IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *L.B.* v. *K.L.,* 2006 YKSC 56

Date: 20061018
Docket No.: S.C. No. 06-B0017
Registry: Whitehorse

Between:

L. B.

Plaintiff

And

K. L.

Defendant

Publication of the name of a child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act*.

Before: Mr. Justice L.F. Gower

Appearances:

Kathleen M. Kinchen — Counsel for the Plaintiff
Shayne Fairman — Counsel for the Defendant

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] There are two principal issues in this family law trial. The first is a "mobility" issue about whether the six-year-old child H. should reside primarily with the defendant mother, who recently moved from Whitehorse to Calgary, Alberta, or with the plaintiff father, who resides in Whitehorse. The second issue is whether there should be an equal or unequal division of the communal property.

[2] There was some urgency to deciding the mobility question, because of the expiry of an interim interim order on the child's residential status and the commencement of the school year. Therefore, I gave my ruling on that issue on September 1, 2006, with an indication that my written reasons would follow.

[3] I will now provide my reasons on the mobility issue and then deal with the question of the division of communal property, on which I reserved.

II. THE MOBILITY ISSUE

A) Findings of Fact

[4] The mother attended junior and senior high school in Calgary and lived there for her early adult years, from the age of 14 to 24. She then moved to British Columbia, met K.U., married him and gave birth to C., a girl, in 1997. At one point, she and K.U. had made plans to relocate to Calgary, but the relationship ended in the summer of 1998. The mother then moved to Whitehorse because her own mother was living here at the time.

[5] The mother and father met in Whitehorse in 1998 and were engaged in a relationship from June 1999 until they finally separated in April 2006. They never married. The father is presently 42 years old and the mother is 36 years old. The mother has primary care of her nine-year-old daughter, C., from the previous relationship with K.U.. The couple's son, H., was born on July 27, 2000 (the "child").

[6] Shortly after the couple met, the mother began working as a receptionist, and later as a legal assistant, at a Whitehorse law firm. However, after H. was born, she stayed home with him for a period of six months pursuant to an employment insurance maternity leave program. The father was then employed by Primerica as a financial

services and mutual fund salesman, on full commission, and later in the construction field. His annual income throughout the entire period of the relationship was consistently and substantially less than that of the mother. The father recently began a new career as an insurance adjuster.

[7] The father was involved in the early upbringing of the child, doing such things as changing diapers, preparing food, feeding, being up at night with the child, attending medical appointments, and delivering and picking up the child at day care. The father also did his fair share of other household duties such as house-cleaning and laundry.

[8] Having said that, I accept the mother's evidence that the father's employment, both with Primerica and in the construction business, often required that he work long hours and, occasionally, on weekends. Consequently, he was, at times, unavailable for parenting.

[9] Just prior to the end of the mother's maternity leave, the entire family travelled to Calgary to visit with friends and family.

[10] When the mother returned to her wage employment at the Whitehorse law firm, she made arrangements for H. to attend the same day care in which she had previously enrolled C. The mother made all the day care payments for both children, until the parties initially separated in September 2005. She was also principally responsible for picking the children up and dropping them off at day care, although the father would assist with this from time to time.

[11] The mother was also exclusively in charge of arranging all the children's social and extra-curricular activities. Although she would discuss these with the father, he was quite content to leave that responsibility to her and was not overly enthusiastic about

participating himself. Indeed, the father conceded in his testimony that the mother “took the lead” in the decisions about the children’s activities. For example, the mother involved the children in such things as pre-school programs, swimming, dance, piano, gymnastics and T-ball. She also taught H. how to cross-country ski and how to golf. The mother registered the children for these activities, where applicable, and paid for all of the associated costs. Occasionally, the father paid for a few piano lessons, but that was the extent of his financial contribution. The mother concedes that the father assisted from time to time with dropping the children off or picking them up from these activities, but I find that he only did so reluctantly, at her request, and he never volunteered.

[12] The mother’s involvement with the children was both extensive and varied. She would regularly attend with the children to see movies at the local cinemas. Once again, this was not something that was of interest to the father and he never participated in this activity with the children on his own. She also exclusively attended with the children at the local library for pre-school reading programs. The father never attended this activity. It was also the mother who was primarily involved with H. and C. in their respective school activities such as craft nights, school concerts, barbecues and family dances. As I understood the evidence, the father attended only two such activities over a four-year period, although he did participate in some parent-teacher interviews as well. In addition, the mother was the parent principally attending the children’s piano recitals, while the father attended only initially. Finally, she often involved herself in joining the children for outside play, including going for bicycle rides, hikes and walks.

[13] In contrast, the father had generally expressed to the mother his opinion that he didn't think having children should impact on his life. While she encouraged him to participate in the children's activities, he did so only occasionally and often reluctantly. The father denied only taking the children to activities "as requested", but rather he said that he did so "as needed". I find this to be a distinction with little difference. Presumably, the father would only know that his services were "needed" in that regard if the mother asked for him to help. The father also conceded that he may have made statements to the mother from time to time, such as "I'm not going to let the children change my life" and "You signed them up [for activities], you take them". Further, the father acknowledged that he had never taken H. to either basketball or hockey, but the reason he gave for this was that "Nobody signed him up". Yet, he conceded that he did not think that this was an issue because he never talked with H. about whether he would be interested in such activities.

[14] The father acknowledged that golf was one of his main hobbies. I accept the mother's testimony that he golfed regularly throughout the relationship, usually in the mornings during the week and often once or twice during the evenings each week. When the father was asked what he "wanted for H." as he grows up, he said "What father does not want his son to be on the PGA tour?". However, he has never taken H. golfing.

[15] The father also conceded, in cross-examination, that his attendance at H.'s school was limited at best. He volunteered only once, apparently by performing some juggling. He did not attend H.'s Christmas concert in December 2005. He did not attend the school's family dances because he didn't feel comfortable going if the mother

was also going, without acknowledging that H. would likely have wanted him to be present at such a social activity. He did not inform himself in advance of the date of H.'s "graduation ceremony" (I assume from kindergarten) and because he did not receive notice of the event from the mother until late in the day of this event, and had a previous commitment to go golfing, he did not attend.

[16] In the early years of the relationship, the family went camping on a regular basis each year from the spring to the fall. During those trips, the father would be involved with the children in boating, fishing and other camping-type activities. In the wintertime, he was involved in other outdoor activities such as snowmobiling, sledding, downhill skiing, and having wiener roasts with hot chocolate.

[17] Over time, the father said he began to feel less and less appreciated by the mother. He said she complained he was not earning enough money and that he should be looking for more lucrative employment. He said that she would often berate him when the two were out together in public. As a result, largely due to the father's aversion to confrontation, he began to attend fewer and fewer public functions with the mother, even if those functions also involved H. Instead, he would take the children on outdoor activities on his own.

[18] The mother and both children returned to Calgary to visit family and friends for three weeks in July 2005, with the father's consent. During this time, she made a decision to leave the relationship.

[19] In the late summer of 2005, the mother moved out of the family home with the two children, with the implicit consent of the father. He explained that he did not want a confrontation with the mother over the children, and he knew that they would be close

by, as there had not yet been any suggestion of them moving to Calgary. The father's aversion to confrontation with the mother is a theme that recurred throughout their relationship and one which I will return to later in these reasons. For the moment, it is important to note that the father himself concedes that there was a period of no communication with the mother after she moved out with the children in 2005, during which he did not exercise access to H. The mother's evidence on this point, which I accept, is that she told the father of her decision to move out of the family home on or about August 9, 2005. The mother then house-sat and stayed with friends outside the family home. On September 10, 2005, she hired movers to move her belongings out of the family home. She confirmed that the father did not object to her taking the children with her.

[20] When the mother initially discussed a visitation schedule with the father, he complained that his various commitments made a formal schedule too difficult to work with and that he would prefer to see the children whenever he was able to, by phoning in advance. According to the mother, whose evidence I once again accept, the father would sometimes phone to arrange access twice a week, but then would not call for two to three weeks at a time. The father said he was unsure of his rights regarding access, but gave no evidence that he sought legal advice on the issue. Further, while he complained in direct examination that it was often difficult for him to get the children for more than two days in a row, he conceded on cross-examination that he saw them "as much as [he] wanted".

[21] Further, the mother began to ask the father about financial assistance for the children, which the father questioned. The mother even went to the point of showing

him a copy of the child support guidelines in the fall of 2005, but the father did not then, and has not to date, paid any child support to the mother. The extent of the father's contribution to the children has been paying half of the children's day care costs, which commenced in September 2005.

[22] The couple agreed that H. could spend Christmas 2005 in Ottawa with the father and the father's sister. C. spent that Christmas with her biological father, K.U., in Fort St. John, British Columbia. The mother spent Christmas 2005 in Calgary, where her mother, father and brother reside, as well as the plaintiff father's brother and sister-in-law and their four children. While there, she visited with H. when he stopped over en route with his father from Whitehorse to Ottawa, return.

[23] In about January 2006, the mother began a series of conversations with the father about her desire to move with the children to Calgary and the possibility of the father being similarly interested. Indeed, the father admitted that after Christmas 2005, with the encouragement of his brother and sister-in-law, he began to briefly explore employment prospects there. He even talked with the children about the possibility of his moving to Calgary and they were in favour of the idea. However, the father ultimately decided that he really didn't want to move and that he preferred his lifestyle in Whitehorse. Nevertheless, the mother continued to express her own interest in moving and that she would like to do so with both children.

[24] About that time, the father was in discussions with the mother about assisting her with a down-payment on a new home. I accept the mother's evidence that the father offered this assistance, regardless of whether the mother remained in Whitehorse or moved to Calgary. In the event of the mother's move with the children, the couple also

discussed sharing travel costs, alternating school holiday access periods with the children, and the father contributing to travel expenses in lieu of paying child support.

[25] Around the end of February 2006, the couple had a particularly extensive and emotional discussion about the mother's intention to move to Calgary. Following that discussion, the father indicated that he would consent to the move with the children, but that he wanted H. to stay in Whitehorse until the end of the school year and for the first half of the summer season. I accept the mother's evidence that the father agreed to put his consent in writing in due course.

[26] Having reached this agreement, the mother and children moved back into the family home in early March 2006. She and the children resided in the basement and lived more or less separately, but amicably, in the home. The father at that time also had a boarder living upstairs in the home. Things went well for about one month, until the couple got into a disagreement about whether the mother should pay rent to the father. The mother refused because the father was not paying any child support.

