Court of Queen's Bench of Alberta

Citation: CRG v RMH, 2014 ABQB 420

Date: 20140714
Docket: FL01 10200
Registry: Calgary

Between:

C.R.G.

Plaintiff

- and -

R.M.H. (also known as R.M.G.)

Defendant

Reasons for Judgment
of the
Honourable Madam Justice C. Dario

Introduction

[1] This is an application for a parenting order and retroactive and ongoing child support under the *Family Law Act*, SA 2003, c F-4.5. Each parent seeks day-to-day care and control of the two children of the relationship: S.J.G. (the son), born April 28, 2006 and S.R.G. (the daughter), born July 18, 2007. The mother also seeks an order permitting her to move with the children to Texas to live with her and her new husband.

Evidence and credibility

[2] Overall, I found Ms. H to be the more credible witness. She answered questions directly and provided clear explanations of various events; her recollection on most questions was specific and detailed. Where there were discrepancies in her evidence, she generally had

reasonable answers and explanations. Furthermore, when asked questions the answers for which were not necessarily beneficial to her case, she nonetheless answered directly.

[3] By contrast, Mr. G had difficulty remembering the details of many events, particularly when they did not reflect well on him. His testimony was inconsistent and evasive, and on cross-examination he was deflecting and defensive. Mr. G was unwilling to acknowledge certain facts even when the evidence was put before him. For example, he denied a relationship with the babysitter, even after the Facebook page announcing their relationship was entered into evidence. He further denied several facts, which Ms. H's counsel then countered by reading back Mr. G's own testimony in prior questioning and affidavits. For example, he stated at trial that he was not out of town for more than a month at a time for work, yet his answers in questioning referenced periods of several months. I will provide further examples of Mr. G's evasive and inconsistent testimony throughout my discussion of the factual background of the case.

[4] The parties presented documentary evidence at trial including read-ins from questioning on discovery and transcripts of text messages. They also gave viva voce testimony. Mr. G raises concerns about some of the text message communications. He says the evidence is unauthenticated, yet he does not point out any interchanges that he thinks are fallacious or inconsistent with his recollection of events. Rather, he suggests Ms. H could have fabricated or altered the entire exchange (approximately 20 pages in total). He then used some of the same evidence to obtain an admission in cross-examination. I accept these text message exchanges as accurate records of the parties' communications.

Factual background

[5] The parties have had a tumultuous relationship, characterized by intermittent periods of separation. The relationship began in 2005 and ended in April 2010. They disagree as to the length of some of the periods of separation, although both accept they were apart for at least a 9 month period from December 2007 to September 2008. I will discuss further periods of separation below.

[6] At the time the parties met, Ms. H was going through divorce proceedings with her former husband. She shared a 50:50 parenting arrangement for the two children of her marriage. Mr. G moved in with Ms. H. Ms. H testified that Mr. G used funds from her divorce settlement to assist in financing his business landscaping and construction business and to purchase their subsequent home, which was registered in his name alone.

[7] At times throughout the relationship, Mr. G worked out of town in Valleyview, Sundre, Canmore and Vernon, BC. I accept Ms. H's testimony and find as a fact that Mr. G was away in some cases for several months at a time. Whenever Mr. G was away, Ms. H had day-to-day care and control of the children, who were born early in the relationship.

[8] Ms. H worked sporadically waitressing, doing some work for Mr. G's company, teaching a basic computer course, dog grooming and in retail sales. In terms of formal training, Ms. H explained that she only had a grade 6 education when she moved to Canada at age 17. When the children of her first marriage reached school age, she attempted to obtain her GED but failed. In 1997, she took a Microsoft course. After 10 years of intermittently working on it, she became a certified technician. Due to the cost, however, she could not maintain her certification.

[9] At trial, Ms. H described incident that occurred in May 2007, less than two months before their daughter's birth, when she had travelled to Vernon with their son to visit Mr. G. He was angry that she had come and did not want to see her. She recounts that on May 31 she encountered him with another woman and there was a physical confrontation during which she was assaulted. The police arrived and called an ambulance, which took Ms. H to hospital for observation. The hospital records note she had sustained injuries consistent with strikes to her abdomen.

[10] Ms. H states this incident resulted in their first period of separation. Ms. H states she obtained a restraining order in Vernon that was converted into a peace bond to allow Mr. G to have access to the children. This document was not produced in evidence. The Alberta court record shows she obtained a restraining order in Alberta against Mr. G in November 2007, which was affirmed and varied in December 2007 to allow for weekend parental access by Mr. G.

[11] Mr. G denies the assault and claims he was falsely accused, but he provides no explanation for the hospital records. He also denies the alleged assault resulted in an immediate separation, stating the parties did not separate until December 2007, despite the November 2007 restraining order. I find as a fact the incident occurred as described by Ms. H, based on the corroborating medical evidence and subsequent restraining orders.

[12] Ms. H gave birth to the parties' second child in July 2007, shortly after the assault. Mr. H testified that Mr. G required her to take a paternity test to prove that SRG was his daughter. She testified that shortly after her daughter's birth, Mr. G directed her to vacate the home and then sold it, leaving Ms. H homeless with four children and no job. Mr. G disputes that he forced Ms. H out of the home. Also, Ms. H claims that she received only about $60,000 from the sale, even though she had invested approximately $135,000 from her divorce proceedings into the home and it had increased in value. These amounts are not in issue in this proceeding but help to illustrate the parties' financial situation.

[13] There is conflicting evidence as to when the parties resumed their relationship; I find as a fact that they resumed living together by July 2009, possibly earlier. In December 2009, Mr. G left the home to assist his father with some health issues. In April 2010, he removed his possessions from Ms. H's home and their cohabitation ended. Ms. H had to vacate the premises shortly thereafter, as she could no longer afford it.

[14] In testimony, Ms. H related an alleged occurrence of sexual interference involving their daughter on November 29, 2009. She reported the incident to police in May 2010; she explained that she did not report it earlier because Mr. G had moved out and no longer posed a threat. She also reported being unsure how to proceed through the legal system, particularly since her daughter was only 18 months old at the time. Mr. G states Ms. H fabricated the incident and it has no merit.

[15] During the investigation of the incident and child assessment that followed in July 2010, Mr. G was limited to supervised access. In September 2010, the police closed their investigation and laid no criminal charges against Mr. G. Upon the closure of the investigation, Ms. H voluntarily stopped imposing the requirement for supervised visits. Ms. H remained the children's primary caregiver throughout this time.

[16] During this time, Mr. G would only agree to pay for babysitting if a particular babysitter, who ran a day-home for children, was used (the "babysitter"). Ms. H was suspicious of the

arrangement, but Mr. G denied he was romantically involved with the babysitter. Ms. H raised several concerns with Mr. G including that the babysitter drove the children without putting on their seatbelts. Mr. G denies these incidents. I find as a fact that Mr. G was romantically interested in the babysitter and subsequently began dating her based on evidence from his Facebook account (which includes him posting their dating status and various friends sending congratulatory remarks). Furthermore, in questioning on discovery, Mr. G admitted to going to Las Vegas with her twice, once in mid-2012 and again in 2013, as well as to Brazil in December 2012. At trial, he admitted to going with her to Miami in 2014. I reject his statement that they travelled only as friends.

[17] In September 2010, Ms. H began a relationship with Mr. H. In the spring of 2011, Ms. H wanted to bring the children to Miami for one month to visit family members. Mr. G verbally agreed to sign the necessary travel documents if he would get one month with the children in exchange. Ms. H testified that after she obtained Mr. G's verbal consent and purchased tickets, Mr. G required her to sign an agreement to share equal parenting time before he would sign the travel consent letters.

[18] On March 9, 2011, the parties entered into a consent order for 50:50 parenting. Ms. H's testimony (supported by some text message evidence) suggests she believed the consent order was an agreement between the parties and would not be filed in court, even though it was in the form of a formal order. She states she signed it in an informal setting, without counsel, in the presence of Mr. G and his friend, Mr. V.

