CITATION: Marrello v. Marrello, 2016 ONSC 835
COURT FILE NO.: FS-14-394815
DATE: 20160203

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
AXANNA MARRELLO	)	Alexandra Abramian and Brigetta Tseitlin, for the Applicant
Applicant	)	
	)	
– and –	)	
	)	
DAKK MARRELLO	)	Jason Gottlieb, for the Respondent
	)	
Respondent	)	John Phillips, for the Office of the Children's Lawyer
	)	
	)	
	)	**HEARD:** October 19-23, 26-30, November 13, December 4, 2015

REASONS FOR DECISION

JUSTICE W. MATHESON

[1] In this divorce application, the issues at trial included custody of and access to the parties' one child, Daria (DOB: January 20, 2012), equalization of net family property, spousal and child support, and whether or not there is a need for a no contact order going forward.

Background

[2] The applicant is 36, born in June 1979. The respondent is also 36, born in January 1980. They were married in June 2007 and separated on May 13, 2014.

[3] The applicant immigrated to Canada from Russia in 1998 with her parents and her younger brother. After learning English, she completed a diploma program in internet website design. She was admitted to the University of Toronto and, in 2007, obtained a Bachelor degree from the University of Toronto with majors in ancient languages and Egyptian culture.

[4] The respondent is from Ontario. He began his higher education at the University of Toronto and then transferred to Ryerson University, where he obtained a degree in aerospace engineering in 2005. After he completed his degree, he began working part-time for his father, as well as looking for another job. His father had a company that provided telephone systems for

businesses. The respondent began as an employee and later worked as an independent contractor.

[5] The parties met in 2003. They began a relationship and moved in together in 2006. They became engaged and married in mid-2007.

[6] Early 2007 was a stressful time for the applicant. She was finishing her degree. The wedding was up-coming. She was involved in the respondent's search for what became the matrimonial home; a townhouse condominium in Toronto. Most significantly, her own parents' marriage had broken down. The applicant was the peacekeeper and that role became increasingly difficult. After the wedding in June 2007 and honeymoon, she went to a general practitioner and was prescribed anti-depressants.

[7] The applicant, when a teenager, had been the victim of a traumatic event. The challenge of dealing with that event led to one occurrence of self-harm at age 17. Many years later, in August 2007, when the applicant was under significant stress and failing at keeping her parents together, she once again engaged in self-harm. She treated herself, but she was shocked at her own behavior so she went to the hospital for help. From that time, she began to see a psychiatrist; first as a result of her attendance at the hospital and later the psychiatrist who testified at trial, Dr. Rakoff. She was ultimately diagnosed with the less severe form of bi-polar disorder and moderate borderline personality disorder. I have intentionally omitted the details of these and related events from these public reasons for decision, given the highly private nature of that evidence. The details are amply described in the applicant's trial evidence.

[8] From this time period onwards, the applicant saw Dr. Rakoff and continues to do so on a regular basis. She has been prescribed various medications and different dosages from time to time. Dr. Rakoff testified that the dosages he prescribed were low doses, and he permitted the respondent to start and stop medications as needed. She went off the medication altogether for periods of time, including when she was trying to get pregnant and when she was pregnant.

[9] The applicant went on to complete a Master's degree in Egyptology in 2008. In 2009, she began to work part-time at a small business that calculates the costs of services for injured people. By 2010, she was working the equivalent of 3 to 4 days a week, mainly from home. She also did some other work from time to time.

[10] The respondent continued to work for his father's business, although it was never a full-time occupation for him. He testified that, at most, he worked about 20 hours a week and not every week. As the years went on, the business fell into difficulty because of the increased use of cell phones, and the respondent worked less and less, although he continued to go in on a regular basis. He also volunteered his time at the condominium where the parties lived, and did a small amount of work for pay at the condominium.

[11] There was considerable trial evidence regarding the source of the money used to pay the parties' household bills. While the applicant worked on a fairly steady basis and contributed

toward the family expenses, the respondent did not earn a steady or even minimum wage income for long periods of time. While it appeared from the amount of time he spent out of the home that he had a regular full-time job with his father, he testified that this was not the case. The family was living off the applicant's contributions to their bills, some income from the respondent, and most significantly monies from the respondent's father that were not compensation for work. These amounts were sometimes given by cheque but were mainly taken in cash. The respondent and his father have testified that a large amount of money was given to the respondent as loans, rather than gifts, which is disputed.

[12] After a long period of attempting to become pregnant, the parties' daughter, Daria, was born on January 20, 2012.

[13] After Daria was born, the applicant re-commenced taking medication. Between adjustments to the medication and recovering from the delivery, she was less able in the first month or more after Daria was born. She cared for Daria mainly during the day, and the respondent cared for Daria through the nights. Both grandmothers were also a significant help.

[14] The respondent testified that he mainly took care of Daria. However, this testimony conflicts with the amount of time that he spent out of the home weekdays, apparently at work and his volunteer work for the condominium as well as his other activities in the evenings.

[15] After Daria was born, the respondent encouraged the applicant to return to work to help with the mortgage. She resumed work gradually. The respondent continued to go to work at his father's business but testified that his paid work decreased over time as the company fell into financial difficulty.

[16] Daria began daycare in May 2013, after which the applicant went back to her regular hours totaling about 3 to 4 days a week over the course of the week, mainly from home.

[17] The applicant testified that after the parties were married, when she started to have her issues, the respondent was the only person who could understand and support her in that difficult time. She testified that she was really grateful to him. However, over time things began to change. She felt better and more capable, yet the respondent's efforts to help had the effect of making her feel worthless and not needed. She felt that he was controlling and hovering.

[18] It was apparent from the trial evidence that the respondent took on a paternalistic role toward his wife, treating her as if she was not able even when she was. I accept his evidence that he was motivated by good intentions, but his choices turned out to be a source of the applicant's feelings of worthlessness.

[19] The extensive role of the respondent's parents in the couple's lives also contributed to the applicant's feelings of worthlessness. The applicant testified that the respondent's parents treated her very well from the outset of the relationship, and they developed a close relationship. However, after Daria was born, the respondent's parents became a constant fixture in the new family's day-to-day life. On their own evidence, the paternal grandparents were at the parties'

home almost every day during the week, and on weekends, Daria would often stay with them at their house. I accept the respondent's evidence, amply documented in emails or texts, that this was often at the request of the applicant, while one or both of the parties went out. But as time went on it became a regular occurrence that the respondent did not feel she could change, especially on weekends.

[20] The applicant began to feel marginalized as a mother. Daria was in daycare during the week, and it was the respondent who took her there and picked her up. The respondent's parents were spending a lot of time in evenings and weekends focused on Daria. Daria often stayed over at their house for weekends. The applicant's parenting time was substantially encroached on, although the paternal grandparents did not understand that this was an issue.

[21] The applicant began to talk to the respondent about unhappiness in the marriage in 2013. By the end of 2013, the applicant felt that the marriage was over, despite efforts to rekindle the relationship. She began to speak out more about her dissatisfaction. By the beginning of 2014, she felt trapped and wanted to separate but felt she could not leave because of Daria. The respondent's belief was that she wanted a break from everything, including both him and their daughter.

[22] Tension in the marriage escalated. In March 2014, the applicant left to stay the night at a hotel and ultimately called 911 out of a concern for suicidal thoughts. She had another short hospital stay, as a voluntary patient. She was advised to talk to the respondent about boundaries and giving her some space, which she did. She testified that the respondent was very accepting of this, and set up her home office for her to also sleep in, but shortly after she went back home he began to press her again about her wish to separate.

[23] In response to the applicant's wish to have more time with Daria, the parties agreed that each parent would have Daria for a couple of days a week, and on those days would drop off and pick up Daria at the day care and care for her in the evenings. Weekends would be shared.

[24] The period from March 2014 until separation in May 2014 was characterized by escalating disputes. There was then a series of events on May 12 and 13, 2014 that substantially escalated the discord between the parties, resulting in their separation.

[25] On May 12, the respondent was pressing a discussion about saving the marriage. Part way through the discussion, he began to secretly tape it. He then started saying things that provoked the applicant, talking about her mental health and an incident that had taken place in November 2013. The applicant was provoked and began to yell and swear, but ultimately calmed down and left. The respondent then went early to the daycare and took Daria, even though it was the applicant's day to pick her up and take care of her. He took Daria to the police station to ask about his concerns, and later went back home. The applicant was trying to find Daria, the parties had another fight, and the applicant initially went to her mother's house. Later she communicated to the respondent that she was coming home and he asked her not to. He

disabled the house lock. When she arrived her key would not work, but ultimately he let her in. His friend Gareth Hughes was there and Daria was upstairs.

[26] Mr. Hughes testified at trial. He testified that he was surprised to hear about the parties' marital problems, as he did that day. He testified that in order to understand the marital problems better he spent about an hour and a half questioning the applicant. At trial, the respondent denied participating in the questioning of the applicant, but Mr. Hughes and the applicant testified that he did so. Despite having to go through this questioning, as Mr. Hughes testified, the applicant was civil throughout their conversation, after which she went to bed.

