V.M.Y. v. S.H.G., [2019] O.J. No. 6702

Ontario Judgments

Ontario Superior Court of Justice

F. Kristjanson J.

Heard: June 3-7 and 21, 2019.

Judgment: December 17, 2019.

Revised: January 8, 2020.

Court File No.: FS-17-415935

[2019] O.J. No. 6702 | 2019 ONSC 7279

Between V.M.Y., Applicant, and S.H.G., Respondent

(206 paras.)

Counsel

V.M.Y., Applicant, Not present.

Shawn Richard for S.H.G.

REASONS FOR DECISION

F. KRISTJANSON J.

OVERVIEW

1 This case is mainly about two children, twelve-year old A.B. and C.D., almost nine. And it is about the best interests of the children, the invasion of their privacy, and the effects of cyberbullying.

2 It is also about a father, V.M.Y., who has engaged in years of cyberbullying of the mother, S.H.G. on websites, YouTube videos, online petitions and emails. It is about a father who videotapes court-ordered access visits with the children--both in-person and on Skype--and edits and posts those access visits and photographs of the children on the internet, with commentary. It is about a father who publicly posts on YouTube a video of his son cowering under a table while the father harangues him over Skype on a court-ordered access visit. It is about a father who posts videos of him describing his daughter, who suffers from a neurological disorder, as looking drugged, when she used to be "normal," and posting that his daughter has a "broken" mind.

3 Despite court orders prohibiting posting, the father continues his cyberbullying campaign abusing S.H.G. and her parents. He seeks to undermine the administration of justice through an online campaign to "unseat" a judge of this Honourable Court for rulings made, internet attacks on trial witnesses and the wife's lawyer, and by flouting court orders and family law disclosure obligations.

4 It is within this context that the court must determine parenting issues in the best interests of the children, a restraining order, child and spousal support, equalization and property issues, and a civil claim for intrusion on seclusion, intentional infliction of mental suffering, invasion of privacy, and punitive damages.

BACKGROUND FACTS

A. The Family

5 The parents married in October 2000 and separated in September 2016. They have two children. Their daughter, A.B., is almost twelve. A.B. has an unspecified neurological disorder and is on the autism spectrum. She requires special needs supports, including significant educational supports. Their son, C.D., is almost nine years old.

6 V.M.Y. is a dual Canadian-U.S. citizen, and S.H.G. is a UK citizen. The family has moved many times, mainly to accommodate V.M.Y.'s work as a music video director and television show and documentary producer. They lived in Los Angeles from 2000 to 2012, with a stint in New York City from 2002-2005. They moved to London, England in 2012 but then relocated to Toronto, where V.M.Y.'s family lives, in December 2013. They returned to Los Angeles from December 2014 to March 2015, and moved back to Toronto from April 2015 to October, 2016, when they separated.

7 I find that V.M.Y. was abusive during the marriage. V.M.Y. damaged furniture in anger, including with knives; trashed a laptop; threatened to kill both himself and S.H.G.; engaged in significant verbal abuse, including in front of the children; and orally threatened that if his business did not succeed, he would kill himself and the children. In December 2015 V.M.Y. wrote an email attacking the respondent and her "satanic cruel family." He threatened that if S.H.G. sought to "take the children from [him]" or limit the time that he spends with the children he would "ensure that the damage done is irreparable" to S.H.G. and her family.

8 The parties agree that their marriage ended September 19, 2016, when V.M.Y. asked for a divorce.

9 On October 16, 2016, S.H.G. left Ontario with the children. Before she left, she bought roundtrip tickets and registered a matrimonial home designation. When S.H.G. arrived in London, England, she informed V.M.Y. and his parents of where she and the children were. She also advised the children's school that they would be missing a few weeks of school. After arriving in London S.H.G. enrolled the children in a local school which the children continue to attend.

B. The Hague Convention Process

10 V.M.Y. started proceedings under the *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 ("Hague Convention") to secure the return of the children to Ontario. The Hague Convention has two objects: to enforce custody rights and to secure the "prompt return" of

children wrongfully removed or retained: *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 (CanLII), [2018] 1 S.C.R. 398 at para. 24.

11 S.H.G. and the children resided in London, England from October 2016 to June 2018. The High Court of Justice Family Division in London, England ordered the children returned to Ontario.

12 During the Hague proceedings, V.M.Y. retained a private investigator to follow S.H.G., her parents and the children. The private investigator placed a tracking device underneath her parents' car. The private investigator followed and photographed S.H.G., her parents and the children at their home, at church, at malls, in parking lots, in restaurants, and in parks.

13 During the Hague proceedings V.M.Y. exercised some parenting time with the children. Under two orders by English courts in the Hague proceedings, V.M.Y.'s parenting time was always supervised by his mother or a third-party supervisor. Notwithstanding this supervision, without S.H.G.'s knowledge or consent, V.M.Y. recorded and then posted on the internet excerpts of his parenting time with the children, in videos which the court viewed.

14 There have been significant gaps in V.M.Y.'s in-person parenting time with the children. He did not see the children in person from September 2017 to May 2018, and he has not seen the children in person since September 2018.

C. S.H.G.'s Return to Ontario With the Children

15 On June 18, 2018, S.H.G. and the children returned to Ontario in accordance with an order of the High Court of Justice Family Division. At the time of the order, V.M.Y. was residing in Los Angeles, California.

16 In support of his Hague Application for the return of the children to Ontario, on December 19, 2016 V.M.Y. gave an undertaking to the High Court of Justice, Family Division in England to make the matrimonial home available for S.H.G. and the children. He did not advise the High Court of Justice that he had executed an Agreement of Purchase and Sale for the matrimonial home in March 2017. S.H.G. discovered the matrimonial home had been sold when a neighbour sent her a photograph of the sold sign on the property. Acting as V.M.Y.'s attorney for property, the applicant's father, B.Y., sold the matrimonial home on March 2, 2017, for $1,136,500. The date of closing was April 20, 2017, later extended to May 2018.

17 After the children returned to Ontario, S.H.G. brought an emergency overholding motion in June 2018. V.M.Y. was to have parenting time on June 24, 2018 and return the children to S.H.G.'s care on June 25, 2018. Yet V.M.Y. did not return the children and refused to disclose their location. During this time V.M.Y. again recorded his access with the children and took them to an undisclosed hotel. On an emergency motion returnable June 26, 2018, the court ordered V.M.Y. to return the children to S.H.G.'s care. The justice granted S.H.G. temporary without prejudice custody of the children during access visits, granted V.M.Y. supervised access, ordered V.M.Y. not to film or record the children, and ordered V.M.Y.'s lawyer to disclose his current address.