[27] On or about August 9, 2006, the mother asked the father to put in writing his consent to her move to Calgary with the children, as he had promised earlier. By then, the mother had already told the children that they were moving to Calgary and they had talked about the periods of visitation they would have with the father. The father responded that he had changed his mind, saying "Why should you get your way?" or words to that effect. The father did not give any reasons for revoking his consent. The mother said she was "devastated" by the news, particularly because he would not give her any more information. The atmosphere between the couple became very tense

after that and the mother once again left the family home with the children for the last time on April 23, 2006.

[28] The mother then took the children with her to Calgary for a week to attend the funeral of her friend's father. The plaintiff father withheld his consent to H. going on that trip, but the mother took both H. and C. in any event. She returned with the children on May 1, 2006, as she had previously promised. The father made no attempt to exercise access to either H. or C. following their return. It was only on May 12, 2006, when the mother phoned him to ask if he wanted to see the children, that the father arranged to see H.

[29] The mother continued with her plans to leave for Calgary with the children. She gave her notice at the Whitehorse law firm where she was employed. The father would not engage with her in any further discussions on the issue and she did not feel that he had given the issue "fair treatment or regard".

[30] She said her motive for the move was to be closer to her "loved ones" and other people to whom she feels connected and who share her values. She was also keen on her children developing closer relationships with their various relatives in and about Calgary. It was implicit that she wished to return to Calgary because it was familiar to her, having grown up there, and because she preferred its various amenities over those available in Whitehorse. She also hoped to obtain more lucrative employment there. When asked why she continued to plan to move with the children, even after the father had revoked his consent, she reiterated all of these reasons and stated that "Healthy, happy people make healthy, happy choices".

[31] The mother was employed at the same Whitehorse law firm from 1999 to 2006. Her income steadily and significantly increased over that period. In 2005, her gross annual income was approximately $45,000. She received a glowing letter of reference from the law firm.

[32] In Calgary, she is particularly interested in working in the oil and gas field, as it is more lucrative than the legal services area, and she expects to earn between $50,000 and $70,000 gross annually. In fact, she testified, and provided various documents confirming, that she had received a very serious expression of interest in being hired as an executive assistant to an oil and gas company known as Western Oil Sands Inc. The salary range for that position was to be approximately $60,000 annually, plus bonuses, benefits and share options. However, she has specifically refrained from taking employment this past summer because of this trial and also because she wanted to ensure that her children were properly placed in school before going back to work. Even so, according to the mother's testimony, Western Oil Sands Inc. was still interested in hiring her as of the time of trial.

[33] The father applied to this Court on June 12, 2006 for an interim interim order restraining the mother from moving with H. from the Yukon. That order was granted on June 14, 2006. It also specified that H. would remain with the father in Whitehorse for the month of July, but that he was permitted to reside with the mother in Calgary for the month of August 2006. The mother moved to Calgary with C. on June 15, 2006, where she currently resides with the children's maternal grandmother.

B) Analysis

(i) Basic Principles

[34] The parties have agreed to an order for joint custody of H. The only issue relating to custody is where H.'s primary residence should be. Because the mother has now moved to Calgary, this has become a "mobility" case and the leading authority in this area is *Gordon* v. *Goertz*, [1996] S.C.J. No. 52. In that case, the mother had been awarded custody of the young daughter, who was seven years old at the time the Supreme Court of Canada issued its reasons. The father had been awarded and was exercising generous access with the daughter. The mother then applied to vary the original custody order to allow her to move to Australia to study orthodontics. The variation was allowed by the trial judge, despite the father's objections, and that decision was upheld by both the Saskatchewan Court of Appeal and the Supreme Court of Canada.

[35] Although *Gordon,* cited above, involved an application to vary an existing custody order, it has generally been accepted as applicable to situations where a mobility issue arises in the first instance, such as in the case at bar. Further, because *Gordon* was a variation case, there was an initial issue of meeting the threshold of demonstrating a material change in circumstances. There is no such threshold issue in the case before me, as this is an application respecting the child's primary residence which is being made for the first time. Finally, the principles in *Gordon* are expressed in terms of the "custodial parent" and the "access parent". Those terms are technically inapplicable in the case before me, as there has been no previous custody order in favour of either parent. However, rather than reinventing the wheel, I will simply re-state the applicable

principles from *Gordon*, with the intention that the reference to “custodial parent” can generally be transposed to the parent who has had primary care of the child. The term “access parent” can therefore generally be transposed to the remaining parent. With that in mind, as well as the fact that this is not a variation case, the applicable principles were summarized in *Gordon* by McLachlin J., as she then was, at para. 49, as follows:

> “
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> . . .
>
> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
>
> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
>
> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
>
> 7. More particularly the judge should consider, inter alia:
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;
>
> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.”

[36] Further, because the couple were never married, the *Children’s Act*, in particular Part 2, applies. Section 29 states that one of the purposes of that Part of the *Act* is to ensure that applications for custody and access are determined in accordance with “the best interests of the child”. Section 30(1) of the *Act* then goes on to state that, in

determining the best interests of a child for the purposes of an application for custody or access, the court is required to consider:

> ". . . . all the needs and circumstances of the child including
>
> (a) the bonding, love, affection and emotional ties between the child and
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons, including grandparents involved in the care and upbringing of the child;
>
> (b) the views and preferences of the child, if those views and preferences can be reasonably determined;
>
> (c) the length of time, having regard to the child's sense of time, that the child has lived in a stable home environment;
>
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessities of life and any special needs of the child;
>
> (e) any plans proposed for the care and upbringing of the child;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live; and
>
> (g) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child."

[37] Further, s. 30(2) of the *Children's Act* states that the past conduct of a parent is not relevant to an issue of custody or access, unless the conduct is relevant to the ability of the person to have care or custody of the child.

[38] Finally, s. 30(3) states that there is no presumption of law or fact that a child's best interests are best served by placing him or her in the custody of a female person rather than a male person, or *vice versa*.

[39] Although this is not a divorce case, many of the precedent cases in this area are. Consequently, they make reference to certain provisions in ss. 16 and 17 of the *Divorce Act*, which are similar to those I have just referred to under the *Children's Act.* For example, s. 16(8) of the *Divorce Act* states that the court shall take into consideration "only the best interests of the child" in making an order for custody or access. And s. 16(9) states that the court shall not take into consideration the past conduct of any parent, unless that conduct is relevant to the ability of that person to act as a parent.

[40] Sections 16(10) and 17(9) of the *Divorce Act* further state the principle that a child should have "as much contact with each [parent] as is consistent with the best interests of the child". That has become known as the "maximum contact principle", and although it does not specifically appear in the *Children's Act*, I agree with the mother's counsel that it is nevertheless a fair principle to apply under that *Act*.

(ii) Calgary vs. Whitehorse

[41] I will deal first with the geographic question. The mother presented extensive evidence about the community of Beddington, an area of northwest Calgary close to Nose Hill Park, where she and her mother reside and where the mother herself grew up. There are a number of community centres, with multiple facilities, in close proximity. One such centre is only a couple of blocks away from the mother's home. The proposed school for both H. and C. is about a five minute drive away, and seems to be of a high calibre. There is no question that H. would have access to numerous parks, extra-curricular activities and sporting facilities in or around the Beddington community. The maternal grandmother's home also appears to be quite new, comfortable and well

furnished. Although the current plan is that the two children would share a bedroom with the mother, there is space available in the unfinished basement for an additional bedroom (or rooms) in the future. The grandmother is retired and available to transport H. and C. to and from school and/or extra-curricular activities, as necessary. She is also able to care for the children after school, such that there would be no need to place H. or C. in a day care.

[42] However, the mother's counsel concedes that in many of these respects, Whitehorse can offer H. equivalent standards of quality. For example, the father lives in an older, but comfortable home in a quiet neighbourhood within the city, in which several of H.'s young friends also reside. H. attends a French-immersion program in a reputable Whitehorse elementary school. His day care has a similarly high reputation and he is well cared for there. He also has access to first-rate sporting facilities, including the newly constructed Canada Games (Multi-plex) Centre, as well as numerous extra-curricular programs.

[43] As a result, leaving aside the value of familial relationships, I conclude that the cities of Whitehorse and Calgary would be equally beneficial to H. Neither city has an advantage over the other in contributing to or serving H.'s best interests.

(iii) Primary Caregiver

[44] The case before me involves two good, caring and intelligent parents. There is no question that both love H. and wish nothing but the best for him. It is also clear that H. has a loving relationship with each of his parents and that parental capacity or fitness is not an issue on either side. As a result, the decision on primary residency is a very

difficult one to make. It is not an overstatement to say, as the father's counsel did, that these kinds of cases are often agonizing for the parties.

[45] Further, because both of the parties are good and caring parents, there is little that distinguishes them in terms of their respective relationships with the child. The father conceded that the mother "has always done what is best for the children, no question" and that she "is as good a parent as any". Similarly, the mother was pleased to concede that, while the father has had H. in his care for the six week summer period this year, he has demonstrated that he is very capable of meeting H.'s needs. As the father's counsel put it, he "rose to the occasion when he became a full-time dad". The mother recognizes that both H. and C. have bonded with the father. Thus, at first glance, both parents seem equally competent to meet H.'s best interests.

[46] However, the decision I have been asked to make regrettably necessitates a closer and more critical analysis of the evidence. That analysis persuades me that the mother has been the primary caregiver for H. throughout his life. While I appreciate that the father participated in H.'s care and upbringing, the fact remains that he was simply not as involved as the mother, nor did he participate to the same degree. The father worked long and odd hours, plus occasional weekends, and had other interests outside the home which, over the longer term, resulted in him having less time to spend with H. The other interests I am referring to include the father's penchant for golf and for socializing with friends over drinks at the pub, both of which he did fairly regularly and several times each week, again, speaking over the longer term. To be clear, I do not fault the father for having such outside interests, but the objective result of pursuing

those interests is that he had less time to co-parent H. and to involve himself in H.'s activities.

[47] Indeed, it is in the area of the children's activities that I find significant differences between the involvement of the respective parents. I acknowledge that earlier in the relationship the couple regularly participated together in various outdoor activities with the children. As time went on, however, and as the relationship between the mother and father began to deteriorate, they participated in fewer activities together with the children as a family.