[27] The next day, the respondent and Mr. Hughes took Daria to daycare. The applicant later did what the respondent had done the day before. She went early to the daycare and picked Daria up on a day that was the other parent's day. The applicant, her mother and Daria then went to meet with the family law lawyer who stills represents the applicant, Ms. Abramian.

[28] Upon their arrival at her office, Ms. Abramian called the respondent and told him who she was, where her office was, that his wife and child were at her office and that his child was safe. However, there then ensued another series of difficult events. The police report indicates that the respondent tried to force his way into the lawyer's office and was pulled back by his father and others. The respondent disputed that account, and also testified that he was trying to see his daughter, who he had not been permitted to see. However, the police report indicated that the respondent tried to force his way into the office when he realized that the car the applicant was driving was blocked in by another car. He and his father had wanted to take the car back. Both the applicant and the respondent drove company cars, owned by the respondent's father or his business.

[29] After the above events, the parties separated and the applicant moved in with her mother. The Children's Aid Society (CAS) became involved and put in place a plan that provided for the applicant's parenting of Daria to be supervised by the applicant's mother until the CAS completed its assessment. There was another incident involving the police, in which the respondent and his father planned to take away the car that the applicant was using, this time at the applicant's mother's apartment building. The respondent testified that on May 15, he and his father took the car out of the parking lot but later put it back after hearing from the police and CAS that the applicant would be permitted to parent Daria.

[30] Considering all the evidence about the events in May, I find that both of the parties contributed to the problems and share roughly equal responsibility for what took place.

[31] This course of events culminated in two urgent motions before this Court, which were first addressed by Justice Czutrin on May 16, 2014. Among other things, Justice Czutrin ordered equal access time, with the applicant's access supervised by her mother. The motions were adjourned to allow the CAS to investigate. Justice Czutrin precluded each spouse from attending at the other's residence, except for the applicant to pick up her things, and provided that there be no contact between them.

[32] The motions originally returnable before Justice Czutrin came before Justice Stevenson on May 29, 2014. The CAS informed the court of the agreement for supervision by the applicant's mother, but also indicated that the CAS completed its investigation; the respondent's allegations were not verified and the CAS was closing its file. The CAS informed the court that it was taking no position on the motions and would not be attending the court hearing.

[33] Justice Stevenson noted the high conflict and the serious allegations being made, and made a referral to the Office of the Children's Lawyer, asking that its investigation be expedited. She implemented a 2-2-3 rotation for parenting time and continued to require supervision.

[34] Another urgent motion was brought, arising from events in June 2014. The applicant planned to pick up Daria at daycare with her mother. They planned to meet there. When the applicant arrived, her mother was not yet there and the daycare staff told her to go and get her, which she did. The applicant should have but did not realize that the specific wording of the supervision order did not permit her to be with Daria without her mother, even if at the daycare with staff and other people present.

[35] The daycare contacted the respondent, who called the police. By the time the applicant and her mother returned, the respondent had arrived and was holding Daria. There ensued a dispute between them inside the daycare. The respondent admits to preventing Daria from going to her mother by physically holding her back. He also testified that the applicant pushed him over while he was holding Daria, injuring him, which was not established on the evidence at trial. A witness from the daycare was on the respondent's witness list at the outset of the trial, but was not called.

[36] The respondent alleged that he had been assaulted but the police did not lay charges. At a later stage, after separation, the respondent initiated a private prosecution, but there was no finding of assault.

[37] The urgent motion arising from this incident was heard on June 30, 2014 by Justice Perkins. He emphasized to the parties that the May 29th order must be followed, noted that it was highly undesirable to have the police being called and noted that Daria needed both parents and would be "damaged if this war continues."

[38] Despite this communication from Justice Perkins, there was another event around Labour Day weekend. In late August, the respondent believed that Daria had a black eye, though any bruise is barely discernable in the photos he took at the time. Through counsel, he asked for an explanation. The applicant replied through counsel that there had been no incidents and that Daria had a vein under that eye that became more noticeable when she was tired or ill. Counsel invited the respondent to report it if he wished to do so. Despite this reply, the respondent's counsel communicated that the respondent would be keeping Daria. This was contrary to the court order of Justice Stevenson, under which the respondent was obliged to bring Daria to the daycare the next day to be picked up by the applicant. The respondent indicated he would keep Daria until a case conference almost two weeks later, on September 11, 2014, which would be a

continuing breach of the court order regarding parenting time. Applicant's counsel therefore wrote saying she was bringing an urgent motion on the Tuesday after the long weekend. Respondent's counsel replied that it was not urgent and he was not available.

[39] On September 2, 2014, Justice Moore heard the urgent motion without respondent's counsel present, and ordered the applicant's access to continue in accordance with the order of Justice Stevenson.

[40] The CAS was contacted about the black eye, investigated, and found no basis for intervention.

[41] The parties were back before the Court on October 21, 2014. Justice Kiteley received the recommendation of the OCL to lift the requirement for supervision, discussed below, and decided to remove that requirement.

Involvement of the OCL

[42] After the referral by Justice Stevenson on June 20, 2014, the Children's Lawyer agreed to provide services in respect of the custody and access of Daria. Marci Goldhar, M.S.W., was appointed to conduct the investigation and make a report. Ms. Goldhar testified at trial.

[43] Ms. Goldhar had been a member of the panel of investigators for the Office of the Children's Lawyer for more than ten years when she embarked on this assignment. She had extensive experience doing assessments. There had never been a complaint made about her of any kind. She followed her normal procedure of identifying who she would contact and interview, and proceeded with those steps. I will not endeavour to set out each step Ms. Goldhar took in her investigation, but note the following. Ms. Goldhar interviewed the parties, conducted observational visits of Daria with each parent, and interviewed the paternal grandparents and maternal grandmother. She attended at the daycare and spoke to Daria's then current and former teachers. She interviewed Daria's pediatrician and the applicant's psychiatrist, Dr. Rakoff. The respondent asked that she interview a friend of his. In keeping with her practice, she therefore also interviewed a friend of the applicant's as well. She reviewed considerable documentation, including documentation provided by the respondent. She also had discussions with the CAS and reviewed its file.

[44] The CAS had no concerns about the applicant's ability to parent Daria, and indicated that they had experience with parents with a mental health diagnosis. The CAS's position was that the applicant's parenting time did not require supervision as of that time. However, the CAS was keeping its file open due to the high conflict between the parents and the possible harm that the high conflict could have on Daria.

[45] As part of her investigation, Ms. Goldhar requested that the parties each attend for a psychological assessment. Each parent underwent an assessment with the same professional, Dr. Olga Henderson. Although the respondent testified at trial that he had to see this particular assessor and had no choice in the matter, it was later clarified that counsel for the parties

exchanged the names of various possible assessors and ultimately agreed on Dr. Henderson, and the respondent was involved in that process.

[46] Dr. Henderson's reports were admitted for the truth of their contents. She assessed the applicant in August 2014 and the respondent in September 2014. The referral specifically raised mental health questions for consideration along with parenting-focused questions. Dr. Henderson did her own testing and assessment and answered all the questions posed to her by the OCL.

[47] In her assessment of the applicant, Dr. Henderson concluded that her knowledge of parenting seemed reasonably good. Neither anger nor impulse control was identified as a significant difficulty for the applicant, nor were any significant lapses in judgment around parenting issues identified. Her test results were not consistent with either prior mental health diagnoses, causing Dr. Henderson to note the possibility that the prior therapeutic intervention had been effective. Dr. Henderson concluded that the only concern identified through her assessment "may be a tendency for some degree of role reversal", through which the applicant could look increasingly to her daughter to meet her own needs for companionship and support if she is not in a satisfying love relationship.

[48] In her assessment of the respondent, Dr. Henderson concluded that the respondent's parenting knowledge was adequate. However, she found limits on his ability to manage interpersonal conflict and stress in an insightful and effective manner. She concluded that the respondent's anger was not well-managed, resulting in some impairment in judgment, noting that when the respondent felt unable to take control of challenging or troublesome situations, his attempts to regain control could escalate to the point where his efforts could become excessive. She also expressed concern that the respondent might communicate his anxieties and fears to Daria, disrupting her relationship with her mother where the mother-child relationship needed to be supported.

[49] Dr. Henderson concluded that an early resolution to the high conflict situation would be helpful to both parties, and recommended counselling for both of them, which they underwent.

[50] These assessments were provided to the OCL and formed part of Ms. Goldhar's investigation.

[51] As a result of her investigation, Ms. Goldhar did not have concerns about the relationship between Daria and either parent. Both were described in positive terms in her report. Like the CAS, she further concluded that supervision of the applicant's access was not required. She made this recommendation on the basis that Daria would continue in daycare and Dr. Rakoff had committed to contact the CAS if the applicant stopped attending her regular appointments with him. Her main concern, which was shared by CAS, was the potential for harm to Daria arising from the high conflict between the parties.

