IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *P.B.* v. *R.J.P.,* 2007 YKSC 59

Date: 20071122
S.C. No. 06-D3870
Registry: Whitehorse

Between:

P.B.

Petitioner

And

R.J.P.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Debbie Hoffman	Counsel for the petitioner
R.J.P.	On his own behalf
Kathleen Kinchen	Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a divorce action. The couple were married in 1990 and separated in 2005. They initially lived in Iqaluit, NU, but moved to Whitehorse in 1996. They have four daughters: V., 16 years old; A., 15; M. 14; and L., 9 years of age.

[2] In December 2005, by agreement, the respondent father moved out of the family home. However, sometime in March 2006, he persuaded the petitioner mother to allow him to return. The father then lived in the family home with the mother and the four

children from March until September 2006. During that time there was a significant increase in the conflict between the parties, some of which involved the children.

[3] The mother retained counsel and commenced this action by filing for divorce on September 8, 2006. On September 19, 2006, the mother obtained an interim order giving her exclusive possession of the family home.

[4] On February 1, 2007, I made a further interim order granting interim custody of all four children and primary residence to the mother. I allowed the father reasonable access, providing it was initiated by the children. I also ordered the father to pay child support, retroactive to November 1, 2006.

[5] While initially represented, the father has acted for himself for most of this proceeding. He has not filed an answer and counter petition nor any application to vary either of the interim orders.

ISSUES

Issue # 1: Division of family assets

a) Is House 3044 in Iqaluit a family asset to be divided equally or otherwise?

b) Should the family home be valued as of the date of separation? If so, should there be an unequal division of that family asset to take into account the date of its valuation?

c) Is the couple's line of credit a family debt to be divided equally or otherwise?

d) Are the party's respective pensions with Northwestel family assets to be divided equally or otherwise?

e) Are the air miles points accumulated by the father a family asset to be divided equally or otherwise?

f) Is the fifth-wheel trailer a family asset to be divided equally or otherwise?

g) Is Royal Bank account 90033 a family asset to be divided equally or otherwise?

h) How are the remaining family assets to be divided?

Issue # 2: Custody

a) Should the mother have sole custody of all four children, or should the parties share joint custody of them?

b) Should custody of the children be divided between the parties?

Issue # 3: Access

In the event that a party is awarded custody of any of the four children, should there be any conditions associated with the other party's access?

Issue # 4: Child Support

a) In determining the father's annual income, what amount is the father receiving as rental income from House 3044?

b) Should the father pay arrears of child support for the period from January 1, 2006 to October 1, 2006, and if so, in what amount?

ANALYSIS

Issue # 1: Division of family assets

a) Is House 3044 in Iqaluit a family asset to be divided equally or otherwise?

[6] At the time of the marriage, the father was debt free and owned a residence in Iqaluit, referred to as House 411, which he was in the process of refurbishing. The couple lived in that residence for about one year. In approximately November 1991, they moved from that residence to another mixed commercial/residential building, known as House 3044.

[7] House 411 was sold in late 1992. There are some minor discrepancies in the evidence of the parties as to the terms and conditions of that sale. The mother recalled the sale price being about $115,000. From that, she said the father made a payment of

$23,000 to a former common-law spouse, P.A., in settlement of her claim to an interest in House 411. That would have resulted in net sale proceeds of $92,000. According to the father, the sale price was $118,000, and P.A. was paid $25,000, resulting in net sale proceeds of $93,000. The father also testified that he loaned $20,000 of the net sale proceeds to one Guy Campbell, which left a balance of about $73,000.

[8] It appears to be common ground that the eventual balance of the sale proceeds from House 411 was deposited into a savings account at the Royal Bank in Iqaluit numbered 90033 (the "savings account"), which funds were then considered to be the father's property. While that account was originally in the name of the father alone, after the marriage and the mother's move to Iqaluit, her name was added to the account. The balance in account 90033 as of October 16, 1992, was $71,687.49. On that basis, I find that the amount of the net sale proceeds from House 411, after the loan of $20,000 to Guy Campbell, was $72,000.

[9] About that time, the couple also opened a joint chequing account. Most of the household expenses were paid for out of the joint chequing account and the mother's paycheques were deposited into that account. The father was then primarily employed as a taxi driver and was in the habit of dealing strictly in cash. There is no clear evidence whether the father deposited his income into either the savings account or the joint chequing account.

[10] The parties initially rented House 3044, but eventually purchased it on November 29, 1993, from the owner, Bob Crann. That purchase was accomplished by borrowing $52,000 from the Royal Bank in Iqaluit, in exchange for a mortgage in the name of both

parties, as well as providing “funds to close” of $19,000. From the combination of the mortgage proceeds and the funds to close ($71,000), Mr. Crann received $70,083.27.

[11] The father testified that, in his mind, the actual purchase price of House 3044 was closer to $100,000, as Mr. Crann previously owed the father about $30,000 and that he forgave Mr. Crann’s loan when purchasing the house. According to the mother, the father had told her that he was purchasing House 3044 for about $50,000 and that this was “a deal” because Bob Crann owed him some money.

[12] I find that the actual purchase price was $70,083.27, as this was the amount transferred to Bob Crann upon the closing of the sale. The father did not produce any documents about the alleged debt owing from Mr. Crann and provided no corroborating evidence on the point. While the mother did say that she understood they were getting a deal on the purchase price, she had no information as to the amount or any other particulars of the alleged debt. I am not satisfied, on a balance of probabilities, that the father has established that there was a legitimate debt owed by Mr. Crann, or how much that debt was. Therefore, I decline to account for it as part of the purchase price of House 3044.

[13] The father maintains that when he was arranging for the purchase of House 3044, the Royal Bank suggested that he borrow $52,000 to put towards the purchase price, rather than simply using the funds from the sale of House 411. Apparently, the reason for this suggestion was that the $52,000 could be repaid from the funds in the savings account and the couple would thereby establish a good credit history. This was particularly important to the father, as he had always dealt in cash and had no credit

rating. In any event, despite the apparent understanding that the loan would be repaid in relatively short order, the loan documents specified it was to be repaid over a 5-year term, with monthly payments of $952.67.

[14] Prior to the closing of the purchase of House 3044, the couple moved to housing provided by the father's employer, Northwestel.

[15] In the summer of 1996, the family moved from Iqaluit to Whitehorse and in October of that year, they moved into the family home in Whitehorse.

[16] I pause here to observe that the couple did not communicate particularly well with respect household finances. The mother claims that she was not fully informed by the father of the reasons for various transactions and arrangements and, from time to time, was called upon to simply sign documents which had previously been prepared by the father, the couple's lawyer or their bank. After the family's move to Whitehorse, the mother claims that she began to approach the father about separating their accounts so that she could have a clearer understanding of what money was coming in and how it was being spent. Although there was an eventual separation of the parties' respective finances, the history of those finances and any joint financial transactions are primarily evident from the documents the mother was able to piece together from assorted miscellaneous papers she located in the family home following the separation.

[17] The mother's counsel has repeatedly demanded production of various documents from the father, including specific financial information. However, the father has failed to produce a list of documents and has only provided partial disclosure. Although the father also filed a volume of miscellaneous documents which included

some financial information, they are of limited assistance as he did not refer to or explain them in his testimony.

[18] For these reasons, the document record of the couple's financial history is somewhat scattered and certain evidence is simply missing, leaving gaps in that history.

[19] For example, an excerpt from a bank book for the savings account was produced in evidence, but only for the period from October 16, 1992 to June 24, 1993. The opening balance, which I mentioned earlier, was $71,687.49 and I find that this was due to the previous deposit of the net sale proceeds from House 411. Over that period a number of significant, but irregular withdrawals were made. Commonly, the amount of those withdrawals were for $2,000 or $3,000, with some as little as $200, and one as great as $5,000. A number of deposits of varying amounts were also made and it would appear that some of the deposits endorsed "pay" would have been the result of paycheques from either or both parties. Over that time period, the balance of the account was reduced to $45,003.97, resulting in net withdrawals of $26,683.52. The mother testified that she has no idea what those withdrawals were for, as they were not made by her. I accept that evidence and therefore conclude that the withdrawals were made by the father, as he was the only other party authorized to deal with the account.