D. Court Approved Return to the UK

18 On September 11, 2018, a justice of the Ontario Superior Court of Justice in Toronto:

* dismissed V.M.Y.'s motion seeking to have the judge to recuse herself for bias,
* granted S.H.G. temporary sole custody of the children,
* ordered the parties to engage Andrea Himel to prepare a voice of the child report,
* permitted S.H.G. to return to London, England with the children,
* granted V.M.Y. supervised in-person parenting time,
* granted V.M.Y. Skype access to take place three times per week, and,
* ordered the trial of the custody, access and mobility issues to take place in Toronto.

E. V.M.Y.'s Conduct

1. V.M.Y.'s Online Activities

19 V.M.Y. has created two main websites which contain embedded links to many videos involving the children. One website is focused on S.H.G., her parents and their family business. The other is a website for a campaign to "unseat" a justice of the Ontario Superior Court of Justice (the "Named Justice") for her rulings in this case. The court viewed the content on both websites, which contain links to other content created by V.M.Y.. On top of the websites, the court viewed ten videos posted on V.M.Y.'s YouTube channel, his Facebook page, his Go Fund Me page to "save an abducted autistic girl from captivity", and two online petitions to remove the Named Justice from the bench.

20 Those websites and videos are hearsay. They are not admitted for the truth of the allegations made by V.M.Y. against S.H.G., her parents and other family members, her lawyer, her witnesses, or the Named Justice. That said, I admit the websites, postings and videos as evidence of the allegations that V.M.Y. has made against the above individuals. They are evidence of the fact that he has recorded his Skype access and parenting time with the children in breach of the court order of June 26, 2018, evidence of his comments about the children online, and evidence of the lengths V.M.Y. has gone to cyberbully and harass S.H.G., her family, her witnesses, her lawyer, and a judge of the Superior Court of Justice.

21 The material posted online by V.M.Y. contains photographs and videos of the children, personal identifying information, and comments about the children. Both main websites include links to YouTube videos of V.M.Y.'s court-ordered parenting time with children, both in-person and Skype access. S.H.G. testified that the children do not know that they are being recorded. V.M.Y. did not tell S.H.G. that he intended to post the videos. S.H.G. never consented to V.M.Y.'s posting of the children's images and videos, which was done contrary to a court order of June 26, 2018. V.M.Y. has refused to remove the videos and images contrary to an order of this court of April 18, 2019.

22 The court spent hours viewing the videos, websites, petitions and internet posts during the trial. A few examples will suffice. In one video, he states that his daughter is "stuttering" because her violent and abusive grandmother "kidnapped" and "drugged" his daughter. He specifically contrasts pictures of his daughter "before" and "after", with the clear inference that his daughter has declined. He calls his daughter "autistic" on the internet postings, even though S.H.G. testifies that they try to avoid labelling. He writes that his "autistic daughter" has been drugged with "opiates and other tranquilizers." In his posts he states he has documented the "mental degradation" of his child; the "before and afters" which show A.B.'s "broken" mind, that A.B.'s mental health is "incredibly damaged." Another online video depicts C.D. cowering under a table during a court-ordered access Skype call with V.M.Y. and his mother, S.Y., with V.M.Y. loudly haranguing his son for not getting out from under the table.

23 V.M.Y. has posted images and videos of S.H.G. and her parents with written and oral commentary accusing them of various illegal acts including kidnapping, child abuse, stealing money from the UK government, multiple "felonies" against the UK, U.S. and Canadian governments, assault, drugging the children, slapping the children, death threats, "breaking countless laws," forging documents, fraud and abusing the children. Both S.H.G. and S.G. denied the allegations, and I accept their evidence. One of his online petitions, entitled "Demand an End to Corruption in Family Law - Investigate the G. Family for Kidnapping, Fraud, and Child Abuse" has several online supporters who have signed the petition, many from the UK, one of whom posted that a young man gave her a flyer at the Armenian Church in the UK, others of whom said they knew the family personally.

24 The children live with their mother and their maternal grandparents, the focus of the online campaign. The online materials pose specific issues for A.B. At some level, A.B. must appreciate that she differs from her friends. The evidence establishes that she excels in areas despite her neurological disorder. She is entering puberty and is almost twelve. V.M.Y. narrates his videos with commentary such as "she used to be age appropriate," posting "before" and "after" pictures stating that she used to be "normal" and now, she is "three years behind", and "look at how she slurs her words, cannot say "Happy New Years."

25 V.M.Y. must be aware of the consequences for the children if they or their peers view the online content that he has posted. He has chosen to place his interests first. Remarkably, on the final day of the trial V.M.Y. emailed S.H.G. threatening to release additional videos.

26 S.H.G. has sought the removal of the rest of the online material, but to date YouTube has only blocked the channel to Canadians (however, Canadians can still view the individual videos). A single petition was removed, but V.M.Y. replaced it.

2. Attacks on the Administration of Justice

27 In his videos, petitions and online posts, V.M.Y. attacks the administration of justice through his attacks on the Named Justice, one of S.H.G.'s lawyers, and some of S.H.G.'s witnesses including those who provided evidence to this court.

28 On November 1, 2018, V.M.Y. registered a website to "unseat" the Named Justice. On November 25, 2018, V.M.Y., in an email sent to his then lawyers and to his father, expressed his desire to "start a movement to get [Named Justice] unseated". The website states that it is "a site dedicated to the removal and punishment of a corrupt and Racist Anti-American Canadian judge named [Named Justice] and a corrupt lawyer named [one of S.H.G.'s lawyers]." The website seeks the removal of the Named Justice from the bench and the removal from the bar of one of S.H.G.'s lawyers. V.M.Y. also started an online petition to remove the Named Justice, which appears to have been signed by third parties judging from the online comments.

29 He accuses the Named Justice of ruling with bias and extremism; being racist against U.S. citizens, ignoring evidence of child abuse; abuse of power; and calls her a judge who does not want to protect the law. He accuses the Named Justice and one of S.H.G.'s lawyers of "corruption" and "collation", which I take to mean collusion. He accuses one of S.H.G.'s lawyers of being a liar, unethical, playing dirty, who made the Children's Aid Society "ignore" child abuse and stopped the investigation of child abuse.

3. Reporting S.H.G. and Her Parents to the Authorities

30 V.M.Y. has made several unsubstantiated accusations against S.H.G. and her family to various authorities in the United States, the United Kingdom and in Canada.

31 V.M.Y. reported S.H.G. and her family to the Metro London Police thirteen times between September 2016 and June 2018, including twice in February 2018. The Metro London Police have never reported any concerns for the children's welfare.

32 In October 2016 V.M.Y. reported S.H.G. and her family to the Los Angeles Police Department to tell them that S.H.G. had kidnapped the children, although the children had not lived in California since March 2015.

33 V.M.Y. reported S.H.G. and her family to the Toronto Police Service, alleging that S.H.G. and her mother were abusing A.B.