[52] After completing her investigation, Ms. Goldhar had two disclosure meetings with the parties and their counsel. The first meeting was focused on the question of whether there was a continued need for the applicant's parenting time to be supervised. The second disclosure meeting covered all matters.

[53] Rather than taking the important input from the OCL in stride and factoring it in to his consideration of the issues, the respondent took an adversarial approach. The respondent surreptitiously taped the second disclosure meeting with Ms. Goldhar. The respondent later accused Ms. Goldhar of threatening him at this meeting. A review of the transcript of that recording makes it clear that there was no threat made against the respondent.

[54] The Report of the Children's Lawyer, dated Oct. 16, 2014, was provided to the parties. Its recommendations were consistent with the disclosure meetings. Among other things, Ms. Goldhar recommended that supervision of the applicant's access be lifted. On custody, she recommended that the status quo be maintained. She also indicated that this was an interim report. She indicated that she was unable to make any final recommendations regarding custody, and invited the parties to request an update from the OCL at a later date. She expressed a concern that the respondent's campaign to prove the applicant could not parent due to mental health issues caused conflict that was detrimental to Daria. She indicated that if the respondent had sole custody, she "would be concerned about complete alienation between [the applicant] and Daria." Based on the trial evidence, I share that concern.

[55] At the hearing of the October 21, 2014 motion, Justice Kiteley accepted the recommendation of the OCL and lifted the supervision order, over the respondent's objection. There then followed a series of challenges made by the respondent against the OCL investigator and her report.

[56] On November 6, 2014, the respondent submitted a statement disputing the OCL report. The package included a lengthy letter from the respondent dated October 28, 2014, stating that, among others things, the OCL report made him out to be a "monster" and that his parents were portrayed as "discriminating bigots." As is evident from the OCL report itself, these are not fair or accurate characterizations of the content of the report.

[57] In accordance with the practice of the OCL, Ms. Goldhar's supervisor reviewed the respondent's dispute in detail, concluding that there were no errors in the report other than minor matters such as the reversal of some meeting dates.

[58] The respondent then sued Ms. Goldhar, alleging negligence and negligent investigation, by statement of claim issued November 24, 2014.

[59] The respondent then wrote to the OCL again, by letter dated December 1, 2014, alleging that the threat made by Ms. Goldhar at the disclosure meeting was a violation of his rights under the *Canadian Charter of Rights and Freedoms*. As shown on the transcript, there was no threat. He further accused Ms. Goldhar of extortion, among other allegations.

[60] Due to these steps taken by the respondent, Ms. Goldhar did not do an update to her report at a later date, as she had suggested in her report.

[61] The respondent made a further complaint to the OCL just before commencement of this trial, by letter dated September 13, 2015, this time accusing Ms. Goldhar of gender discrimination. After following its practice of conducting an review, the OCL replied that the report was not reflective of any discriminatory biases, but "was written as a result of a professional and clinical review of the information provided during [Ms. Goldhar's] period of involvement."

[62] At this trial, Ms. Goldhar testified about the process she followed, her investigation and her report. She made available her investigation notes. She was cross-examined. She was a straightforward and responsive witness. Considering all of her evidence, I find that she conducted a proper investigation, was motivated by her duties and responsibilities as an OCL investigator, and was properly focused on the best interests of Daria. She was able to and did fairly assess the parenting abilities of both parties. I find that she was not improperly motivated or influenced in the conduct of her investigation or the preparation of her recommendations and report. The recommendations made were her own, and are deserving of significant weight.

Dr. Rakoff's evidence

[63] The applicant's psychiatrist, Dr. Rakoff, testified at trial. He obtained his Fellowship in Psychiatry about 24 years ago and has been the applicant's psychiatrist since 2008. Dr. Rakoff testified about his assessment and treatment of the applicant from 2008 onwards, including her regular appointments, various medications prescribed and his assessments of her condition. The main prescription was a low dose. He also testified about certain events that involved him.

[64] Dr. Rakoff did not testify as a Rule 20 expert witness and did not purport to give any expert evidence in that capacity. No Rule 20 expert psychiatric evidence was put forward by either party.

[65] In April and May of 2014, Dr. Rakoff provided applicant's counsel with letters that reported on the applicant's condition and compliance with medication. In cross-examination he confirmed that the applicant's prescriptions were on an as-needed-basis and he believed that the applicant would use the medications appropriately. They were not required to be taken every day, and the applicant would report to him if she stopped taking medications.

[66] In the 2014 letters, Dr. Rakoff also indicated that he was not aware of any concerns about Daria's health and well-being and that to the best of his knowledge, the applicant did not pose any danger to Daria. In cross-examination, he fairly declined to "support" the applicant as a parent over the respondent. He testified that in writing the letters, he was trying to be as objective as possible and was neither qualified to nor comfortable speaking about which of the parties should parent Daria if there was ever a question about who should do so. Dr. Rakoff

noted, however, that as a physician he was legally obliged to report to the CAS should he have any concern about Daria's safety. He has never had a concern.

[67] As of early 2015, Dr. Rakoff testified that the applicant had stopped her medication due to side effects and he had no concerns. He testified that she was dealing with the situation well and using her insights gained from therapy well. He testified that over the course of her appointments in 2015, her mental health had been good and stable notwithstanding the significant stressors since that time including the difficult separation and litigation.

Income evidence

[68] The applicant has maintained a steady job since late 2009. She has worked about three to four days a week on an hourly basis, for $20 an hour, with a gap and then reduced hours after having Daria in 2012. She has sometimes earned additional income, including freelance technology work. Her line 150 income for the last three years has been: $19,155.06 in 2014, $13,670 in 2013 and $6,498 in 2012, the year Daria was born. The applicant testified that she anticipates her 2015 income to be about $29,000 including employment income and freelance work.

[69] The respondent is currently in full-time attendance at school. In May of 2015, he began a 13-month fast-track paralegal program at Seneca College with the objective of ultimately becoming a patent/trademark agent. As of the trial, he testified that he would have no income for 2015 and at least the first half of 2016. He has been paying his expenses through a combination of a student loan and gifts of cash from his father.

[70] Much of the respondent's evidence about his work and income prior to commencing his college program strains credulity.

[71] The only significant job the respondent has held was for his father's company; first as an employee and then as an independent contractor. He began that work in about 2007. At trial, he testified that he worked about 20 hours a week at the most, and that was in the earlier years. For 2012, he testified that he worked about half as much as the prior year, approximately 10 hours a week and not every week, after his father's company experienced a significant downturn in business. The respondent further testified that by 2013, he was only working five or six hours a week at the beginning of the year and by August 2013 he was hardly working. For 2014, he testified that he worked "five minutes here, five minutes there," again for his father's company, stopping altogether by the end of June 2014.

[72] The respondent's trial evidence about his hours of work does not match either his Answer or his sworn evidence in his May 15, 2014 affidavit in these proceedings. Both documents state that he was working "full-time" for his father's business in 2014.

[73] The respondent's answers to cross-examination questions about those prior statements are highly problematic. While he initially agreed that he was working part-time, rather than conceding that his Answer or affidavit was incorrect he testified as follows:

Q. So can you explain why you state to the court [in your Answer] that you are working full-time as of June 9, 2014?

A. I am self-employed. Full-time is the schedule that the daycare dictates to me as having to work to keep the subsidy.

Q. Say that again, please, I'm sorry?

A. I am – I am self-employed. Full-time is whatever hours I choose. …

Q. So when you say in this document in your Answer that, "The father, Dakk, is employed full-time working for two companies with the paternal grandfather" you don't mean "full-time" in the sense that the way we all understand – 40 hours a week 50 weeks a year. You mean however I choose, if it's two hours, if it's five minutes, it's full-time because I am self-employed?

A. Correct, yes.

. . .

Q. [The same statement is in your sworn affidavit of May 15, 2014 at para. 4] "I am employed full-time …" So the same answer? When you said in this affidavit under oath I work full-time, I'm employed full-time, you meant self-employed, choosing my own hours and actually in 2014 working not at all?

A. Well, first of all, it was May 15, 2014, so I believe I said after June; and second of all, the first question, yes, I was working – I was self-employed, those are my full-time hours.

Q. Well, prior to June 2014, you testified that in 2014, you were wrapping up the company, you really weren't working? You were coming in to help your father do some physical things, you were looking for work, you weren't really working?

A. That's correct, yes.

Q. And in May, you signed the affidavit, you swear an affidavit to this court, I worked full-time for two companies. You don't see an inconsistency?

A. No, I do not.

[74] As shown by this evidence, the respondent was prepared to give sworn evidence to the Court both in his affidavit and at trial that was plainly wrong. Obviously, the respondent was not working full-time at any point during the marriage or afterward, self-employed or not. Even at his peak hours of 20 hours a week, he was not working full-time. Yet he needed to be working full-time to get his daycare subsidy. He swore an affidavit saying that he was working full-time when he was not even approaching full-time work.

