CITATION: Bruni v. Bruni, 2010 ONSC 6568
St. Catharines Court File No.: 384/07
Date: November 29, 2010

ONTARIO

SUPERIOR COURT OF JUSTICE

FAMILY COURT

BETWEEN:	)	
	)	
CATHERINE McQUAT BRUNI	)	applicant in person
	)	
Applicant	)	
	)	
─ and ─	)	
	)	
LARRY BRUNI	)	respondent in person
	)	
Respondent	)	Claude F. Leduc,
	)	for the children
	)	
	)	HEARD: May 18, 19, 21,
	)	September 28, 29, 30 and
	)	November 16, 2010, at St. Catharines

J.W. Quinn J.: ─

I INTRODUCTION

[1] Paging Dr. Freud. Paging Dr. Freud.

[2] This is yet another case that reveals the ineffectiveness of Family Court in a bitter custody/access dispute, where the parties require therapeutic intervention rather than legal attention. Here, a husband and wife have been marinating in a

mutual hatred so intense as to surely amount to a personality disorder requiring treatment.

[3] In addition to the volatile issues of custody and access, this application raises a question as to whether grounds exist to set aside the separation agreement of the parties.

[4] Then follows a mash of issues, with the outcome of some being dependent upon the resolution of others: (1) What is the effect of a mediate-first provision in the separation agreement? (2) Was the matrimonial home undervalued in the separation agreement? (3) What are the implications of the respondent/husband, Larry Bruni ("Larry"), having released any interest in the employment pension of the applicant/wife, Catherine McQuat Bruni ("Catherine"), it not having been valued when the separation agreement was signed? (4) Is the separation agreement ambiguous as to the issue of sole custody and joint custody? (5) Do child support arrears exist under the separation agreement? (6) What are the implications of Catherine's failure to discuss extraordinary expenses with Larry before they were incurred? (7) Are there arrears of extraordinary expenses owed by Larry? (8) What is the proper amount for ongoing periodic child support? (9) Does Catherine have a valid claim for spousal support? (10) Is the post-separation, parental-alienation conduct of Catherine (in respect of the parties' daughter) a relevant consideration in determining her claim for spousal support? (11) How, if at all, does the fact that Catherine is living in a stable, common-law relationship figure into her claim for spousal support?

[5] I heard *viva voce* evidence from the parties, their common-law spouses, Larry's sister and from Cynthia Katz, a clinical agent with the Office of the Children's Lawyer. Ms. Katz holds a Masters of Applied Psychology.

[6] Mr. Leduc was appointed by the Office of the Children's Lawyer to represent the children. He had meetings with all concerned and was deeply involved in this matter in the year or so preceding the trial; and, at trial, he questioned witnesses on behalf of the children and made submissions to the court.

[7] The trial began in May of 2010. It was interrupted by a four-month hiatus, resuming in September.

[8] Presiding over a family trial, with many issues, where the parties are self-represented (Mr. Leduc did not participate in the areas of property and support) is a solitary and unfulfilling experience. What evidence was not brought forward because the parties failed to appreciate its relevance? What evidence that *was* introduced would have been recast under a skilful cross-examination? With whom do I play devil's advocate on questions of law?

II BACKGROUND

1. The genesis of the litigation

[9] Larry and Catherine married and had two children. Larry and Sam were close friends. They work for the same employer. Larry was the best man at Sam's wedding. A few years later, Sam separated from his wife and obtained custody of their two young children.[1] Larry and Catherine also separated. Their children remained with Catherine. Sam and his children moved in with Catherine and her children. Larry now has a common-law spouse. She has three children. The two households are located one kilometre apart.

[10] In the midst of this social stew perhaps it is not surprising that Larry and Catherine are having problems, serious problems, regarding the custody of, and access to, their children. The source of the difficulties is hatred: a hardened, harmful, high-octane hatred.[2] Larry and Catherine hate each other, as do Larry and Sam. This hatred has raged unabated since the date of separation. Consequently, the likelihood of an amicable resolution is laughable (hatred devours reason); and, a satisfactory legal solution is impossible (hatred has no legal remedy).

2. Some family particulars

[11] Catherine and Larry were married on October 7, 1995. If only the wedding guests, who tinkled their wine glasses as encouragement for the traditional bussing of the bride and groom, could see the couple now.[3]

[12] The parties have two children, a daughter, Taylor, born on May 23, 1997 (now 13 years of age) and a son, Brandon, born on August 28, 1999 (now 11).

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[1] Their mother, according to Sam, "is not in the picture" and has abandoned the children.

[2] At one point in the trial, I asked Catherine: "If you could push a button and make Larry disappear from the face of the earth, would you push it?" Her I-just-won-a-lottery smile implied the answer that I expected.

[3] I am prepared to certify a class action for the return of all wedding gifts.

After a brief split and reconciliation in 2004, the parties separated for the final time on October 1, 2006,[4] effectively making this an 11-year marriage (they have not divorced).

[13] Larry (aged 38) is employed as a labourer in the waste management business. He lives common law with Sandra Cook ("Sandra"),[5] a personal support worker in a nursing/retirement home.

[14] Catherine (aged 36) is a caretaker with the District School Board of Niagara. In 2008, she commenced a common-law relationship with Sam McTague ("Sam") who works for the same company as does Larry. Catherine's 76-year-old father lives with them and pays room and board.

3. Catherine's genteel family tree

[15] Some family trees have more barren branches than others.

[16] Larry testified about the many death threats he received from Catherine and members of her family around the time of, and in the months following, separation. I will mention some of them.

[17] In September of 2006, Larry went to live with his father "for a couple of days" to "clear my head." When he returned to the matrimonial home, the locks had been changed. Larry stated in evidence: "Catherine didn't want me on the property and her family threatened to have me killed."

[18] Larry gave evidence that, less than one month later, Catherine, "Tried to run me over with her van."[6]

[19] On November 21, 2006, Catherine demanded $400 from Larry or her brother was "going to get the Hells Angels after me."[7]

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[4] It is likely that, in the period 2004-2006, Larry was having one or more extramarital affairs. Interestingly, Larry's father was married five times, in addition to going through several relationships. Perhaps there is an infidelity gene.

[5] The home in which Larry and Sandra live is jointly owned by the two of them. Larry did not reveal this fact in his financial statement filed in these proceedings.

[6] This is always a telltale sign that a husband and wife are drifting apart.

[7] The courtroom energy level in a custody/access dispute spikes quickly when there is evidence that one of the parents has a Hells Angels branch in her family tree. Certainly, my posture improved. Catherine's niece is engaged to a member of the Hells Angels. I take judicial notice of the fact that the Hells Angels Motorcycle Club is a criminal organization (and of the fact that the niece has made a poor choice).

[20] On February 9, 2007, Catherine told Larry that she wanted him to sign adoption papers so that Sam could adopt their children.[8] Said Larry: "She threatened me with her brothers and Hells Angels again."

[21] On August 13, 2007, Catherine's niece (Donna), telephoned Larry "and told me I will get a bullet in my head if I don't sign the adoption papers. She called back later and told me I'm as good as dead." She called a third time, "to tell me her father and uncles are coming to kill me."[9]

[22] The next day, Catherine telephoned Larry and said that she "wanted my truck or her brother and the Hells Angels are coming to get it and me."

[23] On October 18, 2007, a nautical theme was added. According to Larry: "Donna Taylor, Catherine's sister-in-law, yelled out her window that I was going to be floating in the canal dead."

[24] As can be seen, Catherine and her relatives are one-dimensional problem solvers.

4. Separation agreement

[25] Because Larry was not making the child-support payments required under their separation agreement, Catherine filed the agreement with the court for enforcement in December of 2007.[10] Larry has called into question its validity.

(a) *circumstances surrounding signing*

[26] Larry testified that, on May 24, 2007, at 5:00 p.m., he was returning from his place of employment and received a cellphone call from Catherine who said that she "needed the papers signed tonight" and that he should go to the office of her lawyer. By "papers," Larry understood her to mean a separation agreement. Larry further testified that Catherine advised it would be in his "best interests to sign." According to Larry: "I felt that, if I didn't sign, something was going to get

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[8] When one considers that the parties then had been separated for a mere four months and that Larry was exercising access, this is a remarkable request. What does it tell us about Catherine?

[9] Donna is a devotee of the literary device known as, "repetition for emphasis." I do not know whether Donna is the niece who is engaged to the Hells Angels member. If she is, they may be more compatible than I initially surmised.

[10] Pursuant to s. 35(2) of the *Family Law Act*, R.S.O. 1990, Chapter F.3, once a separation agreement is filed with the court, a provision for support may be enforced and varied as if it were an order of the court.

damaged." He did not lay criminal charges arising out of this perceived threat because he "didn't want something to happen to me or my personal property."

[27] Larry arrived at the lawyer's office. He was taken into a room with "papers everywhere, nothing was piled neatly." He sat at a table and the "lawyer was reading parts of the separation agreement to me." Larry testified that he "did not understand some words and asked the lawyer to explain them in laymen's terms."

[28] Larry signed the separation agreement.

