence was not fulsome and did not address her future prospects. Although her decision to leave her teaching post was intentional, she has managed to find employment in her field at a lower level.
- [158] The claimant's efforts towards achieving self-sufficiency were less than reasonable, but this alone does not justify a time-limitation to her support. Self-sufficiency is only one factor in determining spousal support claim; the compensatory principles are also factors that must be considered in regard to support: *Tedham* at para. 37 and 38.
- [159] Self-sufficiency is to be measured against the claimant's ability to sustain a standard of living consistent with what she enjoyed during the marriage. The claimant's unsatisfactory effort to become self-sufficient can be addressed by imputing an amount of income that reflects the impact of her decision to leave her prior employment.

- [160] Considerable uncertainty exists about the amount of money she could earn if she had been able to remain in a teaching position. Her evidence is not entirely helpful on this point.

Reapportionment of Assets

- [161] Third, the respondent argues that the reapportionment (or unequal division) of assets that occurred in 2009 is a factor to be considered when applying the Advisory Guidelines: *McEachern v. McEachern*, 2006 BCCA 508.
- [162] On this application, neither party provided me with details regarding the parties' pre-separation affairs. Moreover, I was not told whether the division of assets in 2009 was by agreement or court order. The terms of settlement were not disclosed to me.
- [163] The unchallenged evidence on this application is sufficient for me to conclude that the claimant received a benefit of almost \$43,000 above her half interest when the respondent paid her for the house. The claimant did not disagree with the respondent's assertion. In the absence of better evidence, I accept that when the claimant received \$100,000 in 2009 for the family home she received \$43,000 more than her one half interest in that property. This discrepancy is, in part, to be considered as part of the compensation she received to address the negative impact on her ability to fully integrate into the work force and achieve her full pre-marriage potential.
- [164] The respondent relied on BC assessment notices to establish the parties past and current asset values; frequently these values are used as a guide in property evaluations. But, for the purposes of this summary trial, I accept them as proof of actual value in spite of the fact that they are not properly before the Court as opinion evidence.
- [165] The respondent's 2013 financial statement reveals the value of his property, net of debt, is \$5,000. The claimant's 2013 financial statement states her assets, net of debt are worth \$46,000. The respondent argues that if support is ordered, it should be to a maximum of three years post separation: *P.M.S. v. T.S.S.*, 2003 BCSC 1207. However, the Advisory Guidelines formula suggests that the spousal support duration for the claimant should be between 8.5 and 17 years from the date of separation.
- [166] The disproportionate division of family assets at the time of separation is a factor in measuring economic disadvantage suffered by the claimant during the marriage. In my view, the respondent ought to be credited for the transfer of his \$47,000 equity in the parties' assets. When addressing the question of whether the claimant has been compensated for the economic loss flowing from the marriage or its breakdown and any need she may have for spousal support.
- [167] I am satisfied that the claimant is entitled to spousal support on compensatory principles and to redress the consequences of her role in the marriage and the aftermath. She also requires support to sustain a standard of living comparable to that she enjoyed during her marriage of 17 years.

- [168] I am satisfied that she should receive continuing support as informed by the Advisory Guidelines taking into account the parenting roles now in place.
- [169] On the question of entitlement to spousal support, I conclude that the omission of words indicating there would be a review of duration is not an oversight and that it is also appropriate to examine the issue of duration on the basis of a variation application. I will address the issues of whether the respondent has established a change in circumstances to warrant a change in the duration of the claimant's support entitlement.
- [170] The claimant entered the workforce in 2009 after being unemployed before their children were in primary school. K.L. was born in 1997, and it is a reasonable inference that the claimant was out of the full time work force for at least 12 years. She trained as a pharmacy technician and worked as an instructor from 2009 until March 2013. She obtained other employment in 2013 but did not describe the type of position she obtained.
- [171] I conclude that when the 2010 order was made, the parties were aware of claimant's role and anticipated income. Almost no evidence described the circumstances under which the parties reached the agreement and consent order.
- [172] The respondent's income has increased since 2010. The claimant's income and capacity to earn income has fluctuated since making of the order, but it has generally increased; the evidence is that claimant does not qualify for the position in which she earned \$47,000 in 2010.

