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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nazarinia v. Amid-Nazarinia,* 2024 BCSC 189

Date: 20240207
Docket: E210560
Registry: Vancouver

Between:

Reza Nazarinia

Claimant

And

Shima Amid-Nazarinia

Respondent

Before: The Honourable Justice Fleming

Reasons for Judgment

The Claimant appearing on his own behalf:	R. Nazarinia
Counsel for the Respondent:	G.K. Thomas
Place and Dates of Trial:	Vancouver, B.C. February 21–24, 27 and 28, March 1–3, 6, 7, 9 and 10, 2023
Place and Date of Judgment:	Vancouver, B.C. February 7, 2024

2024 BCSC 189 (CanLII)

Table of Contents

INTRODUCTION **4**
BACKGROUND **5**
ADMISSIBILITY OF RECORDINGS **11**
The February Recordings 12
Gun Threat Recording 12
Throwing Meat Recording 13
Third Recording 14
Locked in the Office Recording 15
Drop Off Recording 17
School Recording 18
Legal Framework 19
Positions of the Parties 20
Discussion 21
CREDIBILITY **24**
Legal Principles 24
STATUTORY FRAMEWORK **29**
PARENTING ARRANGEMENTS **30**
Legal Framework 31
Discussion 33
Section 211 Report 33
Interviews with R and A 35
Evidence of Ms. Warner 38
Further evidence of the parties 39
History of the Children's Care 42
Parenting Time and Related Orders 50
Guardianship and Parental Responsibilities 53
CHILD SUPPORT **58**
Claimant's *Guidelines* Incomes 60
Respondent's *Guidelines* Incomes 62
Section 7 Expenses 65
SPOUSAL SUPPORT **69**
Legal Framework 69

2024 BCSC 189 (CanLII)

Entitlement 71
Quantum and Duration 72
PROPERTY AND DEBT DIVISION 75
Legal Principles 75
Safety Deposit Box Incident 76
Excluded Property Claim 78
Authorities 79
Relevant Evidence 80
Discussion 82
Disputed Debt Claim 83
Former Family Home 84
Occupational Rent 85
Dividing Other Property and Debt 88

2024 BCSC 189 (CanLII)

2024 BCSC 189 (CanLII)

Introduction

[1] The parties to this family law proceeding are the parents of R and A, now nine and seven years old. Married in 2007, they agree they separated in September 2020, although they continued to live together in the former family home until February 2021.

[2] The main issues in dispute are the regular parenting schedule, final decision-making authority regarding some parental responsibilities, the parties' incomes for child and spousal support purposes, and aspects of the division of property and debt.

[3] The claimant's property and debt claims include an excluded property claim related to what he identifies as a living inheritance received from his mother that he contributed to the purchase of the former family home and a family debt claim based on a renovation completed by his father.

[4] Credibility is also a significant contested issue in this case.

[5] Both parties make some allegations of family violence during the marriage. Both say the other was verbally abusive. The claimant alleges the respondent was also generally volatile and physically aggressive with him on two occasions. The respondent alleges the claimant was generally financially controlling. Neither has suggested, however, that family violence is a consideration in determining the parenting issues.

[6] Aside from the parties' testimony, the evidence includes an uncontested s. 211 report prepared by psychologist Dr. Michael Elterman based on his assessment of the parties and the children (the "Section 211 Report"). The claimant also adduced several audio recordings, all but one of which I found admissible following two *voir dires*. The claimant's partner, Ms. Abadi testified in a *voir dire* because she made one of the recordings. The claimant's only other witness was his mother. The respondent's witnesses included her sister and a neighbour. Each party also relied on volumes of documentary evidence.

2024 BCSC 189 (CanLII)

Background

[7] The claimant is 46 years old. Employed as a director of sale and business development with the Better Business Bureau (the "BBB") since 2021, the claimant started his own business in April 2022, which he says has yet to generate any revenue.

[8] The respondent, 41 years old, is a nutritionist who works mainly at St. Paul's and Richmond Hospitals.

[9] Both parties were born in Iran. The claimant has lived in Canada since he was a young child.

[10] The respondent moved to Canada as an adult accompanied by her parents and sister in May 2007. Her parents and sister returned to Iran for a period of time while her sister completed a medical degree. Since then, all three have lived here Her sister is a licensed physician who works in Vancouver as a general practitioner.

[11] Both the respondent's sister and their parents were always very involved with the parties and the children.

[12] Before immigrating, the respondent completed undergraduate and graduate degrees in soil science.

[13] The parties met soon after the respondent arrived in June 2007 and married in July 2007.

[14] At the time of the marriage, the claimant was working as a sales representative for a large manufacturer of dental implants and dental laboratory equipment. He testified to owning a condominium in North Vancouver, a rental property in Surrey, and financial investments. The respondent suggested the condominium was purchased after they married.

[15] Initially the parties lived in the condominium. In 2008, they moved to Toronto for several months to pursue a business opportunity. The claimant had purchased a

carwash franchise with funds provided by the respondent's parents. Unfortunately the business failed and resulted in civil litigation.

[16] In or about December 2008, the parties returned to the Lower Mainland. After selling the condominium, they lived in a rental apartment.

[17] In 2009, the respondent began studying English and completing science courses at what was then Capilano College. In September 2010, she transferred to UBC.

[18] Before deciding to become a nutritionist, the respondent considered a number of other educational/career options including a doctorate in soil science, dentistry and pharmacy. She entered the food nutrition health program in January 2011, and graduated in or about May 2013.

[19] The claimant completed an undergraduate degree in February 2012 and then a (part-time) executive MBA at SFU in May 2019 while working full-time.

[20] From late 2008 to 2014, he worked as the national sales manager for another company that produces dental implants. From 2014 to 2017, he was a regional sales director for a large contact lens manufacturer.

[21] During his MBA program, from 2017 until early 2019, he was the director of sales for a large pharmaceutical company. In March 2019 until after the separation, he worked as the Vice-President for an industrial trades company.

[22] In 2012, the parties bought their first house in Coquitlam. They bought the former family home in August 2016 after refinancing the Coquitlam house that same year, which they sold in 2017. While living in the Coquitlam house, the parties rented out the basement suite and also earned some income by hosting international students.

[23] After working full-time as a nutritionist, the respondent started a maternity leave in December 2014. R was born in January 2015. A was born only 15 months

2024 BCSC 189 (CanLII)

later in April 2016. The respondent remained at home with the children until December 2018 when she returned to work part-time.

[24] The respondent alleges the claimant was too busy with work and his MBA program to be very involved with the children prior to the separation, although they were in his care on weekends once she starting working again. The claimant describes himself as always actively involved with both R and A from birth.

[25] Following their separation in September 2020, the parties continued to live together in the former family home until on or about February 17, 2021 when the claimant moved out. Before he left, on or about February 8, 2021, the claimant visited their joint safety deposit box, he says, to inventory the items. The respondent arrived soon after. Each of them took photographs of the items that had been kept in the safety deposit box. Each denies taking a diamond necklace and bracelet that were missing by the end of the visit.

[26] The day before the claimant left the former family home, he made four audio recordings of interactions with the respondent.

[27] Ms. Abadi also made a recording on March 2, 2021 of the respondent's mother berating her in the presence of her youngest child and then four year old A, at the elementary school attended by her older child and R.

[28] The claimant complains the respondent severely limited his parenting time with the children once he was no longer living in the former family home, although they spent a great deal of time with and often stayed overnight with their grandparents.

[29] The claimant filed a notice of family claim on March 5, 2021. That same day, he obtained a without notice protection order that expired on April 6, 2021. The protection order prohibited the respondent from attending his home or his work place and from following him. In closing submissions, the claimant acknowledged a conduct order restraining the respondent and through her, her family members, from

2024 BCSC 189 (CanLII)

exposing the children to negative communication or conduct should have been sought instead.

[30] In late March 2021, through counsel, the parties discussed the claimant moving his belongings and other items out of the former family home on March 31, 2021. Arrangements for the move were much disputed between counsel. Before the move, the claimant's then counsel wrote that he would be bringing a truck and co-workers to assist him. Counsel for the respondent took the position "there should be no one other than a police escort". Counsel for the claimant responded that they had agreed to vacate the protection order, the claimant would not be attending with a police officer, and the police were only able to attend for a maximum of one hour. Ultimately, the respondent arranged for police to be present.

[31] Each party accuses the other of behaving badly during the move. The claimant and the respondent's sister do the same.

[32] On April 27, 2021, Master Elwood, as he then was, granted a consent order regarding the claimant's interim parenting time that included after school on Mondays and Wednesdays until 7:30 p.m. and from Saturday mornings to Sunday afternoons. In addition, the claimant was required to drive the children to school three mornings a week (the "Elwood Order").

[33] During the proceeding, the claimant took the position that close to equal, if not equal, parenting time with the children was in their best interest.

[34] The respondent emphasized the claimant's willingness to consent to much less time as provided for in the Elwood Order. The claimant maintained that he was desperate to spend whatever time he could with the children.

[35] The Elwood Order also included a number of conduct orders that required both parties to:

1. encourage the children to have a good relationship with the other parent and to speak positively and respectfully about the other parent, their

2024 BCSC 189 (CanLII)

partner and their family and not to disparage or speak ill of them in front of the children; and

2. not question the children about the other parent or the time spent with them beyond simple conversational questions or to discuss inappropriate adult or legal matters with them.

[36] The conduct orders also precluded Ms. Abadi from parenting the children or picking them up from school etc.

[37] On May 18, 2021, the claimant was terminated from his job without cause.

[38] On June 21, 2021, Master Dick made a summer parenting time and a without prejudice support order. Based on *Guidelines*[1] incomes of $252,143 for the claimant and $27,051 for the respondent, the claimant was required to pay monthly child and spousal support of $4,341 and $3,364 (the "Interim Support Order").

[39] The Interim Support Order also required the claimant to "continue" collecting the "rental property income" and applying it to the mortgage payment on the former family home. The respondent was responsible for one-half of the remaining mortgage payment each month.

[40] The claimant did not pay support after the Interim Support Order.

[41] In or about September 2021, he started his current job with the BBB, which pays a salary of approximately $90,000.

[42] On December 21, 2021, Justice Mayer varied the Interim Support Order and reduced the claimant's *Guidelines* income to $100,000 effective January 1, 2022. He also fixed the arrears of interim child and spousal support and ordered them payable forthwith. Alternatively, however, Mayer J. permitted the arrears to be set off against

[1] *Federal Child Support Guidelines*, SOR/97-175 [*Guidelines*]

2024 BCSC 189 (CanLII)

the amount the respondent was required to pay the claimant for his interest in the former family home if an agreement was reached (the “Mayer Order”).

[43] Justice Mayer also found the claimant in contempt of court for failing to pay child and spousal support and for failing to return the children to the respondent on October 10, 2021, as required by the parenting time schedule in the Elwood Order.

[44] Further terms of the Mayer Order included dismissing the claimant’s previously adjourned application for the sale of the former family home; and varying the Interim Support Order regarding the payment of expenses related to the former family home. Under the Mayer Order, the respondent was required to apply the rental income to the mortgage and to pay various household utilities; and the parties were required to equally share other expenses including property taxes, home insurance, home security and gardening until the home sold.

[45] On June 23, 2022, Justice Fitzpatrick dismissed the claimant’s application to vary his regular parenting time, but granted his application for equal holiday parenting time, on a specified schedule. She also permitted him to travel to California with the children, where his mother and other family members live, and ordered the respondent to provide him with the children’s expired passports.

[46] Self-represented by the time of the trial, the claimant was highly organized and well prepared. Understandably, his approach to most of the contested issues was based on the respondent’s positions and allegations during interim applications and examinations for discovery, some of which changed or were not pursued at the trial. The respondent and her family members had alleged in affidavits, for example, that they were afraid of him and he abused alcohol, which he said was entirely false. Although the respondent complained to a limited extent about his drinking before separation, during her testimony, she did not give evidence that she was ever afraid of him. Her sister made neither allegation. The respondent’s parents were not called as witnesses.

2024 BCSC 189 (CanLII)

2024 BCSC 189 (CanLII)

[47] At the end of the trial, I granted a divorce order. By consent, I also granted a further interim order that provided for equal holiday parenting time during spring break and the summer and an order authorizing the respondent to purchase the claimant's interest in the former family home on terms and without prejudice to their property and debt claims.

[48] After I reserved my decision, the respondent made a request to appear before me that ultimately resulted in an application to re-open her case. Filed September 27, 2023, in her application, she accused the claimant of neglect, alleging he failed to take A to the hospital after she fell and fractured bones in her hand or wrist on the school playground, resulting in significant pain. The respondent also alleged the claimant then unilaterally terminated the children's counselling, which they had been attending since February 2022, because he feared them disclosing his neglect.

[49] I allowed the respondent to re-open her case to address those two circumstances. As a result, the trial continued for one more day on December 8, 2023.

[50] At the conclusion of the continuation, I granted a further interim holiday parenting time order that addressed the specific schedule for the children's "Christmas" school break.

Admissibility of Recordings

[51] As I have indicated, the parties disputed the admissibility of six short audio recordings, along with translated transcripts of the Farsi portions of most of the recordings prepared and signed by a certified court interpreter adduced by the claimant.

[52] The recordings, translated transcripts and related testimony were the subject of two *voir dires*. I ruled that all but one of the recordings, defined below as the Drop Off Recording, admissible. Along with the five recordings, I admitted the *voir dire*

testimony and the translated transcripts as evidence in the trial proper with reasons to follow. These are my reasons.

[53] The claimant testified to making five of the recordings. Four of the five recorded conversations with the respondent in the former family home on or about the day before he moved out, which he identified as February 17, 2021 ("February Recordings"). He made the fifth recording, which includes the children, while dropping them off at the former family home, on or about March 10, 2021 ("Drop Off Recording").

[54] Ms. Abadi testified to making a recording of the respondent's mother at the children's school at the claimant's request. It depicts, as I have indicated, the respondent's mother berating her, using deeply offensive and misogynistic language ("School Recording"). Although Ms. Abadi was cross-examined in the *voir dire* about a range of issues, which I do not intend to discuss, she was not questioned about allegations that involved her hitting her own children, which the respondent had made to Dr. Elterman and then again unpromoted in cross-examination.

The February Recordings

[55] The claimant testified to making the February Recordings with his cell phone and providing them to the translator on a USB stick. He denied editing or altering them in any way. The claimant also testified that the respondent was aware he was recording her, stating they discussed the issue in the first of the four recordings and his phone was visible to her. Page 3 of the transcribed transcript confirms this. The respondent asks the claimant if he is recording her voice. He tells her that he is protecting himself, "because I don't know what you could be capable of". He also says he learned this from her with reference to a recording she made previously.

Gun Threat Recording

[56] The claimant described the first conversation taking place after the respondent came into his office downstairs. The respondent talks about speaking to psychologists and then to his father at some length. At p. 5 of the transcript, she tells

2024 BCSC 189 (CanLII)

the claimant he is mentally sick. On the next page all of a sudden she states that she is scared, is calling the police and then, “I promise I say he has a gun; he is pointing it at my ehh [head]”. The claimant responds by asking her why she is lying. The respondent says that she is not lying although she acknowledges his gun is upstairs. She also says, “have you not threatened me with a gun several times”. The claimant states, “you liar”. The respondent tells him, “if you act like a liar towards me, I can do the same towards you”. She also tells him, “if you play with me, I will play with you”. The claimant continues to call her a liar and ask her when he pointed a gun at her. He also says, “[y]ou injured my hands covered with blood several times”. The respondents responds, “… [y]ou didn’t give me a bruise like this?” The claimant states, “[w]ho, what? So you wouldn’t beat me”. The respondent laughs.

[57] After considerable back and forth, at p. 8 of the transcript, she acknowledges the claimant did not point a gun at her and says she will not tell the police that he did.

[58] The respondent then states that the claimant threatened her that morning with not giving her a single cent. She asks him several times if she is a sponger, apparently referring to earlier conversations. At a certain point he says, “yeah because you don’t want to …”. Moments later she tells him she wants all his financial statements.

[59] The claimant testified to keeping all of his financial documents in his filing cabinet in the office. He tells her to pull them out; he will disclose all of them and he will no hide anything from her. She asks him a few times if he has a lawyer and who that lawyer is, ending with, “who is your lawyer, stupid”. The claimant responds, “don’t act like that. You really aren’t stable”. She calls him stupid again.

