IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *K.E.J. v. P.R.J.,*
2018 BCSC 1401

Date: 20180820
Docket: 16-2028
Registry: Victoria

Between:

K. E. J.

Claimant

And:

P. R. J.

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Claimant:	R.S. Gill
Counsel for the Respondent:	A.J. Duncan
Place and Date of Trial:	Victoria, B.C. May 7-11, 2018 and May 14-16, 2018
Place and Date of Judgment:	Victoria, B.C. August 20, 2018

Overview

[1] This family law case is primarily concerned with the claimant's application to relocate with the parties' two daughters from Victoria, B.C. to Kelowna, B.C. The secondary issues relate to child and spousal support, and property division.

Background

[2] Mr. J. is a captain for WestJet Airlines. He has a Bachelor of Business Administration degree. He was born on November 25, 1971 and is 46 years of age. Ms. J. has a Grade 12 education and is 37 years of age, having been born on July 26, 1980. After graduating from high school in 1998 she worked as a customer service agent in the airline industry. In 2001 she was working for WestJet. The parties met in 2002 when the respondent was a pilot at Pacific Coastal Airlines based out of Vancouver. At about that time the respondent became a pilot at WestJet. He was transferred to Calgary and they continued their relationship. They commenced residing together in 2003. She moved to Calgary and became a flight attendant for WestJet in 2004.

[3] The parties married on January 14, 2006. Their two daughters are A., who was born on November 30, 2006 and is now 11 and K., born on November 15, 2008 who is now 9. The claimant continued to work as a flight attendant until she took maternity leave in 2006 for one year. She returned to work for about two weeks in order to qualify for a profit sharing plan and then quit. The parties agreed that the claimant would be a stay at home mother. In part this was because their roles in the airline industry and work schedules made it impractical for both to work. The claimant continued to be a stay at home mother when they separated. It is not in issue that she was the children's primary caregiver throughout the marriage and after separation. She testified that but for her role in the marriage she would have continued with her career in the airline industry.

[4] When WestJet allowed pilots to live in cities other than Calgary, the parties decided to move back to Victoria as there was more support from family. The respondent would then fly out of Victoria and end in Victoria. When the claimant was

eight months pregnant with K., the parties moved to Victoria and bought a home on Sunnygrove Place in Cordova Bay. They sold their residence in Calgary and used those sale proceeds plus what the claimant understood was a gift of $100,000 to them from the respondent's father, H.J., to purchase the Sunnygrove home. This alleged gift is an issue I will return to later in these reasons.

[5] After K. was born the respondent took eight or nine months parental leave, assisted with the children and worked around the home. The claimant testified however that she continued to be primarily responsible for running the household and caring for the children. She was also the one involved with the children's co-op preschool as a volunteer and was the parent who attended the monthly meetings. When the children commenced elementary school, she continued to volunteer. Both parties would attend parent interviews.

[6] The claimant stated that over time the parties' marriage became "very rocky". As she put it she "looked forward to when [the respondent] was away at work" as it made family life happier. The respondent's work took him away about 18 days per month.

[7] She said that the children were very close to her side of the family – her mother, father, and brother all live in Victoria. She said the children would see her father-in-law once a week and that the respondent did not have a relationship with his mother who the claimant did not meet until 2016.

[8] In 2010 the parties bought a property on Temple Avenue in Victoria, in part because at one time it had been two lots that had been amalgamated, and with the assistance of the claimant's contractor father, they determined it could be subdivided into two lots again. The claimant said the respondent did not want to purchase the Temple property but he eventually agreed and her parents loaned them the money to do so. Their initial efforts to subdivide were not successful but a few years later they successfully subdivided it into two lots, one with a home on it and the other a vacant lot. They did not live in that home but rented it out to the same individual for approximately eight years. The vacant lot was sold in 2017.

[9] In 2011 they purchased a fire damaged home on Lochside Drive in Cordova Bay. The home was later torn down and their new family home was built. The financing for that home also came from the claimant's parents. She testified that her father managed the tearing down and construction of their new home and did so under his home warranty coverage. He did not charge them for doing so. They moved into the new home in March of 2013. The loan from her parents was repaid.

[10] In September 2015 the parties agreed their marriage was over. They separated on September 13, 2015 but continued to reside at the Lochside property. The claimant remained on the main floor of the home with the children and the respondent moved downstairs. While residing in the former family home they took turns with the children. The respondent would have them with him when he was in town. However, living separate and apart in the same house did not work. In January or February 2016, the respondent moved to Vancouver where he was based for his work and stayed with his sister. His explanation for not renting accommodation in Victoria was in part that financial matters such as his child and spousal support obligations were uncertain and the parties were not getting along. He also explained he needed the family support from his sister and a place to regroup. The claimant remained in the Lochside home until it was sold on May 1, 2016. The claimant then rented a home nearby for her and the children.

[11] On October 25, 2016 the parties agreed to a consent order. Its terms included parenting time for the respondent consisting of not less than six overnights per calendar month, and subject to his work schedule, this time was to occur on alternate weekends from Friday after school until Monday morning, with additional time if there was no school on the Friday or Monday. The order also set out interim without prejudice child support payable to the claimant of $3,250 per month and spousal support of $4,400. In addition, the respondent was to pay 75 percent of the children's uninsured medical and dental expenses, and the claimant was to pay 25 percent. The order also included provisions relating to disclosure and property sales.

[12] In late 2015 the claimant reconnected with now fiancée R.S. They had dated for two years before the claimant met the respondent but the relationship ended when Mr. S., who is now also a captain with WestJet, was hired to start an airline in Dubai. They did however remain in contact over the years as friends. They commenced seeing each other in late 2015 or early 2016, and became engaged in December 2016. Mr. S. lives in Kelowna but is employed by WestJet out of Calgary.

[13] As well as being a pilot Mr. S. has past experience in business and real estate. He and the claimant's brother, a contractor, incorporated a company called Rock Shore Developments Ltd. in April 2017. The company is involved in real estate development in Kelowna. They employ the claimant as an assistant for $2,000 per month. In this regard it is important to note that the claimant was the driving force in the parties' real estate purchases during their marriage. The claimant's employment contract is dated June 1, 2017 and she commenced employment in September 2017.

[14] The parties' extended families continue to reside in Victoria. The claimant's mother and father live in the same area of Victoria as the claimant. They are supportive and involved with their grandchildren and have supported the claimant and the respondent financially during the marriage. The respondent's father resides in the Victoria area and while not as involved with the children as the claimant's parents, has also provided financial support.

[15] There is no dispute regarding the parties' respective roles during the marriage. The respondent relied on the claimant to maintain the family home and care for the children in order for him to pursue his career. He was home approximately one-half of the time. I accept his involvement with the children was less than the claimant's because of his career.

[16] In his pleadings, the respondent sought an order that the children continue to reside primarily with the claimant but that his parenting time increase once he established a residence in Victoria. However, he now seeks up to 12 to 14 days a month with the children. The claimant contends the respondent's decision to seek

increased parenting time is a deliberate and strategic effort to defeat her relocation application.

[17] After the respondent moved to his sister's home in Vancouver in January 2016 he continued to see the children in Victoria and at the parties' property in Parksville, B.C. When in Victoria he would rent vacation-by-owner properties, an arrangement he described as unsatisfactory, as different properties were involved and the packing and unpacking lead to uncertainty for the children and was stressful. As a result, in December 2016 he applied for interim occupancy of the Temple property. The claimant opposed the application indicating she wished to reside there. As there was a tenant the application was adjourned until April. At that time the respondent was not aware the claimant was contemplating a move to Kelowna. After a consent order was reached the respondent moved into the Temple home on June 3, 2017. That became his home and parenting time was thereafter at that location. Initially the respondent paid the mortgage however when the subdivided lot was sold in August 2017 the mortgage was paid out. He continued to pay utilities, taxes and insurance on the Temple property.

[18] The respondent's time with the children has occurred in accordance with the consent order of October 2016, that is, every second Friday to Sunday. According to the claimant the children were not happy visiting with their father until he moved into Temple. The claimant states the respondent did not ask for extra time with the children before he moved to Temple. She also stated that he turned down her offers of extra time with the children and that he did not cooperate on one occasion when she asked to switch weekends with him. After the move to Temple he has had, according to the claimant, the occasional extra dinner with the children.

[19] The claimant testified that after reconnecting with Mr. S. she began visiting Kelowna every weekend although in the months prior to trial that had decreased. The children would come to Kelowna with her when not with the respondent. On March 16, 2017 notice of the claimant's intention to relocate to Kelowna was given to the respondent.

[20] A divorce order was granted on May 16, 2018.

Jurisdiction

[21] Both the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp), and the *Family Law Act*, S.B.C. 2011, c. 25 (*FLA)*, are pleaded. The parties agree that the *Divorce Act* is paramount with respect to mobility and custody issues (see *T.K. v. R.J.H.A.*, 2015 BCCA 8 at paras. 27-32). However, as will be discussed in greater detail below, this does not preclude the application of the *FLA*.

Positions of the Parties

Claimant

[22] The claimant seeks the following orders:

a) Sole custody of the children to the claimant with permission to move with them to Kelowna;

b) That the respondent have reasonable access to the children, to include (subject to his availability, with the claimant to be notified in advance):

   i. No less than six days per month, plus an extra day every long weekend created by a statutory holiday or professional development day;

   ii. One-half of spring break and one-half of summer vacation;

   iii. Father's Day when it does not fall on a regularly scheduled weekend;

   iv. Excluding Mother's Day if it does fall on a regularly scheduled weekend;

   v. Hallowe'en, the children's birthdays, and Christmas to be alternated.

c) Division of property with reapportionment in the claimant's favour;

d) The respondent to pay occupational rent; and,

e) Child and spousal support to include imputation of income to the respondent but no imputation of income to the claimant.

Respondent

[23] The respondent opposes the claimant's application to relocate. As mentioned if the claimant's application to relocate with the children is dismissed the respondent seeks increased parenting time, to include:

a) Up to 14 days per month in months that he does not have holidays;

b) Alternate weekends plus up to three days per week (subject to his work schedule) during the week that he does not have the children for the weekend;

c) Six weeks holiday time per year; and

d) Such additional parenting time as the parties may agree to.

He also seeks:

e) Equal division of family property;

f) An order respecting the contingent tax liability arising from the sale of the Temple property, with the respondent to obtain tax advice within 60 days estimating the tax payable to be shared with claimant's counsel with liberty to apply for further directions if the parties cannot agree;

g) Occupational rent not to exceed $5,000 payable by him to the claimant;

h) To retain the Temple property; and,

i) Child and spousal support to be paid without imputation of income to the respondent but with imputation of income to the claimant.

Credibility of the Parties

Claimant

[24] The respondent submits the claimant's evidence should be approached with caution and that where the parties' evidence conflicts, that of the respondent should be preferred. The respondent argues the claimant was not always forthright and showed a propensity to exaggerate. He relied on the following as alleged examples of such behavior:

a) In response to the respondent's December 2016 application for interim occupancy of the Temple property the claimant stated she wanted to move there with the children making no mention of the fact she was considering a move to Kelowna;

b) The notice of relocation stated the claimant was planning to move to Kelowna for financial purposes and while mentioning her "boyfriend" Mr. S., she made no mention of the fact they were engaged; and

c) At her examination for discovery on April 6, 2017 the claimant reiterated that she was moving to Kelowna to pursue a financial opportunity and that while her relationship with Mr. S. was serious she was not planning to live with him. By that point they had been engaged for four months. She also stated that they had not talked about potentially living together at some point in the future.

[25] The claimant's explanation for her failure to disclose her engagement as the primary reason for her wanting to move is of concern. Her explanation is that her former counsel told her not to mention it unless asked as it would affect her entitlement to spousal support. While there is always the possibility of a client misunderstanding the advice of their counsel that does not appear to be the case here. Such advice is surprising and certainly did not advance the claimant's case. On the other hand, new counsel immediately addressed the issue and disclosed the engagement in July of 2017 by advising opposing counsel, and put it on record in

the claimant's trial brief prepared for the trial management conference on September 12, 2017. Given its disclosure well in advance of trial, the claimant's previous non-disclosure did not prejudice the respondent.

[26] While the respondent raised other issues that he submits indicate the claimant was restricting his parenting time, I do not find that to be the case as the claimant's evidence on that issue does not raise issues of credibility.

[27] Aside from the failure to disclose her engagement I find that the claimant's evidence while seeking to present herself in the best light, was not unreliable or misleading in a material sense. Further, given her explanation for that failure to disclose, I do not find it colours my assessment of her credibility generally. As is often the case in family matters the evidence of a party must be assessed taking into account their strong investment in the issues.

Respondent

[28] The claimant submits the respondent tended to minimize his own shortcomings, particularly those issues raised by the children in their comments to Dr. England, a registered psychologist who interviewed the parties and their children, and prepared an *FLA* s. 211 report dated March 25, 2018.

[29] In addition, the claimant points to the respondent's testimony on the issue of the $100,000 gift from his father. The respondent stated in chief that, "[my] father gifted us – sorry, gifted me - $100,000." As counsel for the claimant noted this apparent slip of the tongue is telling and likely represents the respondent's true understanding of the nature of the gift.

[30] Generally, the respondent's evidence, like that of the claimant, sought to explain and justify his position hence, like that of the claimant, it must be considered to have an element of advocacy present.

Custody and Guardianship

Legal Principles

[31] An order for custody is made pursuant to s. 16 of the *Divorce Act*. In making an order under this section the only consideration for the court is the best interests of the children (s. 16(8)).

[32] The doctrine of paramountcy does not preclude the court from making orders under the *FLA* in a proceeding where a divorce is granted. In *B.D.M. v. A.E.M.*, 2014 BCSC 453, Sewell J. stated:

> [111] Unlike the parties in *Hansen*, the parties in this case do not agree to joint custody. Under the *FLA*, both parents are guardians. An order granting custody pursuant to the *Divorce Act* does not expressly preclude the non-custodial parent from continuing to be a guardian. However, by necessary implication it does deprive that parent from exercising most of the parenting responsibilities set out in s. 41 of the *FLA*.
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> …
>
> [115] I can see nothing in the *FLA* that would frustrate the purpose of s. 16 of the *Divorce Act*. The underlying purpose of the relevant provisions of the *Divorce Act* and *FLA* are identical. Both statutes require the Court to consider the best interests of the child in determining parenting responsibility.
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> *…*
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> [117] As identified in *Hansen*, the mandatory requirement that the court consider the factors set out in s. 37 of the *FLA* could be seen as hindering the unfettered discretion contained in s. 16 of the *Divorce Act*. However all the authorities seem to be in agreement that there is little prospect of any real conflict in applying the two statutes. In addition, the specific circumstances set out in s. 37(2) of the *FLA* are not exhaustive of the circumstances that the court must consider in deciding what is in the best interests of a child. Section 37(2) expressly directs the court to consider all of the child's circumstances.
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> [118] In addition, the language of s. 16(1) of the *Divorce Act* is permissive. It provides that the court may make an order respecting custody or access. In my view nothing in s. 16 precludes this court from considering issues of child care rights and responsibilities within the analytical framework set out in the *FLA*, and making an order pursuant to the provincial legislation. The objectives of both statutes appear to be identical.
>
> [119] Finally, although *Hejzlar* has been cited as general authority that the *Divorce Act* is paramount and is therefore "the preferred basis" for custody and mobility orders (e.g. *N.A.F. v. C.D.M.*, 2013 BCSC 2294 at para 14), its reach may not be so broad.