[48] Further, the father concedes that it was always the mother who "took the lead" in planning and enrolling H. and C. in their various extra-curricular activities. In addition, it was almost exclusively the mother who paid for such activities. Finally, although the father was involved, from time to time, in transporting the children from school or day care to various activities, he only reluctantly assisted when asked by the mother to do so, and it was she who did this most of the time. These activities were numerous and varied. The mother was also able to articulate other activities which she knew H. was interested in, such as karate and tap-dancing. Obviously then, she must have talked with H. about such things.

[49] This is to be contrasted with the father's evidence. During H.'s period of residency with him this past summer, the father testified that, after picking him up from the day care and returning home, H. would "ride his bike until supper" and then, after supper, would "play with his friends outside" until bedtime. It was telling to me that the father did not mention his participating directly with H. in these late afternoon and evening activities. Rather, he seemed content to let H. make do on his own. Further,

when asked about H.'s impact on his life, the father said "We still boat" and that "I can get neighbours to look after H. if I golf once a week". When asked what H. does when he's not at home, the father mentioned H. attending school, as well as skating and swimming lessons, and "whatever his interests are". Once again, I found this telling. The father was not able to specifically articulate H.'s other interests, besides those he mentioned. I infer that the reason for this is that he has not talked very much with H. about what his interests are.

[50] In particular, when asked about what he wanted for H. when he grows up, the father specifically said "What father does not want his son to be on the PGA tour?". While not to make too fine a point of this, the father's comment, at the very least, indicates that he had hoped his son would take up the father's interest in golf. Notwithstanding that fact, the father surprisingly has never taken H. golfing. Even more surprising was the father's admission that he was unaware of whether H. had been golfing with his mother. I say this is surprising because, if the father was as genuinely interested in H.'s activities as he would lead me to believe, then I would expect that he would have discussed with H. whether he was interested in playing golf, in which case he would likely have discovered that H. has been golfing with his mother. The fact that this has not happened indicates to me that the father is not particularly engaged with his son on that level.

[51] I drew a similar inference from the fact that the father has never taken H. to, or facilitated H.'s participation in, basketball or hockey. When asked why, he said that "Nobody signed him up". When pressed on this further, he acknowledged that he did not think it was an issue for H. because he has "never talked to H. about this".

[52] In the same vein, the father conceded that he may have made statements in the past to the mother about his involvement in the children's activities, such as "I'm not going to let children change my life" and "You signed them up, you take them". While he specifically denied making statements such as "That's not my shtick" and "It is not my job to entertain the children", given that the "shtick" comment was specifically referenced by the mother in an email at that time, and given that these comments are consistent with the others which the father concedes he may have made, I am satisfied that the father probably did make the disputed comments. All those comments together indicate to me that the father was not particularly interested in the activities of the children in general and more particularly, that he was not inclined to participate with the children in them.

[53] Also probative in this area was the father's answer to the question about what would likely happen (in terms of lifestyle) if H. stays in Whitehorse. He said "I don't know if this will change his life very much, he's only six years old". With respect, this seemed a naïve response and one which failed to appreciate the potential disruption to the child if he is largely deprived of his relationship with his mother and sister. On the other hand, I found that the mother was very thoughtful and fair in her testimony about what she thought would be best for H. She was careful to say that she did not think it would be "better" for H. to live with her, because that would imply she was a "better" parent than the father. However, she did not think it would be in H.'s best interests to remain with his father in Whitehorse, because it is she who attempts to meet H.'s daily needs. She said that, on a day-to-day basis, she is more directly involved with H. and C. She participates with them in their school activities, plans and arranges their social

and extra-curricular activities, and most of the time joins the children for outside play. In short, she said “I’m present, he’s not”.

[54] While there is no legal presumption in favour of the custodial parent, or in this case the parent who is the primary caregiver, as the parent who makes the day-to-day decisions for H., I am entitled to give the mother’s views “great respect” and “the most serious consideration”. At para. 48, of *Gordon*, cited above, McLachlin J., said:

> “While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.”

And earlier, at para. 36, McLachlin J. stated:

> “. . . The judge will normally place great weight on the views of the custodial parent, who may be expected to have the most intimate and perceptive knowledge of what is in the child's interest. . . . “ (my emphasis)

[55] Further, in *Murphy* v. *Murphy*, 2002 YKSC 6, this Court agreed with the British Columbia Court of Appeal in *Levesque* v. *Lapointe*, [1993] B.C.J. No. 23 (C.A.) that “the interests of the children are best served by being with the parent who has been primarily responsible for their care.”

[56] In *Singer* v. *Davila-Singer*, [2002] O.J. No. 5445 (Sup. Ct.), the court recognized, at para. 52, that the mother was the individual in charge of “making the day to day decisions” regarding the children and that “the loss of their primary caretaker would be most detrimental” to the children if the mother was denied permission to relocate with them from Ontario to Germany. At para. 54, the court also said that while granting

custody to the father would allow the children to remain in their familiar surroundings, it would be at the expense of losing their primary caregiver.

(iv) Mother's Motive to Move

[57] I do not find that the mother's motive in moving to Calgary with the children is improper or in any way an attempt to restrict the father's contact with H. See also *Singer*, at para. 51, and *Murphy*, at para. 52, both cited above. Rather, the mother's motive is primarily to return to the community she grew up in and is familiar with, where she feels loved by friends and family and where she can also earn a substantially greater salary. The father himself conceded that the mother has had a "long standing desire" to return to Calgary. She said that she wants to be near people who share her values and to whom she feels connected. She apparently feels the move will be good for her emotionally, psychologically, socially and financially. I find these reasons, taken together, are relevant to the mother's ability to meet H.'s needs: *Gordon*, para. 49.

[58] In *Bjornson* v. *Creighton*, [2002] O.J. No. 4364 (C.A.), the Ontario Court of Appeal, at paras. 21 and 22, held that the trial judge had overlooked or disregarded the "social, psychological and emotional aspects of the mother's desire to return to Alberta with the child". In particular, the court noted the mother's wish to return to Alberta "to regain the general stability, control and independence that she enjoyed in her emotional, professional, psychological and social life there". Further, the court stated that serious regard had to be paid to the mother's views, including those concerning her family, her friends and her job. The mother's parents lived in Red Deer, Alberta, which was about 85 miles away from Calgary, where the mother intended to reside. Also, the

mother's sister, brother-in-law and two children lived just outside of Calgary. Later, at paras. 28 and 30, the Court of Appeal recognized that the mother's plans:

> ". . . to resume a well-adjusted and independent life . . . [would] in all the circumstances of [that] case, enhance the best interests of the child.
>
> . . .
>
> . . . The learned trial judge failed to appreciate the multi-faceted nature of the mother's desire to return to Alberta with the child and the concomitant positive effects on the child's best interests in being cared for by a well-functioning and happy custodial parent."

These comments are directly applicable to the case at bar.

[59] I further find that the mother is likely to obtain lucrative employment in Calgary, which should significantly increase her gross annual income. Her formal education is limited to grade 12 and an honour's certificate in office administration in 1996. Nevertheless, having reviewed her résumé and the letter of reference from her old law firm, having observed her testify in this trial, having noted the expression of interest by Western Oil Sands Inc., and taking judicial notice of the current economic boom in Alberta's oil industry, I am confident that she will have no difficulty in obtaining employment in Calgary at a more lucrative level than what she was earning in Whitehorse. Indeed, should she obtain employment earning in the range of $60,000 annually, which seems likely, that would be an increase of about $15,000 from her 2005 gross income, or thirty-three percent.

[60] An increase in the financial stability in the family unit is a legitimate reason for moving which is directly related to the best interests of the child: *Murphy*, cited above, at para. 52; *S.G.* v. *R.M.T.*, 2004 YKSC 44, at para. 28; *Karpodinis* v. *Kantas*, 2006 BCCA 272, at para. 27; and *Markin* v. *Gysel*, 2004 BCSC 364, at para. 31. In *Bjornson*,

cited above, at para. 23, it was also recognized that the mother's prospective increase in income, which was a factor in support of her move to Calgary was "not marginal" but "quite substantial". Further, in *Shimonko* v. *Henriques*, 2004 BCSC 1391, the court, at paras. 13 and 14, referred to the cases of *Gordon* and *Levesque*, both cited above, and said:

> " . . . it is inappropriate to force a divorced or separated parent to reside in one part of the country when the circumstances and opportunities for her are, on the evidence, better in another part of the country. Divorced or separated parents should not be forced to live in one particular area because they have custody of children."

(v) Disruption and Maximum Contact

[61] While there will be disruption by granting primary residency to the mother, there would similarly be a disruption by granting such residency to the father, given that the mother has already relocated to Calgary and the father seems firm, for the present at least, to remain in Whitehorse. That was the situation in the cases of *Singer* and *Murphy*, both cited above, as well as in *Baxter* v. *Benoit*, 2004 YKSC 56. Yet each of those judgments allowed the children to move with the parent who was relocating, despite the disruption. In particular, this Court in *Murphy* took judicial notice of the ability of children to adapt to such changes.

[62] In any event, the parties have basically agreed that, regardless of where H. has his primary residence, the other parent will have generous access to H. during his school holidays for Christmas and Easter/spring break, as well as for half of the summer school holiday. They have also indicated a willingness for further additional access, subject to agreeing upon who will be responsible for the transportation costs. The mother, in particular, is prepared to allow H. to miss a day or two of school in order to

allow the father occasional access over long weekends. In total, she estimates that there could be as many as eight to 12 trips per year by either H. or the father. Finally, the parties are agreed that the parent with secondary residency would have generous reasonable access to H. via telephone, mail, email and computer webcam. Thus, I find that granting the mother primary residency would not “disastrously” reduce the father’s contact with the child: *Murphy*, cited above, at para. 50. While the move will clearly reduce the amount of time the father and son can spend together, it does not necessarily follow it would not be in the best interests of the child: *Bjornson*, cited above, at para. 51.

[63] While the maximum contact principle is an important consideration, it is not paramount. Rather, the only consideration, at the end of the day, is what is in H.’s best interests. In *Gordon*, the issue was expressed in these terms, at paras. 24 and 25:

> “
>
> . . .
>
> The "maximum contact" principle, as it has been called, is mandatory, but not absolute. The [Divorce] Act only obliges the judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact: Young v. Young, [1993] 4 S.C.R. 3, at pp. 117-18, per McLachlin J.
>
> The reduction of beneficial contact between the child and the access parent does not always dictate a change of custody or an order which restricts moving the child. <u>If the child's needs are likely to be best served by remaining with the custodial parent, and this consideration offsets the loss or reduction in contact with the access parent, then the judge should not vary custody and permit the move</u>. . . .”
> (my emphasis)

See also *S.G.* v. *R.M.T.*, cited above, at para. 33.