[20] The father testified that the $52,000 loan to purchase House 3044 was eventually repaid by monthly mortgage payments of $952.67 from the joint chequing account over the 5-year term of the loan. Eventually, both parties became employed by Northwestel and deposited their respective paycheques into this joint chequing account. The father was unsure whether some of the mortgage payments could have come from the sale of

certain shares, but testified that “either way, they were somehow paid through us”, and here I understood “they” to mean the mortgage payments. He also testified that he never made a lump sum payment or any direct payments on the $52,000 loan. He speculated that there were possibly some transfers to the loan from the savings account, but failed to produce any evidence of such transfers. Certainly, there was no evidence that any of the sizeable withdrawals from the savings account were applied towards the $52,000 loan.

[21] Although the parties produced $19,000 as the “funds to close” the purchase of House 3044 in November 1993, there once again was no evidence about where that $19,000 came from. I infer that it must have come from the savings account, as the parties were of relatively meagre means at that time and there was no other identified source from which the funds to close could have been taken. I credit the father with having contributed those funds to close, as I have found that the net sale proceeds of House 411 were deposited into the savings account in the fall of 1992.

[22] Beyond that, it is evident that the father did not follow through on the original plan to borrow $52,000 to purchase House 3044 and then repay that loan from the proceeds of the sale of House 411. Had that occurred, I would be inclined to give serious consideration to his claim that House 3044 be treated as his property and not as a family asset subject to division under the *Family and Property Support Act*, R.S.Y. 2002, c. 83 (the “*FPS Act*”). However, I reject the father’s claim in that regard and conclude that House 3044 is a family asset for two reasons.

[23] First, a majority of the purchase price, $52,000 of $70,083.27, was entirely repaid from the joint chequing account.

[24] Second, the property taxes, which were a significant expense associated with the maintenance of House 3044, were paid jointly by the parties. As of July 2002, the tax arrears amounted to $27,746.59, and although they were initially paid via the father's Visa account in November 2002, that account was in turn credited for the same amount from the couple's joint line of credit.

[25] Pursuant to s. 15(3) of the *FPS Act*, "… family assets shall be valued as of the earliest date on which the marriage breakdown is deemed under subsection 6(2) to have occurred." Subsection 6(2) states that a marriage breakdown shall be deemed to occur when the parties begin "to live separate and apart without reasonable prospect of the resumption of cohabitation." In this case, the parties clearly agreed that their date of separation was December 31, 2005.

[26] Section 6(1) of the *FPS Act* then goes on to specify that if a marriage breakdown occurs, each spouse is entitled to have the family assets owned at the time of the breakdown "divided in equal shares". However, s. 13 of the *FPS Act* states that the Court may divide the family assets unequally, if it "is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to:

> (a) any agreement other than a marriage contract or a separation agreement;
>
> (b) the duration of the period of cohabitation under the marriage;

> (c) the duration of the period during which the spouses have lived separate and apart;
>
> (d) the date when property was acquired;
>
> (e) the extent to which property was acquired by one spouse by inheritance or gift;
>
> (f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement, or use of property rendering it inequitable for the division of family assets to be in equal shares;
>
> (g) the date of valuation of family assets."

[27] I find that it would be inequitable under s. 13 of the *FPS Act* to divide the value of House 3044 in equal shares, because of the father's initial contribution of $19,000 (the funds to close), which I found must have come from the net sale proceeds of House 411, which was the father's asset from before the marriage.

[28] As the $19,000 represented 27% of the purchase price paid to Bob Crann ($70,083.27), I conclude than the father should receive 27% of the value of House 3044 as of the date of separation. The remaining 73% of that value should be divided equally between the parties. If the house is actually sold for more than its estimated value as of the date of separation, then the father may take the benefit of that increase.

[29] What then is the estimated value of House 3044 as of December 31, 2005? The mother suggests that it should be based upon the appraisal done in 1990, in the amount of $175,000, a copy of which was produced in evidence. The mother says this was a reasonable appraisal, as the subsequent written offer from Bryan Hellwig to purchase House 3044 in 1996 was for the same amount and that offer, in turn, referred to the

proposed price of $175,000 as the “appraised value”. Notwithstanding that the father refused to accept the offer, asserting he had a prior verbal agreement with Mr. Hellwig for $180,000, were I estimating the value of this property as of 1996, I would most likely accept $175,000 as a fair and reasonable estimate.

[30] However, since 1996, the couple have experienced a series of problems with non-payment of rent, damage to the premises and various maintenance issues. Further, although the father testified that he has been trying to sell the property for the last 10 years, he has been unable to do so and now describes it a “white elephant”. He also testified that he had an offer in about 2005 from a woman who was interested in acquiring the property for a food service business. Unfortunately, House 3044 was determined to be within a certain minimum distance from an old landfill site in the Apex area of Iqaluit, and the City would not allow the property to be used for food services. The father said that this has resulted in a drop in the value of the property.

[31] A tax appraisal on House 3044 by the City of Iqaluit was produced in evidence. The photocopy was difficult to read, but it indicates dates of December 13, 2005, and January 27, 2006. It specifies that the value of the land for tax purposes was $70,600, and the improvements were $39,100, for a total appraised tax value of $109,700. However, the mother conceded that the appraised value for tax purpose is not necessarily indicative of the true market value, as the family home on H. Crescent was similarly appraised for tax purposes at an amount significantly below the professional appraisal of $236,000, as of December 31, 2005.

[32] It was significant to me that the father admitted on cross-examination that he would have been willing to accept an offer of about $130,000 for House 3044 at around the end of 2005 or the beginning of 2006. I assume that the father did not simply pick that figure out of the air, but that it was based upon his continuing efforts to sell the property over a period of 10 years. I therefore accept it as a relatively accurate assessment of the potential value as of December 31, 2005. Accordingly, I value House 3044 at $130,000 as of the date of separation.

[33] I also order that the value of the property be divided unequally, such that the father will receive the first 27%, or $35,100, of the estimated value of $130,000. That notionally leaves the amount of $94,900, or 73%, which will be subject to equal division between the parties.

b) Should the family home be valued as of the date of separation? If so, should there be an unequal division of that family asset to take into account the date of its valuation?

[34] There is no disagreement that the family home on H. Crescent is a family asset. Accordingly, I am required by statute to value it as of the stipulated date of separation. Having said that, I am able to take the date of valuation into consideration, pursuant to s. 13 of the *FPS Act*, in deciding whether its value should be divided unequally.

[35] The mother has provided a professional appraisal which values the family home at $236,000 as of December 31, 2005. The father does not challenge the accuracy of that appraisal, but argues that real estate values in Whitehorse have risen dramatically over the last two years and that he should be entitled to benefit from that increase along with the mother. Accordingly, he asked that I value the family home as of the trial date. However, not only am I prohibited by the *FPS Act* from doing that, the father has not

provided any independent evidence on the current value of the house, other than hearsay testimony that he has spoken with a local realtor who said that house prices in Whitehorse have risen about 77% in the last two years.

[36] I queried whether the father has lost an opportunity here which might give rise to an inequity under s. 13 of the *Family Property and Support Act*. Had he been paid his equal share of the equity in the family home on or soon after the date of separation, then presumably he could have reinvested those funds elsewhere and reaped the potential benefit of that investment over the last two years. However, the mother's counsel responded to this question by arguing as follows.

[37] First, and most importantly, the mother gave uncontradicted testimony that, in or about March 2006, she arranged for a remortgaging of the family home, precisely so that she *could* pay the father his share of the equity. This was approved by her bank and the cheque for the father was ready to be picked up at the lawyer's office, but he refused to sign the transaction documents because he still wanted to reconcile with the mother.

[38] Second, the mother took over all the financial responsibility for the cost of maintaining the family home after the date of separation. Since then, she alone has paid the mortgage, the house insurance, the heating and utilities expenses and all other related expenses. Even during the seven months or so that the father returned to live in the family home in 2006, his only financial contribution amounted to periodic purchases of groceries, the payment of one telephone bill, and perhaps some clothing purchases

for the children. Had the mother not covered the housing expenses, the property may have well been foreclosed upon.