Throwing Meat Recording

[60] The claimant testified the second recording began when he was walking up the stairs and the respondent blocked his path. The transcript starts with the respondent saying, “[w]hat is it? You want to beat me”. She also says she is scared if he gets close to her. She tells him to move aside, she is really scared and she will

2024 BCSC 189 (CanLII)

call the police. He responds, “how much of a liar are you? Didn’t you just throw the meat at me”. She denies this, stating she threw it on the floor. She returns to telling him not to come near her.

[61] During this recording, according to the claimant, the respondent threw a package of meat at him, which he had just bought, because it was not organic. After the respondent tells the claimant not to come near her, he states “… okay move aside and let me go the other way. You can’t block the doorway and tell me not to”. The respondent then refers to the claimant losing face in the bank and, “[g]od know[s] everyone in the bank knows what you did”. At that point a young child, identified as R by the claimant, can be heard saying, “[w]hat are you doing?” The respondent comments about giving R the power to choose and “your dad is now well off”. The claimant responds, “… the kids are sleeping. By acting this way you’re just hurting the kids”. The respondent then says, “[s]o, why are you hurting the kids? You say you (*sic*) are discriminating between the kids. Are you so dumb? Stupid”. After the claimant tells her to speak properly, she responds, “you speak properly, to tell the kid, before the kid that I am discriminating unintelligible”.

[62] Regarding the reference to discriminating, during his evidence, the claimant explained he had some concern the respondent had been treating A and R differently based on gender stereotypes and A was becoming less outgoing and confident.

[63] The parties return to arguing about the meat. Essentially the respondent acknowledges throwing it although not at the claimant. The respondent also accuses the claimant a few times of stealing “the gold” and taking $30,000. She calls the respondent a loser and tells him she will cause trouble for him although she does not want to, because he stole all the gold. Finally she tells him to “get lost” and leave the home.

Third Recording

[64] The third recording is very brief. It begins with the sound of footsteps. The claimant testified he had gone downstairs was coming back upstairs again. He

2024 BCSC 189 (CanLII)

recalled he was bringing groceries such as a vegetable platter to put in the fridge. The parties' initial exchange includes:

> C: "Does anyone throw meat?"
>
> R: "Yeah"
>
> C: "Is it normal to do?"
>
> R: "Yeah, because"
>
> C: "Take your hands off my face"
>
> R: "Is it normal to take pictures and send to your dad? … I don't let you put this in the fridge".
>
> C: "What does it mean …
>
> R: "I don't allow it"
>
> …
>
> C "Why are you acting this way?"
>
> …
>
> R: "… because you stole"
>
> C: "Liar"
>
> R: "Am I a liar. You called and cancelled the child's class"
>
> C: Look the two kids are sleeping
>
> R: Why did you cancel the class … Why did you steal the gold? Why did you take the thirty-thousand dollars? Tell the bungling lawyer of yours to at least help you, you loser! I don't want to cause you trouble, but God knows I will. I really didn't want to cause you trouble. Because you stole the fold (unintelligible). You stole all the gold. Get lost and leave the house".

[65] In cross-examination, the claimant testified the respondent had accused him of stealing and lying about things throughout the marriage.

Locked in the Office Recording

[66] The claimant testified to making the fourth recording, which he said was the last of the four, after locking or barricading himself in his office. The sound of a door rattling can be heard, which the claimant identified as the respondent trying to get in. In English, the claimant asks her to leave him alone. He denied the suggestion that he staged this by playing with the door himself. As he points out, she never questions why he is trying to make it look like she is trying to break in. Instead, she

2024 BCSC 189 (CanLII)

implores him to open the door. She tells him she trusted him and talks about him taking the gold, with reference to the safety deposit box incident.

[67] Sounding tearful and intense initially, the respondent then sounds angry. The claimant cautions her that their tenants will call the police. She refers again to him calling her a sponger and saying she discriminates between the children along with making them “bipolar”. The recordings ends with her saying, “I honestly want to leave this life. I really got the best lawyer for this reason. I got the best lawyer for this very reason to know my rights. Am I an avarious (*sic*) person. I don’t want to take anything from you”.

[68] The respondent also testified about the recordings. Extremely unfocused and tangential at times, she referred to having text messages, not in evidence and a recording of her own that would support her version of events. When she was asked if she was aware she was being recorded during the February Recordings, she essentially acknowledged she was.

[69] Addressing some of their content, the respondent denied throwing meat at the claimant. Stating she “dropped it down” or threw it on the floor, the respondent also testified to being very upset because the claimant had cancelled her credit cards and her Costco card, which he disputed during cross examination in the trial proper. The respondent also testified that when the claimant told her during the Third Recording to take her hands off his face, this was “for the recording”, stating it was not possible for her to reach is face because she is very small and he is very tall.

[70] Asked if the translated transcripts match what the parties spoke about that day, the respondent identified a very minor error in one of the transcripts but alleged that only selective parts of ongoing conversations were recorded. She also alleged that during those conversations the claimant said he was not going to give her a penny and he admitted to receiving $150,000 from her parents. According to the respondent, he called her a sponger and a freeloader many times. She also said that during the February Recordings the claimant was trying to “trigger” her, and she did not want to recall some things because they were “so disturbing to her”. When asked

2024 BCSC 189 (CanLII)

about unrecorded threats the claimant had made, however, the respondent said it was just that he always called her a freeloader and he would not give her any money.

[71] Cross-examined about whether she felt she was justified in threatening to call the police and falsely allege the claimant had threatened her with a gun, the respondent answered, “of course, if you act like a liar I can do the same thing”. Later she attempted to minimize the significance of her threat by emphasizing that she never followed through on it.

[72] Appreciating that surreptitious recordings are inherently self-serving, throughout much of the February Recordings, I would note the respondent sounds intense and agitated and the claimant calm and reasonable.

Drop Off Recording

[73] The Drop Off Recording is mostly in English and not transcribed. The claimant testified to arriving at the former family home to drop off the children. The respondent was not home but her mother was. R left the car and went inside but A did not want to go in. The claimant tried to persuade her. He also went to speak with R at the front door. According to the claimant, the respondent’s mother pulled R inside and slammed the door on him. The claimant began recording when the respondent arrived. She can be heard talking to A. Over and over again, the respondent asks A to leave the car with her. A refuses. By this point R has returned to the car. He says his grandmother “slammed Bubba’s face and Bubba got hurt”. The claimant tells him to return to the house. When the claimant offers to drive around with A until she falls asleep, the respondent tells him he cannot leave because she has called the police. One of the children begins to cry, stating, “Bubba is going to jail”. During his testimony, the claimant described the incident as an example of horrible parenting on both sides, although, he was trying to defuse the situation.

2024 BCSC 189 (CanLII)

School Recording

[74] Ms. Abadi testified to making the School Recording outside the elementary school, attended at that time by her older daughter and R. Ms. Abadi and her younger daughter were there to pick up her older daughter. While she was talking on the phone with the claimant, Ms. Abadi heard some profanity. She turned around and realized the respondent's mother was yelling at her. A was with her. Ms. Abadi's ex-husband was also present.

[75] The claimant asked Ms. Abadi to end their call and record what was happening, which she did. Ms. Abadi said she asked the respondent's mother to stop yelling but she continued. Ms. Abadi's daughter was very upset and crying. After Ms. Abadi stopped recording and moved away, the respondent's mother came toward her again. Describing the situation as very stressful, Ms. Abadi said she tried to focus on her daughter.

[76] In cross-examination, Ms. Abadi said she did not know if the respondent's mother was aware she was being recorded, but she would have seen the phone.

[77] Ms. Abadi's account of the circumstances is consistent with the translated transcript and what can be heard in the audio recording. Together, they establish the respondent's mother made profoundly offensive comments to Ms. Abadi about her involvement with the claimant and also disparaged the claimant, in the presence of her younger daughter and A. Loud and angry sounding throughout, the respondent's mother also accused Ms. Abadi of destroying the lives of four children and making them orphans. Ms. Abadi at one point tells her to be quiet.

[78] Ms. Abadi testified that after the incident she had a hard time calming her younger daughter, who refused to go to the school for two days. She also described herself as very fearful of being verbally attacked whenever she attends the school. Ms. Abadi indicated she tries to avoid the respondent and her family members there.

[79] The claimant gave evidence about his text exchange with the respondent during the incident. He wrote, "[y]our mother is at the school swearing and causing a

2024 BCSC 189 (CanLII)

scene". The respondent replied, "[y]our lover is very upset Awwww". When he then stated, "I am concerned for my kids!", the respondent said, "[a]wwwww Falls (*sic*) allegation! Then, "how you know? Your lover?! If you were really concerned, you didn't cheat on me with my ex-friend…".

[80] Describing herself as emotionally distraught over the claimant's relationship with Ms. Abadi at the time, and her mother as over protective, the respondent emphasized that she ensured her mother did not to pick up the children at the school after the incident.

[81] However, Ms. Abadi also described a subsequent incident at the school before the end of the school year in June 2021, involving the respondent that was not recorded. According to Ms. Abadi, the respondent swore at her using the same words her mother did. Her children and R and A were present at the time.

Legal Framework

[82] The recent case of *C.C. v. S.P.R.*, 2022 BCSC 1057, discusses the policy objectives and the legal principles that govern the admission of surreptitious recordings in family law cases. Reviewing the approach in BC, Justice Gibb-Carsley identified a tension in the cases between the strong policy reasons for discouraging the practice, and what the law recognizes as a limited discretion to exclude them.

[83] His decision affirmed the four part test for admissibility articulated in *Finch v. Finch*, 2014 BCSC 653 at para. 62:

1. The recordings must be relevant;
2. The participants must be accurately identified;
3. The recordings must be trustworthy; and
4. The probative value of the recordings must outweigh their prejudicial effect.

2024 BCSC 189 (CanLII)

[84] Trustworthiness relates to whether the recording accurately represents what was said at the time. In other words the concern is whether the recording has been manipulated as opposed to being incomplete or selective: *C.C.* at para. 51.

[85] The issue of prejudice includes prejudice to the parties, the trial process and the reputation of the administration of justice: *Matthews v. Matthews*, 2007 BCSC 1825. Regarding prejudice to the opposing party, the necessary inquiry is the mirror image of the probative value inquiry.

[86] If the evidence is incomplete or capable of manipulation, it will operate prejudicially. At the same time, the prejudice from excluding the evidence must also be considered: *Matthews*. It is recognized that excluding reliable evidence of abuse of a child, for example, would adversely affect the reputation of the administration of justice.

[87] Prejudice to the trial process relates to the cost of admitting the evidence, namely the time involved. Prejudice to the administration of justice arises from admitting improperly obtained evidence. While it is not impermissible to record communications with another person without their knowledge, the court does not wish to condone the practice in family law proceedings because it erodes trust and undermines the prospect of future cooperation between the parties, contrary to some of the objectives in family law such as reducing conflict between parents, spouses and children: *C.C.* at para. 28.

Positions of the Parties

[88] Arguing it is clear the respondent knew about the February Recordings and none of them have been altered or edited in any way, much like in *C.C.*, the claimant said he recorded his interactions with the respondent to protect himself from false allegations and to document her use of threats and abusive language even in the presence of the children. Consistent with this, her affidavit evidence and correspondence prior to trial, alleged that she and her family lived in fear of him. The recordings provide important evidence that this was false and demonstrate her willingness to jeopardize him, as well as her own abusive behaviour.

2024 BCSC 189 (CanLII)

[89] The claimant identifies the Drop Off Recording as demonstrating his close relationship with the children and their wish to spend more time with him. When he made the recording, the respondent was offering him very little parenting time and refusing overnights based on the apparent need for consistency, although the children often stayed overnight at their grandparents' home. He also relies on the Drop Off Recording to show the respondent's antagonism towards him and a pattern of inappropriately involving the police, which in this instance she did because A simply refused to get out of the car.

[90] With respect to the School Recording, the claimant submits it corroborates his significant concern about the respondent's parents' negative influence on the children and their exposure to emotionally harmful conduct after the separation. Absent the recording, he asserts, he would be unable to prove the appalling nature of the respondent's mother's behaviour in the presence of the children. This assertion is supported by not only the respondent's text message to the claimant on March 2, 2021, but also a letter from her counsel dated March 3, 2021, denying "allegations" included in an email from the claimant to the respondent on March 2, 2021. The claimant's email had included: "[t]oday your mother went to [R's] elementary school and caused a very embarrassing scene swearing and using profanities in an uncontrolled rage.… She used vulgar language in front of [R] and [A], who is only 4! Her actions are not acceptable in any situation, let alone in an elementary school and in front of all those young children.…"

[91] The respondent primarily opposed the admission of the recordings based on the assertion that the February Recordings were staged, manipulated, and selective, or taken out of context for the purpose of creating a false narrative about her. She also emphasized the family law policy concerns identified in *C.C.* including the importance of reducing conflict between parties.

Discussion

[92] The test for admission applies to surreptitiously made recordings. Based on the translated transcripts of the February Recordings and the claimant's evidence, I

2024 BCSC 189 (CanLII)

am satisfied the respondent was aware she was being recorded. I am not able to make that finding regarding the School Recording or the Drop Off Recording.

[93] In any event, I will address the *Finch* criteria for all of the recordings.

[94] The respondent has not disputed the relevance of the recordings. All of them are broadly relevant to parenting issues and the underlying determination of the children's best interests. Among the most contentious issues is the schedule for regular parenting time, although the parties' proposals are not radically different, and the allocation of parental responsibilities. The dispute is fueled by a multitude of conflicting allegations about the parties' behaviour during the marriage, as well as after separation. The School Recording is specifically relevant to a concern about the respondent's mother's negative influence on the children, a problem identified by Dr. Elterman during his assessment, and how the respondent dealt with this issue.

[95] There is no dispute about the identity of the people being recorded. Regarding the trustworthiness of the recordings, although the respondent argues they are incomplete, lack context, and the claimant staged the rattling of the door etc., she has not suggested they fail to accurately depict her words or how she spoke and sounded during the recordings.

[96] The first three criteria for admission are satisfied.

[97] Turning to the probative value versus prejudicial effect of the February Recordings, I view their probative value as obvious in the context of this case. Each of them show the parties accusing each other of lying and the respondent accusing the claimant of stealing. She uses aggressive or denigrating language and demonstrates a lack of restraint and volatility, even in the presence of one of the children. Her threats to call police and make what she later admits were false allegations including the extremely serious allegation that the claimant pointed a gun at her head, are deeply concerning. As the claimant points out, absent the recordings, he was particularly vulnerable to this allegation, given not only its

2024 BCSC 189 (CanLII)

seriousness but because he is a gun owner, although his firearm was safely stored at the time.

[98] The February Recordings also support the claimant's general allegations about the respondent's behaviour toward him. Excluding evidence of the respondent's threats and behaviour, in the face of her own allegations and the wide spread, gendered problem of family violence in society generally, would in my view, undermine the reputation of the administration of justice and my determination of the children's best interests.

[99] I have also considered the potential prejudice to the respondent. If made surreptitiously, as Gibb-Carsley J. observed in *C.C.*, a recording can unfairly portray the party being recorded because they do not capture the entire conversation or a very different previous or subsequent conversation. Here, however, I do not accept the claimant staged parts of the recording. Had he rattled the door, after locking himself in his office, I would have expected the respondent to comment. Further, the respondent attempting to enter the office is entirely consistent with what she was saying at the time.

[100] Leaving aside the threats and recognizing the February Recordings provide snapshots, what they also depict contradicts the respondent's portrayal of herself as a particular loving and supportive spouse, and the claimant as verbally abusive during the marriage.

[101] There is no prejudice to the trial process given the brevity of the recordings and the relevance of the testimony, which was admitted into the trial proper.

[102] Regarding the School Recording, again its probative value is obvious. There is no dispute the children have always spent a great deal of time in the care of their maternal grandparents. Again, neither testified. The claimant had an ongoing concern, substantiated by the Section 211 Report that the respondent's family members were speaking negatively to the children about him, Ms. Abadi and their relationship. By the end of the trial, the respondent remained preoccupied by

2024 BCSC 189 (CanLII)

feelings of not only betrayal but hostility and suspicion toward Ms. Abadi and continued to oppose her picking the children up from school.