[19] By contrast, Mr. G states that Ms. H signed the order voluntarily and that she understood its binding nature since she signed it in front of a notary. Mr. G's friend Mr. V swore an affidavit of execution before a notary stating that he witnessed Ms. H's signature. The affidavit of execution only supports that Mr. V appeared before a notary, rather than Ms. H (contrary to Mr. G's statements). Furthermore, even though Ms. H had counsel at the time, her counsel did not sign the consent order.

[20] I accept Ms. H's version of events. The text message evidence and the timing of the consent order lends further credence to her testimony that Mr. G would not let her travel with the children unless she signed the order; he coercively obtained her consent. Just prior to the trip to Miami, Mr. G sent the police to Ms. H's home to seize the children, in strict compliance with the newly filed court order. Ms. H states she had previously told him the children would need to rest for their trip.

[21] I find as a fact based on Ms. H's testimony and other evidence that Ms. H encouraged phone access between Mr. G and the children when they were in Miami and sent him pictures or other updates. By contrast, when the children were in Canada with Mr. G, Ms. H states she had some difficulty getting phone or Skype access to them. There is some text message evidence to support these facts. There is also some evidence of telephone number confusion and some Skype issues (such as the connection dropping) on a few individual occurrences. After one month in Canada, Ms. H hoped the children would return to Miami for another month as part of the 50:50 parenting arrangement, but Mr. G refused. The travel consent provided for only one trip to Miami. The text message evidence suggests Mr. G believed, despite the consent order, that he was entitled to determine when and for how long the children would be available while Ms. H was out of the country. Ms. H returned to Calgary in July without a place to stay or a source of income; she moved in with Mr. H.

[22] Several events were relayed in testimony regarding Mr. G's inappropriate behaviour. The parties recall the events differently. Mr. H was able to corroborate Ms. H's testimony. For example, upon Ms. H's return from Miami and after not having seen her children for several months, Ms. H picked them up to take them out for dinner. The children were excited to see her and they asked if they could sleep over at her place. At first Mr. G agreed, but when they returned to collect their overnight bags and Mr. G saw Mr. H, he refused. Mr. G had to separate the children from Ms. H, despite their protests to spend time with their mother. Mr. G does not deny the incident, but states that he did not use force to separate his son from Ms. H. He also states he did not shut the door on her. He explains that he changed his mind because they were all going to a wedding celebration the next day.

[23] Another example of Mr. G's inappropriate conduct occurred on their son's first day of kindergarten in September 2011. Ms. H states Mr. G arrived intoxicated and said threatening things and pushed her. She called Mr. H and when he arrived, Mr. G allegedly shouted "fucking slut" and/or "whore" to Ms. H in front of their daughter. Mr. G does not deny being at the school, but he states Mr. H made the lewd comments. He notes that there were many people in the schoolyard, yet Mr. and Ms. H have not produced any witnesses. Mr. H states the schoolchildren were inside and there were no supervisors in the playground at the time. I accept Mr. and Ms. H's testimony as to what occurred.

[24] In March 2012, due to complaints from her daughter, Ms. H discovered her genitals were red. Ms. H states her daughter made a comment about her father's dirty hands and Ms. H became concerned Mr. G may have interfered with her. She took the girl to hospital for examination after which a social worker was contacted. No charges were laid against Mr. G.; he states that he has not interfered with his daughter and that her comments relate to him being a landscaper and always having dirty hands. I accept Ms. H's evidence as to what she heard her daughter say and her actions in response, however, I am unable to make any finding on the evidence before me, regarding inappropriate touching by Mr. G.

[25] On March 19, 2012, Ms. H obtained an Emergency Protection Order against Mr. G prohibiting him from contacting her or the children. On March 30, 2012, Justice Hawco confirmed the EPO for one year, but granted Mr. G the right to exercise any court ordered access to his children. At the same time, in response to an application by Mr. G, Justice Hawco ordered a bilateral parenting assessment to assist the parties and the court to determine the parenting arrangement that would be in the children's best interests.

[26] Ms. Jennifer Short conducted the bilateral parenting assessment and released her report on June 5, 2012. In her report, which I will describe in more detail below, she recommended Mr. G be given sole custody and Ms. H have parenting time every second weekend, on a supervised basis for a transitional period. She was concerned Ms. H might react negatively to the change in parenting arrangements and might not shelter her children from her reaction, thus necessitating supervision. There was no other basis for the recommendation for supervised visits.

[27] Justice Rawlins put the assessment recommendations into effect by consent order dated July 5, 2012. She required, however, that Ms. Short be cross-examined on her report and that she answer the court's and counsel's questions; Ms. Short then had seven days to modify her answers as required. Although the cross-examination raised many questions about the bilateral parenting assessment, Ms. Short declined to modify her answers. Justice Rawlins also ordered Mr. G to

surrender the children's passports to Ms. H's counsel. He did not do so, stating the passports were lost.

[28] In an outcome that likely neither the court nor the assessor intended, the supervised access regime has continued to the date of this trial. After being the children's primary caregiver and then sharing 50:50 parenting, Ms. H has been limited to supervised access on alternating weekends for the past two years. Between July 2012 and the time of trial, this has amounted to only 46 visits with her children.

[29] In general, Mr. G laid the blame for missed visits upon Ms. H There is some evidence that Ms. H requested access too late during busy periods (such as Christmas) for the supervising agency to accommodate her requests and that she had some issues at the onset in getting the supervised access in place. There are also emails from the agency, however, stating that Mr. G denied several visits (no reason was given). There is also evidence indicating that the supervising agency could not contact him for some time because his email address had been disabled. Mr. G's response was that the agency must have had the wrong email address I accept Ms. H's statements that Mr. G was unwilling to grant access at times without any stated reasons. At other times, Mr. G refused to grant certain visits stating the children were sick or had lice or because their paternal great-grandfather was ill.

[30] In questioning, Mr. G confirmed that he was unwilling to grant any make-up sessions for missed visits (even where the visits were missed due to reasons such as the children's sickness or that they were visiting other relatives). Mr. G states it was Ms. H's responsibility to ask for make-up visits. In questioning on discovery, however, he stated that even if she had asked for them, he would not have agreed.

[31] The lice incident provides another example of Mr. G's deflection of responsibility. He states the children got lice from wearing wigs while visiting their mother. The supervised access report states, however, that the lice incident preceded the visit in which the children wore wigs and that the children reported the lice came from the babysitter's home.

[32] Ms. H brought two separate applications to remove the supervised access requirement; Mr. G opposed them and they were adjourned to trial. Ms. H asked Mr. G directly for permission to see the children without supervision, but he denied the request even though the assessment report clearly stated supervision was for a transition period only. Mr. G was also unwilling to permit family members to supervise individual visits in place of professional supervisors. At trial, when asked why he was unwilling to release the supervised access condition, Mr. G stated he wanted to see more consistency in Ms. H's visitation schedule. In questioning on discovery, he stated that the supervised visits needed to continue to reduce his concern that she was saying negative things about him or others.

[33] Mr. G's unwillingness to provide access to Ms. H over the holiday period extended to periods when he was not even with the children. In December 2012. Ms. H discovered Mr. G had booked accommodations in Brazil and had concerns that Mr. G would remove the children from the jurisdiction, particularly since Mr. G had not relinquished the children's passports, as he was required to do by court order; the court order also specified that the children were not to be removed from the jurisdiction. Mr. G's girlfriend (the babysitter) is of Brazilian descent. Ms. H brought an application to ensure the children would not be removed. At the hearing, Mr. G told Justice McIntyre under oath on December 19, 2012, that neither he nor the children had any plans to go to Brazil and that he would spend Christmas with his family. Yet at trial, he

confirmed that he had applied in October or November for a visa to go to Brazil. Five days after swearing to the Justice that no one was going to Brazil (and implying that Ms. H was technically savvy and could have created the booking in his name), on December 24, 2012, he departed for Brazil with the babysitter and left the children with friends, instead of letting them spend time with their mother over Christmas.

