IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *S.L.M.D. v. A.V.D.,*
2017 BCSC 394

Date: 20170309
Docket: E95131
Registry: Kelowna

Between:

S.L.M.D.

Claimant

And

A.V.D.

Respondent

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Appearing on Her Own Behalf:	S.L.M. D.
Counsel for the Respondent:	W.T. Clarke
Place and Dates of Trial/Hearing:	Kelowna, B.C. January 31, February 1-3, 2017
Place and Date of Judgment:	Kelowna, B.C. March 9, 2017

Introduction

[1] In this high conflict family law case, the parties seek a divorce and orders settling a number of issues including guardianship, child and spousal support, and the division of family assets and debt.

Background

[2] The claimant is a 48 year old registered nurse on long-term disability as a result of a workplace back injury suffered on December 25, 2006 (“2006 Injury”). She earns approximately $30,000 per year in combined long term disability and CPP disability benefits. She was self-represented at the trial.

[3] The respondent is a 53 year old Operating Room Anesthetic Assistant at Kelowna General Hospital, in Kelowna, British Columbia. He currently earns $98,000 per year. He was represented by

counsel at the trial.

[4] The parties began cohabitating in 1995. After a one-year separation they resumed cohabitation and were married on February 12, 1997 (“Marriage Date”).

[5] The couple moved from Edmonton, Alberta, to West Kelowna, British Columbia, in 2000 and purchased a home at 3144 Webber Road (“Webber Home”) where they resided for 12 years. The claimant and respondent both obtained employment at Kelowna General Hospital.

[6] The parties have three children: S., aged 19, M., age 18, and C., age 16. S. now resides in Edmonton and is independent. In these Reasons, “Children” will refer to M. and C. (the remaining dependent children).

[7] By all accounts, the parties had a troubled and unhappy marriage. They even grew to resent each other. The root cause or causes of their troubles is disputed. The claimant says the respondent became mentally abusive. The respondent says the claimant’s habitual drinking resulted in her becoming impossible to live with. In any event, alcohol and the 2006 Injury appear to have played a major role in the couple’s marital difficulties.

[8] The respondent planned to leave the marriage before the 2006 Injury and had gone as far as finding rental accommodation to move in to. His plans changed because of the 2006 Injury and he decided to stay in the matrimonial home, primarily for the children’s sake, who were then aged approximately 10, 9 and 7.

[9] The respondent says that the claimant’s alcoholism got progressively worse after her injury and was the source of much arguing and fighting between them. By 2012, it reached a crisis level. The hostilities between them even escalated to the point of police involvement.

[10] The claimant has also been battling depression since her injury. She has been under the care of a psychiatrist for approximately ten years. In January 2016, she attempted suicide by overdosing on prescription medications. She was hospitalized and spent approximately three weeks in the mental health ward.

[11] The claimant says she has been alcohol free since July 2015 and takes medication for her depression.

[12] The parties do not have substantial assets. At the time of their separation, their assets consisted of the Webber Home and its contents, a modest RRSP in the respondent’s name and their employment-related pensions.

[13] The parties also have a joint line of credit at the Royal Bank of Canada (“RBC Credit Line”) which is secured against the Webber Home.

[14] The claimant retained a lawyer in April 2012 and commenced this action on May 1, 2012, while she continued to reside at the Webber Home with the respondent and their children.

[15] Later, she decided to purchase a duplex on McCann Court, a street situated in West Kelowna (the “McCann Home”) near the Webber Home, so that she could live near the children. In order to do so, she withdrew $80,000 from the RBC Credit Line on May 23, 2012. She considered that sum her half share of the equity in the Webber Home. In July 2012, she moved into the McCann Home and has lived there since.

[16] There is no real dispute about the date the parties separated. The parties agree that even though the claimant resided at the Webber Home with the respondent until she moved to the McCann Home, for all intents and purposes they were “separated” at law years earlier. They agree that for the purpose of this case, their separation date was May 1, 2012 (“Separation Date”).