[103] There is no suggestion the recording unfairly captures only part of the exchange, or lacked context that might change the complexion of the respondent's mother's frankly appalling comments to Ms. Abadi, in the presence of her younger daughter and A. I can see no meaningful prejudice arising for the recording's admission and excluding it would prejudice the proper administration of justice.

[104] My conclusion about the balance between the probative value and prejudicial effect is different with respect to the Drop Off Recording. In my view, the policy concerns that inform the analysis of prejudice are much more pressing given the children's presence and the attenuated probative value of the recording. Although unfortunate, the circumstances depicted are not at all uncommon in the early stages of separation when parents and children are understandably distressed. Further, there is other better evidence to substantiate the claimant's assertion that he and the children have close and loving relationships and the School Recording provides direct evidence of the respondent's mother's negative behaviour toward the claimant.

Credibility

[105] Determining many of the facts relevant to the parties' disputed claims turns on my assessment of the credibility or truthfulness, and in some instances the reliability or accuracy of their evidence.

Legal Principles

[106] Credibility and reliability are not all or nothing concepts. A trial judge may believe some, all, or none of the testimony of a witness and attach different weights to different part of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.

2024 BCSC 189 (CanLII)

[107] The basic approach to assessing any interested witness was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.) at 357, with these words:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

2024 BCSC 189 (CanLII)

[108] *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, identified several factors that may be considered when assessing both credibility and reliability, which I summarize as follows: the capacity and opportunity of the witness to observe and the witness's ability to recall the events at issue; whether their testimony reflects an ability to resist being influenced by an interest in the outcome; internal and external inconsistencies in the witness' evidence, meaning did their testimony change between direct and cross-examination, between prior statements, their discovery evidence and their evidence at trial; whether the witness' evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence; whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and the witness' demeanour, or how they presented while testifying.

[109] Regarding the last factor, *Faryna* and other authorities have highlighted the danger of relying too heavily on the demeanour of a witness to determine their credibility, recognizing the risk of misinterpreting the testimony of the better actor as truthful, and conversely, the poor presentation of an honest witness as deceptive see: *R. v. Jeng*, 2004 BCCA 464 at para. 54; *R. v. Tyers*, 2015 BCCA 507 at para. 18.

[110] Although trial judges are permitted, if not required, to use their common sense and life experience in assessing credibility, the law prohibits unsupported

stereotypical reasoning and speculation about human behaviour from impacting the assessment.

[111] Finally, I remind myself of the relationship between the civil burden of proof, on a balance of probabilities, and the assessment of credibility, as described in *F.H. v. McDougall*, 2008 SCC 53:

> [49] … In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.
>
> …
>
> [86] However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. …

[112] Applying this legal framework and assessing each party's evidence in the context of the evidence as a whole, in general I find the claimant was a credible witness, although some of his evidence reflected the influence of his interest. In contrast, I have significant concerns about the respondent's credibility and conclude it unsafe to rely on her contested evidence unless it is supported by objective evidence or other evidence I have accepted.

[113] Before discussing my separate assessments of the parties, I would highlight that each party presented as intelligent, confident, friendly and likeable.

[114] As I have indicated, the claimant was self-represented by the time of the trial. In addition to being highly organized he was respectful and polite, even when frustrated if not confounded by the respondent's counsel.

[115] Although both parties portrayed themselves positively and the other negatively during their testimony, the claimant's evidence was mostly factual, specific and direct. Significantly, it was also internally consistent and often aligned with the documentary or objective evidence. His evidence related to the children

2024 BCSC 189 (CanLII)

struck me as especially genuine. Consistent with the Section 211 Report, which I will come to, the claimant displayed considerable insight and sensitivity to their emotional and psychological needs.

[116] Although I also found much of claimant's evidence about financial matters quite straightforward, some of the evidence about his post-separation financial behaviour was less well explained and struck me as strategic.

[117] In addition undisputed evidence shows that at times the claimant's responses to circumstances were inconsistent with his depiction of himself as reasonable and conflict avoidant. I have in mind the claimant reporting the respondent's sister to the College of Physicians and Surgeons based on an antibiotic prescription for A, discussed below. Accepting that he made the report at the height of his mistrust and fear of the respondent and her family, in my view his response was disproportionate and unreasonable. Certainly, he should have and failed to consider the potential risk to his former sister-in-law. Yet, the claimant appeared to struggle to understand this. Another much less significant example arises from his complaint at one point to the respondent about the school lunches she prepared for R, based on a concern about R gaining weight.

[118] There is also the reality that the claimant paid *no* support after the Elwood Order until February 2022, when he began paying child support. Indicating he could not afford to, despite his job loss and much reduced income, I do not accept he could not have paid something, particular starting or about August 2021, when the respondent assumed responsibility for paying the mortgage.

[119] Far more polarized than the claimant's, the respondent's evidence displayed a serious lack of balance. Not only did she portray herself as superlative and the claimant very negatively, her testimony was riddled with unsolicited gratuitous comments despite my repeated interventions and directions that she limited herself to answering questions. Her comments sometimes included serious if not extreme allegations, casually delivered. During cross-examination for example, she offered (entirely unprompted) that the claimant had told her he would kill her one day and

2024 BCSC 189 (CanLII)

Ms. Abadi hits her daughters at times. Represented by experienced counsel from the outset of the proceeding, I view it as significant that neither of these allegations were elicited in direct examination.

[120] Throughout cross-examination, the respondent also attempted to control and dominate the claimant.

[121] Even in direct examination, she struggled to respond to what she was being asked, and was often unfocused and tangential. There were also many internal inconsistencies in the respondent's evidence. Sometimes she contradicted herself from one moment to the next.

[122] Despite being under oath, several times, the respondent attempted to emphasize her honesty on a particular point, by swearing on the lives of R and A that she was telling the truth. Along with violating the rule against oath-helping, this behaviour left me concerned about her commitment to being truthful throughout the entirety of her evidence. There were times when the respondent openly exaggerated. For example, while one of her witnesses, Harriet Werner, was waiting outside the courtroom and there was some discussion about the need to delay her testimony, the respondent stated that Ms. Werner could not wait because she was an "old lady". In fact Ms. Werner is not elderly and retired from her career as a flight attendant fairly recently.

[123] The credibility of the claimant's mother and the respondent's sister was also challenged.

[124] For both, the tone and content of parts of their testimony reflected their respective alliances with one of the parties. Although the claimant's mother also seemed straightforward and reasonable, there was a meaningful shift in her evidence during cross-examination related to what she identified as the respondent's dislike of her and the extent to which she stayed with the parties during visits from the US.

2024 BCSC 189 (CanLII)

[125] The lack of balance in the respondent's sister's evidence was more pronounced. She not only described the respondent and their parents in unrealistically positive terms, she referred to the claimant as hurtful if not vengeful at times, entirely for or against people and overly strategic and manipulative. In an apparent attempt to portray herself as objective, she also mentioned that she still loved him and had loved him like a brother but she struggled to provide meaningful examples in support of her criticisms. Cross-examined about whether the claimant was a good or bad parent, she stated he could be better and indicated he was not all that involved with the children. Her negative comments about his parenting were inconsistent with the weight of the evidence.

[126] Cross-examination also revealed the respondent's sister and the claimant had shared a close positive relationship and he had been particularly supportive of her during her own separation and divorce, although she attempted to minimize his support or characterize his motivation as nefarious. During her testimony, it became apparent that some of the evidence had been discussed with her before she testified. She seemed to make a point of highlighting some of the very same circumstances the respondent did, such as the importance of Thursday evenings for the respondent and the children, which coincided rather obviously with the claimant's request for regular parenting time starting Thursdays after school.

Statutory Framework

[127] The parties' pleadings seek parenting and support orders under both the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*] and *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) [*DA*]. In closing submissions, the claimant relied on the *FLA* only. The respondent addressed both statutes but expressed no preference for the *DA*.

[128] As a federal statute, the *DA* is paramount. However, neither party suggested any operational conflict between the *DA* and the *FLA* in the circumstances of this case. I conclude there is none in relation to the orders I am being asked to make, although I recognize the grounds for varying orders under each statute are somewhat different.

2024 BCSC 189 (CanLII)

[129] Given the breadth of the jurisprudence that has developed regarding the parenting provisions under the *FLA*, and only the *FLA* provides for property and debt division, I prefer to conduct my analysis under the *FLA*. I am satisfied that had I applied the *DA* provisions instead, only the terminology would have changed.

Parenting Arrangements

[130] By the end of the trial, the parties appeared to agree on equally shared holiday parenting time and consented to an interim order to that effect, but they continued to dispute the regular parenting time schedule and how parental responsibilities should be allocated and disputes about decision-making resolved.

[131] Regarding regular parenting time, as I have indicated, the claimant sought parenting time each week from after school on Thursdays until 2:00 p.m. on Sundays. The respondent proposed that he have the children from Fridays at 5:00 p.m. until Sundays at 2:00 p.m. and either Monday or Wednesday from after school to 7:30 p.m.

[132] Regarding parental responsibilities, the claimant proposed the parties “share” or exercise all of them when the children are in their care. In addition to having the obligation to discuss significant decisions with a view to reaching agreement, he proposed that he have final decision-making authority if they cannot agree. The respondent sought an order allocating parental responsibilities on the same terms as the Elwood Order except she would have final decision-making authority with respect to health issues for the children.

[133] In her re-opening application the respondent expressly sought orders that the claimant’s parenting time be supervised and she be allocated all parental responsibilities. At the continuation of the trial however, she asked for sole parental responsibly regarding “medical, dental and counselling” and said she wanted weekend parenting time, complaining that she had lost all weekends with the children since the separation.

2024 BCSC 189 (CanLII)

Legal Framework

[134] Under the *FLA*, parenting time is the time a child spends with a guardian. Enumerated in s. 41, parental responsibilities encompass all aspects of parental decision-making and other powers and obligations of a guardian with respect to a child. They include:

> …
>
> (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
>
> (b) making decisions respecting where the child will reside;
>
> (c) making decisions respecting with whom the child will live and associate;
>
> (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
>
> (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;
>
> (f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
>
> (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
>
> (h) giving, refusing or withdrawing consent for the child, if consent is required;
>
> (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
>
> (j) requesting and receiving from third parties health, education or other information respecting the child;
>
> (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 the child's legal and financial interests;
>
> (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

[135] Parental responsibilities may be allocated to one or more guardians: s. 40(3).

[136] Together parenting time and parental responsibilities constitute parenting arrangements.

2024 BCSC 189 (CanLII)

[137] Section 37(1) of the *FLA* requires only the best interests of a child to be considered in making orders regarding both parenting time and parental responsibilities.

[138] To determine what is in a child's best interests, the court must consider all of their needs and circumstances, including the non-exhaustive list of factors in s. 37(2) of the *FLA*:

> …
>
> (a) the child's health and emotional well-being;
>
> (b) the child's views, unless it would be inappropriate to consider them;
>
> (c) the nature and strength of the relationships between the child and significant persons in the child's life;
>
> (d) the history of the child's care;
>
> (e) the child's need for stability, given the child's age and stage of development;
>
> (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
>
> (g) the impact of family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
>
> (h) whether the actions of the person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
>
> (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
>
> (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

[139] Significantly, s. 37(3) of the *FLA* provides that an order is not in the best interests of a child unless it protects, to the greatest extent possible, their physical, psychological and emotional safety, security and wellbeing.

[140] With these principles in mind, I turn to consider the material aspects of the evidence relevant to the best interests of R and A.

2024 BCSC 189 (CanLII)

Discussion

Section 211 Report

[141] I begin with the Section 211 Report, which sets out Dr. Elterman's unchallenged expert opinion evidence about what parenting arrangements are in the best interests of the children based on his psychological assessment of the children.

[142] At the time of the assessment the claimant was seeking equal parenting time or a "solid block of time" rather than various different times during the week as provided for in the Elwood Order. The respondent largely agreed that his parenting time should be consolidated to avoid the children going back and forth, but she proposed significantly less time for the claimant, from Saturday morning to Sunday afternoons while she was at work.

[143] In completing his assessment, Dr. Elterman met with the parties a number of times and the children twice. He also observed the children with each party and spoke to multiple collateral contacts. In addition, he interviewed Ms. Abadi.

[144] Dr. Elterman wrote the claimant presented as alert, relaxed and professional during his clinical interview. He identified himself as generally happy growing up, apart from his parents' bad marriage and lack of mentorship, also indicating he was healthy, very outgoing and involved in sports. The claimant reported no trauma or family history of substance misuse or psychiatric illness.

[145] Addressing the respondent's clinical interview, Dr. Elterman noted she was friendly and socially poised, but became visibly upset when discussing the claimant's relationship with her former friend. The respondent too described a generally happy, healthy childhood, her parents' marriage as happy, her mother as supportive and her father as easygoing. At the same time, the claimant identified her mother's overprotectiveness, a particular trauma and the near death of her father when she was 14 as problems growing up.

2024 BCSC 189 (CanLII)

[146] Responding to the respondent's allegations of excessive drinking, the claimant told Dr. Elterman he never used alcohol to cope and he drank only the occasional beer with dinner.

[147] Much as he did during his testimony discussed below, the claimant identified the respondent's parents' intrusiveness and constant involvement as a problem from the beginning of the marriage. He expressed concern about the respondent "pawning off" the children on her parents when he was working. The claimant also complained about the respondent fighting with him and belittling him in the children's presence, which he said was something her mother did with her father. When he objected to aspects of the respondent's parenting, the claimant told Dr. Elterman, she would tell him he was being controlling and during conflict she would escalate quickly.

[148] The respondent described the claimant as a little bit narcissistic and his relationship with his own parents as not good. Portraying herself as the driving force behind his decision to attend university, the respondent said at first she admired that he was very supportive and sensitive "in an insecure way". Asked about the deterioration in the marriage and any family violence, she told Dr. Elterman that the claimant insulted her verbally. She referred to him calling her a freeloader and that he did all the work and said he was controlling because he always had to have his way. Stating they did not argue much about money, she said they did argue all the time about her parents and his view they were intrusive and over-involved. She acknowledged her parents would just show up if they did not answer the phone because they were worried.

[149] Asked about parenting conflicts, as indicated above, the respondent complained the claimant would not take the children to activities and classes which he denied, and he drank a lot, which she did not want the children to see. She also emphasized she did not want Ms. Abadi involved in parenting because it was too confusing for the children.

2024 BCSC 189 (CanLII)

[150] Both parties' descriptions of the children, as recorded in the Section 211 Report, reflect sensitivity and insight. Each of them also identified reasonable, if not laudable parenting priorities. The claimant spoke, for example, of wanting the children to feel "their curiosity" to learn and to be "well-rounded good human beings".

[151] The testing results for the parties, however, showed a highly defensive approach. Both seemed motivated to portray themselves as exceptionally free of common shortcomings that most people will admit.

[152] There is no indication in the report that during his interview with Ms. Abadi, Dr. Elterman asked her about respondent's comment that she gets angry with her children quickly and hits them. As I have indicated, neither Ms. Abadi nor the claimant were asked about this in cross-examination and the respondent was not questioned about it in her direct evidence.

Interviews with R and A

[153] R was in Grade 1 and six years old when he met with Dr. Elterman. He expressed finding it difficult to make friends. Denying his dad has a girlfriend, R identified Ms. Abadi as his dad's friend and her daughters as his friends. He described both parties as good parents, also indicating his dad is fun and "not fussy". R specified his mum takes care of him and his sister and is nice to them, but she is not nice to their dad. R indicated he sees his maternal grandparents "a lot" and sleeps at their house as much as he sleeps at the parties' homes. Asked which parent gets mad "quickest", he identified the respondent.

[154] Asked if his parents say mean things about each other, R's responses were mixed. During one interview, he said they both do "just a little" but "mainly" his mum said mean things. In the other interview, he said neither parent says mean things about the other, but he also said his mum asks a lot more about what happens at the other home. In terms of affection, he described his mum as the most affectionate during the first interview and both giving him equal hugs and kisses during the second.