[29] It was Larry's evidence that, at the time he signed, he was under stress, not only from what Catherine had said in her cellphone call, but from the previous threats by members of her family and from the death of his father (who had passed away eight months earlier).

(b) *contents*

[30] I will mention some of the material contents of the separation agreement.

1. <u>independent legal advice</u>

[31] Larry acknowledges in the separation agreement that he "waived his right to independent legal advice."

2. <u>Larry's income</u>

[32] It is stated in the preamble to the separation agreement that, at the time, Larry was employed and earning $45,621 annually and that his income would be "lower in 2007 because of a job change."[11]

3. <u>custody and access</u>

[33] Paragraph 7.1 of the separation agreement gives sole custody of the children to Catherine with reasonable access to Larry, including a minimum of two weeks during the summer. However, paragraph 7.2, which deals with the Child Tax Credit, begins with the words: "Notwithstanding the fact that the parties have joint custody . . ."

[11] It turned out to be lower by only a few hundred dollars.

4. periodic child support

[34] As for child support, the separation agreement provides, in part:

> 13.1 Commencing April 1, 2006,[12] and on the first day of each month up to and including March 1, 2008, [Larry] shall pay to [Catherine] for the support of the two children $600 per month. [Larry] is currently unemployed . . .[13] Commencing on April 1, 2008 . . . [Larry] shall pay . . . [child support in] an amount to be determined pursuant to the Federal Child Support Guidelines for the Province of Ontario . . . In the event that on April 1, 2008 [Larry] has been underpaying . . . based upon his child support payments of $600 [Larry] will arrange to bring his child support payments into good standing.

5. extraordinary expenses

[35] It states in the separation agreement that "all extraordinary or special expenses shall be shared on a proportionate basis, or as otherwise agreed between the parties" and, importantly, that "the extraordinary or special expenses shall be discussed between the parties before they are incurred."

6. spousal support

[36] The separation agreement stipulates that Larry is to pay spousal support for Catherine in the sum of one dollar annually, commencing July 1, 2007 up to and including July 1, 2010. Catherine is given "the right in her sole discretion to commence an application for spousal support on or before July 1, 2010."

7. income tax returns

[37] The separation agreement requires Larry to provide Catherine with his income tax returns and notices of assessment "for the purpose of determining his child support obligation on an annual basis." Larry never complied with this requirement.

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[12] I accept the testimony of Catherine that this date is a typographical error. It should have read "June 1, 2007," as this is the date that Larry commenced his child support payments.

[13] This also is an error. Larry was not unemployed. He was working for "a temp service" between his employment with two waste management companies.

8. matrimonial home

[38] With respect to the matrimonial home, the separation agreement states that it was appraised at $199,000 and encumbered by a Bank of Montreal mortgage for $163,000. Larry conveyed his interest in the home to Catherine, acknowledging that if the home were to be sold, "there would be very little or no equity left to divide . . ."[14]

[39] The separation agreement requires Catherine to obtain a new first mortgage, "discharge the current mortgage and save [Larry] harmless . . ."

[40] Larry takes the position in these proceedings that the matrimonial home was significantly undervalued. He feels that a then-existing appraisal by the mortgagee would substantiate his belief that the matrimonial home was valued at $225,000. Tellingly, he does not challenge the fairness of releasing his interest in the matrimonial home if the correct appraised value is $199,000.

9. dispute resolution

[41] The separation agreement addresses dispute resolution. It states, in part:

> 20.4 . . . Prior to commence (sic) a court action, the parties shall attempt to resolve any difference through family mediation provided at the St. Catharines Court House . . .

10. severability

[42] Paragraph 37.1 of the separation agreement provides that "all of the terms of this agreement are severable from each other and will survive the invalidity of any other term of this agreement."

11. Catherine's employment pension

[43] The separation agreement states that Catherine has an employment pension and Larry agreed "not to make a claim to this pension." Larry was unaware of the

[14] Assuming a sale for $199,000 and disposition costs at 6%, the net equity would be $24,000 of which Larry would have been entitled to $12,000. I accept the evidence of Catherine that it was in consideration of this fact that the separation agreement, although silent on the point, provided for spousal support of only one dollar for up to three years.

pension value, and Catherine did not include a pension in her financial statement filed in these proceedings.[15]

5. The access history

[44] Immediately following the separation of the parties in October of 2006, Larry had access to the children "almost every other week-end" until sometime in 2007 when "it was stopped by Catherine."

[45] Access resumed after Larry provided to Catherine a cheque in the sum of $2,500 needed to repair the latter's washing machine and refrigerator.

[46] It was the testimony of Catherine that Larry was not consistent with his access to the children (but it is more probable that Catherine interfered with Larry's access at every opportunity, such that any inconsistency was the product of frustration and not disinterest).

[47] Access difficulties persisted and temporary orders were required in September and December of 2008 and again in June of 2009.

[48] Catherine denied access entirely to Larry from some point in January of 2010 up to the commencement of the four-month hiatus in the trial (May-October of 2010). This was a remarkably bold step on her part, taken without reasonable excuse or explanation. Most litigants are on their best behaviour as their trial approaches. Her conduct reflects the lack of respect she has for the legal system and the utter disregard with which she treats Larry's parental rights. She is a law onto herself. She is also oblivious to her lack of objectivity in matters of access.

[49] Before the commencement of the hiatus, I ordered the parties to meet with Mr. Leduc and come up with an access schedule to cover the period until the trial resumed. As a result, Larry began exercising access to Brandon every second week-end from Saturday at 10:00 a.m. until Sunday at 6:00 p.m. Taylor usually accompanied Brandon, but always returned home on Saturday (in other words, she did not stay overnight with Larry and Sandra).

[15] On September 12, 2008, in the course of a case conference, a consent order was made by which Catherine was to have her employment pension valued.

[50] During these enforced access visits, Taylor repeatedly said to Larry: "You're not my father. Sam's my father. You're a loser." These are comments that Taylor would have parroted from Catherine, I have no doubt. They are the result of persistent, behind-the-scenes brainwashing by Catherine.

6. Legal proceedings

(a) *change motion by Catherine*

[51] In January of 2008, Catherine brought a motion to change the access and child-support provisions of the separation agreement. As well, she sought payment of child-support arrears, a contribution toward extraordinary expenses and an order for spousal support.

[52] The access change was prompted by the fact that the separation agreement provided reasonable access to Larry upon reasonable notice to Catherine. It was alleged in her motion that, as the parties were unable to communicate regarding what access was reasonable, access should be specified.

[53] In respect of child support, Catherine alleged that Larry was not paying *Guidelines* support as required by the separation agreement. He had not paid child support since August of 2007. Although Larry had provided 12 post-dated cheques to Catherine for 2007, he stopped payment on the cheques (probably a response to the access acrimony).

[54] In her claim for spousal support, Catherine alleged that, during the marriage, she was the primary caregiver for the children and, as a result, was unable to pursue full-time employment.

[55] The change motion seeks some relief that is unavailable by motion. The separation agreement was filed pursuant to s. 35(1) of the *Family Law Act*. However, s. 35(2) restricts any variation of such an agreement to support issues. Therefore, a variation in respect of access and a claim for spousal support (both requested by Catherine) are unavailable in a change motion. The proper procedure is an originating process: see *Carpenter v. Carpenter* (2000), 11 R.F.L. (5th) 281 (Ont. Sup. Ct.). An originating process under the *Family Law Rules,* O. Reg. 114/99, as amended, is an Application.

(b) *Application by Larry*

[56] In May of 2008, Larry commenced an Application[16] in which he sought an order setting aside the separation agreement, pursuant to sections 33(4) and 35 of the *Family Law Act*. Those sections are not apt.

[57] Section 33(4) permits the court to "set aside a provision for support . . . in a domestic contract and may determine and order support in an application under subsection (1) . . . if the provision for support . . . results in unconscionable circumstances . . ." (Subsection (1) is the general provision by which, on Application, a court may "order a person to provide support for his or her dependants and determine the amount of support.")

[58] In my opinion, s. 33(4) is unavailable to Larry because it may not be invoked by the payor of support who is seeking a reduction of the support payments under the separation agreement: see *Porter v. Porter* (1979), 23 O.R. (2d) 492 (H.C.J.). Section 33(4) is available only to a support claimant.

[59] The Application was also brought pursuant to s. 35. That section permits the filing of a separation agreement with the court for enforcement and s. 35(3) allows the court to set aside the agreement under s. 33(4). As s. 33(4) is not available to Larry, neither is s. 35(3).

[60] Consequently, I intend to treat the Application as being brought pursuant to s. 56(4) of the *Family Law Act* (the contents of which I will set out later).

[61] Larry advanced the following grounds as a basis for setting aside the separation agreement:

(a) he did not understand the nature and effect of the agreement;

(b) the agreement is unconscionable, unfair and inequitable;

(c) the negotiation and execution of the agreement were not undertaken in an unimpeachable manner;

[16] Although Larry was the applicant in the Application, he is shown in the title of proceedings as respondent because the first title used (being the one from Catherine's change motion, where she is the applicant) is repeated ever-after.