[34] Mr. G demonstrated his lack of candour by defending his statements to Justice McIntyre saying he had no tickets booked when questioned on December 19. I find as a fact that Mr. G deliberately misled the court with his response. Furthermore, his attitude shows a clear disregard for the children's best interests in seeing their mother over the holidays and reiterates his perspective that Ms. H's access time over the Christmas holidays should be no more than the regularly scheduled weekend visits. Mr. G left the children with friends on other occasions, including when he travelled to Las Vegas with the babysitter.

[35] Further, Ms. H alleges Mr. G did not facilitate telephone or Skype contact between her and the children for a 14-month period. Mr. G states that Ms. H had too many numbers and it was unclear which number to call. There is some limited text message and email evidence to suggest there was confusion as to Ms. H's correct phone number and that Mr. G could not reach Ms. H once when the children tried to call, but this does not explain 14 months of no contact. It also does not explain why Ms. H had to bring a separate court application for phone and Skype access and still had trouble making contact with the children even after obtaining an order. Mr. G also stated in questioning that he was opposed to the children having telephone access with their mother since he would have to supervise the calls and it would be a hassle. In questioning, Mr. G was unable to state any time that was good for Ms. H to call the children. Later in questioning, he admitted he did not have any specific concerns with respect to calls Ms. H has had with the children to date.

[36] Mr. G was asked in questioning if the children ever asked to see their mother more often. He said they asked for overnight visits with her but he allegedly could not remember when or how often. At trial, he conceded that the children likely should see their mother more than they currently do.

[37] One consistent message is evident from the access supervisor's notes: the children love and miss their mother, they want to spend more time with her, and they do not want to be apart from her. Mr. G has been in possession of these reports since at least October 2013, but has remained unwilling to allow any change to the access schedule or release the supervision requirement, even to the time of trial.

[38] Initially, Mr. H participated in the supervised access visits along with Ms. H. By the time of trial, however, he had not seen the children for about 14 months. In May 2012, he obtained a position in Texas as engineering manager to head up a program related to his area of specialization in down-hole drilling equipment. The company gave him an ownership stake and salary. He explained that the job does not require him to be out in the field (his previous job had him out of town and in the field for 20 days at a time) and gives him greater access to his own children, who are close in age to Ms. H's children. Mr. H has not seen Ms. H's children because of the challenge of scheduling her supervised access around visits with his own children when he flies back to Calgary from Texas. On May 10, 2012, Justice Martin granted the parties' consent order to add the issue of where the children should live to the scope of the bilateral assessment.

[39] There is little evidence regarding child support. Ms. H has had limited income and has never paid support to Mr. G. In 2008, after the children of this relationship were born, Ms. H participated in a training program run through Bow Valley College and the United Way. She completed the course in 2009. She testified that she could not find work since it involved mostly shift work and irregular hours and she could not find child care for her two small children when Mr. G was out of town. Subsequently, she was not admitted into Mount Royal University to continue this training.

[40] Mr. G provided some financial assistance to Ms. H from 2009 to April 2010, although Ms. H could not remember specific amounts and stated many of his cheques bounced; Mr. G also could not provide specific information about the amount or frequency of support. The evidence is that Mr. G paid $1,000 per month child support to Ms. H from September 2011 to June 2012, pursuant to court order. He made at least some of these payments through his company. He stopped making payments when he obtained interim sole custody in July 2012.

[41] Mr. G's evasive answers related to his companies' financial statements further call his credibility into question. When asked in questioning about his companies' expenses for "salaries and wages", he answered that he did not know and his accountant knew the answer. He confirmed that he was the only employee but then suggested there could have been others. He did not fulfill the related undertakings to determine who was in his company's employ for the relevant years. At trial, he was again unable to provide details of expenses, including for salaries and wages. His answers were "I don't remember" and "I don't know." In questioning, Mr. G was unable or unwilling to answer how his company derives its revenue.

[42] Mr. G's testimony was vague and very unclear in relation to other company matters. For example, he advised that he is winding up his company due to a number of lawsuits, yet he also stated that his company is the plaintiff in all of these suits and has existing and other potential judgments owing to it. He was unwilling or unable to clarify the reasons behind the dissolution of his corporation. He stated he did not want to disclose this information due to confidentiality, yet I note the statements of claim and defence are matters of public record.

[43] Ms. H submitted evidence, mostly text messages and Facebook communications, purportedly extracted from a broken cell phone she found in Mr. G's trash. Mr. G objects to this evidence; he argues there is no demonstrable connection between him and this evidence, that it is an invasion of his privacy, and that it is fabricated. Ms. H purportedly took the phone from his trash while she had access to his residence to care for the children when he was in Costa Rica in 2011. Mr. G states he would not have allowed Ms. H into his home at the time, although he was unwilling to confirm whether he was in Costa Rica at the relevant time.

[44] Mr. G has had an opportunity to cross-examine Ms. H on this evidence. In light of all the other evidence presented, I accept that this evidence is reliable and credible and its contents raise significant concerns about Mr. G's judgment in parenting. This said, I place limited weight on this evidence. There is an abundance of other evidence upon which I can rely to make my decision about parenting.

Bilateral parenting assessment

[45] Ms. Short, the author of the bilateral parenting assessment, was not called as a witness at trial. Mr. G sought to enter the assessment into evidence, without the transcript of cross-examination. Ms. H objected to entering the assessment into evidence since the assessor was

unavailable for cross-examination. I admitted Ms. Short's assessment and the transcript of her cross-examination into evidence.

[46] In her assessment, Ms. Short determined that the parties were not "ideal candidates" for a collaborative co-parenting arrangement; thus, the 50:50 option was not ideal. She recommended Mr. G be given sole custody. She found that neither parent presented as an ideal candidate for sole custody, but Mr. G appeared to be the parent most likely to promote the children's overall healthy psychological adjustment and development, even though he would likely face challenges in this new parenting role. She recommended Ms. H be granted parenting time every second weekend, with shared holidays and 2-3 weeks during summer vacation. She further recommended that Ms. H have supervised visits for a period of time to assist her in the transition period, based on Ms. Short's concern that the change in parenting would cause Ms. H considerable distress and that it was highly likely she would not shelter or protect the children from her thoughts and opinions and might act with malicious intent.

[47] The result of that recommendation, as I have already stated, was an almost 2-year period of supervised access on alternating weekends and no shared holidays.

[48] Ms. Short was cross-examined on some of the irregularities in her assessment. I will not go through all of the aspects addressed, as there were many; however, I note the following examples:

> 1. English is Ms. H's second language and it is clear she had difficulty understanding some of Ms. Short's questions. Ms. H had to use her cell phone during the testing to look up the meaning of words. Ms. Short did nothing to remediate the issue or account for it in assessing the results. A 2013 Dyslexia Assessment entered in evidence supports Ms. Holmen's weak reading fluency and other reading comprehension deficiencies consistent with dyslexia. Further, Ms. H testified that when she moved to Canada she had only a grade 6 education and when she attempted to complete her GED, she failed.
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> 2. Ms. Short framed her questions as "psycho-legal questions," yet when asked about the legal principles upon which her answers were based, she could not identify any.
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> 3. When asked about the overarching legal test to be applied in custody matters, Ms. Short was unable to articulate the best interests of the child test.
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> 4. Ms. Short did not understand the ramifications of granting sole custody to one party, or the legal implications of such an award. On cross-examination, she stated that granting one party sole custody could result in the following options: one parent, both parents, or both parents with the intervention of a third party could make decisions related to the child.
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> 5. Ms. Short did not interview Mr. H even though she listed him as a person with whom she had made "contact" in her report, and despite the fact that he was a new partner to one of the parents. This is contrary to the recommendations of the College of Psychology, which recommends the new partner be interviewed.