(vi) H.'s Relationship with C. and Others

[64] Further, I agree with the mother's counsel that the father has notably failed to respond to two key points raised by the mother. The first is that an order which grants primary residency to the father will result in H. being separated for most of the year from his sister, C. H. and C. are relatively close in age (six and nine years old, respectively) and they are clearly bonded to one another. The mother says that C. and H. "get along great", although they fight from time to time, like a normal brother and sister. She said that C. likes to teach H. things and that the two have a "good solid relationship". The several photographs of H. and C. interacting filed in evidence appear to confirm this. It was also telling to me that when the mother was talking about her return to Whitehorse to testify in the trial and her initial reunion with H. (who had been with his father for the previous six weeks), she stated that H. immediately ran up to her and gave her a big hug, but expressed his disappointment that C. had not also come to Whitehorse. Similarly, the mother also said that C. had been asking about H. while H. was in Whitehorse.

[65] I conclude that it would be in H.'s best interests to reside together with C., if at all possible.

[66] The second point unresponded to by the father is the extent to which H. has available to him significant and close extended family in Calgary, in the surrounding area, and within a day's driving distance. First, the defendant's mother, with whom H. has a good relationship, as well as the defendant's father and brother, all reside in Calgary. In addition, that city is home to the father's brother and sister-in-law, who are both very fond of H. (the father himself conceded that they "really love H."). Their four

children (H.'s cousins), although generally older than H., also have a good relationship with him. Also, an aunt of the mother lives on a farm near Langdon, Alberta, about a 35 minute drive east of Calgary. Slightly further away, in St. Albert, Alberta, reside the mother's cousin, her husband and their two children. I believe the mother also testified about relatives in Wetaskawin, Alberta. Another aunt and uncle of the mother reside in La Ronge, Saskatchewan.

[67] In contrast, the father's parents have both passed away and he has no siblings or other extended family residing in Whitehorse.

[68] In my view, it would be in H.'s best interests to maintain the close and loving relationship that he has with the various members of his extended family in Alberta and Saskatchewan and that he is more likely to do that if he resides with his mother in Calgary.

(vii) Father's Revocation of Consent

[69] I am also concerned about the failure of the father to advise the mother, after having verbally consented to her moving to Calgary with the children, that he had changed his mind. In the meantime, the mother had already discussed with the children that they were moving to Calgary, and those discussions included the prospect of future access visits by the father. To use the mother's words, the children were both "happy and sad" about this. Obviously, the decision to move caused mixed feelings for the children. The father himself acknowledged that the initial conversation with the mother in which he gave his consent was "very emotional" and that his decision in that regard had been "excruciating". Therefore, he ought to have known how important it was to inform the mother promptly after changing his mind. Nevertheless, the father only

informed the mother that he had done so when she approached him to sign a document indicating his consent in writing, which he had previously promised to provide. Had the mother not approached him for his written consent, the father likely would have delayed communicating the withdrawal of his consent even longer. Further, when he did so, he did not provide the mother with any particular reasons, other than saying “Why should you get your own way?”, or words to that effect. The mother was unable to extract a more adequate explanation for the reversal and consequently felt that the father had not given her plan to move “fair treatment or regard”. She understandably said she was “devastated” by the news. Most importantly, when the father was cross-examined on the point, he was specifically asked “When were you going to tell her?”, to which I heard him answer “Maybe when she was packing up the kids and getting ready to go down the road”. Such an answer was flippant and irresponsible and symptomatic of the father’s anger toward the mother. I find that the father was not acting in H.’s best interests here. It was clearly incumbent upon him to communicate with the mother as soon as possible after he had revoked his consent. By failing to do so, he allowed expectations to grow not only in the mother’s mind, but, more importantly, also in the minds of both H. and C.

(viii) Father’s Aversion to Confrontation

[70] This last point is a good example of the problem I see with the father’s aversion to confrontation, which I mentioned earlier. While a certain level of discomfort in that regard is only natural and to be expected, in the father’s case, I find that his avoidance behaviour was verging on the dysfunctional. First of all, he said that he began to refrain from attending public functions where the mother was also expected to be present,

because he did not want to be confronted by her about various issues of conflict between them. That is understandable to a point, however, it became problematic when the father began failing to attend functions involving H., where H. would likely have appreciated and benefited by his father's attendance. Secondly, when the mother initially separated from the father in late summer of 2005, and moved out of the family home with the children, the father said nothing in objection. The implication in his evidence was not so much that he agreed with the mother in that regard, but that he did not wish to get into an argument with her over the interim care and residency of the children during the separation. Again, his failure to be honest and communicate with the mother about the issue at the time led the mother to certain expectations about his attitude. Consistent with those expectations, the mother then began making plans to possibly move to Calgary with the children. At one point, the father himself expressed a potential interest in moving there so that he could be near the children and his other extended family. That too would have served to encourage the mother in her planning. Then the father expressly consented to the move and offered to provide that consent in writing. The mother's plans proceeded accordingly. Indeed, the couple were getting along so well that on or about March 6, 2006, the mother and the children moved back into the family home. It was not until about a month later, when the mother pressed him, that the father indicated he had changed his mind. The father's conduct in this regard was neither constructive nor fair to H., let alone the mother and C.

[71] Let me also say clearly here that I in no way condone or excuse the mother's apparent plan to move with both children in the absence of either the father's consent or a court order. Having failed to obtain the former, she should have applied for the latter.

Why she did not do so is puzzling, given that she was represented by counsel at the material time, in her divorce action with C.'s father, K.U. It should not have been necessary for the father to bring his application, only days before the mother's scheduled departure date, to stop her from moving with H. Having said that, the father's conduct in the preceding weeks and months, which I have just outlined, nevertheless helps to explain, if not excuse, the mother's intentions.

(ix) H.'s Right of Access

[72] Another point of concern for me is the father's apparent lack of understanding that access is the right of the child and not that of the parent. It is not to be exercised only when the parent chooses. Yet, there were periods of time during the conflict in the relationship where the father simply failed to make any effort to contact H. or to express a desire to have access with him. For example, when the couple separated in the late summer of 2005, the mother attempted to arrange a specified access schedule, but the father declined. Rather, he said that he wanted to see the kids whenever he phoned, i.e., presumably whenever he was interested and available. He also explained that he was unsure of his rights at that time, but he did not get any legal advice either. In any event, sometimes the father would phone twice in one week, but other times he would not phone for two to three weeks at a time. Later, after the mother's one week trip to Calgary for the funeral in 2006, the father again made no effort to contact H. It was only as a result of the mother calling the father about 12 days later, asking if he wanted to see the children that the father made access arrangements. The father's behaviour in this regard suggests to me a certain level of immaturity and petulance over the mother's behaviour. While he may well have had reason to be upset with the mother, that did not

justify withdrawing from H. as well. In doing so, once again I find that the father was not acting in H.'s best interests.

(x) The Father's Case Law

[73] The father's counsel relied on a number of cases which I find to be distinguishable for various reasons:

1) *D.B.J.* v. *L.A.J.*, 2005 YKSC 65 was a case where the mother wanted to move from Whitehorse to Vancouver, British Columbia, with her 21 month old daughter. Thus, the case is immediately distinguishable because of the young age of the child and the likely adverse effect that permitting the move would have had on the father's ability to bond with his daughter. Secondly, the mother in that case had no roots in Vancouver. Rather, she originated from the province of Quebec and her sole reason for moving to Vancouver was to obtain employment. In the case at bar, the mother's reasons for moving are multi-faceted and much more compelling, as I have previously noted.

2) *Karpodinis* v. *Kantas*, cited above, involved a three-year-old child, again much younger than H. Thus, the court initially recognized that because of the child's young age, there were significant bonding issues with his father and his paternal grandparents, and that the child was "at a critical age" in the forging of those relationships. There is no such evidence in the case before me. Secondly, the contemplated move in that case was from Vancouver to Houston, Texas. The trial court recognized that the distance between those two cities was such that the travel time and costs would be significantly

inhibiting factors in exercising access and that the child was too young to travel alone for many years. That is not the case with H., who can travel as an unaccompanied minor between Calgary and Whitehorse on about a two hour direct flight, which is relatively affordable. Thirdly, the sole reason for the mother's move in *Karpodinis* was her employment. In the case at bar, the mother's reasons are multi-faceted, as I have already noted. Lastly, the Court of Appeal noted, at para. 22, that virtually all the familial connections of both parties were resident in the child's home area of Vancouver. In the case at bar, virtually all of the child's extended family reside in Calgary or within a day's drive from that city.

3) In *Markin*, cited above, the mother had indicated that she would not move unless the child was permitted to move with her. Therefore, a continuation of the existing state of affairs would not have been disruptive to the child. In the case before me, the mother has already moved to Calgary and the father has indicated his desire to remain in Whitehorse. Therefore, regardless of where the child primarily resides, he will experience disruption by spending less time with the other parent. Secondly, in *Markin*, the mother had no concrete plan or proposal to facilitate access by the father. In the case before me, the mother has clearly given a great deal of thought to maximizing the amount of access the father can have with H. She has offered to forgo child support for the time being, recognizing that the father can make better use of such funds in exercising and facilitating access. The mother has also investigated the cost of airline connections between Calgary and Whitehorse which,

theoretically, could allow the father to exercise access on occasional weekends between the scheduled periods of access for major school holidays. In that regard, the mother is willing to allow the child to periodically miss school in order to create a longer weekend to facilitate such additional access.

4) *Slade* v. *Slade*, 2002 YKSC 40 was an application to vary a custody and access order. Therefore, a material change in circumstances had to be established. Veale J. of this Court accepted that a deterioration of the mother's financial situation met that threshold. He also seemingly recognized that such a change would affect the best interests of the child. However, he curiously gave no weight to the expected improvement in the mother's financial situation resulting from the proposed move. In the case before me, I have already determined that it is appropriate to consider the expected improvement in the mother's finances as a factor relevant to her ability to meet the needs of the child. Secondly, in *Slade*, the mother was planning to move as a single parent with her only daughter. In the case before me, the mother plans to establish a new family unit, including both H. and C., as well as the maternal grandmother.