(d) he was operating under emotional stress and duress at the time of the execution of the agreement; and,

(e) he did not have independent legal advice.

[62] Larry specifically asked that the child-support provisions in the agreement be set aside because:

(a) they obligated him to pay child support notwithstanding that he was unemployed through no fault of his own;

(b) he was required to pay 14 months retroactive child support with seven months of that support pre-dating the separation;

(c) he transferred his interest in the matrimonial home to Catherine and that interest was substantially undervalued.

[63] All of the statements in (a), (b) and (c) are factually incorrect.

[64] Larry requested that any further enforcement of his child-support obligation contained in the separation agreement be stayed pursuant to section 37 of the *Family Law Act* and that his obligation be retroactively discharged. As he was steadily employed at all times, it is a puzzle how he expected to avoid payment of child support.

[65] He also asked for an equalization of net family property (involving only two assets: the matrimonial home and Catherine's employment pension).

[66] Finally, Larry sought an order for joint custody of the children.

(c) *Answer – Claim by Respondent*

[67] In June of 2008, Catherine delivered an Answer – Claim by Respondent[17] which mirrored the relief outlined in her earlier change motion.

[17] Again, because the title of proceedings is that of the change motion, Catherine is shown as the applicant but, in truth, she is the responding party in Larry's Application.

(d) *Reply*

[68] Larry delivered a Reply[18] in July of 2008 in which he alleged that: he had not been permitted access since October of 2007; the extraordinary expenses claimed had not been "discussed in advance . . . prior to being incurred"; and, Catherine was not entitled to spousal support as she is in "a long-term relationship and does not need support."

[69] I should point out that, although the parties were self-represented at trial, they did have lawyers at, and for a period of time after, the pleadings stage.[19]

7. Conduct of the parties and their common-law spouses

[70] On fourteen occasions, within eighteen months, the parties drew the police into their petty disagreements – a sad commentary on their inability to get along and a shocking abuse of the Niagara Regional Police Service. Although this statistic probably sums up all that one needs to know about the parties, I will elaborate for the doubters.[20]

(a) *Larry*

[71] Larry, who regularly drives by the residence of Sam and Catherine, "often shoots the finger"[21] at Sam and, on about three occasions, has yelled: "Jackass, loser."[22]

[72] In 2007, Larry created a false Facebook account in the name of Catherine on which he posted derogatory comments that appeared as if they had been authored

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[18] I am aware that, under the *Family Law Rules,* Application, Answer – Claim by Respondent and Reply do not begin with capital letters. However, I prefer otherwise.

[19] In fact, they were represented by lawyers through 12 court attendances over two years (according to the endorsement section of the continuing record), during the babysitting phase of the proceedings and before the heavy lifting began. This case should have been identified by the lawyers in the beginning as one that was impossible to settle and pushed quickly to trial, without the endless toing and froing present in typical cases. The legal fees for the 12 attendances would have been better spent on the trial.

[20] A further testament to the hopelessness of the custody/access situation is that the parties and their common-law spouses are unable to jointly attend Brandon's ball-hockey games without erupting into mutual conflict. This is very stressful for Brandon.

[21] A finger is worth a thousand words and, therefore, is particularly useful should one have a vocabulary of less than a thousand words.

[22] When the operator of a motor vehicle yells "jackass" at a pedestrian, the jackassedness of the former has been proved, but, at that point, it is only an allegation as against the latter.

by her. (Facebook is a popular website where one registers and posts personal information.)

[73] On August 14, 2007, Larry sent three text messages[23] to Catherine within a space of four minutes, saying: "The game is just starting. Prepare yourself for a long winding road"; "Busted! Always look in your rear view mirror"; and, "Blood isn't always thicker than water." Two days later he texted: "Loser! Home-wrecker!"[24]

(b) *Sandra*

[74] Sandra is a no-nonsense disciplinarian. By the start of the trial, she had seen Taylor infrequently (perhaps only once), but Brandon approximately every other week-end.

[75] In September of 2008, Larry was exercising access to Taylor in the home where he and Sandra reside. At one point, Taylor wanted to telephone Catherine. However, Sandra prevented her from doing so, saying: "It's your dad's week-end, not your mother's."

[76] In February of 2009, Brandon returned home from week-end access with Larry and explained to Catherine that he was "sick and tired of Sandra always questioning me." Added Brandon: "She asks too many questions about you, mom."

[77] In March of 2009, after another access week-end with Larry, Brandon was angry that Sandra would not allow him to telephone Catherine, "for any reason."

[78] I find that Sandra does not exert a positive gravitational pull in this dysfunctional family constellation.

(c) *Catherine*

[79] The trial began with three days of evidence being heard in May of 2010. As it was necessary for the trial to be interrupted by the four-month hiatus already

[23] In recent years, the evidence in family trials typically includes reams of text messages between the parties, helpfully laying bare their true characters. Assessing credibility is not nearly as difficult as it was before the use of e-mails and text messages became prolific. Parties are not shy about splattering their spleens throughout cyberspace.

[24] These do not strike me as the statements of someone who is concerned about precipitating a Hells Angels house call.

mentioned,[25] I admonished the parties on a number of matters, one of which was the importance of not denigrating the other in the presence of the children. Yet, in August of 2010 (in other words, during the hiatus), Taylor was having an access visit with Larry when she received a text message from Catherine that read: "Is dickhead[26] there?"

[80] At one point, the children told Larry that if they were to telephone, or talk to, him they would "go to jail." Catherine was behind this cruel misinformation.

[81] Larry's sister, Susanne Kelly (whose children attend the same school as do Brandon and Taylor), testified that, in February of 2010, while she was waiting to pick up her children from school, Brandon approached her vehicle crying and said: "I don't know what to do anymore. My mom won't let me see my father." In 2009, Taylor told Ms. Kelly: "I am not allowed to talk to you." And, in April of 2010, Brandon told Savanna (his cousin and Ms. Kelly's daughter) that he was not allowed to play with or talk to her.[27]

[82] Sandra testified that Catherine "gave me the finger while driving on Bunting Road."[28]

[83] In September of 2008, Taylor told Sandra: "You stole my dad from the family, my mom said." Taylor repeated this comment to Sandra during the trial hiatus. Catherine is unable to filter inappropriate thoughts and comments from her conversations with, or in front of, the children. In fact, she deliberately does otherwise, with the hope of alienating at least Taylor from Larry.

(d) *Sam*

[84] Two incidents are representative, in my view, of Sam's nature and character. Firstly, during the trial, Larry passed Sam in the hallway outside the courtroom,

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[25] I confess that I sometimes permit a lengthier hiatus than the schedule of the court might otherwise dictate, in order to afford the parties an opportunity to reflect on the trial experience, come to their senses and resolve their difficulties like mature adults. It is touching how a trial judge can retain his naivety even after 15 years on the bench.

[26] *The New Shorter Oxford English Dictionary* defines "dickhead" as "a stupid person." That would not have been my first guess.

[27] And all of these prohibitions by Catherine are taking place with a trial date already inscribed on her kitchen calendar.

[28] I am uncertain whether this would be considered a hand-held communication device, now illegal while operating a motor vehicle, under recent amendments to the *Highway Traffic Act*.

and the latter said: "You're done."[29] Secondly, on December 24, 2007, Larry attended at Catherine's residence bearing gifts for the two children. The gifts were refused, because, according to Catherine, "Sam doesn't want you giving them anything."

[85] Sam's attitude toward Larry undoubtedly has been influenced by Catherine, as Sam has been dining at her table of hatred for more than three years; however, this explains, but does not excuse, his deplorable conduct.

8. Larry and the children

[86] Ms. Katz (who had meetings and interviews with the parties and the children in September and October of 2009 and again in January, March, April and September of 2010) confirmed the obvious when she told the court that the children are aware how their parents feel about each other.

(a) *Taylor*

[87] Ms. Katz sees Taylor as "closely aligned with" Catherine. By September of 2010, when the trial resumed, Taylor did not want anything to do with Larry and she made this clear to Ms. Katz.

[88] Larry described an incident when, during access with Taylor, he had taken her to a McDonald's restaurant and they were "kicked out" because Taylor "caused a fuss by calling me a deadbeat." This is language that Taylor would have learned from Catherine.

[89] On May 23, 2009, Larry attended Catherine's residence to pick up the children for an access visit. Brandon said to Larry: "Do you know whose birthday it is?" Larry, caught in an afterthought, answered: "Oh, happy birthday Taylor." He pulled $50 out of his pocket and told Taylor not to give it to her mother. Taylor was unwilling to accompany Larry because she was having a party with her friends. Larry responded: "No one will probably show."

[90] On another occasion in July of 2009, Larry said to Taylor: "You put shit in this hand and shit in this hand, smack it together, what do you get? Taylor."[30]

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[29] It takes a special level of audacity to utter threats under the roof of the Court House.

[30] I gather that this is Larry's version of the Big Bang Theory.

