

Hartley v. Del Pero, [2016] A.J. No. 1377

Alberta Judgments

Alberta Court of Queen's Bench
D.C. Read J.

Heard: October 24 and November 3, 2016.

Judgment: December 29, 2016.

Released: January 3, 2017.

Docket: FL03 03868

Registry: Edmonton

[2016] A.J. No. 1377 | 2017 ABQB 1

Between Heather Lynn Hartley, Plaintiff, and Fred Del Pero, Defendant

(206 paras.)

[Editor's note: Supplementary reasons for judgment were released January 10, 2017. See [\[2017\] A.J. No. 14.](#)]

Counsel

Tracy C Brown, for the Plaintiff, Ms. Hartley.

Fred Del Pero, on his own behalf.

Reasons for Judgment

D.C. READ J.

I. Procedural History

- 1 This matter came on for a 10 day trial before me on a number of issues.
- 2 It has had a long protracted and complicated procedural history.
- 3 On June 23, 2006, the Plaintiff filed her first Claim as action # FL03-03752 under the *Family Law Act*, RSA 2000, c F-4.5, seeking a parenting order and support for the children. A number of interlocutory orders were made respecting parenting and support, some of them on consent. This dispute went into case management. Justice E. Macklin of this Court was case manager. A three-day property trial was held in June of 2007 and property issues are now resolved.
- 4 On December 31, 2008, the Plaintiff filed a second claim (the "Second Claim") under the *Family Law Act* as action # FL03-03868, again respecting parenting of and support of the children. The portion of the Second Claim dealing with setting Guideline income for the parties and setting child support was eventually heard in Special Chambers on February 3, 2010. The Chambers Judge issued a written decision reported at [2010 ABQB 29](#).
- 5 This decision was appealed by the Defendant to the Court of Appeal who issued a written Memorandum of Decision reported at [2010 ABCA 182](#). This decision concluded that because there were credibility and factual issues

particularly in respect to the Defendant's Guideline income, child support had to be resolved at a trial. On an interim basis, the Court of Appeal set the Defendant's income at \$80,000 per year.

6 The matter again went into case management, this time with Justice M. Crighton.

II. Scope of this Trial

7 At the beginning of the trial, the Plaintiff thought that the only remaining issue ordered by the Court of Appeal to be resolved at trial was: setting of Guideline incomes and setting how much retroactive and ongoing child support is payable.

8 The unrepresented Defendant had not complied with the case management order and so had provided no information to the Court or to opposing counsel about what he considered to be in issue or how he proposed to proceed. However, at the beginning of the trial, he argued that parenting issues should also be addressed and raised the issue, as well, of whether partner support should be determined.

9 The question of what issues are properly before the Court is complicated by the pleadings and the lack of a response by the Defendant to the Claim under action # FL03-03868 and his failure to comply with various directions of the case management judge designed to ensure that the issues in this trial would be clearly defined and streamlined to the extent possible.

10 The question of what is properly before the Court is, however, easily answered. Rule 12.51 gives the Court wide powers and discretion. It says this:

12.51 In a proceeding under the *Family Law Act*, the Court may, whether or not the respondent has complied with rules 12.18 [*Response to a proceeding under the Family Law Act*] and 12.19 [*Service of documents filed under rule 12.18*],

- (a) decide all or part of the matter on an interim or final basis,
- (b) adjourn all or part of the matter to a later date, or
- (c) set all or part of the matter down for a short oral hearing or trial,

and the Court may give any direction and grant any interim or procedural order that the Court considers appropriate.

11 More importantly, though, the case management order filed September 1, 2015 in the Second Claim, clearly contemplates that parenting will be one of the trial issues. It says this at paragraph 2

The issues for determination at the trial shall include

- a. The Respondent father's Guideline income from May 2006 to present;
- b. Section 3 Child Support owing from May 2006 to present;
- c. Section 7 expenses to be apportioned;
- d. Parenting arrangements;
- e. Costs.

12 Those issues set out in the case management order are properly before the Court for resolution. The Defendant has brought no application for spousal support and addition of this issue at this late date would prejudice the Plaintiff. Spousal support will not be resolved at this trial.

III. Background

13 The parties cohabited between December 2001 and April 2006. They have two children: boy Del Pero born in 2001 and girl Del Pero born in 2003. They are now 15 and almost 13.

14 Since their parents' separation, the children have resided mainly with their mother. Parenting has been a source of ongoing conflict between the parties and two psychologists became involved with the family. Ultimately, a bilateral open assessment was ordered to be completed by Barbara Sheptycki, a registered psychologist. She produced a written report which was provided to the parties' counsel under strict conditions. After the report was released, the parties agreed to a consent order based upon the recommendations made by Ms. Sheptycki. This Order ("Parenting Order") is dated January 23, 2009 and has been followed by the parties since then.

15 Under the terms of this Order, the children are to reside primarily with their mother and she has sole decision making responsibility for them. Their father has parenting time on alternate weekends from Friday after school until Tuesday morning with exchanges taking place at the children's schools or, when school is not in session, at a Tim Horton's restaurant.

16 The Order further provides that the children can spend Mother's Day with their mother and Father's Day with their father. It provides, as well, that school holidays be divided equally in accordance with a carefully worded schedule and that summer school holidays are to be divided equally, again according to a carefully worded schedule.

17 The Order provides for a review in September of 2010 "for the purpose of considering whether or not additional weekday parenting time is appropriate for the Respondent. Additional weekday parenting time for the Respondent should be dependent upon the childrens'[sic] functioning and the parents' level of conflict at that time, the intent being to extend the Respondent's parenting time in a way that does not adversely disrupt the childrens'[sic] regular routine or add to the conflict".

18 There has been conflict, as well, respecting child support payable; the main conflict centred around what income the Respondent father had available to him for Guideline purposes. When it overturned the special chambers' decision on this issue, the Court of Appeal set guideline income, saying this at paragraph 29:

On this record it is difficult to do more than extract an interim guideline income that will provide a fair level of support for the children, without imposing an impossible burden on the appellant. A minute dissection of the various records is counterproductive. Having regard to all of the evidence tendered, and in order to bring some finality to this interim aspect of the litigation, the appellant's guideline income will be set on an interim basis, until trial, at \$80,000 per year.

19 The amount actually payable based upon this decision was clarified by the case management judge. In an order made April 1, 2011, the Respondent was ordered to pay s.3 child support in the amount of \$1,151 per month, commencing June 1, 2010, with the actual amount to be determined at trial. Additionally, he was required to pay s.7 expenses of \$250.00 per month on a without prejudice basis, with the actual obligation to be determined at trial.

IV. Issues

20 There are six issues for resolution:

- a. Is a change of circumstances required before the Parenting Order can be reviewed, and if so, has there been a change of circumstances sufficient to justify a review of the Parenting Order?
- b. If so, what parenting order should be made in the best interests of the children?
- c. What should the father's income be found to be for guideline purposes?

- d. What s.3 child support should be payable based upon this income?
- e. What s.7 expenses have been incurred for the children in the past and what ongoing s.7 expenses have been incurred? What proportionate share of these expenses should each parent pay?
- f. What are the arrears of both s.3 and s.7 child support and how should these be paid?

V. Discussion and Decisions

Issue 1: *Is a change of circumstances required before the Parenting Order can be reviewed, and if so, has there been a change of circumstances sufficient to justify a review of the Parenting Order?*

21 The Plaintiff mother argues that a change of circumstances is required in order to vary the Parenting Order and no change of circumstances has occurred.

22 Pursuant to Section 34(3) of the *Family Law Act* a court may make a "variation order" only if it is satisfied there has been "a change in the needs or circumstances of the child [which] has occurred since the making of the parenting order or the last variation order made in respect to that order".

23 The wording of s. 34(3) is similar but not identical to that of s. 17(5) of the *Divorce Act* RSC 1985, c 3(2nd Supp) as amended. In argument, the Plaintiff mother referred to a number of cases decided under the *Divorce Act*. Because of the similarity of the wording of the two provisions, these may be of some assistance.

24 In both statutes, a distinction is made between an 'interim' order and an 'order'. However, in s 16(1) the *Divorce Act*, makes clear that an "order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage" is different from an "interim order" which may be made under s. 16(2) pending an application for a support order under s. 16(1). Section 17(5) requires a change "in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the order" to vary an "order". No mention is made of a requirement that there be a change of circumstances in order to vary an "interim order".

25 Under the *Divorce Act*, it seems clear that a change of circumstances is required in order to vary a final order. It is not as clear that a change of circumstances is required to vary an interim order or if, in fact, an interim order is variable.

26 As is the case under the *Divorce Act*, in s. 84(1) the *Family Law Act* permits interim orders to be made. However, under the definition found in s.1(k) of the *Family Law Act* a "parenting order" means "an order made under section 32" and, unlike the *Divorce Act*, s. 33 of the *Family Law Act*, permits a parenting order to be made "for a definite or indefinite period or until a specific event occurs...as the court considers appropriate". Arguably, therefore, a parenting order made under s. 32 of the *Family Law Act* may, in itself, be interim and not final.