> [120] *Hejzlar* was a dispute about the child's primary residence, and it is important to note that it was the *FRA*, not the *FLA,* that was under consideration.

[33] In *B.D.M.*, Sewell J. made parenting orders exclusively under the *FLA* and none under the *Divorce Act*. There are also cases where the court has made orders under both: see *M.A.G. v. P.L.M.*, 2014 BCSC 126; *Rana v. Rana*, 2014 BCSC 530; *E.D.A. v. M.A.A.*, 2014 BCSC 1084; *H.C. v. H.P.C.*, 2014 BCSC 1775; and *Boski v. Boski*, 2014 BCSC 1599.

[34] In addition, orders for joint custody can be made under the *Divorce Act* with orders for parental responsibilities under the *FLA* remaining significantly intact for both parties: see *Rashtian v. Baraghoush*, 2013 BCSC 994; *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453; and *Hansen v. Mantei-Hansen*, 2013 BCSC 876.

Discussion

[35] In my view there is no justification for a sole custody order in favour of the claimant. It is important that both parties remain part of these children's lives and the best interests of the children are served by an order for joint custody.

[36] I also declare that the parties remain the joint guardians of the children under the *FLA.*

[37] The issues of parenting time and responsibilities will be addressed later in these reasons.

Relocation

[38] As mentioned the claimant seeks to move to Kelowna with the children. The respondent opposes her relocation application.

Legal Principles

[39] Section 16 of the *Divorce Act* provides:

> **Order for custody**
>
> (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.
>
> …
>
> **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.

[40] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the Supreme Court addressed the approach to relocation applications:

> [49] The law can be summarized as follows:
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> 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.
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> 7. More particularly the judge should consider, *inter alia*:
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
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> (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;
>
> (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.
>
> [50] In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[41] *Gordon* has been summarized and explained in a number of cases. In *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230, Saunders J.A. said:

> [23] The issue of a proposed relocation of a child against the wishes of the non-moving parent, is difficult. In the tangle of competing benefits and detriments to the child it is not easy to determine best interests. This is particularly so where family members beyond the parents are an important part of the child's home life.
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> [24] From the cases, however, certain principles arise. The cases confirm the principle expressed in s. 16(10) of the *Divorce Act* that the court must consider maximizing contact between the child and parent. Yet, that same section makes it clear that maximizing contact is not an absolute principle, and is only to be pursued within the limits of that which is "consistent with the best interests of the child."
>
> [25] Second, *Gordon v. Goertz* tells us that, barring an improper motive for the proposed move, there must be an attitude of respect for a custodial

> parent. This means, in part, that the party seeking to move need not prove the move is necessary, although any degree of necessity, such as for income-earning reasons, may bear upon the best interests of the child.
>
> [26] Third, the authorities generally do not favour the *status quo* as a 'default position'. In *Nunweiler* this court observed that such an approach "reinserts into custody discussions a presumption which is contrary to the instructions in *Gordon v. Goertz* to assess each case individually" and is "contrary to the observations of this court in *Robinson v. Filyk* (1996), 84 B.C.A.C. 290 that presumptions are inappropriate in custody cases and detract from the individual justice to which every child is entitled ..."

[42] As noted by Verhoeven J. in *T.K.*, the factors set out in *Gordon* "are not exhaustive" (para. 44). He went on to say:

> [44] These factors are not exhaustive: *Stav v. Stav*, 2012 BCCA 154 at para. 127. A more comprehensive list of potential factors and relevant considerations is set out in *S.B.C. v. F.A.C.*, 2013 BCSC 211 at paras. 357 362 …
>
> [46] In *S.S.L. v. J.W.W.*, 2010 BCCA 55, the court held that in joint parenting situations where one or both parents' needs (economic, educational or personal) are seen as requiring a change, the court's task is to analyze the evidence in four possible scenarios, which are primary residence with a parent in the new or present location, or joint physical custody in the new or present location, without presuming that the current care-giving and residential arrangement is the preferred one. The status quo is not to be the default result. It must not be assumed that one parent cannot move. Similarly it is not appropriate to rely on any assumptions as to what the parents will actually do depending on the decision of the court: *Stav* at para. 130.
>
> [47] Inevitably, the court must assess the resources available to each parent and the potential effect of those resources on each scenario, which may require an assessment of a parent's emotional and economic prospects, because the children's interests are necessarily intertwined with those of their parents: *S.S.L.* at para. 33; *Stav* at para. 88.
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> [48] In *R.E.Q. v. G.J.K.*, 2012 BCCA 146, at para. 58, the court states that it is not clear how the principle of "great respect" for the views of the "custodial parent" should apply where both parents are custodial parents and are co-parenting. Subsequently in *Stav* at para. 143, the Court of Appeal stated that where there are two "custodial" parents, who have diametrically opposed perceptions as to the best interests of their own children, it is difficult to treat their views as other than neutral in the analysis.
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> [49] The stricture set out in *Gordon* against considering the custodial parent's reason for moving other than in "the exceptional case where it is relevant to that parent's ability to meet the needs of the child", has proven unworkable in practice: *R.E.Q.* at para. 58. A review of the authorities makes it plain that a parent's reasons for seeking to move are almost invariably considered by trial judges, perhaps because these reasons are generally linked to the best interests of children, either by the parent seeking to move,

> or the parent opposing the move: *Stav* at para. 86. That is clearly so in this case, where the mother contends that her reasons for seeking to move coincide with her views as to the best interests of the children. The father mainly challenges the weight that should be given to the factors the mother asserts, and urges that the court give greater weight to other factors. It would be pointless and artificial in this case to attempt to compartmentalize the mother's views. If the mother's views as to her reason for wishing to move is to be considered then of course so should the father's reasons for not wishing to move.
>
> [50] There is a question as to whether in a case such as this the trial judge should consider what the parents say about what they would do depending upon the custody and residency decision the court makes: *Stav*, para. 64. It is accepted that it is unfair to either parent to place them in a double bind by forcing them to state whether they would stay or go, without the children, and reliance on such statements by the court is "discouraged": *Hejzlar*, para. 27. Yet, according to *Stav* at para. 64, in *obiter*, arguably, the evidence of the parents in relation to this question could be relevant to the issue of the children's best interests. I observe that the quote from the judgment of Hayne J. of the High Court of Australia in *U. v. U.*, [2002] H.C.A. 36 set out in para. 26 of *S.S.L.* suggests that the evidence of the parents as to their reasons for what they would do can be explored in evidence, but their answers to such questions are no more than a prelude to a deeper inquiry about the child's best interests and what arrangements best serve those interests.
>
> [51] It is awkward and unsatisfactory to be required to avoid hearing evidence concerning these central questions at trial.

[43] The weight to be given to the maximum contact principle in s. 16(10) of the *Divorce Act* was also discussed in *Orring v. Orring*, 2006 BCCA 523 at para. 41:

> [41] An underlying assumption in *Gordon v. Goertz* is that the “maximum contact” principle militates against relocation because the proposed move will usually adversely affect the access parent’s ability to see the child, which is contrary to Parliament’s stated intention of promoting maximum contact between the child and both parents. A court is therefore faced with having to balance the benefits of the proposed relocation against the child’s interests in maintaining maximum contact with the access parent and may decide against permitting the move: see *Karpodinis v. Kantas*, 2006 BCCA 272; leave to appeal to S.C.C. refused (16 November 2006). The maximum contact principle is not an absolute one but it is a mandatory consideration when determining whether a proposed relocation is in the best interests of the child. There are cases where the other principles will outweigh the negative effects of decreased contact with one parent and thus the custodial parent is permitted to move. This Court’s decision in *Lowcay v. Lowcay*, 2000 BCCA 447 is an example.

Section 211 Report

[44] By a consent order dated September 29, 2017 Dr. England was engaged to prepare a s. 211 report. The order provided that Dr. England was to conduct an investigation, make recommendations, and report to the court regarding the needs of the children, the views of the children, and the ability and willingness of the claimant and the respondent to satisfy the needs of each child. The report was to include a recommendation regarding the parenting arrangements that in Dr. England's opinion are in the best interests of the children.

[45] The facts stated in an *FLA* s. 211 report are considered to be *prima facie* evidence of their truth. In *K.B. v. J.B*., 2015 BCSC 704, the court summarized the role and weight to be given to such reports:

> [8] In terms of the preparation of and evidential concerns with such reports, Burnyeat J., in *Wu v. Sun,* 2006 BCSC 1891, at para. 3, said, "s. 15 reports are not governed completely by the evidentiary rules which would be in effect when dealing with reports requisitioned by one of the parties from an expert", and he described the authors of such reports as the "eyes and ears" of the court.
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> [9] In *Wu,* at paras. 3-7, Burnyeat J. then engaged in a review of the case law that is relevant to the preparation of such reports. This review notes, among other things, that evidence for a s. 15 or s. 211 report is usually gathered over a series of interviews, that safeguards have been included in the process to protect the interests of the parties, that the report may be based on evidence that is not before the court, and that the court can then assess the weight of the opinions based on proof of the underlying facts and assumptions at trial.
>
> [10] This last point warrants some emphasis. Regardless of the information that goes to the report writer, the court ultimately has the discretion to review the background information presented in the report, carry out an independent assessment based on the evidence at trial, and come to a different conclusion as to the best interests of the child; *T.C. v. S.C.*, 2013 BCPC 217, at paras. 143-144; *Plant v. Kempton*, 2011 BCCA 171, at para. 11.

[46] Dr. England conducted her interviews in March of 2018 and released her report on March 25, 2018. She interviewed and conducted psychological testing on each of the parties and both of the children. She also interviewed and assessed the individuals with whom each of the parties have a new relationship, Mr. S. and Ms. H.

[47] Dr. England correctly acknowledged that the Court must consider factors and evidence outside of her terms of reference. As a result, she makes no direct recommendation for or against the proposed move to Kelowna.

[48] Dr. England found that both parties had positive attributes as parents. She reported that A. informed her that she did not want to be with her father more often, asserting that "after a weekend, he can get really mean". She reported her parents fought a lot and that she was now "actually happy they are separated". She described both Mr. S. and Ms. H. in positive terms. A. reported that the respondent had spoken badly of the claimant, including alleging the claimant had had sex with another man, had plastic surgery and was "not smart enough to home-school". A. stated she wanted to move to Kelowna. At their second interview Dr. England reported:

> When asked again about the relocation [A.] again expressed a strong preference to move to Kelowna. The writer asked her what she would want to do if her mother had to stay in Victoria and [A.] said she still would want to move to Kelowna. She was asked who she would live with and she responded "I have no idea, I hope mom or dad would come." [A.] added that her mother told her that "she would follow us." [A.] again talked about there being more activities to do in Kelowna and again referred to have a family there with respect to [Mr. S.] and his daughter.

With respect to K., Dr. England reported:

> [K.] talked about wanting to move to Kelowna and said her mother would feel "really sad" if they were not able to make the move. [K.] offered that she and her sister and the dogs would also be sad because they all really like [Mr. S.] and his daughter. [K.] was asked what she would want to do if her mother was unable to move to Kelowna and she would responded "I would still want to go stay with [R.] and [A.]." [K.] said "I would rather go to Kelowna and visit mom on weekends" but expressed her preference that her mother would also move there. When asked why [K.] would prefer to live with [Mr. S.] and his daughter, [K.] said "I have no friends here - I'm lonely." [K.] went on to complain that there is no "good stuff to do" in Victoria, and does not feel like Victoria is "home sweet home."

[49] After summarizing the results from her interviews, Dr. England reported her "key factual assumptions":

> First, both parents impress as being strongly bonded to their children and as committed to their well-being.
>
> Second, both children impress as having a strong positive bond with their mother, and as having a somewhat more conflicted bond with their father.
>
> Third, while [Ms. J.] has described [Mr. J.] as abusive, the issue of domestic violence is not one that is of such a level of concern that, in and of itself, would play a significant role with respect to either parent's parenting time with the children.
>
> Fourth, [Ms. J.] has been the children's primary parent.
>
> Fifth, allowing that [Mr. J.] does not have the parenting experience that [Ms. J.] has, there is no indication that he would not be equally able to attend to the needs of the children.
>
> Sixth, [Mr. J.] has not had substantially equal time with the children, nor has he expressed a desire to parent the children on an equal basis to [Ms. J.].

She reported as well:

> **Views of the Children**
>
> Both [A.] and [K.] expressed fairly similar views. They recalled considerable conflict in the home when their parents were together, and both children described their parents' new relationships as harmonious and free of conflict. The girls expressed positive feelings both towards [Mr. S.] and [Ms. H.]. Both children described their father as more easily angered than their mother and said that he yells at them when angry. A difference between their views was that [A.] appeared to be move balanced in her perceptions of her parents, while [K.] was more consistently negative with respect to her father, and impressed as somewhat eager to make negative comments about him.
>
> Both children said they wanted the current parenting plan to remain in place, and did not want increased time with their father. With respect to the relocation, both children expressed a strong desire to move to Kelowna. This was so strong that both girls said they would want to move to Kelowna even if their mother did not move.
>
> The writer's impression is that the children's views are the result of a combination of factors. Historically, they have been primarily parented by their mother and as such it is not unexpected that there would be some alignment of their thoughts and feelings with [Ms. J.]. Information from the assessment also indicates that there have been poor parent-child boundaries such that the children have inappropriately been exposed to marital issues of conflict. This would serve to exacerbate feelings of alignment towards a favoured parent. There is also the report of a difference in parenting styles, such that [Ms. J.] presents as being stronger on warmth and nurturance, while [Mr. J.] presents as stronger on structure and demandingness. Both of

these dimensions are important aspects of parenting, but with marital discord, they can become polarized such that the children's experience of their parents also becomes somewhat polarized. When faced with a preference, it is understandable that children will orient more strongly to the warmer parent with fewer expectations, than the parent who is loving, but also more demanding. In addition, both children are girls and it is not unusual that they would feel closer to their mother.

The children's views are likely to have short-term reliability, but are not likely to be highly reliable in the long term. Factors impacting reliability would include the recency of the separation, and the inappropriate exposure to information regarding the parental conflict. Similarly the validity of the children's views is also mixed. While some aspects of their views would appear to be based on their experiences with their father, again the exposure to marital issues of conflict is likely having a significant impact. With respect to the issue of moving, the writer's impression is that Kelowna has been elevated in their minds as such a desirable location, that there would appear to be aspects of fantasy operating which are impacting their views on relocation.

Needs of the Children

Several factors related to the needs of the child have been identified as necessary for consideration when determining the best interests of the child.