[91] Larry explained in his evidence that his comments to Taylor were anaemic attempts at humour. They were not intended to be hurtful. I accept his evidence. Mr. Leduc correctly characterized Larry as a passive man who was not adept at responding to situations involving his post-separation daughter. It is to be remembered that, following separation, Larry was confronted with an angry, hurt, confused and rebellious daughter who had been receiving advanced animosity-tutoring from Catherine. This would be a difficult situation for even the most talented and perceptive of fathers to overcome. Given Larry's near-empty parenting toolbox, it is not surprising that he handled the matter awkwardly. Had Catherine fulfilled her dual parental duty to foster and encourage access between Larry and Taylor and not to speak disparagingly of him in the presence of Taylor, I am confident that this case would have unfolded differently.

(b) *Brandon*

[92] Sam concedes that "Brandon wants to be with his father."

[93] Ms. Katz explained that, in the beginning, Brandon was "quite happy" to have regular access with his father. However, Brandon has now declared that he wants access on his terms. Having watched how badly his parents botched the matter of access, it is little wonder Brandon feels that he can do a better job. He has said to Ms. Katz that he would not mind if access were to occur on alternating week-ends, on one week-day and for part of the summer.

III DISCUSSION

1. Procedural

[94] As the relief sought by Catherine in her Answer – Claim by Respondent includes all of the orders that she asked for in her change motion (and bearing in mind that some of the orders she requested cannot be granted on a motion), I have dismissed the motion and will address the claims of the parties within the context of the Application.

2. Setting aside separation agreement

(a) *s. 56(4) of the Family Law Act*

[95] Section 56(4) of the *Family Law Act* contains the criteria to be applied when considering the discretionary power to set aside a separation agreement:

> 56(4) A court may, on application, set aside a domestic contract[31] or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract.

(b) *evidentiary burden*

[96] The party challenging the separation agreement must bring his or her case within s. 56(4)(a), (b) or (c), then persuade the court to exercise its discretion and set aside the agreement: see *Levan v. Levan* (2006), 32 R.F.L. (6th) 291, [2006] O.J. No. 3584, aff'd (2008) 51 R.F.L. (6th) 237, [2008] O.J. No. 1905, leave to appeal to S.C.C. refused [2008] C.S.C.R. no 331 (cited to QL). Thus, proof of one of the criteria in s. 56(4) does not automatically mean that the separation agreement should be set aside.

[97] As a general rule, the onus is on the party seeking to set aside the separation agreement to prove his or her case: see *Dougherty v. Dougherty* (2008), 51 R.F.L. (6th) 1 (Ont. C.A.).

(c) *failed to disclose significant assets – s. 56(4)(a)*

[98] A failure to disclose an asset does not necessarily render a domestic contract a nullity: see *Levan v. Levan* (2008), 51 R.F.L. (6th) 237, [2008] O.J. No. 1905, leave to appeal to S.C.C. refused [2008] C.S.C.R. no 331.

[99] The non-disclosure must relate to "significant" assets: see *Currey v. Currey* (2002), 26 R.F.L. (5th) 28 (Ont. Sup. Ct.).

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[31] Section 51 of the *Family Law Act* defines "domestic contract" to include a separation agreement.

[100] As well, I would make a distinction between a failure to disclose an asset and a failure to value that asset.

[101] Use of the word "failure" in s. 56(4)(a) implies that proof of intent or *mala fides* is unnecessary.

[102] A breach of s. 56(4)(a) should not be considered in isolation from all of the surrounding circumstances.

[103] In the separation agreement, Larry released his interest in Catherine's employment pension. Although the value of the pension was not set out in the separation agreement or in Catherine's financial statement, its value was determined to be $3,232[32] as of 2008 (thus, it would have been worth even less on the date of separation, two years earlier). There may be situations where the nature of an asset (a "complicated" asset, such as a business or some pensions) is such that disclosing its existence, without assigning a value, will not satisfy s. 56(4)(a) of the *Family Law Act*. However, here, that is not the case.

[104] I do not consider the pension to be a significant asset. Accordingly, the failure to disclose its value is not a material failure so as to engage s. 56(4)(a).

(d) *did not understand nature and consequences of contract – s. 56(4)(b)*

[105] "Nature . . . of the contract," in s. 56(4)(b), raises the question of whether Larry understood the type of agreement that he was signing or did not understand its terms. "Consequences . . . of the contract," in that same clause, deals with the issue of whether Larry did not understand the effect of what he was signing. This would include a mistake of law.

(e) *otherwise in accordance with the law of contract – s. 56(4)(c)*

[106] Section 56(4)(c) covers common-law grounds such as fraud, duress, undue influence, material misrepresentation and unconscionability.

[32] The pension arises from Catherine's seven years of employment as a health-care aid at a nursing home (1996-2003). The employment she commenced in 2003 with the District School Board of Niagara does not provide pension benefits.

(f) *duress*

[107] Duress, in civil law, means "threats to another's property, threats of physical violence or economic duress which induces a contract": see Dukelow and Nuse, *The Dictionary of Canadian Law* (Scarborough: Carswell, 1991).

[108] Duress of the person means "actual or threatened violence to a person . . .": see *The Dictionary of Canadian Law, supra.*

(g) *undue influence*

[109] Undue influence is "the unconscientious use of power or authority by one person over another in such a way that the stronger party acquires a benefit . . .": see *Keeton and Sheridan On Equity,* (London: Pittman and Sons Ltd., 1969), at p. 49.

(h) *unconscionability*

[110] "Unconscionable" means "showing no regard for conscience, not in accordance with what is right or reasonable": see *The New Shorter Oxford English Dictionary*. This definition has been tweaked in the context of s. 5(6) of the *Family Law Act* to include – "shocking": see *Kelly v. Kelly* (1986), 50 R.F.L. (2d) 360; 2 R.F.L. (3d) 1 (H.C.J.); *MacDonald v. MacDonald* (1997), 33 R.F.L. (4th) 75 (Ont. C.A.); and, more than a mere consideration of "fairness" or "reasonableness": see *Sullivan v. Sullivan* (1986), 5 R.F.L. (3d) 28 (Ont. U.F.C.); *Filipponi v. Filipponi* (1992), 40 R.F.L. (3d) 296 (Ont. Gen. Div.).[33]

[111] Unconscionability does not require the presence of duress or undue influence.

(i) *absence of independent legal advice*

[112] The presence or absence of independent legal advice will frequently be an important factor. But, the absence of independent legal advice is not, in itself, grounds for invalidating a separation agreement. It is merely a circumstance to be considered where the challenge to the agreement is based on some other

[33] I do not know why courts find it necessary to alter the meaning of words. One would think that if the legislators had intended "shocking" they would have used "shocking."

contractual grounds: see *Trottier v. Altobelli* (1983), 36 R.F.L. (2d) 199 (Ont. C.A.).

[113] "[L]egal advice is not an automatic antidote for a party's vulnerability": see *Kelly v. Kelly* (2004), 7 R.F.L. (6th) 301 (Ont. C.A.).

(j) *unexplained delay*

[114] Unexplained delay always is a factor for the court to consider when determining whether to grant discretionary relief.

(k) *conclusion*

[115] In respect of the separation agreement, there is no evidence that Larry:

(a) misapprehended its legal nature or consequences;

(b) misunderstood a specific provision (on his own testimony, parts of the agreement were read to him by Catherine's lawyer and he asked for clarification – in other words, this is not a case where a separation agreement was presented to him and he simply signed it);

(c) was unaware of what he was getting and what he was giving up;

(d) was unaware of its importance or gravity; or

(e) was rushed or otherwise was prevented from reading it.

[116] In addition, I make these findings:

(a) Larry has not explained why he allegedly feared reprisals from Catherine's family when the separation agreement was signed, but is not afraid today (this lack of explanation tends to negate the presence of duress and undue influence);

(b) The fact that Larry chose not to read the agreement from start to finish is the result of his own carelessness or negligence;

(c) There is nothing in the separation agreement that is unconscionable or otherwise unfair, so as to arouse the suspicion of the court (in other words, it is not a bad bargain);

(d) Larry's acquiescence subsequent to signing the separation agreement served to ratify its provisions;

(e) Larry has not explained his one-year delay in applying to set aside the separation agreement. For example, he did not act to set it aside upon learning of an unfair provision or of something not disclosed at the time of execution (the separation agreement was signed in May of 2007 and Larry commenced his Application in May of 2008 – this unexplained delay also tends to negate the presence of duress, undue influence and, indeed, any complaint that he now raises about the separation agreement);

(f) There is no evidence (and I do not understand it to be suggested) that Larry was the victim of fraud or material misrepresentation;

(g) There was no inequality of education, life experiences or bargaining power between Larry and Catherine; and,

(h) In the absence of supporting medical evidence, Larry cannot rely on the stress from his father's death (eight months earlier) as grounds to set aside the separation agreement.

[117] Was the statement by Catherine (that it would be in Larry's "best interests to sign" the separation agreement) a threat of violence to him or his property? Catherine was not known for coyness or ambiguity in her words and deeds. I think that, had she intended these words to be a threat (rather than a statement of fact), she would have said so. Furthermore, even if it was a threat, I am not persuaded that Larry took it seriously. After all, Catherine and her relatives had been giving the Hells Angels speech for eight months preceding the signing of the separation agreement, without incident. A threat oft made is merely noise.