(xi) Views of the Child

[74] Finally, although H. is still relatively young, he has indicated to his mother that he favours the move to Calgary. Indeed, both H. and C. have expressed this view. The father himself corroborated this. When he discussed with the children the idea of them moving to Calgary with the mother, they both said they wanted to.

C) Conclusion on Mobility Issue

[75] Having considered all of the needs and circumstances of the child, I am satisfied that it would be in his best interests to reside primarily with his mother in Calgary. In summary, my reasons for this conclusion are as follows:

1) The mother has been and continues to be more involved in the day-to-day decision making and activities of H. and is more likely to be intimately aware of the child's needs;
2) The mother has no ulterior motive in asking that H. reside primarily with her. She does not seek to interfere with the father's time with the child and recognizes that he is a capable and caring parent. Rather, the mother's motive for the move is to reconnect to the city in which she was largely raised and to enhance her emotional, psychological, social and professional life. I find that by doing so, the mother is likely to be a more well-functioning and happy parent, which will have a concomitant positive effect on H.'s best interests;
3) It will be beneficial for H. to reside with his sister and maternal grandmother, both of whom he is bonded and closely attached to;
4) It will be beneficial to H. to be cared for by his maternal grandmother after school hours, as opposed to having to attend a day care;
5) It will be beneficial for H. to be in close proximity to his other extended family members in the province of Alberta, and also in Saskatchewan;
6) Although the father has demonstrated that he is a competent and loving parent, he has also, from time to time, regrettably failed to act in the child's

best interests by failing to communicate functionally with the mother, by failing to exercise access and by exhibiting a somewhat disinterested attitude towards H.'s extra-curricular and school activities; and

7) H. himself has indicated his willingness to move to Calgary with his mother.

[76] In the result, I order that:

1) The parties shall have joint custody of H.;

2) H. shall reside with the mother;

3) H. shall reside with the father during H.'s school holidays for Christmas and Easter/Spring Break in alternate years, as well as for one-half of H.'s summer school holidays, with the summertime periods alternating each year from the first half to the second half of the school holiday. The commencement of these periods of residency with the father will be subject to the agreement of the parties. H. may further reside with the father at any other times that the parties may agree upon. The costs of transporting H. from Calgary to Whitehorse and return, in order that he may reside with the father during these and any other periods agreed to by the parties, shall be split equally between the parties, unless they agree otherwise;

4) While H. is residing with the mother, the father shall have generous reasonable access to H., including access in person upon reasonable notice to the mother and at the father's expense, and also access by telephone, mail, email, and computer webcam, with all such access to be subject to such other arrangements as the parties may agree upon.

III. THE COMMUNAL PROPERTY ISSUE

A) Nature of the Issue

[77] The global issue here is whether there should be an equal or unequal division of the communal property. However, this larger question is further particularized as follows:

1) The father seeks an unequal division of the communal property on the basis that 25 Balsam Crescent and a 1979 motor home were inheritances from his deceased mother and therefore should not form part of the couple's communal property. On the basis of the principles of unjust enrichment and constructive trust, the father seeks a declaration that the defendant mother's half-interest in 25 Balsam, arising from her joint tenancy with the father on title, is held by her in trust for him. In the alternative, the father claims that there was either an express or resulting trust in his favour regarding the mother's half-interest in 25 Balsam. Although not explicitly pled, he also seeks to be credited with the full value of the motor home.
2) The mother has counter-claimed, seeking an equal division of the assets and debts acquired during the relationship. In particular, she seeks a declaration that she holds a one-half interest in 25 Balsam by virtue of her legal ownership as a joint tenant of the property. Alternatively, she similarly submits that her one-half interest in 25 Balsam arises from either an express trust, a resulting trust or a constructive trust.

B) Findings of Fact

[78] The mother and C. moved into the father's residence in the Arkell subdivision of Whitehorse in June 1999. At that time, he was living in a mobile home and working at Primerica. The mother was then, or shortly thereafter, working with the Whitehorse law firm. The couple discussed splitting the household expenses equally and did so for the first couple of months. However, the father's income was lower than the mother's and she was soon paying the entire mortgage, half the groceries, and the majority of the house insurance, the phone bill, the utilities payment, the electrical bill, the property taxes, and the satellite TV bill. The father contributed whatever he could towards these various latter bills, but to a lesser degree.

[79] The father's mother became very ill in the winter of 1999 – 2000. In about February 2000, she had apparently been moved from her home, at 25 Balsam Crescent, to a medical care facility. The father's mother suggested to the father that she would not be likely to return and that he should either sell 25 Balsam on her behalf or move in to the home with his new family. At that time, the defendant mother had become pregnant with H. and the mobile home in Arkell was becoming too crowded for the couple and their, soon to be, two children.

[80] The defendant mother had reservations about moving into 25 Balsam, as it had been the home in which the father was raised for a significant portion of his life as a teenager and young adult. She also knew that the father was very attached to his mother and that 25 Balsam would likely be of strong emotional significance to him. She discussed this issue with the father and, in particular, her fear that she would not feel like it was truly her home. She suggested they consider buying a different home.

However, the father clearly wanted to move back there and he assured the mother by words to the effect that it would be “her home too”.

[81] The father initially denied having any such conversation with the mother, but when pressed on cross-examination, he conceded that he simply didn’t recall the defendant mother having such reservations about the move. I prefer the evidence of the mother on this point. Having witnessed the father testify in a tearful fashion about the illness and subsequent death of his mother, it is clear to me that 25 Balsam would have had particular emotional significance for him and that this would very likely have been an issue of concern for the mother. As the house was free and clear of any mortgage, it would have been relatively easy for the couple to sell the property and obtain interim financing to purchase another home. Therefore, the decision to move into 25 Balsam was probably only made after some deliberation. Ultimately, they did so in February 2000.

[82] The couple rented the Arkell residence for a few months and then sold it for a nominal profit of approximately $1,750. The father did not share this equity with the mother.

[83] The father’s mother died on March 3, 2000 and the plaintiff father, acting as executor, began the administration of her estate. The father, his brother and sister were to share equally in their mother’s estate.

[84] Unfortunately, the father’s evidence was unclear as to the precise value of the estate. At one point, he said that the net value, after taxes, was about $360,000. At another point in his evidence, the father estimated that the gross value of the estate was $574,000, comprised of the following assets:

25 Balsam	$154,000
Open investment account	$ 80,000
Retirement income fund (“RIF”)	$340,000 (before taxes)
Total gross value	$574,000.

If the father was correct about the latter, then the difference between the gross value of the estate ($574,000) and the net value ($360,000), would have been approximately $214,000 or 37 percent. While it is possible that such an amount may have been paid directly to Revenue Canada as estate taxes when the investment account and RIF were collapsed and liquidated, there is no record of the father having accounted for such taxes. Although, the father prepared a tax return for the estate in 2000, it showed approximately $250,000 of total income and only $1,100 in total tax deducted. Thus, the return calculated that the estate then owed just over $100,000 in income tax. Unfortunately, the father never filed this return with Revenue Canada; nor has he made any inquiries to determine what potential interest or penalties may be owing on the outstanding taxes. Finally, he was unable to clarify at trial why the tax return shows total income of about $250,000, when the net value of the estate was estimated by him to be $360,000.

[85] It is conceivable that the cash portion of the estate ($80,000 and $340,000) after deducting taxes of about 40% ($170,000) could have resulted in net income to the estate of about $250,000. However, if that was the case, then the taxes paid should have been accounted for on the tax return, which they were not. Also, this does not explain why the estate’s bank account shows a deposit of just under $320,000 on June 30, 2000 and no withdrawal clearly identified as being in payment of taxes.

[86] In any event, neither of the siblings were interested in 25 Balsam, whereas the father wanted to retain that property for himself. Therefore, on the assumption the net

value of the estate was $360,000, he paid each of his brother and sister $120,000 and transferred the title to 25 Balsam, valued at $154,000, from the estate into his name alone, intending to subsequently account to the estate for having received more than a one-third share.

[87] After distributing the estate proceeds, the father said he knew he had to pay the taxes to Revenue Canada. He apparently intended to do so by using the remaining cash in the estate account and by obtaining a loan for the balance, secured by a mortgage on 25 Balsam. However, the father's income was very low about that time and he gradually began dipping into the estate account to pay various and sundry household expenses. As of December 2002, by which time the siblings had been paid the final instalments of their respective shares in the estate, the account had a balance of just under $17,000, but by January 2006, the account had been reduced to a nominal sum of about $25.00. And, because the estate's tax return has never been filed, the correct amount of the tax payable remains unknown.

[88] Following the move to 25 Balsam, the mother continued to pay the majority of the household bills. Although the property was mortgage-free, the couple incurred the other usual types of expenses such as utilities, electricity, heating, insurance, taxes, television, groceries, and general maintenance. The mother estimates that she paid a minimum of two-thirds of these household expenses from the time the couple moved in, until they initially separated in the summer of 2005. I find the mother's estimate here is reasonable and perhaps even an understatement. I say that because the comparative incomes of the parties over the years, from the time they first began living together, were as follows:

Year	Father's Income	Mother's Income
1999	$9,962.00	$22,666.00
2000	$6,935.00	$25,447.00
2001	$8,275.00	$32,630.00
2002	$5,528.00	$37,524.00
2003	$7,170.85	$40,123.00
2004	$21,296.00	$41,599.00
2005	$33,993.00	$45,071.01

It can readily be seen that, in the years prior to their initial separation, the mother's income ranged from being about double that of the father to as much as five or six times his annual income.

[89] Notwithstanding that the couple took possession of 25 Balsam free and clear, they continued to experience financial problems. They carried various credit card debts in addition to a line of credit and a loan. There is no question that these were joint debts accumulated by the parties through the course of their relationship. Their total liabilities at that time were over $48,000 and they had to do something to manage their several interest-laden payments. In 2004, they jointly decided to get a large line of credit to pay off this debt. The father did not think that he could do so by himself, because his income at that time was too low, however, he made no inquiries in that regard nor did he investigate other possibilities, such as the mother acting as a guarantor of a loan to the father alone. Therefore, there is no objective evidence that he could not have obtained the financing on his own. In any event, he and the mother proceeded with the refinancing together. The father did not disclose the estate's tax debt to the bank and there was no evidence the mother was aware of the amount that debt at that time.