The first factor to consider is the children's health and emotional well-being. Both children are healthy and appear to be very well cared for. Neither child has any special needs. In terms of emotional well-being, the children have been exposed to marital conflict and there appear to be some sequelae from this. [A.] particularly has been exposed to inappropriate adult information that has impacted her. At the same time, [A.] is more mature than [K.] and presents as more able to differentiate her thoughts and feelings from those of the adults around her. [K.] impressed as being quite caught-up in the marital discord. She has presented with symptoms of anxiety, although it appears that this has been well attended to and has largely resolved. [K.] is still quite young and in keeping with this developmental stage, presents as more black and white in her thinking, particularly as it relates to her thoughts and feelings regarding her father. For both children's emotional well-being, they need to be insulated from the issues of conflict between the parents. They would benefit tremendously from their parents functioning better in terms of co-parenting. This will assist them in developing more mature perspective taking and will release them from experiencing a loyalty conflict where they feel that they need to take sides.

The second factor is the nature and strength of the relationships between the children and significant persons in the children's lives. These children have several adults in their lives who love them. Both parents have re-partnered and both [Mr. S.] and [Ms. H.] present as being a positive addition to the children's lives. The children also have maternal grandparents, a paternal grandfather and an aunt and uncle. They also describe feeling attached to [Mr. S.'s] daughter. The parents present as appreciative that all of these relationships need to be supported and to date there have not been significant problems with respect to these various relationships. This is likely

to remain the case in any of the potential scenarios considered in connection with [Ms. J.'s] desire to relocate the children to Kelowna.

Related to the above, [Ms. J.] reported that her parents and brother intend to move to Kelowna if she is able to relocate with the children. This would be advantageous for the children as the loss of these relationships (in addition to their relationship with their paternal grandfather) should they move to Kelowna would be significant. This not only for the children's immediate contact with these people, but also because of the support these individuals provide to the parents. The writer notes that [Ms. J.'s] family have been residents of Victoria for approximately 40 years or more. The concern is that they may change their mind, or relocate only to find they miss Victoria and want to return. Therefore it is difficult to know what, if any, weight should be attached to this proposal.

The third factor is the history of the children's care. Mr. and Ms. [J.] adopted a traditional arrangement in their marriage, such that [Mr. J.] was the sole financial provider, and [Ms. J.] was the primary parent of the children. This typically results in children developing a stronger bond of attachment to the primary parent, at least in early childhood. Both parents described the marriage as unhappy for some time prior to the separation. There was ongoing stress associated with the real estate ventures. While ultimately they may have profited financially, it taxed the marriage and the availability of psychological resources to be directed towards parenting, especially for [Mr. J.]. When such a marriage ends, the parent who has not been with the children as much, tends not have as strong a bond with them, and is also somewhat behind in terms of having developed parenting skills. Both of these issues appear to be the case with [Mr. J.]. However, he has demonstrated his desire to develop his relationship with the girls. The more that children become equally bonded with both parents over time, the better their overall adjustment long term.

The fourth factor is the child's need for stability, given the child's age and stage of development. With respect to stability, children with separated parents experience more disruption in their lives than children from intact family units. Not only is there a change in residence and all that this entails for the children, but also changes in relationships with both adults and children. Changes in economic status between households may translate into changes regarding activities, and numerous other factors. For this reason, children of separated parents have a heightened need for stability.

Post separation there was a period of instability from the time [Mr. J.] left the family home in January 2016 until June 2017, when he finally secured housing in Victoria. The children's therapist noted that it was a difficult transition for the children to adjust to their current circumstances. In addition, she noted that there has been improvement once things became more stabilized for [Mr. J.]. [Mr. J.] is concerned about the issue of stability as it relates to [Ms. J.'s] proposed relocation of the children to Kelowna. Based on his experience of stress in the marriage due to financial issues related to property development, he expressed concern that [Ms. J.] is already repeating this pattern with [Mr. S.]. He reported that they are financially over-extended. This can lead to instability with respect to housing, area of residence and school, and also impact relationship stability. There appears to

be some support for this concern, particularly if the children should relocate to Kelowna. An analysis and opinion of [Mr. S.'s] and [Ms. J.'s] financial status is beyond the scope of a psychological assessment, but it bears exploration given the significant impact this can have on the children. Should an expert opinion or finding of fact determine that the financial situation is not stable and secure, then the psychological opinion is that this is detrimental to the needs of the children, and would weigh against relocation.

A final point with respect to stability relates to [Ms. J.'s] relationship with [Mr. S.]. The fact that they had a relationship previously is a positive indicator that this relationship may endure. At the same time, it is noted that this will be [Mr. S.'s] third marriage. In addition, there are issues that have been raised that are very similar to [Ms. J.'s] complaints regarding [Mr. J.]. It appears that [Mr. S.'s] second marriage was volatile and conflictual. In addition there appeared to be a dynamic in that relationship that was similar to the dynamic in the [J.] marriage, and that this also escalated over time. It is not insignificant that his stepdaughter, with whom he said he had a strong bond, is estranged from him, as he is about to become a stepfather to [A.] and [K.]. Overall, the writer has some reservations regarding these issues in terms of what impact they may have on the nature and long term stability of [Mr. S.'s] relationship with the children.

The Ability and Willingness of Each Parent to Satisfy the Needs of the Children

In this family situation both parents present as very competent individuals who are committed to their children's well-being, and more than able to exercise the myriad tasks related to satisfying the needs of the children.

[Ms. J.] has been the primary parent of the children since their birth, and presents with many of the skills that come with this history. There are no significant concerns regarding her parenting ability, apart from co-parenting issues. [Ms. J.] described [Mr. J.] as abusive in the marriage, not only towards herself, but also in some of his interactions with the children. The nature of some of these interactions are not uncommon in the end stages of an unhappy marriage, and typically there is substantial improvement in the first three years post-separation. While this appears to be the case in this situation, the writer's impression was that there continues to be a readiness on [Ms. J.'s] part to focus negatively on [Mr. J.]. For some time, it appeared that this was the basis for [Ms. J.] restricting [Mr. J.] access to the children. In March 2017 [Ms. J.] made known her desire to move to Kelowna with the children. In June 2017 [Mr. J.] secured the occupancy of the Temple Avenue home, which he had sought since December 2016. Six months elapsed before there was increased cooperation between them. Both parents expressed their concern that the other is making changes only for the purposes of the assessment. This raises the question regarding the extent to which [Ms. J.'s] increased cooperation with [Mr. J.] is a strategy she is employing to further her goal to relocate. The writer notes that for a mobility application, the relocating parent needs to demonstrate how they will maintain the relationship between the child and the other guardian, therefore if she were found to be unduly restrictive, this may weigh against the relocation. The extent to which [Ms. J.] was aware of this, and made a calculated shift to present as more accommodating is unknown. The concern

for the writer is that given its recency in the context of a relocation application, it may not be representative of how supportive she will be of the children's relationship with their father, should they be allowed to move to Kelowna. The writer would feel much more confident of this factor if there were a longer history of co-operative co-parenting. In the writer's opinion, it is too early to say that this has been established, such that it would endure post-relocation.

[Mr. J.] assumed the traditional role of being the primary breadwinner in the family. As such, he does not have the same bond with the children, and he presents as lagging in terms of parenting skills. In a traditional marriage, fathers are more likely to distance themselves from their children as a consequence of distancing from their wives. Typically, these fathers develop a stronger and more involved parenting relationship with their children post-separation, and this tends to increase over time. There is no indication that the children's relationship with [Mr. J.] could not follow this same trajectory. Issues of impression management for the purposes of the assessment have been raised as a concern for [Mr. J.]. While he made some acknowledgement of his problematic behaviours, they impress as minimized and the writer is not confident that he recognizes the impact of his behaviours on others. Overall, it appears that [Mr. J.'s] personal circumstances have changed in that he is now in a more harmonious relationship, and his relationship with the children has improved.

Relocation

In this case [Ms. J.] would like to move to Kelowna because she is engaged to marry [Mr. S.], and he resides in Kelowna. Not only does he reside there, but his one biological child, for whom he is provides parenting on an equal basis with the child's mother, also lives in Kelowna. [Mr. S.] has no intention of leaving Kelowna. If [Ms. J.] is unable to move to Kelowna, he will continue to reside there, and she will divide her time between Victoria and Kelowna in order that she can maintain her involvement in parenting [A.] and [K.]. There is no information that the relocation will provide increased financial opportunities, nor that there are any increased educational opportunities. The relocation appears to centre around [Ms. J.'s] understandable desire to establish a new household with her future husband.

With respect to proposing an arrangement to preserve the children's relationship with the other parent, [Ms. J.] proposes that the children continue having alternate long weekends with [Mr. J.]. Given that [Mr. J.] and [Mr. S.] are WestJet employees, this may be more feasible than would be the case if they were not; however, the writer also understands that there are complications that can arise with this.

…

In this situation it would appear that [Mr. J.] did not have as high a level of involvement as many other fathers. He did not equally co-parent the children during the marriage, and with his dissatisfaction in the marriage, it appeared that he became increasingly intolerant, impatient, and at times quite harsh with the children. The dual problem with this is that the children do not have as solid a relationship with their father as the writer would like to see, such that the relocation is likely to create even more disengagement. At the same

time, the children are very used to their father not being around and are less likely to experience a significant feeling of loss by moving to Kelowna.

Gatekeeping

Gatekeeping refers to the ability of a parent to support the other parent-child relationship. Quality of gatekeeping has been described in the literature as the key to a child having a "successful relocation." Gatekeeping is assessed by considering the history to date of the relocating parent in being supportive, and not unduly restrictive, of the other parent's involvement in the lives of the children.

Again, the writer's opinion is that there is not yet an established history where [Ms. J.] has demonstrated that she is supportive of the children having the best possible relationship with their father. The recent shift in more cooperative parenting has occurred in the context of the mobility application, and therefore it is difficult to detangle these potentially conflicting motivations.

…

Recency of divorce

Several authorities on divorce and child development have expressed concern on the combination of a relatively recent parental separation with relocation, with the combination creating more risk for the child in terms of overall adjustment. The thinking behind this is that a child is likely to cope better if first there is some stabilization in the family, before relocation is considered.

In this case, while the parents physically separated in January 2016, there was a protracted period of instability for [Mr. J.] until he secured housing in June 2017. This then coincided with the children's complaints subsiding, and there began to be improvement in the father's relationship with the children. At the same time, the children have continued to be aware of the parental acrimony, and have aligned themselves with their mother. This serves to keep things unsettled and delays the children feeling more settled in their family. Taken together, these issues have delayed the children experiencing stability post-separation.

In conclusion, there are factors which suggest that the children would adapt well to relocation, and there are factors which present some degree of concern. Taking all of the above into consideration, the writer would be more confident that the move would not have a significant negative impact on the children if it were to be delayed by one year. This would also enable more information to be gathered with respect to some of the issues of concern outlined above.

[50] Dr. England then provided the following recommendations:

Parenting Plan

Should both parents remain in Victoria, it is recommended that the current plan continue, but with the addition that there is a formal process established which supports [Mr. J.] having additional time with the children when he is

available. For example, once his schedule is released, four days per month should be identified where he has a visit with the girls until 7:00 pm that evening. This may include taking them to their extra-curricular activities. This schedule would also be recommended if both parents move to Kelowna.

If [Ms. J.] and the children relocate to Kelowna, it is recommended that the alternate long weekends continue and that [Ms. J.] take full responsibility to ensure that [Mr. J.] has the children with no delays for his weekend time. This should involve purchasing airline tickets when needed in order to ensure there is no disruption to the parenting plan.

[Ms. J.] indicated that if the children are not allowed to relocate, she will continue to provide [Mr. J.] with alternate weekends (which should include all non-school days) and she will be taking the children to Kelowna on her weekends.

With respect to holidays, it is recommended that special single event days (e.g., Mother's Day, Father's Day, and parent birthdays) be assigned to the respective parent, other single event days (e.g., Halloween and children's birthdays) be alternated, and longer holidays (e.g., Winter Break, Spring Break) be either divided and shared, or alternated as the parents see fit. It is recommended that the children spend equal time with their parents during the summer break.

Decision Making

Regardless of relocation, it is recommended that both parents retain guardianship and be involved in all decision making regarding the children. In the event of a relocation, this may be somewhat more challenging, but it will also assist in [Mr. J.] being involved in the children's lives.

Counselling and Programs

It is recommended that [Mr. S.] and [Ms. J.] attend for at least three counselling sessions, and undertake directed reading as recommended by the counsellor, to discuss their blended family, particularly with respect to clarifying roles regarding discipline of the children.

It is recommended that [Mr. J.] take a parenting course of at least 12 hours duration in order to enhance his parenting skills, particularly with regard to discipline and emotional engagement. This can be done either through attendance at a course, or he can book individual sessions with a counsellor to complete this work. This latter option may be easier for him to accommodate given his work schedule.

Communication

With respect to communications between the parents and the children, the writer recommends that with [Mr. J.] having only alternate weekend access, there is no communication between the children and their mother during his parenting time. At the same time, in order to support his relationship with the children, it is recommended that they are able to contact him whenever they are with their mother (providing it is not an interruption to her parenting). The writer understands that children rarely initiate such contact, and this may well be the case in this situation. However, at this point it is recommended for this

> to be left open rather than scheduling a call, as this often presents its own difficulties.
>
> With respect to communication between the parents, it is recommended that they develop some form of template in which they complete the minimal information necessary regarding such things as: medical/health issues, school and homework, and recreational activities. …

[51] Dr. England was cross-examined on her report.

[52] The claimant submits that Dr. England demonstrated bias in favour of the respondent. One example counsel asserts demonstrates that Dr. England favoured the respondent is when Dr. England initially agreed that her reference to a one-year delay in the claimant's relocation was not a formal recommendation but rather simply a reservation. However, when examined by counsel for the respondent, she characterized it as a recommendation, and only after a break stated that it really was just a suggestion. Another example relied on by counsel for the claimant was that Dr. England had misinterpreted a letter from counsel that proposed a hold on increased parenting time until her assessment was done, and instead used it to support her concerns over gatekeeping. I note in any event after late 2017 the claimant's position on increased parenting time softened and this was acknowledged by both the respondent and Dr. England.

[53] Counsel also raised the concern Dr. England referred to respecting Mr. S.'s financial stability. This related to a builder's lien filed on one of his projects. It is clear on the evidence that both the respondent, and as a result Dr. England, did not have all of the information regarding the builder's lien. The evidence of Mr. S. made it clear it was a not an unusual dispute over costs claimed. I accept it was not evidence of any financial instability on his part. Indeed, the evidence is that he has substantial assets far in excess of his debts.

[54] Counsel for the respondent did not take exception to the report of Dr. England.

[55] I do not accept that Dr. England displayed any evidence of bias. In my view she approached the assignment objectively and attempted to provide a balanced

and nuanced assessment of the parties and the issues she was tasked to address. The examples cited by counsel for the claimant do not evidence bias but rather a reading of her report in the context of the evidence at trial.