[75] In contrast with this trial testimony, the respondent used 35-40 hours a week as an appropriate measure for full-time work in his submission that income be imputed to the applicant for the purpose of his support claims.

[76] The respondent's account of his hours of work also does not match the time he spent away from the home when the applicant understood that he was at work. The applicant testified that in 2012, after Daria was born in January, the respondent continued to go to the office on regular hours, for most of each business day. This was confirmed in evidence by the respondent's mother, although denied by him.

[77] The respondent's declared income also does not match the pattern of hours described in his testimony. His line 150 income in 2010 and 2011, when he testified he was working about 20 hours a week, was $12,785 and $11,000 respectively. In 2012, when he testified his hours were halved, his declared income not including the child tax credit was $12,530. In 2013 and 2014, when he said his hours dropped to almost nothing, his declared income not including the child tax credit was $12,411 and $11,684 respectively. Small amounts that the respondent received for some work at his condominium do not account for the difference.

[78] Nor are there good records of the payments he received for the work he did at his father's company from time to time. All such records were ordered produced.

[79] The respondent testified that his income was not tied to hours and his father paid him whatever he was able to pay. The respondent's father testified that his son told him the amounts. The respondent failed to produce company cheques substantiating his income from his father's business over most of the relevant time period. Only one of the cheques that were produced is noted as a salary payment, for 2010. It is for $10,628.75, an odd amount for a non-hourly rate lump sum payment.

[80] Most of the cheques produced have been described in the trial evidence of both the respondent and his father as reimbursements for business expenses, not income. Apparently, the respondent often put company expenditures on his personal credit card that were then reimbursed to him, none of which was income.

[81] As for job searches, there was evidence of job searches at certain periods of time, but it does not cover the entire period. As well, the job searches were for specific types of work, not simply for paying work. Not surprisingly, the respondent's failure to obtain regular work turned out to be a source of stress in the marriage.

[82] Throughout this period, the respondent did spend significant time doing volunteer work at the condominium, being compensated only for some jobs in small amounts. He has also done volunteer work at the daycare, where he is now the head of the volunteer board. Surprisingly, he was unable, in his testimony, to give estimates of the time he spends in either of these activities, even for 2015.

[83] As of now, the respondent is supported by a combination of OSAP loans and money from his father. Financial support from his father was also the respondent's main source of money during the marriage. There is now an issue about whether and to what extent that financial support was by way of loans or gifts. There are also problems with the respondent's evidence, as well as his father's evidence, in this area.

Gifts and alleged loans

[84] Throughout the relevant period, the respondent's bank accounts showed large amounts of money that were unaccounted for through cheques or traceable deposits. The respondent testified that he received large amounts of money from his father personally, rather than as salary or work-related compensation. Of that money, the respondent now claims that his father made a series of loans to him, totaling $176,000, in addition to the occasions when he received cash from his father that did not need to be repaid. He seeks to deduct that amount from his NFP.

[85] I accept the trial evidence that the respondent's father personally had the means to give this amount of money to his son; there is no issue in that regard. The source of the funds was primarily from litigation settlements. Those settlements were corroborated by the father's litigation counsel, who testified at trial.

[86] Of the $176,000 now claimed to be loans, only about $47,000 was advanced from the respondent's father by cheque. The rest was said to be advanced in cash, from time to time.

[87] The respondent testified that he would obtain large amounts of cash from a location where his father left cash that was available for him to take. He would also take cash that was not expected to be repaid from a similar location. He agreed at trial that some of the cash he took was not expected to be repaid and was therefore a gift.

[88] There are no records at all detailing the individual cash amounts that the respondent took each time, let alone whether each amount taken was a loan or a gift.

[89] The respondent's father testified that cash was readily available for his son to take and, as to the aggregate of amounts taken from time to time, he trusted his son to give him accurate figures.

[90] There are not matching bank deposits for all of the purported loans. And the respondent's bank accounts were used for more than just personal purposes. He also used them to receive funds from his father in reimbursement of expenses of his father's company and used them for condominium matters.

[91] In addition, the respondent and his father's evidence about the availability of cash at the relevant location conflicted in some respects with the evidence of the respondent's mother, who also took cash.

[92] In support of the respondent's position that the amounts claimed on his NFP were loans, the respondent relies on a series of handwritten notes, signed by him and his father, that purport to document the loans. Both he and his father testified that these documents are loan agreements entered into from time to time between them. They are not witnessed. The notes do not identify the manner in which the amounts were advanced (cash or cheque) and most of them do not identify the intended use of the funds. No demand for repayment of any of the amounts has ever been made.

[93] The first purported loan document says it relates to the down payment on the matrimonial home. The matrimonial home is the main asset in this marriage. This condominium townhouse was purchased by the respondent and is registered in his name. The applicant did not contribute financially to its initial purchase but regularly contributed to the mortgage payments. The $42,500 down payment came from the respondent's father. The applicant testified that the respondent had told her it was a gift.

[94] Before trial, the respondent was ordered to request and produce the bank documents about the original mortgage. He testified that he requested the documents from the mortgagee, TD Canada Trust, but they were no longer available. Only renewal documentation was available. As shown later in the trial evidence, this testimony was incorrect.

[95] Both the respondent and his father testified that the down payment was a loan. Both were cross-examined on that proposition, and it was put to each of them that it was a gift, and that a gift letter was given to TD Canada Trust. The respondent's father testified that the amount was not a gift and he did not recall such a letter. The respondent testified that to suggest he had told the bank it was a gift would be an outright lie.

[96] A representative of TD Canada Trust was subpoenaed and testified at trial, in reply. She brought with her the mortgage file, which does still exist. She testified that there was no indication in the file that a request had been made for it in this litigation.

[97] The TD Canada Trust file included the respondent's original request for mortgage financing and documentation regarding the follow-on steps through which the mortgage loan was given. Most significantly, the file contained a TD Canada Trust form of gift letter signed by both the respondent and his father. Those signatories expressly confirmed that the $42,500 down payment was "a genuine gift that did not have to be repaid."

[98] The TD Canada Trust confirmed that the loan was given due to the deposit. The respondent's income at the time would not have justified the loan.

[99] Considering all of the trial evidence regarding the down payment and the circumstances in which it was made, I conclude that the evidence of the respondent and his father on this matter

is not credible. On the trial evidence, I find that they were forthright with TD Canada Trust and have since changed their story in the context of this marriage breakdown, in the hopes that the bank file and gift letter would not surface. Their credibility on this amount and the other purported loans is substantially undermined. The first of the handwritten notes that purport to document the loans is false, and the other handwritten notes ought not to be given any weight.

[100] After separation, the respondent's father continued to support his son financially, although he agrees that his post-separation support is a gift, not a loan. In their testimony, again neither father nor son could say precisely how much money the father had been giving his son since the separation in 2014 to the time of trial. Apart from a $7,000 cheque for living expenses and money to pay his lawyer, the amounts have again been taken in cash, without documentation. The respondent testified that he did not know how much he had taken in cash. His father said he did not know either, although in cross-examination he testified that it was not more than $1,000 a month.

Conclusions regarding parties' evidence

[101] During the trial, both sides attempted to show that the other had misstated the facts in prior affidavits or in their trial evidence. There were errors in the affidavits of both parties, some better explained than others. Both sides also disputed some of the statements in police reports and in some other documents. Neither party's testimony was free from errors, nor would I expect it to be. Both parties' view of the history of their marriage is also now coloured by the events surrounding the marriage breakdown. I have taken all of this into account when weighing their evidence.

[102] There were, however, significant differences regarding how the parties dealt with questions about past events and potential or actual inconsistencies in their evidence, which also inform the question of their credibility. The applicant was responsive in her answers to questions and provided explanations for inconsistencies. She also acknowledged some mistakes that she had made and showed some insight into her past conduct and where she went wrong. In contrast, the respondent was unresponsive on tough questions, and showed little insight into his past conduct and where he went wrong.

[103] As well, there were many specific aspects of the respondent's evidence that raised concerns about his credibility and the reliability of his testimony. His evidence about his "full-time" work and his evidence about the TD Canada Trust mortgage down payment are two instances where his evidence was plainly wrong. This was also apparent in the respondent's written communications complaining about the OCL, where he misstated the facts and repeatedly made extreme allegations that were unsupported by the facts. In his trial testimony, he also repeatedly exaggerated or misstated facts to support his position, especially in the financial area and in regard to the applicant's conduct and mental health.

[104] My impression of the respondent's trial evidence is much the same at that articulated by Dr. Henderson – when put in a difficult situation he showed poor judgment and his efforts to achieve his goals became excessive – which made his evidence unreliable.

Discussion

[105] The issues between the parties are as follows:

(1) custody of and access to Daria;

(2) the request to continue, in part, the order of Justice Czutrin dated May 16, 2014;

(3) the equalization of net family property;

(4) spousal support; and,

(5) child support.