[118] In all of the circumstances, there is no reason to invalidate the separation agreement.

3. Failure to pursue mediation

[119] It did not emerge in testimony that the separation agreement required the parties to pursue mediation as a condition precedent to commencing a court action

and I did not notice this provision until the trial was well underway. Normally, I would dismiss all proceedings as being premature and in breach of the separation agreement; and do so without anguishing over whether the mediation would have been successful. (The separation agreement does not say that mediation is to be pursued only if it is likely to be successful.) Mediation was contractually required as a condition precedent to litigation. However, because the validity of the separation agreement is being challenged, to enforce the mediate-first provision requires that I, firstly, uphold the agreement; and this, in turn, would necessitate a bifurcated trial.

[120] Justice is best served in this case by waiving compliance with the mediate-first requirement in the separation agreement.

4. Custody

[121] In his Application, Larry sought joint custody of both Taylor and Brandon. In his closing argument at trial, he asked for sole custody of Brandon. Mr. Leduc was taken aback by this request, calling it unreasonable and not in the best interests of the children, who get along well together. I agree.

[122] It is disturbing that Larry's judgment is so flawed that he would think it appropriate to spilt up the children. Larry is thinking only of himself. After more than two years of litigation, he still does not grasp the point of the exercise.

[123] The children have been in the custody of Catherine since the separation in 2006. There is no basis upon which the court should consider altering the *status quo* and separating the children.

[124] To eliminate the contradiction regarding custody in the separation agreement, paragraph 7.2 shall be varied so as to delete the opening words: "Notwithstanding the fact that the parties have joint custody . . ." This leaves sole custody with Catherine under the separation agreement.

5. Access

(a) *Brandon*

[125] It is undisputed that Brandon wants to spend some time with Larry. A modest schedule of access would be appropriate, as follows: (1) during the school

year, in alternate weeks, from Friday after school until Sunday at 8:00 p.m. (or 24 hours later, if Monday is a holiday); (2) from 10:00 a.m. until 8:00 p.m. on Easter Sunday, Thanksgiving Day and Father's Day; (3) from 10:00 a.m. until 8:00 p.m. on December 26th in even-numbered years, commencing in 2010; (4) from 10:00 a.m. until 8:00 p.m. on December 25th in odd-numbered years, commencing in 2011; (5) half of March break, or otherwise in accordance with Brandon's wishes; (6) a minimum of two one-week periods in the summer, upon 90 days notice to Catherine; and, (7) such additional summer and other access as Brandon requests.

[126] The access provisions of the separation agreement shall be changed accordingly.

(b) *Taylor*

[127] Generally, it is unwise to place an immature 13-year-old in charge of her life. Here, however, Catharine and Sam have engineered an alienation that is so complete as to leave the court with no feasible option.

[128] I make these findings: (1) The alienation was not present before Larry and Catherine separated; (2) This is not a case where Taylor has weighed the good and bad attributes of her father and found him, on balance, to be parentally deficient: she sees Larry as all bad – there is no ambivalence to her feelings; she is not disguising her true feelings; (3) Larry, although well-intentioned, is an inept father, who has not taken steps to identify, and fix, his shortcomings as a parent; nevertheless, the utter rejection of him by Taylor is disproportionate, unfair and unwarranted; (4) As Ms. Katz observed, Taylor has aligned herself with Catherine whose hate for Larry is palpable; the battle lines are clearly drawn and Taylor knows the side that she wants to be on; (5) I am unable to think of anything that Larry can do to quickly repair the damage in his relationship with Taylor; and, if I could, I have doubts that he has the skill-sets to pull it off; (6) I did not hear evidence of a single instance of Taylor, since separation, expressing love or affection for Larry; (7) Although children are often required by their parents to do things that they do not want to do, obligating Taylor to visit her father or to engage in counselling is considerably more complicated than insisting that she do her homework or go to the dentist; (8) The history of the parties is such that there is no reason to think they would meaningfully take part in, or benefit from, therapy or

counselling; (9) While it is Catherine's duty to encourage and support a relationship between Taylor and Larry, that duty has been breached too severely to be remedied by the court; (10) It is not realistic to expect that the parties have the incentive and finances to engage in the extensive therapy and counselling that are needed; (11) Depriving Catherine of custody (sometimes an appropriate way of dealing with an alienating parent) would not benefit Taylor at this point.

[129] It is my view, sadly, that the alienation here is so severe that it is in the best interests of Taylor not to order or enforce access by Larry. If access happens, fine.

[130] Without professional help, Larry is incapable of addressing the breakdown in his relationship with Taylor. Although, as I have said, well-intentioned, he is an ineffective parent and, without counselling and other assistance, he will remain ineffective. While Catherine, aided and abetted by Sam, initiated the alienation of father and daughter, Larry has not improved the situation. But, I emphasize the fundamental fact that Catherine's conduct is the *sine qua non* of the alienation.

[131] Absent counselling, matters will worsen, not improve. No practical purpose would be served if the court were to decree a schedule of counselling for the parties and the children. The hate and psychological damage that now prevail would require years of comprehensive counselling to undo. The legal system does not have the resources to monitor a schedule of counselling (nor should it do so). The function of Family Court is not to change people, but to dispose of their disputes at a given point in time. I preside over a court, not a church.

[132] Larry might consider some common-sense steps, such as cards, letters or gifts, to show that he is receptive to a relationship with Taylor should she have a change of heart. However, he would be wise to have those steps independently vetted by a responsible person (preferably, a professional in the child-psychology or family-counselling field).

[133] It is agreed by all that Taylor is immature for her age and she has been diagnosed with an anxiety disorder. Catherine conceded, in deft cross-examination by Mr. Leduc, that the conflict in this case is harming Taylor's health.[34] Enforced access would exacerbate the situation.

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[34] And, despite this knowledge, Catherine has actively sought to create conflict between Taylor and Larry.

[134] Finally, on this issue, I observe that Taylor calls Sam "dad," whereas Brandon refers to him as "Sam." Neither Sam nor Catherine attempted to dissuade Taylor, calling the matter "her choice." Yes, the alienation indeed is complete.

[135] The separation agreement shall be varied so as to be silent regarding access by Larry to Taylor.

6. Incorrigibility of the parties

[136] In 2009, Niagara Family and Children's Services became involved with the parties and, on October 7th of that year, made recommendations to them, including the imperative need for counselling. The recommendations were ignored. Ms. Katz and Mr. Leduc made similar suggestions, at various times, without success. At the start of the hiatus in the trial that I have mentioned, I lectured the parties on what they should do, and how they should conduct themselves, pending the resumption of the trial (including how Larry might deal with his estrangement from Taylor). Most of what I said was ignored.

[137] I urged the parties to obtain some form of counselling during the hiatus. They did. Normally that would be good news; but here it is not. Larry had several parenting/counselling sessions. Yet, in his closing argument, he still thought that it was appropriate to ask that the children be separated for custodial purposes. And Catherine, well, she sent the "dickhead" text message after having had three counselling sessions. In the witness box, after the hiatus, Catherine testified that she now realizes her text message was inappropriate. A brief recap is in order: Catherine rejected the advice and recommendations of Niagara Family and Children's Services, Ms. Katz and Mr. Leduc; she ignored my several protestations during the pre-hiatus part of the trial during which I was critical of how the parties spoke of each other in the presence of the children; she disregarded my order that she and Larry were not to denigrate each other in the presence of the children during the hiatus; and, she participated in three court-recommended counselling sessions. After all of that she, nevertheless, sent the text message. Now, in the witness box, she purports to be bathed in the light of repentance and reason. I think not.

[138] As I said previously, and perhaps more than once, parties usually are on their best behaviour when involved with litigation that is before the court. Here, the

parties (especially Catherine) did not allow this more-than-two-year case to deter them from their course of conduct. To this day they think that they are right and everyone else is wrong.

7. Child support

(a) *arrears of Guidelines table child support*

[139] The separation agreement expressly invokes the *Child Support Guidelines*, O. Reg. 391/97, as amended ("*Guidelines*"), for the payment of periodic child support fixed in accordance with the Child Support Table for Ontario. Of course, the table support is based on Larry's income as calculated in accordance with, in this case, s. 16 of the *Guidelines*:

> 16. . . . a . . . parent'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.

[140] Although the separation agreement obligates Larry to provide a copy of his annual income tax returns to Catherine and to adjust the amount of table support in accordance with his income, Larry, without explanation, never fulfilled that obligation. It was not until these proceedings were commenced that Catherine learned of Larry's actual income in the years following the execution of the separation agreement.

[141] I have already pointed out that a typographical error in the separation agreement showed April 1, 2006 as the commencement date for child support payments. In fact, it was June 1, 2007. This is the date that Catherine provided to the Family Responsibility Office when she filed the separation agreement for enforcement in December of 2007 and it is the date from which child support has been collected.

[142] Catherine agrees that Larry, at last, has paid the table child support owing for 2007.

[143] In 2008, Larry had an income of $53,000. The table amount for child support under the *Guidelines* is $798 monthly ($9,576 annually) for the two children. Larry paid $1,880, leaving $7,696 as arrears.