[39] Third, the mother has also lost an opportunity to reinvest her share of House 3044. That property could have been sold to Bryan Hellwig in September 1996 for $175,000. However, as I indicated earlier, the father refused, maintaining that he and Mr. Hellwig had a previous verbal agreement that the sale price was to be $180,000. The mother was extremely upset by the father’s refusal to complete the sale at that time, because the couple were in need of funds, as they were in the process of purchasing the family home in Whitehorse.

[40] I agree with those arguments and I am consequently persuaded that it would not be inequitable to divide the value of the family home equally between the parties as of the date of separation.

c) Is the couple’s line of credit a family debt to be divided equally or otherwise?

[41] The line of credit was originally taken out jointly by the parties to finance the family’s move from Iqaluit to Whitehorse, including the purchase of a 1991 Ford F250 diesel truck. As of September 24, 2001, the amount owing on that line of credit was $13,441.31, which roughly reflected the balance due from the cost of the move. About that time, the father decided that the couple would only make interest payments on the line of credit, arguing that they could not afford to pay down the principal. The mother disagreed, but no principal payments were made, with the exception of a lump sum payment of about $6,200 by the mother in October 2002 and a payment of $5,000 by the father in September 2004. As of December 31, 2005, the balance owing on the line

of credit was $43,289.13. The majority of the current amount of the debt is the result of paying the property taxes on House 3044, which, as of July 2002, were $27,746.59 in arrears. Pursuant to s. 4(a) of the *FPS Act*, the line of credit could be viewed, in effect, as funds in an account with a chartered bank ordinarily used for shelter or household purposes. In any event, it was clearly a joint account used for family purposes. Accordingly, I find that the amount of $43,289.13 is a family debt which the parties should share equally.

d) Are the party's respective pensions with Northwestel family assets to be divided equally or otherwise?

[42] The mother has provided evidence that the commuted value of her pension with Northwestel as of the date of separation was $26,356. In other words, had she left her employment on that date, she would have been able to transfer her pension in that amount to a new employer's pension plan. Further, there is evidence that the commuted value of the father's pension with Northwestel, as of December 31, 2005, was $73,295. The mother's counsel argues that the combined value of the two pensions should be equally divided and that this could be done by Northwestel splitting the two pensions at source. If that were done, each party would be credited with a pension of $49,825.50.

[43] In response, the father made a submission, somewhat confusing to me, that Northwestel requires its employees to retire at the age of 65 and when the father reaches that age, his pension will not be fully mature. On the other hand, he says that because the mother is younger than he, her pension will likely be fully mature by the time she is required to retire and she will receive higher pension payments as a result.

As a result, he suggests that the pensions should remain in the hand of each party as they are.

[44] There is no question that the pensions are family assets under either ss. 4(e) or (f) of the *FPS Act*, depending on whether the plans have vested or not, as both were accumulated during the course of the marriage. Therefore, according to s. 6(1) of the *FPS Act*, each spouse is entitled to have these family assets divided in equal shares as of the date of separation, unless it would be inequitable, to do so having regard to the various considerations set out in s. 13 of the *Act*. I am not persuaded that any of those considerations apply in this circumstance and accordingly, I order that the combined value of the parties' respective pensions with Northwestel is to be divided equally between them.

e) Are the air miles points accumulated by the father a family asset to be divided equally or otherwise?

[45] The mother provided evidence that the father has accumulated about 147,330 airline points on his Royal Bank "Avion" Visa account as of the date of separation. This account was used to pay all the household bills for the family prior to the date of separation, and it was always replenished from the couple's joint chequing account. Accordingly, the mother's counsel says that the airline points are family assets subject to equal division. However, she advises that Royal Bank Avion will not transfer airline points upon a divorce. Therefore, she asked that I order the father, upon the mother's request in writing, to book airline tickets on her behalf until her one-half share of the points is used up, that is just under 74,000 points.

[46] The father really had no argument to the contrary, other than his testimony that he thought the points were his and that the current balance should remain with him. I disagree and declare that the airline points are family assets subject to equal division in the manner requested by the mother's counsel.

f) Is the fifth-wheel trailer a family asset to be divided equally or otherwise?

[47] With regard to the fifth-wheel, the mother concedes that the father had loaned Guy Campbell $20,000 prior to the cross-country move and that Mr. Campbell had given the father the trailer in exchange. Upon arriving in Whitehorse, the family lived in the fifth-wheel for about three months, until they purchased the family home. It has since been used for a family reunion in 2001 and occasionally for the children's summer sleepovers. I gather it is currently in the mother's possession, however, she is unable to make any use of it, as she does not yet have her driver's licence. She estimates that its value at the time of separation was about $10,000.

[48] In his direct examination, the father said the mother should take the full value of the fifth-wheel, and then in his closing submissions he contradicted himself and said that he should take the full value of the trailer.

[49] The $20,000 loan to Guy Campbell was from the sale proceeds from House 411, which funds were the property of the father, largely acquired as a result of his efforts and investments prior to the marriage. Therefore notionally, neither the sale proceeds nor the loan should be treated as family assets under the *FPS Act*. In the alternative, even if the $20,000 loan to Mr. Campbell, which later served as the consideration for the acquisition of the fifth-wheel trailer, could be considered a family asset, I would find,

under s. 13(f) of the *FPS Act*, that it would be inequitable to divide the value of the fifth-wheel equally between the parties. Therefore, I conclude that the father should be fully credited with the value of the fifth-wheel at the date of separation, which I find to be $10,000. Since the mother currently has no use for the trailer, I would expect that the parties could best give effect to my ruling here by the father agreeing to retake possession of it, or forfeit its value.

g) Is Royal Bank Savings account a family asset to be divided equally or otherwise?

[50] This account had a balance of $12,444.69 as of the date of separation. By that time, the account had been used for several years by both spouses for various household purposes and was in both their names. Accordingly, pursuant to s. 4(a) of the *FPS Act*, I find that the balance in the account at separation should be treated as a family asset. In the alternative, even if that balance could still be considered a non-family asset, pursuant to s. 7 of the *FPS Act,* I am satisfied that upon separation, the mother would be entitled to a one-half beneficial interest in those funds.

[51] The father's position on the savings account was a little more difficult to discern. In his direct-examination, he said that he wants what he came into the marriage with, less "a $20,000 discount", but failed to explain what he thought that discount was for. In his closing submission, he maintained that what was his before the marriage should remain his. Here he cited the $92,000 in gross sale proceeds from House 411 and said that that amount "should come off the top" prior to the division of the family assets. Later in his closing submission, he said that he wanted $72,000 from the sale of House 411 taken "off the top", or in the alternative, that the full value of House 3044 should go to

him. These statements are again indicative of the confusion, at best, and inconsistency, at worst, of the father's various statements and testimony throughout the trial.

[52] I have already acknowledged that the net sale proceeds from House 411 would likely have been treated as non-family assets if they had been used for the purchase of House 3044, as was originally planned. Indeed, I have already credited the father with the $19,000 amount of the funds to close in the purchase of House 3044 for that very reason. I have also credited the father with the $20,000 loan, made from those sale proceeds, which resulted in the later acquisition by the couple of the fifth-wheel trailer. However, beyond that, the father has provided no evidence as to how the funds from the sale of House 411 were dealt with within the savings account, or otherwise. What evidence there is shows that there were a significant number of large withdrawals from that account at various times, in all likelihood by the father, which remain unaccounted for and unexplained. Therefore, I find that the father has been unable to make a case that the funds in the savings account at the date of separation should not be divided equally. As I have found the account to be a family asset, then it is subject to equal division, unless the considerations in s. 13 of the *FPS Act* dictate otherwise, and I conclude they do not. Alternatively, as the account was in the names of both spouses, the father has not rebutted the effective presumption in s. 7(2) of the *FPS Act*, that the mother is entitled to a one-half beneficial interest in the money in that account upon the couple's separation. Accordingly, the value of the account at the date of separation, $12,444.69, is a family asset to be equally divided.

h) How are the remaining assets to be divided?

[53] The 1991 Ford F-250 diesel truck was purchased by the parties in order to move from Iqaluit to Whitehorse in 1996 for a price of about $14,000, which was paid for out of the couple's line of credit. It is clearly a family asset and its value is subject to equal division. As of the date of separation, the mother estimates that its value would have been about $3,000, although it is in worse shape presently. Indeed, the father confirms that it is currently parked because it has stopped running. Nevertheless, since the father provided no evidence to challenge the mother's estimate that the truck would have been valued at about $3,000 as of the date of separation, I will accept the mother's value in that regard.