27 The following cases were referenced by the mother in argument: *Gordon v. Goertz* [1996] 2 S.C.R. 27; *Cheng v. Li* 2015 ABCA 322; *Weigers v. Gray* 2008 SKCA 7; *Rupp v. Rupp* [1996] A.J. No. 986. Each of these was a decision made under the *Divorce Act* and in each case, there had been a final judgment of divorce which included a final order for custody. While each of these cases discussed the requirement for a change of circumstances before a variation order could be contemplated, they are not necessarily applicable in respect to a "parenting order" made under the *Family Law Act* because of the difference in the statutory scheme.

28 Importantly, the Parenting Order in this case contained two provisions which appear to contemplate further changes to the order.

29 Paragraph 3 says this:

It is further ordered that in accordance with the report dated September 3, 2008 prepared by Barbara Sheptycki, in September 2010, the parenting arrangement shall be reviewed for the purpose of considering whether or not additional weekday parenting time is appropriate for the Respondent. Additional weekday

parenting time for the Respondent should be dependent upon the childrens'[sic] functioning and the parents' level of conflict at that time, the intent being to extend the Respondent's parenting time in a way that does not adversely disrupt the childrens'[sic] regular routine or add to the conflict.

30 Paragraph 16 says this:

It is further ordered that the parties shall continue with the case management process already in place so that the family situation can be monitored and any necessary changes to the parenting plan can be made in a timely manner.

31 The Parenting Order in this case does not use the term "interim" in its title. Instead, it is called a "Consent Parenting Order". However, because of its specific provisions, I am not satisfied that it was intended to be a final order. As a consequence, the argument offered by Ms. Hartley's counsel and the case law provided do not convince me that a change of circumstances is required before a review of the Parenting Order can be undertaken.

Issue 2: *What parenting order should be made in the best interests of the children?*

32 What is in the "best interests" of the children is the only valid factor to consider in making a parenting order under the *Family Law Act*: s.16(8).

33 Mr. Del Pero argued that the Parenting Order should be changed. At one point during the trial, he indicated that he wanted to have his son reside with him full time and wished to have a 50/50 regime with his daughter. In final argument, however, he said that he would be satisfied if he had 50/50 parenting time with both children. From his point of view, this would be little different from the current regime, given that the children are in school much of the week now anyway and he already shares 50/50 parenting time during all holiday breaks from school, including the summer vacation period. He says he feels excluded from his children's lives under the present regime and believes that Ms. Hartley's reasons for wishing to maintain the present regime have much more to do with power and money than they do about the children's best interests.

34 Mr. Del Pero believes that the children have opinions about with whom they should live and thought it would be helpful to me to hear from them. He argued that his children are clearly old enough to have their voices heard and it is only by hearing from them that I would be able to make a decision about their best interests.

35 It is noteworthy that Mr. Del Pero gave no notice either to opposing counsel or to the Court of his intention to call the children as witnesses.

36 Ms. Hartley opposed this. It is her view that it would be harmful for the children to have to speak to a judge. She argued as well, that their evidence may not be reliable, pointing to various emails and other communications, tendered in evidence, which caused her to think their father is attempting to influence the children with threats that he will not be in their lives if they do not spend more time with him and with negative comments about her.

37 The father thought that the appropriate way of proceeding would be for me to interview the children in my private chambers. He thought the children should be interviewed together.

38 I concluded that before making a decision about whether or not to hear from the children, I first needed to hear the evidence of both parents and in particular, their observations about their children. Having done so, I gave an oral decision near the end of the trial, concluding that I should not interview the children in this case. I gave a number of reasons.

39 My first concern was that there would not be time during the course of the trial to engage in any long interview process with the children and I doubted that I could get an accurate idea of the children's views in a limited interview. Notwithstanding the father's views, I thought it would be inadvisable for me to interview the children together. They are different people and may well have differing views and neither should feel pressured or be influenced by the views of the other. Interviewing them separately would, of course, take more time.

40 Secondly, I am not trained as a psychologist or psychiatrist and was concerned that I may not be able to appropriately interpret the answers the children may give, or even to ask the appropriate questions.

41 Thirdly, having reviewed the evidence, particularly the emails and text messages between the father and the son, I was concerned that the father may have made threats to the children and tried to influence them. This seemed particularly to be the case in respect to the son. I had concerns, therefore, about the reliability of what the children would tell me and whether I would really be getting their views.

42 Fourthly, I do not know these children but, particularly with respect to the boy, I had concerns about his ability to articulate his real feelings. I understand that he may have some learning disability or behavioural issue that might make it more difficult for him to articulate his real feelings or to even understand what they are.

43 Given all of that, I was not satisfied that a judicial interview would be the best way of providing the children with an opportunity to be heard.

44 While I declined to interview the children, there is little doubt that children who are capable of forming their own views have a right to express those views in all matters affecting them, including judicial proceedings such as this one. They also have a right to have their views given due weight in accordance with their age and maturity. *The United Nations Convention of the Rights of the Child* and statutes from various provinces mandate that a child's views and preferences are to be considered as one factor in determining both custody and access.

45 Alberta does not have a statute mandating that a child's views are to be considered but cases from other jurisdictions as well as some from Alberta make clear that a child's views should be considered. See for example *BLG v. DLG* [2010] Y.J. No. 119; *T(B.L) v. T(R.J)* 2003 ABOB 89; *A(S.M) v. H (S.F)* 2007 ABOB 95, reversed on other grounds 2009 ABCA 123; *Cavanagh v. Balkaron* 2008 ABCA 423.

46 There are, however, a number of ways that the voice of a child can be heard in court. The evidence can be presented by or through a neutral third party such as a psychologist, psychiatrist or social worker who interviews the children and may do psychological testing on the children and their parents. It may also be presented by a specially trained lawyer who represents the children and can prepare and present the children's views. Children can also meet with the judge, as was suggested here, in what is usually termed a judicial interview. In court testimony of the children is also, of course, a possibility.

47 However, while the children's voices should be heard, common sense and the case law tell us that teenaged children do not have the right to decide unilaterally what is in their best interests or to be the sole determiners of where or with whom they should live. The Courts cannot be bound by the wishes of the children: *T(C) v. T(M)* 2016 ABOB 556.

48 As I explained in the course of the trial, the better course would be to have Ms. Sheptycki update her previous report. She has the advantage of the insights she has gained from all the work she has done with this family in the past. Hopefully, therefore, the cost of this updated report will not be exorbitant and it can be completed within a reasonable period of time. Since he is the party seeking a change to the parenting regime, I directed that the father pay for this in the first instance.

49 Obtaining such a report could not occur within the time period set aside for this trial and the issue of parenting may need to be revisited once this report has been obtained.

50 Mr. Del Pero also tried to enter as an exhibit, a letter he said his son had written. He said his daughter had also written a letter. For reasons I expressed orally during the trial, I did not permit him to make these letters exhibits. They are unsworn hearsay and inadmissible.

51 An updated assessment report is only one piece of evidence. During the trial, I had the benefit of hearing oral evidence from the parents and a number of others who are close to the children. This evidence permits me to make some observations and reach some conclusions in respect to the children's best interests.

52 Ms. Hartley described her separation from Mr. Del Pero and the ongoing issues between them as very high conflict. She described her son as being extremely upset after the separation and said he was acting out in school. She said that she took him to his pediatrician, inviting along Mr. Del Pero. Ms. Hartley believed as a result of that discussion that their son needed counselling. She said that Mr. Del Pero would not agree to it outright and, instead, tried to use it as a bargaining chip, saying he would agree to counselling only in exchange for more parenting time.

53 Ms. Hartley was forced to obtain a court order for counselling. She then took their son to a psychiatrist recommended by the pediatrician and later to the Child and Adolescent Services Association ("CASA") when this was recommended by the psychiatrist. In turn, CASA referred him to a socialization program that Ms. Hartley attended with her son. After some time-period, their son was discharged from the CASA program.

54 Although discharged, her son continued to have some learning difficulties and some behavioural issues, particularly at school according to Ms. Hartley. She said he was weak in English and math and had run-ins at school that required her to attend at the school for conferences and discussions. She described, in particular, a situation in which he engaged in aggressive and bullying behaviour against a friend of his sister's. Ms. Hartley believed this behaviour was related to an earlier problem at the school, when someone reported to her that Mr. Del Pero had tried to kiss a child and put his arms around her. According to Ms. Hartley, this resulted in some sanctions being taken by the school against Mr. Del Pero and caused difficulties for their daughter's social relationships. Some mothers were reluctant to have their children come to their daughter's home unless they knew that Ms. Hartley would be there. Ms. Hartley believes that her son's bullying behaviour towards the girl was related to his efforts to try to defend his father.

55 According to Ms. Hartley, the incident also caused some difficulties with her son's school placement. At some point, he was taken out of the neighbourhood school he attended with his sister. Ms. Hartley said this placement occurred to aid him with his learning issues. However, when it was decided he could return to his neighbourhood school, Ms. Hartley said her daughter pleaded with her not to have him return to the same school. As a result, her son attended another school.