2024 BCSC 189 (CanLII)

[155] In both interviews, R reported being happy when he is with each parent. He referred to the separation as making him sad. He understood his parents separated because they argued too much, which he heard. He wanted to continue seeing his dad every weekend. R also stated if he had a problem, he would talk to his dad because it is easier to talk to him.

[156] During A's interviews, she conveyed it was easy to make friends. A described her parents in similar terms to R. Her dad is nice, funny and "not fussy"; her mum is "fussy" and has a lot of rules. Unlike R, she had advice for her mum that would make her a better parent: play with them more. A also said her mum "could be more healthy". A had no advice for her dad. Again like R, A said her mum is the one that gets mad quickest and yells the most. Her dad gives the most hugs. A denied that the parties say mean things about one another. If she had a problem she too would talk to her dad, because "I love him" and he does more "things" with them like playing tag, silly stuff and singing.

[157] A identified Ms. Abadi as her dad's girlfriend and described her negatively based on what she said her grandparents have told her: Ms. Abadi is not a "good girl"; she is a "bad girl" and she "took my dad away from my whole family". A was also aware that her mum is sad about what Ms. Abadi did, and that the two of them were friends at one time. Related to this, A said that Ms. Abadi is always there when she sees her dad and she "does not want her to come" because she "stole my dad … from me". Asked if Ms. Abadi is nice, A responded she is not and her daughters "are bad too", indicating one of them had pushed her.

[158] Describing his observations of the parties with the children, Dr. Elterman noted that when the respondent was with them, R and A mostly interacted with each other. R took the dominant role. He teased A quite frequently and A was "quite passive and demure". Dr. Elterman's impression was this relationship dynamic between R and A was quite strong. He also found R was "undisciplined", commenting he threw a toy onto the floor and seemed to have no sense that he ought to pick up after himself. To the extent the children did interact with the

2024 BCSC 189 (CanLII)

respondent, she spoke to them gently and affectionately. At times she became quite animated and was also nervous about what they might do toward one another in the office.

[159] In contrast, when Dr. Elterman observed the children with the claimant, they competed for his attention rather than interacting with each other. Both children attempted to drape their bodies around him and he appeared more relaxed than he had during the interviews. Although, the respondent suggests their focus on him was because they see him less, Dr. Elterman also observed that R was less provoking towards A. Dr. Elterman commented that the claimant did a good job of balancing his attention between the two. At the end of the visit, the children cooperated when he asked them to pick up the toys.

[160] Ultimately, Dr. Elterman recommended that the claimant have the children on alternate “weekends” as follows:

1. During week one he would have the children from Thursday at 5:00 p.m. until Sunday at 2:00 p.m.; and

2. During week two he would have them from Friday at 5:00 p.m. until Sunday at 2:00 p.m.; and Mondays from 2:30 p.m. until 7:30 p.m.

[161] Dr. Elterman also recommended equally shared holiday parenting time during Spring Break and Christmas Break, with the parties alternating the first and second half of each of those breaks.

[162] In addition to sharing “joint guardianship”, he recommended the parties also share parental responsibilities. Addressing conflicts related to the children’s activities and medical providers, he recommended each party schedule activities during their own parenting time, but they choose one doctor and dentist for the children. In terms of intervention, the only counselling he recommended was for the respondent, related to her distress regarding the claimant’s relationship.

2024 BCSC 189 (CanLII)

[163] Significantly, Dr. Elterman identified each party as providing a high level of parenting to the children. He viewed each of them as motivated to be the best parent they can.

[164] I turn now to canvass aspects of the other evidence relevant to the children's best interest and the factors under s. 37(2) of the *FLA*. I will not discuss some of the negative aspects of each party's evidence about the other in as much detail as I otherwise might in light of Dr. Elterman's unchallenged and favourable opinions about their parenting and the parties' positions on parenting time, which include agreement to equally shared holiday parenting time.

[165] In summary, the Section 211 Report and the parties' positions prior to the respondent's re-opening application, demonstrated that neither had any meaningful concern about the ability of the other to provide the children with ongoing care that meets the children's need for emotional, physical and psychological safety and well being.

Evidence of Ms. Warner

[166] I begin with the entirely positive evidence of Ms. Warner, a neighbour who lives across the street from the former family home. She spoke warmly and favourably about both parties, and the respondent in particular, indicating the two have become friends since the separation and her retirement. Describing the claimant as a friendly, helpful neighbour, Ms. Warner said that quite often she would see him and the children happily engaged outside before the separation.

[167] Ms. Warner also recalled the children appearing confused, angry and upset initially after the separation. Now, she said, they seem happy and play very well together. Ms. Warner has never seen them arguing with one another. She described the respondent as a wonderful mother who is attentive, considerate, takes the time to explain things, ensures they are well dressed, and provides them with healthy meals and snacks. Indicating the children always look well looked after, Ms. Warner also described the claimant bringing them home recently and carrying A to the sidewalk so her runners would not get wet.

2024 BCSC 189 (CanLII)

Further evidence of the parties

[168] Turning to the other evidence, unfortunately before R was born the respondent suffered from miscarriages. No doubt distressing, they impacted on the marriage. Much as he did with Dr. Elterman, the claimant described his in laws as always overinvolved and controlling, offering many examples such as his mother-in-law trying to enter the operating room when the respondent was undergoing a C-section. The claimant recalled he and his mother-in-law fighting after R was born because she wanted the respondent and R to stay with her and her husband for six months. Indicating he and the respondent argued a lot about her parents and both of them grew up with lots of conflict, the claimant maintained that it was the respondent who instigated their conflict and he responded by trying to de-escalate and disengage.

[169] The claimant also described the respondent as quick to anger and alleged two incidents that involved her becoming physically aggressive with him. One of them, which the respondent did not really dispute, occurred in their Coquitlam home, just before the respondent's sister divorce. The claimant said the respondent threw a mug at him. He raised his hand to protect himself. It was badly cut by the mug and required six stitches. The second, much earlier, incident involved the respondent scratching his arms and causing them to bleed and him grabbing hold of her arms to restrain her.

[170] There is no suggestion the respondent engaged in any further acts of physical aggression, apart from the meat throwing allegation based on one of the February Recordings.

[171] In any event, the claimant expressed more concern about the respondent regularly belittling and insulting him. Aspects of the recordings and a long series of text messages sent on June 29, 2019 show the respondent speaking to him in derogatory terms. Along with calling him stupid and not a winner she referred to him eating like a cow. She told him repeatedly that she hates him and she only stayed with him after they got married because she was sorry his parents were hurting him.

2024 BCSC 189 (CanLII)

[172] Clearly, exposing the children to this kind of communication could undermine their emotional well being.

[173] I note that during this same series of messages, the respondent also complained the claimant has hurt her, been really rude to her and her parents, and bullied her, without saying how.

[174] Testifying the claimant was always in charge of their finances, the respondent described him as controlling when it came to money. She indicated he monitored her spending and complained, much as she did in the recording, that he called her a freeloader all the time because he was the one earning money, despite all that she contributed by caring for the children and managing the household. Despite my concerns about the respondent's credibility, given the claimant's apparent view of the marriage as involving him doing "it all" essentially, I am inclined to accept the claimant used this kind of language with her on occasion.

[175] Ultimately, bearing in mind the best interest factors related to family violence, I am not concerned that either party's ability to provide direct care to the children or meet their needs, apart from the impact to past exposure to conflict and the potential for future exposure to further conflict during exchanges or verbal communication.

[176] The claimant also alleged that during the marriage the respondent started to alienate him from his own family by speaking badly to them about him, and the respondent, her sister and her parents becoming a kind of united front against him.

[177] He emphasized that the respondent's sister's boyfriend/husband raised the same issues and was subjected to the same dynamics. He and his brother-in-law became very close and have remained friends. Unfortunately, the respondent's sister was diagnosed with cancer that required significant treatment and her marriage ended quickly. When they separated, the claimant testified that his mother-in-law asked him to sell a Tag Watch that he had given his brother-in-law. Although, the respondent's sister denied keeping the watch during her testimony, the

2024 BCSC 189 (CanLII)

respondent was cross-examined about an affidavit in which she deposed to her sister having it.

[178] After the respondent's sister and his brother-in-law divorced, the claimant said that the respondent, her sister and her parents really retreated and he became an outsider. The claimant identified the watch issue and the family's response to his brother-in-law as contributing to his fear and mistrust after the separation.

[179] The respondent's sister testified it was the claimant who treated her parents badly, describing him as condescending and unappreciative of all they did in terms of caring for the children. The respondent gave similar evidence.

[180] Both the respondent and her sister described their parents as very loving and highly supportive to them and the children. They emphasized that the two of them and R and A are their parents whole world.

[181] As I have stated, the claimant expressed significant concerns about the respondent's parents' level of involvement with the children and the respondent's efforts to limit his parenting role after he left the former family home. One of his specific concerns was the children's ongoing exposure to the grandparents' relationship dynamic, which as he told Dr. Elterman, involved the respondent's mother belittling and insulting the respondent's father.

[182] As I recall, the respondent did not address the claimant's concern about her mother's behaviour toward her father or the wrongfulness of her mother's comments in the School Recording apart from saying she stopped her mother from attending the school and describing her mother as overprotective. The respondent also testified to being devastated for several months after the claimant left the former family home by his new relationship to explain perhaps what happened at the school, as well as the children's frequent overnights with their grandparents.

[183] As indicated, the claimant's counsel sought and obtained a short term protection order when he filed his notice of family claim. During the trial, the claimant

2024 BCSC 189 (CanLII)

acknowledged he should have applied a conduct order limiting the respondent and her families' communications in the presence of the children.

History of the Children's Care

[184] Both parties gave evidence that the claimant was involved in all aspects of R's care as a baby, although he returned to work two weeks after R was born. The respondent referred to them learning together as first time parents. Born at full term, A remained in hospital for a period of time because of a health issue. I accept the claimant was also engaged in providing care to A, as well as R, when he was home.

[185] At home full-time from 2015 to late 2018 it is clear the respondent was the primary caregiver to the children.

[186] In his director of sales positions, the claimant travelled a great deal and sometimes worked in the evenings. A was only 18 months old when, in addition to working full-time, he started his MBA which involved attending classes every other Saturday as well as completing assignments, etc.

[187] Once the respondent returned to work part-time, however, she typically worked Saturday and Sunday shifts, as I have indicated, as well as long weekends, which meant the claimant was consistently, if not frequently, solely responsible for the children. He gave detailed evidence about providing for all aspects of their care. Text communications indicate this included taking them to medical and other appointments. A multitude of photographs depict the claimant and the children engaged in many fun activities and at home with one another. I note that most of the text messages between the parties during these times were not only respectful, but also gentle and affectionate.

[188] I accept the claimant was devoted to R and A and their needs while caring for them.

[189] The respondent's sister described her as always putting the children first and protecting them from conflict between the parties. As I have indicated, the

2024 BCSC 189 (CanLII)

respondent's sister also gave less than favourable evidence about the claimant's parenting. I put little weight on her relative assessment. In addition to being much more involved and much more capable than the respondent's sister acknowledged, I am satisfied the claimant has demonstrated a stronger ability to protect the children from the parties' conflicts and negative information, as reflected in some of their written communications, aspects of the February Recordings, and the claimant's testimony, which conveyed both genuine concern and insight into the children being emotionally harmed by their exposure. Other than the antibiotic incident, which I will come to, he also demonstrated a better ability to distinguish the children's needs from his own.

[190] Since the separation, the claimant has established an entirely suitable home for the children on the main floor of his father's house located not far from the former family home.

[191] The claimant maintained that increasing his regular parenting time is best for the children. In addition to expressing enthusiasm about being involved in all of the every day parenting tasks, he emphasized his close and loving relationships with both R and A, and his informed approach to parenting.

[192] Apart from complaining about the claimant refusing to take the children to their activities, the respondent was not critical of his actual care of the children since separation until she applied to re-open her case and alleged the claimant neglected A by failing to seek medical treatment for the fractures and then suddenly cancelled the children's ongoing counselling.

[193] Prior to the continuation, the respondent did highlight the claimant had been critical of aspects of her parenting and at the continuation, his disrespectful, if not rude, written communications with her related to the children. One example of the former involved what she said was the claimant sending pictures of R's school lunches and criticizing her for feeding him too many carbs. The claimant acknowledged raising the issue because he was concerned about R gaining weight, but it was the respondent, not him, who sent photo(s).

2024 BCSC 189 (CanLII)

[194] I will speak briefly about the parties attempting to involve the police on a number of occasions since the separation. It is the respondent who has called the most often. More than once, she has alleged the claimant was engaging in stalking type behaviour, which I do not accept. On one occasion, she called to police to report the claimant was recording her and the children in a public swimming pool from the viewing area at the local recreation centre. I accept the claimant's version of events that he was there because of Ms. Abadi and her children. The respondent's own evidence and the February Recordings leave me concerned that she does not appreciate the serious potential harm that could result from making false or exaggerated allegations to the police, or the importance of not wasting police resources.

[195] Both parties and the respondent's sister also gave evidence about what I have already identified as the claimant's unreasonable response to an antibiotic prescription, which is relevant, in my view, to parental decision-making.

[196] In 2020, A was hospitalized after developing a very high fever that resulted in a febrile seizure. According to the respondent, she was advised to "bring down' any fevers in the future. In December 2022, A had a high fever for several days. The respondent's sister arranged for A to be seen in person by a doctor at the medical clinic where she works. The doctor prescribed antibiotics for an ear infection but specified the prescription should be not be filled until a later date if the fever persisted. According to the respondent, A's fever worsened in the middle of the night. The pharmacy refused to fill the prescription because it was before the date specified by the doctor. The respondent asked her sister to contact the pharmacy and "override" the prescription or call in a new one, which she did.

[197] The following day, A was in the claimant's care. The respondent tore off the label before providing him with the prescription, anticipating he would react badly. After speaking to the doctor at the respondent's sister's clinic and learning about respondent's sister's role in prescribing the antibiotics, he complained to the College about both the other doctor and her sister. Initially, describing his complaint as an

2024 BCSC 189 (CanLII)

attempt to obtain information, he later emphasized it was unethical for a doctor to treat a family member, overprescribing antibiotics is part of Iranian culture and the respondent ought to have taken A to the hospital when she could not fill the prescription. I found this last assertion troubling given that A had already been examined, diagnosed and prescribed treatment and taking her to the hospital feverish would have involved an uncomfortable if not long wait in the middle of the night. The claimant also alleged the respondent left A alone to attend the pharmacy. I am confident she would not do such a thing. I accept instead, as she stated, she arranged for her parents to care for the children while attending the pharmacy.

[198] Turning to respondent's later allegation of medical neglect, there is no dispute that after school on Friday May 12, 2023, A fell on the playground and X-rays taken on Sunday May 14, 2023 showed two fractures in her left wrist.

[199] The claimant testified that he was watching R when A approached him and said she had fallen from the monkey bars. After he checked her head and neck and asked if she was okay, she went back to playing. He saw no bruising or swelling and A did not complain of any pain until Sunday around 1:30 when she said her hand was sore after she fell again playing tag in the backyard. Because it was time to return the children to the respondent, the claimant said he gave A a brace to wear and told her to tell the respondent what had happened. During his testimony the claimant played a short video clip that showed both children dancing to music on his deck on Saturday May 13, 2023. A is wearing long sleeves that covered her left wrist, but for that short period of time she appeared comfortable and relaxed.

[200] The respondent described A's hand as swollen and bruised when she arrived at 2:00 p.m. on Sunday, although this is not documented in the medical records. She also alleges A stated that when she told the claimant she had fallen from the monkey bars, she also told him she needed an X-ray, but he said X-rays are not good for the body. The respondent added that A had "broken" her hand twice before, so she knows the "procedure" to explain the X-ray comment.

2024 BCSC 189 (CanLII)

[201] The respondent took A to St. Paul's Hospital shortly after she was dropped off. After the x-rays, A's wrist was casted. Sunday, May 14, 2023 was Mother's Day. During her testimony, the respondent suggested the claimant chose to leave A in pain and not seek medical treatment for her wrist because he wanted to disrupt or ruin her time with the children on Mother's Day.

[202] The next day, the respondent made a complaint to Ministry of Children and Family Development ("MCFD") about the claimant failing to obtain medical care for A. In a letter dated November 11, 2023, the MCFD Team Leader Tammy Morrey writes that the complaint did not meet the threshold for child protection concerns and the file was closed on May 18, 2023 because no service was required.