(1) Custody and access

[106] Both parents seek sole custody. Each parent proposes a similar access schedule, with roughly equal division of weekends, holidays and special occasions and a day or so of access for the noncustodial parent during regular weekdays.

[107] This proceeding was commenced under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd supp). The Court's determination of access issues is therefore governed by section 16 of that Act.

[108] Section 16(8) provides that the sole criterion for determining custody and access issues is "the best interests of the child of the marriage, as determined by reference to the condition, means, needs and other circumstances of the child."

[109] The best interests of the child are paramount. The convenience and wishes of the parents are not ignored, but are secondary to the welfare of the child: *Folahan v. Folahan*, 2013 ONSC 2966, [2013] O.J. No. 2450, at para. 9.

[110] The *Divorce Act* does not set out a detailed list of other factors to be considered when determining the best interests of the child. However, in an effort to apply that test with greater precision and consistency, Ontario courts have considered the criteria set out in sections 20 and 24 of the *Children's Law Reform Act*, R.S.O 1990, c. C.12 *(CLRA)*: *Folahan*, at para. 10. Section 24(2) sets out a number of criteria, including the following:

> (2) The court shall consider all the child's needs and circumstances, including,
>
> (a) the 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 involved in the child's care and upbringing;
>
> (b) the child's views and preferences, if they can reasonably be ascertained;
>
> (c) the length of time 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 and education, the necessaries of life and any special needs of the child;
>
> (e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live;
>
> (g) the ability of each person applying for custody of or access to the child to act as a parent; and
>
> (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

[111] Within this framework, the legislation and relevant case law emphasize the importance of maximizing contact with each parent: *Folahan,* at para. 12-13, citing *Young v. Young,* [1993] 4 S.C.R. 3. As set out in section 16(10) of the *Divorce Act*:

> In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact. [Emphasis added.]

[112] The courts have recognized the importance of a parent's willingness and ability to promote a relationship with the other parent. As recently put in *Di Bratto v. Sebastiao,* [2015] O.J. No. 1785, 2015 ONSC 1996, at para. 82:

> Maximization of contact by the child to both parties is also a major indicator of whether a party in a custody proceeding can also best meet the needs of the child. A parent who promotes the child's contact with the other is presumably doing so because he or she also desires to promote the child's relationship with the other. The willingness to do so is obviously a positive attribute for any person seeking custody as this shows that the parent is willing to set aside any of their own personal animosities against the other in the best interests of the child. It bodes well for the child's relationship with both parents in the future as well as future cooperation between the parties. The corollary of this is, of course, that custody is contraindicated for a party who does not wish to promote the relationship between the child and the other parent. For obvious reasons, that is seen as harmful to the child and it eventually sets the stage for potential parental alienation. The "maximum contact" principle has been applied in custody matters on numerous occasions and is an essential part of any consideration of the best interests of a child subject to a custody dispute… [Citation omitted.]

[113] As recently confirmed by the Ontario Court of Appeal, it is not necessary for a court to make a specific finding regarding "custody": *M. v. F.*, 2015 ONCA 277, 58 R.F.L. (7th). Both the Ontario legislation, at issue in *M. v. F.*, and the *Divorce Act*, are permissive. Like s. 28(1) of the *CLRA*, s. 16(1) of the *Divorce Act* provide that the court "may" make an order respecting custody. As put by the Court of Appeal at paras. 39-40:

> For over twenty years, multi-disciplinary professionals have been urging the courts to move away from the highly charged terminology of "custody" and "access." <u>These words denote that there are winners and losers when it comes to children. They promote an adversarial approach to parenting and do little to benefit the child. The danger of this "winner/loser syndrome" in child custody battles has long been recognized.</u>
>
> It was therefore open to the trial judge to adopt the "parenting plan" proposed by the assessor without awarding "custody." It was also in keeping with the well-recognized view that the word "custody" denotes "winner" so consequently the other parent is the "loser" and this syndrome is not in the best interests of the child. [Emphasis added.]

[114] I have considered all of the relevant factors and evidence in deciding what is in Daria's best interests. Throughout the trial, Daria was described as a highly intelligent, engaging,

friendly and happy child. Fortunately, she has been shielded from most of the conflict between her parents, which is as it should be.

[115] Both parents have a strong, loving bond and commitment to their daughter. Both parents are committed to Daria and will provide her with a stable home. Further, while Daria is too young to have her interests expressed directly, on the trial evidence I find that she loves both her parents and benefits from her time with both of them. As well, both parents have support from others that assist them in their parental responsibilities as shown in the trial evidence from a number of witnesses.

[116] Both the applicant's mother and her partner testified at trial and I find them both supportive and committed family members, properly focused on how they may assist the applicant in her parental responsibilities, in Daria's best interests.

[117] The respondent's father, mother and brother all also testified at trial. They are also supportive and committed family members, who have already developed strong loving bonds with Daria. I have, however, a significant concern about this very loyal family group. In this case, none of these family members appear to understand the importance of supporting the development and maintenance of a strong bond between the applicant and Daria. It appears to me that this family has taken loyalty, which is a positive attribute up to a point, to an unhelpful extreme. They do not appear to even entertain the possibility that there may be another side to the respondent's view of events.

[118] More troubling is the tendency, shown in the family's evidence, to disregard the applicant and her role seemingly without any awareness that they were doing so. They have little or no appreciation for the need to include the child's mother in decisions about Daria. For example, the respondent's parents began taking Daria to church regularly without first discussing religious choices with the applicant. The paternal grandfather, in his trial testimony, did not appreciate why that dialogue would be important, even now. The respondent does not attend church with them the majority of the time, and could not name the denomination of the church at trial. More recently, the paternal grandfather has taken Daria to the pediatrician on a number of occasions, without letting the applicant know, and without seeming to understand the importance of doing so. The extent to which their focus on Daria omitted the applicant was striking in their trial evidence, taken as a whole.

[119] I emphasize this concern because there is overwhelming evidence that the paternal grandparents play a major role with Daria during the respondent's parenting time. This pattern was already established before the marriage broke down and continues now. If Daria was in the respondent's sole custody, there would be a substantial risk of alienation of the applicant, which is not in Daria's best interests.

[120] I am also concerned that the respondent is still unable to see how his own conduct both contributed to and provoked problems during the breakdown of the marriage, the events leading to separation and the early stages of litigation. Instead, he has shown a pattern of attacking the

people and institutions involved in assessing parenting issues, beginning with his repeated attacks against the OCL, and including his challenges to the conclusions of the CAS and Dr. Henderson. While I have no difficulty with the respondent looking critically at those conclusions, in this case the evidence demonstrated that the challenges made were not reasonable or thoughtful and there was a complete failure to appreciate that these professionals had identified areas where the respondent should factor their advice into his own conduct and decision-making.

[121] The respondent testified that he was motivated by fear and a genuine concern for both his own safety and his daughter's safety. The trial evidence did not demonstrate any reasonable basis upon which the respondent would fear for his own safety. At some level, it is always legitimate to fear for a child's safety, but the findings of the CAS, OCL, Dr. Rakoff and Dr. Henderson ought to have assuaged those concerns to a significant degree if not entirely. Instead, the respondent engaged in a series of repeated and unreasonable attacks on any opinion that was critical of him or, in his view, not sufficiently critical of the applicant. At trial, the respondent continued his pattern of attacking participants in this process with whom he did not agree.

[122] In the view of the CAS and the OCL, the respondent was engaged in a "campaign" to use the applicant's mental illness against her. There was certainly evidence to support that view, although the respondent testified that he took the steps he did out of a concern for himself and Daria. The respondent further submitted that the applicant orchestrated the marriage breakdown and related events in furtherance of a strategy to obtain custody of Daria. That was not proved on the trial evidence.

[123] The respondent relies upon *Izyuk v. Bilousov*, 2011 ONSC 6451, [2011] O.J. No. 4963, in which the trial judge concluded that a strategy had been deployed by the mother through manipulation and deceit, and also concluded that, in that case, the report of the OCL was significantly flawed. However, as shown in the lengthy articulation of the facts in that case, it was a significantly different situation, and not of assistance in this case.

[124] For the purposes of this application, the applicant's mental illness must be considered in the determination of what is in the best interests of Daria.

[125] The respondent's counsel began the cross-examination of the applicant by emphasizing that mental illness does not disqualify a parent. That is certainly the case. Applicant's counsel have provided examples of cases where a parent was given sole custody even though that parent had a mental illness such as that which the applicant has suffered from: *Beauchamp v. Beauchamp*, [1995] O.J. No. 828 (Gen. Div.); *Children's Aid Society of Toronto v. E.Y.*, [2008] O.J. No. 272 (S.C.J.); *Cass v. Tomlinson*, 2011 ONCJ 691, [2011] O.J. No. 5628; *Murphy v. Murphy*, [1997] N.S.J. No. 529 (Fam. Ct.).