56 Mr. Del Pero was asked about the kissing incident in cross-examination and he did not deny that something had occurred. However, he believed he had been unfairly labelled as a pedophile by the school in response to a perfectly innocent situation. He said that the incident occurred when he was at the school and gave his daughter a hug and a kiss in front of her friends. He said another child then came up expecting the same thing. While it was not absolutely clear from his evidence, my impression from what he did say is that he acknowledged he had hugged and kissed this other child in response to her request.

57 Ms. Hartley believes that their son continues to have difficulties in school and with socialization. She said that he can still have outbursts and makes comments that she believes are racist or misogynist. She believes he continues to have some weakness in English and math and believes that he has current absence and tardiness problems, as well as lack of attention problems in school. She tendered into evidence a number of emails and text messages she believes have passed between her son and his father during school hours. She believes as a result of seeing these emails that her son gives his father food orders from school and that Mr. Del Pero then delivers the ordered food to his son. She also believes from these emails that her son and his father chat about things completely unrelated to school during school hours.

58 Ms. Hartley says she is very concerned about her son's weight, believing he has gained 40 pounds over the past year. She attributes this weight gain to the amount of junk food being purchased and provided to her son by Mr. Del Pero and consumed by her son at school and when he is at his father's house.

59 She is also concerned about continuing conflict over sharing time with Mr. Del Pero in respect to various activities of the children. She said that she and her side of the family generally do not go to concerts or sports activities if they know Mr. Del Pero will be there and said she believed this was in accordance with the children's wishes. She said that the children have expressed concern to her that her son has been sent over by Mr. Del Pero to tell her to leave when she attends an event that is on his parenting time. Ms. Hartley's mother said she had had a similar experience.

60 Mr. Del Pero described the history of his relationship with his children. He said when the children were very young before the separation, the family went to lots of events and activities and everyone got a great deal of enjoyment from this. He said he continued to do this after the separation but felt that Ms. Hartley interfered with his time with the children and made it needlessly difficult for him to see them. He said he felt like he had no say in their upbringing.

61 Nonetheless, he says that he still has a close relationship with both of the children. He called the bond he has with his daughter "priceless" and said he and his son continue to enjoy such a close relationship that his son still likes to walk with him hand in hand.

62 Mr. Del Pero agreed that his son has had some academic problems in school but says these are now behind him. Mr. Del Pero believes that his son is a normal intelligent teenager. He pointed with pride to his son's marks in social studies but agreed that his marks in some other subjects could improve.

63 He also agreed that his son has had behaviour problems in school but thought many of these were related to his involvement in sports. He agreed that his son had been suspended for one game in hockey for fighting but said he thought that was because the sport of hockey encourages fighting. In Mr. Del Pero's view, any sport that encourages fighting is not a good sport.

64 Mr. Del Pero described the values he has tried to instill in his children, and explained that he learned these values from his own father. One important value is respect for higher authority. However, he said instilling this value was a challenge for him because, in his view, Ms. Hartley has not complied with the current Parenting Order.

65 Mr. Del Pero also expressed worries about the children's treatment at their mother's home. He said that the children had said things to him such as that their mother hit them and these comments caused him to believe the children may be being mistreated in Ms. Hartley's home.

66 In cross examination, Mr. Del Pero agreed that he had called the police and child welfare as a consequence of his concern about treatment of the children. He said that was all he felt he could do because it was "he said/she said" situation, that he felt he had little power and "you have to let the proper people deal with that". He denied telling the children that their mother was abusive but said the children had told him that she was.

67 He was concerned, as well, about telephone access to the children, pointing out that the Order requires that they call him between 7 and 8 pm. He said they frequently do not call him during this time-period. This was his principal example of how Ms. Hartley does not respect the Parenting Order. He said the children had told him they could not use the phone when they are at their mother's.

68 In cross-examination, he at first denied he had texted his son when he was at school and said he was not "Jerry Tom" referencing the name used by the person in the email strings who appears to have been texting with his son when he was at school. He said, as well, that he does not have a phone and is very much against technology.

69 However, a short while later during the cross examination, he seemed to admit that he had texted his son at school, asking rhetorically what was wrong with a child reaching out to someone when they were at school. In response to questions about texts from his son appearing to order food from the person known as "Jerry Tom", Mr. Del Pero admitted he sometimes took food to his son at school but said this was "not very often". He said that if his

parents had taken time off work to go to his school to bring him food, he would have felt like "a million bucks" and said in doing so, he was not breaking any law.

70 Even though he denied it, I have concluded that Mr. Del Pero did send the text messages to his son that were made exhibit 31. His denial is simply not credible in the face of his later admission that he received messages from his son at school related to food orders and his admission that he sometimes took food to him or his comment about believing there was nothing wrong about his son reaching out. Further, the emails that purport to be from their son reference "Dad" as the person being spoken to.

71 Mary Hartley, the children's maternal grandmother also gave evidence. She is quite involved with her grandchildren and had been even before the parents' separation. When they were younger, she frequently babysat the children and as they grew older, she drove the children to and from their various activities. Often, she would stay to watch.

72 Mary Hartley expressed concern about her grandson's mental health. It was her view that he took the conflict between his parents very seriously and that it weighed on his mind too much. In her words, "it is a lot of stress on him and you can see he has a lot on his mind". She disapproved of what she saw as Mr. Del Pero's attempts to treat her grandson as a buddy rather than acting as his father.

73 Mary Hartley said she believes she had a good relationship with both children, saying she talked to them frequently when they were in the car being driven by her to their various activities. She said she thought her talks with the children were facilitated because she does not allow them to use their electronic devices when they are in the car with her.

74 She gave evidence, as well, about the continued stress and conflict between the parents that she had observed. In particular, she said that she did not think Mr. Del Pero had spoken to her since the breakup when she recalled that he swore at her. Prior to that, she said she felt she had a fairly good relationship with Mr. Del Pero. She also gave evidence about being careful not to be at the same function as Mr. Del Pero. She said the children were concerned about this as well, asking her not to go into the school, for example, if they knew their father was going to be there. She has respected the children's wishes in this.

75 Ms. Hartley's husband, Michael Boyle, also gave evidence. He has been married to Ms. Hartley for three years but they lived together for two years before that. He has been previously married and has two children of his own, now in their twenties that live in a suite in the basement of the Hartley/Boyle home. He believes the blended family gets along pretty well together, describing a busy household that revolved around the children's activity schedule and said that the only real rule was that everyone had to eat together.

76 He described his relationship with the Del Pero children as friendly but said they called him "Mike" and he was careful not to discipline or otherwise take on too much of a parent role. He said he does not talk to the children about their father or what happens when the children are at his house. He said he does help with driving the children to their various activities but said that he, also, was careful not to go to activities or events where Mr. Del Pero was present.

77 He described the Del Pero boy as a "good kid", well read and with interesting ideas but said he could have a bit of a temper when he gets stressed. He said that when he gets angry, he can lash out and say whatever is on his mind. In Mr. Boyle's view, it is necessary to keep things very "black and white" with him. In his opinion, the Del Pero boy has trouble with grey areas. He said he thought the boy needed a lot of structure, needing to be told before something happens so he could be prepared for it and needing timing cues. He also thought the boy was anxious and stressed about the continuing conflict between his parents.

78 He said that he believes the boy has a lot of worries about fairness and money as it relates to his father. Mr. Boyle said he and Ms. Hartley had to show him a calendar at one point, to convince him that his father had equal time during vacation periods. He also raised a concern that the boy had been involved by his father in adult issues. One example he gave was on a day he was home during the day when the boy was with his father. He said he was

surprised to see the boy who came into the house, unexpectedly, and dropped a pile of cheques on the counter, saying "these are for Mum". They were support cheques.

79 In cross examination, Mr. Boyle denied that he had ever seen Ms. Hartley speak in a disrespectful manner to the children or discipline them physically. He did agree that she sometimes raised her voice. He also denied that he had ever screamed at the children or raised his hand against them.

80 Manuela Kostiw, the children's paternal aunt, also gave evidence about the children. She said she saw the children every other weekend when they were with their father and that, in addition, they call her to chat or because of a specific issue. She said she takes them to activities and to school and watches their sports activities. She believes she has a good relationship with them and that they confide in her a lot.

81 In her observation, the children have a strong relationship with the senior Del Peros, their paternal grandparents. For her, the main problem with the children now is that it is extremely difficult to arrange family celebrations.

82 On the evidence, the Del Pero boy has had some challenges since the parties' separation. From my review of the bilateral custody report completed by Ms. Sheptycki, as well as the evidence of the parents, it appears that he has had behavioural issues at school. When he was younger, there were instances of bullying behaviour and of inappropriate verbal utterances in class. He also had some challenges in applying himself to learning activities. Out of class, he also had challenges with personal space issues and inappropriate verbal outbursts. Help was sought from counsellors and from CASA as well as from tutors.