[54] The mother says that the father acquired numerous tools over the course of the marriage. When asked about the value of the tools as of the date of separation, the mother initially said she had "no idea", but then speculated that they could easily be worth between $3,000 and $5,000. She said that the father currently has all these tools in his possession, with the exception of a hardwood nailer, which he is free to collect from the family home at any time. The mother seemed to acknowledge that some of the tools, for example, the hardwood nailer, were purchased by the father prior to the marriage. That is consistent with the father's evidence, as he initially acquired many of the tools to renovate House 411.

[55] The father values the tools altogether at about $2,500 and acknowledges that he has most of them. He also said that the mother has about $400 worth of gardening tools, including a lawn mower, which she can keep in her possession. He said that the

hardwood nailer should be returned to him, since it is not a family asset and its value should not be subject to equal division.

[56] I find that not all of the tools can be considered family assets, as many were acquired by the father prior to the marriage. Given the less than satisfactory state of the evidence on this point, it is largely an exercise in speculation on my part to place a value on the remaining tools which can be considered family assets subject to equal division. I find that value to be $2,000.

[57] In her testimony, the mother referred to two bank accounts in the father's name, which he opened prior to separation. They are both with the Royal Bank of Canada and described as a "Signature Plus" account and a "Calculator Plus" account. The mother was unaware that the father maintained these accounts until just prior to the trial, and has no information as to their value as of the date of separation. According to the father, he provided the value of these two accounts, as of the separation date, to his former counsel, Lenore Morris. If so, then I assume that it would not be very difficult for the father to retrieve that information from Ms. Morris. In any event, the father agrees that the accounts should be treated as family assets subject to equal division. I agree with the mother's counsel that the most appropriate way of handling this issue would be to make an order that the father produce bank statements for each of the accounts, as of December 31, 2005, and that whatever the balance on each account is, the value be divided equally.

[58] In her evidence and argument, the mother referred to the remaining items making up the balance of the family assets. These included the couple's Manulife

Investments, their BCE Shares and their respective RRSPs. As I understood him, the father never challenged the assertion that these were family assets subject to equal division. In any event, s. 4 (f) of the *FPS Act*, would support that conclusion. In particular, the parties' respective ownership of these assets, prior to equal division, as of the date of separation, were as follows:

Asset	Mother	Father
RRSPs	$ 15,980.29	$ 9,287.63
BCE Shares	$ 3,740.49	$ 12,549.82
Manulife Investments	$ 3,225.46	$ 2,286.87

I find that these are all family assets to be pooled and subject to equal division.

[59] There are some remaining items of furniture and other personal property, which I understand the couple agree should go to the father in order to finally resolve this divorce. However, the mother seeks a continuation of the no-contact order from the February 1, 2007 interim order, with the exception of her agreement to accept his communications by email. Therefore, I will make a direction that the father contact the mother by email, or alternatively via his current partner, P.E., and arrange to collect these items by the end of November from the family home and provide a specific date and time when he will attend at the residence for that purpose.

[60] Finally, the mother has indicated that she cannot operate the garage door at the family home, because the portable garage door opener has gone missing. She assumed that the father has this device in his possession, but as I understand it, the

father maintains that it has simply been lost in the shuffle. As I expect the mother will become the owner of the home in due course, pursuant to these reasons, I view this as a maintenance item which she should be responsible for.

[61] In summary, my conclusions with respect of the division of family assets and debts can be better understood by referring to the following chart:

Division of Family Assets and Debts

Asset	Mother	Father
House 3044, Iqaluit		$94,900 ($130,000 less 27%)
H. Crescent, Whitehorse	$236,000	
Northwestel Pensions	Split at Source*	Split at Source*
RRSPs	$15,980.29	$9,287.63
BCE Shares	$3,740.49	$12,549.82
Manulife Investment	$3,225.46	$2,286.87
RBC Bank Account 90033		$12,444.69
1991 Ford F250 Truck		$3,000
Tools		$2,000
Debts		
H. Crescent Mortgage	($124,609.09)	
RBC LOC		($43,289.13)
Balance	$134,337.15	$93,179.88
Total Net Assets	$227,517.03	

Equalization of Above-Noted Assets and Debts:

The father will retain House 3044 to be used or disposed of as he sees fit. The mother will retain exclusive possession and ownership of the H. Crescent house. If title to either property requires a transfer from both parties to the party now entitled to ownership, then I order such transfer be effected.

Total Net Value of Assets owned by the parties at separation: $227,517.03.

Each party is to retain half of the value of those assets or $113,758.51.

Before equalization, the mother retains $134,337.15, so she must pay to the father $20,578.64 to equalize the assets retained by each party:

$93,179.88 + $20,578.64 = $113,758.51, to be retained by the father after he receives payment from the mother.

$134,337.15 - $20,578.64 = $113,758.51, to be retained by the mother after she makes payment to the father.

Additional Assets:

1. Pension Plans: to be "split at source" – Northwestel to equalize and split pension plans.

2. Royal Bank Signature and Calculator Plus accounts – statements as of December 31, 2005, to be filed with the court and provided to the mother's lawyer and the father shall pay to the mother 50% of the balance in each of the two accounts as of December 31, 2005.

3. The father will take possession of the fifth-wheel trailer, or forfeit its value.

Issue # 2: Custody

a) Should the mother have sole custody of all four daughters, or should the parties share joint custody of them?

[62] I will begin this discussion by noting that, while there were differences and inconsistencies in the evidence of the parties, I found the mother to be generally more credible and consistent. That is not to say that I found the father's evidence to be unbelievable. However, while attempting to recognize the disadvantage that the father was struggling with in representing himself in this trial, as will become apparent later in these reasons, I also formed the impression that he is continuing to delude himself

about certain aspects of his relationship with his children, both collectively and individually, especially with respect to the older three children.

[63] In the early years of their marriage, the couple got along relatively well and the mother conceded that the father was actively involved in the births and the raising of the children. She further conceded that he was an attentive parent and that he helped around the house by doing such things as changing diapers and buying groceries. Although there were signs of initial tension between the parties during their time in Iqaluit, the mother acknowledged that, for much of the marriage, she had no problems with the father as a parent.

[64] However, the friction between the couple began to increase in 2005 and, by mid-December, they recognized that they were fighting so much that it was not healthy for the children and the father agreed to move out of the family home. The parties tried to come up with a practical separation agreement, but despite numerous discussions about possible terms and conditions, nothing was ever formally or finally agreed to. They each attended both the first and second level “For the Sake of the Children - Parenting After Separation” workshops in the spring of 2006 and the relations between them were generally amicable in the early part of that year.

[65] In March 2006, the mother allowed the father to move back into the family home. Each gives a different version of how that happened. The mother says that this was only to be a temporary arrangement, until the father obtained alternative accommodation. However, according to the father, he was attempting to reassert his claim to the family home and also hoped to reconcile with the mother. In any event, the conflict between

the parties took a significant turn for the worse over the ensuing months and, most unfortunately, their arguments were often witnessed by some or all of the children.

[66] According to the mother, whose evidence I accept on a balance of probabilities, the father became increasingly insistent upon the mother agreeing in writing to certain terms the parties had discussed, which were intended to form the basis of their separation agreement. In particular, it is common ground that they had often discussed their intention to share the custody of the children and to allow them to reside with each other for equal amounts of time. The father repeatedly referred to this as the mother's "promise" that they would share the children "50/50". However, the harder the father pushed the mother into signing a separation agreement, the more the mother began to resist. They argued constantly about that and other domestic issues. The mother said she also began "running interference" between the father and the children. The father became increasingly critical of the children's behaviour and conduct in such things as the clothing they wore, their homework, and their ability to pick up after themselves. He became, in the mother's words, "relentless" with her and the children and "was picking at us all the time". The father would tell the children that the petitioner was not a good mother. In the children's presence, the father would call the mother a "wack job", a "bitch", a "liar", and "crazy". To make matters worse, the couple were also arguing about the division of their matrimonial property, which became more and more of a sore point. He would tell the children that the mother was "stealing" from him and that she was "like a bank robber". There was often yelling back and forth and the children would sometimes try to intervene.