Discussion

[56] This is not a case that starts from a position of equal or nearly equal shared parenting. The claimant was the primary parent throughout the children's lives both while the parents were together and after separation.

[57] I will approach the issue of relocation by reviewing and applying the factors noted earlier from *Gordon*. The analysis involves a fresh inquiry into what is in the best interests of the children, having regard to all the relevant circumstances relating to their needs and the ability of the respective parents to satisfy them. It is not founded on a legal presumption in favour of the custodial parent. However, the custodial parent's views are entitled to great respect. Each case turns on its own circumstances.

[58] In particular the court in *Gordon* directed that the trial judge should consider a number of factors.

A. Existing custody arrangement and relationship between the children and the custodial parent

[59] As Dr. England found, both parents are strongly bonded to their children and the children are strongly bonded to the claimant as she has been their primary caregiver throughout. While they have a loving relationship with their father and he is an important part of their lives, the children have expressed their desire to remain primarily with their mother. As Dr. England indicates, their views regarding the move to Kelowna are those of young children and they have been affected by the parental separation and their closeness to their mother. Yet, they do not have reservations about living primarily with their mother and assume that will always be the case. Importantly, given their mother is engaged to be married, they are also comfortable with Mr. S. and have positive views of him.

B. Existing access arrangement and the relationship between the children and the respondent

[60] As noted this is not a shared parenting case. While the children wish to have parenting time with their father they did not ask for additional time with him. Given the nature of the respondent's work he has throughout their lives had a subsidiary role in their lives. That will have affected the bond they have with him as compared to their mother. While that of necessity has occurred because of his employment as a pilot and captain, his decision to relocate to Vancouver rather than renting accommodation in Victoria from January 2016 or moving into the Temple property leads to the inference he was content with his subsidiary role. Renting in Victoria instead of moving to Vancouver would have improved his parenting options. It appears both parties and Dr. England accepted that after the respondent moved to the Temple property the relationship between the parties and the children's parenting time with their father improved.

C. Desirability of maximizing contact between the children and both parents

[61] While maximum contact must be considered (per s. 16(10) of the *Divorce Act*), such contact must be consistent with the best interests of the children. As a result, it is not an absolute: *Stav v. Stav*, 2012 BCCA 154 at para. 129.

[62] If relocation is permitted the distance between Victoria and Kelowna if travelled by ferry or car would normally have more significance to the issue of contact between a non-custodial parent and the children than it does in this case. The situation here is somewhat unusual as both parties and households are associated with the airline industry. Because of travel benefits available to both the parties air travel is readily available to them and their children. Indeed, the evidence is that unlike many families, these parties travel by air not only to and from work but for the vast majority of their holidays. As a result, it is proposed that contact between the children and their father can be readily maintained via air. The children apparently are used to travelling by air and are not stressed by it.

[63] There was much evidence of what flights were available, what passes the children would have access to, the potential travel delays and cancellations and issues surrounding accompanying the children and the children not being seated together and the like. While such issues can arise, the evidence is that problems in getting the children to and from Victoria will be unusual. If there are issues regarding a lack of discount seats being available the claimant has agreed to purchase tickets as necessary to facilitate the respondent's parenting time and to take other measures to make sure that the planned parenting time with their father occurs. The right of the children to use travel passes available through Mr. S. was also in issue however the evidence establishes they do have access to them, and their use was never denied.

[64] The respondent raises concerns regarding the willingness of the claimant to facilitate his parenting time. The respondent submits in addition to the logistical problems of living in different cities the conduct of the claimant since separation raises concerns respecting her willingness to facilitate such contact.

[65] There is evidence the claimant initially failed to fully appreciate her duty to consult and communicate. There is also some evidence this could be potentially ongoing. In part this appears attributable to her strong sense of being the primary parent who has raised the children. That is understandable given her and the children's bonds and the fact that during the marriage the respondent's occupation took him away from the family home for substantial periods of time. While understandable however it is nevertheless necessary that both parents appreciate and understand the importance of consultation and communication in the best interests of their children.

[66] Notwithstanding the parties' access to air travel there will be some impact on the children's relationship with their father. In any situation where parents live in different cities parenting time is lessened from what it would be if they were in the same location. The distance between the children and their father will reduce the actual weekend time they have with him. As the children mature and as they

become more involved in Kelowna the likelihood of regular weekend access may diminish. I note however that the children's involvement even with a parent they primarily reside with will decrease as they get older.

D. Views of the children

[67] The children are now 9 and 11. They have expressed their views that they wish to move to both the respondent and Dr. England. While not yet teenagers neither are they very young – their views are to be given some weight. The evidence is however that the children have been involved in their mother's campaign to move to Kelowna and as a result the weight to be given to their views is lessened.

[68] The respondent submits that the children would be fine with remaining in Victoria if they saw that their mother was fine with that scenario. I am not prepared to accept that would be the case. As discussed, their mother has always been the primary parent. In my view from the children's perspective, that situation is one they perceive as preferable and I accept as well it is in their best interests.

E. Custodial parent's reasons for moving

[69] The claimant's reason for moving is a factor "only in the exceptional case where it is relevant to [her] ability to meet the needs" of the children (*Gordon* at para. 49). In this instance, the claimant is engaged to Mr. S., and this engagement is relevant to her desire to relocate to Kelowna. Mr. S. is not in a position to move as he has shared primary parenting of his daughter in Kelowna. The two plan to wed whether or not the relocation is permitted.

[70] The intention of the custodial parent to remarry was considered in *Lowcay v. Lowcay,* 2000 BCCA 447 and *Vinderskov v. Vinderskov*, 2001 BCSC 1636, appeal allowed in part 2002 BCCA 590.

[71] In *Lowcay* the parties agreed to joint custody when they separated however the children's primary residence was with their mother. They saw their father regularly. The mother commenced a new relationship and her fiancée moved from

British Columbia to Ontario for his employment. The mother sought sole custody and permission to move to Ontario with the children who were then five and eight years of age. The Court of Appeal noted that the move would be disruptive for the children and that they would be moving away from their grandparents, however ultimately upheld the trial judge's decision to permit the move. The court concluded:

> [16] Although maximum contact with both parents is generally in the best interests of the child, the trial judge was faced with the reality that the mother was about to remarry and move to be with her husband where he worked in Ontario. He concluded that on the evidence that in spite of the presence of grandparents in British Columbia, the very close and loving relationship with the father, and other ties to Powell River and Comox, the children's needs were likely best served by remaining with the mother.

[72] In *Vinderskov* the mother sought to move from Vancouver Island to New Brunswick with the parties' two children. Her initial request in 2000 was denied. In 2001 she applied again as she was now engaged to a resident of New Brunswick. The children were by that time 11 and 8 years of age. The father was a pilot for Air B.C., a subsidiary of Air Canada. He had liberal access as he was able to determine his work periods to facilitate it. Her engagement was found to be a material change. The court permitted the move finding:

> [19] Mrs. Vinderskov, in her testimony stated that she will not have to work. However, she said she likes working as a nurse but said she would get the girls organized and wait to make a decision as to whether or not to go to work.
>
> [20] It is important to note that she says that if she is unable to take the girls to New Brunswick she will not marry Mr. Vienneau and will remain in Nanaimo.
>
> [21] I have considered this eventuality on the children. If the custodial parent, whom I find Mrs. Vinderskov is, is unhappy or disturbed by reason of being barred from taking the children to New Brunswick and hence not marrying Mr. Vienneau then this I find can only reflect on the children. I say reflect on the children to the extent that Mrs. Vinderskov's happiness, is, I find, so intertwined with them that the potential of psychological harm might occur. I am reluctant to enter the area of the professionals, whom I have partially relied on but I feel I must weigh the possibility of this eventuality.
>
> [22] Mrs. Vinderskov in her evidence stated that if she were permitted to move with the children to New Brunswick that she was prepared to agree to expanded access to Mr. Vinderskov. Mr. Vinderskov is a pilot and he has the

> ability to obtain standby passes for family members and for himself to travel to New Brunswick and to bring the children to British Columbia.

[73] In *R.E.Q. v. G.J.K.*, 2012 BCCA 146, Newbury J.A., for the court stated, after reviewing a number of appellate decisions in B.C.:

> [57] The untrained reader of the foregoing appellate decisions might be forgiven for concluding that the Court of Appeal came dangerously close to reweighing the evidence and substituting its own discretion for that of the court below (a process that might be permitted by the standard of review enunciated in *Oldman River*, but not by that enunciated in *Van de Perre* and *Hickey, supra*). Indeed, trial counsel for Mr. K. suggested as much in his closing submissions at trial. The reader might also be forgiven for questioning whether the complex and convoluted reasoning now required of a trial judge in cases of this kind is in fact consistent with the overarching principle that as stated in *Gordon v. Goertz*, the best interests of the child are not merely "paramount" in mobility cases but are "the only consideration." (Para. 28.) In my respectful view, the reasoning in *Gordon v. Goertz* is in danger of being distorted into a set of 'rules' that undermine this principle. The Court's statement that the views of the custodial parent are "entitled to great respect" has evolved into a *de facto* presumption in favour of the wishes of the custodial parent - notwithstanding the fact that the majority of the Court in *Gordon v. Goertz* rejected the imposition of a presumption. (Professor R. Thompson has referred to this as the unspoken "primary caregiver presumption": see *Ten Years After Gordon: No Law, Nowhere"* (2007), 35 R.F.L. (6th) 307 at 315 and "*Where is B.C. Law Going? The New Mobility",* prepared for the Continuing Legal Education Society of British Columbia's Family Law - 2011 Update, at 8.2.7.) As seen above, the *de facto* presumption has been reflected in suggestions that the "rights" of custodial parents are inconsistent with restrictions on their mobility with the children, and that such restrictions should exist only in the "rarest of cases".
>
> [58] Like *Gordon v. Goertz* itself, the *de facto* presumption has been extended from variation applications to cases where an initial determination of custody is being made (*Nunweiler),* and more recently, to cases in which the parents are sharing custody and are in fact co-parenting (*S.S.L.)*. It is not clear how the "great respect" principle should work where both parents are custodial parents. Further, the prohibition in this province and elsewhere (see *S.S.L.*, para. 28; *D.P. v. R.B.* 2009 PECA 12 at para. 32; *Spencer v. Spencer* 2005 ABCA 262 at para. 18) against placing the custodial parent in a 'double-bind' by inquiring at trial whether he or she will move without the children, seems to have made consideration of the *status quo* impermissible as a possible outcome - even though this court has also said that the best interests of the child must be considered "in the round" (*Hejzlar*) or in the context of all four possible scenarios (*S.S.L.*). Finally, the stricture (from *Gordon v. Goertz*) against considering the relocating parent's reasons for wishing to move except where they are relevant to his or her "ability to meet the needs of the child" has proven unworkable, as trial judges are reluctant to approve the disruption of children from familiar surroundings and relationships for reasons that, while not improper, may be selfish or trivial. As

> Professor Thompson notes, the prohibition is either simply ignored altogether or is circumvented by invoking the bromide that 'what is good for the custodial parent is good for the children.' (See Thompson, *Ten Years After Gordon, supra*, at 316.)
>
> [59] It may, with deference, be time for the Supreme Court of Canada to reconsider whether cases of this kind are to be determined with reference only to the children's best interests or whether what I suggest is an unspoken factor in mobility cases - the "mobility rights" of custodial parents - are also a proper consideration. It is not for me to suggest that such rights should or should not be considered; but if they are, it seems to me that Canadian courts require guidance as to how such rights, if rights they be, are to be weighed against other factors relating to children's best interests. [Emphasis added by the Court of Appeal.]

[74] The claimant also relies on her submission that she would be unhappy and frustrated if she cannot move with the children and that unhappiness and frustration would affect the household and the children. Should the relocation not be permitted their situation will not be ideal as the claimant would still live in Victoria with the children when they were not in the care of the respondent and would travel over the weekends to Kelowna. Such an arrangement will likely affect her relationship with Mr. S. and such stresses are likely to affect her and as a result the children. It would also still result in the children travelling.

[75] Further, while the claimant can do some of her work for Rock Shore remotely I accept that her presence in Kelowna is needed to fully engage in that employment and to promote her ability to become self-supporting. As will be discussed below in greater detail in the context of spousal support, the claimant has no post-secondary education and minimal work history and skills. The job with Rock Shore will allow her to gain valuable experience and to earn income to contribute to the children and the household, a factor which I find to be in the best interests of the children.

F. Disruption of the children in a change of custody

[76] This factor does not arise as the proposed relocation does not contemplate a change in custody. The claimant has made it clear that if she is not permitted to relocate she will continue to live in Victoria and commute to Kelowna for work and to see Mr. S.. In addition, the respondent has made it clear that he will continue to

reside in Victoria, whether or not the relocation application is granted. As a result, the double bind concerns do not arise, as the parents have made their positions clear in this regard.

G. Disruption to the children consequent on removal from family, schools, and the community they have come to know

[77] The evidence, including that of the parties, the children's counsellor, and Dr. England is that the children are intelligent, good students and function well. There is no evidence that they would not adapt well to a move. They are also familiar with Kelowna, Mr. S. and his daughter.

[78] While the claimant's parents may move to Kelowna, even if they do not the claimant's mother also has access to flight benefits from her past work as a flight attendant. The evidence also indicates that given the financial assistance they have given to the parties over the years, they can afford to travel to visit the children.

[79] However, the children's connections in Victoria to their school, extended family, activities, friends, and their father and his partner weigh against relocation. As counsel for the respondent notes the move to Kelowna is marked by uncertainties, both economic and practical, in comparison to the stable and established situation in Victoria.

[80] As a result, Dr. England noted that "there are factors which suggest the children would adapt well to relocation, and there are factors which present some degree of concern," including the "protracted period of instability for Mr. J. until he secured housing in 2017." This led Dr. England to conclude that she "would be more confident that the move would not have significant negative impact on the children if it were to be delayed by one year … [which] would enable more information to be gathered with respect to some of the issues of concern outlined above."

[81] The possible benefit of such a postponement must be weighed against possible detriments. Delayed relocation would leave the parties in a continued state of uncertainty and stabilizing the parenting regime would be delayed. In addition, it

would either require an adjournment of this trial for a year or an order that no change occur for a year and then possibly another trial with all the expense, stress and uncertainty that would entail. It would increase the stress on the claimant as she would undoubtedly have to travel back and forth to Kelowna in order to parent her daughters, maintain her relationship with Mr. S., and further her work with Rock Shore.

[82] The respondent argues relocation of the children would move them from a well-established situation to one of uncertainty; from one where the children are stable and doing well to one where new relationships will have to be forged, where there is less family support and less time with their father.

[83] At para. 50 of *Gordon* the court summarized as follows:

> [50] In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[84] In my view the potential benefits of a 12-month delay are outweighed by a resulting delay in resolution of the issue. The children are well aware of their mother's proposed marriage and the fact that Mr. S. resides in Kelowna. They are also aware of their potential move to Kelowna. In addition, some of the primary concerns of Dr. England that gave rise to the suggested delay were gatekeeping, the financial security of Mr. S. and the relative recency of the claimant's relationship with Mr. S.