[90] The couple obtained the line of credit in late March 2004. It was for a maximum of $100,000 and was, as required by the bank, secured by a collateral mortgage, with both the mother and father as co-mortgagors. Concurrently, title to 25 Balsam was transferred from the father alone to the father and mother jointly. At that time, the property was valued at $163,000.

[91] There was some discussion between the parties about the mother becoming a joint tenant of 25 Balsam, although it was not very extensive. The father had then commented to the mother that he thought she “wanted half”, which I understood to mean a half-interest in 25 Balsam. However, the mother responded to the father that she “did not want half”, but rather, as they were ”in a relationship together and [had] common goals”, her motivation was that the two of them would be able to pay their combined debts. To use her words, “we decided to go into joint tenancy to repay this debt”.

[92] The couple used the line of credit to pay off all their various loans and debts. Subsequently, they also used it to purchase a personal vehicle for the mother, a boat, trailer and an ATV for the family, as well as to pay for some renovations to 25 Balsam. The parties agreed that the mother would make the principal payments toward the line of credit, presumably to reflect the fact that it had been used to purchase her personal vehicle at a cost of $12,000. She testified that the father agreed to pay the interest payments, which were automatically withdrawn from his personal chequing account, and “whatever he could” towards the principal. The mother did in fact make a number of principal payments towards the line of credit from June 2004 to January 2005, totalling $5,150.00. However, it appears the only payments made by the father were

interest payments. He also used the line of credit on one occasion to withdraw $500 in cash for personal use. As of February 2006, the line of credit had a balance owing of just under $66,000.

[93] The mother stopped making her principal payments because the father was not making his. The father said in cross-examination that he didn't know what his contribution towards paying down the line of credit was to be, presumably in an attempt to explain why he was not making payments, other than interest payments by default. I find the father's explanation lacks credibility. It is difficult to believe that the couple would obtain a credit line to a maximum of $100,000 and actually incur $66,000 in debt under the line, without having had some discussion about how they would repay such a substantial debt. Further, the mother's evidence that the father agreed to pay whatever he could is consistent with the type of arrangement that the couple had earlier in their relationship in paying the household bills.

[94] The couple separated for the first time in August 2005.

[95] In or about early 2006, they began discussing the division of their mutual assets and liabilities. The mother prepared a list of those communal assets and liabilities, which included 25 Balsam and the motor home. The father reviewed this list at an initial meeting between the couple in January 2006 and then, or shortly after, drafted his own list of joint assets and liabilities, which <u>again</u> included 25 Balsam and the motor home, along with the estate's tax debt. They had a discussion about this list lasting an hour to an hour and a half. This is significant because the father now claims that both 25 Balsam and the motor home were gifts to him from his own mother by inheritance, and therefore should be excluded from the couple's communal assets. He tried to

explain that he originally included these items to “avoid confrontation” over the issue. Nevertheless, I infer that the father’s actions in this regard are evidence of his intention, at that time, to treat 25 Balsam and the motor home as part of the couple’s communal property. I also infer that it was about this time that the mother was first informed of the exact amount of the estate’s tax liability, as estimated by the father. The mother had previously been aware that the father had prepared a tax return for the estate and that there were taxes due, but there was no evidence that, prior to this point, she had been told of the actual amount owing.

[96] Following this initial meeting, the mother obtained a blank separation agreement template and prepared a series of drafts dealing exclusively with the couple’s financial issues. These drafts detailed the assets to be retained by each of the mother and the father as well as the debts that each would be responsible for. Every draft contained a schedule which specifically listed the total communal assets and liabilities. Ultimately, three successive versions of a separation agreement were prepared by the mother and were discussed between the parties at various meetings in or about January 2006. These discussions were obviously extensive, as they took place over a total time of six to eight hours. In each of the three drafts, 25 Balsam and the motor home were listed among the couple’s communal assets. The tax debt to Revenue Canada from the estate of the father’s deceased mother was also listed among the couple’s communal liabilities, notwithstanding that it was technically the father’s responsibility as the executor of the estate. By the third draft, 25 Balsam was assigned a value of $222,000, the motor home was valued at $6,000 and the estate tax debt continued to be estimated at $100,000. The total assets were valued at $320,000 and the total liabilities at

$192,000 resulting in a net worth (equity) of $128,000. That was to be divided equally between the parties and, after an accounting for the various assets and debts retained by each, the father was to pay the mother an equalization payment of $41,000.

[97] Despite these extensive negotiations, a separation agreement was never signed by the parties. Up to the discussion of the third draft, it appears as if neither had sought legal advice. However, the father then decided to call the “Law Line”, a legal information service provided by the Yukon Public Legal Education Association, and claimed to have received advice that the property he inherited from his mother could “probably” be excluded from the couple’s communal property. Accordingly, he prepared a new list of communal assets and liabilities which expressly excluded 25 Balsam and the motor home, as well as the estate’s tax debt to Revenue Canada. Coincidentally, the father’s revised numbers resulted in the value of total assets equalling the value of total liabilities, such that there would be no equity to divide between them.

C) Analysis

(i) The Alternative Claims

[98] To begin with, as there was no trust agreement signed by the parties, there was clearly no express trust in favour of either. There was also no implied common intention between the parties to create a resulting trust for the benefit of either the father or the mother. I recognize that in cases of common-law relationships (as distinct from marriages), where one spouse transfers property to the other there may be a presumption of resulting trust, such that the burden falls on the title-holder to establish that he or she has taken the property as a gift and is not holding it as trustee for the other common-law spouse: See *Fumich* v. *Babi*c, 2005 BCCA 552. In this case, that

presumption would put an onus on the mother, as joint tenant and half-owner of 25 Balsam, to prove on a balance of probabilities that she did not receive her title as trustee for the father. However, even if the presumption of resulting trust applies, and there is some doubt about whether it does (see *Huscroft* v. *Bodor*, 2004 BCSC 249), I am satisfied, based on the following reasons, that the mother has met her burden and that there is no further basis to consider the father's claim on this ground. The corollary, as will be seen, is that there is also no need to consider the mother's own claim of resulting trust. Therefore, the alternative claims of both parties on the grounds of express or resulting trust must fail.

(ii) The Father's Constructive Trust Claim

[99] As for the father's claim of constructive trust, he argues that he did not intend to share the equity in 25 Balsam when he transferred the title to himself and the mother as joint tenants and that he only did so to obtain the line of credit. He says there is no evidence that he intended to make a gift to the mother of 50 percent in the equity in the home, and accordingly it would be unjust for her to receive the benefit of that equity. Rather, the father submits that the mother's one-half legal interest in the property is being held by her in trust for him, as a remedy for her unjust enrichment.

[100] For me to find that there has been an unjust enrichment here, I must be satisfied that there has been:

1) An enrichment of the mother;
2) A corresponding deprivation of the father and;
3) An absence of any juristic reason for the enrichment.

[101] Clearly, the mother was enriched when the father transferred the one-half interest in 25 Balsam to her when the line of credit was obtained. It is that very enrichment which forms the basis of the mother's counterclaim for an equal division of the communal assets, which she says includes 25 Balsam and the motor home.

[102] Conversely, there was a corresponding deprivation to the father by virtue of having transferred one-half of his interest in 25 Balsam to the mother at a time when the property was valued at $163,000, free and clear of all encumbrances.

[103] The real question is whether there was any juristic reason for the enrichment. I am satisfied that there are several such reasons. First and foremost, the mother agreed to become bound as a co-mortgagor of the property pursuant to a collateral mortgage securing the $100,000 line of credit. She thereby incurred a legal obligation and a consequent risk in the event of a default in repaying the line of credit. Second, it is clear that the line of credit was obtained to pay off debts which were jointly incurred by the couple as family expenses during the term of their relationship, as well as to pay for subsequent communal expenditures. Thus, the current credit line debt is a communal debt. Third, it is clear that the mother paid the lion's share of the household expenses incurred by the couple while they lived together at 25 Balsam and I find that, in doing so, she contributed to the preservation and maintenance of that property. Indeed, the father's own counsel submitted there was no question that the mother shouldered a larger part of the financial load in that regard. Finally, it was the mother alone who made the principal payments towards the line of credit and she only stopped because the father failed to make any such payments, as they had agreed.

[104] There was a dispute between the parties about the extent to which I can look to the evidence of the negotiations over the separation agreement to determine whether either or both of the parties intended to treat 25 Balsam and the motor home as communal assets. This issue arose when I questioned the father's counsel about her submission that there was "no evidence" that the father wanted to give the mother 50 percent of the equity in 25 Balsam at the time of the refinancing. I pointed to the following facts indicating otherwise: the father's own initial list of assets and liabilities, which included both 25 Balsam and the motor home; the several drafts of the separation agreement, each of which included 25 Balsam and the motor home on a schedule of communal assets; as well as the fact that there had been extensive discussion between the parties about the communal property on a number of occasions over several hours, during which the father never once asserted that 25 Balsam and the motor home should be removed from the list. Further, the mother referred to these settlement discussions in her statement of defence and counterclaim and the father did not file a statement of defence to the counterclaim or any reply to the statement of defence taking issue with the mother's pleadings in that regard. Therefore, I conclude that the settlement negotiations were not "without prejudice" and that it is open to me to consider their probative value in determining the intention of the parties. Having done so, it seems obvious that the father intended 25 Balsam and the motor home to be dealt with as communal assets subject to division. That, in turn, is evidence that, at the time of the refinancing, he intended to advance to the mother a 50 percent interest in the family home. In other words, there is evidence that he intended to share equally with the mother the beneficial ownership of the property. The father apparently only changed his

mind about 25 Balsam relatively late in the separation agreement negotiations, when the third draft was ready to sign, after receiving advice or information that the property he inherited from his mother “probably” would not be considered communal property.

[105] I also agree with what I took to be an equitable argument by the mother’s counsel. He stated that, while the father brought to the relationship the mortgage-free home at 25 Balsam, the mother brought her consistently greater income, which allowed her to pay the majority of the household expenses over the six-year term of the relationship. Now, notwithstanding the transfer of 25 Balsam into the joint names of the parties, the father, in effect, “wants the house back”. However, there is no legal justification for that, as I have already concluded. Further, doing so at this stage would be manifestly unfair to the mother. She cannot now be compensated for the cash contributions she made to the relationship and to the preservation and maintenance of the family home, since it would be virtually impossible to retroactively calculate the value of those contributions.