[203] The healing of A's fractures has been monitored by a pediatric orthopedic surgeon at BC Children's Hospital. The cast was removed on June 16, 2023.

[204] The respondent has scheduled and taken A to all of the follow-up appointments. I accept she did not notify the claimant in advance of those appointments. He responded inappropriately, however, when the respondent texted him to advise A would be few minutes late for the start of his parenting time because one those follow up appointments.

[205] Having assessed each party's evidence regarding these circumstances in the context of evidence as a whole, however, I do not accept respondent's allegation of medical neglect. More than anything, I am confident the claimant would not ignore A's complaints of pain or signs of injury.

[206] At the continuation both parties also gave evidence about the claimant's termination of the children's counselling on May 25, 2023.

[207] Correspondence between counsel in 2021 shows that the claimant was the first to propose counselling for the children. His evidence includes emails he sent to psychologists or their clinics inquiring about counselling for the children. A letter from respondent's counsel criticizes him for unilaterally contacting potential counselling agencies.

2024 BCSC 189 (CanLII)

[208] There is no dispute that the respondent later registered the children for individual counselling with Family Services of the North Shore, without the claimant's knowledge sometime prior to February 2022, when their sessions began. He only became aware of the counselling in or about August 2022 when the respondent consented to the agency releasing information about the counselling to the claimant. Shortly, thereafter the claimant met with R's counsellor.

[209] The respondent alleged that the claimant terminated the children's counselling because he was concerned about what they might disclose to their counsellors about him, which the claimant flatly denied.

[210] The parties gave conflicting evidence about the children's views of their counselling. According to the respondent, R in particular absolutely loves his counsellor. According to the claimant, both children have expressed that they do not like attending, A in particular.

[211] The claimant also testified to becoming concerned the form of counselling was not suitable for the children, characterizing it as play therapy, after speaking with his sister who is a psychologist and her good friend who is involved with the same counselling organization. Based on their information, he concluded the counselling was geared to children who have suffered significant trauma as opposed to dealing with as A and R have, their parents' high conflict "divorce". His sister's friend also told him that although his consent was not necessary for them to attend, if he formally withdrew his consent, the counselling could not continue.

[212] Throughout her evidence and during cross-examination of the claimant at the continuation, the respondent referred repeatedly to the claimant refusing to cooperate with her. At the same time she also highlighted some of her own recent communications, which were respectful and factual. One example involved arranging for a parent-teacher meeting for R. His teacher proposed that the parties attend together because R, and her other students, were presenting during the meeting. The claimant testified that R told him he was not comfortable with this, so he told the teacher he would arrange to meet with her individually. The claimant also

2024 BCSC 189 (CanLII)

indicated R gets “very shaken” at drop off times, which he attributed to conflict between the parties during a past drop off.

[213] Had the parties been co-parenting respectfully and cooperatively, the respondent would have obtained the claimant’s consent before enrolling the children in counselling and the claimant would have discussed his concerns about the counselling before taking the steps of withdrawing his consent.

[214] Although the claimant indicated he is agreeable to counselling for the children related to the parties’ separation at the continuation, he emphasized the fact that Dr. Elterman did not recommend any in the Section 211 Report.

[215] Addressing briefly the children’s other significant relationships, there is no dispute the respondent’s sister has also been consistently involved with the children. Although she is a busy doctor, she spends time with the respondent and the children regularly. I have no trouble accepting she is a loving aunt who delights in spoiling her niece and nephew.

[216] Although, the claimant has a close relationship with his father and in fact rents the upper floor of his home, his father was not involved in caring for the children before separation. The claimant denies the respondent’s allegation that his father’s use of alcohol prevented him from playing a caregiving role, indicating her parents essentially left no room for others. The respondent did not any express concern for the children related to her former father-in-law’s drinking. Further, she described her prior relationship with him as positive. In any event, I expect his level of involvement with the children has increased given the claimant lives in his home.

[217] The claimant’s mother has lived in San Diego for many years. Her involvement with the children has been limited therefore to visits here and in California over the years, including a visit there in summer of 2022.

[218] Both parties gave evidence about each of the children and their development. Based on all of the relevant evidence, I am confident R and A are bright, healthy, very well cared for and much loved.

2024 BCSC 189 (CanLII)

[219] The respondent identified a broad array of activities that the children were involved in at the time of separation. Essentially they were attending at least one activity almost every day. During his testimony, the claimant complained that after separation his limited parenting time was occupied by appointments and events scheduled by the respondent. Although the respondent alleged the claimant refused to take the children to swimming and skating lessons, his testimony and photographs show him doing so before the separation. After separation, he emphasized he was never consulted about registering them for activities. The claimant maintained the view the respondent was attempting to interfere with or prevent him from organizing his own parenting time.

[220] R and A attend a local public elementary school.

[221] Asked about the children's progress at school, the respondent described R as a bit behind in reading. She also outlined her efforts to support his reading, such a reading together every night, having him read to A and helping him prepare for his spelling tests. The respondent indicated R is very active and loves animals. Stating that A is different, and the "princess" of the house, the respondent referred to A as "creatively messy". She loves to make clothes for her dolls. A has told the respondent she will be a fashioner designer when she grows up. She also loves reading and learned the alphabet at a young age.

[222] More recently R became involved in school and community basketball, a sport the claimant has played since he was a teenager. The respondent testified that despite his own love of basketball, the claimant has been unwilling to take R to weekend games. She gave similar evidence at the continuation. Not cross-examined on this point, in closing submissions before the continuation, the claimant stated he was happy to facilitate R's involvement in basketball. At the continuation, he reiterated his ongoing concern about the respondent scheduling activities and appointments during his parenting time.

2024 BCSC 189 (CanLII)

2024 BCSC 189 (CanLII)

Parenting Time and Related Orders

[223] Addressing the claimant's proposed regular parenting schedule, the respondent complained the children would not have a full day with her and when there is a professional day on a Friday the claimant would have two full days in a row. She also highlighted, as did her sister, that on Thursday nights she and the children have a ritual that involves eating whatever they want and watching movies, which of course could be moved to another night.

[224] The respondent's work schedule, which includes Saturdays and Sunday mornings, however, also prevents her from having the children for full weekend days. Further based on the claimant's proposed schedule, the children would be in her care every holiday Monday.

[225] It is likely clear from my discussion of the evidence and findings, that I view the regular parenting time schedule proposed by the claimant and equally shared holiday parenting time, which the parties consented to an interim basis, as in the best interests of the children, bearing in mind all of their needs and circumstances and the relevant factors set out in s. 37(2) of the *FLA*.

[226] In summary, leaving aside the past exposure of the children to the parties' conflict and the respondent's misconduct toward the claimant in particular, their ongoing antagonism, deep mutual mistrust, the claimant's unreasonable response to the antibiotic prescription and the respondent's failure at times to protect the children from the negative behaviour of her mother, I accept Dr. Elterman's opinion that the children have received a high level of parenting from both parties.

[227] I find each party has the capacity to provide fully for all aspects of the children's care.

[228] The issue here is not how the parties directly parent the children. Instead, it how their dysfunctional relationship with one another may impact on R and A. Until the continuation, the evidence showed the claimant had a much stronger ability to recognize and shield the children from the potential for emotional harm. Although

recent written communications between the parties show the respondent communicating more appropriately than him at times, it is clear she continues to escalate quickly. Both are highly reactive to each other. I will have more to say about how to address this issue below.

[229] Accordingly, I make the following final parenting time orders:

1. Subject to Holiday Parenting Time which includes the Summer Break, Spring Break and the Winter Break from school, Regular Parenting Time will be follows:

    a. The claimant will have parenting time with the children each week from after school on Thursdays until 2:00 p.m. on Sundays;

    b. The respondent will have parenting time for the balance of the week; and

    c. The claimant will pick up the children after school on Thursdays and drop them off at their piano lesson on Sundays.

    d. Each party will provide the other with the option of caring for the children when they cannot exercise their parenting time, before arranging for a third party caregiver, including extended family members.

2. The parties will equally share Holiday Parenting Time as follows:

    a. Spring Break:

        i. Starting with the respondent in 2024, and then alternating in each year thereafter, one party will have parenting time with the children, from after school at the start of Spring Break until the Sunday of the second week at noon; and

2024 BCSC 189 (CanLII)

ii. The other party will have parenting time with the children from Sunday at noon on the second week until they are dropped off for the start of school at the end of Spring Break.

b. Winter Break:

i. Starting with claimant in 2024, and then alternating each year thereafter, one party will have parenting time with the children from after school at the start of the Winter Break until noon on Christmas Day;

ii. The other party will have parenting time with the children for an equivalent amount of time; and

iii. The parties will share equally the remaining parenting time until the children are dropped off for the start of school at the end of the Winter Break.

c. Summer Break:

i. Starting with the respondent in 2024, the parties will have parenting time with the children for alternating one week periods starting after school at the start of the Summer Break with the exchanges taking place on a day and time to be agreed to, or absent agreement on Fridays at 9:00 a.m. subject to each party having one two week block with the children in July or August;

ii. The parties will exchange their proposed two week blocks of time by May 1 of each year and use their best efforts to reach agreement on the proposed two week blocks. In the event they do not agree, each party will have the right to their proposal in alternating years, starting with the claimant in 2024;

d. The claimant may travel with the children to California during his Holiday Parenting Time without the written consent of the respondent,

2024 BCSC 189 (CanLII)

but he will inform the respondent of the travel and provide her with an itinerary and flight details as soon as he makes those arrangements in advance of the travel;

e. Otherwise, each party will require the consent of the other to travel with the children outside of British Columbia, which consent must not be unreasonably withheld;

f. Each party is required to advise the other of any travel with the children outside of the Lower Mainland for more than 48 hours;

g. Each party will cooperate with the other in completing any necessary documents and taking all necessary steps to ensure the children's Canadian passports remain valid; and

h. The claimant will keep the children's passports for safekeeping, except when they are travelling with the respondent.

Guardianship and Parental Responsibilities

[230] The parties agree they are both guardians. The respondent asks that she be solely responsible for the children's health care. The claimant seeks final decision-making with respect to all parental responsibilities in the event the parties cannot agree. Otherwise, they seem to agree that the parental responsibilities enumerated in s. 41 of the *FLA* should be allocated to each of them.

[231] Despite their capacity for good, if not excellent, direct parenting of the children, I am concerned about how the parties will approach joint decision-making in the exercise of parental responsibilities.

[232] In my view, it is not in the children's best interests for the respondent to have sole responsibility for the children's health care or the claimant to have final decision-making authority regarding all areas of parental responsibility.

2024 BCSC 189 (CanLII)

2024 BCSC 189 (CanLII)

[233] The parties have had significant conflict related to appointments for the children and arrangements for counselling, and I have expressed concern about the claimant's behaviour during the antibiotic incident. In order to motivate both of them to engage reasonably and reach agreement, I have decided to allocate final decision-making authority regarding particular areas of responsibility to each of them. As set out below, the respondent will have final decision-making authority about a significant health care decision if the parties cannot agree, except for decisions related to counselling for the children. Given the respondent's level of hostility and intense reactivity to the claimant, her past history of complaints to the police and MCFD, and the claimant's strong focus on protecting the children's emotional well being, he will have final decision-making authority with respect to any counselling or psychological treatment for the children. The claimant will also have final decision making authority, in the event the parties cannot agree, on significant educational issues. Further, each party will have final decision making authority, when the other party propose an extracurricular activity that would occur during their parenting time. To be clear, each party will make day to day decisions about the children which may involve decisions about their health and related to education. when they are in their care. Before either party exercises their power to make a final decision they must engage in meaningful consultation with the other and make their best efforts to reach agreement.

[234] Accordingly, I grant the following orders:

1. Pursuant to s. 39 of the *FLA*, I declare both parties are guardians of the children.

2. Pursuant to ss. 40 and 41 of the *FLA*, all of the enumerated parental responsibilities in s. 41 are allocated to each party.

3. The parties will exercise their parental responsibilities as follows:

    a) Each party will make day to day decisions affecting the children including day to day decisions about health care and education and

have day to day care, control and supervision of the children during their parenting time;

b) Each party must advise the other of any significant matters affecting the children that arise during their parenting time;

c) Each party must discuss with the other any significant decisions concerning the children including decisions related to their health, education, extracurricular activities if it impacts on the other party's parenting time, general welfare and other matters;

d) Neither party may change the children's school without the consent of the other or a court order;

e) In the event the parties cannot agree on a significant decision despite meaningful consultation and their best efforts:

(i) the claimant will make final decisions regarding the children's education, and the respondent may apply to the Court for directions if she considers the claimant's decision contrary to the best interests of the child;

(ii) the respondent will make final decisions regarding children's health except for counselling or psychological services, and the claimant may apply for directions to the Court if he considers the respondent's decision contrary to the best interests of the child;

(iii) regarding any counselling or psychological services for the children, the claimant will make final decisions and the respondent may apply to the Court for directions if she considers his decision contrary to the best interests of the child; and

(iv) the claimant will make the final decision if the respondent proposes an extracurricular activity that falls within his parenting

2024 BCSC 189 (CanLII)

time and the respondent will make a final decision if the claimant proposes an extracurricular activity that falls within her parenting time[2].

f) Absent the written consent of the parties or court order, the children will reside with each party in the municipalities of North or West Vancouver, BC;

g) Each party has the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers; and

h) In the event of the death of one party, the surviving party will be the only guardian of the children.

[235] To clarify further about health care for the children, each party will be responsible for arranging any health care the children may need during their parenting time, including urgent medical care. Each party must immediately inform the other of any medical emergencies and any health care appointments they make for the children. Both parties are entitled to attend any medical appointments for the children. The parties must discuss and attempt to reach agreement on any significant health care decisions for the children. It is only in the event they cannot agree on a significant decision that the respondent will make the final decision, unless that decision relates to counselling, in which case the claimant has the power to decide.

[236] While my decision about parenting time and parental responsibilities should end any incentive to focus on the conduct of the other, I anticipate that absent therapeutic intervention, effective co-parenting will be very challenging for these parties, given their deep seated mistrust and hostility toward one another.

[2] In the absence of evidence suggesting the children' religious or cultural upbringing and the balance of the enumerated parental responsibilities have been a source of conflict, I make no further orders regarding final decision-making authority.

2024 BCSC 189 (CanLII)

[237] At the original end of the trial, each party expressed some willingness to participate in co-parenting counselling. By the time of the continuation in December 2023, however, the claimant was not prepared to attend any appointments with the respondent, describing himself as emotionally and psychologically exhausted by her and the litigation. The respondent remained willing to attend.

[238] I have little doubt the children are well aware and adversely impacted by the parties' very negative and charged feelings for one another.

[239] I am strongly of the view that the parties require some form of co-parenting counselling to assist them in establishing appropriate communication and the business like relationship that is necessary to effectively share parenting.

[240] Consequently, I order the parties to attend no less than 10 sessions of co-parenting counselling. The sessions should begin as soon as practicable. The claimant will not be required to attend in person sessions with the respondent, absent his consent but he will be required to communicate with the respondent and otherwise attend as recommended by the therapist. The therapist will be selected by the claimant providing the respondent with two recommendations and the respondent will choose from one of the two. The therapist will be provided with a copy of my reasons.

[241] The cost of the counselling will be equally shared by the parties.

[242] I also make the following conduct orders:

1. Each party will:

   (a) put the best interests of the child(ren) before their own interests;

   (b) encourage the child(ren) to have a good relationship with the other parent and speak to the child(ren) about the other parent and that parent's partner in a respectful manner;

2024 BCSC 189 (CanLII)

(c) maintain polite, respectful communications with each other, refraining from any negative or hostile criticism or arguments in front of the child(ren);

(d) ensure that all of their written communication is respectful, factual and brief; and

(e) not:

(i) question the child(ren) about the other parent or time spent with the other parent beyond simple conversational questions; and

(ii) discuss with the child(ren) any inappropriate adult matters.

2. The respondent will direct her family members to refrain from any negative comments about the claimant and his current partner; and ensure her mother does not pick up or drop off the children at school or at other locations where the claimant or his partner might be expected to attend.