[17] The respondent has been paying the monthly mortgage payments on the Webber Home since the Separation Date. Further, he has covered all property taxes, utilities, maintenance and repairs with respect to that home. He has spent time and money upgrading the home including replacing the roof, installing new flooring and painting the home.

[18] He has also paid all the interest on the RBC Credit Line.

[19] After the claimant’s move to the McCann Home, S. continued to reside with the respondent in the Webber Home. Initially, M. and C. moved into the McCann Home with the claimant. In September 2013, M. moved back to the Webber Home, followed by C. in February 2014, when the claimant asked her to leave. Since then, the Children have resided almost entirely with the respondent.

[20] The respondent has been heavily involved with the children’s sporting activities for some time. Particularly, he has been involved with S. and M.’s hockey and other sports over the years and has coached their teams. He also assists with C.’s gymnastics.

[21] Recently, the Children have had some behavioural issues, including experimenting with drugs, and have faced some difficulties at school.

[22] Parenting time was on an informal basis. The parties left it to the children to determine the amount of time they would spend at the two residences.

[23] The claimant accuses the respondent of mismanaging the Children’s lives since they have been living with him. She says that he is responsible for their drug use and the other difficulties they are having. She also accuses the respondent of turning the Children against her by “brainwashing” them.

[24] The respondent paid the claimant 13 payments of $750 per month from September 2012 to September 2013, as spousal support. He has not paid anything since.

[25] No child support has been paid by either party.

[26] On June 30, 2016, the claimant withdrew a further $30,000 from the RBC Credit Line without the respondent's knowledge or consent. On August 8, 2016, she took an additional $5,000, also without the respondent's knowledge or consent. In total, since the Separation Date, the claimant has taken $115,000 from the RBC Credit Line.

[27] Save for a judicial case conference in 2014, there have been no court applications or orders dealing with the substantive family law issues between them. Efforts to resolve their differences on their own have also been unsuccessful.

[28] In the last few years, the claimant has been representing herself in these proceedings. Despite repeated requests and indeed a court order that she make financial disclosure to the respondent, she hasn't cooperated. Indeed, she thought that if she defied court orders, she would be incarcerated and a legal aid lawyer would be assigned to represent her with this case. The last Form 8 Financial Disclosure she provided was dated September 14, 2014.

Issues

[29] The issues to be resolved are:

i. The divorce and associated name change;

ii. The division of family assets and family debt;

iii. The spousal support payable to the claimant;

iv. The child support payable by the claimant; and

v. The custody/guardianship of the Children.

The Claimant's Position

[30] The claimant makes an uncontested application for divorce and an associated name change for herself, returning her surname back to her maiden name.

[31] The claimant made no substantive submissions on the division of family assets and debt, rather simply stating that she wants "what's fair".

[32] Respecting spousal support, she wants the respondent to pay her spousal support in the mid-range according to the *Spousal Support Advisory Guidelines*.

[33] Regarding child support, she seeks child support from the respondent according to the *Federal Child Support Guidelines* and denies that she should have to pay child support to him in return.

[34] The claimant's position on guardianship is that she wants joint guardianship of C. In addition, she wants the ability to make the final decision if the claimant and the respondent cannot agree on

what is in C.'s best interests. While she agrees that it is really up to C. to decide where she wants to live, given her age, she says that C. needs her support and guidance.

[35] She takes no position on guardianship with respect to M. She recognizes that he is 18 and is capable of making his own decisions.

The Respondent's Position

[36] The respondent does not contest the divorce application and takes no position with respect to the claimant's related name change.

[37] Regarding the division of family assets and debt, he generally takes the position that they should be split evenly among the parties. In particular, he agrees that the parties' pensions should be divided in the normal way; that is, with each party receiving a 50% interest in the other's pensions from the Marriage Date to the Separation Date.

[38] He also says that when they separated, the parties essentially agreed that the respondent would own and be responsible for the Webber Home and the claimant would own and be responsible for the McCann Home. Because of this agreement, he seeks an order that the valuation date for the division of family assets should be May 1, 2012, the date the claimant filed the Notice of Family Claim commencing this proceeding.