6. Ms. Short misunderstood some of the basic facts (eg. when the parties separated, how long they had been together, who had primary care of the children during certain periods, etc.)

7. Ms. Short did not look at the child welfare or police files related to the reported incidents of sexual interference in 2012. Yet in her report she stated that the children were "at risk" even though she made no findings of abuse, neglect or imminent harm. Also, she was aware of the 2007 alleged assault on Ms. H when she was pregnant with her daughter. She saw the hospital records, restraining orders, and an undertaking made to a police officer in B.C. signed by Mr. G to refrain from having any contact with Ms. H. Ms. Short stated that this incident, whether or not it had happened, would not affect her opinion of Mr. G's parenting ability. She also appeared unconcerned that he might lie about this incident.

8. Ms. Short did not ask either parent for a parenting plan. She made a determination that Mr. G was the more stable parent, better able to provide routines for the children. When questioned, she was unable to recount any meaningful routines. Her information amounted to the following: the children get up, but she did not know when, and they had breakfast; in the afternoon (presumably after school/kindergarten) they either went home or to the day home, where they would have dinner (the time was unclear as the father's work hours varied depending on his work load); they might sleep at the day home. Bedtime was between 7:30 and 8:30.

9. In cross-examination, when presented with what counsel asserted were Mr. G's phone records and other documentation suggesting Mr. G had hired a prostitute, and subsequently hired that person, a stranger to the children, to look after them for 3 to 4 days (including overnight), Ms. Short was reluctant to say that this would necessarily impact her assessment of Mr. G's ability to parent.

10. Ms. Short found that Ms. H was manipulating the children. When cross-examined, the only example she could give was that during the session with the children present, Ms. H informed Ms. Short that she had married Mr. H and that they would be moving to Texas. When Ms. Short advised it was inappropriate to discuss this in front of the children, Ms. H said she had already told the children that they would be moving to Texas. Ms. H states that she did not say these things to Ms. Short. The copy of Ms. H's marriage certificate provided at trial indicates that she did not marry Mr. H until October 21, 2013, long after Ms. Short issued her report.

11. Ms. Short only observed Ms. H with the children in her office for one session lasting 20-60 minutes.

12. Ms. Short did not provide any meaningful substantiation for why Mr. G would be the more stable or preferred parent.

> 13. This was Ms. Short's second parenting assessment, which speaks to her limited experience at the time.

[49] I also note that Ms. Short relied upon information from the babysitter in making her assessment. Ms. Short was unaware of Mr. G's romantic association with the babysitter; therefore the babysitter's testimony may not have been as objective as Ms. Short may have believed it to be.

[50] Based on her assessment, Ms. Short came to the following conclusions regarding Ms. H's characteristics: orderliness, perfectionism, emotional control and the avoidance of mistakes at the expense of being flexible and open, combined with her susceptibility to paranoia, mistrust and perceptions of malevolent intentions, all of which could impact her ability to parent. Psychometric testing (a written exam) also suggested Ms. H is susceptible to paranoia and mistrust, as well as readily perceives malevolent intentions from other's benign remarks or behaviours. Ms. Short found Ms. H has immense difficulty respecting Mr. G as a co-parent. Further, she identifies Ms. H's concerns about her ability to support her family without Mr. H's assistance (thus necessitating the move to Texas) as an issue related to her capacity to parent.

[51] Ms. Short was aware that Ms. H, at the time of the assessment, was undergoing some treatments for thyroid cancer. Ms. H states she was also dealing with the death of a niece who was very close to her, and taking upgrading courses at Mount Royal University – all of which added to her stress level at the time. This is borne out by Ms. Short's finding that Ms. H's overall "Life Stress" score was exceptionally high. Nonetheless, Ms. Short did not consider these circumstances in her assessment.

[52] Ms. Short came to the following conclusions regarding Mr. G's characteristics: need for admiration, lack of empathy, sense of entitlement and inflated sense of self-worth, all of which could impact on his ability to parent. Psychometric testing suggested Mr. G is very intense, has potential emotional issues, downplays distressing emotions, denies troublesome relationships, maintains an inflated sense of self-worth, has a pretense of self-satisfaction, and is susceptible to anger, depression, and moodiness.

[53] The report is unclear upon what basis Ms. Short prefers Mr. G as the more stable parent. Her responses on cross-examination make it even less clear why she would prefer Mr. G.

[54] I further note that Ms. Short imposed supervised access based on her mere suspicion of mal-intent, having observed Ms. H only once with her children in an unnatural setting (in Ms. Short's office for an hour or less). The supervised access reports are almost all positive; only the final report contains anything negative. The report states Ms. H told her son that he could come with her to Texas after she "won." Ms. H explains that the recording of this incident was a misunderstanding, and that it was her daughter who asked if they could come to Texas when she wins, to which she replied "When we win? no, no," and tried to change the subject. It is to be noted that the children frequently asked their mother if they could stay with her and this is the only record of such a comment. Furthermore, in the context of 46 supervised visits with this being the only potential negative comment, I find as a fact that there is no evidence of mal-intent on Ms. H's part. In fact, based on the parties' past conduct, it appears that Mr. G is the parent who has difficulty even granting Ms. H access to her children, let alone co-parenting with her.

[55] Based on the foregoing, I will not place much weight on the recommendations of the 2012 bilateral parenting assessment. While the intent of these assessments is to assist the court in

making difficult decisions with limited information, they are not infallible and the court must not rely on them exclusively. This case presents a situation in which the assessment results are likely flawed and too much reliance on the assessment will yield less than ideal results. With the passage of time, and with the benefit of further evidence unavailable to the assessor, including the supervised access visit reports, I also have the benefit of seeing how the assessment recommendations have played out.

Parenting order

[56] At the time of trial, the children were 8 and 6 years old, in grade 2 and 1 respectively. They are stated to be generally healthy with no noted medical or other identified special needs. They have missed very few days of school in the past year. Their report cards show "satisfactory achievement of grade level learner outcomes" in most subject areas, although there is "improvement needed in meeting grade level learner expectations" in some areas of reading, writing and math.

[57] Mr. G seeks an order granting him day-to-day care and control of the children with access to Ms. H on alternating weekends from Friday after school to Monday morning. He proposes they split Christmas and summer holiday time. Mr. G expresses concern that if left with their mother, the children might not be brought to school on time, although he provides no basis for his concern. He is willing, if Ms. H remains in Calgary, for Ms. H to have Wednesday night access or even overnight access from Wednesday night to Thursday morning.

[58] Ms. H seeks an order granting her day-to-day care and control of the children and permission to move with the children to Texas to join Mr. H. She is willing to grant Mr. G all holiday times, including summer holidays, spring break and Christmas, as well as additional time if he comes to Texas to visit the children.

[59] Neither party believes a 50:50 parenting arrangement is workable and I agree with this submission.

[60] There is no earlier court order in this case that the parties seek to vary. As such, the principles from ***Gordon v Goertz***, [1996] 2 SCR 27, which involved an application for a change of an existing court order for custody when the custodial mother wanted to move to Australia, do not apply: ***MacPhail v Karasek***, 2006 ABCA 238 at para 30, leave to appeal to SCC refused (February 8, 2007). The real issue here is whether the children's primary residence should be with Ms. H in Texas or with Mr. G in Calgary. Nonetheless, the guidelines set out in ***Gordon*** for assessing the best interests of the children are helpful in these circumstances.

[61] ***Gordon*** requires an assessment of the existing arrangements and the relationship between the children and each of the parents. The analysis must consider the desirability of maximizing contact between the children and both parents. The assessment should take into consideration the wishes of the children. The parent's reasons for moving are relevant if it affects that parent's ability to meet the needs of the children. The court must also consider the disruption to the children of any change in custody and the disruption consequent on removal from family, schools, and the community the children have come to know.