[144] Larry earned $57,690 in 2009, for which monthly *Guidelines* table child support is $866 ($10,392 annually). As Larry paid only $3,941, there are arrears of $6,451.[35]

[145] Having found that there were gaps in the financial evidence adduced at trial, I required the parties to re-attend before me on November 16, 2010 and give further testimony. Larry was directed to bring with him a cumulative paystub for 2010. He had led everyone (including the court) to believe that his income in 2010 would be comparable to what he received in 2009. However, as of November 6, 2010, he had earned $68,626. This produces a projected full-year income of $81,000 (rounded), for which *Guidelines* table support is $1,171. Up to September 30, 2010, Larry paid $4,766 in child support. He should have paid $10,539 (9 months x $1,171). The arrears, therefore, to that point in 2010, are $5,773.

[146] Total child support arrears as of September 30, 2010 amount to $19,920.

(b) *arrears of child support under s. 7*

[147] The separation agreement also expressly addresses special or extraordinary expenses which, in turn, engages s. 7 of the *Guidelines*:

> 7(1) In an order for the support of a child, the court may, on the request of either parent or spouse or of an applicant under section 33 of the Act, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents or spouses and those of the child and to the spending pattern of the parents or spouses in respect of the child during cohabitation:
>
> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> (b) that portion of the medical and dental insurance premiums attributable to the child;
>
> (c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy, prescription drugs, hearing aids, glasses and contact lenses;

[35] On June 12, 2009, a temporary order was made requiring Larry to pay monthly child support of $563 based on his representation that he would earn $38,000 in 2009. He never explained why he was off by 34%.

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

[148] The term "extraordinary expenses" is defined in s. 7 (1.1) of the *Guidelines*:

(1.1) For the purposes of clauses (1) (d) and (f),

"extraordinary expenses" means

(a) expenses that exceed those that the parent or spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that parent's or spouse's income and the amount that the parent or spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate, or

(b) where clause (a) is not applicable, expenses that the court considers are extraordinary taking into account,

(i) the amount of the expense in relation to the income of the parent or spouse requesting the amount, including the amount that the parent or spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child,

(iv) the overall cost of the programs and activities, and

(v) any other similar factors that the court considers relevant.

[149] The proportionate sharing of s. 7 expenses is addressed in s. 7(2) of the *Guidelines*:

7(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents or spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[150] Catherine tendered in evidence a schedule of expenses, covering the years 2007-2010, totalling $8,862.72, which she contends is Larry's unpaid portion of "special or extraordinary" expenses caught by the separation agreement. Some of the expenses clearly are not "special or extraordinary" (for example, haircuts and clothing) and some may qualify for that designation (such as, athletic and medical expenditures). However, there is no evidence that Catherine ever followed the

requirement in the separation agreement that these expenses "shall be discussed between the parties before they are incurred." I cannot dismiss this contractual requirement as unimportant or unnecessary. On the contrary, it is a key provision in an agreement that Catherine seeks to uphold.[36]

[151] As Catherine has breached the separation agreement in respect of the issue of special or extraordinary expenses, her claim for proportionate reimbursement by Larry fails. The integrity of contracts must be maintained.

(c) *ongoing child support*

[152] With a projected income for 2010 of $81,000 (rounded), the monthly *Guidelines* ongoing table child support is $1,171, payable on the first of every month commencing on January 1, 2010. If Larry earns less in 2011, I expect that he will be quick to advise Catherine of his true income, something that he has never done since separation; this might help him to develop the contractually-required habit of providing Catherine with his annual income tax returns.

8. Net equalization payment

[153] Larry has restricted his claim for a net equalization payment to two assets – the matrimonial home and Catherine's employment pension. However, to succeed on this aspect of the case, the separation agreement must be set aside in whole or as it relates to the property issues. Having already upheld the validity of the separation agreement, I will deal with this claim only briefly.

[154] In respect of the matrimonial home, Larry contends that it was undervalued in the separation agreement. As he insisted that the mortgagee (the Bank of Montreal) possessed a 2006 appraisal supporting his contention, I made a mid-trial order requiring the bank to produce a copy "of any appraisal in its possession (or for which it has the authority to obtain) dated in 2006." An appraisal for $199,000

[36] One might question the purpose of obligating warring spouses to discuss s. 7 expenses before they are incurred. The answer is that the separation agreement makes it a requirement to do so. I will not engage in the speculative exercise of determining what Larry's response would have been, or reasonably should have been, had he been consulted in advance (under the separation agreement, to be an eligible special or extraordinary expense, it was unnecessary for Larry to agree with the expense – consultation, not consent, was required).

was produced, putting to rest the complaint regarding the value of the matrimonial home. It was fairly dealt with in the separation agreement.

[155] The pension was disclosed in the separation agreement without a value and, subsequently, found to be worth $3,232 as of 2008 (with a lesser value likely as of the date of separation in 2006).

[156] The minimal value of the pension and the unexplained delay in Larry having commenced his Application to reopen the pension issue, combine to defeat his claim in this regard.

[157] Section 56(4)(a) of the *Family Law Act* has not been breached and there are no additional circumstances that would prompt me to set aside the separation agreement or even that part of the agreement dealing with the equalization of net family property.

9. Spousal support

[158] I come now to the issue of spousal support, historically the roulette of family law (blindfolds, darts and Ouija boards being optional).

(a) *support obligation of spouses*

[159] Section 30 of the *Family Law Act* deals with the fundamental obligation of spouses to provide support:

> 30. Every spouse and every same-sex partner has an obligation to provide support for himself or herself and for the other spouse or same-sex partner, in accordance with need, to the extent that he or she is capable of doing so.

(b) *court may order support*

[160] Section 33(1) of the *Family Law Act* contains the statutory authority for the court to determine the eligibility of a spouse for, and the amount of, support.

> 33(1) A court may, on application, order a person to provide support for his or her dependants and determine the amount of support.

(c) *purposes of a spousal support order*

[161] The purposes of a spousal support order are found in s. 33(8):

> 33(8) An order for the support of a spouse should,[37]
>
> (a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;
>
> (b) share the economic burden of child support equitably;
>
> (c) make fair provision to assist the spouse to become able to contribute to his or her own support; and
>
> (d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).

These purposes are relevant when considering entitlement to spousal support as well as the issues of amount and duration.

[162] Section 33(8)(a) recognizes that marriage (or a common-law union) is a partnership, with the spouses taking on different roles; and, those roles can produce different economic consequences. The consequences may be negative (loss of career opportunities, for example) or positive (such as career enhancement).

[163] To obtain compensatory support, a spouse must prove actual economic disadvantage: see *Radcliff v. Radcliff* (1994), 51 A.C.W.S. (3d) 1318 (Ont. Gen. Div.), affirmed 7 R.F.L. (5th) 425 (Ont. C.A.).

[164] Catherine has a grade-12 education. When married in 1995, she was employed full-time as a housekeeper in a retirement home earning approximately $12,000 annually. In 1996, Catherine took a six-month evening course that qualified her to work as a health-care aid. She obtained full-time employment in that capacity at a nursing home where she worked until 2003, earning $7,000-$10,000 in most years. Catherine found the work too laborious, quit and obtained part-time employment in 2003 as a caretaker with the District School Board of Niagara. According to her sworn financial statement filed for trial, her gross income for 2010 is expected to be $28,317 (inclusive of $7,200 "rental income" from her father).

[165] Catherine could upgrade her qualifications as a health-care aid, become a personal support worker and earn a much greater income. However, she has not investigated what would be required in terms of time and expense to do so. She also has the option to apply to the District School Board of Niagara for a full-time position which, if obtained, would double her income. She testified that, to apply

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[37] "Should" has been interpreted to mean "must."

for full-time work, one must be eligible from the seniority list. She was vague as to her position on that list and I find that she has not given serious thought to increasing her hours of work, despite the resultant additional income. I draw the adverse inference that her eligibility for full-time employment already exists or probably is close at hand.

[166] Nevertheless, I am persuaded that, but for the child-raising responsibilities assumed by Catherine during the marriage, today she would be employed full-time, likely with the District School Board of Niagara (which, she testified, would have been her career path), or hold a similar position elsewhere.

[167] Section 33(8)(b) of the *Family Law Act* is an acknowledgement that raising children involves an economic burden to be shared fairly and it is sometimes used to justify time-limited periodic support for a wife whose ability to pursue employment after separation is compromised by the need to care for the parties' young children. Taylor and Brandon are not an obstacle to Catherine obtaining post-separation full-time employment or to upgrading her education or job skills.

[168] Section 33(8)(c) is consistent with the obligation of spouses to provide for their own support. A common example would be requiring one spouse to pay support to the other while the latter completes a retraining or educational program. No such program has been proposed by Catherine.

[169] As spousal support invariably is addressed after all property issues are determined, s. 33(8)(d) is the mechanism by which the court is empowered to remedy any remaining inequity and alleviate the adverse consequences of the marriage breakdown.