[39] With respect to spousal support, the respondent concedes that the claimant is entitled to spousal support from July 2012, onwards. He would nonetheless like any order regarding spousal support to be reviewable when C. turns 19.

[40] The respondent wants child support from the claimant on a retroactive and prospective basis. He says that the children have lived with him most of the time since the parties separated, entitling him to retroactive child support, and the Children continue to live with him, entitling him to prospective child support. For the sake of efficiency, he says the spousal support owed by him to the claimant should be set off by the child support owed to him.

[41] Relating to guardianship of the Children, he takes the position that he should be granted sole guardianship of M. and C. The respondent asserts that the claimant's alcoholism, depression and general volatility has and will make joint parenting of the Children difficult. In effect, he says that there is too much bad blood between the parties and that requiring the two of them to communicate directly over matters involving the Children simply won't work. He says that he has always done what is best for the children and given the personal challenges the claimant is facing, he is better situated than her to be granted sole guardianship.

Views of the Children

[42] The Children gave their views on guardianship indirectly through a "Views of the Child" report prepared by Jeffrey Peterson. Mr. Peterson interviewed the Children on May 8, 2014, and prepared

the report on May 15, 2014. The report mostly repeats the content of what I infer were relatively short question and answer exchanges between Mr. Peterson and the Children. To the extent it is helpful, it is that although the Children say they love the claimant, they would prefer to live with the respondent most of the time.

Analysis

[43] The parties' testimony differed at times on some material points. I will therefore begin my analysis with an assessment of the parties' credibility and reliability in order to determine whose evidence I should rely on in deciding the issues before me.

[44] Although the claimant did her best to honestly provide her version of the events leading up to this action, I did not find her evidence to be reliable in many areas. Her testimony was dramatic and was given in an argumentative, rambling, vague, abrupt and non-responsive manner. During her cross-examination, she tended to give speeches instead of answering questions. Further, she would often answer questions by posing questions of her own. She was also hostile and bitter towards the respondent's lawyer, Mr. Clarke.

[45] By comparison, I found the respondent's testimony to be much more reliable. He had a good recollection of events and was calm and measured in giving his answers. Although the claimant chose not to cross-examine him, explaining that she did not want to put him through what she was put through during her cross-examination, I suspect that she recognized that much of what the respondent testified about her was true.

[46] I conclude that where the parties' testimony conflicts, I will prefer the respondent's evidence.

i. Divorce and Name Change

[47] Turning to the issues before me, the parties seek an uncontested divorce under s. 8(1) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). The requirements, relevant to the parties, to obtain a divorce are set out in ss. 8(1) - (2)(a) and read as follows:

> **Divorce**
>
> **8** (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.
>
> **Breakdown of marriage**
>
> (2) Breakdown of a marriage is established only if
>
> (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; …

[48] I am satisfied on the evidence that there has been a "breakdown of the marriage", specifically by the parties having lived separate and apart for many years - albeit in the same house - and in different houses since the Separation Date.

[49] I recognize that pursuant to s. 10(1) of the *Divorce Act*, it is my duty to satisfy myself that there is no possibility of the reconciliation of the spouses before granting the divorce sought. In view of the parties' obvious bitterness, resentment, and inability to communicate civilly with respect to one another, I am satisfied that there is no possibility of reconciliation in this case.

[50] I also find there has been no improper collusion in bringing this application for divorce and that reasonable arrangements have been made for the support of the children, in this judgment and otherwise, satisfying my additional duties under ss. 11(1)(a) and 11(1)(b) of the *Divorce Act*.

[51] I am satisfied that there should be an order of divorce which will take effect 31 days from the date of this judgment.

[52] On a further related matter, the claimant applies for an order changing her surname to her maiden name, which is "Viitala".

[53] Section 5 of the *Name Act*, R.S.B.C. 1996 c. 328, provides:

> **5** (1) If
>
> (a) a court in Canada has
>
> (i) granted a decree absolute for dissolution of a marriage, or
>
> (ii) made an order for nullity of a marriage, or
>
> (b) a judge or officer of a court in Canada has issued a certificate stating that a divorce granted under the *Divorce Act* (Canada) has dissolved a marriage,
>
> the Supreme Court may, at any time, on the application of a former spouse, order that his or her name be changed to the name he or she desires.

