SUPREME COURT OF YUKON

Citation: *S.L.H. v. A.W.H.,* 2019 YKSC 43

Date:20190904
S.C. No.: 18-D5076
Registry: Whitehorse

BETWEEN:

S.L.H.

PLAINTIFF

AND

A.W.H.

DEFENDANT

Before Mr. Justice D.R. Aston

Appearances:
Shaunagh Stikeman — Counsel for the Plaintiff
A.W.H. — Appearing on his own behalf

REASONS FOR JUDGMENT

Introduction and Background

[1] The parties were married July 4, 2012. The plaintiff is 34, the defendant ten years her senior. They have three young children. The eldest, M.H., turned five on June 29. The twins, A.H. and B.H., just turned three on August 8.

[2] The parties agree that their date of separation is April 3, 2018. They continued to live under the same roof until the plaintiff found alternative accommodation August 3, 2018.

[3] They had begun to live together as a couple in September 2008. Their cohabitation was interrupted from time to time in 2009 and 2010 because of the

plaintiff's attendance in Ontario for post-secondary school that enabled her to change careers and become a dental hygienist. A.W.H. was a successful chiropractor until he was seriously hurt in a motor vehicle accident in 2009. He has been unemployed since then. After lengthy litigation, his personal injury claim was settled for more than $2 million in 2016.

[4] Just prior to the marriage, the parties signed a pre-nuptial contract, dated June 27, 2012. Property claims have been resolved pursuant to that agreement.

[5] This litigation began in August 2018. On September 20, 2018, Mahoney J. varied an alternating days arrangement the parties had put in place for the care of their three children. His order created a three-week rotating residential schedule. It was an "interim interim" order, no more than a short term arrangement until the court could make a more fulsome examination of the circumstances and the best interests of the children.

[6] On December 24, 2018, Campbell J. made an order addressing child support and daycare costs. It is clear from her reasons that the assessment of the defendant's income was "preliminary", simply to put something in place and based on limited evidence. Her Order contemplated an appropriate adjustment for the child's support once better information was available.

[7] On January 10, 2019, Campbell J. varied the three-week rotating schedule that had been in place since the order of September 20. With some flexibility, the parties have followed that temporary order since it was rendered.

[8] On March 13, 2019, Campbell J. made a further interim order addressing decision making respecting the children and ancillary issues such as access to third

party information, possession of the children's health cards, birth certificates and passports and the resolution of the parental dispute over which school M.H. would be enrolled in come the Fall.

[9] On May 17, 2019, I made an order arising out of the case conference held May 10, 2019. The plaintiff's application for a summary trial of the property issues was adjourned to the opening of the trial, fixed for the week of July 15. The issues for trial were identified: a) custody and access, including any order incidental to decision making, a parenting schedule, or other rights or responsibilities of the parents respecting their children; b) child support, including the determination of the actual or imputed income of each parent for support purposes and the responsibility for expenses under s. 7 of the Child Support Guidelines; c) whether the pre-nuptial agreement is a valid, subsisting and enforceable agreement, including the provision respecting Canada Pension Plan contributions; d) the property rights of the parties, the division of their property and any incidental order needed in relation thereto; e) spousal support; f) dissolution of the marriage; and g) costs.

[10] On June 17, 2019, the defendant delivered a fresh counterclaim. I will address his expanded claims in the course of these reasons.

[11] The trial proceeded in a bifurcated fashion. It began with the hearing of the plaintiff's Rule 19 application for summary judgment on property issues. Following the hearing of that application, the trial of the other issues was completed. A decision, with oral reasons, was rendered on July 19 on the Rule 19 application. The remaining issues were reserved and will now be addressed in these Reasons.

Custody and Access

[12] The plaintiff's statement of claim proposed an order granting her sole custody of the children with a residential schedule that would divide the children's time on a 70/30 basis. The husband, from the outset, has claimed joint custody of the children and a 50/50 sharing of their time. Prior to trial, the plaintiff indicated she would be amenable to a joint custody order provided the March 13, 2019 order giving her the final say if the parties were unable to agree on decisions after consultation and discussions was continued. She proposed only a minor variation of the residential schedule ordered January 10, 2019.

[13] Prior to the separation, both parents were actively engaged in child rearing. Though the plaintiff worked a full time job after her last maternity leave ended in the summer of 2017, I am satisfied that over the entirety of the children's lives she assumed more of the care giving responsibilities than the defendant. She took a year of maternity leave when M.H. was born in 2014. After the twins were born in August 2016, she was on maternity leave for another year. When she returned to work in September 2017, the morning routine stayed the same. This meant that she had to get up at about 5 a.m. to get the children ready for daycare and to prepare their lunches after getting herself ready for work, while A.W.H. slept in. She would then drive the children to daycare, put in a full day at work, pick the children up at daycare and then participate in family time and activities until the children went to bed at around 8:00 or 8:30 p.m. She would go to bed herself at about that time. Even on weekends she would be responsible for the children in the morning while A.W.H., a night-owl by nature, slept in. A.W.H. was quite

involved with the children, and developed a close relationship with them, but I reject his claim that he was the "primary parent" before separation.