(d) *determining amount of spousal support*

[170] Section 33(9) of the *Family Law Act* outlines the criteria that the court is required to consider in determining the amount and duration of a spousal support order:

> 33(9) In determining the amount and duration, if any, of support for a spouse or parent in relation to need, the court shall consider all the circumstances of the parties, including,
>
> (a) the dependant's and respondent's current assets and means;

(b) the assets and means that the dependant and respondent are likely to have in the future;

(c) the dependant's capacity to contribute to his or her own support;

(d) the respondent's capacity to provide support;

(e) the dependant's and respondent's age and physical and mental health;

(f) the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together;

(g) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;

(h) any legal obligation of the respondent or dependant to provide support for another person;

(i) the desirability of the dependant or respondent remaining at home to care for a child;

(j) a contribution by the dependant to the realization of the respondent's career potential;

(k) [Repealed: 1997, c. 20, s. 3 (3).]

(l) if the dependant is a spouse,

(i) the length of time the dependant and respondent cohabited,

(ii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,

(iii) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(iv) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(v) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support,

(v.1) [Repealed: 2005, c. 5, s. 27 (12).]

(vi) the effect on the spouse's earnings and career development of the responsibility of caring for a child; and

(m) any other legal right of the dependant to support, other than out of public money.

[171] The criteria in s. 33(9) do not represent a closed list and the relative importance of each will be determined by the surrounding circumstances.

(e) *current assets and means and accustomed standard of living*

[172] Catherine's current assets and means are no less now than they were before separation and her standard of living has not diminished, as she has the same employment and replaced one spouse with another earning a comparable income. (I do not accept her evidence that Sam's only contribution to the household coffers is a monthly payment of $600. Such an arrangement is inconsistent with "the beautiful relationship" about which Catherine testified.)

[173] Apart from 2010 (when his income was much higher than normal), the same can be said of Larry.

[174] Standard of living is a measure of dependency in long-term marriages: see *Fisher v. Fisher* (2008), 88 O.R. (3d) 241 (C.A.), at para. 56. This is not a long-term marriage.

(f) *future assets and means*

[175] It is likely that the best income years for Catherine lie ahead and her future assets and means soon will improve beyond that which existed at the time of separation.

(g) *Larry's capacity to provide spousal support*

[176] For the first three years following separation (2007, 2008 and 2009), Larry did not have the capacity to provide spousal support. That capacity did not exist until 2010.

(h) *need and self-sufficiency*[38]

[177] "Self-sufficiency . . . is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation. See *Linton v. Linton* (1990), 1 O.R. (3d) 1 (C.A.), at pp. 27-28 . . . Thus, a determination of self-sufficiency requires consideration of the parties' present and potential incomes,

[38] Although some authorities appear to distinguish need and self-sufficiency, I view them as synonymous. If one has need, one is not self-sufficient; if one is self-sufficient, one is not in need.

their standard of living during marriage, the efficacy of any suggested steps to increase a party's means, the parties' likely post-separation circumstances (including the impact of equalization of their property), the duration of their cohabitation and any other relevant factors": see *Fisher, supra,* at para. 53.

[178] On her own, Catherine would have need and not be self-sufficient at this time. However, considering her current family unit, she is in the same position, or better, than she was before separation. She will achieve on-her-own self-sufficiency when she secures full-time employment with the District School Board of Niagara.

(i) *compensatory support*

[179] "The concept of economic advantage or disadvantage arising from the marriage is the foundation for the principles of compensatory support": see *Fisher*, *supra,* at para. 43.

[180] Economic disadvantage may arise from the marriage and/or from its breakdown: see *Fisher, supra,* at paras. 46-48.

[181] What is compensatory support? It is support designed to: compensate a spouse "for foregone careers and missed opportunities during the marriage";[39] to serve as "reimbursement . . . for . . . hardships accrued as a result of the marriage";[40] and, to compensate "for contributions to the marriage and for losses sustained as a consequence of the marriage".[41] In practice, the two most common situations leading to compensatory support seem to arise where one spouse (usually the wife) gives up or compromises her education, training or career to raise the children of the marriage or does so to support the education, training or career of her husband.

[182] To justify an award of compensatory spousal support, it is not enough that one spouse suffers an economic deprivation or that the other spouse experiences a financial gain because of the roles adopted in the marriage. The deprivation or the financial gain must be significant. The court should not engage in the making of fine calculations of net gains and losses and balance exactly all contributions to the

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39 *Bracklow v. Bracklow* (1999), 44 R.F.L. (4th) 1 (S.C.C.) at 16.
40 *Bracklow, supra,* at 21.
41 *Bracklow, supra,* at 22.

marriage. Marriage and the decisions made during marriage are too complex to permit a painstaking analysis of such things.

[183] Obviously, entitlement to an award of compensatory support must be established to the civil burden of proof.

(j) *balancing of circumstances*

[184] The purposes of spousal support, and the criteria for determining the amount and duration of that support, require a balancing of the circumstances of the parties.

(k) *no motion for temporary spousal support*

[185] In the two years or so between the commencement of these proceedings and the trial, Catherine did not bring a motion for temporary spousal support (and it is to be noted that she was represented by a lawyer during this period). The well-accepted view of temporary spousal support says that it is intended to allow the recipient spouse to live comfortably until trial. Consequently, the unexplained failure to bring such a motion is a relevant factor regarding the issue of need, but not so on the question of entitlement to compensatory spousal support.

(l) *relationship between Catherine and Sam*

[186] The relationship between Catherine and Sam appears to be stable. Not only was Sam willing to adopt Brandon and Taylor in early 2007, but, in 2009, he included them as beneficiaries under the medical benefits available through his employment.

[187] It is the law that cohabitation with a new partner (or even remarriage) is not an automatic bar to spousal support – a reality rarely accepted by the payor spouse.

[188] Determining the effect of cohabitation on spousal support is easier in the face of factual extremes (not present in this case). Here, the duration of the marriage is neither short nor long; and, Catherine, the recipient spouse, is neither young nor old.

(m) *provisional conclusion on spousal support*

[189] The fact that Catherine has re-partnered with a spouse who earns approximately the same income as Larry, coupled with her entitlement to compensatory support, leads me to the conclusion that any award of spousal support should be time-limited and decline annually.

[190] I have in mind spousal support for a brief number of years measured from the date of separation. However, having found that Larry did not possess the capacity to pay spousal support for the first three years following separation (2007, 2008 and 2009), Catherine's entitlement would not commence until 2010. I do not think that it is fair or correct to use Larry's anomalous 2010 income as a basis for awarding spousal support for a period of time preceding 2010.

[191] I intend to look firstly at Rogerson and Thompson, *Spousal Support Advisory Guidelines,* (Department of Justice Canada, July 2008) ("*SSAGs*"), see what they produce in the way of amount and duration and then gauge their reasonableness in the circumstances of this case.

(n) *SSAGs*

[192] The *SSAGs* are a "useful tool" in calculating spousal support: see *Yemchuk v. Yemchuk* (2005), 16 R.F.L. (6th) 430 (B.C.C.A.), at para. 64.

[193] The *SSAGs* "employ an income-sharing model of support . . . [rather than relying on] . . . budget-based evidence": see *Fisher, supra*, at para. 94.

[194] The *SSAGS* "are neither legislated nor binding; they are only advisory. The parties, their lawyers and the courts are not required to employ them": see *Fisher, supra,* at para. 95.

[195] "In many cases, the [*SSAGs*] do not apply . . . they only apply to initial orders for support and not to variation orders . . . They do not apply in cases where a prior agreement provides for support and, obviously, where the requisite entitlement has not been established . . .": see *Fisher, supra,* at para. 96.

[196] The claim by Catherine for spousal support arises from "a prior agreement" and requests a "variation" order. I suppose, on a strict analysis, therefore, the *SSAGs* do not apply. On the other hand, it does not seem sensible to allow a one-dollar-a-year spousal support provision in a separation agreement to foreclose

reliance upon the *SSAGs.* One dollar annually is not so much a support provision as it is a jurisdiction-preserving device.

[197] The *SSAGs* "suggest a range of both amount and duration of support that reflects the current law": see *Fisher,* at para. 98.

[198] There are two passages from the *Fisher* decision that seem to be inherently contradictory:

(a) After assessing the amount and duration of spousal support "in the traditional manner . . . based on the circumstances involved, it is helpful to consider the reasonableness of this award by reference to the [*SSAGs*]": see paras. 101 and 92; and,

(b) In cases where the trial judge "decides to award a quantum of support outside the suggested range [of the *SSAGs*]," he or she should provide reasons "explaining why the [*SSAGs*] do not provide an appropriate result": see para. 103.

[199] I would have thought that assessing spousal support "in the traditional manner" (where rules of thumb were developed judge by judge), would not be the preferred starting point, as the shotgun results thereby produced are what prompted the creation of the *SSAGs*.

[200] If a trial judge must explain why his or her support order is not within the range suggested by the *SSAGs,* is this not the equivalent of relying on the *SSAGs* in the first instance and departing therefrom only with good reason?