83 Now in Grade 10, the Del Pero boy apparently continues to find mathematics and English challenging, while excelling in social studies. His mother is concerned about tardiness and unexcused absences from classes and about his habit of trying to bring Starbucks drinks into class with him, something the school has discouraged. He continues to be involved in sports but was recently suspended from his hockey team for fighting. This is a concern to both his parents.

84 His mother believes he would benefit from further counselling. She also testified that she is worried about his diet, attributing a 40 pound weight gain he has apparently had in the past year, to his habit of ordering his father to bring and eating fast food while he is at school and when he is at his father's.

85 In contrast, Mr. Del Pero believes his son is a normal teenaged boy. He thinks his son is healthy and does not require further counselling, basing his opinion on his own observations as well as informal discussions he has had with a physician and an unnamed counsellor of some sort, both of whom are friends of his family.

86 Neither parent believes that their daughter has had difficulties similar to those experienced by her brother. She is described as "flying under the radar" in respect to the ongoing conflict between her parents. She is described as doing well in school and excelling in sports, particularly in soccer where her dream is to be a member of the Olympic women's soccer team. Historically, the reports are similar. The Del Pero girl has had a wide circle of friends and has enjoyed success at school and in other athletic pursuits.

87 Having considered all of this evidence, I have reached a number of conclusions.

88 Both parents clearly love their children but it is equally clear that the children are a battle ground in the continuing conflict between these parents.

89 I have considered but rejected Mr. Del Pero's concern that there is any physical mistreatment of the children by Ms. Hartley. Other than his worries, there is no evidence of this and all other parties deny it.

90 Doubtless, there is blame to be shared but I was struck by what appeared to be Mr. Del Pero's still extreme level of animosity towards his children's mother, more than ten years after their breakup. He is suspicious of everything she does and assumes the worst in any situation. The extreme language he used to express his suspicion and

hostility was surprising. For example, he said he thought that Ms. Hartley's opposition to having the children interviewed by me as the judge was because she was either "brain washing them or holding them hostage".

91 Further, he seemed unable to let go of any incident or perceived wrong. Although many incidents were referred to in evidence, one example suffices.

92 Even at the trial, Mr. Del Pero was still ruminating over an incident that had apparently occurred a number of years ago. His son had apparently fallen while skiing with his mother at Snow Valley and had some severe bruising. Ms. Hartley testified that she took him to emergency at a hospital to have him checked out, not because she thought there was really anything serious wrong but because she was so concerned about how Mr. Del Pero would react. Aside from the bruising, her son was uninjured.

93 Mr. Del Pero, however, testified that he remains suspicious that the bruising could not have been caused by a fall while skiing. He was suspicious, as well, about some sort of cover up of what had happened at the ski hill. After he learned of son's injury, he testified that he communicated directly with the Snow Valley ski patrol. They told him about an accident that had occurred on the day in question to a boy who had been snowboarding (as opposed to skiing) and whose father had come to get him. To Mr. Del Pero this was clear evidence that the story he had been told about his son's accident was fabricated and that someone must have also masqueraded as his son's father as part of the cover up. He said this at trial.

94 He appears either to have discounted or simply not to have considered the much more reasonable explanation that another boy who was snowboarding, as opposed to skiing, that day had also been injured and the ski patrol was simply mixing up the two incidents.

95 The level of suspicion and mistrust that Mr. Del Pero harbours against Ms. Hartley even after ten years of separation, does not bode well for his future ability to successfully co-parent with Ms. Hartley and is adversely affecting the children.

96 Mr. Del Pero's reaction to the children's sometimes failure to telephone their father each evening between 7 and 8 pm is indicative of the difficulties. Under the terms of the Parenting Order, Ms. Hartley is required to have the children call their father between 7 pm and 8 pm on specific nights. Both Mr. Del Pero and Ms. Hartley testified that the children did not always telephone Mr. Del Pero precisely in accordance with this order. Mr. Del Pero testified that he believed this was because Ms. Hartley was disabling or discouraging the children from phoning him and that the children had to sneak around at their mother's house to call him. Ms. Hartley testified that the children were free to telephone their father whenever they wished to but said that sometimes they were at activities and missed the time period specified in the order; notwithstanding, this worried the Del Pero girl in particular.

97 I accept Ms. Hartley's evidence in this regard for two reasons. Firstly, it seems reasonable to think that active young teenagers such as the two Del Pero children could well have sporting or other activities that keep them busy and make it impossible to telephone exactly at the appointed time. Secondly, Mr. Del Pero's suspicions that Ms. Hartley keeps the children from phoning are inconsistent with another concern of his. He expressed great concern that Ms. Hartley had recently purchased an expensive iPhone for their daughter and seemed to see it as an attempt by Ms. Hartley to flaunt what he said was her higher standard of living. However, Ms. Hartley's gift of an iPhone to her daughter is inconsistent with her restricting her daughter's telephone use.

98 Mr. Del Pero's concern about the failure of the children to call him strictly in accordance with the order is harmful to the children. Mr. Del Pero's comments to his son in the text messages and emails (made Exhibit 31) include comments that seem to threaten his son about his failure to communicate; example: "I am selling your magic cards if you no answer" or taunt him if he fails to do so; example: "I answer in two second, you no answer in hundreds of years because you love your mamma".

99 Mr. Del Pero said such communications were mere jokes and a part of Italian humour, well understood by his son to be jokes. However, a reasonable person would not take such comments to be jokes and I would be surprised if they do not cause the boy stress.

100 A further example of the harm to the children caused by Mr. Del Pero's suspicion and mistrust can be found in his reaction to Ms. Hartley's concerns about their son's weight. Mr. Del Pero said it was "insulting" for his mother to say that their son was "obese" although she did not use that word. His testimony made it clear that he refused to accept Ms. Hartley's communication to him that their son might become diabetic. Mr. Del Pero said he could not believe this was not some sort of fabrication unless he had heard it directly from the pediatrician and he had not.

101 The contradiction in Mr. Del Pero's position is readily apparent. Ms. Hartley told Mr. Del Pero that this is what the pediatrician had told her. Mr. Del Pero has complete access to this pediatrician and all other medical caregivers for the children as a result of the Parenting Order. It would be easy for him to check with the pediatrician if he required verification but, apparently, he has not done so.

102 It is troubling that Mr. Del Pero will not accept that his son's weight is becoming a problem and has taken no steps to verify the advice that Ms. Hartley said she had received from the pediatrician, relying instead, he says, upon informal advice he has received from a family friend who tells him both children are healthy. This family friend has not examined the children nor conducted any tests upon them. He is not their physician and they are not his patients. It is difficult to understand how any off-the-cuff comment could be seen as more reliable than the medical opinion of a treating physician.

103 Ms. Hartley has taken her son to the pediatrician the children have seen for years and has attempted to provide the information she says she has received to Mr. Del Pero. Mr. Del Pero's dismissal of this information as a fabrication while making no effort to verify it could well be harmful to the boy's health, particularly if, as Mr. Del Pero readily admitted, he continues to offer fast food to his son on demand.

104 That there is little direct communication between the parents is a further barrier to successful co-parenting. Ms. Hartley sends emails with necessary information, sometimes requesting a response from Mr. Del Pero. Often, he does not respond. From Ms. Hartley's, Mr. Boyle's and Mary Hartley's evidence, all of which I accept, I find that Mr. Del Pero uses the children, particularly his son, as his means of communication. Again, this is harmful to the children. The boy should not be used as a communication device by Mr. Del Pero. It unnecessarily involves him in the continued conflict between his parents and, I am sure, causes him stress.

105 All of the evidence convinces me that Ms. Hartley must continue to be the decision maker for the children and that this cannot be shared with Mr. Del Pero. This issue may be revisited once Ms. Sheptycki has issued her updated report.

106 I am satisfied, as well, that there is no reason to change the amount of time Mr. Del Pero has with the children, subject of course, to a further review after Ms. Sheptycki's updated report. Ms. Hartley is able to offer structure and routine that seem to be missing from Mr. Del Pero's household and, at least during the week, such structure and routine is necessary and in the children's best interests. Ms. Hartley, together with her mother and her husband, are able to get the children to their many activities. Mr. Del Pero chafes at this, believing the activities are not necessary or worrying that the children will be hurt or learn inappropriate attitudes towards violence if they participate.

107 Mr. Del Pero admits that soccer is a passion for their daughter and agreed this involvement is positive because it keeps her from a too early interest in boys. But in his testimony, he also said he felt that Ms. Hartley was pushing her into this sport and worried that she would be injured. He expressed similar concerns about their son's participation in hockey.

108 Given his attitude, it seems doubtful that Mr. Del Pero would make getting the children to their sporting activities a priority. I have no doubt that, particularly in the case of their daughter, this would be harmful to her. Ms. Hartley testified that because her daughter is on a 'rep' team, if she missed practices or games she could be kicked off the team. This would be a disaster for her aspirations to excel in soccer. Failure to get their son to his sports activities could also be harmful to him, as well, because he would not get necessary exercise or camaraderie with others his own age.