[62] Ultimately, however, the determination in this case must be guided only by the best interests of the children, as per s 32 of the *Family Law Act*. Section 18(2) sets out some of the considerations relevant to the children's best interests:

(2) In determining what is in the best interests of a child, the court shall

(a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and

(b) consider all the child's needs and circumstances, including

(i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,

(ii) the history of care for the child,

(iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,

(iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,

(v) any plans proposed for the child's care and upbringing,

(vi) any family violence, including its impact on the safety of the child and other family and household members, the child's general well-being, the ability of the person who engaged in the family violence to care for and meet the needs of the child, and the appropriateness of making an order that would require the guardians to co-operate on issues affecting the child,

(vii) the nature, strength and stability of the relationship between the child and each person residing in the child's household and any other significant person in the child's life, and between the child and each person in respect of whom an order under this Part would apply,

(viii) the ability and willingness of each person in respect of whom an order under this Part would apply

(A) to care for and meet the needs of the child, and

(B) to communicate and co-operate on issues affecting the child,

(ix) taking into consideration the views of the child's current guardians, the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian,

(x) the ability and willingness of each guardian or proposed guardian to exercise the powers, responsibilities and entitlements of guardianship, and

(xi) any civil or criminal proceedings that are relevant to the safety or well-being of the child.

[63] I find as a fact that Ms. H provided the children's day-to-day care from their birth until March 2011, when they were 4 and 5 years old. She was often their sole caregiver during this time, while Mr. G worked out of town and during periods of separation. Between March 2011 and July 2012, the parties shared parenting on a 50:50 basis, although Mr. G coercively obtained Ms. H's consent to this arrangement. In July 2012, Ms. H's supervised access began based on the recommendations contained in the flawed bilateral parenting assessment described above.

[64] All parenting orders to date in this matter have been interim orders and do not create a new status quo: ***MacPhail***. Since there is no final order in place, there is no need to establish a change in circumstances to make a change to the parenting arrangements: ***Porochnavy v Going***, 2013 ABCA 23. The determination must be based exclusively upon what is in the best interests of the children.

[65] As stated above, I place limited weight on the bilateral parenting assessment. I also have come to my decision below without taking into account the allegations of inappropriate sexual touching; I did not have sufficient information to make any findings related to these alleged incidents.

[66] I find that it is in the children's best interests to be in their mother's day-to-day care and control. She is better able to provide for their psychological, emotional and physical safety. I make this determination based on all of the facts recounted above, including:

(a) Ms. H's role as the primary (and sometimes sole) caregiver in the children's first 4-5 years and her continued role in the shared parenting arrangement between March 2011 and July 2012;
(b) The children's desire to spend more time with their mother and statements to the effect they want to be with her;
(c) Mr. G's disregard for the children's desire to spend more time with their mother;
(d) Mr. G's inappropriate comments about Ms. H in front of their daughter (the schoolyard incident);
(e) At least one and possibly more instances of physical violence directed at Ms. H by Mr. G (the Vernon incident); and,
(f) Mr. G's seeming disregard for safety. The child access supervisor noted that when Mr. G dropped off the children they were not in their booster seats on at least one occasion.

[67] I also find that the goal of maximizing contact between the children and each parent will be best achieved by granting Ms. H primary care; she is the parent more likely to nurture an ongoing relationship between the children and Mr. G. Evidence of Ms. H's willingness to involve Mr. G includes the regular weekly phone calls she arranged between him and the children while she was with them for a month in Miami and her provision of pictures and other updates when they were away. This contrasts with Mr. G who would not grant consistent phone access even when directed to do so by court order. Also, he explained in questioning that he did not provide Ms. H with any medical or school information because the children are generally

healthy and, since she has such limited involvement with them, he doesn't know what information she would want.

[68] Furthermore, Ms. H willingly consented to release the requirement for Mr. G's supervised access once the child welfare and police investigations were complete and she consented to revision of the EPO to allow for child visitation. Meanwhile, Mr. G has been unwilling to remove the supervised access requirement even in the face of two separate court applications to do so, without any legitimate reason for requiring the continuation of supervision.

[69] Mr. G also repeatedly disregarded the children's expressed desire to spend time with their mother and went to the extreme of deceiving the court to avoid visitation with their mother while he was in Brazil. He was also unwilling to grant any make-up visits or allow for longer holiday access despite the recommendations for shared holidays in the bilateral parenting assessment. This contrasts with Ms. H who travelled with the children when they were very young to visit Mr. G at his worksites throughout Alberta and BC.

[70] Finally, Ms. H was able to identify positive traits about Mr. G as a father, including that he is good at playing with the children and that he cares for them. This is to be contrasted with Mr. G, who was unable to identify any positive things about Ms. H as a mother. He did not agree that she was a devoted parent or that she cares for her children, even though these were Ms. Short's findings.

[71] Regrettably, there was little evidence regarding Mr. G's relationship with his children. He has been their primary caregiver for the past two years of their lives. At trial, he stated that his work allows him flexibility to pick them up from the bus when they return home from school each day. This may be a new work and school routine; it is different from the one Ms. Short identified in her cross-examination. The children are not engaged in any extra-curricular activities. Mr. G advises that they go on bike rides together and he does other activities with them. He also suggests that the children do activities with friends and other family members. Other than the information relayed earlier in these reasons, there is little information – positive or negative – regarding Mr. G's parenting ability. Information regarding Ms. H's relationship with the children comes from the supervised access reports. It is clear that the children love and miss their mother.

[72] There is no doubt a change in parenting and a move to Texas will alter the children's routines and change their relationship with Mr. G. I find, however, that the children are young and that they have missed their mother very much and need their mother in their lives. She will be supported by Mr. H in Texas and will be able to devote herself to them. I have also considered the benefit derived from Mr. and Ms. H living together as a family unit and the financial stability for Ms. H and the children that will result. She and Mr. H can better provide for the children in Texas than they could if they were forced to return to Calgary.

[73] Although the move to another jurisdiction will be a big transition, Ms. H has provided a comprehensive plan for the children's care and upbringing. While Mr. G has raised concerns about Ms. H's ability to provide for the children in the event that Ms. H not remain with Mr. H (she is financially dependent upon him in the United States and cannot work there), I am not in a position to speculate on what might happen to any of the parties, nor can I take such an eventuality into consideration without some evidence of the relationship being in jeopardy.

[74] If the children remain in Calgary with their father, I have reason to believe Mr. G will not encourage access with Ms. H. Ms. H's past difficulties in obtaining his cooperation to set up telephone and Skype access provide but one example. I find the disruption consequent to a change in day-to-day care and control and a move to Texas do not outweigh the other factors in making it in the children's best interests to be in their mother's primary care.

[75] After considering the totality of the evidence and hearing the submissions of both parties, I hereby make the following parenting order:

[76] Both parents are the guardians of the children as set out in s 20 of the *Family Law Act*. Ms. H shall have day-to-day care and control of the children. Each party shall enjoy all of the rights of guardianship set out in s 21 of the Act, subject to the following provisos:

(a) Mr. G shall exercise his rights of guardianship only while exercising his parenting time, except those rights that pertain to providing or obtaining information relating to the children, which rights may be exercised at any time;

(b) Mr. G shall not be entitled to the following rights of guardianship as described in s 21(6) of the *Family Law Act*:

i) To decide the children's place of residence and to change the children's place of residence;

[77] It is clear there is significant conflict between the parties and they are unable to communicate. As such, it is unlikely that they will be able to make joint decisions in all instances. In the event of disagreement in the exercise of rights of guardianship, Ms. H shall be entitled to make the final determination since the children will be in her primary care and control.

[78] Ms. H is entitled to move with the children to Texas. The move shall not occur before August 3, 2014. Until that time, the parenting arrangement shall be as follows:

> Until June 27, 2014, the parenting shall remain as it is currently structured pursuant to the interim parenting access order of April 17, 2014.
>
> Commencing June 28, 2014, Ms. H shall exercise her parenting time with the children for one week, until July 5, 2014. Then Mr. G shall exercise his parenting time with the children for one week, until July 12, 2014. Then Ms. H shall exercise her parenting time with the children for one week, until July 19. Then Mr. G shall exercise his parenting time with the children for 2 weeks, until August 2, 2014.