Conclusions re: Spousal Support

- [173] In my view, the respondent has not demonstrated changes in the claimant's circumstances, except for alterations in parenting arrangements to meet the material change test in Willick. The impact on the respondent of the parenting changes is addressed in the child support provisions earlier in these reasons.
- [174] I cannot infer that the possibility of the claimant being unable to earn income much above her 2012 level was unforeseeable or not within the contemplation of the parties at the time of the order.
- [175] I take into account the claimant's current needs and circumstances, the length of time they live together and her functions during the marriage in rejecting the imposition of a little limitation on her support entitlement. This was a lengthy and traditional marriage in which the parties would have lived comfortably on the respondent's income. His income has continued to improve while the claimant's income remains at a modest level, even when she worked at her instructor's position.
- [176] The claimant does not have the prospect of achieving a standard of living remotely similar to her experience during the marriage.

- [177] Although there was a slight deterioration in the value of the respondent's capital, this does not constitute a material change in his circumstances or the claimant's circumstances. Further, I am not satisfied that the claimant is capable of reaching a level of self-sufficiency when measuring her need against her ability to sustain her marital standard of living. Tedham at paras. 50 and 51.
- [178] Support on the compensatory model is designed to reflect losses occurring to the mother caused by her absence from the workforce for family duties. Self-sufficiency is to be considered in the broader context of the marital standard of living and the ability of one spouse to achieve that standard through their own efforts.
- [179] The compensation received by the claimant of approximately \$43,000 does not fairly correspond to the likely impact of the claimant's dedication to child care and domestic duties. Accordingly, I am not prepared to introduce a time limit for the claimant's support entitlement because the evidence did not reflect a radical change in circumstances that would justify a variation of the parties' agreement with the inclusion of limitations to her support. It may be that circumstances will change over time justifying such a change. But the evidence in this application did not meet the respondent's obligation on a balance of probabilities.
- [180] However, it is important to reflect that the claimant did not act reasonably in pursuing the optimum income opportunities with Vancouver Career College and her evidence relating to current employment was insufficient to convince me that she had acted reasonably in taking her new job.
- [181] Based on the claimant's evidence I will impute income to her, taking into consideration that her average earnings for 2011 to 2013 (including her 2013 position being paid at \$15 per hour), of \$36,500 for the purposes of calculating spousal and child support. This amount will be reduced by an allowance for vacation pay she has received in the past. The ESA rate for new employees is 4%, and her imputed income will be reduced to \$35,000.
- [182] In my view, it would not be appropriate to establish an expiry date for the claimant's entitlement to support. I have adopted the Advisory Guidelines regarding the amount of support payable at \$1,879 per month commencing February 2013.
- [183] I accept that the respondent is entitled to an adjustment to his Guideline income under s. 8.9 of the Advisory Guidelines by a gross up to the parties' spousal support Guideline income by the amounts payable under s. 7.
- [184] I ask the parties to do the calculations to reflect this part of the decision and, if they are not in agreement, then the parties will have liberty to apply by video conference to settle any outstanding differences.

- [185] The respondent has not paid spousal support since February 2011. The respondent began paying child support at a lesser amount in March 2011 and alleges that the parties agreed to reduce support in October 2011. He admits spousal support arrears of \$1,250 for March 2011 to October 2011; I have calculated this amount to be \$2,080.
- [186] I will assess the respondent's obligation for arrears on the basis that this amount is \$2,080 (\$260 x eight months).
- [187] I accept that the respondent's spousal support obligation was suspended from October 2011 to September 2012 and no arrears accrued for that time.
- [188] From September 2012 to December 2012, the respondent will pay support to the claimant at \$260 per month. This review began in February 2013. I will use that date as the commencement date for the review contemplated by the order.
- [189] I have concluded that in addition to the \$2,080 for 2011 he will pay the claimant \$780 (\$260 x three months as per the order) in spousal support for October through January 2013.
- [190] Finally, for 2013 the respondent will pay \$1,826 per month of spousal support to the claimant subject to a recalculation of that amount after determining the amount by which his Guideline income should be reduced due to special expenses under s. 8.9 of the Advisory Guidelines.
- [191] I am attaching, as Appendix A to these reasons, the Divorcemate calculation made to arrive at my conclusions for child and spousal support. If there are errors in my calculations, the parties are at liberty to address those miscalculations.

Extraordinary Expenses

- [192] From October 2011 until August 2012 the parties acted under an agreement or consensus altering the claimant's support obligations for K.L. The payment of extraordinary expenses, primarily related to her hockey activity, were to paid by the respondent in exchange for a reduction in his support payments to the claimant. The respondent estimated these expenses to be \$20,000 per year not including spending money for K.L.
- [193] In 2013, he had paid an additional \$382.32 for J.M.'s activities including guitar and soccer.
- [194] The claimant rejected the continuation of this arrangement after August 2012. I have dealt with the respondent's continuing obligation to pay spousal and child support in light of those conclusions.