[67] Eventually, in about late August or early September 2006, the children approached the mother indicating that the family could not all live together in the same house. Rather, they said they wanted to live together with the mother in the family home and be able to see the father whenever they wanted to. This expression by the children caused the mother to change her mind about the prospect of sharing custody and residency of the children with the father. That in turn caused the father to accuse the mother that she had broken her "promise" on that point, which further fuelled their conflict. The father then began involving the children more directly by continually expressing his opinion to them that if he did not have them 50% of the time, he could not truly be their father.

[68] On September 19, 2006, the mother was awarded exclusive possession of the family home and the father was ordered to vacate. Between that date and the date of the interim order on February 1, 2007, the father became increasingly obsessed with his perceived right to obtain a separation agreement which allowed him time with the children on a "50/50" basis. He began phoning the mother and the children several times a day, and on one occasion he made as many as 16 calls in one hour. He would also frequently email the mother at work, sometimes 4 or 5 times a day, and would also attend at her work place. The children eventually became so frustrated by the father's constant emails that they blocked him out on their personal computer so that he could not communicate with them in that fashion anymore. However, as I understand it, the father continued to send text messages to the children on their cell phones. While the father was on his medical leave, not only would he attend at the mother's workplace, but he would also accost her at bus stops and coffee shops and would sometimes follow

her in his vehicle. The eldest child, V., expressed to her teacher, J.L.S., that she thought the father was becoming increasingly unstable and was not in a sane state of mind. The middle children, A. and M., told the same teacher that the father frequently talked badly about their mother and about the court case and would not stop discussing the case even when they asked him to. The father told V. “if your mother gets custody, I don’t want to see you until you are all grown up”. He also told A. and M. that if they did not live with him 50% of the time, he would move to China, Alberta or Newfoundland. V. referred to this as “emotional blackmail” on the part of the father, which was particularly distressing for her because, prior to the separation, she and the father had a very close relationship.

[69] On one occasion, while A. was under the father’s care, she went downtown to visit a friend, apparently against his wishes. The father pursued her in his vehicle, parked the vehicle and left the youngest child, L., in the vehicle alone for about half an hour while he went looking for A., who had noticed the father looking for her and hid in a department store in order to avoid being seen. She later told her mother that she felt the father was “stalking” her on that occasion. She also expressed concerns to J.L.S. that when she came out of her school the father would be waiting for her.

[70] In January 2007, the father was trying to enforce a 50/50 shared custody arrangement. Accordingly, on the agreed-upon days, the mother would let the children know that their father was coming by to pick them up. However, sometimes some of the children would then begin to express their reasons why they did not want to go with the father, such as studying for exams or other prior arrangements. When the mother relayed these reasons to the father, he insisted that all the children come with him as

arranged. If they resisted, he would, in their presence, threaten to call the police, which upset them greatly. Alternatively, he occasionally insisted that the mother write him a note indicating that she would not hold it against him if he allowed one or more of the children to remain with the mother. Two such notes were produced in evidence dated January 3rd and 4th, 2007, which the mother said she wrote under duress to appease the father and avoid further conflict.

[71] The father's behaviour ultimately prompted the mother to bring her application for the interim order of February 1, 2007. In support of that application, the child advocate filed an affidavit by J.L.S., V.'s teacher, indicating that all three of the older children had told J.L.S. that they did not want the father contacting them, and that they would prefer to initiate contact when they wanted to see him.[1] Quite remarkably, in my view, the father conceded that after the interim order was made, he discussed the affidavit of J.L.S. with the children directly.

[72] The father claims that he went into a significant depression after my interim order of February 1, 2007, which only allowed him access to the children when initiated by them. However, the father's evidence on this topic was inconsistent and difficult to understand. He testified that he was on medical leave from his employer, Northwestel, from August 23, 2006, to April 16, 2007, inclusive. I gathered from the father's submissions and testimony that this medical leave was essentially for stress and depression associated with the separation. Therefore, in that sense, the father was

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[1] There was evidence from both parties, and the witness called by the child advocate, touching on the contents of this affidavit. Also, the closing submissions of the child advocate included references to this affidavit. However, by oversight, the affidavit was not made an exhibit during the trial. In order to ensure the record is complete, I direct the clerk to make the affidavit of J.L.S. #1, filed January 31, 2007, Exhibit 10 in this trial.

apparently *already* suffering from depression prior to the interim order on February 1, 2007. Nevertheless, the father said that the interim order caused him to go into a severe downward spiral for several months afterwards and that it was only in the last month or so that he was able to get back on his feet. Once again, that is inconsistent with the fact that he returned to work about mid-April 2007.

[73] It is also important to note that this trial was originally scheduled to commence on February 19, 2007. However, a pre-trial conference was held on January 22, 2007, at which time the father appeared with counsel, André Roothman, and sought an adjournment. Mr. Roothman stated that he had not yet been formally retained, but apparently indicated that he was about to be retained, because the reason for his appearance was to advise the court that he was unavailable for the trial in February and thus the need for an adjournment. The record of the pre-trial conference does not indicate whether the application was opposed, but in any event, the trial was adjourned to commence on October 17, 2007. Notwithstanding that lengthy adjournment, the father took no steps to confirm the retainer arrangements with Mr. Roothman. Indeed, he appeared at the outset of this trial indicating that he wished a further adjournment to retain Mr. Roothman. When I asked him why he had not made more diligent efforts to retain counsel in the interim, he cited his debilitating depression as his excuse. However, I have just indicated, his depression was apparently not so great that he was unable to return to work and resume his normal duties with his employer, not to mention his normal salary. Further, although I gave him the opportunity to do so, the father failed to provide any medical evidence to confirm or explain the nature of his depression.

[74] Perhaps not surprisingly, after the interim order on February 1, 2007, the frequency of the father's contact with the older three children dropped off significantly. This was despite the mother continually encouraging them to call their father and placing the father's various phone numbers in a conspicuous location in the family home for the purpose of facilitating that conduct. In particular, the mother encouraged the three older girls to call their father on Easter and Father's Day in 2007, but they refused to do so saying that they did "not have a father". The older three children indicated to the mother that they did not want to call their father because, whenever they did, he would insist on discussing the marital conflict and the "50/50" arrangement and seemed uninterested in discussing the children's issues and interests. On one occasion, V. indicated that she was talking with her father on the telephone about some drawings that she had done and posted on the Internet, to which the father responded, "Your mother is a bitch". On other occasions, the father continually indicated that if the older three girls did not agree to the 50/50 timeshare, he would not be their father anymore.

[75] On May 4, 2007, the father sent an email to M.'s teacher asking to have his name taken off the teacher's mailing list. In that email, he stated that the mother had sole custody of his "former children", and he need not be reminded of what she had "taken" from him. He also said that he didn't think that he could be of any assistance to the teacher now that "… [M.] is no longer my daughter as per her mother and the courts." Unfortunately, though I accept the father's evidence that this was not intentional, this email was copied to the parents of the other children in M.'s class. The mother indicated that the email "upset M. quite a lot".

[76] On another occasion, the father told V. and M. that he was attending a family reunion in Newfoundland in July 2007, but that they were not welcome because “they weren’t family”.

[77] Despite these difficulties, the mother continued in her efforts to encourage the children to have contact with the father. To be clear, it was primarily the three older children who were reticent in that regard. The youngest child, L., has continued to maintain contact and has had periodic overnight access with the father.

[78] About five months ago, the father met his current common-law spouse, P.E. over the Internet. They maintained a long distance relationship for about two months and got together in Newfoundland this past July and spent about one month together. P.E. moved to the Yukon with the father in mid-September and the two have lived together since then.

[79] In late September or early October, after L. had exercised overnight access with them, the father and P.E. returned L. to the family home. Having been informed of the new relationship by the mother, the three older children were quite excited about meeting the father’s girlfriend and ran out onto the driveway to meet them. The father indicated that he was “back to normal”, with reference to his earlier depression. The three older children made arrangements to meet the father later that week at a downtown coffee shop on October 4, 2007.

[80] On the Monday night prior to the planned meeting, V. visited with the father and P.E. at his apartment. Once again, the father asked V. if she was interested in a 50/50 custody arrangement. According to P.E., the first part of the meeting between the father

and V. was pretty “awkward”. Eventually V. said that she would consider the 50/50 arrangement, but wanted to discuss some more details about it later.