[79] If Ms. H's move to Texas occurs later than August 3, 2014, the parties shall continue alternating weeks, one week at a time, until the day prior to the departure for Texas, at which time the children shall be returned to Ms. H by 10AM.

[80] The parties will exchange the children on the curbside of Ms. H's temporary location in Calgary at 9AM, unless the parties agree otherwise. Ms. H may ask a third party family member to accompany her or to facilitate the exchange provided that the third party is someone with whom the children are familiar.

[81] After the move to Texas, Mr. G shall have parenting time as follows:

(a) Six weeks during the summer break, as mutually agreed to by the parties, but if the parties cannot agree, Ms. H shall select her 2-week block first, provided she does so prior to May 30 each year. Ms. H shall pay for the children's flights for this trip.
(b) One half of Christmas holidays each year. Mr. G shall exercise his parenting time in the first half of the break in odd numbered years and the second half of the break in even numbered years (consequently Ms. H shall exercise her parenting time in the first half of the break in even numbered years and the second half of the break in odd numbered years). Mr. G shall pay for the flights for this trip.
(c) At least six days of the Spring Break. Ms. H shall pay for the flights for this trip.
(d) Such other times as mutually and reasonably agreed to by the parties if Mr. G visits Texas or otherwise as agreed.

[82] The party paying for the flights shall book them, subject to confirmation from the other party that the dates and times are acceptable.

[83] I am aware that Mr. G's parenting time is less generous that what Ms. H proposed. I make this order based on what I deem to be in the best interests of the children. I find that it is in the children's best interests to have some holiday time with their primary caregiver and to have time off school in the community in which they live to strike a balance between maximizing time with both parents while maintaining some stability and normalcy in their home life.

[84] When the children are with Ms. H, she shall provide Mr. G with updates regarding their schooling, health and other matters of significance. She also shall facilitate weekly phone or Skype access with Mr. G and the children's paternal family members.

[85] When the children are with Mr. G, he shall provide Ms. H with updates regarding the children's health and other matters of significance. He also shall facilitate weekly phone or Skype access with Ms. H and the children's maternal family members.

[86] Mr. G shall surrender the children's passports to Ms. H for the trip to Texas.

[87] In the event I am wrong in permitting Ms. H to move with the children to Texas, I conclude the children should nonetheless be in her day to day care and control.

Retroactive child support

[88] Each of the parties seeks s. 3 retroactive child support. Mr. G seeks retroactive support from Ms. H for the period in which he had primary care of the children, from August 2012 to present. He asks the court to impute income to Ms. H for this period.

[89] Ms. H seeks retroactive child support from Mr. G for the period from April 2010 to June 2012. The parties shared parenting of the children from March 2011 to July 2012, but Ms. H's income, unless imputed, was below the $10,000 threshold for payment of support.

[90] In ***DBS v SRG***, 2006 SCC 37 at paras 54 & 60 Bastarache J, writing for the majority, stated that parents have an obligation to support their children in a manner commensurate with their income and that child support is the right of the child. Entitlement to retroactive child support is based on four fact-driven, relevant, but non-exhaustive factors:

> 1. whether there was a reasonable excuse for why support was not sought earlier;
> 2. the conduct of the payor and whether the payor engaged in "blameworthy" conduct;
> 3. the circumstances of the child;
> 4. any hardship occasioned by a retroactive award. (***Goulding v Keck,*** 2014 ABCA 138 at para 21, summarizing the principles from ***DBS***)

[91] It is a holistic fact-based analysis to provide fairness to all parties: ***Goulding*** at para 24.

[92] Assuming entitlement is established, the general rule is that an order for retroactive child support will go back to the date the recipient parent gave effective notice to the payor parent of the requested change in support. Retroactive orders can go back beyond the effective date of notice and sometimes more than three years, if the payor parent engaged in blameworthy conduct. Bastarache J explained at para 124:

> The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise **where the payor parent engages in blameworthy conduct**. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but **also where (s)he withholds information. Not disclosing a material change in circumstances — including an increase in income that one would expect to alter the amount of child support payable — is itself blameworthy conduct.** The presence of such blameworthy conduct will move the **presumptive date of retroactivity back to the time when circumstances changed materially.** A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

[93] The court defined blameworthy conduct at para 106 as anything that privileges the payor parent's own interests over the child's right to an appropriate amount of support.

Ms. H's claim for retroactive child support

[94] Ms. H seeks retroactive child support for the period from April 2010 to June 2012. She is not asking for retroactive child support for the periods of May 2007 to July 2009 and November 2009 to April 2010, times during which I have found she was the primary parent.

[95] Mr. G contests going back as far as 2010 for retroactive child support. Ms. H did not specify the effective date of notice. I find Mr. G had notice of Ms. H's claim for child support by October 16, 2013 when he was to be questioned on his 2010 and 2011 financial statements. The procedure record shows numerous applications for disclosure by both parties at least as far back as November 15, 2011, the original returnable date for a notice to disclose application, wherein both parties were required to make financial disclosure. I find as a fact that this is the date of formal notice. The date of effective notice could have been as early as May 13, 2010, however, based on the notation of a notice to produce documents in the procedure record, or even earlier based on Ms. H's requests for money verbally and through text messages.

[96] Ms. H explained she did not bring an earlier application for child support because she was focused on parenting time and access to her children. The numerous court orders on record

in the last four years support this assertion, including applications to remove the supervised access requirement and to allow her phone access to the children.

[97] There is some text message evidence that Mr. G sent Ms. H some money while she was in Miami, although neither party suggests a specific amount. Mr. G also testified to making some payments towards Ms. H's mortgage, although he provided no receipts to substantiate the assertion, nor did he identify specific amounts. Mr. G claims he paid $3,400 to a collection agency to satisfy Ms. H's outstanding debt, but no receipt was provided. Mr. G did provide receipts for a vehicle purchased by Ms. H in the amount of $11,760, which appears to have been paid for by Mr. G's company. In any event, these payments do not relate to child support and they are from before the time period in which child support is claimed.

[98] ***DBS*** also requires that I consider the benefit to the children of a retroactive award and any hardship the payor might suffer. The Alberta Court of Appeal recently explained each of these requirements in ***Goulding***. The court stated at para 51 that ***DBS*** "does not impose an evidentiary burden on the recipient parent to prove 'significant need' on the part of the child in order to succeed in an application for retroactive support". The question to be asked is: "did the child receive the same benefits and support as if he or she had been supported by both parents?" It is clear on the evidence that Ms. H and the children struggled financially in the time periods in which Mr. G failed to provide support or did not provide enough support.

[99] Ms. Holmen's Line 150 income based on her Notice of Assessment's is:

2007: $1,700
2008: $13.504
2009: $22,133
2010: $11,819
2011: 6,136
2012: $4,231

[100] Since moving to Texas in 2013 she has not earned an income, since she is not able to work in the United States. She advises that she attempted to complete some upgrading in 2012.

[101] Mr. G contests all of these income amounts. He argues that they are less than what Ms. H would have been paying in rent, for example, so he reasons that these figures cannot reflect her total income. I note that Ms. H's testimony contains many examples of financial difficulties over the years. She testified to cashing in an RRSP to pay her rent and her credit cards; she lost an apartment and even had to sell her car to make ends meet. She also testified to getting food from the food bank. When she was in Miami in 2011, she was delayed in returning to Calgary as she had no place to live. Mr. G was asked in questioning on discovery to review Ms. H's Notices of Assessment and indicate whether he thought they were accurate, but he refused to comment.