[54] Given my order for dissolution of the parties' marriage, I order that the claimant's surname be changed to "Viitala" and additionally, for the style of cause in this proceeding to be amended accordingly.

ii. Division of Family Assets and Family Debts

[55] Because this action pre-dates the *Family Law Act*, S.B.C. 2011, c. 25, the division of family assets and family debts falls to be determined under the former *Family Relations Act,* R.S.B.C. 1996, c. 128 ("*FRA*"), pursuant to the transition provisions in s. 252(2) of the *Family Law Act*.

[56] Under s. 56(2) of the *FRA,* each spouse is entitled to a one-half interest in each family asset when one of the triggering events set out in s. 56(1) occurs. I find that the triggering event set out in s. 56(1)(c) has occurred in this case, specifically by my order for the dissolution of the marriage. Accordingly, and as the parties agree anyways, the family assets and family debt should be divided equally between them.

[57] The question becomes what is the appropriate valuation date for the family assets and family debt. I find that it would be fair in the circumstances to generally use the Separation Date of May 1, 2012, as the valuation date. That being said, I find that there are certain items, like the Webber Home

and RRSP interests, which would be more appropriately valued on different dates. Hence, I will generally use the Separation Date as the valuation date, except as specified otherwise.

[58] The parties identified the following as their family assets and family debt to be divided:

a) the Webber Home;

b) the Webber Home's contents;

c) the respondent's RRSP;

d) the RBC Credit Line (in part); and

e) the parties' CPP and employment pensions.

[59] There are no other significant family assets or debt. It is possible that the McCann Home could be characterized as a family asset. But the parties agree that the respondent has no interest in the McCann Home, which the claimant paid for after the Separation Date by accepting a debt from the RBC Credit Line, provided the claimant is solely responsible for repaying that debt.

a) ***The Webber Home***

[60] There is no debate that the Webber Home is a family asset and that the claimant is entitled to an undivided one-half interest in it.

[61] Yet the claimant has no will to maintain her one-half interest in the Webber Home. Rather, she wants her one-half interest in the Webber Home to be paid out to her. The respondent does not object.

[62] The evidence before me is that as of September 2014, the Webber Home's fair market value was $325,000. The respondent proposes that I should use that value for the valuation of the Webber Home, less any encumbrances that existed as of the Separation Date. The claimant does not disagree. I find that would be a fair valuation of the property.

[63] The encumbrances against the Webber Home on May 1, 2012, included a mortgage with the Royal Bank of Canada of approximately $97,000 and the RBC Credit Line of approximately $82,000. The equity in the Webber Home as of the Separation Date was therefore approximately $146,000 ($325,000 - $97,000 - $82,000). Accordingly, the claimant would be entitled to $73,000, reflecting one-half of the net value of the Webber Home.

[64] That being said, the claimant acknowledges that she must account for the $80,000 that she withdrew from the RBC Credit Line in May 2012, to buy the McCann Home, as well as the additional $35,000 she withdrew in the summer of 2016. It is not disputed that that debt is personal debt and not family debt. Setting off the claimant's equity in the Webber Home ($73,000) against the money she

withdrew from the RBC Credit Line ($115,000), the difference is $42,000. The claimant is ordered to pay that amount ($42,000) to the respondent.

[65] In addition, I order that the respondent shall be entitled to exclusive ownership and possession of the Webber Home located at 3144 Webber Road, West Kelowna, B.C. and legally described as PID: 003-033-643, Lot 12, District Lot 3904, Plan KAP36286, ODYD free of any claim from the claimant. Within 30 days of today's date, the claimant shall transfer her interest in the Webber Home to the respondent for his use absolutely and the respondent shall be responsible for paying all of the costs (including registration fees and land transfer tax, if any) associated with the transfer. The Registrar of Land Titles shall, upon filing a certified copy of this order, transfer the Webber Home to the respondent.