109 Having more time with their father could also be detrimental to the children's schooling. Although Mr. Del Pero dismissed the issue as trivial, the evidence was that the boy has been absent or late for school when in his father's care. Neither does Mr. Del Pero accept that his son has any academic problems. In fact, in his evidence, he appeared to blame a teacher who had gone out of her way to give him help outside of regular classes.

110 In my view the Parenting Order should not change except for the following minor variations:

- a) Paragraph 4 of the Consent Order should be amended to remove any reference to a requirement that either parent be required to have the Del Pero boy take his hockey equipment to school. In high school, he no longer has a home room where things can be kept safely for him and he is old enough to make his own arrangements respecting hockey equipment. When he is with his father, he can simply be dropped off at his mother's home to pick up his equipment and can return it when he is finished the game or practice. Thus paragraph 4 of the Order should be deleted to remove everything after the first two sentences.
- b) Paragraph 9 of the Consent Order should be deleted as the Del Pero boy is no longer in a French immersion program;
- c) Paragraphs 8 and 11 shall be amended to provide that the children may (not must) telephone or text the Respondent father at any reasonable time at the children's discretion, provided that the children shall not telephone or text the Respondent during the school day except in an emergency.

Issue 3: *What should the father's income be found to be for guideline purposes?*

111 Ms. Hartley argues that the gifts Mr. Del Pero has received on a long term basis and continues to receive from Ital Motors and from his parents should be treated as part of his income. The gifts are substantial and permit Mr. Del Pero to live a very comfortable lifestyle and to accumulate assets notwithstanding that he reports very little in income.

112 Mr. Del Pero argues that the amounts he receives are true gifts. He points out that he does not have to report them as income under the *Income Tax Act RSC 1985, c.1 (5th Supp)* and argues that since the *Child Support Guidelines*, Reg. 391/97 as amended ("Guidelines") are based upon line 150 income reported to the Canada Revenue Agency ("CRA"), they should not be included as income for child support purposes either.

113 The term "gift" is not a defined term in either the Guidelines or the *Income Tax Act*. At common law, a gift is defined as "the transfer of any property from one person to another gratuitously while the donor is alive and not in expectation of death". *Black's Law Dictionary*, 10th ed. defines "gift" as "a voluntary transfer of personal property without consideration...A parting by owner with property without pecuniary consideration".

114 The Guidelines establish a process to determine each spouse's "financial means" at section 16:

Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading 'Total Income' in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

115 Section 19 indicates the Court may impute income to a spouse in appropriate circumstances.

116 A number of such circumstances are enumerated in the Guidelines but the section expressly indicates the list is not exhaustive.

117 It is important to consider s.19(1) of the Guidelines in light of the Guidelines' objectives set out in s.1. Their purpose is to establish fair support for children to ensure they benefit from the "financial means" of both their parents.

118 In addition to the enumerated grounds, it is possible for a court to impute higher levels of income in other circumstances, such as if the payor parent's lifestyle significantly exceeds their reported means.

119 In *Bak v. Dobell*, [2007 ONCA 304](#), the Ontario Court of Appeal did a careful analysis of the Guidelines in the course of determining whether parental gifts given to a payor spouse in that case, should be included in income for the purpose of determining child support payable.

120 In *Bak*, the Court of Appeal reconsidered a decision of a trial judge who dismissed a mother's application to increase child support for a 13 year old child and instead vacated a consent child support order previously entered into between the parents which was based upon the then earnings of the father. The father suffered from a severe personality disorder among other conditions and had a long history of failures to sustain employment because of his disabilities. The mother was a low income artist. However, the father's father had given him extensive gifts over the years, including provision of homes, a vehicle, generous financing in various career training and business ventures, payment of professional fees on the son's behalf and funds for his day-to-day needs. The funds for his day-to-day needs alone amounted to \$1750 per month at the time of trial. The mother sought to have these gifts included in the father's income which would result in increased child support.

121 The Court of Appeal dismissed the mother's appeal. In doing so, it provided an analysis that first categorized the gifts received by the father in terms of what they were used for before concluding that under appropriate circumstances, a gift may be unusual enough that it should be included in imputing income under s. 19(1) of the Guidelines. That Court suggested a number of factors to consider when determining if "gifts" should be used to impute a higher income to a recipient:

- (i). regularity of the gifts;
- (ii) duration of their receipt;
- (iii) whether the gifts were part of the family's income during cohabitation that entrenched a particular lifestyle;
- (iv) the circumstances of the gifts that earmark them as exceptional;
- (v) whether the gifts do more than provide a basic standard of living;
- (vi) the income generated by the gifts in proportion to the payor's entire income;
- (vii) whether they are paid to support an adult child through a crisis or period of disability;
- (viii) whether the gifts are likely to continue; and
- (ix) the true purpose and nature of the gifts.

122 *Bak* was cited with approval by the Alberta Court of Appeal in *Hartley v. Del Pero*, [2010 ABCA 182](#) and in *Simpson v. Bettenson* [2014 ABCA 21](#) at para 12, for the proposition that a payor's lifestyle often will be relevant to whether a court may impute income under s.19(1) of the Guidelines.

123 Although the Court of Appeal has already considered the within case, their decision dealt mainly with a procedural issue and specifically indicated that the issue was to be resolved at this trial.

124 However the decision of that Court in *Kretschmer v. Terrigno*, [2012 ABCA 345](#) is helpful. The facts in *Kretschmer* bear a similarity to this case.

125 In *Kretschmer*, the payor father was employed at the Calgary restaurant, Osteria de Medici, owned by a company controlled by his parents. He drew a modest salary from the restaurant but received other financial benefits directly and indirectly from his parents' company including payment of his mortgage, utilities, vehicle expenses, credit card payments, RRSP contributions, and petty cash and other expenses. All of his "investments, income expenses and business dealings were interconnected with those of his family" according to the decision:

para 40. As in the present case, the father in *Kretschmer* reported only his actual salary from the restaurant for the purpose of calculating his child support obligations.

126 The trial judge in *Kretschmer* drew an adverse inference from what he found to be inadequate disclosure of the father's financial information and concluded that the father's "means" included not only the amount he actually received as salary from the restaurant, grossed up because the restaurant deducted no tax from this salary, but also the mortgage payment costs, his automotive costs paid for by the company, rental revenue the husband received from a basement suite in the house he lived in, owned by his mother, and the amounts paid for his RRSP.

127 The majority of the Court of Appeal found no error in the trial judge's exercise of his discretion in this fashion. In dissent, Slatter, J.A. concluded that the trial judge should have exercised his discretion on a more principled basis, concluding that it was an error for the judge to have taken the total income asserted by the father and then add other attributed amounts to him.

128 I take from the majority decision in *Kretschmer* that gifts in family circumstances that are regular and of long duration and that which materially improve the lifestyle of the receiving party, may be included as income for purposes of determining child support obligations.

129 In the present case, it seems clear that as was the case in *Kretschmer*, Mr. Del Pero's finances are inextricably linked to those of his parents and of his parents' company Ital Motors. His entire working life has been spent at Ital Motors. He is not an owner of the company but it seems apparent that he has much day-to-day control of the corporation. He had signing power for cheques, at least for some time period, and he works at the business regularly and makes day-to-day business decisions for the company. He takes part in promotional activities in order to improve the business and was instrumental in approaching an Italian manufacturer, in the past, to try to have the company become a scooter dealer. Online, he has described himself as the manager or business manager of the company. As well, he has sought and obtained line of credit loans personally that he says are for the benefit of the company and has purchased many items on his own credit cards that he says are for the benefit of the company.

130 Mr. Del Pero has most of his bills, including his utility bills and credit card statements, directed to the company and these are paid by the company as a matter of course. While Mr. Del Pero says he has no control of what his father gives him, the fact is that he, himself, seems to have been more than just aware that this was happening. He may, in fact, be the directing mind in ensuring the company paid these.

131 Mr. Del Pero insists that his father remains the directing mind of the company, but his father did not give any evidence and is over 80 years of age. In the absence of any evidence from his father, and given the other evidence of Mr. Del Pero junior's active control, I infer that the father's continued involvement in the company is more or less as a figure head and that it is Mr. Del Pero junior who is, in fact the operating mind.

132 I conclude, therefore, that Mr. Del Pero has considerable control over the payments made on his behalf. Counsel for Ms. Hartley argued that this was a situation in which the corporate veil should be pierced and that the payments should not properly be characterized as gifts but as income, notwithstanding that the father has ultimate control over the company.

133 Superficially, this argument has some attraction. Although Mr. Del Pero is neither a shareholder nor a director of Ital Motors, that fact is not evident from the books of the company. The external accountants for the company have attempted to rationalize the extensive payments made on behalf of Mr. Del Pero and his sister over the years but the effect has been mostly confusion. Mr. Del Pero has had what was characterized as a "shareholders" loan on the books of the company in some years.