34 Between June 2018 and September 2018, V.M.Y. reported S.H.G. to the Children's Aid Society of Toronto eight times. The Children's Aid Society of Toronto closed its investigation in August 2018. In September 2018, V.M.Y. reported to the Children's Aid Society that S.H.G. and her mother had abused A.B. He told the Children's Aid Society that if he had an open file, he could stop S.H.G. from returning to London, England with the children.

35 V.M.Y. reported S.H.G. and her family to the children's school in London. In February 25, 2018, V.M.Y. emailed the headmaster of the children's school in the United Kingdom and reported to Ms. Beck that the children were in danger.

36 V.M.Y. reported S.H.G. and her family to the local child welfare services in London, England (Brent Family Services). In March 2017, V.M.Y. advised Brent Family Services that S.H.G. was abusing the children. Brent Family Services investigated the allegations and later closed its file in May 2017. In early 2018, V.M.Y. again reported to Brent Family Services that S.H.G. was abusing the children. In April 2018, Brent Family Services again closed its file.

37 V.M.Y. reported S.H.G. to the U.S. State Department and the FBI. V.M.Y. complained to the U.S. State Department that S.H.G. had forged his signature. B.Y., V.M.Y.'s father, gave evidence that the FBI told V.M.Y. that if S.H.G. returned to the U.S. she would be arrested and may face jail time. S.H.G. sought to verify the truth of these claims but failed.

38 In July 2018, V.M.Y. and his father attended before a Justice of the Peace in Toronto seeking to lay a private charge against S.H.G.'s mother. He swore that S.H.G.'s mother had "continually sexually assaulted" him, been violent with him, threatened to have him killed, and had slapped and abused his daughter. The charges were withdrawn before the hearing.

4. V.M.Y.'s Abusive Emails

39 Throughout the proceedings, V.M.Y. sent S.H.G. abusive emails. S.Y. testified that V.M.Y.:

(a) compared S.H.G. to "sadistic animals"

(b) called her a "Beast to the human soul"

(c) called her an "absolute liar"

(d) called her "reprehensible"

(e) called her a "child abuser, child drugger"

(f) asserted that she "doesn't think"

(g) asserted that she has "destroyed" the children

(h) asserted that alcohol has eroded her "sanity and mind"

(i) accused her of "threatening, drugging and brainwashing A.B.", and

(j) told her that she needs to go to jail.

5. Failure to Comply with Court Orders

40 V.M.Y. has flouted the following court orders:

(1) Final order of Justice Stewart made on June 8, 2018, paragraphs 6 (to pay S.H.G. $5,795.00 per month for two months and he paid one month only), 10 (not to intimidate or harass S.H.G.);

(2) Temporary order of Justice Stewart made on June 8, 2018, paragraphs 4 (to amend his application in 15 days) and 6 (before access, to provide a detailed itinerary as to where the children would stay and a phone number to reach the children);

(3) Temporary order of Justice Akbarali made on June 26, 2018, paragraphs 9 (to pay costs of $16,167.19 within 30 days) and 13 (not to film or record the children, nor permit anyone else to film or record the children during access visits);

(4) Temporary order of Justice McWatt made on July 9, 2018, paragraphs 1 (to pay $5,795.00) and 6 (to pay costs of $1,000.00);

(5) Temporary order of Justice Monahan made on October 26, 2018, paragraph 7 (to provide an unedited copy of a videotape);

(6) Final order of Justice Diamond made on January 22, 2019, paragraph 6 (completion of questioning--V.M.Y. failed to attend the scheduled questioning); and

(7) Temporary order of Justice Akbarali made on April 18, 2019, its entirety, discussed below.

41 On April 18, 2019, Justice Akbarali further ordered V.M.Y. to:

* remove four internet sites and remove from the internet all posts in writing referring to, and all videos and images of, the children, S.H.G. and her family, and the family business.

* not post to the internet any such videos, images or writing in the future;

* not record his access with the children;

* identify in writing to S.H.G.'s counsel all videos and images and posts in writing posted to the internet of the children, S.H.G. and her family, or the family business; and

* stop harassing or speaking ill of S.H.G. and her family.

42 V.M.Y. has violated this order in its entirety. Indeed, posts were made in the three weeks just before the trial, he continued to record and post the access visits, and on the last day of trial sent an email threatening to post more videos.

THE ISSUES

43 The issues are:

(1) Should the court grant a restraining order against the applicant?

(2) What orders should be made on parenting issues of custody and access?

(3) Should the children be permitted to reside with the respondent in England?

(4) Is the respondent entitled to spousal support?

(5) What are the incomes of the parties for spousal and child support purposes?

(6) How much child and spousal support is to be paid by the applicant?

(7) Should the court grant security for support?

(8) What payments are required for equalization and property issues?

(9) Should the court award the respondent damages in nuisance, harassment, intentional infliction of mental suffering, invasion of privacy and punitive damages?

(10) Should the court grant the request for a divorce?

Issue #1: Should the court grant a restraining order against V.M.Y.?

44 Section 46(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 ("FLA") permits the court to make an interim or final restraining order against a spouse or former spouse if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody. By final order dated June 7, 2019, I granted a final restraining order under section 46 of the *Family Law Act*. These are my reasons.

45 Key elements in determining whether a restraining order should issue as summarized by Paulseth, J. in *Children's Aid Society of Toronto v. L.S.*, 2017 ONCJ 506 at para. 44 include:

* Restraining orders are serious and should not be ordered unless a clear case has been made out. See: *Ciffolillo v. Niewelglowski*, 2007 ONCJ 469.

* A restraining order is serious, with criminal consequences if there is a breach. It will also likely appear if prospective employers conduct a criminal record (CPIC) search. This could adversely affect a person's ability to work. It may affect a person's immigration status. See: *F.K. v. M.C.*, 2017 ONCJ 181.

* It is not sufficient to argue that there would be no harm in granting the order. See: *Edwards v. Tronick-Wehring*, 2004 ONCJ 195.

* Before the court can grant a restraining order, it must be satisfied that there are "reasonable grounds for the person to fear for his or her own safety or for the safety of their child". See: *McCall v. Res*, 2013 ONCJ 254.

* The person's fear may be entirely subjective so long as it is legitimate. See: *Fuda v. Fuda*, 2011 ONSC 154, 2011 CarswellOnt 146 (Ont. S.C.J.); *McCall v. Res, supra*.

* A person's subjective fear can extend to both the person's physical safety and psychological safety. See: *Azimi v. Mirzaei*, 2010 CarswellOnt 4464 (Ont. S.C.J.).

* It is not necessary for a respondent to have actually committed an act, gesture or words of harassment, to justify a restraining order. It is enough if an applicant has a legitimate fear of such acts being committed. An applicant does not have to have an overwhelming fear that could be understood by almost everyone; the standard for granting an order is not that elevated. See: *Fuda v. Fuda, supra*.