[66] For completeness, I also order that the claimant shall be entitled to exclusive ownership and possession of the McCann Home located at 2942 McCann Court, West Kelowna, B.C., legally described as PID: 002-352-265, Strata Lot 2, District Lot 3796, ODYD Strata Plan K366, free of any claim from the respondent.

b) ***The Webber Home's Contents***

[67] The parties arrived at an agreement mid-trial on the valuation of the Webber Home's contents as of the Separation Date and how the claimant should be compensated for her fair share. They agreed that the respondent would pay the claimant $4,000 for her one-half interest in the contents. In addition, she would be entitled to the aluminum fishing boat, its motor and the fishing gear her father had given the parties.

c) ***The Respondent's RRSP***

[68] The parties agree that the respondent's RRSP with the Royal Bank of Canada should be valued as of the date of trial and split equally between them. The total value of the RRSP is presently $21,238.68, meaning the claimant is entitled to $10,619.34 ("Claimant's RRSP Interest"). The claimant is entitled to have the Claimant's RRSP Interest rolled over into a new RRSP at an institution of her choice, by way of spousal roll-over. She will be at liberty to make those arrangements and once made, the respondent will instruct the Royal Bank of Canada to transfer the Claimant's RRSP Interest to her own RRSP.

d) ***The RBC Credit Line***

[69] As previously mentioned, at the Separation Date the RBC Credit Line stood at $82,000. On May 23, 2012, the claimant withdrew an additional $80,000, which she used to purchase the McCann Home. When the claimant moved into the McCann Home in July 2012, the RBC Credit Line stood at $162,000.

[70] Also as previously mentioned, on June 30, 2016, the claimant withdrew a further $30,000 from the RBC Credit Line and on August 8, 2016, a further $5,000. All told, the claimant has withdrawn

$115,000 from the RBC Credit Line.

[71] The respondent has paid all interest charges on the RBC Credit Line since the Separation Date. The claimant agrees she must account for the withdrawals she has made (totaling $115,000) and the interest the respondent has paid on her behalf with respect to that debt. As the $115,000 has already been accounted for earlier in this judgment, all that remains is accounting for the interest paid on that amount.

[72] The respondent provided a schedule of interest he has paid on the $115,000 the claimant withdrew from the RBC Credit Line to the end of February 2017:

a.	$80,000 x 57 months at 3.35%:	$12,730.00
b.	$30,000 x 7 months at 3.35%:	$586.25
c.	$5,000 x 5 months at 3.35%:	$ 69.79
	Total:	$13,386.04
	Rounded:	$13,386.00

[73] I accept the rounded amount ($13,386) as the sum the claimant must account to the respondent as interest on the money she withdrew from the RBC Credit Line.

[74] The respondent and the Royal Bank of Canada have been awaiting this decision so that the mortgage on the Webber Home can be renewed. With the renewal, the respondent plans on consolidating the mortgage with the RBC Credit Line and agrees to be solely responsible for the total debt.

e) *The Parties' CPP and Employment Pensions*

[75] The parties agree that their respective CPP and employment pensions ought to be divided equally from the Marriage Date to the Separation Date.

[76] However, the evidence regarding the claimant's pensions is vague. She has not produced any documents confirming the details of her pensions but she acknowledges she likely has pensions in both Alberta and British Columbia related to her nursing career.

[77] Similarly, the respondent acknowledges that his pensions through his employment in Alberta and in British Columbia must also be split with the claimant from the Marriage Date to the Separation Date, but he failed to provide detailed evidence about them.

[78] Accordingly, within thirty days of today's date, the parties shall disclose to each other their respective pension account numbers and provide each other with detailed information about all of their respective pensions in Alberta and British Columbia, and anywhere else if relevant. Once that information is disclosed, the parties' pensions will be split with each being entitled to one-half of the other's pensions from the Marriage Date to the Separation Date.

iii. Spousal Support Payable to the Claimant

[79] Pursuant to s. 15.2 of the *Divorce Act,* the claimant seeks retroactive and ongoing spousal support.