[14] Contested custody cases often lead to decisions and behaviour by parents that are regrettable. In this case, living under the same roof for three months after the April 3 separation date created a powder keg that blew up on June 29, 2018. Neither parent really bears more of the blame for that unfortunate chain of events. Both of them could be castigated for behaviour that lead to the emergency intervention order of June 29 but there is no useful purpose in that exercise now, and I refrain from doing so. It is time to move on.

[15] When the parties first separated, S.L.H. said she wanted to move into the jointly owned rental property on [redacted]. She gave notice to the tenants. Unbeknownst to her, A.W.H. had prematurely signed an extension of the lease so that the tenancy would no longer end in September 2018. He signed that agreement with the tenants in May 2018, after the parties were separated but while they were still under the same roof in the family home. He then encouraged the tenants to dispute S.L.H.'s claim for occupancy by going to the Landlord and Tenant Board. Instead, he offered S.L.H. temporary occupancy of the [redacted] cottage knowing that it was neither safe for the children nor even habitable for S.L.H. It has no functioning water and requires much work to be done.

[16] A.W.H. has occasionally continued to be unreasonable or difficult in his position on parenting and financial issues. His petty request for compensation for half the cost of the extra car seats and "her share" of the costs of the pre-separation Punta Cana vacation are two examples. His hard nosed position on the division of household

contents and keeping both vehicles to himself until the Court ordered him to give the mother of his children the use of one of them are other examples. He did not voluntarily pay any child support before ordered to do so in December. However, I appreciate his extreme frustration, even grief, in not seeing his children every day. I take that into account. I understand that his worry over his children and his finances, and his sense of loss, has fueled certain adversarial conduct and an attitude that is objectively unreasonable.

[17] Since September 20, 2018, the children have been primarily in the plaintiff's care. On A.W.H.'s calculation, the children have been with him 38% of the time under the temporary orders. It seems his calculation excludes the time the children are sleeping (17 out of 21 nights at their mother's) and that it attributes to him the hours the children are in daycare on the weekdays he picks them up. His calculation remains unexplained and it is not a reflection of the reality of their shared responsibilities.

[18] In the summer of 2018, when the parents were sharing alternate days with the children, four-year-old M.H. was having temper tantrums and all three children were crying more than normal. B.H. was often waking up at night. However, I accept the plaintiff's evidence that since the interim order of September 20, 2018, the children have settled down and they are doing relatively well. M.H. is excited to start kindergarten in September. B.H. has made significant gains with his speech delay and gross motor skill issues. A.H. has no apparent special needs. They are happy children who will have the opportunity to develop their full potential.

[19] Transfers of the children, when they are returned by the father directly to the mother, continue to be a problem, with tears and resistance. A.W.H. attributes this to

the children wanting to spend more time with him. His unproven allegation is that the cause of problematic returns to the mother is "fear of abandonment by their father". He asserts a need for "developmental therapy" for all three children.

[20] S.L.H. believes that A.W.H. promotes the problem by doddling at the exchange and making it an unnecessarily drawn out process. She also believes that the children are reflecting his wishes and not their own. She quotes then four-year-old M.H. as saying to her "daddy wants me to tell you one day daddy, one day mommy".

[21] Whatever the cause, both parents agree the children do struggle with the transfer from the father to the mother.

[22] Another problem seems to be the rushed time the father has with the children from 4:00 p.m. to 6:45 p.m. every Monday and Wednesday. This may well be connected to the difficulties the children have returning to their mother's home those days.

[23] It is encouraging that since the temporary order of March 13, 2019, there have been no difficulties over decision-making and both parents have been able to attend swimming lessons, dance classes, gymnastics, school functions and other events without incident. Their email exchanges are not acrimonious. The parents were able to organize a joint birthday party for M.H. this past June, even though they were both no doubt anxious about the upcoming trial scheduled for July 15.

[24] A.W.H. proposes a residential schedule that would follow a 2-2-3-day rotation. He says "it's reasonable because I am not asking for more than an equal time".

[25] I do accept the evidence from A.W.H. and others that his time with the children is generally speaking "quality time". He takes advantage of teachable moments and he

engages the children in many age appropriate games and activities. The same can be said of S.L.H. Though the defendant's sister Laura pointed fingers of blame at the plaintiff, A.W.H., to his credit, did not criticize her parenting efforts or parenting capacity.