[126] The applicant testified about the difficult subject of the incident in her childhood, and later problems giving rise to the diagnosis of mental illness and treatment. When she had her

more serious episodes, they exhibited themselves in self-harm, not in any inclination to harm others. As well, it was she who called for help.

[127] Since 2007, the applicant has seen Dr. Rakoff, who testified about her regular attendance at appointments with him and his treatment regime, which included but did not require medication. He frankly indicated that his expertise was not custody and access, but from his standpoint as the applicant's treating psychiatrist, her mental illness did not present any risk to Daria. I accept his evidence that he is aware of his legal obligation to report to the CAS should he have any concern about harm coming to Daria. I accept his testimony that he would meet that obligation. As of trial, and in the past, he has not had that concern.

[128] Dr. Rakoff's testimony addressed the period including 2015, before the trial. The respondent put forward no psychiatric evidence about the applicant's current mental health.

[129] There is no doubt that the applicant had a couple of very angry altercations with the respondent in the course of the marital breakdown. That is not necessarily a function of mental illness, and certainly was not proved to be the case here. Both parents misconducted themselves during this period.

[130] The respondent has put forward mental illness as the reason he should have sole custody. He overstates Dr. Henderson's conclusion that there may be a tendency for some degree of role reversal and also submits that "there are still many safety risks" related to the applicant's mental illness and how she manages it. The respondent did not establish these claims at trial.

[131] In considering the extent to which mental illness should affect the outcome of this trial, I place significant weight on the evidence of the OCL, Dr. Henderson and the evidence about the CAS assessment, none of which concluded that there was a safety risk.

[132] I also note that the order sought by the respondent at trial does not request that the applicant's access be supervised.

[133] The interim access schedule in place in this case is a 2 day – 2 day – 3 day rotation through which the parties have equal parenting time. Equal parenting time has worked well, and is consistent with the benefits of maintaining strong bonds between the child and both parents, especially where the child is young. Daria has done well under this schedule. I find that it would be best for Daria to continue with it. It will ameliorate the substantial risk of parental alienation that has been proved at trial. It is also responsive to any concerns regarding mental health issues given the frequency of exchanges. My order also provides for equal sharing of parenting time for holidays and special occasions, largely in keeping with the proposed parenting schedules put forward by the parties.

[134] Another stable and positive part of Daria's life has been the daycare where she has spent her weekdays from a very early age. Daria is about to start school, and the trial evidence is that there are three schools that are connected to this daycare. I find that it would be in her best interest to attend one of those three schools.

[135] Exchanges between the parents have previously taken place at the daycare or, on non-daycare days, at a police station. In their trial testimony, the parents both expressed a desire to move those exchanges to another neutral location such as a Tim Hortons. I have incorporated this into my order.

[136] Parties also both expressed a wish to begin written communications with each other about Daria. This is a constructive step and I have incorporated it into my order. Both parents are commended for their desire to communicate with each other in Daria's best interests.

[137] I conclude that it is neither necessary nor helpful to give one parent or the other sole custody of Daria. As put in *M. v. H.*, it would promote an adversarial approach to parenting and would not be in Daria's best interests.

[138] It is in Daria's best interests that each of her parents have some final say in significant decisions about her. Bearing in mind the trial evidence, it would be in Daria's best interests to have the applicant have final decision-making authority with respect to educational decisions and the respondent have final decision-making authority with respect to religion (other than regarding the choice of schools) and non-emergency medical matters.

[139] Specific terms with respect to parenting time and related matters are set out in the final section of this judgment.

(2) No contact order

[140] An order was made by Justice Czutrin on May 16, 2014, which precluded each spouse attending at the other's residence and provided that there be no contact between them. This order was made after the events immediately beforehand, in the rocky period of time surrounding the ultimate breakdown of this marriage. However, at trial both parties expressed a wish to resume direct contact between them about Daria, as set out above.

[141] The applicant has requested that the order be continued with respect to other contact. However, based on the trial evidence, I conclude that this interim order is no longer required. The difficult period surrounding the marriage breakdown is now quite some time ago. Things have calmed down. Both parties are in new relationships and moving forward with their lives. I expect the parties to focus, going forward, on what is in Daria's best interest, and conflict between her parents is not in her best interest.

(3) Equalization of net family property

[142] The only dispute between the parties about equalization arises from amounts described as loans on the respondent's NFP. The respondent included $176,000 of debt that he submits are loans from his father that he must repay. The applicant claims that any amounts advanced from the respondent's father were gifts and should not be treated as debts on the respondent's NFP.

[143] If these amounts are proper debts of the respondent, equalization calls for a payment to the applicant of $23,761.02. If, however, the funds were not advanced or were gifts, the payment to the applicant increases to $114,261.02.

[144] In written submissions the applicant placed the burden on the respondent to prove these loans. However, in oral argument the applicant appeared to agree with the respondent that *Pecore v. Pecore,* 2007 SCC 17, [2007] 1 S.C.R. 795 shifted the burden to the applicant to prove the amounts were gifts once the respondent proved that the funds had been advanced.

[145] Under *Pecore*, there is a presumption of a resulting trust where there has been a gratuitous transfer between a parent and an adult child. *Pecore* holds that the effect of the presumption is to shift the burden of proof to the recipient of the alleged gift to establish that it was a gift, on a balance of probabilities: *Pecore*, at para. 43. Here, the parties submit that the burden shifts one step further, to the other spouse in a marriage breakdown.

[146] *Pecore* was a case where one of the parties to the alleged gift was deceased, and it focused on whether the recipient of the alleged gift had to rebut a presumption of resulting trust. It was not a case about the division of property in a divorce. It did not address statutory or policy considerations in the context of equalization under the *Family Law Act,* R.S.O. 1990, c. F.3. It did not address the reality that in the context of equalization, both parties to the alleged loan are likely to be joined in common cause against the other spouse. That is the case before me. These differences do not appear to have been explored in equalization cases, some of which apply *Pecore* and others of which do not do so.

[147] I prefer the approach in *J.B. v. D.M.*, 2014 ONSC 7410, [2014] O.J. No. 6207, which places the burden to prove the loan squarely on the party seeking to deduct the amount from his or her NFP for the purpose of equalization. However, in the case before me the result is the same. Even if there is a presumption of resulting trust, the applicant has met the onus to rebut the presumption.

[148] I begin with the question of whether the respondent has proved that the funds were actually advanced. I conclude that they were. Of the $176,000 claimed as debt, about $47,000 was advanced by cheque. As for the balance of the funds said to be advanced in cash, there are very large amounts of otherwise unaccounted for money in the respondent's bank accounts over the relevant period. I conclude that the rest of the money was taken by the respondent from his father in cash. The real issue is whether the funds were loans or gifts.

[149] As set out in *Locke v. Locke,* [2002] B.C.J. No. 1850, 2000 BCSC 1300, a number of factors are relevant when considering if money advanced by a parent to an adult child is a loan or a gift, including the following:

(1) whether there are any contemporaneous documents evidencing a loan;

(2) whether the manner for repayment is specified;

(3) whether there is security held for the loan;

(4) whether there are advances to one child and not others, or advances of unequal amounts to various children;

(5) whether there has been any demand for payment before the separation of the parties; and,

(6) whether there is any expectation, or likelihood of repayment.

[150] The respondent relies heavily on the handwritten notes signed by him and his father that are said to be contemporaneous loan documentation, and invites the court to disregard the gift letter to TD Canada Trust. The respondent advances two cases where courts were prepared to find that an advance was a loan notwithstanding a bank gift letter.

[151] This is not a case where a gift letter was signed but the parent nonetheless notified the lender that it was a loan before closing, as was the case in *Crepeau v. Crepeau*, 2012 ONSC 418, [2012] O.J. No. 431. Nor is it a case where the parties treated the advance as a loan from the outset, and despite a gift letter there was substantial corroborating evidence that the advance was actually a loan, as was the case in *Crepeau* and *Bemrose v. Fetter,* 2013 ONSC 2433, [2003] O.J. No. 1838. Nor is this a case where the parties to the gift letter acknowledged signing it in their testimony yet put forward an explanation about why they did so despite the advance being a loan. The respondent and his father were given a fair opportunity to do so.

[152] At best, these cases show that a gift letter may not be determinative. Nonetheless, it has a significant impact on the issue of the claimed loans. Where the characterization of a transfer is at issue, the credibility of the parties is critically important to the court's determination of the issue: *Crepeau*, at para. 41.

[153] I have considered all the trial evidence relevant to the *Locke* factors, and find the following especially significant:

(i) the parties to the purported loans have demonstrated their willingness to be untruthful about them;

(ii) the handwritten, unwitnessed loan documents have been demonstrated as deserving of no weight;

(iii) the one contemporaneous document deserving of weight is the TD Canada Trust gift letter, which the respondent and his father signed confirming that the down payment was a gift before the marriage broke down;

(iv) even the purported loan documents do not call for any security;

(v) there has been no demand for repayment of any of the purported loans;

(vi) the respondent has admitted that when he took cash from time to time, it was not always expected to be paid back, and there are no records, contemporaneous or otherwise, distinguishing between cash taken as gift or loan;

(vii) the complete absence of record keeping regarding these large amounts of cash belies any suggestion that the respondent's father intended specific cash amounts to be loans rather than gifts;

(viii) the complete absence of record keeping also belies any suggestion that the respondent's father was concerned to maintain any sort of equal treatment as between monies given to his two children;

(ix) the respondent told the applicant the down payment was a gift; and,

(x) the father continues to support the respondent but now treats this support as a gift and no repayment is required.