[80] The respondent concedes that the claimant is entitled to spousal support from July 2012, onwards. Both parties agree that spousal support should be based on the mid-range of the *Spousal Support Advisory Guidelines.*

[81] The claimant, however, did not provide many details of her income since the Separation Date. Her evidence was that she has not filed tax returns since 2013. She says that her only income is her disability benefits totalling approximately $31,000 per year.

[82] The respondent has provided calculations of the spousal support he should have been paying since the Separation Date, based on his income, which is known, and estimating the claimant's income based on her known disability benefits of roughly $31,000.

[83] I accept the respondent's calculations - which take into account the 13 payments of spousal support he made from September 2012 to September 2013. Based on them, retroactive spousal support payable by the respondent to the claimant is $63,909 to December 31, 2016.

[84] Based on the respondent's 2016 income of $98,000 and using $31,000 as the claimant's income, the prospective spousal support payable by the respondent, to commence January 1, 2017, is $1,167 per month. That sum is based on the mid-range of the *Spousal Support Advisory Guidelines* with M. and C. continuing to reside with the respondent.

[85] The quantum of ongoing spousal support will be reviewable beginning July 1, 2017, when M. graduates from high school, and will be reviewable again when C. graduates high school.

[86] The respondent will have a further liberty to apply to review the claimant's entitlement to spousal support after July 1, 2020.

iv. Child Support Payable by the Claimant

[87] The respondent seeks child support from the claimant retroactive to the dates when the Webber Home became each of the children's primary residence. He has provided evidence, which I accept, of when the three children resided with the claimant and when they resided with him since the Separation Date. He provided further evidence, which I also accept, about what their respective incomes were and what the *Federal Child Support Guidelines* calculations are.

[88] I find that the following occurred since the parties separated:

a) S. has resided with the respondent since July 15, 2012, until his graduation from high school when he moved to Edmonton;

b) M. resided with the claimant from July 15, 2012 to September 4, 2013, after which he resided with the respondent; and

c) C. resided with the claimant from July 15, 2012 to February 2, 2014, after which she resided with the respondent.

[89] The claimant suggests she has spent an average of about $200 per month per child on the Children since July 2012. She also says she paid for S.'s braces without help from the respondent. She did not offer any documentary evidence in support of any of these expenses.

[90] The respondent denies these assertions and says he has been paying the children's expenses.

[91] While I don't doubt the claimant has spent *some* money on the children over the years, I am not persuaded that she has spent anything like the amount she suggests. Her failure throughout this litigation to cooperate and produce any documents in support makes it difficult, if not impossible, to accept her evidence. The claimant has the burden of establishing that these payments were made but has failed to meet that burden.

[92] Retroactive child support is not automatic. Before considering the respondent's application, I must consider the four factors set out in *D.B.S. v. S.R.G.*, 2006 SCC 37 ("DBS"), to determine whether retroactive child support ought to be ordered. Those factors are:

1. whether the respondent has a reasonable excuse for not seeking child support earlier;

2. the claimant's conduct;

3. the children's circumstances; and

4. the hardship that would be occasioned by a retroactive award.

[93] Usually, a retroactive child support order should not be made more than three years before the respondent gave the claimant "formal notice" that he was seeking child support: *D.B.S.* at para. 123.

[94] Further, any retroactive child support that I order should be paid by the claimant must fit the circumstances before me. Blind adherence to the *Guidelines* may not be appropriate: *D.B.S.* at para. 128.

[95] In view of *D.B.S.*, fairness to the parties is another relevant consideration. Fairness may require that a retroactive award not be made where it would disrupt a settled status quo. I should strive for a "holistic view of the matter" based on the facts before me: *D.B.S.* at para. 99.

[96] The issue then becomes how a retroactive child support order, if one should be made, can be crafted to protect the claimant's interests in certainty and the respondent's need to be reimbursed a shortfall in the children's expenses.

[97] In addition, *ad hoc* payments made by the respondent to support the children should be taken into account in any award for retroactive child support.

[98] I have considered the *D.B.S.* factors and how they apply to the facts before me. Taking a holistic approach, I have determined that some retroactive child support ought to be paid by the claimant to the respondent. In particular, and with some modifications, I accept the respondent's calculations (set out in Schedule "A" to these Reasons) on retroactive child support payable by the claimant. The total retroactive child support owing by the claimant to the respondent as of December 31, 2016, is $10,699. I order that amount be paid.