[26] S.L.H. has a sound objection to the defendant's parenting plan proposal of a 2-2-3 residential schedule. First, on his own evidence (para 73 of his July 11, 2019 affidavit) he sleeps 12 hours every 24 because sleep is the only time he gets relief from chronic pain and fatigue. His close friend J.M. confirmed that the defendant is in the habit of staying up very late at night and generally sleeps from 3:00 a.m. until mid-day or early afternoon. Second, his proposal creates too many direct exchanges between the parents. It is better to use the daycare as the pick up and drop off point. Third, his proposal would exacerbate the significant differences the children experience between the parents for established bedtimes and their routines at night and in the morning. The children have been spending 17 out of every 21 nights with their mother. I am sympathetic to A.W.H.'s assertion that evening meals, bedtime and morning routines are important time for active parenting and bonding with children, particularly with children this young. However, the benefits of extending additional time to A.W.H. need to be balanced by the need for stability and consistency.

[27] It is abundantly obvious from the evidence at trial that when it comes to their children, both parents love them dearly and have much to offer as role models, teachers and care givers. The children are lucky to have such devoted and capable parents.

[28] The legal test when it comes to any court decision over custody, access or other incidental parenting order is simply "what is in the best interests of the child?". The *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) offers up as a starting point, the so called

"maximum contact" provision in s. 16(10): a child should have "as much contact with each spouse as is consistent with the best interests of the child". The recent amendments to the *Divorce Act* add a specific list of factors to take into account in determining "best interests". This non-exhaustive list of factors is a useful checklist even if it does not actually change what most courts have been doing for years.

[29] When the provisions in the new *Divorce Act* were being debated, there was concerted lobbying for a provision that would make joint custody and 50/50 residential time the new starting point. That did not happen. The "maximum contact" principle is preserved in the new legislation, but that principle continues to be balanced against other factors such as minimizing disruption for children, promoting stability for them and consideration of parenting history, the age, maturity and any special needs of the child, and the ability of the parents to communicate, cooperate and insulate their children from conflict.

[30] In this case, I think it would be beneficial for the children to have some additional time with their father each week but I think his proposal for a 2-2-3 schedule is problematic. Over a two-week period, each parent would have five of the ten nights preceding daycare the next morning. That is too disruptive and unstable in terms of the bedtime and morning routines that the children have known all their lives. The children are used to being with their mother almost every morning before daycare. It is the only routine they have known. As they grow older, appropriate changes can be made. Residential schedules are not cast in stone.

[31] However, even now I do not believe it would be too disruptive of their routine to grant A.W.H. some days when he would have the children overnight before getting them

to daycare the next morning. The logical days to consider are some of those days when he already has the children from 4:00 p.m. to 6:45 p.m. The added advantage of this is that it would reduce the number of times the father is returning the children directly to the mother, instead substituting the daycare for his "return" of the children. From the children's perspective it would avoid the rush that there now is to finish up dinner at their father's before returning to their mother's and having to settle down there for bedtime on Mondays and Wednesdays.

[32] A.W.H.'s ability to handle the children for an extended stretch of time will be tested by the expansion of his overnight access, but with proper management of his medication and sleep routine he should be able to manage. If not, the following order may be changed to ensure proper supervision and management of the children while they are in his care.

[33] The present three-week residential schedule set out in para. 9 of the interim order of January 10, 2019, will be varied so the father's time with the children will be as follows:

1. On the week following the weekend with the mother, the father's time on Monday (currently from 4 p.m. to 6:45 p.m.) shall be extended to an overnight and he will take them to daycare or school Tuesday morning;
2. In the following week, the father's time on Wednesday (currently from 4 p.m. to 6:45 p.m.) shall be extended to an overnight and he will take them to daycare or school Thursday morning.
3. In the week preceding the weekend the children spend with their mother the father's time on Wednesday (currently from 4:00 p.m. to 6:45 p.m.)

shall be extended to an overnight and he will take them to daycare or school on Thursday. However, in this week the father's time from 4 p.m. to 5 p.m. on Fridays is vacated so that the mother's weekend time shall start with pickup from daycare or school on Thursday and extend to dropping the children off at daycare or school the following Monday.

[34] The children will otherwise be in the day to day care of the mother

[35] The effects of this order are these:

1. A.W.H. will have seven overnights every 21 days, instead of four. This will give him more quality time at bedtime and the following morning. It will not unduly disrupt the consistent routine the children are used to at their mother's;
2. In the 21-day cycle, the children will be with their mother for at least part of the day 19 of those days, and with their father for at least part of the day on 15 days. From the perspective of the children, they will spend some part of the day with their father more than 70% of the time. This balances the maximum contact principle with the need for stability which is so important for children this age. They will be able to feel connected to both parents almost daily; and
3. Assuming the parent who takes the children to daycare is providing both breakfast and lunch, this new rotating schedule would make S.L.H. responsible for the 39 meals (62%) over the three-week period and A.W.H. responsible for 24 meals (38%).