* A restraining order will be made where a person has demonstrated a lengthy period of harassment or irresponsible, impulsive behaviour with the objective of harassing or distressing a party. There should be some persistence to the conduct complained of and a reasonable expectation that it will continue without court involvement. See: *Purewal v. Purewal*, 2004 ONCJ 195.

46 Based on all the evidence, I find that a clear case has been made out for a permanent restraining order. I am satisfied that there are reasonable grounds for S.H.G. to fear for her own safety and for the safety of her children. This encompasses both physical safety and psychological safety, based on a long period of egregious and continuing threats and menace to S.H.G. and those whom V.M.Y. perceives support S.H.G.. These include S.H.G.'s parents, her lawyer, her witnesses and a judge who issued orders with which V.M.Y. disagrees. I find that there has been persistence to the conduct complained of and there is a reasonable expectation that it will continue without court involvement because it has persisted despite the court orders of June 26, 2018 and April 19, 2019: *Purewal v. Purewal*, 2004 ONCJ 195, para. 40.

47 The facts in support of such an order include:

(a) V.M.Y. has created webpages and a YouTube channel dedicated to cyberbullying S.H.G. and her family. But what is of greatest concern is that he has also posted videos of the children in which he identifies the behaviour of A.B., who is 11 years old and has a neurological disorder, as being the behaviour of a drugged and autistic child who is not "normal". He is mocking her behaviour.

(b) Both children have access to the internet, as do their peers. V.M.Y.'s comments about A.B. are particularly concerning. He appears to have no insight as to how A.B. could interpret his commentary.

(c) On the internet V.M.Y. accuses S.H.G. and her parents, with whom the children live, of kidnapping, child abuse, stealing money from the UK government, assault, drugging children, fraud, making death threats, breaking laws in the U.S., UK and Canada, and more.

(d) V.M.Y. has disseminated these statements and links to the websites and videos to S.H.G.'s family and friends, as well as to business and church associates of S.H.G. and her parents. He has sent targeted emails urging people in the family business (owned by the maternal grandfather, and where the mother works) and in the Armenian community in London, England (in which the maternal family is an active participant) to view the abusive websites and videos.

(e) V.M.Y. has invited the public at large, through the internet, to view videos of A.B. and C.D. online, and to join him in cyberbullying S.H.G., her parents, one of her lawyers, her witnesses and a judge of this Honourable Court.

(f) In response to S.H.G.'s expressed concerns about the effect of V.M.Y.'s activity online, the applicant sent her messages posted by strangers, including some resident in the UK;

(g) S.H.G. is concerned that one of these people who V.M.Y. is inciting could find the address of her parent's business online and track the family down;

(h) S.H.G. is terrified of this prospect, which flows from V.M.Y.'s conduct;

(i) She is having nightmares as a result of V.M.Y.'s conduct and worries about the safety of the children and her own safety;

(j) S.H.G. now dreads the court-ordered Skype calls, which V.M.Y. records;

(k) V.M.Y. is posting videos attacking S.H.G.'s witnesses; and

(l) V.M.Y. threatens that there is "Much Much Much More Coming Soon...".

48 I grant a permanent restraining order on the terms set out in the Order below.

Issue #2: What orders should be made on parenting issues of custody and access?

A. The Best Interests of the Child Framework

49 Parenting orders are made in the best interests of the children, as set out in sections 16 (8)- (10) of the *Divorce Act*, RSC 1985, c. 3 (2d Supp), taking into consideration "only the best interests of the child ...as determined by reference to the condition, means, needs and other circumstances of the child."

50 Section 16(10) of the *Divorce Act* establishes the maximum contact principle, that a child should have as much contact with each spouse as accords with the best interests of the child. Parliament has expressed its opinion that in general, court orders are intended to promote the opportunity of the child to know each parent and to enjoy the benefit of what each parent has to share with their children, but only where it is in the child's best interests. Maximum contact should be restricted only to the extent that it conflicts with the best interests of the child: *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at pp. 46, 117-18.

51 I am also guided by the factors relevant to the best interests of the child set out in sections 24(2), (3) and (4) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("CLRA").

1. The UN *Rights of the Child Convention* and Best Interests of the Child

52 I find that the best interests of the child must also be interpreted in a manner consistent with Articles 12, 16 and 23 of the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which Canada signed on May 28, 1990 and ratified on December 13, 1991 ("*Rights of the Child Convention*"). The use of the *Rights of the Child Convention* in interpreting the best interests of the child was endorsed by the Supreme Court of Canada in *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30, paras. 92-93.

53 In this case, the *Rights of the Child Convention* is particularly useful in analyzing privacy, disability and the views of the children.

(a) Privacy

54 The father has posted significant personal information about the children on the internet, including posted court-ordered access visits with the children on the internet, and has edited and labelled pictures and videos of the children, often with critical commentary, on the internet. Article 16 of the *Rights of the*

Child Convention provides broad protection of the right of a child to privacy:

> Article 16
>
> 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
> 2. The child has the right to the protection of the law against such interference or attacks.

55 In the family law sphere, the heightened vulnerability of children is a concern when parents use public internet postings in a way that intrudes on the privacy of children, as is the case here.

56 The Ontario Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, leave to appeal to the SCC refused, dealt with a child's right to privacy in the context of the confidentiality of lawyer-client litigation records in the Office of the Children's Lawyer. The decision confirms the importance of using the *Rights of the Child Convention* generally, and in cases where privacy interests are in issue. The Court emphasizes that because of children's vulnerability, courts have a duty to recognize, advance and protect their interests, including their privacy interests, holding that:

* The *Rights of the Child Convention* "requires that children be afforded special safeguards, care and legal protection by the courts on all matters involving their best interests, including privacy": para. 51, and
* "Children are among the most vulnerable members of society. Courts, administrative authorities and legislative bodies have a duty to recognize, advance and protect their interests. When children are the subject of a custody dispute or child protection proceedings, they are at their most vulnerable": para. 64.

57 At paragraph 74, the Court recognizes that the preamble to the *Rights of the Child Convention* directs that special safeguards and care, including legal protection, be afforded to children. The preamble states:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."

58 The Court of Appeal concludes at para. 75 that special safeguards required in view of the vulnerability of children, as recognized in the *Rights of the Child Convention*, include "[t]o have his or her privacy fully respected at all stages of the proceedings": *Convention*, art. 40(2)(b)(vii).