[85] While I accept the gatekeeping issue is valid, the financial concern is not, for the reasons given earlier. The relative recency of the relationship is ameliorated to a degree by the fact the claimant and Mr. S. had a prior relationship, have remained in contact, and know each other well. Nor do I find the concerns mentioned respecting travel difficulties as sufficiently significant so as to be a factor.

Conclusion on Relocation

[86] The distance between the respondent and his children if the relocation is permitted is ameliorated to a degree by the unique circumstances arising from the various parties' involvement in the aviation industry. The issue of the expense of air travel is a much less relevant factor than might have otherwise been the case. This is also true for the claimant's family should they choose not to move to Kelowna. In addition, these are children who have been brought up using air travel.

[87] In my view, the claimant's proposed move, her marriage to Mr. S. and her employment with Rock Shore are consistent with the best interests of the children as it will provide a stable two-parent home for herself and the children, and will allow her to work and contribute income to that household.

[88] In addition, the views of the children, though not of significant weight considering their exposure to the claimant's desire to move to Kelowna, are in favour of relocation. Neither child expressed a desire to see their father more, and should the relocation be allowed, they will see him only slightly less than under the current parenting arrangements (as they will be flying to Victoria).

[89] For these reasons, and those included above, I find that the claimant's application to relocate to Kelowna is allowed under s. 16 of the *Divorce Act*, effective on the date of this judgment but subject to the requirements set out below in regards to parenting time and responsibilities.

Parenting Time and Responsibilities

[90] As stated above, the court must only consider the best interests of the child when making orders for parenting time or contact: *FLA* s. 37(1).

[91] The current arrangement, as set out in the consent order between the parties, is working well. The respondent is able to see the children regularly and maintain a relationship with them and they with him, and I see no reason why this cannot continue with the children residing in Kelowna given the evidence of the ease of

arranging air travel. Therefore parenting time will continue as set out in the consent order and as proposed by the claimant, being:

a) The respondent has reasonable access to the children, to include (subject to his availability, with the claimant to be notified in advance):

   i. No less than six days per month, plus an extra day every long weekend created by a statutory holiday or professional development day;

   ii. One-half of spring break and one-half of summer vacation;

   iii. Father's Day when it does not fall on a regularly scheduled weekend;

   iv. Excluding Mother's Day if it does fall on a regularly scheduled weekend;

   v. Hallowe'en, the children's birthdays, and Christmas to be alternated.

[92] In my view the parties should share parenting responsibilities under s. 41 of the *FLA* with the exception of sub-sections (a), (b) and (c), given the relocation of the claimant. Section 41(a) relates to day-to-day decisions affecting the children. Sections 41(b) and (c) relate to decisions respecting where the children will reside, and with whom the children will live and associate.

Family Violence

[93] There is no allegation or evidence of family violence hence s. 38 of the *FLA* is not engaged.

Division of Family Property

Legal Principles

[94] Part 5 of the *FLA* governs property division. The main provisions are ss. 81, 84, and 85. Under s. 81 of the *FLA*, each spouse is entitled to a presumptive one-half undivided interest in each family asset as a tenant in common upon separation.

The relevant provisions of the *FLA* with respect to the issues of reapportionment and compensation are ss. 95, 96, and 97.

[95] The *FRA* permitted an unequal division of family property if an equal division would result in unfairness. That has changed under the *FLA* as a court is only to reapportion family property if an equal division would be "significantly unfair" (s. 95). Justice Brown commented on this difference in *L.G. v. R.G.*, 2013 BCSC 983, stating:

> [71] In my view, the term "significantly unfair" in s. 95(1) of the *FLA* essentially is a caution against a departure from the default of equal division in an attempt to achieve "perfect fairness". Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.

[96] Significant unfairness is further discussed in *Remmem v. Remmem*, 2014 BCSC 1552:

> [43] It is only at the very end of the exercise that equitable considerations come into play pursuant to s. 95. After determining the full extent of the family property, the court must go through the notional exercise of dividing that property equally. The court must consider if equal division would be "significantly unfair". If it would, then it is possible to order an unequal division.
>
> [44] The *FLA* provisions granting the court a discretion to order other than an equal division are very different from the provisions in the previous legislative scheme. Pursuant to s. 65(1) of the *Family Relations Act*, R.S.B.C. 1996, c. 128 (the "*FRA*"), courts had a discretion to divide family property in unequal shares if the court found that the division of property (pursuant to agreement or the provisions of the *FRA*) would be unfair having regard to the factors set out in that section. The first and obvious difference between the discretion given under the *FRA* and the discretion given in Part 5 of the *FLA* is that in order to exercise the discretion, it is no longer sufficient to find that a division of property is merely "unfair". There must be a finding that the division of property pursuant to the statutory scheme is "significantly" unfair. The *Concise Oxford English Dictionary* defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact – something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).

[97] Further, where the court determines that it would be significantly unfair not to divide excluded assets, having regard to the factors set forth in s. 96(2), the court may make an order that excluded property be divided. In *Andermatt v. Tahmasebpour*, 2015 BCSC 1743, Pearlman J. applied the same principles set out in *L.G*. and *Remmem* for s. 95 and found:

> [59] I conclude that the "significant unfairness" warranting the division of excluded property under s. 96 must be compelling or meaningful, on a consideration of the factors set out s. 96(b)(i) and (ii). Division will be justified where the court finds that the consequences of not dividing excluded property would be so weighty as to produce an unjust or unreasonable result.

[98] Under the *FLA* family debts are also divisible under s. 86. Once the court has divided the family assets under Part 5 of the *FLA*, it must then consider the mechanism by which the division of property is to be achieved, pursuant to s. 97.

Real Property

[99] The parties have owned several real properties and also had assets prior to commencing their relationship. As a result, issues of excluded property arise that the parties have resolved. However, some issues in regards to real property remain outstanding.

[100] At the commencement of their relationship the respondent owned a townhome on Hidden Creek Cove, Calgary, Alberta. After they began their relationship, the parties purchased a property on Kincora Bay, Calgary, to which the claimant contributed $35,980. On their return to Victoria they purchased the property on Sunnygrove Place. They then purchased two strata units in Parksville and the Temple property which as mentioned was later subdivided into two lots. They also purchased the property on Lochside Drive which had a substantially burned down home on it, cleared the site, and built the family home.

[101] Commendably the parties have made a number of admissions of fact by way of a Statement of Agreed Facts that settles many of these property issues (reproduced here with slight adjustments):

STATEMENT OF AGREED FACTS

1. The claimant is entitled to an exclusion from family property, under s. 85 of the *FLA* in family property in the amount of $35,980 in respect of her contributions to the purchase of the property on Kincora Bay, Calgary.

2. The claimant is entitled to an exclusion from family property, under s. 85 of the *FLA*, in respect of her registered 1/8 interest on the title to the property on Stancombe Place, Victoria, BC.

3. The value of construction and management services provided by the claimant's father to the parties for their construction of the family home at Lochside Drive was a gift to both parties, jointly.

4. The respondent is entitled to an exclusion from family property, under s. 85 of the *FLA*, in the amount of $126,025 in respect of the value of his interest in the townhouse on Hidden Creek Cove, Calgary, at the commencement of the relationship.

5. The respondent is entitled to an exclusion from family property, under s. 85 of the *FLA*, in the amount of $100,000, in respect of a gift he received from his father in September of 2008 to assist in the purchase of the family home on Sunnygrove Place, Victoria.

6. The respondent is entitled to an exclusion from family property, under s. 85 of the *FLA*, in respect of his Registered Retirement Savings Plans, in the amount of $22,677, owned at the commencement of the relationship.

7. The fair market value of the family property on Temple Avenue is $820,000.

8. The fair rental value of the family property on Temple Avenue, during the time it has been occupied by the respondent since June 1, 2017, is $1,400 per month.

9. Since separation, the parties have sold the following properties, with the remaining net sale proceeds being held in trust by the law firm of Jawl Bundon LLP pending the outcome of this trial:

    a. Lochside Drive (family residence, tax exempt)

    b. Resort Drive, Parksville (revenue property)

    c. Resort Drive, Parksville (revenue property)

    d. Major Road, Victoria (bare land, located next to the Temple property)

10. Capital gains taxes payable by both parties on the sale of the properties listed in paragraph 9 are family debts under s. 86 of the *FLA.* The following advances towards these liabilities were paid from the funds held in trust on April 30, 2018, without prejudice and subject to adjustment once each party's liability for capital gains taxes on the properties has been determined, with liberty to apply in

the event of disagreement:

a. The claimant: $34,000

b. The respondent: $46,767.30

11. The amount of $21,356.42 advanced to the respondent from the jointly held funds, referred to in paragraph 24 of the order of 25/Oct/2016, was properly applied to a line of credit that was a family debt.

12. By agreement, the parties have repaid debts owed to family members from the sale proceeds of the properties, as follows:

a. The respondent's father: $100,000

b. The claimant's mother: $71,200

c. The claimant's father: $6,800

[102] Therefore the only contentious issues respecting property division are a contingent capital gains tax arising from the sale of the Temple property, the issue of occupational rent payable by the respondent for his occupancy of the Temple home, the issue of who may retain the Temple property and finally the claimant's request for reapportionment of family property in her favour.

Temple Property

[103] The claimant only wished to retain the Temple property if she was unsuccessful in her relocation application. Her position was that if she was permitted to move, she does not oppose the respondent purchasing her one-half interest in the property for $410,000 as established by the appraised and agreed upon value of $820,000. The respondent was not opposed to this suggestion, but sought insulation from the contingent tax liability he may incur depending on if he chose to subsequently sell the property.

[104] Because the Temple property was a rental property there is a contingent tax liability if it is sold.

[105] In *Jaszczewska v. Kostanski*. 2016 BCCA 286, the parties' assets included shares in a company that developed a strata unit project. Several of the strata units

remained unsold. The potential tax implications of their disposition were in issue, as it affected the value of the corporate shares that were divided.

[106] The Court of Appeal noted at para. 69, relying on *Stein v. Stein*, 2008 SCC 35, that "contingent tax liabilities can be dealt with on an 'if and when' basis." The court found that the tax issue would be resolved when the final strata units were sold, which was expected to occur within a reasonable time. As a result, a sum was held back from the compensation order to be held for two tax years. If the tax liability was incurred it would be accounted for and shared but if it was not incurred within the two years the funds were to be released to the claimant without any further tax liability to her should taxes be incurred after that.

[107] In *Sinai v. Mahmoud*, 2017 BCCA 155, the Court of Appeal said:

> [30] In my view the judge's expressed understanding of the circumstances in which distributive taxes should be factored into division of family assets does not accord with the jurisprudence that has developed under the *Family Relations Act*.
>
> [31] The judge referred to the relevant authorities before him, and said:
>
> > [163] … In determining the amount of the compensation order, disposition costs, including tax consequences, must be taken into account if an asset must be sold in order for the non-owing spouse to realize his or her interest in the asset. They need not be taken into account "when it is not known when, if ever, the asset would be sold", or where those costs are "hypothetical and speculative"…
>
> [32] While this statement is correct, it is incomplete, and does not give effect to the first premise, which is to the extent the circumstances of the asset permits, and provided there is evidence on which to do so, the parties are entitled to equality of treatment (see *Stein* at para. 9). To that end, assets should be put upon the same level for fairness and proper assessment of the relative outcomes. This removes opacity and allows for a clear view of the equivalence of wealth distributed, absent which an order may effect an unintended and unrecognized redistribution, and may ricochet onto the support orders made. The principles of fairness and presumptive equal division apply, with due regard to the practical character of the assets and inherent limitations. Recently Mr. Justice Savage summarized the law under the *Family Relations Act* in *Maguire v. Maguire*, 2016 BCCA 431:
>
> > [38] The case law that developed under the *FRA* provided that there is no absolute rule as to whether tax consequences should or should not be taken into account in the division of family assets. Where there is evidence that a division of family assets will attract tax consequences, an allowance should be made for tax. Where it is not

> clear when or in what amount taxes will be exigible, an allowance may not be made: *Murchie v. Murchie* (1984), 53 B.C.L.R. 157 at para. 390 (C.A.); *Halpin* at para. 63; *McPherson v. McPherson* (1988), 48 D.L.R. (4th) 577 at 583 (Ont. C.A.). Likewise, where taxes are "speculative" the court may not take taxes into account: *O'Bryan v. O'Bryan* (1997), 43 B.C.L.R. (3d) 296 at para. 54 (C.A.); *Ouellette v. Ouellette*, 2012 BCCA 145 at paras. 31-32. [Emphasis added by the Court of Appeal.]
>
> [33] I consider that the law, correctly understood, does not limit the requirement of an allowance for distributive taxes to cases in which the asset must be sold to allow the non-owning spouse to realize his or her interest in the asset. It was this feature which appears to have prompted the judge's valuation of the corporations without allowance for personal income taxes that will become payable. In *Laxton* Madam Justice Smith discussed the correct treatment of tax consequences from selling the asset in issue (shares of a publicly traded company) and held the personal tax consequences to the seller "should have been deducted from the compensation award". In doing so she affirmed the requirement for such treatment when a sale is required for the non-owning spouse to realize his or her interest, but she did not limit accounting for tax consequences to that single circumstance, citing Madam Justice Huddart's comments in *Kowalewich,* in turn referring to the reminder of Madam Justice Southin in *Blackett* that "section 66 is not an expropriation provision".
>
> [34] As *Ouellette* demonstrates, it will not be necessary and indeed perhaps not always even possible, to account for tax consequences inherent in liquidating an asset. In *Ouellette,* however, the sums discussed appear to have been speculative and unsupported by evidence as to the quantum, and the judge found "Mr. Ouellette did not intend to sell his interest in the business …" That is not the case before us. Here the corporations are two holding companies and a personal services corporation, none of them requiring the continuity essential to an on-going concern as was the case in *Ouellette*. Significantly, the record here includes evidence of the scale of the tax liability inherent in bringing the wealth out from behind the corporate curtain, which the appellant was willing to do immediately, and there is no evidence to the effect the monies retained in the corporations could be sheltered so as to attract a tax burden less than posited by the expert Mr. Tidball.

[108] The position of the claimant is that such an eventuality is so remote that the claimant should bear no responsibility for any capital gains tax payable on an eventual sale of the Temple property by the respondent nor should she have any liability for any real estate commission given the respondent does not intend to sell. She also said that if the respondent does not intend to retain the Temple property, he ought to transfer his interest to her at its adjusted cost base for the purposes of its sale, as the capital gains payable would be lower, and the parties could then share the net proceeds of the sale.

[109] As mentioned the respondent's position at the time of trial was that he ought to be awarded the property, but noted there could be tax consequences both if he subsequently retains the property and if he sells it. This is why counsel for the respondent stated in submissions that only after the mobility and other issues are resolved can the Temple issue be resolved. The respondent proposes an order that he obtain tax advice and an estimate of the capital gains tax within 60 days of judgment, such advice to be provided to the claimant. If the parties cannot resolve by agreement then he seeks liberty to apply for further directions from the court.