[81] The night before the appointed meeting at the coffee shop on October 4th, A. and M. visited the father’s apartment. Once again, the divorce and the potential living arrangements were raised by the father. A. did not want to discuss the issue or talk to anybody about it. P.E. told her that she would have to make some choices in that regard and that she would also have to tell the right people what her choices were. P.E. told A. that she had to take responsibility for her own future. Once again, the father let A. and M. know, in no uncertain terms, that he wanted the children half time. Eventually, A. and M. capitulated and said that they would live with the father half time, following which the remainder of the visit went very well, according to P.E.

[82] On October 4, 2007, only two weeks before the commencement of this trial, V., A. and M. went downtown by bus to meet the father at the appointed coffee shop. The father arrived late and immediately indicated to the children that if they did not agree with the 50/50 arrangement, he would not be their father and would move away. The children became very upset with him and his insistence in discussing, yet again, the conflict. According to the mother, the children later related to her that they were originally excited about meeting with the father, because they thought that things had changed, and that he was back to normal now with his new girlfriend. However, when the father pursued the conversation about the 50/50 arrangement, they realized that nothing had changed. The mother spent about two hours debriefing the three older children after this incident, as they very were variously upset, crying, swearing and hysterical.

[83] The mother's testimony in that regard was corroborated by D.T-D., the only witness called by the child advocate. D.T-D. has three children of her own, ranging in age from 10 to 14. She first met the parties in Iqaluit in about 1994, and later became reacquainted with the mother in 1997 in Whitehorse, when D.T-D's oldest daughter became a friend of the parties' children. D.T-D. just happened to be downtown with one of her daughters the evening of October 4th, and was parked in her car across the street from the coffee shop. She described V., A. and M. all coming out of the coffee shop and crossing the street to meet with her. She could see the father watching the group from the other side of the street. D.T-D. described V. as being highly agitated and completely falling apart. She said that A. and M. were very angry. As soon as the children entered D.T-D.'s vehicle, 'they completely exploded", saying repeatedly: "he's doing it again"; "it's the 50/50 again"; and "if we don't do it, he's not our dad". D.T-D. described the children as "devastated" by their earlier conversation with the father. They all indicated that if they did not agree to the 50/50 arrangement, the respondent said that he did not want to be their father anymore. V. and M. indicated that the father has "always done that" and that "he's got a mental problem". They described him as a "control freak" and discussed his manipulation of the youngest daughter, L. They said that "things had to be done just his way" and that since the father had left the family home, things had been better. M. told D.T-D. that they should be able to choose when they want to see the father and that he does not understand that the more he tries to force them, the less they want to see him.

[84] I accept all of D.T-D.'s testimony about the children's responses following the meeting on October 4th. She struck me as objective and disinterested in the outcome of

this trial. Although she is an acquaintance of the mother, they are not friends and do not see each other socially. Her principal connection to the girls is through her eldest daughter. She has never had a discussion with the mother about particulars of this conflict. Nor had she ever been involved in such an intimate conversation with the girls before.

[85] Upon L.'s return from spending the past Thanksgiving weekend with the father and P.E., she was at home sick on the following Monday and asked the mother "What does 50/50 mean?" That indicates the father had very recently discussed the conflict with L. also.

[86] In his testimony and in his submissions, the father attempted to generally explain his behaviour by suggesting it was due to the emotional crash he suffered after the interim order of February 1, 2007. And, although he was getting back on his feet and starting to feel normal again through the summer and early fall, he conceded that, at the coffee shop meeting on October 4th, he lapsed back into his old ways. In other words, he suggested it was a slip and not an indicator of his future behaviour.

[87] However, I accept the submission of the mother's counsel that the facts do not support the father's explanation in that regard. On the contrary, they show that the father's difficult behaviour began long before the interim order of February 1, 2007, and has continued virtually to the present.

[88] All this has caused significant stress for the children. In the days and weeks leading up to this trial, V. and A. have missed various amounts of school because they have not been feeling well. V. seems to be in a depression. A., who already suffers from

insomnia, says that she has had even more trouble sleeping in the past two months or so. V. and A. have also exhibited eating problems in recent weeks. While M. has been attending school more regularly than the other children, she is not sleeping well either. L. missed an entire week of school just prior to trial and has exhibited particularly "clingy" behaviour with the mother over the 10 days prior to the trial. The mother herself has been authorized for six weeks of stress leave by her physician commencing October 12, 2007, and her stress is likely to have an adverse impact upon the children, who currently need her care and succour more than ever.

[89] The mother does not say that the father is unable to be a parent. She has not disparaged the father or said to the children that he is an unfit parent. On the contrary, she has made remarkable efforts, in the circumstances, to encourage the children to maintain contact and a relationship with their father. Throughout this entire conflict, the mother has always maintained that the children should be able to spend as much time with their father as they wish. The only reason she recanted from earlier discussions with the father on equally shared custody was because the children themselves had indicated that they wanted to live with her in the same house, providing they could see their father whenever they wanted to.

[90] Although the mother says that she is completely open to what the children want, in terms of custody, she thinks that they should be with her. This is because they want to be with her, because they can talk to each other and because they trust each other. In contrast, she says that the father does not respect the maturity and the privacy of the children and does not trust them. She points to the fact that the father has hurt the children in many ways and that this is an indication of his inability to put their best

interests before his own interests. She also says that a joint custody arrangement would be unworkable, as the two are unable to communicate effectively, and joint decision-making would be virtually impossible. Accordingly, she seeks the authority to make major decisions for the girls, but acknowledged that she would take input from the father, providing those communications are only made by email.

[91] The initial interim custody order in favour of the mother was made under s. 16(2) of the *Divorce Act*. In this trial, the mother seeks a final order under s. 16 for custody and primary residence (I refer to it as a "final" order recognizing that custody is always an issue which can be revisited by the court, pursuant to an application to vary under s. 17 of the *Divorce Act*, if there is a material change in circumstances.). The father has failed to file an answer and counter-petition and thus, technically, he has made no application for custody at all. Nevertheless, recognizing that the father has been unrepresented in this trial, I will treat his submissions as a *de facto* application for a custody order. Section 16(8) of the *Divorce Act* indicates that, in making a custody order, I must take into consideration only the best interests of the children. Further, s. 16(9) prohibits me from taking into consideration any conduct of a parent, unless that conduct is relevant to the ability of that parent to act in that capacity.

[92] This is where I find the father's case essentially fails. I agree with the submissions of the mother's counsel that it is very clear the father has not acted in the best interests of the children throughout this conflict. He seems to be completely unable to set aside his anger towards the mother and his resentment over his perception that she has broken her promise to share custody of the children equally, notwithstanding that there was never a completed or binding agreement between them in that regard.

For example, he testified in direct examination that when he moved out of the family home, he wanted the mother to realize "how expensive and time consuming it is to raise four children". I infer from this statement that this was the reason he failed to pay any child support after the date of separation, until the interim order of February 1, 2007. Thus, it appears the father wanted to somehow punish the mother and teach her a lesson by not paying child support, when it was ultimately the children's best interests which would be adversely affected by such conduct.

[93] The father also repeatedly pressured the girls into agreeing to spend 50% of their time with him, failing which he has threatened that he will not be their father, that he will move from the Yukon and that he will not see them again until they are adults. He has said extremely hurtful things to the children at various times, often with the awareness that what he was saying would cause undue stress. For example, his remark to V. and M. that they were not welcome at his family reunion in July 2007 "because they weren't family". Also, his email to M.'s teacher stating that "she is no longer my daughter" and referring to his "former children". Finally, and most recently, when the three older girls had agreed to meet him and his new common-law spouse for coffee to get reacquainted and re-establish their relationship on a new footing, he once again used the opportunity to pressure them with his ultimatum on the 50/50 arrangement. Given the history of this case, and particularly the affidavit of J.L.S., the father had to have known that such a confrontation would cause the three older girls a great deal of pain and upset. Nevertheless, he proceeded because he was putting his own interests ahead of the best interests of the children.