59 In *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, the Supreme Court considered the humiliation of sexualized online bullying in the context of restrictions on media coverage. In so doing, the court recognized that:

* children have an inherent vulnerability, well recognized in law (para. 17),
* the constitutional protection of privacy embraces the privacy of young persons, as an aspect of their rights under section 7 and 8 of the *Charter of Rights and Freedoms*,

* "the protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy of the young person" (para. 18); and
* it is logical to infer that children may suffer harm through cyberbullying. (para. 20)

60 For family law, I define cyberbullying as the use of electronic technology, including social media, text messaging, websites and email, in a manner that is intended to cause, or should reasonably be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property: adapted from *A.B. v. Bragg Communications*, para. 21.

61 In *E.H. v. O.K.*, 2018 ONCJ 412, Justice Sherr found at para. 133 that the father had "inappropriately vented about the mother and the court case on social media," and had posted the child's picture publicly on Twitter to solicit funding, a breach of the child's privacy and contrary to her best interests. He held at para. 134, and I agree that:

> [134] The court has the authority pursuant to clause 28 (1) (c) of the [*Children's Law Reform] Act* to make the orders sought by the mother and the child to prevent the father from making such postings and to require him to remove the existing ones. ...Many courts are now making such orders in the best interests of children...

62 As stated by Templeton, J. in a child protection case, *Chatham-Kent Children's Services v. A.H.*, 2014 ONSC 1697, but equally applicable to custody and access cases (at para. 42):

> [Children] are subject to the conduct and attitudes of the adults who interact with them. Disclosure to others of the intimacy of their lives is beyond their control. Without the ability or opportunity for critical thought, they are swept into a process of the balancing of rights of others and in that process, it can be difficult to hear their voice (emphasis added).

63 Children are particularly vulnerable to the online postings of a parent which expose the intimacy of a child's life which only a parent should have access to. Public posting of recorded in-person and Skype access visits with children, photographs of parental moments, and written and video commentary about the children in a cyberbullying campaign directed to undermining the spouse in family law litigation, viewed objectively, is an offensive intrusion on the privacy of the child. Court-ordered access visits are the right of the child--not a tool for parents to manipulate and then post publicly in a cyberbullying campaign against the other parent. I find that the father's websites, videos, petitions and postings are an intrusion on the privacy of these children and should reasonably be known to cause these children intimidation, humiliation, distress and harm to their feelings, self-esteem and reputation. Because of the extraordinary campaign of cyberbullying conducted by the father, where the images, access visits and voices of the children are plastered across the internet, it is essential to consider the father's actions as they affect the children's privacy in the context of the best interests analysis.

(b) **Disability**

64 Article 23 of the Convention applies to children with disabilities; it too serves as an interpretive source when addressing the best interests of the child. It provides:

> Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

65 The court must consider those aspects of the parenting plans that will support A.B. to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate her active participation in the community.

(c) **Views of the Child and the Right to be Heard**

66 The importance of hearing, and placing appropriate weight on, the views of the child is a critical development in family law. Article 12 of the *Rights of the Child Convention* provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

67 The principle of hearing the child's views and preferences and incorporating those views in judicial decision-making about matters affecting a child's best interests dovetails with section 24(2)(b) of the CLRA. A views of the child report is one important way in which a child can be heard in a family court proceeding affecting the child's future. It is important to recognize the agency of children, and where possible, to hear their voice before making custody and access decisions which have a profound effect on the life of a child.

68 The benefits to judicial decision-making of hearing a child's voice were set out by Martinson J. in *G. (B.J.) v. G. (D.L.)*, 2010 YKSC 44 as follows at paras. 21-22:

> [21] Obtaining information of all sorts from children, including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working successfully. They have important information to offer about such things as schedules, including time spent with each parent, that work for them, extra-curricular activities and lessons, vacations, schools, and exchanges between their two homes and how these work best. They can also speak about what their life is like from their point of view, including the impact of the separation on them as well as the impact of the conduct of their parents.
>
> [22] Receiving children's input early in the process, and throughout as appropriate, can reduce conflict by focusing or refocusing matters on the children and what is important to them. It can reduce the intensity and duration of the conflict and enhance conciliation between parents so that they can communicate more effectively for the benefit of their child. When children are actively

> involved in problem solving and given recognition that their ideas are important and are being heard, they are empowered and their confidence and self-esteem grow. They feel that they have been treated with dignity. In addition, children's participation in the decision-making process correlates positively with their ability to adapt to a newly reconfigured family.

69 Before the children returned to London, England in the fall of 2016, Andrea Himel prepared a views of the child report. After meeting with Ms. Himel several times, both children advised that they want to live in London, England. They miss their friends and cousins in England and would prefer to attend school at the UK school. C.D. and A.B. wanted in-person parenting time with their father to take place in London, England. I accept and give weight to the views of the children in assessing custody and access and relocation issues.

B. Findings re S.H.G. and the Best Interests of the Children

70 The only evidence before the court is that in the mother's care the children are thriving, are loved, are cared for, and are living peacefully with their mother in their grandparents' home in London, England. The mother has been the primary caregiver for the children since birth and has had sole responsibility for the children since 2016. Throughout their lives, the mother has taken responsibility for making medical and educational decisions, and she has made good choices. The mother is the one who has sought out professionals to identify and meet A.B.'s special needs to provide her daughter with a full and decent life. She has sought to create conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community, and which recognize and draw on state supports for assistance. By contrast, the father, in his videos, has exposed his daughter's life on the internet, disparaged his daughter's appearance and labelled her as appearing "drugged" and not "normal".

71 The mother has a detailed plan of care, which supports the love, affection and emotional ties with the maternal grandparents with whom the children live in England, and cousins, aunts and uncles involved in their upbringing. This is a stable and supportive family unit.

72 Both children currently attend the UK school in London, England. C.D. is progressing well at school. A.B. has received special education funding from the local authority in the form of a comprehensive Education Health and Care Plan ("EHCP"). A.B.'s EHCP results from assessments done by specialists in education, health, psychology and speech therapy. It focuses on specific, measurable, attainable, and realistic goals and timeframes.

73 A.B.'s time at the UK school is the longest time that A.B. has attended any school. A.B. has support from three members of staff at her school. Although A.B. has issues around anxiety and social communication, her teachers have reported several improvements, including that she is less anxious, is starting to build friendships, appears calmer in class, has made significant improvements socially, and is making progress acquiring self-help skills.

74 S.H.G. intends to support both children's educational development but continues to make special efforts for A.B. The affidavits of Honor Beck, Helena Donovan, Sinead Lay, Lisa Egan and Tony Crocker all lay out the support that is in place, a stable plan exclusively to support A.B. from now until she reaches age 25. That plan, which will be reviewed annually, has already been amended to increase A.B.'s one-on-one support from 19 to 26 hours per week to account for her anticipated change of school as she advances a grade level and to account for her potential increased need in support. In a few years, A.B. will also have input and involvement and will contribute to her EHCP, supporting her autonomy and ensuring her voice

is heard. If A.B.'s needs are not being met, there is a process in place to consult educational psychologists and other professionals to address A.B.'s needs.