[110] There may as well be tax implications arising if the respondent retains the Temple property.

[111] The evidence does not address the tax implications sufficiently to ensure they are properly addressed. For example, the source of the funds used to buy Temple, if those of the respondent, may raise issues of attribution of the gain to him. In my view since there is agreement that there will be a capital gain the respondent's suggestion is appropriate. As a result, there will be an order that the respondent obtain tax advice respecting the implications of the respondent retaining the Temple home, or as suggested transferring it to the claimant for sale, and an estimate of the capital gains tax arising in those circumstances within 60 days of judgment, with such advice to be provided to the claimant. If the parties cannot then resolve disposition of the Temple property by agreement they have liberty to apply for further directions from the court.

[112] Though dependent on the resolution of the capital gains tax liability, and subject to agreement of the parties on that issue, I note here that should the respondent retain ownership of the Temple property he is to compensate the claimant for her half-interest in that property, being $410,000.

Stancombe Property

[113] The Stancombe property is a rental operated by the claimant's father showing the claimant as a 1/8th owner in the Land Title Office. It was so registered by the

claimant's father. I am satisfied on the evidence that the claimant only holds bare legal title and has no beneficial interest in the property. It is as a result not family property. The parties in any event admit that it is excluded property.

Summary of Real Property Division

[114] With respect to the funds held in trust with Jawl Bundon LLP, representing the net sale proceeds from the sale of the real properties, the amount currently held in trust is $713,446.53. Adding to that the refund for Dr. England's retainer, $1,554.94, yields a balance of $715,001.47. That amount is to be divided as follows:

Note	Claimant	Respondent
Balance in Trust	$357,500.73	$357,500.74
Hidden Creek Cove exclusion	-$126,025	$126,025
Kincora Bay exclusion	$35,980	-$35,980
Rent paid by the claimant from joint funds due to the respondent as was not a shared liability	-$9,871.26	$9,871.26
Payment to each	$257,584.47	$457,417

Vehicles

[115] The parties owned two vehicles, a Mercedes Benz and an Acura. The evidence of vehicle values consists of auto-trader printouts. The parties do not agree on the values proposed. It appears the value of the Mercedes retained by the claimant may be in the area of $17,000 to $21,000 and the value of the Acura retained by the respondent around $4,000. The individual factors that contribute to the value of each vehicle are not accounted for in the evidence. To complicate matters further the claimant testified the Mercedes was recently damaged in an accident reducing its value.

[116] Counsel for the claimant submits this issue is essentially *de minimis*, however the difference in values is significant and should be accounted for.

[117] The evidence however does not permit assessment of the vehicle values. If the parties are not able to resolve the valuations by agreement within 30 days I order that each vehicle be taken to a dealer in such vehicles and that a written valuation be obtained. If the valuations given are a range, the mid-point shall establish that vehicle's value. The difference in values shall be accounted for in the equal property division.

[118] As the two vehicles are jointly registered the Mercedes shall be transferred to the claimant and the Acura to the respondent.

RRSPs

[119] The parties' RRSPs shall be equalized by way of a rollover under s. 146(16)(b) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.). The division of the RRSPs shall be calculated as follows:

RRSP	Claimant	Respondent	Notes
TD SDRSP	$22,316.46		
TD SDRSP		$165,955	
Pacific Coast RRSP		$13,000	
CST Equity Plan Solutions			*In specie*
Agreed exclusions		-$22,677	
Subtotal	$22,316.46	$156,278	
Equalization Payment	$66,980.77	-$66,980.77	
Net	$89,297.23	$89,297.23	

[120] The respondent shall transfer $66,980.77 by tax free rollover to the claimant.

[121] The respondent's RRSP-registered WestJet shares (CST Equity Plan Solutions) are agreed to be family property and are to be divided equally by way of a rollover *in specie* under s. 146(16)(b) of the *Income Tax Act*. The reported share balance is 2,415.1194 shares. As with the non-registered shares, such a transfer will

require a transfer to the respondent's TD account and then a transfer to the claimant. As requested by counsel if there is any difficulty in effecting such a rollover that the parties cannot resolve by agreement they have liberty to apply.

Non-Registered Assets

[122] In addition, the respondent's non-registered assets, consisting of WestJet shares valued at $12,237.02, are family property and are to be divided. Therefore, $6,118.50 is to be added to the claimant's entitlement, and subtracted from the respondent's.

Reapportionment

Claimant's Position

[123] The claimant seeks reapportionment in her favour. Her basis for doing so is unusual.

[124] As noted, after the parties moved to Victoria from Calgary they bought a home on Sunnygrove Place in Cordova Bay. They did so using the sale proceeds of the Calgary property sale and a gift of $100,000 from the respondent's father H.J. The claimant testified that she and the respondent were in the kitchen of their Calgary home when the respondent's father gifted them $100,000 for which she thanked him.

[125] The claimant submits that notwithstanding her formal admission in these proceedings that the gift was to the respondent only "it would be significantly unfair, within the meaning of s. 95 of the *FLA,* not to reapportion family property to share with Ms. J. the benefit of H.J.'s generosity." That is, it would be unfair not to credit her for something she was always told was a gift and was half hers and for which her expectation has been frustrated.

[126] She submits this unfairness is further highlighted by the fact that it was her efforts that lead to acquisition and subdivision of the Temple property, yielding a substantial profit, and it was her family's support that allowed the parties to purchase

the Temple and Lochside properties, and to obtain a home warranty and general contracting services to construct their Lochside residence.

Respondent's Position

[127] The respondent submits there is no basis for unequal division as none of the circumstances the claimant points to meet the threshold of "significant unfairness." He notes that s. 81(a) of the *FLA* states that the presumption is that "spouses are entitled to family property and responsible for family debt, regardless of their respective use or contribution", and that s. 81(b) specifies that each spouse's share is presumptively an "undivided half interest in all family property."

[128] In addition, the parties have agreed in the statement of agreed facts that the $100,000 gift from the respondent's father is the excluded property of the respondent and the respondent says that there is no evidence that the claimant's belief in the nature of the gift, if incorrect, was relied on and resulted in any significant loss or unfairness to her.

Discussion

[129] Regarding the claimant's first argument that she should benefit from reapportionment to share in the gift from the respondent's father, this does not itself support reapportionment. She has had the benefit of the use of the funds and the only loss or unfairness is that of an expectation unfulfilled. In my view, an expectation does not form a basis for a finding of substantial unfairness, especially when the claimant has made a formal admission of fact that the money was a gift to the respondent.

[130] The submission of the claimant in regards to her contribution to the parties' real estate projects asks the court to weigh the relative contributions of the parties to the family assets. Given a marriage is a "joint endeavour" (*Moge v. Moge*, [1992] 3 S.C.R. 813 at 870) in which each party contributes in their own way, such "valuation" of contributions is not in general the approach to property division under the *FLA*. In fact, as noted by the respondent the presumption under the *FLA* is that

each spouse shares equally in family property irrespective of their contribution to it (see s. 81).

[131] However, the Court of Appeal has recognized that contribution may be a relevant factor in determining whether to divide family property unequally under s. 95 of the *FLA*. In *Jaszczewski*, the court remarked:

> [44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the *FLA* as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.

[132] However, in the context of all of the evidence, including the respondent's financial contributions during the marriage, and those of his family, the claimant's efforts in furtherance of the parties' acquisition of real property, and the efforts of her family, equal division of the family property is not "substantially unfair". As noted by Brown J. in *L.G. v. R.G.*, 2013 BCSC 983 at para. 71:

> [71] In my view, the term 'significantly unfair' in s. 95(1) of the *FLA* essentially is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.

[133] The claim for reapportionment in favour of the claimant is dismissed.

[134] As the parties may have agreed to certain advances to the parties' post-trial the division ordered above is reduced by any such advances.

Occupational Rent

[135] The respondent has been living in the Temple property since August 2017. There is no mortgage on Temple. The claimant argues that since she has been paying $2,000 in rent she should recover that cost from the funds in trust from August 1, 2017. Alternatively, given the Temple property has a monthly rental value

of $1,400 she submits she should receive one-half of that amount from the respondent.

[136] The respondent acknowledges that ouster is not a legal requirement for entitlement to occupational rent. He suggests that monthly rent of $1,400 per month is appropriate and that half of that amount should be credited to the claimant less equal sharing of property insurance, property taxes and a credit of $200 a month to reflect maintenance costs incurred to the parties' mutual benefit.

[137] In *Stasiewski v. Stasiewski*, 2007 BCCA 205, the wife had evicted the husband from the matrimonial home. As a result, he incurred rent of $1,200 per month. The matrimonial home was capable of being rented for $2,400 to $2,600 per month. The trial judge ordered that the wife credit the husband $400 per month for occupational rent to reflect in part "the fact that the [husband] had been incurring rental costs" (para. 25). On appeal the Court of Appeal found that the trial judge's "decision to credit the husband with occupation rent was an exercise of his discretion to do equity between the parties in the circumstances" (para. 33).

[138] In *McFarlen v. McFarlen*, 2017 BCSC 1737, Jenkins J. summarized the law respecting occupational rent at paras. 12 to 19, concluding as follows:

> [20] So, is "ouster" a condition precedent to a claim for occupational rent? The authorities suggest that this remains an open question. Based on my interpretation of the law in this province, I accept that "ouster" is no longer a pre-condition to a claim for occupational rent measured by the cost of alternative accommodation. The statements by Verhoeven J. which have been adopted by McEwan J. in *Piderman* as well as the statement by Willcock J. in *L.M.R v. J.F.R.*, 187 A.C.W.S. (3d) 775, support this interpretation. My reasoning is reflective of the opinions expressed by Verhoeven J. and McEwan J. in *Ross, Piderman* and *C.M.L.S*.- that the proper way to approach a claim for occupational rent is as a discretionary tool to achieve fairness. Such a conclusion is consistent with family law legislation including the *Divorce Act*, (R.S.C., 1985, c. 3 (2nd Supp.)) and the *FLA* which are not premised upon "fault based" principles. If I have correctly interpreted the law in British Columbia, then a review of the claim can proceed on the basis of equity. If "ouster" is required, this issue would have to proceed to trial to determine whether or not there has been an ouster.
>
> [21] With respect to the respondent's claim for occupational rent for the cost of maintaining the property, a claim can be submitted regardless of whether "ouster" has occurred: *Donovan v. Donovan* (1986), 7 B.C.L.R. (2d)

> 221, 5 R.F.L. (3d) 1 (S.C.) at para 12; *B.G.P. v. L.M.P.*, 2012 BCSC 1240 at paras. 41-47.
>
> [22] However, I note that an award of occupation rent cannot be justified by a claim for capital and non-capital expenses of maintaining the property; see *Oyama* at para. 6. The only expenditures an occupying tenant can put forward is a claim for expenditures made to the benefit of the property: see *Stasiewski v. Stasiewski*, 2007 BCCA 205, 67 B.C.L.R. (4th) 81 at para. 28 citing *Donovan v. Donovan* (1986), 7 B.C.L.R. (2d) 221, 5 R.F.L. (3d) 1.

[139] Taking into account the rental expense of the claimant and the children along with the respondent's occupation of the Temple property, fairness is achieved by the respondent paying to the credit of the claimant 50 percent of the monthly rental value of the Temple property (totalling $7,000), less 50 percent of the insurance costs paid by the respondent on the Temple property ($704.50), for a total of $6,295.50. The evidence does not establish the respondent's estimate of $200 per month that he alleged he spent on maintenance and therefore this amount will not be credited to the respondent. The rent of $700 per month for the Temple property shall continue when occupied by the respondent until such time as the Temple property is either purchased by the respondent or sold to a third party.

Incomes of the Parties

[140] The determination of child and spousal support payable depends on the parties' incomes. Both ask the court to impute income to the other.

[141] Section 19 of the *Federal Child Support Guidelines*, S.O.R./97-175 provides:

> 19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse; …

[142] The discretion of a court to impute income is broad and is not limited to the enumerated heads in s. 19 (see *Riel v. Holland* (2003), 67 O.R. (3d) 416 (C.A.) at paras. 35-36).

Position of the Claimant

[143] The claimant seeks to impute income to the respondent based on his access to his Employee Share Purchase program ("ESP") with WestJet under which he can purchase shares worth up to 20 percent of his income and WestJet will match his contribution. The claimant submits the respondent should continue to take advantage of the program and sell each preceding years' shares on a rolling basis to supplement his income. She submits it is a significant benefit to him and should be accounted for. It is suggested that $36,000, which is slightly less than 20 percent of his income as matched by his employer, should be added onto his annual salary.

[144] The claimant submits that the respondent's *Guidelines* income as a result should be set at $253,374. She notes this is not out of line with past earnings, that he is about to reach WestJet's top pay grade and this amount does not account for overtime, which in any event she is not asking be imputed.

[145] The claimant also submits that income should not be imputed to her given she has a Grade 12 education, she was a homemaker and primary caregiver to their daughters and is in fact earning $2,000 a month which is more that she would earn at minimum wage, and has the future potential of greater earnings as Rock Shore grows.

Position of the Respondent

[146] The respondent submits there is no basis to impute income to him and that support should be based on his most current income, not his past earnings given those fluctuate. He says that he opted out of the ESP because if he paid into the plan, his net income would not be enough to meet his support obligations.

[147] The respondent also seeks to impute income to the claimant because he says if she relocates to Kelowna there is no reason she cannot work full-time. Her plan to continue working part-time for Rock Shore is characterized by the respondent as intentional underemployment that warrants imputation of income under *Guidelines* s. 19(1)(a).

Discussion

The Respondent's Income

[148] The claimant's argument in support of imputed income to the respondent relates to the respondent's ESP. The ESP is not a compulsory benefit. It is optional at the discretion of the employee.

[149] The claimant disputes the reasonableness of the respondent's decision to reduce his income by foregoing participation in the ESP. She submits that his doing so in order to address the demands on his cash flow could have been ameliorated by selling his existing shares to address those demands.

[150] The respondent ceased contributing to the ESP in 2016. As mentioned he did so for cash flow reasons. He submits that if he continued to participate in the ESP after separation he would not have had the net income required to pay the support he has been paying. In addition, he must pay income tax on both his and his employer's contribution and on any gain. Further, his purchases are locked in for one year.

[151] The respondent's participation in the ESP affects both his net income and his taxes payable. It results in him paying tax on more income than he can access. That is the opposite of what s. 19 addresses, where income is imputed when a payor is paying less tax than normally payable. In addition, even if he was paying into the ESP program it would not result in increased income being attributed to the respondent unless and until those contributions were accessible.

[152] In *Redlick v. Redlick*, 2013 BCSC 1155, the payor spouse received contributions from her employer to her employee locked-in RRSP and these were reported in her line 150 income, however they were not accessible until she retired. As a result, the court did not include them in the payor's income.