[94] Further, repeatedly throughout this trial, the father referred to the interim order of February 1, 2007, as the occasion when the children were "taken" from him. Such comments indicate a blindness on the father's part to his own role and responsibility in the circumstances leading up that interim order. Not only does the father completely deny the allegations of the children which led to that order, in a remarkable exhibition of callousness and poor judgment he confronted the children directly with the statements they were reported to have made in the affidavit of J.L.S. At this trial, the father continued to exhibit an almost delusional lack of awareness about how much he has hurt his children, particularly the three older girls. Rather, he has fixated on his 50/50 bottom line and nothing else will appease him.

[95] I place no weight on the apparent agreement of the older three daughters to consider the 50/50 arrangement, when they met with the father and P.E. at the father's apartment on the evenings just before the coffee shop date of October 4th. The only significance of that evidence is that it shows how the father would not rest until he extracted a commitment from each of the three girls, under compulsion, following which the visits went more smoothly. In other words, I find that the girls would say what he wanted to hear, in order to have a more enjoyable visit with their father.

[96] The respondent believes that he cannot be a true parent if he does not have the right to exercise a leadership role with the authority to guide and discipline his children. He is unable to accept the notion that, regardless of whether he has custody of the children, or any of them, he continues to be their parent and father and has a responsibility to act in their best interests to ensure that they are properly raised, nurtured and loved. A non-custodial parent, with access rights only, is nevertheless a

parent. The father seems unable to accept this concept and, so long as he does, he is likely to have a difficult, if not tortured, relationship with his children. Rather, I am hopeful that the father will come to understand that he is to make the best of a less than ideal situation by attempting to meet the needs of his children, not only during times of access, but 100% of the time, regardless of where they happen to be residing. While the father, if denied custody, would not have the ultimate right to make major decisions for the girls, the mother has indicated her willingness to accept input from him (via email) and I am confident in her good faith that she will do just that.

[97] The father's failings in this regard are all the more surprising given the fact that he has attended both levels of the "For the Sake of the Children - Parenting After Separation" workshops. As a result, I would have expected him to have a greater level of awareness of how he should put the children's interests ahead of his own. The father also professed a fondness for "self-help" books and claims to have done a good deal of reading in this area. He believes this has increased his ability to be a better parent. However, his conduct throughout this proceeding, and in this trial in particular, has indicated to me that, while the father may be able to "talk the talk", he seems unable to "*walk* the talk" and put this knowledge into practice.

[98] I agree with the submissions of the child advocate that part of every parent's responsibility is protecting their children from pain and that this is a role which the father has not played well. Rather than making every effort to ensure that the children were protected from the emotional turmoil of the breakdown of this relationship, he placed them squarely in the middle of the dispute and engaged them to such a degree that he ultimately pushed them away from him. As M. astutely observed, the respondent does

not understand that the more he tries to force them, the less the children want to see him. While his perceived role as a father may be crucial to his identity and sense of self-worth, at the end of the day, his concerns have been for himself and not for his children. His focus has been on *his* rights and his role as a father and *not* on the damage that he has caused to his relationship with his daughters.

[99] In conclusion on this point, I am satisfied under s. 16 of the *Divorce Act* that it would be in the best interests of the children to award custody of all four children to the mother.

[100] Further, I find that the long standing acrimonious relationship between the parties and their seeming inability to communicate, at least to this stage, makes this situation an inappropriate one for any consideration of joint custody or guardianship. However, to be clear, that is not my only concern in this regard. My earlier conclusions about the father's seeming inability to understand how much his inappropriate conduct has hurt his own children is equally applicable to any consideration of joint custody or guardianship. Simply put, I do not feel that it would be in the best interests of the children that the father have decision-making authority, as a custodial parent, for any of them at this time.

[101] I agree with the submissions of the mother's counsel that it is the mother who has been the psychological parent of the children. She has never maintained that the respondent is a bad father, but rather has expressed her concerns about his hurtful statements and conduct and their impact upon the children from time to time. Moreover, throughout this conflict she has been consistent in her encouragement of the children to

maintain contact and communication with their father. She has consistently said that she is open to whatever type of relationship the children wish to have with their father and that they can spend as much time as they want with him. There is no evidence that she has ever tried to sway the children in her favour, as the father has done. She has allowed them to express their feelings and has not exhibited any personal agenda or interference in the children's relationship with their father. She stated she understands the importance of the children embracing the father's new girlfriend into their lives. In short, I am satisfied that she truly understands that it is in the children's best interests to have their own relationship with their father, as they see fit, without interference from her. All this gives me confidence, as I said earlier, that the mother will exercise good faith in ensuring that the children's right to have access with their father is fully exercised and that she will also be open to taking the father's views into account on any major decision-making with respect to the children.

b) Should custody of the children be divided between the parties?

[102] In his final submissions, the father indicated that, failing joint custody, I should give consideration to dividing custody of the children between the parties. In particular, he variously suggested that one parent has the "final say" with respect to two children and the other parent has the final say for the remaining two children. At other times, he suggested that the mother might have custody of the older three girls and that he should have custody of the youngest, L. For the reasons which I have given above, I find that it would not be in the best interests of *any* of the girls for the father to have final decision-making authority over them. I am also strongly influenced here by the mother's evidence that it was the desire of all the children that they remain together and that they live with

the mother in the family home, providing that they are able to see the father whenever they wish to do so.

Issue # 3: Access

In the event that a party is awarded custody of any of the four children, should there be any conditions associated with the other party's access?

[103] Given that I have awarded custody of all four children to the mother, I must now decide whether there should be any conditions associated with the father's access. It has been the mother's position throughout that access should be in accordance with the children's wishes. Initially, the mother qualified that position by seeking an order that it should be up to the children to initiate access, as in the interim order of February 1, 2007. However, having heard the final submissions of the child advocate that the father should *not* be prohibited from contacting the children when he wishes, the mother expressed her agreement on that point. The child advocate also suggested that access not be scheduled, but that it remained as unspecified reasonable access. I agree.

[104] For his part, the father indicated that he was in agreement with having no communication with the mother, except by email. He did however want the opportunity for his common-law spouse, P.E., to be able to phone the mother to advise her when the father has sent an email. In my view, that would be appropriate and could be accomplished by a condition which simply limits the father from having *direct* contact with the mother, except by email and only about issues respecting the children. In his testimony on the issue of access, the father said "I would take what time I can get", and that, at a bare minimum, he wants the ability to initiate contact with the children. Given the now joint position of the child advocate and the mother, it appears that would be

appropriate. I expect that, as each of the children have cell phones, the father will be able to contact them directly without having to involve the mother unnecessarily.

[105] Finally, the father testified that he wanted a condition included in any final order that the children reside in Whitehorse and that the mother not move from Whitehorse or the Yukon without his consent. However, given that the father has failed to file an answer and counter petition, it would be unfair to impose such a condition upon the mother, since she did not receive any notice of the issue prior to the father's testimony. Accordingly, I decline the father's request on this point.

Issue # 4: Child Support

a) What amount is the father receiving as rental income from House 3044?

[106] After the couple moved from Iqaluit in July 1996, they rented out House 3044. Originally, the father was responsible for collecting the rent. However, from October 2002 to May 2004, the mother arranged to have the rent collected by a friend of hers in Iqaluit, K.L., in exchange for paying K.L. 10% of the rents collected. Over that period, a total of $17,300 in rent was collected, before payment of K.L.'s commission or any building maintenance costs. That indicates an average rent of $865 per month over 20 months. As of June 2004, the father again assumed the responsibility for collecting rent on House 3044. He filed materials indicating that the monthly rent over the years from 2004 to 2006, inclusive, varied from $1,200 to $1,100 per month. For each year he specified the gross amount of rent which was potentially collectable, versus the actual rent received. In 2004, there was a write down of 31% in uncollected rent. In 2005, the write down was 41% and in 2006 it was 62.5%. Therefore, the average write down in uncollected rent over the previous three years was 45%.

[107] In addition, the father provided evidence about the tax arrears owing to the City of Iqaluit respecting House 3044. In his direct examination, the father testified that in 2006 a total of $3,840.60 was payable, presumably by the father, for taxes and penalties. In addition, the father provided some documents regarding a land lease with the City of Iqaluit, presumably for House 3044. Although the document is not clear on its face that it in fact pertains to House 3044, the father testified that it shows the land lease payment for House 3044 for 2006 was $267.50.