75 S.H.G. intends to continue to keep V.M.Y. informed about the children's progress. S.H.G. has consistently shared the children's achievements in school, A.B.'s artwork and images of the children's important events with V.M.Y..

76 Although S.H.G. has encouraged the children to participate in the Skype calls with V.M.Y., she believes that the Skype calls should be limited to one call per week. S.H.G. wants the children to enjoy their Skype calls with their father. She believes that is her job as a mother, but she also wants the children to feel safe from harm. She testified that three times per week has been disruptive for the children whom she must coax onto the calls.

C. Findings re V.M.Y. and the Best Interests of the Children

77 V.M.Y. currently resides in Los Angeles, California and has been residing in Los Angeles since October 2016. V.M.Y.'s plan of care is largely unknown because he failed to participate in the trial.

78 There is no evidence other than disturbing videos about the relationship between the father and the children. The father has not had in-person access since September 2018. He has abused the court-ordered Skype access by videotaping, editing and posting those access visits.

79 I accept the evidence that the calls are disruptive because of V.M.Y.'s conduct, based on the evidence of S.H.G. and the portions of the court-ordered access posted on the internet, which I viewed. He shouts at C.D. when he hides under the table to avoid the Skype call. He grills A.B., putting an iPhone inches from her face, about whether her mother and maternal grandmother slap her, causing her great and visible distress. He confuses the children by claiming that other adults are in the room when they are not. During the trial, the court watched a video entitled "Z.G. &/or S.H.G. policing everything the kids say", April 2019. In the video, V.M.Y. points to an image from a Skype call with the children, claiming that it is the maternal grandmother monitoring the call. On careful examination the image is a combination of a vase and the reflection of the computer screen against a glass cabinet.

80 S.H.G. gave evidence C.D. often leaves the room during Skype calls because V.M.Y. tells the children that their grandmother is mean and hates him. S.H.G. has observed C.D. cowering under the table, but she has not intervened because she felt that it was not her place to do so. C.D. could be seen cowering under the table during a Skype call in a video viewed by the court during the trial.

81 Despite V.M.Y.'s abusive behaviour, S.H.G. still believes that it is in A.B. and C.D.'s best interests to have parenting time with their father. She has invited V.M.Y. to London, England to exercise parenting time with the children, although he has not done so.

82 About in-person parenting time, neither of V.M.Y.'s parents is an appropriate supervisor. V.M.Y. has videotaped the children in the presence of both of his parents. During the trial, the court reviewed videos posted by V.M.Y.. Those videos included clips of his Skype parenting time with the children. His mother was present during the Skype calls. Rather than discourage V.M.Y., his mother participated in his poor behaviour. His mother was also present during the parenting time detailed above and depicted in at least two videos viewed by the court.

83 Further, his father was aware of V.M.Y.'s online campaign to abuse S.H.G. and her family and

permitted V.M.Y. to use his e-mail address to facilitate the dissemination of that abuse within the Armenian community in London, and to the employees of the G. family business.

84 The father seeks to improperly undermine the children's relationship with their mother, which is an important consideration in determining his ability to meet their needs: *Jackson v. Jackson*, 2017 ONSC 1566, at para. 59.

85 Because he chose not to participate in the trial, there is no evidence of the other best interest factors in relation to V.M.Y..

86 V.M.Y. referred to several private schools in California where he will send the children. There is no evidence in the plan of care of any steps that will be taken to accommodate A.B.'s special needs. Based on his failure to answer undertakings, I find that V.M.Y. had no role in setting up speech therapy for A.B. in England, seeking to get A.B. assessed in 2012 through 2016; or providing input into any of her speech, language, special education or additional needs assessments in California or England, and his parenting plan does not refer to either assessments or accommodations in California.

87 Maximum contact may not always be possible or in the children's best interests. When the contact itself clashes with the best interests of the child, contact may be denied or curtailed. This is a case in which the best interests of the children clash with contact. Maximizing contact between V.M.Y. and the children is not desirable for these reasons:

(a) V.M.Y.'s current contact with the children is limited to Skype calls with the children. Despite V.M.Y.'s limited contact with the children, he has persisted in recording the children during the court-ordered Skype access calls (in breach of two existing court orders), and posting edited portions online;

(b) V.M.Y. flouts a court order by continuing to post images and information about the children online, as well as harassing and harmful allegations about the mother and maternal grandparents with whom the children live;

(c) He uses the videos and posts to make negative comments about the appearance of the children;

(d) V.M.Y. speaks negatively about S.H.G. and her parents to the children.

CONCLUSION

88 I make these findings:

1. Each parent has love and affection for the children. That said, the emotional ties with the mother are more consistent and developed given that she has been the sole caregiver since 2016. V.M.Y. has not spent time in person with the children since September 2018. He has used court-ordered Skype and in-person access to make videos, posted on the internet, of the children, criticizing the mother and her family in these videos.
2. There is a high level of conflict between the parties which has not declined post-separation. Indeed, V.M.Y. has taken many actions which fan the flames of conflict. Because of the conflict, attributable to V.M.Y., the parties cannot make decisions together jointly and cannot communicate or discuss parenting issues.

3. V.M.Y. focuses on himself and his interests; he does not focus on the needs of the children. V.M.Y. intrudes on the privacy of the children in his cyberbullying campaign, without considering the effect on the children of the intrusion on their privacy. He does not consider the likely harm if they discover, when conducting internet searches of their mother, their grandparents or the family business, both the intrusion on their privacy and the effect of internet attacks on those whom they love.
4. S.H.G. has a well-founded fear of V.M.Y.'s anger and threats, which undermines her sense of physical and psychological safety.
5. V.M.Y. has not shown insight into the effect of the conflict and his behaviour and choices on the children.
6. S.H.G. has been the children's primary caregiver since birth and sole caregiver since 2016. She has arranged school and extracurricular and social activities for the children, and the children are doing well.
7. S.H.G. has provided a stable home environment for the children, and can provide the children with guidance, education and the necessaries of life. It is in the children's best interests to continue this familiar, stable environment.
8. The children have lived in London with their mother and maternal grandparents since 2016; they have many cousins and family in London as well as friends and a school community;
9. V.M.Y. has moved to Los Angeles; other than the potential private schools he would like to enroll the children in, he has not pointed to other supports or community.
10. V.M.Y.'s plan does not recognize A.B.'s special needs, and he does not provide any consideration of means to ensure dignity, promote self-reliance and facilitate A.B.'s active participation in the community.
11. There is no communication between the parties. At this point, a restraining order prevents it. The mother is fearful of V.M.Y..
12. The children's views and preferences, which I accept, are that they live with their mother in London, and that V.M.Y. have access with them in London.
13. V.M.Y. is unable to put the children's needs first. The children must be protected on the internet, and their mother and grandparents, whom they love, must also be protected from internet attacks. V.M.Y. must rise above his anger at S.H.G. to put the interests of the children first.