[102] In the meantime, Mr. G benefitted from having access to the funds that should have been paid in support. I see no reason to refuse to award retroactive support on this ground. It is clear that Ms. H struggled financially through much of the time that she had primary or shared parenting responsibility for the children and that the children would have benefitted from child support.

[103] Finally, I must consider whether Mr. G will suffer hardship as a result of the retroactive award. Again, I take direction from the appellate court's recent comments at para 57:

> Hardship, however, is not an abstract or impressionistic concept to be asserted by a payor in an effort to avoid a retroactive award. To weigh against granting retroactive child support, the payor parent must establish real facts from which a reasonable finding of serious hardship could be made. A bald or vague assertion of hardship is not sufficient. The obligation to pay support at the *Guidelines* amount for a prior period is not a hardship (*Greene* at para 87). The payor does not suffer hardship by having to pay money which he or she may otherwise owe.

[104] Mr. G provided no evidence regarding hardship. He claimed he does not earn the significant income suggested by Ms. H, but he failed to disclose sufficient financial information to make his case. I further note the availability of various means through which the retroactive award can be paid, be it lump sum, a series of periodic payments, or a combination of the two: ***Goulding*** at para 58.

[105] I have determined it is appropriate to award retroactive child support. I must now determine the appropriate time period for retroactive support and the quantum. The Supreme Court in ***DBS*** notes that where one party has engaged in blameworthy activity, the court may look further back than 3 years from the effective date of notice. Bastarache J stated at para 153 in relation to one of the four appeals that the father, given his substantial income, could not be considered blameless in not paying child support.

[106] I find Mr. G did not pay child support from the time of final separation in April 2010 until ordered to do so in September 2011. His failure to do so, particularly given the income available to him at the time, is blameworthy conduct. A payor parent who knowingly avoids or diminishes his support obligation to his children should not profit: ***DBS*** at para 107. Although he began paying support in September 2011 pursuant to an interim order, I find he must have known that the $1,000 monthly payment was not enough to satisfy his child support obligations given the income he had at his disposal. I conclude that Mr. G is liable for retroactive child support from April 2010 to June 2012.

[107] To date, Mr. G had made $11,000 in child support payments pursuant to court order to Ms. H through the Maintenance Enforcement Program for this period of time:

> 2011- $1000/month for Sept – Dec (4 months)
> 2012 - $1000/month for January – July (7 months)

[108] Ms. H's counsel stated at trial that it has been very difficult to get disclosure from Mr. G and that he has refused to satisfy undertakings. For example, he has not provided his Notices of Assessment for 2010 and 2011, only for 2008 and 2009. The record shows many applications for disclosure and that Mr. G did not attend the Dispute Resolution Office meeting set for December 2013.

[109] Mr. G operates his own company ("Mr. G's company") and has also incorporated a numbered company (the "numbered company") for some of his contracting work. I have considered the income statements of these companies. Section 18 of the *Alberta Child Support Guidelines*, Alta Reg 147/2005, permits the court to include all or part of the pre-tax income of a corporation where the payor parent is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the payor's annual income, as determined under section 16, does not fairly reflect all the money available for the payment of child support. In terms of

Mr. G's income, the majority of his answers at discovery and at trial to questions regarding his companies' financial statements were "I don't know" or "You have to ask my accountant". He was unable to explain some inconsistencies. For example, there is a line item in the Income Statement for Mr. G's company for employee salaries, however, Mr. G confirmed in questioning that he is the only employee. He argued at trial that the entry reflected monies paid to contractors, not to him, despite another line item in the Income Statement for "Contracts and Professional Fees." Ms. H is asking for Mr. G's income to be determined based on the net income of his companies with certain expenses added back. She submits his income for 2010 is $223,751 and for 2011 (based on the combined incomes of his two companies) his income is $292,559. From 2012 onwards (based on the absence of any information provided), she asks for his income to be imputed at $207,000.

[110] Mr. G argues that his income is far less than the amounts suggested by Ms. H. He suggests an amount of $117,000 for 2010 and claims his company ran at a loss in 2011. He has provided a letter from his new employer/partner stating that his 2014 income will be $75,000. Although Mr. G is planning to dissolve his company, he has confirmed that the numbered company will continue to operate. It is not clear whether his new position will preclude him from working through his numbered company as well.

[111] Section 19 of the *Guidelines* allows the court to impute the amount of income to a parent that it considers appropriate if the parent fails to provide income information when under a legal obligation to do so. Given the lack of financial information and Mr. G's failure to clarify his income on questioning and at trial, I make the following determinations of his income:

2010:

[112] Mr. G's company's Gross Revenue was $1,218,728 and its Net Income was: $142,848

[113] To this, I add back the following as non-permitted expenses:

- $18,677 in legal fees which Mr. G acknowledged related primarily to his personal matters;
- $ 4,457.50 representing 50% of business promotions (which were not explained by Mr. G and could include dinners, holiday trips, etc.);
- $723.50 representing roughly 25% of the costs for vehicle insurance. I note that the company only had two vehicles and one was being used by Ms. H;
- $2,500 representing some personal vehicle fuel and personal vehicle use (in contrast to the over $40,000 in vehicle insurance, fuel, repairs and other costs expensed on the income statement);
- $2,034 for travel and lodging. While this could be a legitimate business expense, Mr. G provided no work related travel dates, destinations or other information;
- $800 for a personal cell phone plan and long distance (this is from a total cell phone expense amount of $4,744);
- $6,293 for use of home office; and
- $23,281 for income taxes deducted off corporate income since child support is calculated based on gross income amounts.

[114] Ms. H sought to add back the amortization amounts, however, given the nature of the business, equipment will depreciate and will need to be replaced, therefore this amount will not be added back. She also asked that half of the phone, fuel/vehicle, repairs/maintenance and vehicle liability expenses be added back. Again, given the nature of the business, only the amounts set out above will be added back into Mr. G's income.

[115] Thus, I conclude that Mr. G's personal gross income for 2010 is $201,614. The Table amount for child support for this income level for two children is $2,790/month. I have considered that Mr. G's income is over $150,000 and have found that the Table amount is appropriate. Consequently, retroactive child support for the 9 month period from April 1 to December 31 is $25,110, less any amounts paid in respect of this period as child support through the Maintenance Enforcement Program.

2011:

[116] In 2011, Mr. G had income from his company and from the numbered company. Mr. G's company's Gross Revenue was $1,307,222, and its Net Income was -$27,980. To this, I add back the following as non-permitted expenses:

- $5,080 for 50% of business promotion expense;
- $800 for cellular phone;
- $2,307.50 for roughly 25% of vehicle insurance;
- $45,500 for personal vehicle fuel and personal vehicle use (from a total amount in excess of $100,000, which suggests at least one new vehicle was purchased in this period);
- $625.50 for 50% of the costs of computer maintenance (being both a work and home use computer);
- $139,907 for wages and salaries (as there was no response to undertakings to confirm the nature of this expense and Mr. G was the company's only employee at that time);
- $8,085 for vacation earned; and
- $3,530 for home office use.

[117] The sum of the corporate net income and these added back amounts is $177,855.

[118] The numbered company's Gross Revenue was $107,501 and its Net Income was $87,648. To this, I add back the following as non-permitted expenses:

- $746 for 50% of business promotions;
- $1,071 for another vehicle registration, and 50% of repairs and maintenance on it;
- $14,268 for income taxes on the corporate net income.

[119] The sum of the corporate net income and these added back amounts is $103,733.

[120] There was a discussion at trial about Mr. G working for his friend Mr. V at a restaurant. Mr. G says he was not paid for this work. In any case, any amounts paid for this work have not been reported. In the absence of any other information, I make no findings related to this potential source of income.

[121] Thus, I conclude Mr. G's gross personal income for 2011 was $177,855 from his company and $103,733 from his numbered company for a total of $281,588.