[106] I am similarly persuaded that the mother should be able to share equally in the $59,000 increase in the probable value of the family home from 2004, when the title was transferred into the parties’ joint names, to the date of the parties’ final separation. Given that the mother took on the obligation and consequent risk of a co-mortgagor, and given that it was only she who made principal payments towards the related line of credit, coupled with the fact that she has consistently paid for the majority of the couple’s household expenses over the entire period of their relationship, it seems to me that it would be unfair to accede to the father’s constructive trust argument and thereby deny the mother the opportunity to share the benefit of the home’s increase in value.

[107] This case is similar to that of *Reich* v. *Sager*, [1995] B.C.J. No. 2620. There, the parties cohabited together over a four-year period. During the relationship, title to the house in which they resided, which was owned by the mother and her former spouse, was transferred to the mother and father as joint tenants. The father contributed to some extent to the mortgage payments and assumed obligations under the covenant to pay the mortgage debt. The mother sought a declaration that the father held his undivided half-interest in the property in trust for her. Drake J. of the British Columbia Supreme Court held that, although the father had been enriched by becoming entitled to an undivided half-interest in the family home, this enrichment could not be said to be unjust given the contributions he made towards preserving and maintaining the property, by virtue of the mortgage payments, as well as assuming obligations under the mortgage. In the result, there was a "sufficient juristic reason for his enrichment" and it could not be said to be unjust.

[108] *W.A.S.* v. *D.W.T.*, 2003 BCSC 865, is also instructive. Although that was a case involving an allegation of resulting trust, there are some similarities in the circumstances. The couple cohabited in a common-law relationship, which was on-again, off-again over a period of approximately 20 years. Their resources were largely pooled to pay for living expenses. By 1993, they ceased having sexual relations and by 1995, they no longer shared a room together. In 1996, the common-law husband transferred title in the family home, which was previously registered solely in his name, to himself and the common-law wife as joint tenants. In 2000, the common-law husband left the home. He maintained that legal title to the home was held in a resulting trust in his favour and that the common-law wife's share of the equity should

be determined by way of her actual contributions to the purchase. The common-law wife, on the other hand, argued that she held an undivided one-half share of title and, accordingly, was entitled to one-half of the equity in the home. The husband proposed that there was a presumption of a resulting trust in his favour, because he conveyed the property to his common-law spouse without consideration. Groberman J. of the British Columbia Supreme Court, at para. 38, felt that it was unnecessary to deal with that proposition, because there was sufficient evidence to show that the common-law husband intended to advance the one-half share of the property to his common-law wife as a gift. He had deliberately taken steps, apparently with full legal advice, to put the title in joint tenancy. No trust agreement had been executed. The matter had been discussed between the couple and, although the common-law husband took that step with “some reluctance”, there was no evidence of undue influence or any other factor which would vitiate his apparent intention to share the title equally with the common-law wife. Further, although neither party strongly argued the issue of constructive trust in the alternative, Groberman J. found that no such claim could be made in any case, as it was clear that the common-law husband intended to advance equity in the home to his spouse, which would negate any argument of unjust enrichment. “If there was any such enrichment”, said Groberman J., at para. 48, “it clearly was not without juridical reason.” I take this last statement to mean that the juristic reason for the enrichment was the deliberate and intentional transfer of one-half of the interest in the property by the common-law husband to the common-law wife.

[109] In the case before me, I similarly find that the father intended to share equally with the mother the legal and beneficial ownership of 25 Balsam. He had earlier

promised the mother, when they moved in, that 25 Balsam would be “her home too”. Further, as was the case in *W.A.S.*, at para. 41, the father’s apparent reluctance at the time of the refinancing, because he thought the mother “wanted half” of the family home, and his albeit brief discussions with the mother, show that he considered the transfer to be something more that simply a “piece of paper”. As Groberman J. put it, the father must have “clearly understood that he was giving up a beneficial interest”. Finally, as with *W.A.S.*, there was nothing to vitiate his apparent consent to that transfer. Despite his subjective view that he had no choice but to add the mother to the title, there is no objective evidence that was the case.

[110] The father relied on the case of *Wundele* v. *Wundele*, [1994] B.C.J. No. 2514. That case involved a couple who had been married for approximately 17 years. Accordingly, the British Columbia *Family Relations Act* applied. Section 51 of that Act is roughly equivalent to s. 13 of the Yukon *Family and Property Support Act* and allows for an unequal division of family property in certain circumstances, including the extent to which property was acquired by one spouse through inheritance. In that case, the wife relied on the fact that she received two inheritances during the marriage totalling $97,000 and applied most of that money to the family’s first and second residences. The husband had been making the mortgage payments, as the wife did not work outside of the home for most of the marriage. The British Columbia Court of Appeal held that the husband largely acquired his interest in the family home because of the wife’s generous use of her inheritances. On the facts of that particular case, the Court concluded that an equal division of the family assets would be “manifestly unfair”. The wife had only the home “to fall back on” and her need for economic independence and

self-sufficiency, also a consideration under the *Act*, together with the wife's custody of the couple's three children, compelled an unequal division (para. 14). In the result, the Court awarded 75 percent of the value of the family home and contents to the wife.

[111] It is interesting to note that, at para. 14 of *Wundele*, the Court of Appeal also cited *Murchie* v. *Murchie* (1984), 39 R.F.L. (2d) 385 (B.C.C.A.) as authority for the proposition that "little weight may be given to the contribution of an inheritance where, in a long marriage, the other spouse made significant contributions as well".

[112] In any event, *Wundele* is distinguishable for two reasons. First, in the case before me, the couple were never married. Thus, the Yukon *Family Property and Support Act*, in particular s. 13, has no application. Second, the father does not have primary residency of the child H. Third, the father is employed as an insurance adjuster earning approximately $36,000 annually. Consequently, he is economically independent and self-sufficient, and does not rely upon 25 Balsam "to fall back on", as did the wife in *Wundele*.

[113] The father's counsel also relied on *Anderson* v. *Anderson*, 2004 BCSC 1434. That too was a case of a marriage which lasted for 27 years and, consequently, s. 65(1) of the British Columbia *Family Relations Act* was considered in determining whether to award an unequal division of the value of the family home. In particular, Truscott J., of the British Columbia Supreme Court, had regard to the extent to which the property was acquired through the wife's inheritance, as well as the need of the wife to become and remain economically independent and self-sufficient. The wife contributed approximately $105,500 towards renovations to the family home as well as $130,000 towards reducing the mortgage. The home was valued at $750,000. The wife was 53

years old and had sacrificed her earning capacity to raise the couple's three children. She also claimed that she needed to own a greater share of the interest in the family home to become economically self-sufficient. Truscott J. agreed and ordered the mother 70 percent of the value in the family home. However, as with *Wundele*, cited above, I would distinguish *Anderson* on the bases that, in the case before me, there is no comparable legislation applicable, as the couple were never married, and that the father has made no argument that he requires more than 50 percent of the family home in order to become more economically self-sufficient.

[114] In summary, while the mother was clearly enriched by the father's transfer to her of a one-half interest in 25 Balsam, I conclude that there was a juristic reason (or reasons) for the enrichment. Accordingly, his claim of constructive trust must fail and I declare that the mother retains her 50 percent legal interest in the property.

(iii) The Mother's Constructive Trust Claim

[115] Since I have ruled that the mother is entitled to share equally in the value of 25 Balsam by virtue of her joint tenancy, there is no need to consider her alternative claim of constructive trust in relation to that property. However, there was no clear evidence as to the legal ownership of the motor home. If it is registered solely in the father's name, then it is appropriate for me to consider whether the mother's constructive trust claim entitles her to a one-half interest in that item as well.

[116] *Markin* v. *Gysel*, cited above, was submitted primarily in support of the father's argument on the mobility issue, however, it also involved the division of communal property and an issue of constructive trust. There, the mother moved to join the father in Williams Lake, British Columbia and they lived together in a common-law relationship

for about four years. The parties resided in a house purchased by the father, operated a joint bank account, became formally engaged, and had a child together. Even after the father announced to the mother that he no longer wanted to continue the relationship, they continued sharing their residence for about five months before the father finally moved out. An issue arose as to whether the mother was entitled to an interest in the parties' residence in Williams Lake on the basis of resulting trust or unjust enrichment. When the house was purchased, the father contributed $48,000 and the mother provided $5,000. The father then believed that they were starting a life together, even though he put only his name on the title. In addition to her cash contribution, the mother executed the mortgage as a covenantor, although she did not make any of the mortgage payments. She also made an indirect contribution to the home through her efforts as a homemaker and mother, which enabled the father to devote his time and energies to his job with considerable success. Joyce J. of the British Columbia Supreme Court held, at para. 61, that it was well established that the provision of homemaking and childcare during a common-law relationship can constitute a benefit and form a foundation for a claim in unjust enrichment. The Court further concluded, at para. 59, that, by providing both direct and indirect contributions towards the acquisition and maintenance of the home, the mother had suffered a deprivation which enriched the father without juristic reason. At para. 70, Joyce J. concluded that the father not only expected that the mother would be a joint owner of the home, but that, although he caused title to be registered in his name alone, "he intended that in equity they were to be joint owners". In the result, the Court awarded the mother a one-half interest in the home.

[117] I am similarly persuaded that the mother should be entitled to share equally in the (relatively nominal) value of the motor home on this basis. Here, the father received a benefit in relation to the mobile home, as with all the other undisputed communal assets, by virtue of the mother's consistent payment of the majority of the household expenses over their six-year relationship. Some of those expenses likely included the costs of operating and maintaining the motor home, in which case the benefit to the father would have been direct. To the extent the mother's financial contributions to the household allowed the father to use his disposable income for the operation and maintenance of the motor home, the benefit to the father would have been indirect.

[118] Conversely, the mother suffered a deprivation, in that she paid significantly more than half of the household expenses and therefore had less disposable income for her own personal needs.

[119] Finally, there is no juristic reason to support the father's enrichment in this regard. He originally intended the mobile home to be communal property. Further, the mother paid more than her share towards the household solely because the father consistently earned less than she did for the duration of the relationship. He could have earned more, as was evident from the increase in his income from construction work in 2004 and 2005, but was attempting for most of the relationship to build a career with Primerica, which he ultimately failed to do.