D. Sole or Joint Custody?

89 The ability or inability of parents to communicate about their child appropriately is critical to determining whether there should be an order of sole or joint custody: *Kaplanis v. Kaplanis*, 2005 CanLII 1625 (ON CA). Given the father's extreme hostility to the mother, and his actions in a cyberbullying campaign against the mother and her family, I find that the father is not willing or able to cooperate or communicate effectively with the mother about the children. The children's best interests are served by awarding sole custody to S.H.G.. This is an extremely high conflict case. There is no reasonable prospect that the parties could make decisions about the children together, because of V.M.Y.'s conduct.

90 An objective review of the evidence makes clear that the parents cannot communicate, because of V.M.Y.'s post-separation cyberbullying campaign against S.H.G. and her family. Considering his obvious

anger directed to S.H.G., I do not believe it appropriate to require any level of direct communication between the two parties.

91 There are simply no facts that would support an order of joint custody because of V.M.Y.'s continued cyberbullying and invasion of privacy of the children. On the evidence before me, I find that sole custody to S.H.G. is the only order that is in the best interests of the children.

E. Access

92 I issued an access order at the end of the hearing. My reasons are set out in this decision. I conclude that it is not in the best interests of the children to have access with their father by Skype (or any video calling platform), telephone or any means which can be recorded and published on the internet or social media platforms. I find that any future access by Skype/video call or telephone must be prohibited until existing videos and pictures of the children and members of their family (their mother and maternal grandparents) on internet/social media are removed. Once the videos and images are removed, then Skype/Facetime/telephone access may recommence only under supervision to ensure that no taping of the children takes place during access visits, and no publication of the taping of access visits takes place.

93 The website and other internet postings refer to the children. Many postings include video of the children during access visits, which the children do not know are being recorded and posted. The father's narrative on the videos and postings consistently maligns those whom the children live with and love--S.H.G. and her parents. They stand accused of kidnapping, fraud, drugging the children and abusing the children. The privacy of the children has been violated. The comments appear critical of the children. Despite the order of April 18, 2019 to remove sites and content, V.M.Y. has persisted in this conduct, and continues to add new material to the internet. V.M.Y. also criticizes A.B. I am concerned with the impact on the children if they find this material on the internet.

94 There is no absolute right to access, although the best interests of the child are generally promoted when a child has meaningful contact with both parents. But access is the right of the child and not the right of a parent. Where the father is abusing access by videotaping and posting that access, often edited with commentary, criticizing the mother, grandparents, and indeed the children, and invading their privacy, then I find that the right of access must be restricted in the best interests of the children. Since V.M.Y. has violated the earlier court orders, I find that the only way to ensure compliance is to supervise the access to prevent recordings being made, and to base the access on removing the inappropriate postings.

95 The father seems oblivious to the harm to the children. In persisting in his internet campaign, he is clearly placing his interests first. He is unable to understand the best interests of the children require that he refrain from these attacks.

96 V.M.Y. must learn how to manage his anger and vindictiveness, so that the children understand from each parent that they are supported in their relationship with the other parent, and so that the parents may each engage fully in the children's upbringing. The graduated supervised access schedule, which requires removal of all offending material from the internet, is in the order below.

Issue #3: Should the children be permitted to reside with the mother in England?

97 Following the Hague proceeding, the UK Court ordered the children returned to Ontario. The children have been residing in England under a temporary Order dated September 11, 2018. At the time of trial

neither parent lived in Ontario. V.M.Y.'s plan involves parenting the children in Los Angeles. S.H.G.'s plan involves parenting the children in London, UK.

98 This is an initial application for custody. Neither party lives in Canada. Both parties bear the evidentiary burden of convincing the court that the children's residence should be changed from Ontario. The court's analysis is guided by the following factors relevant to an initial application for custody, drawn from *Falvai v. Falvai*, 2008 BCCA 503, 60 R.F.L. (6th) 296, additional reasons 2009 CarswellBC 2380, 73 R.F.L. (6th) 52 at para. 26 to 28 (B.C. C.A.); *Gordon v. Goertz*, [1996] 2 S.C.R. 27, para. 49 (SCC):

(a) the desirability of maximizing contact between the child and both parents. The court will consider the willingness to facilitate the children's contact with the non-custodial parent.

(b) the views of the child.

(c) the custodial parent's reason for moving, only in the exceptional case when it is relevant to that parent's ability to meet the needs of the child.

(d) disruption to the child of a change in custody.

(e) disruption to the child consequent on removal from family, schools, and the community they have come to know.

99 These factors support S.H.G.'s request for the children to remain in London, England, for reasons set out in this decision. I order that S.H.G. may reside in London, England with the children, and that shall be their primary residence.

100 I set a schedule for V.M.Y. to spend access time in person with the children in London, England. S.H.G. is prepared to facilitate parenting time between V.M.Y. and the children. There is no evidence that V.M.Y. may not travel to the UK. By contrast, S.H.G. may not be free to travel to the United States because of V.M.Y.'s reports to the U.S. State Department and the FBI. In addition, S.H.G. has no status in Canada.

Issue #4: Is the respondent entitled to spousal support?

101 Section 15.2(4) of the *Divorce Act* provides that when making an order for spousal support, the court shall consider the conditions, means, needs and other circumstances of each spouse, including how long the spouses cohabited; the functions performed by each spouse during cohabitation; and any order, agreement or arrangement related to support of either spouse.

102 Section 15.2(6) provides that the objective of an order for spousal support should:

(a) Recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) Apportion between the spouses any financial consequences arising from the case of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) Relieve any economic hardship of the spouses arising from the breakdown of the marriage, and

(d) In so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable time period.

103 Entitlement to spousal support is established if any one of the four statutory objectives set out in section 15.2(6) is met: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, para. 49; *Moge v. Moge*, [1992] 3 S.C.R. 813, p. 853. Marriage is a "joint endeavour" and a socio-economic partnership. In considering compensation, the court must ask what loss the marriage or marriage breakdown caused that would not have been suffered otherwise: *Bracklow v. Bracklow*, , paras. 41 and 49.

104 The relationship displays what Carol Rogerson & Rollie Thompson, in the *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice Canada, 2016) identify at page 5 as "common markers of compensatory claims", including being home with children full-time, having primary care of children after separation, and moving for the payor's career.

105 S.H.G. is entitled to spousal support on both a strong compensatory and needs basis, given these facts:

(a) The parties were married for 16 years and had a traditional marriage. S.H.G. maintained the household and performed all childcare responsibilities while V.M.Y. focused on his career, which included travelling regularly while S.H.G. remained at home with the children.