[36] When it comes to decision making it seems to me the plaintiff is more child focused. She is not content that the parents attend alternate medical appointments for the children and suggests both parents ought to be able to attend every appointment. She rejects the father's suggestion that for some decisions they should "just flip a coin" if they cannot agree. The defendant is more focused on which parent is better suited to decide any dispute they might have. He concedes that the mother is better equipped to monitor the dental health of the children but contends he is better equipped to assess their health care and therapeutic needs. He says his professional qualifications as a former chiropractor "mirror physician training" and diagnostic skill and that he has developed considerable skill with internet research. I am concerned that the defendant would use decision-making power to fulfill his own need to assert his authority. On the other hand, I trust the plaintiff to consult with the defendant and make reasonable child focused decisions if the parents are unable to come to a consensus.

[37] I accept the plaintiff's position with respect to consultation, access to third party records, decision-making and other incidental matters in relation to the children. The formal order will grant joint custody but will also include the provisions of paragraph 1 of the Order of March 13, 2019.

The Plaintiff's Income

[38] The plaintiff started working as a dental hygienist in Whitehorse in the Fall of 2011. It was not full time work at first. By 2012 or 2013, she was able to work full time hours but in 2014 and 2015, she missed half a year each year because of maternity leave for M.H. In 2016, she worked full time the first part of the year but was again on

maternity leave for a year after the twins were born that summer. She returned to work in September 2017. Her first full calendar year of fulltime employment was 2018.

[39] In 2016, she earned $48,302; in 2017, $42,157 and in 2018, $75,644.26 according to Line 150 of her income tax returns and her Notices of Assessment.

[40] The plaintiff's paystubs for the first 5 months of 2019 (based on a $42 per hour rate of pay) totalled $39,254.72 an amount that included a bonus of almost $7,000 as well as vacation pay. As of June 2, her base rate was increased from $42 an hour to $46 an hour. This will affect her ability to continue to earn a bonus. Her bonus is based on a percentage of her individual billings over a certain amount. She will now have a higher target because of the increased hourly wage.

[41] Based on her new rate of pay her "regular earnings" will amount to a little over a $7,000 per month or almost $50,000 for the 7 months of the year from June 1, 2019 to December 31, 2019.

[42] I find therefore that her earnings for 2019 will be approximately $90,000. Out of that income, she must pay for her professional licence, liability insurance and her contribution to the medical benefits package with her employer.

The Defendant's Income

[43] The defendant's income, or imputed income, is more difficult to assess. One of the difficulties of making a fair and reasonable assessment of the defendant's income is his concerted effort to avoid complete disclosure and to portray an inaccurate or misleading picture of his financial resources.

[44] The defendant's updated Financial Statement sworn the week before the trial claims that he has investment income of less than $3 per month and net rental income

of less than $500 per year. He has still not provided evidence of the expenses he has paid for the rental property notwithstanding demands for such an accounting going back to last Fall. His Financial Statement lists expenses in excess of $13,000 per month. He says he is living off his capital and incurring debt. In the Financial Statement, he puts a present value of $90,000 on his $1,000,000 investment in the company I will refer to as BPH. He values his real estate substantially below the figures in his own professional appraisal evidence. Oddly enough he does put a value of $75,000 on his "golf memorabilia", presumably an item he does not need to worry about because it is either excluded property under the terms of the pre-nuptial agreement or excluded because it is not a family asset that would be shareable with S.L.H. in any event. In short, his financial statement is completely unreliable as evidence of his true financial circumstances. It invites, in fact demands, adverse inferences. It is not easy to draw the line between an adverse inference and pure speculation but that is the task at hand.

[45] When A.W.H. received his motor vehicle settlement in 2016, he received a net amount of just over $1.6 million in addition to earlier advances. After paying off some debts and making some extravagant purchases, he had about $1.3 million to invest. He testified that at the 3% going rate of return at that time, the capital sum would not generate enough income for the lifestyle to which he aspired for himself and the family. He wanted to avoid having to encroach on capital. He sought out a higher potential return and ultimately decided to invest $1,000,000 in a venture that promised to grow to $5,000,000 USD within three years! However, that company has not lived up to those high hopes. He now says he cannot rely on getting any more of his investment back. What started out as a "partnership" in 2016 when he made the investment was

transformed into a “share purchase agreement” in February 2018. (See Tab 2(E) of Exhibit 2.) Paragraph 5 of that share purchase agreement provides a timetable for the redemption of A.W.H.’s shares for $1.3 million, $300,000 more than his original investment. That redemption amount goes higher if payments are not made in a timely fashion. According to the share purchase agreement, A.W.H. could receive as much as $1.8 million if payments are stretched out beyond the final deadline of February 2020.