[243] I would encourage but do not order the parties to establish an electronic calendar for the children that is accessible and kept up to date by each of them.

Child Support

[244] Under section 147 of the *FLA* each parent has a duty to provide support for their child. Section 150(1) requires the amount of a child support order to be determined in accordance with the *Guidelines*.

[245] A key objective of the *Guidelines* is to establish a fair standard of support for children that ensures they continue to benefit from the financial means of both parents after separation. The *Guidelines* require payment of the “table” amount of child support based on the payor’s annual income, and an additional amount, if any, for extra or specified expenses under s. 7, based on both parents’ annual incomes.

[246] The respondent proposed the parties’ *Guidelines* income be freshly determined starting July 1, 2021, when the interim without prejudice support orders

2024 BCSC 189 (CanLII)

were made, based on their incomes in the previous year. Given the significant drop in the claimant's employment income in 2022, this approach would result in higher *Guidelines* incomes for the claimant in 2021 and 2022 and therefore higher support payments until 2023. I am able and therefore view it as more appropriate to determine the parties' *Guidelines* incomes for 2021 and 2022 based on the incomes they actually received in those years.

[247] Section 16 of the *Guidelines* provides that each parent's annual income is determined using the sources of income set out under the heading "Total Income" in the Canada Revenue Agency ("CRA") T1 General form, namely the income set out at line 150, adjusted in accordance with Schedule III of the *Guidelines*.

[248] Under s. 19 of the *Guidelines*, income may to be imputed in a broad range of circumstances, including where a payor is intentionally under employed or unreasonably deducts expenses from their income. Section 19(2) specifies that the reasonableness of an expense deduction is not solely governed by whether it is permissible under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[249] The respondent asks that additional income be imputed to the claimant's current employment income.

[250] The test for imputing income based on intentional underemployment is one of reasonableness. The court considers the party's capacity to earn income in light of their age, education, health, work history, and work availability and whether they have taken reasonable steps to obtain employment commensurate with these factors: *Van Gool v. Van Gool*, 1998 CanLII 5650 (C.A.), supplementary judgment 1999 BCCA 188.

[251] Section 9 of the *Guidelines* provides that if each party exercises not less than 40% of parenting time over the course of a year, the amount of the child support order must be determined by taking into account the amounts set out in the applicable tables for each party, the increased costs of shared parenting

2024 BCSC 189 (CanLII)

arrangements, and the conditions, means, needs and other circumstances of each party and the child.

Claimant's *Guidelines* Incomes

[252] The claimant gave detailed evidence about his employment history. As indicated, he worked in a number of high level sales positions for medical supply/manufacturing companies prior to completing his MBA. In cross-examination, he agreed all of them paid not less than $150,000. According to both parties, they also involved very long hours and significant travel.

[253] During his MBA, the claimant met the CEO of his last employer, a company based in Langley focused on industrial construction. In 2019, the claimant began working there as the vice president of business development, which was his first executive position. That year, he earned employment income of $250,000 from that position as well as two previous positions. In 2020, he earned $252,000, which included unused vacation time, as well as a bonus. The claimant identified his base salary as around $200,000.

[254] The claimant described the company losing a lot of business due to the Covid-19 pandemic. In May 2021, he was terminated, three months after the vice president of operations was terminated, something he had never experienced before. After the termination, the claimant received severance pay up to the end of August or September 2021.

[255] His 2021 employment income was $217,000. He also received $43,907 in RRSP income, which the respondent concedes should not be included in his *Guidelines* income.

[256] The claimant expressed significant frustration with the respondent and her counsel for alleging he had orchestrated the termination to reduce his support obligation before the trial. The claimant maintained he would like to be earning a much higher income, identifying his current income and the associated increase in his credit card debt as difficult and stressful for him.

2024 BCSC 189 (CanLII)

[257] The claimant testified to applying for 270 jobs after losing his previous position. Since he began working for the BBB as the director of sales and business development, in 2021 he has continued to apply for jobs. His documents include more than 300 pages of job applications. Not cross-examined about any of the applications, he also gave unchallenged evidence that during his job search, he learned the executive positions he is qualified for, in the medical, optical and pharmaceutical fields, are based in Toronto or the United States. Finding a position here is further confounded by his limited experience in an executive role.

[258] In addition to his present job, the claimant is on the board of directors and chairs particular committees for two charities. In April 2022, he started his own business called THE SALES LAB. The website was launched in May or June 2022. Essentially, THE SALES LAB offers sales audits to other businesses. I accept it has not yet generated any revenue.

[259] In 2022, the claimant earned $90,930 in employment income. He identified his current salary as unchanged.

[260] As indicated, the claimant's line 150 income for 2021 was approximately $217,000. He too did not claim any portion of the rental income he received that year. However, the respondent did not ask that it be included in his income for 2021. Accordingly, I find $217,000 to be his 2021 *Guidelines* income.

[261] The respondent suggests that an income in the range of $100,000 to $125,000 should imputed to the claimant currently. I presume this would be her position for 2022 based on his line 150 income in that year.

[262] Obviously bright, capable, hardworking, dynamic and highly motivated, the claimant's income may well increase again in the future, through his business and or different employment. In addition to the limits of the local job market for someone with his experience and skill set, he identified the time and effort involved in representing himself as a barrier to investing time in his business.

2024 BCSC 189 (CanLII)

[263] Although, the claimant earned over twice as much employment income in 2019, 2020 and 2021 than he did in 2022 and historically earned about 50% more, based on his unchallenged evidence, I am not persuaded he has been underemployed since his termination in 2021. I accept he has been more than diligent in searching for suitable positions and the confluence of his work experience and the Vancouver market as reflected in his evidence, have prevented him from finding a higher paying position. Going forward, given the regular and holiday time parenting schedule I have ordered, I also accept it is reasonable for him not to pursue the more lucrative employment he had in the past that required frequent travel.

[264] Accordingly, I decline to impute income to the claimant and find his 2022 *Guidelines* income and his current *Guidelines* income to be $90,930.

[265] Based on his 2021 *Guidelines* income, the claimant's monthly child support obligation for July through December 2021 was $2,949.60. Based on his 2022 *Guidelines* income, his monthly child support obligation from January 1, 2022 to the present is $1,401.39.

Respondent's *Guidelines* Incomes

[266] The respondent described working full-time as a nutritionist after she graduated in May 2013 until her first maternity leave in December 2014. She returned to work in December 2018, starting with a casual position at Richmond Hospital. She also worked casually at St. Paul's Hospital.

[267] In 2019, the respondent earned a total income (from employment) of $30,125. In 2020, she earned employment income of $28,045 and other income of $10,000, related to payments to health care workers during Covid-19.

[268] The respondent secured a permanent position at Fraser Health in October 2020. Her work schedule is Saturdays, Sundays, Mondays and Wednesdays. She also continues to work causally at St. Paul's Hospital. In 2021, her employment

2024 BCSC 189 (CanLII)

income was $40,938. Her employment income in 2022 was $42,824, which she says represents full-time hours.

[269] As I have said, after the separation the respondent received part and then starting in August 2021 all of the rental income, which she has not claimed in her income tax returns. The respondent gave detailed evidence about entering into various tenancy agreements starting in or about April 2021. One suite was rented for $1,550 per month and the other for $1,400. She also testified to being required by the municipal government to dismantle the $1,400 suite in 2022 because it was "illegal", which involved some expense.

[270] It is unclear how much rental income the respondent received in 2021. The claimant identifies his share as $9,800. Consistent with not claiming his share either, he has not asked that any of the rental income the respondent received in 2021 included in her 2021 *Guidelines* income.

[271] Accordingly, I find the respondent's *Guidelines* income for 2021 was $40,938.

[272] The respondent's most recent form F8 Financial Statement filed January 20, 2023 deposes to gross rental income of $26,000 and a net loss of $18,728 which she purports to deduct from her employment income of $27,184, resulting in a *Guidelines* income of $12,850. In cross-examination, the respondent testified that $27,184 was her base salary, although it is significantly lower than what she actually earned in 2021 or 2022 and the net loss of $18,727 results from deducting the mortgage interest, property taxes, house insurance, home security and other expenses.

[273] The claimant suggests the respondent's *Guidelines* income for 2022 is $61,442 based on her employment income and rental income of $18,600. Apart from identifying her 2021 income as $38,045 and her 2022 income as $40,938 and defending the deduction of the net loss of rental income from her employment income, the respondent made few if any other submissions about her *Guidelines* incomes.

2024 BCSC 189 (CanLII)

[274] There is no dispute that she received all of the rental income in 2022, which in my view must be included in her 2022 *Guidelines* income, less reasonable expenses.

[275] Sections 19(1)(g) and (2) of the *Guidelines* require the reasonableness of expenses claimed against gross rental income to be assessed in much the same way as business expenses: *Barry v. Davis*, 2021 BCSC 546. Although the party seeking to impute income bears the onus of proof, under s. 19(1)(g), the initial evidentiary burden is met by showing the other party has deducted (business) expenses: *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at para. 140; and *C.M. v. V.M.*, 2016 BCSC 2144 at paras. 39–40. The onus then shifts to the claiming party to demonstrate the expenses are reasonably deducted from income for child support purposes: *C.M.* This requires the claimed expense to not only be reasonable, but also to have a legitimate business purpose. What this means is personal expenses, that is expenses that provide a personal benefit and/or constitute an ordinary living expense, should be added back into the other party's income: *D.M.B.*; *Kowalewich v. Kowalewich*, 2001 BCCA 450.

[276] The respondent's gross rental income of $26,000 and the net loss of $18,727 indicate she is claiming expenses of approximately $45,000, consistent with all of mortgage payments in 2022, $34,000, and all of the property taxes of approximately $7,000, along with other expenses.

[277] This approach is unreasonable, if not also impermissible. In my view, reasonable expenses are limited to a proportionate share of the utilities and other services such as internet and cable if they are not included in the rent, maintenance, repairs and other costs related to the suite, such as securing and perhaps ending a tenancy. Although a proportionate share of mortgage interest and property taxes may be permitted for income tax purposes, they are expenses the respondent incurs regardless of the suite, and therefore properly included in income for child support purposes.

2024 BCSC 189 (CanLII)

[278] Without evidence that would allow me to calculate the precise cost of what would be reasonable, I assess the reasonable rental expenses at 15% of the gross rental income.

[279] Accordingly, the rental income portion of the respondent's *Guidelines* income for 2022 is $22,000 and her *Guidelines* income is $64,824 ($42,824 + $22,000). Starting in 2023, if she continues to receive rental income of $1,550, the rental income portion of her total income will reduce to $15,810.

[280] Based on the claimant's 2021 *Guideline* incomes, his monthly child support obligation from July 1, 2021 up to and including December 1, 2021 is $2,949.60 for a total obligation of $14,748.00.

[281] For 2022 onward, based on his 2022 *Guidelines* income, the claimant's monthly child support obligation is $1,401.39.

[282] I trust the parties can determine the amount of any arrears of child support owing to the respondent since July 2021, based on 2021 and 2022 *Guidelines* incomes I have found.

[283] Given the children will be in the claimant's care not less than 40% of the time going forward, s. 9 of the *Guidelines* is engaged. Absent any evidence or submissions regarding the factors to be considered, child support will be payable based on table amounts required for the claimant's 2022 *Guidelines* income and the respondent's 2023 Guidelines (income employment income of $42,824 plus $15,810 for a total of $58,634. Accordingly, their respective monthly child support obligations are $1,401.39 for the claimant and $910.02 for the respondent, resulting in a monthly set off payment from the claimant to the respondent of $491.37.

Section 7 Expenses

[284] The claimant seeks an order that the children's future extracurricular activities should be agreed to before one parent can seek contribution from the other, along with an order the parties pay in proportion to their incomes. Although the

2024 BCSC 189 (CanLII)

respondent's evidence includes a binder of receipts related to the children's activities, counselling for the children and day camps (Exhibit 10), she made no submissions in support of a claim for the costs or the total amount of those costs.

[285] Special or extraordinary expenses are provided for in s. 7(1) of the *Guidelines*, which reads:

> **7. (1)** In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> **(a)** child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> **(b)** that portion of the medical and dental insurance premiums attributable to the child;
>
> **(c)** health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
>
> **(d)** extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
>
> **(e)** expenses for post-secondary education; and
>
> **(f)** extraordinary expenses for extracurricular activities.

[286] Section 7 expenses must be necessary based on the child's best interests and reasonable relative to the means of the parents and the family's spending pattern prior to separation. In assessing "means", the court may consider the parties' capital assets, income distribution, debts, third-party resources, access costs, support obligations, receipt of support, and any other relevant factors (*Delichte v. Rogers*, 2013 MBCA 106, 37 R.F.L. (7th) 81 at para. 38).

[287] Expenses claimed for extracurricular activities under ss. 7(1)(d) and (f) must also fall under the definition of "extraordinary" set out in s. 7(1.1):

2024 BCSC 189 (CanLII)

> **(1.1)** For the purposes of paragraphs (1)*(d) and (f)*, the term ***extraordinary expenses*** means
>
> > **(a)** expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
> >
> > **(b)** where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
> >
> > > **(i)** the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
> > >
> > > **(ii)** the nature and number of the educational programs and extracurricular activities,
> > >
> > > **(iii)** any special needs and talents of the child or children,
> > >
> > > **(iv)** the overall cost of the programs and activities, and
> > >
> > > **(v)** any other similar factor that the court considers relevant.

[288] The respondent's evidence and the receipts satisfy me that the children attended counselling from 2022 until the claimant revoked his consent in May 2023. Although the respondent registered them without his involvement, which will not be permissible in future, their counselling qualifies as a health related expense under s. 7(1)(c). I order the claimant to pay his proportionate share of the cost of the children's sessions prior to cancellation. I trust the parties can agree on the total amount of that cost.

[289] The receipts for the children's activities include the cost of swimming lessons, piano lessons, basketball, martial arts, ski passes and ski gear. Absent evidence or submissions about how the activity expenses fall within the scope of s. 7(1.1) and the claimant's evidence he was not consulted about the children's participation in various activities to date, I am not prepared to make an order that the claimant contribute to the activity expenses included in Exhibit 10.

2024 BCSC 189 (CanLII)

[290] As I have said, the claimant repeatedly complained about the respondent registering the children for activities and scheduling appointments during his parenting time, which has been much more limited than the respondent's. Certainly, she continued to maintain a heavy schedule of activities for the children mostly without the claimant's input. The respondent emphasized that she organized certain activities, such as spring break and summer day camps, in part because of her work schedule. My impression is the parties also have different views about how best to structure the children's time when they are not at school.

[291] During the trial, I encouraged the parties to recognize that as the children get older, it will be less and less feasible to compartmentalize their activities and a greater degree of cooperation if not collaboration will be required.

[292] Basketball for R is one activity that occurs during both parties' time. As I understand it, the claimant remains agreeable to facilitating R's participation in basketball during his parenting time despite his complaints at the continuation of the trial.

[293] I order each party to contribute to the cost of the most financially significant extracurricular activity for each child in proportion to their incomes. Otherwise, the activity costs with be borne by the parent who registers the child for that activity, absent consent.

[294] I also order each party to pay the other their proportionate share of qualifying s. 7(1) (a) through (d) expenses, within ten days of being provided with proof of payment.

[295] Finally, addressing the need for ongoing disclosure I grant the following order:

1. For as long as either of the children is eligible for child support under the *FLA*, each party will provide the other with a copy of their income tax return for the previous year, including all attachments, no later than July 1 each year; and copies of financial statements and corporate tax returns for any companies in which they hold a controlling interest, and any notice of

2024 BCSC 189 (CanLII)

> assessment or reassessment provided by the Canada Revenue Agency, immediately upon receipt.

Spousal Support

[296] The respondent's claim for spousal support is based on compensatory and non-compensatory grounds. Although, the claimant has not disputed that she is entitled to spousal support, he does appear to dispute the nature and strength of her entitlement.

Legal Framework

[297] Under s. 161 of the *FLA*, a spouse's entitlement to spousal support is determined by considering all of 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.

[298] Animated by the first and second objectives, compensatory support is intended to provide a spouse with redress for an economic disadvantage arising from the marriage or its breakdown (such as diminished earning capacity and lost career opportunities from taking on childcare responsibilities) *or* an economic advantage conferred upon the other spouse (such as enhanced earning capacity through career development): *Chutter v. Chutter*, 2008 BCCA 507 at para. 51. Both are not required.