[154] These purported loans do not pass muster. I find on the trial evidence that they were not loans; they were gifts. Accordingly, the respondent is not entitled to include these amounts as debts on his NFP.

[155] The respondent shall therefore pay the sum of $114,261.02 to the applicant as an equalization payment.

(4) Spousal support

[156] In the Notice of Application, the applicant sought spousal support. Just before trial, the respondent amended his Answer to add a claim for spousal support. Both parties ask that income be imputed to their spouse as part of their claims for spousal (and child) support.

[157] Under s. 15.2 (1) of the *Divorce Act*, a court may make an order requiring a spouse to pay an amount as the court thinks reasonable for the support of the other spouse. Subsection 15.2 (4) provides as follows:

> 15.2 (4) In making an order under subsection (1) …, the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

> (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> > (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> >
> > (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
> >
> > (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> >
> > (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[158] There is no automatic entitlement to spousal support. A spouse seeking support must establish entitlement, which can be based upon compensatory, non-compensatory or contractual grounds: *Poirier v. Poirier*, 2010 ONSC 920, 81 R.F.L. (6th) 161 at para. 45, citing *Moge v. Moge*, [1992] 3 S.C.R. 813.

[159] The applicant did not specify on what basis she claimed entitlement to spousal support, except for references to the higher standard of living that the parties were able to maintain during the marriage. The family history does not suggest that the claim is for compensatory support. Given the submissions about lifestyle, it appears to be a claim for non-compensatory support.

[160] It does appear that the parties enjoyed a standard of living well beyond their income during their marriage, as a result of both gifts from the respondent's father largely supporting their expenses, and the use of company cars also from the respondent's father. The respondent still maintains that standard of living, still lives in the same townhouse and still drives a company car. The applicant testified about her living arrangements after separation, but as of the end of the trial, she was moving into a condominium with her new partner and there was not a significant amount of evidence regarding her standard of living as of that change.

[161] The respondent claims non-compensatory support based upon need. He relies on the fact that the applicant regularly contributed to the household expenses during the marriage. She did. But her contributions dwarfed in comparison to the very large sums of money the respondent regularly obtained from his father. The respondent's father testified that he will continue to support his son as long as he is able to do so.

[162] The respondent also relies on income disparity, which is not, on its own, determinative of the issue of whether there should be support. This submission is based on the imputation of income to the applicant. I therefore move to the question of imputed income.

[163] Section 19(1) of the *Child Support Guidelines*, Ont. Reg. 391/97, as amended, addresses imputing income. Both sides rely on subsection 19(1)(a), which provides as follows:

> 19. (1) The court may impute such amount of income to a parent or spouse as it considers appropriate in the circumstances, which circumstances include,
>
> (a) the parent or spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent or spouse; …

[164] The test for imputing income for child support purposes applies equally for spousal support purposes: *Spousal Support Advisory Guidelines,* at p. 46; *Poirier*, at paras. 83-85. The parties have both applied the *Spousal Support Advisory Guidelines,* and have provided DivorceMate calculations.

[165] The respondent submits that an income of $35,000 should be imputed to the applicant, rather than the amount of $19,155 for 2014 and $29,000 for 2015 attested to in the evidence. The applicant submits that an income of $60,155 should be imputed to the respondent, rather than the amount of $12,000 shown on the respondent's DivorceMate calculations.

[166] As set out in *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (C.A.), at para. 23, there are three questions that must be considered in deciding whether or not to impute income in this case:

(1) is the spouse intentionally under-employed or unemployed?

(2) if so, is the intentional under-employment or unemployment required by virtue of the spouse's reasonable education or health needs?

(3) If the answer to question #2 is negative, what income is appropriately imputed in the circumstances?

[167] The onus is on the party seeking to establish that the other spouse is intentionally unemployed or under-employed. The person requesting an imputation of income must establish an evidentiary basis upon which the finding can be made. However, the absence of evidence of a reasonable job search will usually lead to a finding that the spouse was or is intentionally under-employed or unemployed: *Carter v. Spracklin*, 2012 ONCJ 193, [2012] O.J. No. 1533 at para. 28, citing *Graham v. Bruto*, 2008 ONCA 260, [2008] O.J. No. 1306.

[168] This is not a case of intentional under or unemployment in the sense of a deliberate attempt to avoid or undermine support obligations. The patterns of income-earning for both parties were well-established in the marriage and continued afterward. In the case of the applicant, she worked for the same company throughout, supplementing her income with some other work, and her income has increased after separation. In the case of the respondent, while he earned some income during the marriage, his source of funds was primarily his father, which continues. His pattern of not working full-time was already established during the marriage. The main change since then is his enrollment in a full-time education program, which is for the purpose of re-training.

[169] There is, however, no need to find a specific intent to evade support obligations: *Drygala*, at paras. 25-26. For the purpose of imputing income, "intentionally" means a voluntary act. The spouse required to pay support is intentionally under-employed if that spouse chooses to earn less than he or she is capable of earning. That spouse is intentionally unemployed when he or she chooses not to work when capable of earning an income: *Drygala*, at para. 28.

[170] Beginning with the applicant, she testified that she did not work full time in her regular job, although she did historically ask for more hours and no more work was available. She did supplement her income with other work for short periods, but she was not working full-time. During the marriage, she did not need to do so. The family expenses were amply covered by money from the respondent's father together with the modest income of the parties from time to time. After the breakdown of the marriage, there is some evidence of additional work shown by the applicant's testimony that she expected to earn $29,000 in 2015, which was a significant increase from prior years. However, there was not significant evidence about attempts to work full-time after separation.

[171] The respondent submits that there are no needs, including mental health needs, that require the applicant to work less than full-time and she has not proved one of the exceptions to the requirement to be employed full-time under s. 19(1)(a). On the trial evidence, I agree. In the absence of sufficient evidence about attempts to work full-time since separation, I conclude that to a limited extent the applicant has been intentionally under-employed since that time.

[172] Moving to the question of what income is appropriately imputed to the applicant, the respondent submits that at $20 per hour the applicant would earn $36,400 a year if she worked 35 hours a week and $41,600 if she worked 40 hours a week. Based on these figures, he argues for an imputed income of $35,000. The respondent also submits that there are a number of reasons why it would be reasonable to argue for an imputed income higher than the $35,000 figure put forward by him.

[173] I agree that 35 to 40 hours a week is an acceptable range for full-time work. However, the evidence does not establish that those additional hours should be imputed at $20 an hour. Using minimum wage for the additional hours, which is reasonable based on the trial evidence, leads to a range of about $33,800 to $36,400. Taking this into account, and other factors

including the applicant's age, education and technology skills and steady work history, I conclude that the respondent's request to impute an income of $35,000 is appropriate.

[174] Moving to the respondent, on his own evidence he has been essentially unemployed since before separation, and remains so. There is ample evidence that he was intentionally under or unemployed during much of the marriage, and this continued after separation.

[175] The respondent attempted, at trial, to establish some impairment as a result of back problems. However, based on the evidence of his general practitioner, he failed to do so. That evidence demonstrated some intermittent back problems that were treated, and showed significant activity levels afterward. The medical evidence did not demonstrate any permanent disability. Perhaps for this reason, this evidence was not emphasized in final argument.

[176] Taking into account the respondent's age, his engineering degree and the failure to prove any impediment to attaining some work, the respondent could have obtained at least a minimum wage job, which would have provided an income of more than $20,000 a year. His line 150 income has never approached that amount.

[177] After separation, the respondent made little or no effort to obtain short-term employment, but he did consider the long-term by entering into a full-time education program that commenced in May 2015. In final argument, the applicant properly accepted that when the respondent began his full-time education program, it became an acceptable reason for the respondent's lack of full-time employment.

[178] Even though the respondent had little or no line 150 income and was intentionally under or unemployed until at least May 2015, he was receiving large amounts of money. He received and continues to receive monetary gifts from his father, which pay his living expenses. The applicant submits that those gifts should be treated as income for the purpose of support.

[179] Actual income is presumptively restricted to that which is the subject of taxation. However, imputed income does not depend solely on taxable income. The court has discretion to impute income where the imputation is supported by the evidence. Where a party receives regular gifts from his or her parent, the court may impute the amount of those gifts as income for support purposes: *Bak v. Dobell* (2007), 86 O.R. (3d) 196 (C.A.), at para. 75; *Korman v. Korman,* 2015 ONCA 578, 126 O.R. (3d) 561, at paras. 47-51, 62-65, 67.