[46] A.W.H. has received a series of significant payments to date, none of which were disclosed in his Financial Statements in this case because he says those payments are nothing more than a return of capital, not “income”. Shortly before the date of separation in April 2018, A.W.H. received a payment of $100,000. He used the funds to pay down the line of credit on the jointly owned rental property. He subsequently took the line of credit back up to its maximum after the date of separation. He says that the $79,000 advance that he took post separation was used in part to pay about $40,000 in household bills between the date of separation and the date the plaintiff moved out of the matrimonial home in early August. He has failed to prove that allegation. I reject the notion that he paid any of S.L.H.’s debts or bills with that money. The bills he paid would have been bills in his own name, for which he alone was responsible under the pre-nuptial agreement.

[47] In 2018, A.W.H. received an additional $17,000 (April 30); $60,000 (July 24) and $12,500 (December). The exact amount he received from BPH in 2018 totalled $190,336.40.

[48] He has received an additional $85,000 from BPH in the first half of 2019.

[49] His July 2019 Financial Statement shows no trace of having saved or reinvested any part of the $275,000 he has received in the 17 months between March 1, 2018 and this trial. He values his remaining shares in BPH at $90,000, whereas on their face they are still worth more than $1,000,000 under the share purchase agreement.

[50] Though A.W.H. is worried that he will not be paid the full amount owing to him from BPH, and that he will have no effective legal remedy if that should be the case, there is no cogent evidence the share purchase agreement will not be honoured. To the contrary, there is a letter attached to the defendant's July 11, 2019 affidavit from the person in control of BPH stating that "BPH intends to fulfill its obligations and redeem the shares in full." The letter confirms the payments made to date and the manner of calculating the minimum payments under the timetable in the share purchase agreement. It states quarterly payments up to October 2019 have been made and infers that further payments will follow.

[51] It is important not to "double count" the $100,000 paid in March 2018. That has already been factored into the Rule 19 Judgment. For the purposes of calculating the defendant's capital gain on the redemption of his BPH shares for support purposes, the $1.3 million is adjusted to $1.2 million. His remaining post separation capital gain will therefore amount to a figure of $200,000 to $700,000, depending on when the payments are made and assuming they are in fact made. One way of calculating the defendant's income for support purposes is to average his post separation capital gain of $200,000 - $700,000 over the years it will take to collect it.

[52] There is another way to approach the income attributable to the settlement money he received. At the December 7, 2018 court attendance before Campbell J. the

defendant took the position that the only portion of the settlement money to be taken into account is the part attributable to future income loss. The application judge went through the exercise of making such a calculation in paras. 13 - 21 of her reasons and concluded that $48,567.78 per annum was the appropriate figure. At trial, the defendant challenges that calculation. In his July 11, 2019 affidavit, he points out the failure to back out any component for future care costs. He continues with a convoluted rationalization to explain why the income attributable to him for the $1.6 million in settlement funds should only be about $1,000 per year.

[53] I look at it in a different way altogether. I do not accept the premise that only the future income loss component of the settlement is to be used in calculating imputed income for child support purposes. There is no principled reason why the entirety of the net settlement of $1.6 million is inappropriate. Assuming, without necessarily accepting, that $300,000 of that amount was spent to repay debts and for expenses benefitting the whole family, there is about $1.3 million left that has gone into his cottage property (including chattels) and the BPH investment. The defendant testified he could only earn about a 3% return on investment in 2016 or 2017. Based on the adverse inferences I draw concerning his uncorroborated financial evidence I am skeptical of that evidence. I believe it undervalues his 2016-2017 options. I estimate a more realistic rate of return is 4% or 5%, without a need to encroach on capital. The income on $1.3 million would amount to $52,000 to $65,000 annually.

[54] Generally, child support is based on the definition of income in s. 15 of the *Child Support Guidelines* and line 150 of a parent's income tax return. However, parents have an obligation to support their children by a reasonable use of their capital to

generate income. See s. 19(1)(e) of the *Child Support Guidelines*. Out of his settlement money, A.W.H. has invested substantially in the cottage property. He has been attempting for several years now to turn the cottage into an income producing asset. He has paid $30,000 for furniture from Wayfair and has invested in an expensive boat and trailer, together with an uninstalled dock. He has had ample time to turn the cottage into a revenue generating asset.

[55] I am also mindful that the defendant's equity in the cottage and his half share of the equity in the family home and rental property amounts to several hundred thousand dollars.

[56] If it turns out the defendant is not paid the full redemption price for his BPH shares it does not necessarily follow that all of the unrecoverable amount "written off" ought to be taken into account in the calculation of imputed income for child support purposes. That outcome respecting his BPH shares would simply reflect his own greed and recklessness in making the investment. I would not discount entirely the income to be attributed to him from his failed investment. Though the defendant says the plaintiff participated in the decision to make this investment and was excited by the potential return it offered, I have no doubt that it was a unilateral decision by A.W.H. He has always considered his motor vehicle settlement money his own exclusive property to do with as he pleased. That freedom was, is, and will continue to be, tempered by his legal obligation to support his children and to prudently use his capital to fulfill that obligation.