[122] The Table amount of child support at this income level is $3,862/month, however, the parties shared parenting in a 50:50 arrangement from March 2011 onwards. Section 9 of the *Guidelines* displaces the presumptively applicable Table amounts and mandates its own system for shared parenting situations: ***Contino v Leonelli-Contino***, 2005 SCC 63 at para 24. The Court explained at para 24:

> While ss. 3(2), 4, 5 and 10 provide a framework establishing a structured discretion, each provision incorporates distinct factors which are absent in s. 9. Sections 3(2) and 4 specifically prescribe that the amount in the Guidelines is mandatory unless the court considers that there are reasons to find that it is inappropriate. **Section 9 does not contain such a presumption.** As submitted by the father, if the drafters of the Guidelines had intended this approach, they would have used the same words to provide for direction in all of the relevant sections. In fact, **the wording of s. 9 is imperative. The court "must" determine the amount of child support in accordance with the three listed factors once the 40 percent threshold is met.** There is no discretion as to when the section is to be applied: discretion exists only in relation to the quantification of child support. [Emphasis added]

[123] Ms. H's income was too low to offset any of Mr. G's child support. The parties did not submit budget information regarding who shared which costs during the period of shared parenting. Nonetheless, I take into consideration the recognized increased costs of shared parenting for the 10 month period from March to December 2011 in determining Mr. G's retroactive support obligations. I also take into account that Ms. H did not pay any child support to Mr. G for the two year period in which he had primary care and control of the children, nor will she owe any retroactive support (see discussion below). For these reasons, I reduce Mr. G's child support for this period by 20%. I do so to achieve an outcome that is fair in all the circumstances of the case: ***DBS*** at para 130. Consequently, retroactive child support for January and February 2011 is $7,724 and for March to December 2011 is $30,896 for a total of $38,620, less any amounts paid in respect of this period as child support through the Maintenance Enforcement Program.

2012:

[124] Mr. G has submitted no financial information beyond 2011. He advises that his accountant has not yet completed the corporate financial statements for 2012.

[125] Ms. H asks this court to impute an income of $207,000 to Mr. G for that year. As this is less than the average of the previous two years, and is also less than the immediately preceding year, in the absence of any information at all on this time period, I accept Ms. H's submission and impute a gross income of $207,000.

[126] The Table amount for child support at this income level is $2,862/month. I make the same 20% reduction as I did for 2011 to reflect the shared parenting arrangement. Consequently, Mr. G's retroactive child support for the 6 month period in 2012 is $13,737, less any amounts paid in respect of this period as child support through the Maintenance Enforcement Program.

[127] Therefore, the total retroactive support owing for the period from April 2010 to June 2012 is $77,467, less any amounts paid in respect of this period through the Maintenance Enforcement Program.

Mr. G's claim for retroactive child support

[128] Mr. G asks this court to impute income to Ms. H for the purposes of assessing retroactive child support for the period of August 2012 to present. Mr. G suggests that Ms. H could be working in the computing industry or as a nursing aide in a senior's home, as the latter is work for which she has had some training. Although he suggests she could earn an income of $42,000 in these types of roles, he has not provided any evidence of availability of work in the suggested fields or incomes that would be commensurate with such work. Further, given her visa status in the U.S., Ms. H would likely have to return to Canada to find such work. I find as a fact that she moved to the U.S. to be with her husband, not to avoid working. Mr. G has not satisfied the test laid out in ***Hunt v Smolis-Hunt***, 2001 ABCA 229, to establish that Ms. H has been intentionally under-employed or not working in an attempt to evade child support; there is no basis upon which to impute an income to her for the period from August 2012 to the present. I need not determine whether there is entitlement to retroactive support since Ms. H's income falls below the threshold for payment of support. There will be no order for retroactive support to be paid to Mr. G.

Child support – going forward

[129] Mr. G advises that he is or will be starting work with a new company this year and will earn a salary of only $75,000 per year (to be paid to his numbered company). Mr. G says he may become a partner of this company but he is not "guaranteed to" do so. It is not clear to me whether he has or will have an equity stake in this new company, or whether he will continue to work through his other companies at the same time. Mr. G states his company is being wound-up (notwithstanding ongoing lawsuits for which his company is allegedly owed money), however his numbered company is not being wound-up. I base the going forward amount of child support on the information available to me, namely Mr. G's past income. This amount shall be subject to review and retroactive adjustment to January 1st each year.

[130] Commencing September 1, 2014, Mr. G shall pay Ms. H s 3 child support in the amount of $2,862/month based on a 2013 imputed income of $207,000. This amount is subject to review and adjustment after the exchange of financial information on June 30 of each year, including all information relevant to his income such as corporate financial statements and corporate tax returns of affiliated companies.

[131] Commencing September 1, 2014, section 7 expenses shall be shared equally by the parties since a proportionate division of these expenses does not accurately reflect Ms. H's financial means in her partnership with Mr. H.

[132] All payments shall be made through the Maintenance Enforcement Program.

Cost of the bilateral parenting assessment

[133] The cost of the bilateral parenting assessment was $12,877.50. Pursuant to the May 10, 2012 order of Justice Martin, the cost was initially paid by Mr. G with the final allocation of the costs to be determined at trial.

[134] Due to the irregularities with the assessment (discussed above) and in an attempt to have the Court reconsider the parenting arrangement that resulted from the assessment, Ms. H received leave to undergo a second assessment. Although this assessment has been completed, neither party has seen the results and it is not before me. The estimate for the assessment was $16,000; but the total cost ended up being between $19,500 and $22,500. After having paid approximately $12,500 for the assessment to date, Ms. H still owes between $7,000 and $10,000 to obtain the report, funds she states she does not have. During this time, Ms. H states that her mother died and she had to pay for unplanned funeral expenses as well.

[135] In light of the ultimate outcome of this trial, and the irregularities in the first bilateral parenting assessment, I find the cost of the first assessment should be borne by the parties equally. I note that Mr. G's non-disclosure of his relationship with the babysitter may have impacted Ms. Short's perceptions of Ms. H's "paranoia" and mistrust of others, and possibly impacted other aspects of her assessment, which could suggest that he pay for a greater portion of the assessment cost. His dishonesty, however, was not the sole source of flaws in the assessment or the sole reason for the request for a second assessment. Although Ms. H bore the cost of the subsequent assessment, this assessment was not provided to the Court. Ms. H's share of the cost of the first assessment, namely $6,438.75, shall be set-off against amounts payable to her by Mr. G.

Cost of supervised visits

[136] Ms. H requests that Mr. G pay for her supervised access visits from March 3, 2013 onwards. She argues that the supervised visits should have stopped by or before the end of 2012, but certainly by the time she applied to court to have the supervision requirement removed. The total amount paid for supervision is $13,594.61: $1,871.68 between September 2012 to March 2, 2013 and $11,722.32 from March 3, 2013 onwards. Although she spent a considerable amount for travel to and from Texas, she is not requesting any amount in that regard.

[137] Mr. G argues that Ms. H should have proceeded with the expedited trial, which was granted by the court, if she did not want to continue with supervised access.

[138] Given the lack of any true reason for supervised visits and Ms. Short's clear intention to implement them only for a transitional period, and given Mr. G's unwillingness to release Ms. H from the supervision requirement despite two attempts to bring an application to this effect before the court, I conclude that Mr. G should pay $11,722.32 for the cost of supervised access from March 3, 2013 onwards. This reflects an almost 9 month period of supervised access for which Ms. H has had to pay, well beyond a "transitionary period".

Costs and payment plan

[139] The parties may apply within sixty (60) days of this decision to make submissions on costs, and Mr. G may at the same time propose a payment schedule for retroactive amounts owing.

[140] I remain seized with this matter for six months from the date of these reasons for judgment.

Heard on the 14th day of April, 2014 to the 18th day of April, 2014 and the 26th day of May, 2014.
Dated at the City of Calgary, Alberta this 14th day of July, 2014.

C. Dario
J.C.Q.B.A.

Appearances:

C.R.G.
Self-Represented Plaintiff

Sonja Lusignan
for the Defendant