[299] If compensatory support is not justified, need alone may be sufficient to establish an entitlement to non-compensatory support, which is intended to narrow the gap between the means and needs of the spouses upon marriage breakdown as contemplated by the third and fourth objective in s. 161 of the *FLA*. The concept of

2024 BCSC 189 (CanLII)

need, however, extends beyond the basic necessities of life and varies with the circumstances of the parties: *Chutter* at para. 55; *H.C.F. v. D.T.F.*, 2017 BCSC 1226 at para. 212; *Loesch v. Walji*, 2008 BCCA 214 at para. 39. The same is true of self-sufficiency.

[300] The jurisprudence recognizes that compensatory and non-compensatory support share the goals of equitable sharing of the economic consequences of a spousal relationship or its breakdown and narrowing the gap between the needs and means of the spouses. Viewed as a joint endeavour, the longer the spousal relationship, the "greater will be the presumptive claim to an equal standard of living on dissolution": *Moge v. Moge*, [1992] 3 S.C.R. 813 at para. 84.

[301] Once entitlement is established, the amount and duration of spousal support is determined pursuant to s. 162 of the *FLA*:

> **162** The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:
>
> (a) the length of time the spouses lived together;
>
> (b) the functions performed by each spouse during the period they lived together;
>
> (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[302] "Means" has been interpreted to include all capital and other sources of income: *Leskun v. Leskun*, 2006 SCC 25 at para. 29.

[303] The *Spousal Support Advisory Guidelines* [*SSAG*] become relevant at this stage. Guidelines, as opposed to law, they are nonetheless an important tool in deciding on an appropriate award: *Bozak v. Bozak*, 2008 BCSC 1458 at para. 37.

[304] The *SSAG* use formulas that produce ranges for the amount and duration of support within the legal framework provided by the *DA* and the *FLA*, as well as the case law. The two basic formulas are the without child support and with child support formulas, where there is a concurrent child support obligation. When the with child

2024 BCSC 189 (CanLII)

support formula applies, as it does in this case, entitlement to spousal support is typically compensatory.

[305] Under the *SSAG*, the duration of support is based on the longer period of time that results from applying the length of the marriage test and the age of the child test. The first results in support lasting between one half and one year for each year of marriage. The age of the child test results in a range from the number of years until the youngest child starts full-time school to the number of years until the youngest child finishes high school..

[306] Several factors are considered when determining where a particular award of spousal support should fall within the ranges for amount and duration. These include the strength of the recipient's compensatory claim and their need, as well as the age, number, and any special needs of the children, and the payor's needs and ability to pay, which can be affected by debt payments: see Chapter 9 of the *Spousal Support Advisory Guidelines: The Revised User's Guide English Edition*, (Ottawa: Department of Justice, 2016) [*Revised Guide*].

Entitlement

[307] In asserting she has a strong compensatory claim, the respondent argues the support she provided to the claimant from the outset of the marriage factors into the strength of her entitlement. She relies on their short term move to Toronto, which she suggests delayed the start of her post-secondary education, along with her efforts to encourage and facilitate the respondent's return to university, and her responsibility for managing the household, their tenants and international students before their children were born, as well as her role as their primary caregiver.

[308] Although I am satisfied the respondent is entitled to compensatory spousal support, and she was probably always more responsible for household chores than the claimant, in my view her entitlement did not arise until the onset of her role in caring for the children. I find in other words, it was only at that stage, that she began to suffer an economic disadvantage or confer an economic advantage on the claimant, as a result of the role she played in the marriage.

2024 BCSC 189 (CanLII)

[309] The respondent's post-secondary education began with English language training in 2009. I do not accept the parties' short term move to Toronto presented a barrier to taking this initial step. It is also clear that the respondent struggled for some time to decide on a career path. She chose to become a nutritionist, a less lucrative occupation than some of the other options she considered such as dentistry, because of her interests, not her role in the marriage. She remained a student until May 2013, supported by the claimant, while he worked full-time and attended university himself. After completing her program, the respondent worked full-time as a nutritionist until her first maternity leave.

[310] From 2015 until the end of 2018, the respondent remained at home caring for R, and then both R and A, as well as managing the household. During this time, the claimant worked very long hours and travelled for work, unrestrained by child care or housekeeping responsibilities. Once he started his MBA, the respondent's role facilitated his completion of the program while he continued to work full-time. I also accept that obtaining an MBA enhanced his earning capacity.

[311] The parties' respective roles continued until after the separation, although the respondent's work schedule prior to separation, meant the claimant was primarily responsible for the children on weekends and I accept he also engaged in household chores.

[312] I assess the strength of the respondent's compensatory entitlement as approaching moderate, given the relatively short duration of her child care/housekeeping role, during the marriage and completion of her professional education and full time work experience prior to taking on that role. Until the respondent began receiving the rental income and the claimant started his current job, which involved a significant drop in salary, she was also entitled to support on non-compensatory grounds.

Quantum and Duration

[313] Based on the parties' 2021 *Guidelines* incomes and applying the with child support formula, the DivorceMate calculation results in a range for monthly spousal

2024 BCSC 189 (CanLII)

support from $2,640 (low) to $3,247 (mid) and $3,889 (high) for an indefinite (unspecified) duration, subject to variation or review, with a minimum duration of 6.5 years and a maximum duration of 13 years from the date of separation. Any amount along the range provides the respondent with more of the net disposal income ("NDI") than the claimant, in light of his child support obligation.

[314] The DivorceMate calculation for 2022 results in a range of zero, in light of the claimant's much lower and the respondent's higher *Guidelines* incomes, along with the same range for duration as 2021. Even with zero spousal support, however, given the claimant's child support obligation, the respondent continues to receive more than 50% of the NDI.

[315] Based on shared parenting going forward and the parties' current *Guidelines* incomes, the DivorceMate calculation shows a range in monthly spousal support from zero to $339, and again the same range for duration as 2021. An award of $339 at the high end of the range leaves each party with 50% of the NDI.

[316] The *SSAG* and the *Revised Guide* tell us that in choosing a location within the range regarding the amount of spousal support, the mid-point should not be treated as the default outcome. Nor is it the norm to reserve the lower and upper ends of the range for exceptional cases. The authors suggest with child support cases should more often be resolved at the upper end of the range because the formula already adjusts for "average" ability to pay: Chapter 9, p. 45 of the *Revised Guide*. They also comment, however, that in shared custody cases, the default outcome in "bi-nuclear" cases (no new partners or new children) should be spousal support that generates a 50/50 split of NDI.

[317] Bearing in mind the nature and strength of the respondent's entitlement, the parties' needs, the claimant's ability to pay, and the resulting NDI of more than 50%, I am satisfied that from July to the end of December 2021, the appropriate monthly spousal support amount is at the low end of the range, or $2,640. Until in or about August 2021, the claimant paid the mortgage as well as household bills, although each party received rental income from one of the two suites. Once the respondent

2024 BCSC 189 (CanLII)

became responsible for the mortgage and household bills, in August 2021, she was also receiving the rental income, which she did not claim on her income tax return and has not been included in her Guidelines income for 2021.

[318] Accordingly, I grant an order that the claimant pay the respondent $15,840, based on monthly spousal support of $2,640 from July 1, 2021 up to and including December 1, 2021.

[319] The claimant is not required to pay any amount in monthly spousal support in 2022 and until the date of judgment, given the parties' relative incomes and the claimant's child support obligation, although the respondent's entitlement to spousal support has continued.

[320] Prospectively, I am satisfied that monthly spousal support at the high end of the range or $339 per month is appropriate, given the respondent's ongoing compensatory entitlement, the parties' "shared custody" arrangement, and the claimant's low income relative to his history of earnings.

[321] Therefore, from the date of judgment and on the first of each month thereafter until further order of the court or written agreement of the parties, the claimant will pay the respondent monthly spousal support of $339.

[322] Addressing the duration of the spousal support order, as I have indicated the DivorceMate calculations show an indefinite duration along with a maximum of 13 years from the date of separation, reflecting the *SSAG's* length of marriage and age of child tests. Recognizing the modest to moderate as opposed to strong entitlement to compensatory support, along with the lack of any payment in 2022, I fix the maximum duration of spousal support at 10 years from July 1, 2021.

[323] The Interim Support Order and the Mayer Order related to the arrears of interim child and spousal support have no effect given my support final support order.

2024 BCSC 189 (CanLII)

Property and Debt Division

[324] The primary disputes regarding the division of property and debt involve the claimant's excluded property claim based on funds he says his mother gifted to him and he contributed to the purchase of the former family home; and a family debt claim based on a renovation of the former family home his father completed before the separation. The claimant's notice of family claim also included a claim for an unequal division of family property and family debt, which he did not pursue at the trial. He did pursue a disputed claim for occupation rent. The parties also significantly disputed a minor issue, related to the items kept in their joint safety deposit.

Legal Principles

[325] Part 5 of the *FLA* governs the division of property and debt after separation, based on an excluded property regime that defines property as family property or excluded property. The relevant principles are:

1. Spouses are entitled to family property and are responsible for family debt regardless of their respective use or contribution (s. 81(a));

2. On separation, each spouse has a presumptive right to an undivided half interest in all family property as a tenant in common and is equally responsible for family debt (s. 81 (b);

3. Any real or personal property owned by at least one spouse at separation is family property, subject to s. 85 which identifies property excluded from family property (s. 84);

4. Excluded property includes property acquired by a spouse before the relationship began and gifts from a third party (s. 85(1)(a) and (b.1)), and property derived from property or the disposition of property referred to in ss. 85(1)(a) through (f);

2024 BCSC 189 (CanLII)

5. The party claiming that property is excluded bears the onus of proving it is excluded (s. 85(2); *Pisarski v. Piesik*, 2018 BCCA 326);

6. Family debt includes all financial obligations incurred by a spouse at separation and after separation if incurred for the purpose of maintaining family property (s. 86);

7. Family debt and family property are presumptively valued as of the date of the trial, absent an agreement that provides otherwise (s. 87);

8. An unequal division of family property, family debt or both may be ordered if it would be significantly unfair to divide them equally based on the considerations in s. 95(2) and (3); and

9. The significant unfairness threshold is a high bar. It requires unfairness that is "compelling or meaningful having regard to the factors set out in s. 95(2)", or something objectively unjust, unreasonable or unfair in an important or substantial sense: *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44; *V.J.F. v S.K.W.*, 2016 BCCA 186 at para. 10; and *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 41 and 42.

Safety Deposit Box Incident

[326] Before turning to the financially significant property and debt claims, I will discuss an incident that occurred at the Royal Bank of Canada ("RBC") on February 8, 2021 referenced earlier in these reasons.

[327] The claimant testified that on the advice of a friend and given his former brother-in-law's Tag Watch was taken after his separation from the respondent's sister, he went to the RBC where the parties had a joint safety deposit box ("SDB") with the intention of preparing an inventory of the contents. After the SDB was opened, the respondent appeared and according to the claimant, "made a scene". She asked him why he was taking the jewelry. He told her he was just taking pictures, which he did. There is no dispute his pictures show all of the contents laid

2024 BCSC 189 (CanLII)

out on a table. The parties appear to agree some of the items were gifts to each of them. Others were gifts to the children. A diamond necklace and bracelet, kept in a long rectangular box, were a wedding gift to the respondent from the claimant's family.

[328] The claimant described the respondent leaving the bank abruptly. After that, he packed everything up. When he opened the large rectangular box there was nothing in it except a single earring. He contacted his counsel who wrote to the respondent's lawyer.

[329] The respondent testified the claimant was acting very oddly that morning. Without explaining how this could be, she said she was advised he would probably attend the bank that day and so she went there after dropping A at preschool.

[330] There is no dispute that only the claimant had attended the SDB before. In describing what happened, the respondent referred to taking pictures, not touching anything and the claimant grabbing "stuff". A number of times, she "swore on my kids' life", stating "my kids are my word" that she did not take anything and the claimant knows he did.

[331] The respondent also gave confusing, contradictory evidence about the value of the diamond necklace and bracelet. In direct examination, she said that Costco sells the necklace for $35,000. Cross-examined about this, the respondent said her necklace cost $18,000 because she needed white gold. She also said she went to Costco a few days earlier and saw the bracelet alone was selling for $9,000. She denied knowing what the value of her diamond jewelry was when she received it, but she also testified that she went to Costco with the claimant's family when they bought it for her and it cost $35,000.

[332] There is no other evidence about the value of the necklace or the bracelet.

[333] Addressing various gold coins in SDB, the respondent indicated her mother had given her all of the Iranian coins, although she also said she received some from a friend. Questioned about previously suggesting the gold coins were worth

2024 BCSC 189 (CanLII)

$35,000, the respondent said she was referring to gold coins purchased with her parents at Costco. She also acknowledged the claimant had received some gold coins as gifts.

[334] A letter sent by the respondent's counsel dated March 1, 2021 attaches photographs of the items in the SDB and identify the items the respondent was claiming belonged to her (Exhibit 19, Tab 2).

[335] At the conclusion of the trial, the claimant offered the respondent those same items, except the missing diamond bracelet and necklace.

[336] In light of my assessment of the parties' credibility and their evidence regarding the SDB incident, I accept the missing diamond jewelry is not in the claimant's possession.

[337] Accordingly, as he suggested, I order him to provide the respondent with the items she identified as hers in the photographs at Exhibit 19, Tab 2.

Excluded Property Claim

[338] The claimant claims $170,000 of the net value of the former family home is his excluded property, based on a gift he says he received from his mother and then contributed to the purchase of the former family home.

[339] The respondent argues the claimant has failed to establish the exclusion on several grounds.

[340] As I have indicated, excluded property includes, among other things, a gift to a spouse from a third party; and property derived from such property (s. 85(1)(a), (b.1), and (g) of the *FLA*). To establish the exclusion, the claimant must prove on a balance of probabilities that his mother gifted $170,000, he contributed the funds to the purchase of the former family home and he did not intend to gift them to the respondent when he contributed them *(*see: *Shih v. Shih*, 2017 BCCA 37, paras. 40 and 44, and *Beaverstock v. Beaverstock*, 2011 BCCA 413). In the event his intention

2024 BCSC 189 (CanLII)

at the time of the contribution cannot be determined, the presumption of advancement applies and the exclusion is lost.

Authorities

[341] With respect to proving the exclusion at the last stage, *Venables v. Venables*, 2019 BCCA 281, affirmed that the intention of the spouse transferring “ownership” of the excluded property at the time of the transfer is critical to determining whether the property remains excluded or becomes family property. The same is true when a spouse contributes excluded funds to a joint purchase.

[342] In *Pisarski v. Piesik*, 2019 BCCA 129, the parties purchased a house in their joint names shortly after they married with funds each of them contributed. The trial judge concluded the wife’s funds were excluded but they became family property when she contributed them to purchase the jointly held house. Concluding each party intended to gift their respective contributions, he noted they had pooled funds to acquire the house without taking steps to document that the wife’s contribution would be treated as separate. In dismissing the appeal, Justice MacKenzie described the contribution as a gift to the marriage as an “entity to which both parties belonged": *Pisarski* (C.A.) at para. 45.

[343] Similarly, in *Namdarpour v. Vahman*, 2019 BCCA 153, the Court of Appeal upheld the trial judge's conclusion that the husband’s personal injury settlement lost its exclusion and became family property. After the husband deposited the settlement funds into a joint bank account, the funds were used for a down payment on a property registered to both parties. The same joint account was also used for family purposes and both parties declared rental income from the property purchased with the settlement funds.

[344] Justice Savage remarked that depositing of funds into a joint account by itself, was not persuasive evidence of donative intent. However, the pattern of activity in the joint account along with splitting the rental income supported the finding that the husband intended to gift the funds.

2024 BCSC 189 (CanLII)

[345] In discussing the approach to determining a party's intention and the application of the presumption of advancement, Justice Savage explained:

> [40] … (1) a conclusion about intention is only to be determined after consideration of "all the circumstances" of the case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those considerations include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption [of advancement] operate.