134 However, Mr. Del Pero junior's name does not appear at Corporate Registry and I was provided no authority for the proposition that piercing the corporate veil was a remedy available where the individual involved is not a shareholder.

135 The notion of piercing of the corporate veil does not assist in resolving the issue of what income Mr. Del Pero has available.

136 In my view, the various payments are more properly characterized as gifts.

137 In considering the factors outlined in *Bak*, I note that the evidence was that these various personal expense payments were made throughout the parties' relationship and have continued since the separation. They have been therefore of long duration and are very much entrenched as part of the financial compensation Mr. Del Pero receives for his work. Further, the evidence shows that Mr. Del Pero's reported salary, both during the relationship and since the separation, has been low. In all years since 2003, his reported income has been less than \$15,000. Nonetheless, he has lived a very comfortable lifestyle in a mortgage free home in an upscale neighbourhood and has been able to accumulate substantial assets. It seems clear that Mr. Del Pero could not have afforded the lifestyle without the gift payments and they have, thus materially improved his lifestyle.

138 Theoretically, of course, his father and mother could decide not to continue these but I heard no evidence that this was a likely possibility. I did hear evidence that the company loses money but it has done so for years and the payments have continued.

139 Bearing these factors in mind, I conclude, therefore, that at least some of the payments made on Mr. Del Pero's behalf should be considered as income for the purpose of determining his child support obligations. The issue then becomes, which payments should be included.

140 Disclosure has been a continuing problem in this matter.

141 While Ms. Hartley's income is straight forward because she is a salaried employee and works for the Government of Alberta, Mr. Del Pero's is not. Obtaining information from Ital Motors of what amounts they paid on Mr. Del Pero's behalf has been difficult. More or less complete information was ultimately obtained for the years 2004 through 2010, but this was only after much delay and more than one court order was obtained to require it. This information allowed Leonard Boon, CA and Certified Business Evaluator, hired by Ms. Hartley, to complete an expert's report. However, information since 2010 has been sparse.

142 I am asked by Ms. Hartley to use averages of the amounts paid by the company in earlier years on Mr. Del Pero's behalf to estimate the amounts paid since 2010.

143 Ms. Hartley's counsel provided various summaries in an effort to simplify the process of determining what income should be attributed to Mr. Del Pero and these proved helpful although I note that in some instances, the back up evidence was not properly introduced into evidence. For example, a litigation aid titled "Components of Fred Del Pero's Income" was made Exhibit F and one of the items outlined was "Payments on Fred's BMO Line of Credit". However, in the voluminous materials that were actually made exhibits, I was unable to find any supporting evidence for the numbers summarized in this column in Exhibit F.

144 From the evidence I do have, it appears that the payments made by Ital Motors on behalf of Mr. Del Pero can be loosely grouped into four categories: (1) utility expenses (including power, electricity, water, cable and telephone) and property taxes paid by Ital Motors for service to Mr. Del Pero's home; (2) credit card payments (Esso, Amex, and Visa) and payments made on his behalf on personal lines of credit (TD Canada Trust, BMO); (3) legal and accounting fees; and (4) daycare and other miscellaneous children's expenses.

145 Again, considering the factors set out in *Bak*, I conclude that legal and accounting fees paid should not be included as part of Mr. Del Pero's income. Unlike many of the other payments, these were exceptional and not made on a regular basis. Further, although summarized in Exhibit F, I was not able to find any invoices or cheques backing these up within the documentation that was actually made an exhibit at trial. I note, parenthetically, that invoices and cheques were found in a binder labelled as Trial Binder # 5, but this binder was never made an exhibit.

146 Utility expenses paid on behalf of Mr. Del Pero were however, much more regular. With a few minor exceptions, complete back up documentation was provided for Telus, Atco(Direct Energy), Epcor, and Shaw bills paid by Ital Motors for utilities services to Mr. Del Pero's home address each month in the years 2004, 2005, 2006, and 2008. Evidence is missing for 2007.

147 As I indicated above, the scope of this trial is limited to determination of child support arrears from May of 2006 onwards. Nonetheless, the evidence respecting 2004 and 2005 is helpful because it reveals a pattern.

148 The backup documentation respecting utility payments after 2008 is nonexistent.

149 There are numerous difficulties with the evidence in general. This is partly due to Mr. Del Pero's failure to disclose information, notwithstanding the numerous disclosure orders, and partly due to the inaccuracy and inconsistency of evidence Mr. Del Pero has given over the years. It is also partly due to the inaccuracy of the corporate records themselves. As Mr. Boon points out in his expert's report, the corporate records are unreliable. There are many large and unexplained differences between the company's general ledger maintained by the company's internal bookkeeper, Mr. Del Pero's sister, and the financial statements prepared by the company's external accountants.

150 The corporate financial statements are otherwise inaccurate as well. For example, some assets owned by the company or by the company jointly with one of the other Del Peros (including the Respondent) do not appear on the company's books at all. A property next door to Ital Motors is registered jointly to Ital Motors, Mr. Del Pero senior, and Mr. Del Pero junior. A restaurant operates on this property, apparently under a lease which was not in evidence. Presumably, this lease generates income of some sort but this income appears nowhere on the books of the company. I note, parenthetically, that it does not appear either in the income tax returns of Mr. Del Pero junior. Mr. Del Pero senior's income tax returns were not in evidence.

151 Further, the accountant who testified at trial was not the same one that had prepared the financial statements in the 2004-2008 time period and could not explain many of the entries in the annual returns not prepared by her. As well, as Mr. Boon also pointed out, the financial statements were prepared on a "notice to reader" basis with no attempt by the external accountant to verify the accuracy or completeness of the information provided by management of the company.

152 Mr. Boon concluded he could not calculate Mr. Del Pero's true earnings without obtaining extensive further information both from Mr. Del Pero and from the corporation, and as well, perhaps, from his sister and his parents. As counsel for Ms. Hartley candidly admitted, the cost and time required to do such further digging was so prohibitive, Ms. Hartley opted instead to simply go to trial.

153 Unlike Mr. Boon, I am required to make a decision about what Mr. Del Pero's actual income is. I conclude that because Mr. Del Pero had the onus to provide information and has failed to do so and as he has provided contradictory information over time, I must make an adverse inference against him.

154 I conclude that for each of 2006 through 2008, his actual income should include payments made on his behalf for utilities. Thus, I conclude that for 2006, the amount of \$4593 should be added to his income. For 2007, the amount added should be \$4600. Because there is no information for 2008, I am prepared to simply use the same amount as for 2007 and so found the amount to be added for 2008 should be \$4600 as well. In each case, these numbers must be grossed up to account for the fact that they are after tax dollars.

155 For the period after 2008, Ms. Hartley's counsel suggests using the average total of all of the expenses paid on Mr. Del Pero's behalf and found to be income. In the absence of any better evidence, this seems to be a reasonable approach. I believe I can take judicial notice of the fact that utility costs in the City of Edmonton, while volatile since deregulation, have not substantially diminished over all since 2008. Accordingly, Mr. Del Pero's utility expenses for the years 2009 to 2015 are imputed at \$4,598 per year based on an average of Mr. Del Pero's utility fees from 2006 to 2008.

156 Property taxes paid on Mr. Del Pero's Crestwood home are the second component of the first category. These are estimated by Ms. Hartley at \$3960 or year for each of the years 2004 to 2008. No corroborating tax notices, invoices, or cancelled cheques were made exhibits and it appears this amount is an estimate. Mr. Del Pero agreed in cross examination, however, that both property taxes and home insurance on his home are and have been paid for by "his father". Based upon this evidence, I am prepared to conclude that property taxes and home insurance payments should be included as a component of Mr. Del Pero's income. The amount suggested by Ms. Hartley seems reasonable and no other evidence was provided. Thus, I find that the sum of \$3960, grossed up, should be included as part of Mr. Del Pero's income for the years 2006 through 2008, and until the present.

157 I move now to the second of the categories: credit card payments. In her litigation aid summary, Ms. Hartley's counsel has accurately totalled the amounts paid by Ital Motors for Mr. Del Pero's various credit cards for the years 2004 to 2008. Corroborating credit card statements for each of the totals were made exhibits. The amounts are as follows:

2004 - \$55,269;

2005 - \$53,240□

2006-\$46,937□

2007- \$34,998

□

2008- \$42,400□

□

158 Mr. Del Pero argues that some of the charges on these cards were for company expenses. In his evidence and in cross examination of Mr. Boon, he went through a few of these in detail. It does appear from this evidence that some charges may, in fact, have been company charges.

159 However, my review of these statements indicates that most charges appear to be personal. Mr. Del Pero admits that historically he has paid most of his expenses by credit card and continues to do so. Payment of these credit card statements by the corporation has been regular and long standing. These payments are instrumental in permitting Mr. Del Pero a lifestyle that his low salaried income would never permit. I propose to deal with the fact that some of the charges made are, in fact, company expenses by including 90% of these charges as income for Mr. Del Pero.