[153] In this case the contributions to the ESP are locked in for only one year. The submission of the claimant seeks to require the respondent to contribute and then

avoid the locked-in issue by drawing down the previous year's contribution each year. The respondent on the other hand submits these contributions cannot be considered income until they are accessible. The respondent has no objection to adjusting his support obligations if in the future he is financially able to participate in the ESP program again.

[154] In *Redlick* the court noted:

> [51] The concept of income is broadly defined under the *Guidelines*, making it fair and appropriate to take into account many forms of income, benefits, compensation or attributed income, benefits or compensation that would not otherwise be treated as table income*: Dahlgren v. Hodgson*, 1999 ABCA 23 at para. 4.

[155] However, implicit in the concept of income in whatever its form is that it is accessible. In my opinion the claimant has not shown that it would be reasonable to require the respondent to participate in the ESP, particularly in light of the significant child and spousal support she is seeking. While it is a benefit that he acknowledges can be considered income there is a difference between a benefit received and one that he has elected not to receive for valid and rational reasons. The suggestion of the claimant would require the expenditure of funds and the incurring of tax liabilities by the respondent which while of benefit to him in increasing his income would potentially limit his available funds for a period of time. It would result in the respondent lacking sufficient net pay to meet his support obligations and to support himself. The actions of the respondent are not unreasonable. I decline to impute potential ESP benefits to him as imputed income.

[156] The respondent's employment income over the past three years has been:

a) 2015 - $207,527.11;

b) 2016 - $207,868; and

c) 2017 - $199,357.71.

[157] It does not appear to be in dispute that the *Guidelines* income of the respondent in 2017 including other non-taxable income was $217,296 and this

amount is to be used for the purposes of calculating ongoing spousal and child support. As a result, his income for support purposes is $217,296.

The Claimant's Income

[158] The claimant's reason for pursuing only part-time employment is to be available for the children after school and for their activities. In addition, it appears implicit that her role in Rock Shore, while part-time at the moment, is expected to provide more financial benefits and hours of work as the company grows.

[159] In *Llewellyn v. Llewellyn*, 2002 BCCA 182 at paras. 30-31, the Court of Appeal noted that a desire to be available for children after school is not a sufficient basis to justify underemployment. In this instance that is not the only reason for the claimant's current employment.

[160] Given her educational and vocational background it is unlikely she could secure full-time employment much over minimum wage. Such employment would not result in earnings greater than she is currently receiving of $2,000 per month. In addition, her current employment will result in her improving her skills, and over time will increase her earning capacity, something a minimum wage job is not likely to do. As a result, I do not find her course of action unreasonable and decline to impute income to her. For the purposes of spousal support, I find her income to be $24,000 per annum pursuant to her employment contract with Rock Shore.

Ongoing Child Support

[161] The claimant seeks child support pursuant to the *Guidelines* based on the respondent's income. This is not in dispute. The amount is $2,953 per month for the two children.

[162] The parties do not agree on s. 7 expenses. The respondent submits that at one time the Kumon program for the children assisted them but he no longer believes it to be necessary. The children are also involved in dance, something they did when the parties were together. There is no evidence that dance was objected to

by the respondent during the relationship. The children also have participated in singing lessons, art and golf lessons.

[163] Counsel for the respondent refers to *Piper v. Piper*, 2010 BCSC 1718 at paras. 92-93, for the principles that apply to extraordinary expenses noting that while the children's activities are beneficial they have not been shown to be necessary. The respondent notes as well the need to ensure that the expense of any s. 7 items is reasonable in relation to the means of the parties.

[164] Given the children will be relocating the activities they will participate in outside of school are not confirmed nor is their cost. The parties have an obligation to reach agreement on such expenses. Where such agreement is reached the expenses are to be shared proportionately to the parties' incomes. Failing agreement they may apply to the court supported by the necessary evidence to allow the court to determine if the requirements of s. 7 of the *Guidelines* are met.

[165] As a result no order is made at this time respecting s. 7 expenses.

Ongoing Spousal Support

[166] The claimant seeks spousal support primarily on a compensatory basis. She submits it was a mutual decision of the parties that she leave her career to become a full-time homemaker and parent.

[167] The respondent acknowledges the claimant is entitled to spousal support, initially on both compensatory and non-compensatory grounds. He submits that as it has now been almost three years since separation, with an intervening "re-partnering", the non-compensatory basis for support has diminished. He further submits the claim for compensatory support should be assessed with the expectation and objective of promoting insofar as practicable, the claimant's self-sufficiency. He acknowledges that if no income is imputed to the claimant then the range under the *Spousal Support Advisory Guidelines* (Ottawa: Dept. of Justice, 2008), ("SSAG"), is a low of $3,329, a mid-range of $3,895 and a high of $4,462.

Legal Principles

[168] Spousal support orders may be made under either the *FLA* or the *Divorce Act*. The objectives and factors that must be considered for spousal support under both Acts mirror each other (*Liu v. Liu*, 2014 BCSC 1110 at para. 35).

[169] Orders for spousal support under the *Divorce Act* are made pursuant to s. 15.2. This section also sets out the objectives for spousal support under the *Divorce Act* and the factors to be considered:

> **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.
>
> …
>
> Objectives of spousal support order
>
> (6) An order made under subsection (1) or an interim order under subsection (2) 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 practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[170] Under the *FLA* the provisions relating to spousal support are found in ss. 160-165. The objectives of spousal support are set out in s. 161:

> 161. In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:
>
> (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;

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

[171] In determining the quantum and duration of spousal support it is also necessary to bear in mind the three models of spousal support described in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, namely: compensatory, contractual and non-contractual (needs-based).

[172] The nature and significance of compensatory spousal support is discussed in numerous authorities including *Moge* and *Bracklow*. The appropriate measure of compensatory support is not assessed by doing a detailed accounting at the end of a marriage to determine what financial "losses" a spouse suffered as a result of expenditures made during the marriage (including the period of cohabitation). Instead, the Court must have regard to the statutory provisions governing support, the relevant authorities, and the *SSAG*.

[173] The importance of the marital standard of living in lengthy marriages has been emphasized in many cases, including *Tedham v. Tedham*, 2005 BCCA 502, where at para. 51 the Court of Appeal referred, with approval, to the following passage from the reasons for judgment of L'Heureux Dubé J., speaking for the court in *Moge* at p. 870:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution. [Citations omitted.]

[174] More recently in *Chutter v. Chutter*, 2008 BCCA 507, Rowles J.A. described the purpose and rationale underlying the compensatory grounds for spousal support:

> [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:
>
> > The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.
>
> [51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in *Moge* at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for <u>both</u> the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added).
>
> [52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support at 870:
>
> > Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement …. <u>As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.</u>
> >
> > [Emphasis added, internal citations omitted.]
>
> [53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:

> [11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.
>
> [12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).
>
> [Emphasis added by the Court of Appeal.]

[175] In determining whether a party has been economically disadvantaged as a result of the marriage, Rowles J.A. noted that the fact that a woman worked outside the home does not preclude her from an award for spousal support (at para. 71):

> [71] ... [T]he fact that the support-seeking spouse was employed outside the marriage, or engaged in the same career at the end of the marriage as at its start, does not necessarily preclude entitlement to spousal support on compensatory grounds. What was said by McLachlin J. (as she then was) in concurring reasons in *Moge*, at 882, is apposite:
>
> > Even women who have worked outside the home during the marriage may find that their career advancement has been permanently reduced by the effort which they devoted to home and family instead of their jobs, whether the woman be a janitor like Mrs. Moge or a well-trained professional.

[176] A compensatory award should continue until compensation is achieved even if the spouse has attained self-sufficiency (*Chutter* at para. 79; *Tedham* at para. 60, *Morigeau v. Moorey*, 2015 BCCA 160 at para. 37).

[177] Non-compensatory support is “grounded in the ‘social obligation model’ of marriage, in which marriage is seen as an interdependent union” (*Chutter* at

para. 54). Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, not the state (*Chutter*, at para. 54). "Need" alone may be sufficient to ground a claim for spousal support (*Bracklow* at para. 43).

[178] What constitutes "need" is something more than basic necessities. As noted by Rowles J.A. in *Chutter* at para. 55:

> [55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:
>
> > "Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[179] Likewise, economic self-sufficiency is a relative concept:

> [56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (*Bracklow*, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:
>
> > [21] … self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of $68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.
>
> [57] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, 16 R.F.L. (6th) 430, Prowse J.A. referred to *Myers* and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown. In *Yemchuk*, the husband had appealed the decision of the trial judge dismissing his claim for spousal support on the basis that he had not established any need. While Prowse J.A. found that the husband was entitled to spousal support on compensatory grounds, she also went on to state that the trial judge's treatment of the husband's need for support had been "unduly restrictive":
>
> > [41] I am also satisfied that the trial judge erred in viewing Mr. Yemchuk's "need" for support from too narrow a perspective. He treated "need" as solely a question of whether Mr. Yemchuk could

> meet his stated expenses with the income available to him. After attributing $800-$1,000 per month to Mr. Yemchuk, the trial judge found that Mr. Yemchuk could meet his expenses and, therefore, was not entitled to support.
>
> [58] In *Tedham v. Tedham*, 2005 BCCA 502, 20 R.F.L. (6th) 217, Prowse J.A. referred to *Yemchuk* as illustrative of the fact that the courts, at least in longer marriages, are measuring need against the marital standard of living (para. 55), and followed *Allaire* in finding that the objective of self-sufficiency must be viewed in the context of the marital standard of living (para. 60).

[180] Madam Justice Rowles explained that a spouse suffers hardship where she must encroach on her capital in order to maintain the same standard of living that was enjoyed during the marriage (*Chutter* at para. 90):

> [90] If the appellant must encroach upon her capital to maintain a standard of living comparable to that which she enjoyed during the marriage, then arguably she is suffering hardship from the breakdown of the marriage and experiencing the loss of marital standard of living, since her capital would deplete over time and eventually she would be in a worse position than had the marriage continued. If that is so, whether the respondent has the means to assist her financially to live a lifestyle closer to what they shared as a couple is a relevant question (*Allaire*, at para. 21; *Hodgkinson*) ...

[181] She also referred to *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, as an example where an award for spousal support went beyond basic necessities:

> [59] Non-compensatory support was also considered in *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, 25 R.F.L. (6th) 235. In that case, the parties divided assets of close to $7 million, and the wife was awarded time-limited spousal support on non-compensatory grounds. The trial judge had found that the wife was not entitled to spousal support on either compensatory or non-compensatory grounds: she was not financially disadvantaged by the marriage; she was both highly trained and capable of stepping back into the work force; and she was able to earn investment income from her share of the capital assets. On appeal, Saunders J.A., for the court, held that the trial judge's analysis of the wife's needs and means was "impermissibly narrow"; in part because it had not taken into account the marital standard of living or the husband's post-separation standard of living:
>
> > [68] However, the trial judge did not relate that capacity to earn income from her capital assets and from employment to the standard of living the parties enjoyed during marriage or to the standard of living of Mr. Hodgkinson after trial, or advert to the time lag that would be involved in earning income from a business if Mrs. Hodgkinson immediately resumed work as a chef or caterer. While none of these factors is, by itself, a determinant of Mrs. Hodgkinson's entitlement to

> spousal support, their absence illustrates what I consider an impermissibly narrow approach to the issue of spousal support.
>
> [69] Both the question of hardship to Mrs. Hodgkinson ([15.2(6)(c)]) and her self-sufficiency ([15.2(6)(d)]) bear some relationship to the standard of living enjoyed by the parties during the marriage (tempered by the income available) and by the other spouse after the marriage. While Mrs. Hodgkinson is not entitled to support at a level that would maintain the highly affluent lifestyle the parties shared, particularly as it appears to have been beyond the level of Mr. Hodgkinson's earnings, in these circumstances she is entitled to a degree of comfort well beyond “basic needs”.
>
> …
>
> [74] It was an error, in my view, for the trial judge to fail to recognize these several aspects. The arrangement between the parties during marriage as described by the trial judge, in my view, required consideration of spousal support from the perspective of the standard of living that is still reasonably available to them, although in two residences. While recognizing that Mrs. Hodgkinson is not necessarily entitled, step for step, to Mr. Hodgkinson's standard of living, something closer is required.

[182] In determining the appropriate level of spousal support on an initial application, the Court of Appeal has stated that the *SSAG* should be used as a guide in determining both the quantum and duration of support, assuming that entitlement has first been established: see, for example, *Tedham*; *McEachern v. McEachern*, 2006 BCCA 508; *Redpath v. Redpath*, 2006 BCCA 338; and *Yemchuk v. Yemchuk*, 2005 BCCA 406. However, the *SSAG* are guidelines and not law: see *Beninger v. Beninger*, 2007 BCCA 619; and *Yemchuk*. In *Redpath*, the Court of Appeal noted that an award which substantially differs from the range set by the *SSAG* might constitute an error of law in the absence of a reasonable explanation for the difference (para. 42).

[183] It is ultimately for the court to determine, based on all the circumstances of the particular case, the appropriate amount and duration of spousal support.

[184] The length of the relationship will usually have an impact on the amount of the spousal support award. As Prowse J.A. explained at para. 57 of *Foster v. Foster*, 2007 BCCA 83:

> [57] … In general terms, a shorter term marriage will usually attract a shorter term award. This result is consistent with the view that the shorter the period the parties live together, the less intertwined their financial lives are likely to be, and the more likely they are to be able to resume their pre-marital status without suffering a significant economic loss. Clearly, that general proposition is subject to the facts of each case and will be less applicable, for example, where there are children of the marriage for whom the dependent spouse assumes primary responsibility, or where, as here, the marriage has resulted in the dislocation of [the plaintiff] from her country of origin and her support networks there.

[185] Before considering the issue of quantum of spousal support I first address the issue of the claimant's re-partnering.

Re-Partnering

[186] The claimant has stated that she and Mr. S. will marry, whether or not the relocation is permitted.

[187] Re-partnering does not automatically end spousal support. While it can do so it can also lead to a reduction in spousal support. The factors that can be accounted for include whether the spousal support ordered is compensatory or non-compensatory, the length of the first marriage, the age of the recipient, the duration and stability of the new relationship and the standard of living in the new household: *K.A.M. v. P.K.M.*, 2008 BCSC 93 at paras. 68-73.

[188] In *K.A.M.* Barrow J. said this:

> [68] It seems to me that both positions are flawed. As to Ms. M's position, it ignores the limits on the application of the *Spousal Support Advisory Guidelines* when applied to situations in which the recipient spouse has "re-partnered". At s. 10.7, the authors of the *SSAG* write:
>
> > The remarriage or re-partnering of the support recipient does have an effect on spousal support under the current law, but how much and when and why are less certain. There is little consensus in the decided cases. Remarriage does not mean automatic termination of spousal support, but support is often reduced or suspended or sometimes even terminated. Compensatory support is often treated differently from non-compensatory support. Much depends upon the standard of living in the recipient's new household. The length of the first marriage seems to make a difference, consistent with concepts of merger over time. The age of the recipient spouse also influences outcomes.