[99] Going forward, the claimant shall pay the respondent monthly child support of $279 per month from January 1, 2017, for as long as the Children remain children of the marriage. As requested, this sum will be set off by the spousal support payable by the respondent to the claimant resulting in the respondent paying the claimant $888.00 per month.

[100] Additionally, there will be an order that commencing July 1, 2017, and by July 1 of each year thereafter while M. and/or C. remain children of the marriage, the parties shall exchange their full T1 General tax returns and Notices of Assessments. Child support payable by the claimant to the respondent, and spousal support payable by the respondent to the claimant shall be adjusted to accord with the *Federal Child Support Guidelines* and *Spousal Support Advisory Guidelines*, as the case may be.

v. Custody/Guardianship of the Children

[101] I am being asked to decide custody/guardianship for the Children. That is no easy task in view of the acrimony that exists between the parties and their inability to communicate civilly, especially on matters involving the children.

[102] The test for determining an appropriate guardianship order under both s. 16(8) of the *Divorce Act* and s. 37(1) of the *Family Law Act* is what is in the best interests of the children. Further, s. 37(2) of the *Family Law Act* provides a list of factors to consider when deciding what would be in the children's best interests.

[103] The respondent has been the Children's primary guardian and caregiver for most of the time since the Separation Date. Particularly, M. has lived with the respondent since living with the claimant for about one year and C. has lived with the respondent since the claimant asked her to leave her home in February 2014.

[104] The evidence is overwhelming that, regardless of the reasons, the parties cannot communicate sufficiently to permit them to co-parent the Children. In such circumstances, an order for sole custody/sole guardianship is warranted: *Bain v. Bain,* 2008 BCCA 49 para. 18.

[105] Furthermore, I find that the Children's lives have already been negatively affected by the parties' conflict and it is not in their best interests that they be placed in a situation where conflict

could continue, specifically by ordering a co-parenting arrangement. An order for sole guardianship is the only reasonable option.

[106] While I have no doubt that the claimant loves her children and is distraught about how her relationship with the Children has turned out, it is my view that it would not be appropriate in this case to make an order that would require the parties to cooperate on issues affecting M. and C. I am satisfied that the parties cannot cooperate at any level and ordering them to do so would be futile.

[107] The respondent does not pretend that he has been a perfect father. Despite that admission, I conclude on the evidence that for at least the last few years, he has performed most of the parenting duties with respect to the Children. The evidence suggests that the Children have had some issues with illicit drugs, their peer groups, and school in the last few years, but I am nonetheless satisfied that the Children are doing relatively well and that their daily routines ought not to change.

[108] In fact, the claimant concedes that the respondent is a good father. In her words, he is an "awesome dad". She also agrees the Children continue to need him.

[109] All things considered, I am satisfied that granting the respondent sole guardianship of the Children is in their best interests. Therefore, for as long as they remain children of the marriage or until further agreement or order, the respondent will be solely responsible for the Children's guardianship including performing all of the parenting responsibilities set out in ss. 41(a)-(l) of the *Family Law Act*:

> (a) making day-to-day decisions affecting them and having day-to-day care, control and supervision of them;
>
> (b) making decisions respecting where they will reside;
>
> (c) making decisions respecting with whom they will live and associate;
>
> (d) making decisions respecting their education and participation in extracurricular activities, including the nature, extent and location;
>
> (f) subject to section 17 of the *Infants Act* , giving, refusing or withdrawing consent to medical, dental and other health-related treatments for them;
>
> (g) applying for a passport, licence, permit, benefit, privilege or other thing for them;
>
> (h) giving, refusing or withdrawing their consent, if consent is required;
>
> (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
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> (j) requesting and receiving from third parties health, education or other information respecting them;
>
> (k) subject to any applicable provincial legislation,
>
> (i) starting, defending, compromising or settling any proceeding relating to the child, and
>
> (ii) identifying, advancing and protecting their legal and financial interests;
>
> (l) exercising any other responsibilities reasonably necessary to nurture their development.