[57] In any event, the evidence does not support a finding that the BPH investment is not recoverable.

[58] I turn next to A.W.H.'s income earning capacity.

[59] In describing the extent of his present physical disabilities, A.W.H. has portrayed himself as a man who is unable to work at meaningful employment more than a few hours a week but at the same time capable of all the childcare responsibilities as he proposes to assume.

[60] From his disabling surgery in 2013 until the settlement of his motor vehicle claim in 2016, A.W.H. always used a cane when outside of his home. When he went on trips to Vancouver and Toronto, to the zoo and the aquarium, he used a wheelchair to get around. He was well aware the defending insurance company had him under surveillance. However, the very day after his motor vehicle accident settlement he parked his cane in the cupboard and never used it again.

[61] The evidence at this trial discloses that A.W.H. has a greater physical capacity for employment than he admits to. According to his own evidence and that of at least three of the witnesses he called on his own behalf, A.W.H. has been able to dig holes, plant trees, pull out trees and stumps, install flooring, mow his own lawn and move large amounts of landscape materials in the last few years. His neighbour R.D. described A.W.H. moving a full dump truck load of gravel (albeit over about six weeks) when he was constructing the playground area for the children in the yard in the family home.

[62] Apart from physical work, A.W.H. has developed skills through countless hours on the computer. In addition to extensive on-line shopping, he has demonstrated a proficiency in both medical and legal research in this trial as well as in the litigation of his motor vehicle settlement. He is a highly intelligent individual with exceptional communication skills. He has professional training as a Chiropractor, training that he himself admits provides transferrable skills to other gainful employment.

[63] In his trial testimony A.W.H. said he plans to register for an on-line course or courses to qualify him for a government job at the Workers Compensation Board or some other like government agency, as a hearing officer or in some other capacity that would take into account his professional expertise. He did not offer any direct explanation as to why he has not taken any such steps before now but hinted that the time and stress of this lawsuit has been all consuming for him. He hopes that his chronic fatigue will improve once this case is finished so that he will be able to work for a paycheque at least part of the time the children are not with him. He testified that if the children are in his care 50% of the time as he proposes he would be able to work for a maximum 8 hours per week. This would be in addition to the "work" he does maintaining his home, renting Green Cr. and continuing to make the cottage property habitable so it can be rented out. The decision now being rendered with respect to the rental property and the residential schedule will allow him to work more hours than his own 8 hour estimate because Green Cr. is to be sold and the children will not be with him half of the weekdays over any two week period. On his own evidence, he was counting the time looking after the children as the equivalent of "work".

[64] There is no question that A.W.H. is "intentionally unemployed" and that income ought to be attributed to him under s. 19(1)(a) of the *Child Support Guidelines* for his income earning capacity.

[65] In my view, he could have started his efforts to re-enter the workplace long before now. He has been physically capable of some part time employment since 2016. I am disinclined to allow him a period of grace to retrain and find suitable employment. He could have taken any necessary retraining and could be actively looking for work

now, if not actually employed already. All things considered, I find he should be capable of commanding $40 an hour and working 20 hours per week. A conservative estimate of his potential employment income is $35,000- $40,000 per annum.

[66] I find that A.W.H. has an imputed income at least equal to that of the plaintiff.

[67] Though his potential employment is not immediate, I am not inclined to fine tune a retroactive variation of the child support that has been ordered given the very substantial sums he has received from BPH since the date of separation, amounts that are at least in part a prepayment of the minimum $300,000 capital gain he will make on the redemption of his shares.

[68] Having found that the parties have actual or imputed income of about $90,000 each, or perhaps a little more than that, the child support claim will be resolved by ordering the defendant to pay the table amount based on an imputed income of $90,000 and requiring the parties to equally share the after-subsidy after-tax cost of the daycare. For the purpose of any subsidy or the Canada Child Benefit, the plaintiff is deemed to be the primary parent. No retroactive variation of the interim order is necessary because it is so close to the order now made.

Spousal Support

[69] On the first day of the trial, I indicated that the defendant's counterclaim for spousal support, first raised in his pleading delivered less than two weeks before the trial, would not proceed. However, when the Rule 19 application was heard in short order on the first day of the trial, I reversed that ruling and allowed A.W.H.'s claim to go forward. He claims spousal support notwithstanding the terms of the pre-nuptial agreement in which both sides released any such claim. I also granted leave to S.L.H.

to amend her statement of claim to assert a spousal support claim as a response to A.W.H.'s counterclaim. Therefore, the spousal support claims of both sides will be determined by the Court.

[70] S.L.H. admitted in her testimony that at the time the pre-nuptial agreement was signed, she did not think that her husband would later become "permanently disabled". A.W.H. submits that his present need for support was not contemplated by the parties at the time the agreement was signed, and therefore not part of their bargain.