> In particular fact situations, usually at the extremes of these sorts of factors, we can predict outcomes. For example, after a short-to-medium first marriage, where the recipient spouse is younger and the support is non-compensatory and for transitional purposes, remarriage by the recipient is likely to result in termination of support. At the other extreme, where spousal support is being paid to an older spouse after a long traditional marriage, remarriage is unlikely to terminate spousal support, although the amount may be reduced.
>
> An ability to predict in some cases, however, is not sufficient to underpin a formula for adjustment to the new spouse's or partner's income. Ideally, a formula would provide a means of incorporating some amount of gross income from the new spouse or partner, to reduce the income disparity under either formula. Any such incorporation could increase with each year of the new marriage or relationship. Where the recipient remarries or re-partners with someone who has a similar or higher income than the previous spouse, eventually—faster or slower, depending upon the formula adopted—spousal support would be extinguished. Where the recipient remarries or re-partners with a lower income spouse, support might continue under such a formula until the maximum durational limit, unless terminated earlier.
>
> For the moment, however, we have been unable to construct a formula with sufficient consensus or flexibility to adjust to these situations. This is a fertile area for further discussion in the next stage of the project, especially as people become comfortable with the basic concepts of the advisory guidelines. For now, we have to leave the issues surrounding the recipient's remarriage or re-partnering to individual case-by-case negotiation and decision making.

Given this limitation, it would be wrong to notionally apply the *Guidelines* and conclude, by virtue of a disparity between what they indicate ought to be paid and what the agreement provides, that the goals and objectives of the *Divorce Act* have not been sufficiently taken into account.

[69] Mr. M's position is flawed in two respects. First, "re-partnering" does not necessarily terminate a spouse's entitlement to support and may not, at least initially, have much effect on the quantum of support. That is particularly so where, as here, the entitlement to support is conceptually based on the compensatory theory described in *Bracklow v. Bracklow,* [1999] 1 S.C.R. 420 (see generally *Murphy v. Murphy,* 2007 BCCA 500). Moreover, his argument that his obligation is satisfied through his subsidization of the real property ignores the fact that the agreement provides that he is to be reimbursed for those expenses.

[189] In the circumstances of that case Barrow J. addressed continuing compensatory support where the payee has re-partnered as follows:

> [72] What then of the effect of re-partnering? Although not free of doubt, I consider that the fact of re-partnering has no effect on entitlement and should

> have little effect on quantum at least initially, given the compensatory nature of the entitlement. As the recipient spouse's new relationship matures, however, the concept of "merger over time", which partially animates the determination of quantum and duration of support, would, if applied to the second union, suggest a growing obligation on the new spouse to support the former spouse of the first union. To the extent that is so, it would be reasonable to reduce the obligation of the first paying spouse over time. Given the ages of the parties, and assuming equal earnings by Mr. Schell and Mr. M, and frankly acknowledging the somewhat arbitrary nature of the exercise, I consider it appropriate for Mr. M's obligation to reduce by 10 percent per year for each year that the new relationship subsists. The result would be that Ms. M would receive support in declining amounts over the course of 10 years. In 10 years, Ms. M will be in her mid 50s. She will by then, assuming no change in her circumstances generally, have 10 years of current work experience to her credit, be in a longstanding relationship and have no dependent children. A declining award would serve all of the objectives of in s. 15.2(5) of the *Divorce Act.*
>
> [73] Applying this rough formula to the situation as it stood in February 2005, Ms. M would have been entitled to $750 less 10 percent (the relationship with Mr. Schell was then a year old). I have chosen an amount near the bottom of the range suggested by the *SSAG,* in part, because there is no needs basis to her entitlement. Exclusive of the affect of income tax in 2006, she would have been entitled to $750 less 20 percent; in 2007, her entitlement would be $750 less 30 percent.

[190] In *C.L.M. v. R.A.M.*, 2008 BCSC 217, the court quoted from *Kelly v. Kelly*, 2007 BCSC 227 at para. 15, and stated:

> [19] … In *Kelly v. Kelly*, 2007 BCSC 227 (B.C. S.C.) at para. 15 Mr. Justice Barrow noted, "When remarriage does amount to a material change in circumstances, and when it is the spouse receiving support that remarries, the burden is on that party to demonstrate that, despite remarriage, there is a continuing basis for spousal support (*Friesen v. Friesen*, [2004] B.C.J. No. 2224 (B.C. S.C.) [Friesen] and *Witt v. Witt*, 32 R.F.L. (3d) 140, [1991] B.C.J. No. 772 (B.C. S.C.) [Witt]".

[191] The respondent cites *Zacharias v. Zacharias*, 2015 BCCA 376, as an example of the effect of remarriage. There, continued compensatory support was found appropriate in an amount that enabled the recipient to continue to enjoy a standard of living similar to that enjoyed during the marriage and not better than that of the payor.

[192] The respondent submits the claimant has not provided sufficient reliable information respecting the impact of her pending marriage on her standard of living

and need, noting concerns respecting her credibility, the lack of clarity respecting which expenses Mr. S. is helping with, a lack of information respecting their standard of living, the expensive property in which Mr. S. resides, and Mr. S.'s greater take-home income than that of Mr. J. This, the respondent says, leads to the inference that the need for non-compensatory support should cease at some point due to the claimant's re-partnering. He submits that any spousal support award should be reduced by 10 percent per year for a further nine years resulting in support having been paid for 12 years, a period longer than the marriage. In the alternative, he submits the court may consider a reduction of 10 percent per year for four more years then a review of spousal support.

Analysis

[193] As mentioned the claimant's claim is essentially compensatory. She points to the mutual decision that she would leave her career as a flight attendant and become a full-time homemaker and parent. In support of her claim she provided documents showing that a WestJet flight attendant with similar seniority to what she would have had she kept working earns approximately $65,000 per annum. She also notes that Ms. H., the respondent's girlfriend, is a flight attendant with WestJet with less seniority and earns about $55,000.

[194] With respect to the issue of re-partnering the claimant submits that is less of an issue at present but concedes that if she relocates with the children to Kelowna it will become more of an issue.

[195] The claimant also submits that an award for spousal support should be at the upper end of the *SSAG* range relying on the comment made by the authors of *The Spousal Support Advisory Guidelines: Revised Users' Guide* (Ottawa, Dept. of Justice, 2016) that under the "with child support" formula, values for spousal support should typically resolve in the upper end of the range and that it is an error to assume that the mid-point is the default (p. 45).

[196] The *DivorceMate* calculations using the *SSAG* suggest the range set out earlier ($3,229 - $4,462) with support for an indefinite period but subject to variation

and possibly review with a minimum duration of five and one-half years and a maximum duration of 11 years from the date of separation.

[197] The claimant submits that the spousal support of $4,400 per month set out in the consent order of October 25, 2016 is reasonable and should continue.

[198] The claimant has a strong compensatory claim given her role in the marriage and her abandoned career. She currently has both limited income and limited earning capacity given her re-entry into the workforce. Based on those factors her entitlement to spousal support falls into the higher end of the range.

[199] However, the claimant's re-partnering while not automatically reducing such entitlement is a factor in the circumstances of this case. Also relevant in this instance is that this was a medium length marriage, the claimant is relatively young and over time will undoubtedly move towards self-sufficiency and, if the relationship with Mr. S. continues, there will eventually be a merger whereby the obligation of Mr. S. increases and that of the respondent decreases. The economic prospects for the claimant and Mr. S. are an additional factor given the relatively recent move into property development (which apparently has been profitable and is expected to be more so) as their standard of living may increase in comparison to that of the respondent's.

[200] As a result, I will adopt the approach of Barrow J. in *K.A.M.* and order support, which is now compensatory support not needs based, in the sum of $4,000 per month commencing September 1, 2018 reducing at 10 percent per year for a period of four years after which it is to be reviewed. Such an order will account for the issue of re-partnering and time for the economic prospects of the claimant and her standard of living to develop. I note that from the date of separation that will result in support for a minimum of seven years which is within the range referred to in the *SSAG*.

Retroactive Child Support

[201] The respondent has paid child support. From May to October 2016, he paid $2,827.50 per month. His actual income for 2016 was $210,809 which indicates a *Guidelines* table amount payable of $2,877. The result is the payments were $49.50 per month short of the table amount.

[202] From November 2016 to December 2016 the respondent paid $3,250, when as mentioned the table amount was $2,877. This led to an overpayment of $373 per month. For 2017 he paid $3,250 when based on his actual income in that year of $217,296 the table amount was $2,953, hence he overpaid $297 per month.

[203] The claimant does not seek a retroactive change to the child support paid nor does the respondent. As a result there will be no order for retroactive child support.

Retroactive Spousal Support

[204] The respondent paid spousal support from May to October 2016 of $4,268 per month. The *SSAG* range based on his 2016 income was $3,949 - $5,110 with $4,546 being the mid-point. In November and December 2016, he paid $4,400 per month.

[205] From January 2017 onward, the respondent has paid $4,400 with a *SSAG* range based on his income of $3,329 – $4,462, having a mid-point of $3,895.

[206] The respondent submits he has fully met or exceeded his spousal support obligations to date. The claimant, however, seeks retroactive spousal support.

[207] The Supreme Court in *D.B.S. v. S.R.G.*, 2006 SCC 37, set out the principles on which retroactive support may be awarded. The court directed trial judges to adopt a broad and holistic approach in the application of four factors, summarized at para. 133, none of which is determinative on its own:

a) Is there a reasonable excuse for why support was not sought earlier?

b) Was there any blameworthy conduct on the part of the payor parent?

c) Is a retroactive award appropriate in light of the child's past and present circumstances?

d) Will a retroactive award cause hardship to the payor parent or to his or her other children?

[208] The court noted at paras. 120-125 that the commencement date for a retroactive award should not be restricted to the date upon which a claimant applied to the court or gave formal notice, but rather should be the date of effective notice by the recipient to the payor. The court defined effective notice as "any indication by the recipient parent that child support should be paid" (para. 121), and that generally this is when the topic is broached.

[209] There are circumstances where it is reasonable to infer that effective notice has been given to a payor parent even in the absence of a specific request. Both parents have a legal obligation to contribute to a retroactive child support award.

[210] Though decided in the context of a retroactive child support award, the factors set out in *D.B.S.* apply to a claim for retroactive spousal support as well: *Ducharme v. Remple*, 2016 BCCA 198 at para. 17.

[211] In my view the test for retroactive support is not met as there was no blameworthy behavior nor has the claimant shown that a retroactive support order would be appropriate.

Security for Support

[212] The claimant seeks either an order that the respondent's support obligations are binding on his estate, or, alternatively, an order that life insurance be provided as security. The only information respecting the respondent's life insurance is that he has a group policy through his employer which the claimant believes pays out two and a half times his salary. There were no submissions respecting the amount of life insurance sought as security, nor whether it was to be an existing policy or a new policy, nor who was to fund it.

[213] As a result, I will order pursuant to s. 170(g) of the *FLA* that the obligations of the respondent to pay child and spousal support as ordered in these reasons is a debt of his estate for as long as the obligation to pay such support exists.

Costs

[214] The parties wish to make submissions on costs. They are at liberty to do so.

Summary

[215] As a result, the following orders are made:

Parenting Issues

[216] The parties will have joint custody of the children under the *Divorce Act*, and will remain joint guardians under the *FLA*.

[217] The claimant is permitted to relocate to Kelowna, effective on the date of this judgment, but subject to the requirements set out relating to parenting time and responsibilities.

[218] The respondent will have reasonable access to the children, to include (subject to his availability, with the claimant to be notified in advance):

a) No less than six days per month, plus an extra day every long weekend created by a statutory holiday or professional development day;

b) One-half of spring break and one-half of summer vacation;

c) Father's Day when it does not fall on a regularly scheduled weekend;

d) Excluding Mother's Day if it does fall on a regularly scheduled weekend; and

e) Hallowe'en, the children's birthdays, and Christmas to be alternated.

[219] The parties will share parenting responsibilities under s. 37 of the *FLA* equally, with the exception of s. 37(1)(a), (b), and (c), which will be the claimant's sole responsibility.

Property Division

[220] The respondent will obtain tax advice respecting the capital gains tax implications of retaining the Temple property, or transferring it to the claimant for sale, within 60 days of this judgment. If the parties cannot then resolve disposition of the Temple property by agreement, they have liberty to apply for further directions from the court.

[221] Subject to the capital gains tax issue, and subject to agreement by the parties, should the respondent retain the Temple property he is to compensate the claimant for her one-half interest in that property, being $410,000.

[222] The remainder of the funds held in trust from the parties' disposition of various properties, $715,001.47, is to be divided as set out in the chart above and subject to further orders below.

[223] The Mercedes Benz is to be transferred to the claimant, and the Acura to the respondent, and the difference in value is to be accounted for in equal property division. If the parties cannot resolve the valuations within 30 days of the date of judgment, the parties are to take them to a dealer of such vehicles and obtain a written valuation. If that valuation is given as a range, the mid-point is to be used to establish the vehicle's value.

[224] The parties' RRSP's shall be equalized by way of a rollover under s. 146(16)(b) of the *Income Tax Act*. This shall be accomplished by the respondent transferring $66,980.77 to the claimant by tax free rollover.

[225] In addition, the respondent's RRSP-registered WestJet shares are agreed to be family property and are to be divided by a rollover *in specie* under s. 146(16)(b) of

the *Income Tax Act*. If there is any difficulty in effecting such a rollover that the parties cannot resolve by agreement they have liberty to apply.

[226] The respondent's non-registered assets, consisting of WestJet shares valued at $12,237.02, are family property and are to be divided. Therefore, $6,118.51 is to be added to the claimant's entitlement, and subtracted from the respondent's.

[227] The claimant's request for reapportionment of family property on the basis of significant unfairness is denied.

[228] The division ordered is subject to the parties' agreement on any advances of the funds held in trust post-trial.

Occupational Rent

[229] The respondent is to pay the claimant occupational rent of $6,295.50, which takes into account half the rental value of the Temple property, and half the cost for insurance. The respondent is to continue to pay $700 to the claimant for occupational rent until such time as the Temple property is purchased by the respondent or sold to a third party.

Support

[230] The income of the respondent for support purposes is $217,296.

[231] The income of the claimant for support purposes is $24,000.

[232] Ongoing child support is set at $2,953 per month based on the *Guidelines*. There will be no order for retroactive child support.

[233] No order is made regarding s. 7 expenses given the uncertainty as to the nature and cost of these expenses in anticipation of the claimant's relocation to Kelowna. The parties are encouraged to reach agreement on such expenses, and to share expenses proportionately in accordance with their incomes. Failing agreement the parties may apply to the court with the necessary supporting documentation.

[234] The respondent will pay $4,000 per month spousal support to the claimant commencing September 1, 2018 on a compensatory basis. This amount will reduce by 10 percent per year for a period of four years, after which it is to be reviewed. There will be no order for retroactive spousal support.

"R.D. Punnett, J."
The Honourable Mr. Justice Punnett