160 Thus, the following amounts should be added to his income:

2006 - \$42,243;

2007 - \$31,548;

2008 - \$38,160.□

□

Again, as these are after tax amounts, they should be grossed up.

161 After 2008, there is, again, no specific evidence that the company has paid for Mr. Del Pero's credit card charges but he agrees they have continued to be paid by someone other than him. In the absence of specific numbers, it seems reasonable to use an average of the historical amounts. The average of the amounts paid from 2004 to 2008 is \$46,569. Ninety percent of this number is \$41,912. Without better evidence, I will use this number as the amount paid by the company or otherwise from other sources for credit card charges for Mr. Del Pero's personal expenses in 2009 and until the present time. This amount, grossed up, should be included in his income for years subsequent to 2008.

162 Mr. Del Pero has had a number of lines of credit over the years. Ms. Hartley seeks to include as part of his income two in particular: payments on a BMO line of credit and payments on a TD line of credit. Mr. Del Pero has a further line of credit with RBC which he uses for investments but there is no evidence that payments on this account are made by anyone but Mr. Del Pero, from sales of his investments.

163 Ms. Hartley takes the position that the net payments on Mr. Del Pero's TD line of credit should be included as part of his income as well as payments made on his BMO line of credit. In respect to the latter, however, although numbers are included in the summary made exhibit F as a litigation aid, it is not clear where these numbers came from. My search of the exhibit books disclosed no back up documentation respecting any payments made. Nor was there any oral evidence on this issue. In the absence of any evidence corroborating the suggested numbers, I decline to include them as income.

164 In respect to the TD line of credit payments, there is corroborating documentation found in Exhibit 8. Most of the payments appear to have been made at ATM machines, and it is unclear who made them. Mr. Del Pero refused to say how they had been paid without an opportunity to review all of the documentation thoroughly. It was not clear why he had failed to do this before trial.

165 Nonetheless, clearly on the evidence, \$53,033 was paid on the TD line of credit in 2007 and a further \$23,880 was paid in 2008. This line of credit did not exist before 2007. In 2009, there is evidence that a total of \$13,681 was paid. There is only one statement from 2010, showing a payment of \$5970. These amounts were not included on Exhibit F, although it is not clear why.

166 On the evidence, it is not clear if these payments were made by Mr. Del Pero himself or by someone else on his behalf. That does not matter. Mr. Del Pero does not dispute the payments were made and provides no explanation for where the funds came from to make these substantial payments. Clearly, payments of this magnitude are out of the question for someone with the low income reported by Mr. Del Pero (\$29,318 in 2007; \$12,597 in 2008; \$13,266 in 2009; and \$12,928 in 2010). I must conclude, therefore, that Mr. Del Pero has another source of funds besides his reported income and on this basis conclude that these amounts should be included in his income for child support purposes for the relevant years. Again, these are after tax dollars and should be grossed up.

167 Ms. Hartley suggests it would be appropriate to include these amounts in the average extra income available to Mr. Del Pero for the years after 2010. However, with no evidence that any further payments were made, I am not prepared to do so.

168 I move now to the last of the categories of expenses: daycare and other miscellaneous children's expenses.

169 A Notice to Admit Facts was served on Mr. Del Pero before trial and was never responded to. Mr. Del Pero did agree to some of these. For those that he did not agree to, I determined that they should be taken as facts unless there was evidence to the contrary. Mr. Del Pero agreed that both his son and daughter had attended a daycare at Canada Place; his son from January to 2002 until August of 2006. He agreed that his daughter attended the same day care from August 2006, first full time and from September 2006 until August 2008 three days a week.

170 Daycare expenses for the children were paid by the company on Mr. Del Pero's behalf in 2005-2008.

171 The totals are as follows:

2005- \$13,460;

2006- \$8,845;

2007 - \$9,384;

2008 - \$6,964. □

□

These numbers were accurately summarized in Exhibit F. Corroborating evidence, albeit incomplete, is found in Exhibit 26 and includes entries from the corporate general ledger "Fred Shareholders Loan" account, cheques written by Ital Motors to the Canada Place Childcare Society and some daycare receipts.

172 There is no evidence of any payments since 2008 but Ms. Hartley suggests it would be appropriate to include an average of the amounts paid during the years for which there is evidence for the years 2009-2016. I decline to do so. Daycare expenses likely ended in 2008 so it would be inappropriate to use an average which includes daycare costs in subsequent years.

173 The daycare expenses are clearly personal responsibilities of Mr. Del Pero and the evidence is that they were paid regularly and consistently during the years 2005-2008. Such payments permitted Mr. Del Pero a more comfortable lifestyle than he otherwise could have afforded. I conclude that the payments made by the corporation on his behalf for the years 2006 through 2008, as summarized in Exhibit F, should be included as a part of his income for those years. Again, there should be the appropriate tax gross up because these are after tax dollars.

174 In summary, with respect to payments of expenses on his behalf, I find that Mr. Del Pero's imputed income should be increased to include the following amounts:

YEAR	Payments for Mr. Del Pero's Expenses
2006	\$59,641
2007	\$102,525
2008	\$77,564
2009	\$64,151
2010	\$56,440
2011	\$50,470
2012	\$50,470
2013	\$50,470
2014	\$50,470
2015	\$50,470

175 In each case, these amounts should be grossed up using the method outlined by Mr. Boon to account for the fact that a person would have to earn more than the stated amounts in order to pay these accounts in after tax dollars. I am unable to make this calculation but direct that it be done by Mr. Boon and the numbers provided to the parties within one month of release of this judgment.

176 Mr. Del Pero's reported Line 150 income for the years in question is as follows:

YEAR	Line 150 Income
2000	\$31,201
2001	\$35,559
2002	\$13,145
2003	\$28,774
2004	\$28,774
2005	\$12,709
2006	\$12,598
2007	\$29,318
2008	\$15,175
2009	\$13,266
2010	\$12,928
2011	\$26,297
2012	\$4,445
2013	\$1,440
2014	\$23,473
2015	\$13,457

177 He has earned employment income from Ital Motors and, in addition, has reported rental income, and investment income. However, from the evidence of Mr. Boon, I am satisfied that Mr. Del Pero's income reported to CRA is also inaccurate. He has not reported all of his rental income, his interest income, his profit obtained from curbing cars, or his capital gains from sales of properties and other capital assets. Additionally, he provided two letters from Ital Motors to TD Canada Trust and ATB in support of applications for credit facilities. Each purports to certify Mr. Del Pero's income and is signed by his sister on behalf of Ital Motors. Each gives a different salary. One represented that his income was over \$15,000 per month; the other that his income is over \$13,000 per month. Neither bears any resemblance to his reported income.

178 Notwithstanding that his sister agreed in her evidence that she had signed the letters as comptroller for Ital Motors and notwithstanding that Mr. Del Pero agreed he had tendered them to the financial institutions, both denied they were a misrepresentation. Both said the numbers were provided at the direction of the financial institution who told them what figures to insert for income. Officers for both ATB and TD were called and both denied this was so.

179 Mr. Del Pero's credibility was severely damaged by this. His denial, under oath, of responsibility for providing demonstrably false information is incomprehensible and causes me to doubt all of his evidence. His readiness to provide false or misleading information to CRA and to financial institutions also causes me to doubt his willingness to provide accurate information in this proceeding.

180 My task is to determine what Mr. Del Pero's Guideline income is and has been. Mr. Del Pero has not provided complete disclosure. I am unable to rely upon Mr. Del Pero's oral evidence. The corporate financial records for Ital Motors are inaccurate and incomplete. Mr. Del Pero's tax returns are not accurate. Mr. Boon described his task as trying to put together a puzzle with many of the pieces missing. I would go further and compare the task to putting together a puzzle with missing pieces but with the addition of pieces from different and unrelated puzzles.

181 Nonetheless, his income must be determined on a principled basis.

182 Payment of expenses is part of the puzzle but only one part.

183 One can start with Mr. Del Pero's stated employment income in each year. These figures are as follows:

YEAR	Line 101 Employment Income
2006	\$11,763
2007	\$11,763
2008	\$11,763
2009	\$11,763
2010	\$9,803
2011	\$9,240
2012	\$3,904
2013	\$3,500
2014	\$3,500
2015	\$0

184 Mr. Del Pero also owns three rental properties. He earns income from these and one assumes this income is accurately reported on his income tax returns. However, there is no back up documentation to show that this is so. He also has a one-third interest in the restaurant property next door to Ital Motors. He says he gets no income from this because his father had to pay for extensive renovations so that the tenant restaurant could operate. This evidence is uncorroborated by documentary evidence. He does not report any rental income from the restaurant property.