[71] Having found that the pre-nuptial deal agreement is a valid, subsisting and enforceable agreement, the releases of spousal support contained therein are binding unless the Court finds that it would not only be unfair but unconscionable to hold the parties to their bargain. See s.34(3) of the *Family Property and Support Act,* R.S.Y. 2002, c. 83

[72] A.W.H. submits that at the time the pre-nuptial agreement was signed he expected to fully recover from his motor vehicle accident injuries. It was only after his 2013 surgery that he became permanently disabled. I accept that he has a permanent partial disability. One problem with his submission is that as a result of the exacerbation of his disability after the 2013 surgery, he obtained a much larger settlement (over $2,000,000) which he was able to keep as his own separate property under the terms of the pre-nuptial agreement. The larger amount offsets somewhat his submission that the extent of his disability was not contemplated at the time of the pre-nuptial agreement. The fact that he put two properties in joint names, thereby losing part of the property otherwise excluded, was the product of his voluntary action. He cannot now argue that

his own voluntary choice in that regard makes the spousal support release "unconscionable".

[73] A.W.H. asserts that he financed the plaintiff's education as a dental hygienist and that her wages have more than doubled as a consequence. First of all, this occurred before the marriage and before the pre-nuptial agreement was signed. Second, he "financed" her studies in the form of a loan which she repaid to him in the years following their marriage, finally paying off her debt to him in 2014. His financial assistance does not support a claim for compensatory support.

[74] A.W.H. alleges that he was destitute at the time of the separation in 2018. Quite apart from the substantial equity he has in the family home, the rental property and the cottage, he had just received a payment of $100,000 as a return on his investment in BPH, a return he did not disclose to the plaintiff until required to do so in this litigation. His statements to her (and to his own family members) in March and April 2018, that he "did not know how he was going to keep the lights on" without a financial contribution from S.L.H. was a brazen misrepresentation of his financial circumstances.

[75] His evidence that he alone paid for every single household bill during the marriage is nothing short of ridiculous. S.L.H. has not accumulated any savings or assets. Given the terms of the pre-nuptial agreement she might have purchased her own golf clubs or put the new vehicle in joint names if she had known of her husband's hard nosed attitude. If she had accumulated any savings as a hedge against being left bereft of any property as he wished her to be she would have been well within her rights to protect herself in that fashion.

[76] I reject A.W.H.'s assertion that the plaintiff is equally responsible for the jeopardy of his investment in BPH. He did not have to choose an investment that would not pay out income out for several years. His financial need at the time of separation and today is self inflicted.

[77] A.W.H. has failed to establish a claim for spousal support based on the factors and objectives enumerated in s.15.2 of the *Divorce Act*. Even if there was no pre-nuptial agreement I would dismiss his claim for spousal support.

[78] If it were not for the pre-nuptial agreement the plaintiff might have a valid claim for spousal support. Perhaps in the form of a lump sum. She had to replace her vehicle because A.W.H. kept the Ford F150 intended to replace the vehicle she had earlier purchased from her father. He kept the great majority of the household contents and she had to replace many items. He will now be able to apply for a division of the Canada Pension Plan credits she accumulated before the separation, so she will lose the benefit of the invalid contractual provision that would have protected her. Not only will her CPP retirement benefit be reduced, A.W.H. will immediately be able to apply for a CPP disability pension.

[79] However, S.L.H. took the position she is prepared to abide by the release in the pre-nuptial agreement if A.W.H.'s claim were dismissed, so her claim is also dismissed.

Debts Alleged to be Owing to the Defendant's Father and Sister

[80] The defendant's father W.H. did not testify or provide any affidavit evidence for the trial. However, there is an email dated March 12, 2019, from him which is attached to the defendant's financial statement sworn July 11, 2019 (page 41). That email purports to confirm a loan of $25,000 in 2013 which, with interest, has grown to

$32,463.15 as of July 2019. There is no indication of what the loan was for or who the money was loaned to. However, it is telling that the loan was to be paid when the defendant received his insurance settlement. The inference is that the money was a loan from father to son, repayable by the son in 2016 but never paid. Apparently no demand for payment has ever been made, not even in the email of March 12, 2019. The plaintiff testified she was unaware of this transaction between the defendant and his father. I am skeptical that the defendant will ever be called upon to pay this "loan" but in case a demand for payment is ever made I will address the issue of responsibility for repayment by finding that this is a separate debt of A.W.H. and his sole responsibility under the terms of the pre-nuptial agreement. The judgment to issue in this case will include a provision supplementary to the judgment already rendered on the Rule 19 application that the defendant shall indemnify the plaintiff for any liability, including costs, she may incur as a consequence of any claim against her by W.H.

[81] The question of whether the defendant's sister Laura has a valid claim for an outstanding loan is beyond the scope of the pleadings in this trial. She is not a party to the proceeding. If Laura asserts a claim for an outstanding loan it will be open to the parties to this proceeding to claim contribution and indemnity from one another. For example, it seems patently absurd to suggest that the plaintiff alone would be responsible for money advanced to meet daycare costs.