[108] The mother's counsel asked me to find that the father is continuing to collect rent from House 3044 at the rate of $1,200 per month, or a gross amount of $14,400 per year. She then suggested that I discount that by 50% because of such things as maintenance, uncollected rents and taxes, etc., leaving the father with a net amount of $7,200 per year to be added to his employment income. While that approach initially seems a generous concession by the mother, it appears from the father's documents that the average write down for uncollected rent *alone* over the last three years was 45%. In addition to that, the father indicated, in his final submissions, that the present land lease and taxes for House 3044 total about $4,000 per year.

[109] The father also testified that, in February 2007, he arranged a hearing with the rental officer in Iqaluit to collect rental arrears owed by a former tenant over the previous four years totalling about $20,000. However, since obtaining that judgment in his favour, the father has taken no steps to enforce the judgment.

[110] In my view, the father should bear some responsibility for his apparent lack of diligence in collecting the rent on the property.

[111] I find that the average collectable rent on House 3044, on a prospective basis is $1,150 per month. That would result in a gross annual rental income of $13,800. From that I am prepared to subtract a write down of 30% ($4,140), leaving a balance of $9,660. I am further prepared to subtract $4,000 for taxes and lease payments, as per the father's final submission. That would leave the father with net income from House 3044 of about $5,660 per year.

[112] Adding $5,660 to the father's gross employment income of $46,856.61, would result in total combined income of $52,516.61. This income, according to the *Child Support Guidelines*, rounded down to $52,500, results in a child support payment for four children of $1,232 per month.

[113] In his final submissions, the father claimed that such an amount would be equivalent to about 50% of his net income and that this would constitute undue hardship under s. 10 of the *Guidelines*. However, I reject the father's submission in that regard, as he has failed to make the application required under s. 10 and consequently I have been unable to engage in any comparison of the standard of living of the respective parties. In any event, it would appear from the evidence that the reasons which might give rise to a justifiable claim for undue hardship under s. 10(2) of the *Guidelines* are not in evidence in this trial.

b) Should the father pay arrears of child support for the period from January 1, 2006 to October 1, 2006, and if so, in what amount?

[114] As I alluded to earlier, the father has admitted that he did not pay child support over this time, following his initial move out of the family home, which the parties stipulated to be as of December 31, 2005. Pursuant to the interim order of February 1,

2007, the father was ordered to pay, and has paid to date, child support retroactive to November 1, 2006.

[115] According to the father's T-4 slip for 2006, his employment income for that year was $36,251.18. In addition, the father testified that he was on medical leave from August 23, 2006 to April 16, 2007. Since the T-4 would not reflect the father's medical benefits, it indicates that the father's employment income from January 1, 2006, to August 23, 2006, was $36,251.18.

[116] With respect to his period of medical leave, for the first 15 weeks, the father received a gross income of $815.25 per week, totalling $12,228.75. Then from December 13 to 31, 2006, the father's income was reduced to $413 per week, for a total of $826. Thus, his total medical benefits from August 23 to December 31, 2006, were $13,054.75. Adding that amount to his employment income results in a grand total of $49,305.93.

[117] In addition, I have found that the father should have been receiving approximately $5,660 per year in rental income from House 3044, bringing his gross total income for 2006 up to $54,965.93. Under the *Child Support Guidelines*, with that income rounded up to $55,000, the father should have been paying child support over the period of January to October 2006 in the amount of $1,288 per month. Therefore, the accumulated arrears over the 10-month period would total $12,880.

[118] The father suggested that he made a number of payments for various household expenses while he lived in the family home from March to September 2006. However, the evidence is that these were limited to the payment of one particular telephone bill

and the purchase of groceries on a handful of occasions. In addition, the father said that he once purchased a pair of runners for one of the children in the amount $64. Although he provided various Visa statements which he submitted as proof of other purchases, he failed to testified about the particulars of those statements or provide any receipts to indicate that any given purchase pertained to a particular household expense. The father's lack of evidence in that regard is to be contrasted with that of the mother, who gave uncontradicted evidence that she paid for virtually all the household expenses over that period including: the mortgage, house insurance on the family home, house insurance on House 3044, oil, electricity, cable TV, telephone, groceries, as well as the children's school costs and activities. Thus, the father was, in effect, living in the family home for free, without paying for his room and board and without contributing in any significant way to the family's expense. Over that time, the mother accumulated a significant amount of debt, as evidenced from her Visa, MasterCard and line of credit accounts, which, leaving aside payments she made for legal fees, increased her overall indebtedness by about $15,400. Presumably, she would not have incurred that debt if the father had been paying child support, as he was required to do by law.

CONCLUSION

[119] To be clear, it is my intention that the following order will revoke and replace all previous existing interim orders.

1. Division of family assets

a) The family assets and debts are to be divided between the parties as set out in para. 61 of these reasons. As the total net value of the assets owned by the parties at

the date of separation is $227,517.03, each party is to retain an equal share of those assets in the amount of $113,758.51. Accordingly, as the mother is currently retaining assets valued at $134,337.15, she is required to pay to the father $20,578.64 to equalize the assets retained by each party.

b) The father will retain House 3044 to be used or disposed of as he sees fit. The mother will retain exclusive possession and ownership of the H. Crescent house. If title to either property requires a transfer from both parties, or either party, to the party now entitled to ownership, then I order such a transfer be effected.

c) The combined value of the parties' respective pension plans with Northwestel are to be split at source, such that each will receive a pension of equal value.

d) The father shall, upon receipt of the mother's written request, book airline tickets on her behalf, until her one-half share of the father's Royal Bank "Avion" Visa account airline points are used up, in the amount of 74,000 points, or as otherwise agreed by the parties in writing.

e) The father shall provide to the mother's counsel bank statements as of December 31, 2005, for Royal Bank accounts # 5087473 and 5087572 and he shall pay to the mother 50% of the balance in each of those accounts as of that date.

f) The father will take possession of the fifth-wheel trailer, or forfeit its value.

g) The father will contact the mother by email, or alternatively, through his partner, P.E., to give notice of a specific date and time when he will attend at the family home to collect the remaining items of furniture, tools and other personal property belonging to

him, which the father must collect by no later than 10 p.m. November 30, 2007, unless otherwise agreed by the parties in writing.

h) All of the above equalization payments shall be completed or accounted for by the parties by December 31, 2007, unless otherwise ordered or agreed to by them in writing. The various amounts due under this order may be set-off against each other for purposes of achieving equalization.

2. Custody

The mother is awarded custody of the children:

V., born July 17, 1991;

A., born October 18, 1992;

M., born November 1, 1993; and

L., born April 7, 1998.

3. Access

The father is awarded reasonable and generous access to the children and, for greater certainty, may contact them for the purpose of initiating such access.

4. Child Support

a) The father shall pay child support for the children to the mother in the amount of $1,232 per month based upon a gross annual income of $52,500 commencing December 1, 2007, and on the first day of each month following.

b) The father shall pay retroactive child support for the children to the mother in the amount of $1,288 per month, based upon a gross annual income of $55,000, for the period between January 1, 2006 and October 1, 2006, inclusive, which arrears total $12,880.

c) This order may be registered with the Maintenance Enforcement Program for the purposes of payment, collection and enforcement.

5. No contact

The father shall not annoy, molest or harass the mother, her friends, co-workers or family members, and shall have no direct contact with her, except by email and solely for the purpose of giving effect to the terms of this order, including the arrangement of access to the children. The father shall not attend at the mother's work place, unless it is for the purpose of his own work and while at the mother's work place, the father shall have no direct or indirect contact with the mother. The father shall only attend at the mother's residence on H. Crescent for the purpose of picking up the children, and, he shall not approach the home, but shall remain in his vehicle and honk the horn when doing so.

6. Approval of Order

The requirement for the father to approve the form of this order in writing is dispensed with, but the draft order shall be provided to me for approval.

7. Costs

a) For greater certainty, the father remains liable for the mother's costs for the interim order of February 1, 2007, in the amount of $1,000.

b) The mother specifically sought a further opportunity to address me on the issue of costs for this trial, following the issuance of these reasons. I am prepared to hear the parties on this issue, at their convenience, and will remain seized of this matter for that purpose and in the event that further clarifications, directions or orders are sought.

GOWER J.