[180] Where there is evidence of a settled pattern of monetary gifts that are used to maintain the family's lifestyle, and there is evidence that those gifts will continue, as is the case here, those gifts may be taken into account in imputing income to the recipient spouse: *Bak*, at para. 75; *Korman,* at paras. 66-67.

[181] The respondent received very large sums of money from his father. For example, in the period from 2011 to 2015 there are unexplained deposits in the respondent's bank account totaling more than $275,000, which, on the trial evidence, was money from his father.

[182] After separation in 2014, the respondent had no other significant source of money other than his father. In 2015, the respondent had two main sources of money: his father and OSAP. He obtained a $30,000 OSAP loan, payable in installments. He received money from his father to pay his legal bills. He received a $7,000 cheque from his father to assist with his living expenses. And he received additional cash from his father for his expenses. In his father's trial testimony, he testified that he did not know how much money he had given his son, even for 2015. Later in his testimony, he indicated that in 2015 it was not more than $1,000 a month, which, based on the other evidence, I give little weight.

[183] All the monies gifted, other than the amount needed for the down payment on the house and more recently for legal fees, were used to provide both the basic funds needed to pay the bills and an improved standard of living and, during the marriage, represented most of the monies brought into the family by the respondent. Those factors support taking the amounts into account as imputed income: *Bak*, at para. 75.

[184] In this case, the main problem is not whether or not to impute the gifts as income – they certainly should be – but the uncertainty around the amount of those gifts from time to time. This uncertainty arises because of the approach taken by the respondent and his father, including an almost total lack of documentation and an apparently near total lack of recall even for recent time periods. There is, however, evidence regarding the amount of gifts shown by the unaccounted for funds in the respondent's bank accounts and evidence of the family expenses during the marriage and the respondent's expenses after the marriage. The respondent continues to live in the same townhouse. In his September 11, 2015 financial statement, he showed annual expenses of $48,360. After the child tax benefit, his expenses were $47,510, without any income.

[185] When considering the evidence about expenses that need to be paid after the marriage, I have disregarded the father's gifts directed at paying lawyer's fees, as one-time expenses. I have also taken into account the OSAP loan as a source of funds.

[186] In the respondent's DivorceMate calculations, he used $12,000 for his income. While this amount was not explained, it is plainly insufficient to cover his expenses, even with the OSAP loan covering part of his expenses in 2015.

[187] I conclude that it is appropriate to impute an annual income of $30,000 as a result of parental gifts, as of now. For the earlier period, between separation and commencement of school, I impute $45,000 as the respondent's annual income, being a minimum wage income together with parental gifts necessary to meet his expenses over that time.

[188] DivorceMate calculations using these figures show no spousal support payable for either party at the low end of the range for both periods of time, and, for the present, no support at the middle of the range as well. Although this is not determinative, it is consistent with my consideration of all factors as well as entitlement.

[189] I find both parties' claims for entitlement weak in this case, and bearing in mind all factors, order no spousal support.

(5) Child support

[190] In this case, each parent has the child 50% of the time. Child support is therefore based on shared parenting.

[191] In this case, both parents seek table support; no compensation for s. 7 expenses has been requested. Table support is calculated using imputed income.

[192] The table support under the *Child Support Guidelines* is not substantial. For the initial period from June 1, 2014 (after separation mid-May), to the commencement of school in May 2015, child support is payable by the respondent. For the whole period, the total arrears is $2,310. For the period after the respondent began his full-time education program, the obligation to pay shifts to the applicant. However, it is only $33 per month. These amounts will not have a significant financial impact but will give rise to administrative costs and possible points of conflict between the parties that are not in Daria's interests. Section 9 of the *Child Support Guidelines* permits a departure from these default figures in circumstances that apply here. Considering the circumstances of the parties and the needs of Daria, I conclude under s. 9(c) that there shall be no child support.

Judgment

[193] I therefore make the following orders:

(1) with respect to Daria (DOB: January 20, 2012):

(i) the parties shall continue to have alternating parenting time with Daria on a two day – two day – three day rotating schedule, except as provided in subparagraphs (ii) to (viii) of this order;

(ii) March break access shall alternate between the parties, with the applicant having Daria in even-numbered years and the respondent having Daria in odd-numbered years;

(iii) summer school vacation shall be divided between the parties equally, as follows:

(a) for summers in 2016 to and including 2019, the summer shall be divided into two week intervals, and the parties shall alternate, commencing with the respondent in even-numbered years and the applicant in odd-numbered years;

(b) commencing in 2020, the respondent shall have Daria for the first half of the summer in even-numbered years, and the applicant shall have Daria for the first half of the summer in odd-numbered years;

(iv) Christmas/New Year's vacation shall be divided between the parties equally, with the applicant having Daria for the first half of the vacation in even numbered years, and the respondent having the child for the first half of the vacation in odd-numbered years;

(v) for Christmas Day, the parent who does have Daria in his or her care shall have Daria from 3 PM to 8 PM that day;

(vi) Daria shall be in the respondent's care on Father's Day from 10 AM to 7 PM if she is not already scheduled to be in his care;

(vii) Daria shall be in the applicant's care on Mother's Day from 10 AM to 7 PM if she is not already scheduled to be in her care;

(viii) Daria shall have contact with each of her parents on her birthday for a three-hour period – on weekdays or schooldays, Daria will have contact with the parent she is not resident with on that day from after daycare/school until 8 PM; on weekend days, that contact shall take place for a three-hour period and include either a lunch or a dinner;

(ix) the parties shall reasonably accommodate each other in arranging for the changes from the regular schedule provided for in subparagraph (i) to address the other schedules in subparagraphs (ii) – (viii);

(x) all drop-offs and pick-ups shall take place at the daycare or at school on a daycare or school day, at a mutually agreed location on any other day or, if there is no agreement, outside at the front of the building where the parent who is receiving Daria lives;

(xi) each party shall be permitted one daily telephone or Skype call with Daria between 7 PM and 7:30 PM on those days that Daria is in the other parent's care; if for any reason Daria is not available to receive the call at that time, the parent with whom Daria is residing shall be responsible for facilitating a return call as soon as practically possible;

(xii) both parties may each attend Daria's extracurricular activities, daycare and school functions;

(xiii) the parties shall communicate with each other by text or email regarding Daria;

(xiv) the parties shall provide each other with current contact information regarding their residence, email and telephone, as it may change from time to time;

(xv) Daria's public school shall be selected from the three schools that have a relationship with her daycare;

(xvi) subject to subparagraph (xv), to the extent that the parties cannot agree on education decisions for Daria, the applicant shall have final decision-making authority;

(xvii) to the extent that the parties cannot agree on religious decisions (other than regarding the choice of schools) or non-emergency health decisions for Daria, the respondent shall have final decision-making authority;

(xviii) whichever parent has Daria during any emergency medical situation shall have final decision-making authority during the emergency and shall promptly inform the other parent of the emergency;

(xix) the parties shall keep Daria's OHIP card in her knapsack, with her, so that it travels back and forth between the parents along with Daria;

(xx) each party shall promptly inform the other of any scheduled medical or other appointments;

(xxi) both parties may obtain any medical or other information concerning Daria directly from the daycare, school or any other third-party;

(xxii) the applicant shall be responsible for obtaining necessary government identification for Daria and promptly providing photocopies of it to the respondent;

(xxiii) if either party plans a vacation with Daria that involves being away from their normal residence, they shall, at least fourteen days before the intended travel, provide the non-traveling parent with a detailed itinerary including the name of any airline carrier, flight numbers and flight times, and all accommodation including address and telephone numbers;

(xxiv) if either party plans a vacation with Daria outside of Canada they will also provide the non-traveling parent with a form of consent to travel within fourteen days before the intended travel and, within seven days, the non-traveling parent shall either provide an executed consent or the reason(s) why they do not consent;

(xxv) the parties shall refrain from making any derogatory comments about the other parent or the other parent's extended family in the presence of Daria;

(2) the respondent shall pay the sum of $114,261.02 to the applicant as the equalization payment;

(3) the claims for support are dismissed; and,

(4) paragraphs 5, 6 and 7 of the interim order of Justice Czutrin dated May 16, 2014 automatically terminate as of the date of this judgment.

[194] If the parties are unable to agree on interest and costs, the applicant shall make her submissions by delivering brief written submissions together with a costs outline and any offers to settle relied upon by February 22, 2016. The respondent shall make his submissions by delivering brief written submissions together with a costs outline and any offers to settle relied upon by March 7, 2016. Any brief written reply may be made by March 14, 2016.

Justice W. Matheson

Released: February 3, 2016

CITATION: Marrello v. Marrello, 2016 ONSC 835
COURT FILE NO.: FS-14-394815
DATE: 20160203

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AXANNA MARRELLO

Applicant

– and –

DAKK MARRELLO

Respondent

REASONS FOR DECISION

Justice W. Matheson

Released: February 3, 2016