[201] Although in *Fisher,* the Court stated that "the structure of" its reasons followed the approach in (a) above, I do not interpret the case as decreeing this approach to be mandatory. Consequently, I think that it is acceptable to look firstly at the *SSAGs* as long as one then considers the reasonableness of the result in all of the circumstances of the case. The *SSAGs* have not yet attained the fine-tuning sought by their creators, but if they "suggest a range of both amount and duration that reflects the current law," they are a worthy and dependable starting point in the hunt for a fair and predictable spousal support award.

(o) *amount and duration under the SSAGs*

[202] Larry's projected annual income for 2010 is $81,000 (rounded). Using Catherine's income as set out in her sworn financial statement and applying the with-child-support formula under the *SSAGs,* the monthly spousal support range is: $98(low); $466(mid); and $863(high). The minimum duration under the *SSAGs* is 5.5 years and the maximum is 11 years, both measured from the date of separation. The minimum period of 5.5 is generally what I thought would be appropriate (I was considering five years). Had Larry been earning $81,000 annually since separation, I would have selected the mid-range support figure of $466, preferring to be conservative in the circumstances of this case,[42] and require that it be paid for the first year after separation, declining to $400 in the second year, $350 in the third year, $300 in the fourth, $250 in the fifth and $200 in the remnant year.[43] As Larry's ability to pay did not arise until the fourth year after separation, I order (but still provisionally) monthly spousal support of $300 in 2010, $250 in 2011 and $200 for the first six months of 2012.[44]

(p) *spousal conduct*

[203] Notwithstanding the *SSAGs,* s. 33(10) of the *Family Law Act* gives a discretion to the court to consider spousal conduct in arriving at the amount of support:

> 33(10) The obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship.

[204] Section 33(10) contains a number of key words and phrases, but they are straightforward in meaning and do not present any semantic tricks.

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[42] Why conservative? As I have already pointed out, Catherine quit full-time employment (with pension benefits) before separation and replaced it with part-time work (and did so for reasons unassociated with her role or duties in the marriage). She has not taken steps or even made inquiries about improving her position in the job market and she is living common law in a brief but stable relationship with a man earning an income comparable to that of Larry.

[43] For the sake of interest, I point out that the range of monthly spousal support under the *SSAGs* is $0-$0 if Larry's annual income were to be $64,000, $0-$174 if $68,000, $0-$273 for $70,000 and $0(low)-$146(mid)-$477(high) at $74,000, with the income for Catherine being as found in her sworn financial statement.

[44] Although the commencement date for the calculation of spousal support is October 1, 2006, and the 5.5 years should be measured from that date, for convenience, I have used January 1, 2007 as the first payment date. Therefore, the six months of the remnant year would begin on January 1, 2012.

[205] To begin with, "course of conduct" requires something more than an isolated incident.

[206] The words "unconscionable", "obvious", "gross," "repudiation" and "relationship" have meanings in everyday parlance consistent with their use in law. They are defined in *The New Shorter Oxford English Dictionary* to include the following: "unconscionable" – "showing no regard for conscience; not in accordance with what is right or reasonable";[45] "obvious" – "plain and evident to the mind; perfectly clear or manifest; such as common sense might suggest"; "gross" – "flagrant, glaring"; "repudiation" – "rejection, disownment, disavowal"; "relationship" – "an emotional association between two people; the state of being related" and "related" means "connected by blood or marriage."

[207] Section 33(10) provides clear guidance as to when the court may consider the typically-taboo topic of spousal conduct. There is no need to formulate a test.[46] Section 33(10) contains its own test; and it will be a rare case that passes the test.

[208] Section 33(10) does not restrict "a course of conduct" to pre-separation conduct. Also, "relationship," in my opinion, includes the relationship of spouses as co-parents. The relationship of parent and child is inextricably linked to that of husband and wife. Accordingly, I am permitted to consider the post-separation alienation that Catherine created between Taylor and Larry in determining the amount of spousal support to which Catherine is entitled.

[209] The parental alienation[47] in this case reflects an intent by Catherine to destroy the relationship between Taylor and Larry; it is shocking conduct. It also amounts to a hideous repudiation of the relationship between Catherine and Larry as co-parents of Taylor. The harm here probably is irreparable. Certainly, it is extremely serious at best. How could such conduct not satisfy the requirements of s. 33(10), stringent as they are?

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[45] And "shocking," as I pointed out in an earlier footnote.

[46] In *Morey v. Morey* (1978), 8 R.F.L. (2d) 31 (Ont. Prov. Ct.), the court, dealing with s. 18(6) of the *Family Law Reform Act* (which is worded identically to s. 33(10) of the *Family Law Act*), outlined a number of guiding principles. Those same principles were relied on in *B.(S.) v. B.(L.)* (1999), 2 R.F.L. (5th) 32 (Ont. Sup. Ct.). However, in my respectful view, these principles do not materially add to an understanding or application of s. 33(10).

[47] I point out that I am not concerned with "parental alienation" as a psychological or a psychiatric term. My reference to parental alienation is merely factual and reflects the ordinary dictionary meaning of the words: "parental" – "of, pertaining to, or in the nature of a parent"; "alienation" – "the act of estranging or state of estrangement in feeling or affection": see *The New Shorter Oxford English Dictionary*.

(q) *final conclusion on spousal support*

[210] While Larry's access-conduct has largely reflected nothing more than inept parenting, Catherine's parental-alienation behaviour has been evil. Is there a remedy?

[211] Dollars cannot replace the father-daughter relationship that Catherine has destroyed. However, in the circumstances of this case, justice has only a Hobson's choice. Catherine's alienation of Taylor and Larry must be condemned and, an effective method of expressing that condemnation, is by way of a reduction in spousal support.

[212] Accordingly, the spousal support to which Catherine would otherwise be entitled shall be reduced to one dollar monthly.

IV RESULT

[213] Despite the involvement of Niagara Family and Children's Services, Ms. Katz, Mr. Leduc and the court, the parties repeatedly have shown that they are immune to reason. Consequently, in my decision, I have tried ridicule as a last resort.

[214] I point out for the benefit of the parties that, these proceedings being an effort to vary their separation agreement, those provisions that I have not changed remain binding upon them and any future breach may have legal consequences. In other words, my decision does not replace the entire separation agreement. The matrimonial responsibilities and obligations of the parties are now encompassed by the separation agreement and by the orders that I now make:

1. The Application by Larry is dismissed.

2. The Claim by Respondent of Catherine is allowed in part.

3. The separation agreement is varied as follows:

(a) The words "Notwithstanding the fact that the parties have joint custody," in paragraph 7.2 of the separation agreement, shall be deleted.

(b) The contents of paragraph 8 of the separation agreement (access) shall be deleted. In their place, access by Larry to Brandon shall be as set out in paragraph [125] above. The separation agreement, therefore, shall be silent as to access to Taylor.

(c) The contents of paragraph 13.1 of the separation agreement (child support) shall be deleted and replaced with the following:

(i) Based on an income of $53,000 in 2008, Larry shall pay *Guidelines* table child support for 2008 in the sum of $798 monthly for the two children, payable on the first of each month commencing January 1, 2008;

(ii) Based on an income of $57,690 in 2009, Larry shall pay *Guidelines* table child support for 2009 in the sum of $866 monthly for the two children, payable on the first of each month commencing January 1, 2009;

(iii) Based on an income of $81,000 in 2010, Larry shall pay *Guidelines* table child support in the sum of $1,171 monthly for the two children, payable on the first of each month commencing January 1, 2010 until otherwise ordered.

(d) The contents of paragraph 6 (spousal support) are deleted and replaced by a provision by which Larry shall pay spousal support to Catherine in the sum of one dollar on the first of each month, commencing on January 1, 2010 and ending on June 1, 2012.

(4) Arrears of *Guidelines* table child support are fixed at $19,920 as of September of 2010.

(5) All other claims in the Claim by Respondent (but for costs) are dismissed.

[215] As for costs, I have not heard submissions on that issue. My strong preliminary view is that success in these proceedings has been mixed such that the parties should bear their own costs. However, not having heard argument on the matter, I do not feel that I am entitled to order no costs. If either party wishes to

seek costs they should obtain a date from the trial co-ordinator for that purpose. If neither does so within 60 days of the date of these Reasons, the final order on costs shall be as I have indicated.

[216] A word must be said about the children's lawyer, Mr. Leduc. I am indebted to him for his effective questioning of the witnesses and wise and helpful submissions. I expect that this was a trying experience for him. Throughout his year-long involvement in the case, he was contacted on numerous occasions by the parties and by the children. While generally siding with Larry's position, Mr. Leduc, nonetheless, conducted himself in a fair-minded manner, impartial to the parties, always alert to the best interests of the children and in the highest traditions of the Office of the Children's Lawyer.

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The Honourable Mr. Justice J.W. Quinn

RELEASED: November 29, 2010

CITATION: Bruni v. Bruni, 2010 ONSC 6568

COURT FILE NO.: 384/07

DATE: November 29, 2010

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CATHERINE McQUAT BRUNI

Applicant

- and -

LARRY BRUNI

Respondent

REASONS FOR JUDGMENT

J.W. Quinn J.

Released: November 29, 2010