185 Assuming that the reported rental income is otherwise accurate, the gross amounts earned by Mr. Del Pero as rental income are as follows:

YEAR	Line 160 Gross Rental Income
2003	\$26,000
2004	\$34,800
2005	\$34,900
2006	\$24,450
2007	\$34,400
2008	\$31,025
2009	\$35,800
2010	\$33,650
2011	\$37,800
2012	\$23,000
2013	\$17,550
2014	\$49,200
2015	\$39,700

186 Certainly there are expenses associated with rental properties and these are properly deductible from gross rental income for income tax purposes. Mr. Del Pero has clearly used these deductions extensively. For example, in 2014, Mr. Del Pero's gross rental income was reported as \$49,200 but his reported net rental income was only \$18,560. However, given his other inaccuracies and in the absence of corroborating documentation, I am not prepared to accept that all expenses deducted for income tax purposes are, in fact, properly deductible for purposes of determining Mr. Del Pero's income for child support purposes. I heard evidence, for example, that Mr. Del Pero paid out in full the mortgage on his home in 2008 before he took out a line of credit on this same property in order to make the interest deductible from his rental income. It should be recalled, as well, that there is evidence that the corporation, in fact, made the interest payments.

187 In the absence of better evidence, for the purposes of determining his Guideline income, I will subtract 20% of the gross rental income to account for payment of rental property expenses but include the remaining 80% of gross rental income as income for Guideline purposes for each year. These numbers are as follows:

YEAR	Gross Rental Income Less 20%
2006	\$19,560
2007	\$27,520
2008	\$24,820
2009	\$28,640
2010	\$26,920
2011	\$30,240
2012	\$18,400
2013	\$14,040
2014	\$39,360
2015	\$31,760

188 Interest and partnership income as reported on Mr. Del Pero's income tax returns is likely related to his investments. No evidence of these investments was tendered and so the accuracy of the numbers reported to CRA is unknown. In the absence of better evidence, I will accept these numbers at face value and include them as part of

Mr. Del Pero's income for each year. These numbers are as follows:

YEAR	Lines 120, 121, 122 and 130: Dividends, Investments, Partnership and Other Income
2006	(\$1,014)
2007	\$16,924
2008	\$2,478
2009	\$2,318
2010	\$2,724
2011	(\$787)
2012	\$1,044
2013	\$3,882
2014	\$608
2015	\$2,515

189 Taxable capital gains are also shown on Mr. Del Pero's income tax returns for some of the years in question. They are as follows:

YEAR	Line 127: Taxable Capital Gains
2006	\$11
2007	\$411
2008	\$0
2009	\$0
2010	\$1,096
2011	\$3,796
2012	\$3,770
2013	\$6,274
2014	\$808
2015	\$0

190 I doubt the accuracy of these numbers. Mr. Boon pointed out that his review of other provided documentation showed that while Ms. Hartley had reported the capital gain earned on a property jointly owned by the parties, in the year it was sold, Mr. Del Pero did not. One wonders how many other capital gains have simply been omitted from Mr. Del Pero's income tax returns. Further, as capital gains are taxable only at 50% of the actual gain, the number reported to CRA are only one half of the profit actually obtained.

191 While only one-half of these gains is taxable, there is no reason the same rule needs to apply for Guideline purposes in this particular case. Mr. Del Pero has not provided complete disclosure and, as already noted, I have found him not to be a credible witness. I am suspicious that he has available to him more income that he has disclosed in this proceeding and, in fact, to CRA. Under the circumstances, I conclude that since all of the profits reported were actually received by Mr. Del Pero, these were available to him for child support purposes.

192 There is an argument to be made that capital gains reflect one time transactions and should not be included as income for child support purposes. Mr. Del Pero did not make this argument but, nonetheless, I have considered it. I have concluded that the capital gains should be included for child support purposes in this instance because, although there is no evidence of his investments, from the evidence of Mr. Boon, it seems clear that Mr. Del Pero's investments have considerable value. He may have held some of these for a number of years but the transactions appear to be numerous and profitable. This is money available to Mr. Del Pero and should be included in his Guideline income. The numbers to be added are as follows:

YEAR	Taxable Capital Gains x2
2006	\$22
2007	\$822
2008	\$0
2009	\$0
2010	\$2,192
2011	\$7,592
2012	\$7,540
2013	\$12,548
2014	\$1,616
2015	\$0

193 Although Mr. Del Pero has deducted extensive carrying charges from his reported income over the years, I decline to take these into account for purposes of determining his Guideline income. He has muddled his interest payments so thoroughly that it is impossible to determine if he, in fact, paid these amounts himself or if they were paid by his parents, the corporation or by some other entity. He must bear the burden of his lack of candor and failure to provide documentation.

194 To summarize, therefore, Mr. Del Pero's income for Guideline purposes for each of the relevant years is as follows:

YEAR	Mr. Del Pero's Expenses Paid by Other Sources (Before Gross Up)	Mr. Del Pero's Reported Income from Tax Returns as Modified	Total Guideline Income (Before Gross Up)
2006	\$59,641	\$18,568	\$78,209
2007	\$102,525	\$45,266	\$147,791
2008	\$77,564	\$27,298	\$104,862
2009	\$64,151	\$30,958	\$95,109
2010	\$56,440	\$31,836	\$88,276
2011	\$50,470	\$37,045	\$87,515
2012	\$50,470	\$26,984	\$77,454
2013	\$50,470	\$30,470	\$80,940
2014	\$50,470	\$41,584	\$92,054
2015	\$50,470	\$34,275	\$84,745

195 For each year, these figures must be increased by the amounts Mr. Boon determines should be added to gross up the expenses paid amounts.

Issue 4 : *What s.3 child support should be payable based upon this income?*

196 Because of the missing gross up information, I am unable to set out in this judgment the actual amounts that I have found Mr. Del Pero should have been paying for child support for the years in question. However, once Mr. Boon has provided the gross up information, these amounts should be easily determinable. I direct counsel for Ms. Hartley to calculate these and provide this information to Mr. Del Pero within one month of obtaining the figures from Mr. Boon.

197 For 2016, the 2015 numbers should be used. I direct further that Mr. Del Pero is to provide a complete copy of his 2016 income tax return including all schedules to Mr. Hartley through her counsel as soon as it has been prepared and to provide complete copies of all further years' tax returns to her by no later than June 30 of each year, every year in which child support remains payable.

Issue 5: *What s. 7 expenses have been incurred for the children in the past and what ongoing s. 7 expenses have been incurred and what proportionate share of these expenses should be paid by each parent?*

198 Ms. Hartley's line 150 income is as follows:

YEAR	Line 150 Income
2000	\$77,832
2001	\$34,503
2002	\$88,818
2003	\$89,933
2004	\$44,544
2005	\$118,573
2006	\$135,275
2007	\$125,965
2008	\$155,820
2009	\$202,164
2010	\$167,339
2011	\$176,248
2012	\$188,237
2013	\$236,189
2014	\$190,676
2015	\$239,159

199 Mr. Del Pero's income is as I have found it to be above subject to the additions to be made following Mr. Boon's calculations.

200 The total amounts of s.7 expenses for each year may be summarized as follows:

YEAR	Childcare	Medical & Dental	Educational	TOTAL
2006	\$12,488	\$509	\$0	\$12,997
2007	\$30,693	\$403	\$0	\$31,096
2008	\$28,915	\$661	\$50	\$29,626
2009	\$15,714	\$1,108	\$0	\$16,822
2010	\$17,689	\$1,289	\$0	\$18,978
2011	\$7,195	\$1,345	\$4,372	\$12,912
2012	\$10,601	\$2,114	\$1,420	\$14,135
2013	\$4,622	\$1,231	\$235	\$6,088
2014	\$0	\$1,879	\$90	\$1,969
2015	\$0	\$1,505	\$0	\$1,505
2016	\$0	\$1,753	\$220	\$1,973

201 Once the necessary information has been obtained from Mr. Boon, I direct that counsel for Ms. Hartley do the necessary calculations and provide the resulting numbers to Mr. Del Pero within one month of receipt of Mr. Boon's figures.

Issue 6: *What are the arrears of both s. 3 and s.7 child support and how should these be paid?*

202 The last issue for resolution is what the arrears are. Again, I cannot make final calculations absent figures respecting the gross ups which Mr. Boon will provide.

203 However, the amounts actually paid are clearly summarized at tab 1 of Exhibit 25. I find these summaries to be accurate. Once the Boon information is obtained, I direct counsel for Ms. Hartley to do the necessary calculations to determine the actual amount owed by Mr. Del Pero for arrears for both s.3 and s.7 child support for the period from May 2006 until the end of December 2016.

204 The amount owing may be considerable. To the extent possible, it should be paid immediately from the funds held in trust for this purpose. However, if it is too large, it may be that the monies held in trust will not be sufficient to completely pay these arrears and the amount remaining may also be too large for Mr. Del Pero to pay at once. If this is the case, then he may approach me within a reasonable period of time after the numbers have been calculated and in writing, copying Ms. Hartley through her counsel, with a proposal respecting how the amount owing will be paid by him. Ms. Hartley will have two weeks after she receives this proposal to reply.

205 It may be that I can make a decision respecting payment of the remaining arrears simply based upon these written representations. If I cannot, I will be in further touch with the parties to arrange a hearing.

206 Costs may be spoken to if required.

Dated at the City of Edmonton, Alberta this 29th day of December, 2016.