[110] During the trial, I invited the parties to investigate the possibility of them using an online tool called "OurFamilyWizard.com" ("OFW") as a resource to assist them in communicating and

exchanging information regarding the Children. During submissions, both agreed that OFW appeared to be an excellent resource and they were both keen to try it. It would act as a buffer that would allow for needed information regarding the Children to be exchanged while keeping conflict to a minimum.

[111] I therefore also make the following additional orders with respect to guardianship:

a) the parties will enroll in OFW, with each being responsible for paying the costs of their respective enrollment;

b) the respondent will advise the claimant via OFW of any matters or life decisions of a significant nature with respect to the Children, and seriously consider the claimant's wishes where appropriate;

c) the respondent will discuss with the claimant via OFW any significant decisions which have to be made with respect to the Children, including significant decisions concerning the Children's health (except emergency decisions), education, religious instruction and matters of a general nature concerning the Children's welfare;

d) in the event that, despite their best efforts, the parties cannot reach an agreement with respect to any major decision, the respondent will have the right to make the final decision; and

e) the claimant and respondent shall each have the right to obtain information concerning the Children directly from third parties, including teachers, counsellors, medical professionals and third party caregivers.

Final Accounting

[112] I have made a number of orders about the transfer of money between the parties. In order to facilitate these transfers, I will set off some of the amounts owed by each party against some of their entitlements.

[113] I have found the following:

a) the claimant owes $10,699 to the respondent for retroactive child support;

b) the respondent owes the claimant $63,909 in retroactive spousal support;

c) the respondent owes the claimant $4,000 for her interest in the Webber Home's contents;

d) the claimant owes the respondent $13,386 for interest on the $115,000 she withdrew from the RBC Credit Line; and

e) the claimant owes the respondent $42,000 for the division of family assets and debts.

[114] Accordingly, the respondent owes the claimant $67,909 ($63,909 + $4,000) and the claimant owes the respondent $66,085 ($10,699 + $13,386 + $42,000). The respondent is liable to pay the difference of $1,824 ($67,909 - $66,085) to the claimant. Attached to these Reasons as Schedule “B” is a summary of this accounting.

[115] To be clear, these sums do not include the division of the respondent’s RRSP, the division of the parties’ pensions, or prospective spousal support and child support. Those amounts are still outstanding and must still be paid as ordered.

[116] Furthermore, no orders in this judgment alter or replace any orders that have previously been made with respect to the parties, except for any orders that would necessarily obstruct my orders in this judgment regarding OFW, which I order are henceforth terminated.

Costs

[117] The respondent seeks liberty to speak to costs. He may do so provided arrangements are made with scheduling within 30 days of this judgment.

“G.P. Weatherill, J.”

Schedule “A”

Child Support Calculations

Date Range	Claimant’s Income	Respondent’s Income	Claimant’s FCSG Amount	Respondent’s FCSG Amount	Respondent’s FCSG Owing
July 2012-December 2012:	$ 29,358	$ 66,963	$ 608	$ 1,015	$ 2,442
January 2013-August 2013:	29,358	100,911	608	1,490	7,056
September 2013-December 2013:			608	928	1,280
January 2014:	30,683	127,980	473	1,151	678
February 2014-December 2014:	30,683		633		(6,963)
January 2015-December 2016:	30,683	98,000	633		(15,192)
				Net Retroactive Child Support owing by claimant to respondent:	$(10,699)

Schedule "B"

Reconciliation of Spousal and Child Support

Item	Payable to Respondent	Payable to Claimant	Net Payable to Claimant
Retroactive Child Support	$10,699.00		
Retroactive Spousal Support		$63,909.00	
Interest on RBC Credit Line	$13,386.00		
House Equity		73,000.00	
Webber Home Contents		4,000.00	
Advance of Funds to Claimant:			
Less: May 2012		(80,000.00)	
July 2016		(30,000.00)	
August 2016		(5,000.00)	
	$24,085.00	$25,909.00	$1,824.00