[346] After *Namdarpour*, in *Small v. Small*, 2020 BCSC 707, Justice Horsman as she then was, interpreted the case authorities as standing for the proposition that if a party "makes no attempt to keep excluded property separate, this supports an intention to gift the property to the other spouse": at para. 108 citing *Pisarski* (C.A.) at para. 48; *Wickstrom v. Ng*, 2019 BCSC 1685 at paras. 160–161.

Relevant Evidence

[347] The claimant's mother testified to giving the claimant and his siblings $170,000 or $130,000 (USD) each in or about February 2016. She recalled the claimant telling her after purchasing the former family home that he had used the funds as part of the down payment. As a prior consistent statement, her evidence is admissible to rebut the suggestion of recent fabrication but not to prove the truth of what the claimant apparently said.

[348] The claimant's mother denied the money was a gift to both parties or discussing that with them. She also denied the suggestion that she required the claimant to repay her. After the gift, she testified, she needed about $31,000 to complete the purchase of a house. The claimant lent her $20,000 and $11,000, which she said she repaid although she was uncertain about when.

[349] Cross-examined about her relationships with each party, the claimant's mother denied there were times she was so upset with the claimant that she refused to speak to him, stating the two of them had a wonderful relationship until he got married. She also denied not liking the respondent, testifying she loved her daughter

2024 BCSC 189 (CanLII)

in law as the mother of her grandchildren. According to the claimant's mother, it was the respondent who did not like "us" and was rejecting of them, noting the claimant typically called when he was in the car or away from home. Confronted about positive behaviour by the respondent, such as driving her across the border, the claimant's mother described the respondent as softening after having children. In cross-examination, the claimant's mother also acknowledged staying with the parties at times, after indicating she never stayed at their home because the respondent did not want her there.

[350] In addition to testifying his mother gave him and not both parties $170,300 or about $130,000 (USD), by wiring it to his account, in contrast to his mother's evidence, the claimant said she did not like the respondent. He described his mother wiring the funds to his account and then converting $130,000 (USD) to gold bullion. Documents support this evidence.

[351] Maintaining the funds were put toward the purchase of the former family home in August 2016, the claimant emphasized they bought the house in a very hot market after losing out on eight prior offers. Short on funds to complete the purchase, he said, in addition to contributing his $170,000, he also borrowed money from his brother-in-law and the respondent's sister which was repaid, consistent with evidence of a cheque. The parties did not sell the Coquitlam home until May 2017. From the $1,234,672 they received, they paid the mortgage of $1,007,474, leaving $227,198.

[352] Prior to purchasing the former family home, the parties refinanced the Coquitlam house. The claimant denied receiving enough money from the refinancing to make the $170,000 unnecessary. In addition to a deposit of $150,000, the parties made a down payment of $500,000 and paid about $41,000 in property transfer tax. Cross-examined about a document request made at his discovery related to the source of the funds used to purchase the former family home, the claimant indicated he disclosed everything he has, including a statement of adjustments from their notary. He acknowledged not contacting the notary again after the discovery.

2024 BCSC 189 (CanLII)

[353] In support of his claim, the claimant emphasized that although he brought other assets into the marriage, he was only asserting an exclusion over his living inheritance. He testified his intention was to maintain the funds as his own and not to gift them to the respondent. Asked whether he discussed his intention with the respondent before the purchase, the claimant said she knew because he told her the funds were his living inheritance.

[354] The respondent gave conflicting evidence on this issue. She testified the claimant's mother gave them a cheque for $131,000 in 2016, which the claimant paid back over time. She maintained her mother-in-law asked for the money back because she and the claimant did not have a good relationship. In support of her evidence he repaid his mother, she testified the claimant told her in 2020 he was happy because they did not have any more debt. The respondent also asserted she was 100% sure it was paid back through a line of credit. Yet, when she was asked whether the $170,000 was used to purchase the former family home, the respondent said she did not know. She also acknowledged the claimant's mother gave him the funds as a living inheritance because she also gave funds to her other children.

Discussion

[355] The respondent argues the claimant has failed to prove every aspect of his claim: that he received a gift from his mother, that he contributed the gift to the purchase of the former family home and his intention at the time was not to gift the contribution.

[356] Based on the evidence of the claimant and his mother, I have no trouble accepting she gifted him approximately $170,000. Based on his evidence and the evidence regarding the parties' financial circumstances generally, including the repaid loan to the respondent's sister and her husband, I also accept that the claimant contributed the funds to the purchase of the former family home.

[357] Ultimately, however, given the state of the law, I view the claimant's evidence as insufficient to establish he did not intend to gift his living inheritance to the respondent or the marriage when he contributed the funds. The only evidence about

2024 BCSC 189 (CanLII)

manifesting an intention to keep the $170,000 separate was his testimony that he told the respondent they were his living inheritance. Further, he also gave the impression he viewed the asserted exclusion as a matter of fairness because he had chosen not to claim exclusions over property he owned prior to marriage. Ultimately, I left unable to determine his specific intention when he contributed the funds based on the evidence. Applying the presumption of advancement, I find the exclusion was lost and dismiss his excluded property claim.

Disputed Debt Claim

[358] The claimant claims as family debt approximately $91,389, which he says the parties owed his father at separation, based on his renovation to the former family home.

[359] The claimant testified that before the project, his father told the parties the renovation would cost around $91,000. The claimant alleges he and the respondent agreed to pay him for his work but did not pay him anything after he completed the renovation.

[360] Photographs detail the extent of the renovation. The claimant's documents include an invoice from 3NR Construction ("3NR") addressed to both parties, in the amount of $91,389 dated March 20, 2018. The invoice includes a detailed description of the work done but no breakdown in the total amount.

[361] Indicating 3NR was his father's construction business, the claimant said his father gave them the invoice after the renovation and told them to pay when they could. The claimant also testified that after the separation, his father wanted to be paid. In response, he said he paid his father $71,000 using $30,000 from an RBC line of credit that had a zero balance and some other bonus money but did not indicate whether he told the respondent about the payment.

[362] She denied that her father-in-law ever talked about charging the parties for the renovation, although she also testified he said he did not want to charge them for his labour but they had to pay for materials. The respondent described the project as

2024 BCSC 189 (CanLII)

a “family reno”, indicated she and her dad helped her father-in-law and bought various materials. Describing the renovation as minor, she acknowledged, however, it took five or six weeks to complete. The respondent denied seeing the invoice until it was attached to one of the claimant’s affidavits. She also denied any discussion with the claimant about paying his father after the renovation, stating he told her he had given his father a surround system as a thank you.

[363] The respondent gave additional evidence about retaining a local construction company to provide her with an estimate for the cost of the renovation. A document prepared by the owner of Caniversal International Services Ltd. estimated the cost at $25,700 based on a more limited list of work than is set out in the 3NR estimate.

[364] Other than asking the respondent to agree the renovation cost was at least $25,000, the claimant did not cross-examine her on this issue.

[365] In submissions, the respondent asked me to find that the 3NR invoice is a sham because the claimant’s father did not testify in support of the alleged debt, although the claimant was never cross-examined about the invoice being fake or why his father was not being called to give evidence. In response, the claimant submitted that his father was suffering from a bad fall and giving evidence would have been difficult for him.

[366] Ultimately, although, I accept the claimant paid his father $71,000, I am uncertain about the reason for the payment. Based on the claimant’s evidence, his failure to cross-examine the respondent on her evidence there was no agreement to pay his father for his labour, and absent evidence from his father, I was left with the impression that the claimant paid his father based on a sense of moral obligation. In other words, I am not persuaded the parties and his father entered into a contract that created an outstanding debt at the time of separation.

Former Family Home

[367] The parties agreed to an order authorizing the respondent to purchase the claimant’s interest in the former family home at the conclusion of the trial. Having

2024 BCSC 189 (CanLII)

dismissed the claimant's excluded property claim, and there being no claim for an unequal division, each party is entitled to an equal share of the net value of the property.

[368] The evidence includes appraisals prepared by Anthony Rivard on November 15, 2021 and January 7, 2023. Both appraise the market value of the former family home at $2,150,000. The CIBC mortgage statement from January 2023 showed a balance of $1,333,248.41 and maturity balance for February 17, 2023 of $1,331,911.80.

[369] The respondent's buy out of the claimant's interest involved paying out and discharging the CIBC mortgage. She and her sister had been approved for a new mortgage with BMO.

[370] I do not know the precise amount of the mortgage as of the date she paid it out.

[371] I trust the parties can agree on amount of the net equity and the claimant's half share. Based on the figures available to me I expect the value of his share to be not less than $409,044 ($818,088 x .5).

Occupational Rent

[372] Along with occupational rent, the claimant proposed an adjustment to his share of the former family home based on offsetting each parties' contribution to the mortgage since the separation less the rental income received.

[373] The claimant paid the mortgage from the date of separation until the end of July or August 2021. Since then the respondent has paid the mortgage. After the claimant left the former family home, as I have said, each party received rental income from one of two tenants for seven months. The respondent received rental income from both tenants for about 12 months until she was required to remove one of the suites. Since then she has received rental income from the remaining suite. I

2024 BCSC 189 (CanLII)

have included the rental income since 2022 less an amount for reasonable expenses in her *Guidelines* incomes.

[374] The claimant calculated a proposed adjustment that would require $8,726.83 to be deducted from his share of the net value of the former family home.

[375] Queried about the legal basis for the accounting exercise, the respondent indicated she was content with considering their respective contributions awash.

[376] In any event, I would note the comments of Justice Butler in *Storey v. Terry*, 2020 BCCA 30:

> [23] …Subsection 86(b) does not require that all payments made to maintain property after separation be regarded as family debt to be divided equally. As this Court recognized in *Jaszczewska*, entitlement to an equal share of the family property exists independent of use or contribution:
>
> > [38] … The *FLA* starts with the presumption found in s. 81 that family property is to be equally divided. As I read s. 81, each spouse is presumptively entitled to an undivided half interest in all family property, regardless of their respective use or contribution. … But as I read it, the phrase in s. 81(a) refers to the basis of entitlement to family property. Entitlement exists independent of contribution or use, and the extent of that entitlement on separation is defined in s. 81(b).
> >
> > [39] Also, because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property. Once again, because of s. 81, this entitlement exists independent of the parties' respective contribution to the post-separation increase in value.

[377] Turning to the issue of occupational rent, based on $2,000 per month, the claimant seeks occupational rent of $48,000 although he made no submissions in support of the claim.

[378] Again in *Storey*, Butler J. identified the proper approach to claims for occupational rent where one spouse leaves the family property:

> [226] At common law, a co-tenant is entitled to claim occupation rent when he or she has been ousted from property. Absent an ouster from the property, there is no claim. However, if the tenant in possession seeks to recover property expenses from the departed tenant, the court retains a discretion to set off occupation rent against the expense claim. There is no absolute right

2024 BCSC 189 (CanLII)

> to such a claim or set off. Occupation rent is an equitable remedy (*L.M.R*. at paras. 27-29, 31, 32).
>
> [227] In *Stasiewski* the Court of Appeal held that in family proceedings occupation rent is not a stand-alone claim but should be considered in deciding whether to order an unequal division of family property. In *Shen v. Tong*, 2013 BCCA 519, Justice Smith in concurring reasons identified the objective of an award for occupation rent as doing what is "'just and equitable' between the parties, albeit within the parameters of s. 65(1) of the *FRA*" (at para. 94).

[379] Other cases have clarified that ouster is not a focus in the family law context. They also emphasize that occupational rent is an exceptional remedy that should be used cautiously. Various factors have been identified as relevant, such as the conduct of the spouses including the failure to pay support, where the children are residing, when the demand for occupational rent was first made, financial difficulties experienced by the non-occupying spouse, and who is paying the expenses associated with the home.

[380] The claimant has been occupying the main floor of his father's house where he has established a suitable home for himself and the children since he left the former family home. In his first Form F8 Financial Statement, he identified his monthly rent as $3,500. His most recent Form F8 financial statement shows rent of $3,000 per month. He said very little if anything about his rent expense in direct examination. In cross-examination, the claimant gave fairly vague evidence about having paid rent. He also indicated he and his father were "offsetting it", his father was keeping track of what he owed, and he was paying about $2,500 per month. The plan, the claimant said, was to contribute what he owed his father to the mortgage once the former family home sold.

[381] Bearing in mind it is an exceptional remedy, in my view, the claimant has not established an award of occupational rent is appropriate in this case. I am left uncertain about the extent to which the claimant has paid rent to his father. Whether the amount was $3,500 or $3,000, if paid it was still significantly less than the mortgage payment. Further, the claimant has not contributed to the mortgage since August 2021. The claimant's support obligation did not start until July 1, 2021 one

2024 BCSC 189 (CanLII)

month prior. Until early 2022, he paid no child support and he has yet to pay any spousal support. Based on the parties' *Guidelines* incomes, his arrears will be significantly less than previously determined, lessening any argument based on financial difficulties. Finally, the children have continued to reside in the former family home with the respondent who has relied on rental income as well as her employment income to pay the mortgage and other expenses.

Dividing Other Property and Debt

[382] There is little dispute about the remaining property and debt issues. The parties had a number of bank accounts, RRSPs and an RESP and four lines of credit at the time of separation that are listed in the *Scott* Schedule appended to the claimant's closing submissions. The *Scott* Schedule shows no balances in any of the bank accounts. The respondent has not sought any orders regarding those accounts. My understanding is that any joint bank accounts have been closed.

[383] The parties agree to valuing three of their lines of credit as of the date of separation and largely agree on the balances, along with dividing them evenly.

[384] Those lines of credit and balances are as follows:

CIBC Personal Line of Credit Account (438) - $56,961;

Joint Scotia Bank Personal Line of Credit (019) - $33,183; and

Joint RBC Royal Line of Credit (001) – zero[3].

[385] The parties also had a joint CIBC Personal Line of Credit (138) which had a balance of zero at separation. The claimant later withdrew funds from that account in December 2020. The balance as of January 2023 was $13,641.54. That debt is not family debt and is instead the responsibility of the claimant.

[3] The claimant suggest the balance is $400, but the account statements show this balance arising from a withdrawal of $400 on September 13, 2020 shortly after separation, which means the $400 was not family debt.

2024 BCSC 189 (CanLII)

[386] The respondent also has an outstanding student loan, which the claimant agrees is a family debt. The parties disagree about whether the debt should be divided based on its value at separation or trial. At separation the outstanding amount was $26,126.99. The current balance is $18,180.28. As I have indicated, the presumptive valuation date for family debt is the date of trial absent significant unfairness or an agreement to the contrary. There is no suggestion of significant unfairness here. To the contrary, the respondent acknowledged receiving repayment assistance from the government. The loan statements in evidence indicate it is the repayment assistance that reduced the balance owing on the loan. Accordingly, each party will be responsible for half of the amount left owing on the respondent's student loan, less any further repayment assistance she is entitled to. She will ensure the debt is discharged and provide confirmation of the discharge to the claimant.

[387] Regarding the parties' RRSPs and their RESP, the claimant testified to collapsing three of his plans after separation to pay legal fees. He readily acknowledged his obligation "to make them whole" again, once he receives his share of the net equity in the former family home. He testified to "cashing out" $43,907, which appears in his 2021 tax return and selling and withdrawing about $30,000 from an RBC RRSP, as well as withdrawing $29,899 from the RESP account in order to have cash. I have not been able to confirm the details of the transactions based on the documentary evidence. During submissions, the claimant indicated he provided tax documents to respondent's counsel, to "buy back" the funds he withdrew and effect a rollover. The parties have leave to appear in the event they are unable to resolve this aspect of the property division.

[388] Both parties have a vehicle they wish to keep. The claimant has a 2017 BMW 750i which is financed and approximately $60,000 is still owing. He has not included the loan as a family debt. The respondent's vehicle is a 2016 BMW 2006. Her financial statement indicates it is leased.

2024 BCSC 189 (CanLII)

[389] Absent any claim for division or an equalization of the net values of the vehicles, I order each party to retain their respective vehicle free of any claim by the other.

[390] The parties have also agreed to equally share the cost of the Section 211 Report. By consent, then, I order the parties to contribute equally to the cost of the Section 211 Report which is $16,800.

[391] In the event the parties are not able to agree on the issue of costs, they have leave to schedule a costs hearing before me.

"Fleming J."

2024 BCSC 189 (CanLII)