[82] A.W.H.'s younger sister Laura has been his confidante for years. They supported one another in their long legal battles with insurance companies related to their disabilities. Before the pre-nuptial agreement was signed, A.W.H. showed his sister a copy of it. He consulted with her about its terms.

[83] Her animosity to her sister-in-law, the plaintiff, is palpable. She is unfairly judgemental and negative. For example, she has no difficulty calling the plaintiff a "gold digger" even knowing what she does know about the one sided pre-nuptial agreement the plaintiff signed.

[84] I found her evidence was "rehearsed" in the sense that a simple question from her brother set her off on rambling diatribes of criticism and allegations of misconduct and deceitfulness on the part of the plaintiff. Though there were apparently times when Laura got along with the plaintiff, it is abundantly apparent she would not have loaned her money but for Laura's strong ties to her brother and her concern for his children.

Divorce

[85] A.W.H. has failed to prove his adultery allegation, nor does his allegation of "financial abuse" provide any basis for the dissolution of the marriage. However, it is clear the parties have been separated for more than a year and there is no reasonable prospect of a reconciliation. The divorce is granted on the plaintiff's Statement of Claim, subject to the usual provision that it takes effect 31 days hence.

Costs

[86] The plaintiff's claim asserted that property issues ought to be governed by the pre-nuptial agreement. The defendant's position was that she was not entitled to any property or money beyond what she had already received. The plaintiff's Rule 19 application ensured that this issue was resolved procedurally in the most cost efficient manner. She was not entirely successful, but she was clearly successful on the main items. She is entitled to a substantial contribution towards her costs on this issue, including the reserved costs of the May 10, 2019 conference.

[87] The parenting issues reflect a genuine good faith belief by each parent in their positions. The father was modestly successful; but the mother more so. By the time of trial "joint custody" was not the real issue. For the most part the parents have successfully insulated the children from their conflict. This aspect of the litigation probably took up one-third to one-half of the time and effort invested in the case. A.W.H. was less successful than S.L.H. on this issue but he should not be penalized for pursuing what he honestly believed to be in the best interests of his children. The plaintiff is entitled to costs on this issue, but the amount ought to be modest in relation to the costs she incurred.

[88] The plaintiff was entirely successful on the issues of child and spousal support. The defendant was not timely or forthcoming concerning accurate or complete financial disclosure, exacerbating the costs incurred by the plaintiff. He is obliged to make a substantial contribution towards those costs.

[89] A.W.H. has consistently maintained that he could not afford to retain counsel after his second lawyer withdrew from the case. He was unsuccessful in obtaining legal aid. Mindful of the fact he received $275,000 from BPH in the 16 or 17 months before trial, I reject his claim that he could not retain counsel. He chose to be self-represented. He weighed the cost against the benefit. He has dealt with litigation and its cost in the past. He knew the plaintiff was incurring substantial costs.

[90] Having regard to these considerations, and the complexity and importance of the case, I order A.W.H. to pay costs fixed at $50,000, all inclusive.

Disposition and Order

[91] The parties are divorced from one another, the dissolution of the marriage to take effect 31 days hence.

[92] The parties will share joint custody of their children, M.H., born June 29, 2014, and the twins B.H. and A.H., born August 8, 2016.

[93] The parents shall inform one another of any significant matters that may arise pertaining to the children. They shall discuss significant decisions respecting the health, education, general well-being and extra-curricular activities of the children and make reasonable good faith efforts to reach an agreement. In the event they are unable to agree, the plaintiff shall have the right to decide.

[94] The parents each have the right to obtain information, records and other documents directly from any third party concerning the health, education or general wellbeing of any of the children.

[95] The plaintiff shall maintain the RESP in her own name and is not required to account to the defendant for her management of the account.

[96] The terms of the March 13, 2019 order in relation to passports, health cards and birth certificates for the children will be continued.

[97] Subject to flexible arrangements for vacation time and special occasions, the residential schedule for the children will be as set out in paragraphs 33 and 34 of these reasons.

[98] Neither parent shall remove any child from Yukon without the prior written consent of the other.

[99] Commencing August 1, 2019, the defendant will pay child support to the plaintiff of $1,795 per month, the Yukon table amount for the three children on his imputed annual income of $90,000.

[100] Commencing August 1, 2019, the defendant will pay child support to the plaintiff calculated as 50% of the after-subsidy after-tax cost of daycare pursuant to s.7 of the C*hild Support Guidelines*

[101] The interim child support order shall continue in force until July 31, 2019, without retroactive variation.

[102] The claims for spousal support are dismissed.

[103] The defendant shall pay the plaintiff costs, fixed at $50,000 all inclusive.

September 2, 2019

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ASTON J.