- [195] The order required the parties to pay extraordinary expenses on a basis that the respondent paid 70% and the claimant 30%. The claimant argues that the order required her to contribute to the children's extraordinary expenses "that are agreed upon by the parties, and, if the parties cannot agree, then they will agree to submit that issue to mediation or to a parenting coordinator for a decision." Neither of the parties submitted the question of extraordinary expenses to an arbitrator or parenting coordinator.
- [196] The fact that neither party pursued the mediation/parenting coordinator requirement to settle issues regarding extraordinary expenses does not relieve the claimant from her obligations to contribute to those costs. The agreement requires the claimant to pay 30% of those expenses subject to annual readjustments in May of each year.
- [197] The claimant's submission that she should be freed from paying a share of K.L.'s hockey related expenses because she does not agree with K.L.'s investment in hockey is against the clear language of the order.
- [198] The nature of the respondent's argument invites the Court to resolve the disagreement around extraordinary expenses. On an ongoing basis, the parties must resolve these issues in accordance with their agreement.
- [199] In my view, the parties have created a mechanism to resolve disputes regarding extraordinary expenses by way of mediation or engaging a parenting coordinator. Issues around extraordinary expenses are likely to continue to exist in this family, and in my view, the parties preferred resolution mechanism ought to prevail to resolve these disputes.
- [200] The respondent submits that the expenses were reasonable extraordinary expenses and that the claimant cannot escape her responsibility to contribute to those costs from May 2011 the present.
- [201] He relies on *Laurie v. Laurie*, 2002 BCCA 317 for the proposition that the parties should moderate their lifestyles to afford extraordinary athletic pursuits of K.L. The amount involved in K.L.'s hockey activity is sufficiently large to clarify as an extraordinary expense. The respondent says that it is in her best interest and consistent with the family spending patterns before separation that the parties share those costs in proportion to their incomes: see *McLaughlin v. McLaughlin*, [1998] B.C.J. No. 2514 (C.A.).
- [202] He argues that the parent's combined incomes coupled with the family spending patterns before separation support his claim that these expenses are reasonable. He argues that the nature and amount of the expense, the number of activities involved, the needs of the child, and the number of children in the family will influence an analysis of whether expenses are extraordinary.

- [203] If they are extraordinary, then the Court is required to consider whether the expenses are necessary relation to the child's best interests. The evidence concerning K.L.'s hockey activities was that she began playing hockey as a five-year-old and has continued to do so since. There was no indication of the costs incurred by the family before separation or the level of achievement she attained before separation.
- [204] I appreciate the evidence is sparse on this issue, but I am satisfied that the parties have generally agreed to permit K.L. to pursue her interest in hockey. She has an identified aptitude that has been recognized by invitations to play in Prince George and Richmond. It is an expensive undertaking but within the means of the respondent to finance the largest portion of those costs. I am satisfied that the expenses claimed by the respondent should constitute extraordinary expenses under s. 7(1)(f) of the Guidelines. I am also satisfied that the expenses described by the respondent are reasonable in the context of K.L.'s involvement.
- [205] In my view, the claimant's resources are limited by comparison to the respondent's resources. The respondent was otherwise entitled to have the issue of these costs dealt with in a timely way through a mediator or parent coordinator. The expenses were incurred against the claimant's wishes and, in my view, the agreement should preclude the respondent from demanding a contribution from the claimant before November 2012.
- [206] Commencing February 2013, the claimant will pay to the respondent extraordinary expenses based on her Guideline incomes for 2012 and the new Guideline incomes imputed to the parties for 2013.
- [207] This order will result in the creation of the child support obligation payable by the claimant to the respondent for the children's extraordinary expenses after January 2013.

Conclusion

Parenting

- [208] K.L. will remain in the custody of the respondent. J.M. will reside equally with the claimant and respondent.

Income for Support Purposes

- [209] The respondent's Guideline income will be imputed at \$141,500 and the claimant's income at \$35,000.

Child Support

- [210] The respondent's child support obligations after the appropriate set-off will be \$718 commencing February 1, 2013.

Child support arrears

[211] The respondent will pay the claimant's child support arrears accruing after October 1, 2012 of \$ 396 assuming that he made payments of lesser amounts in those months.

Extraordinary Expenses

[212] The claimant will pay to the respondent an amount that is equal to 20% of the s. 7 expenses incurred from November 2012 to the present.

Spousal Support

[213] The respondent will pay the claimant spousal support in the sum of \$1,879 commencing February 1, 2013.

Spousal Support Arrears

[214] The respondent will pay the claimant spousal support arrears of \$2,080.

"The Honourable Mr. Justice Armstrong"

Appendix "A"

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