[120] Thus, by providing direct and indirect contributions toward the operation and maintenance of the mobile home, the mother was deprived and the father was enriched without juristic reason. Accordingly, if the vehicle is registered in the father's name alone, I declare that he holds a one-half interest in it in trust for the mother.

(iv) The Estate's Tax Liability

[121] In their closing submissions, subject to the father's qualification that 25 Balsam and the motor home should not be included with the couple's communal assets, both counsel seemed to agree that the estate's tax liability should be grouped together with the couple's other communal debts and subtracted from the couple's total assets in order to determine the equity to be divided between them.

[122] However, counsel for the mother further submitted that, following this approach, the final amount owing from the father to his client to equalize the division of communal property is $41,000, which amount presumes that the estate's tax liability is in fact $100,000. Given the problems with the father's evidence on this point, which I discussed earlier, I have no confidence that the father's estimate of $100,000 is correct. Even if I assume it is, the additional interest and possible penalties which have accrued in the intervening six years following his mother's death in March 2000 have likely increased the total tax liability to significantly more than $100,000. Further, if the principal amount of the taxes due ends up being significantly more or less than $100,000, then conversely there will be proportionately either less or more equity to divide between the parties. Thus, in preparing these reasons, I did not feel I was able to order any specific amount as an equalization payment to the mother, since the correct amount due will vary with the amount of the estate's tax liability.

[123] I was further puzzled by the implicit agreement between the parties that the estate's tax debt should be grouped together with the couple's other communal debts, since that particular debt appeared to be solely the responsibility of the father. As the executor to his mother's estate, it was clearly the father's obligation to provide an

accounting of the estate's assets and liabilities and this should have been done prior to the final distribution of proceeds to the beneficiaries. Unfortunately, because the father's evidence on this point was sadly and surprisingly lacking, I have no clear understanding of whether or how much of the estate's taxes were deducted at source, for example when the open investment account and RIF were collapsed and liquidated. Accordingly, in my deliberation prior to judgment, I questioned why I should not remove the estate's tax debt from the communal debts before subtracting the total debts from the couple's total liabilities, in order to determine the equity subject to division. I also asked myself why the father should not be responsible for the payment of the entire tax debt out of his share of that equity.

[124] Given these concerns, I requested that both counsel return before me to make further submissions on the tax issue. As I understood them, their respective positions are as follows.

[125] The father's counsel argued that the estate's tax liability is "fixed to the home" on 25 Balsam. The reason for this is that, when the father was distributing the estate to himself and his siblings, he implicitly agreed to personally take responsibility for paying the estate's taxes. He planned to do so by combining the cash balance remaining in the estate's bank account with a loan secured by a mortgage on 25 Balsam sufficient to top up the payment to $100,000.

[126] It seemed to be the father's understanding that there was approximately $30,000 in the estate's account after he paid his brother and sister their respective shares ($120,000 each) and that he would therefore have to borrow an additional $70,000 under a mortgage, which he would personally be responsible for repaying. However, as

it turns out, there was just under $17,000 in the estate's bank account after the final instalment payments were made to the siblings and, as a result, the father would have had to borrow about $83,000 in order to pay the total tax debt of $100,000. The father would then have received a $154,000 share of the estate (the value of 25 Balsam) which, after subtracting the face value of the additional mortgage required to pay the tax debt, would have been reduced to something in the neighbourhood of $71,000. That amount would be reduced even further if one were to account for the interest on the mortgage over time. Thus, the father would be receiving far less than a one-third equal share of the $360,000 estimated net value of the estate.

[127] Why the father would have offered or agreed to such an arrangement is difficult to understand. It is equally difficult to comprehend why he did not simply determine the taxes due by the estate and pay those taxes before making any distribution of the estate's proceeds.

[128] Be that as it may, the father's counsel now says that the tax liability is inextricably linked to the value of the home. Thus, if the home is to be included with the couple's other communal assets, then the tax debt must similarly be included with their other communal debts in order to determine the couple's overall equity. The father's counsel argued that it would be manifestly unfair to the father to take the estate's tax liability out of the equation when determining the couple's equity and then require the father to pay the total amount of those taxes out of his share of the equity. Her reasoning, as I understood it, was that, but for the father receiving 25 Balsam as an inheritance, the value of that property would likely never have potentially formed part of the couple's communal assets. Further, because the father agreed to pay the estate's taxes on the

strength of having inherited 25 Balsam, he should only be required to pay for those taxes from his share of the total equity resulting after the total communal debts, including the taxes, have been subtracted from the total communal assets.

[129] With respect, not only does the logic of this argument seem somewhat circular, it also fails to address the father's apparent error in not determining and paying the estate's taxes before distributing the value of the estate. Nevertheless, I have some sympathy for the notion that the father probably would not have taken title to 25 Balsam, as his share of the estate, without relying upon the value of the property in order to eventually finance the payment of the estate's taxes. Further, if he had not accepted 25 Balsam as his share of the estate, then the couple would likely not be litigating whether that particular asset is subject to division, along with the other communal assets.

[130] As for the undetermined amount of the tax liability, the father's counsel suggests that I proceed in one of two ways. The first would be to notionally award the mother whatever share of the equity I feel is appropriate, and then direct that, prior to payment, the amount of taxes due by the estate as of the date of separation be deducted. Obviously, in that scenario the amount of the taxes due would have to be determined after the delivery of my judgment on the issue, unless the parties agree otherwise. The second possible option would be to allow the father to reopen his case and to present fresh evidence on the amount of the estate's tax liability. The father was unable to give any kind of time estimate as to how long that might take. He said that he was immediately prepared to present all the necessary materials to a tax professional in order to prepare another tax return for submission to Revenue Canada. However, while that might present an initial figure for the estate's tax liability, it would not include the

amount of any accrued interest or penalties and would be subject to a subsequent review by Revenue Canada. Thus, it is conceivable that several weeks or months may be required in order for the father to obtain this information.

[131] In response, the mother's counsel repeated his original closing submission that it was the father's onus to provide evidence regarding the estate's tax liability and his relative failure to do so should not prejudice the interests of the mother. In particular, he is opposed to the father reopening his case and an adjournment of the trial in order for him to provide the missing information. In the alternative, the mother's counsel proposes two options if his own. First, that I continue to use the values of assets and liabilities negotiated by the parties, as referenced in the third draft of the separation agreement. He submits that would be a fair and reasonable approach, which is "attractive in its simplicity". He argues that the figures used by the parties during their negotiations were presumably thought to be reasonable values, including the estimated debt for the estate taxes. Further, some partial payments have already been made based on those values. Thus, by ordering that the mother be paid a specific equalization payment of $41,000, the other outstanding matters between the parties can be resolved. For example, the father will then be required to obtain financing to pay out the joint line of credit, thereby removing the mother's name from that obligation. Also, the title to 25 Balsam could be transferred from the father and mother jointly to the father's name alone. Thus, proceeding in this fashion would put closure to the issues between the parties.

[132] The second option proposed by the mother's counsel is that I simply make a determination on the general relief sought by the parties in their respective pleadings. For example, if I were to rule in the mother's favour and find that she has a one-half

interest in both 25 Balsam and the motor home, then the parties can determine how best to give effect to my judgment. I understood that to mean that they may agree to await the final determination of the estate's tax liability, or that they may negotiate some other form of settlement of the issue. In the event that they are unable to agree as to how to proceed, then they could return before me to seek further directions. Thus, this option is essentially the same as the first option proposed by the father's counsel.

D) Conclusion on Communal Property Division

[133] I recognize that this action is unusual in that it came to trial only six short weeks after it was commenced. As I understand it, that was made possible by an unexpected opening in the Court's calendar, which the parties took full advantage of, no doubt because of the primacy of settling the mobility question before the beginning of the school year this fall. However, in the apparent rush to prepare for trial, it appears that the issue of the estate's tax liability did not receive the attention it deserved. While that is understandable to a point, I agree with the mother's counsel that it was the father's onus to provide further and better particulars on that issue and that the mother is entitled to this Court's decision on the merits, without being prejudiced by a further delay of several weeks, if not months. Thus, I will not allow an adjournment or permit the father to reopen his case to provide fresh evidence on the estate's tax liability. Rather, I will rely upon my conclusions on the legal issues set out above and leave it to the parties to attempt to work out the specifics later. If they are unable to effectively implement the terms of this judgment, they may return before me to seek further directions and I will retain jurisdiction accordingly.

[134] On the perceived need for closure, I decline to follow the mother's counsel's suggestion that I simply order a $41,000 equalization payment to the mother, essentially for the sake of convenience. To do so risks unfairness to both parties. If the tax debt is more than $100,000, then the father should pay less than $41,000. Conversely, if the tax debt is less than $100,000, then the mother is entitled to more than $41,000.

[135] On the question of whether the couple's equity should be determined without including the estate's tax debt in the couple's total liabilities, and then requiring the father to pay the tax debt from his share of the equity thus calculated, the mother's counsel never strongly pressed me to do so. While he did suggest in his original closing that the estate debt was technically not his client's obligation, he also said that she agreed to deduct the debt from the couple's total assets in order to determine the equity subject to division. Indeed, it was this very approach which gave rise to her claim for an equalization payment of $41,000. In all of the circumstances, I am persuaded, for the reasons I have already set out, that it would be unfair at this stage to determine the couple's equity without deducting the estate's tax debt from the total communal assets.

[136] To summarize, I find that the father has not justified an order for an unequal division of the family assets. In particular, I have rejected the father's claim that the mother holds her 50 percent legal interest in 25 Balsam in trust for him on the basis of either an express, a resulting or a constructive trust. Accordingly, I have found that the mother is entitled to retain her one-half interest in the home. In addition, the mother is entitled to share equally in the value of the couple's motor home. Therefore, the mother is entitled to an equal share of the couple's equity, which shall be determined by deducting from the total communal assets, the total communal debts, including the

amount of the estate's tax liability as of April 30, 2006, which is approximately the date of the final separation between the parties.

[137] Because the amount of the estate's tax liability is unknown, it is not possible for me to order a specific equalization payment from the father to the mother. Rather, I will leave it to the parties to attempt to resolve that by agreement or further investigation, failing which they may return before me for directions.

IV. COSTS

[138] Because I have not yet heard submissions on costs, I refrain from making any such order at this time. Counsel may also address me on that later, should they be unable to agree.

GOWER J.