(b) S.H.G. sacrificed her career for the benefit of V.M.Y.. S.H.G. moved between New York City, Los Angeles and Toronto for V.M.Y.'s benefit. She gave up her career as a copywriter in New York City to support V.M.Y.'s career.

(c) Since separation, S.H.G. has been working part-time and solely caring for the children. There is a significant decline in her standard of living after separation. While her parents are generous in providing housing for S.H.G. and her children, the appropriate level of spousal support does not depend on gratuitous support offered by third parties post-separation. She has received no contribution from V.M.Y. and uses most of her income to support and provide for the children.

(d) During the marriage S.H.G. was mainly responsible for raising the children and finding supports for A.B.'s neurological issues. Although S.H.G. has a university degree, she sacrificed her career for her family and suffered an economic disadvantage.

(e) V.M.Y. can earn an income of USD$157,500 or CAD$208,766 (at an exchange rate of $1.3255 CAD/USD), the income he earned prior to 2016, and can pay support.

(f) A.B.'s needs require S.H.G. to dedicate more time and expense to A.B.'s care.

(g) S.H.G. cannot maintain the standard of living she had achieved during the marriage without spousal support.

106 *The Revised User's Guide* identifies these factors relevant to location within the range for both amount and duration:

(a) strength of any compensatory claim

(b) recipient's needs

(c) age, number, needs and standard of living of children (if any)

(d) needs and ability to pay of payor

(e) work incentives for payor

(f) property division and debts

(g) self-sufficiency incentives.

107 Applying these factors, (a) there is a strong compensatory claim, given the 16-year marriage and the roles of the parties; (b) the financial needs of S.H.G. cannot be met on her income; (c) the children are 12 and 9, and will be dependent for some time. The special needs of A.B. require additional parental attention; (d) the father is capable of full-time, significantly remunerative work and has or should have the ability to pay; (d) work incentives for the payor are required due to his failure to pay support to date, and to ensure that V.M.Y. obtains appropriate employment; (e) there is a relatively low property settlement and S.H.G. has significant debts; and (g) the spousal support is based on full-time imputed income attributed to Ms. Gulikan in part because of a self-sufficiency incentive.

108 I order that V.M.Y. is to pay S.H.G. spousal support for an indefinite duration, to a maximum of 16 years in accordance with the SSAG Divorcemate calculations, on the high end of the spousal support range. The quantum is set out below.

Issue #5: What are the incomes of the parties for support purposes?

109 I impute income to V.M.Y. of USD$157,500 or CAD$208,766 (at an exchange rate of $1.3255 CAD/USD), and income to S.H.G. of $33,516.00.

110 This is a case of egregious non-disclosure, the almost complete failure to comply with family law disclosure obligations, including under the Federal *Child Support Guidelines* SOR/97-175. If a party fails to provide full financial disclosure relating to his income, the court is entitled to draw an adverse inference and to impute income to them: *Szitas v. Szitas*, 2012 ONSC 1548. There is no need to find a specific intent on the part of V.M.Y. to avoid his support obligations. Imputing income is one means by which the court gives effect to the obligation of parents to support their children. To meet this obligation, a parent must earn what he or she is capable of earning: *Drygala v. Pauli*, 2002 CarswellOnt 3228 at paras. 24 to 35 (C.A.).

111 Since V.M.Y. has failed to provide meaningful financial disclosure to establish his income for child and support purposes, I must impute income. In 2016, V.M.Y. was earning an annual income of CAD$208,766 in film and television production. S.H.G. testified that she is not aware of any reason that V.M.Y. could not earn this level of income at present in the same industry. Currently, V.M.Y. works in hemp health treatments and has received funds from an investor. He has a cannabidiol based business called Fresh Farms CBD, advertised online.

112 V.M.Y.'s position is that if the children were to reside in California with him, the children would attend private school. The annual tuition cost for two children at the schools he identified ranges from CAD$163,632 to CAD$142,804. The evidence is that V.M.Y. intended to pay the children's tuition through his income. To afford those private schools, V.M.Y. would have to make well over CAD $208,766.00 annually. It is reasonable for this court to impute income to V.M.Y. consistent with his plan of care. As a result, I impute income to V.M.Y. of USD $157,500, or CAD $208,766.00.

113 S.H.G.'s evidence shows part-time income of $19,152.00, based on 20 hours per week. I do not accept that S.H.G. can only work part-time now that her children are settled in school. She too has a duty to maximize her income for child support purposes. I find that S.H.G. can earn $35,516.00 for full-time work and I impute income to her of $35,516.

Issue #6: How much child and spousal support should the applicant pay?

114 V.M.Y. has an obligation to pay child support in accordance with the *Federal Child Support Guidelines* and section 15.1 of the *Divorce Act*, and spousal support under section 15.2 of that *Act*. V.M.Y. has made no financial contributions toward the spousal or child support since the date of separation except for one court-ordered support payment of $5,795.00.

1. Retroactive Spousal and Child Support

115 The parties separated in September 2016, S.H.G. claimed child support and spousal support in her Answer. I find that the claim for child and spousal support should begin as claimed in November 2016 when the mother and the children left the home and began living independently.

116 In *D.B.S. v. S.R.G.*, 2006 SCC 37 (CanLII) the Supreme Court set out four factors to consider when determining whether a retroactive child support order is appropriate in a given case (paras. 101-116). These four factors are:

(1) Is there a reasonable excuse for why child support was not sought earlier?

(2) Has there been any (blameworthy) conduct by the payor parent?

(3) What are the circumstances of the children?

(4) Will there be hardship occasioned by a retroactive award?

117 The parties were engaged in high conflict litigation and a Hague Application following the separation. S.H.G. gave notice at the start of the family litigation, one year after separation.

118 V.M.Y. has not voluntarily paid spousal or child support to S.H.G., although he knew or should have known that she was at home for the children for many years, she was solely responsible for the children after separation, and that she and the children would struggle financially. As the Supreme Court held in *D.B.S.*:

(1) Blameworthy conduct is anything that privileges the payor's own interests over his children's right to an appropriate amount of support (para. 106);

(2) Even where a payor parent does nothing active to avoid his obligations, he may still be acting in a blameworthy manner if he "consciously chooses to ignore them" (para. 107);

(3) A payor parent who knowingly avoids or diminishes his support obligations to his children should not be allowed to profit from such conduct (para. 107).

119 V.M.Y.'s willingness to favour himself above his children's needs, and his failure to consider S.H.G.'s likely financial difficulties as a result of his actions, do not constitute a reasonably held belief that he was meeting his support obligations.

120 The children are dependent on the means of their grandparents, who are providing funds to S.H.G. that are to be repaid in accordance with promissory notes. While S.H.G.'s parents have been generous in providing a home for their grandchildren, they are under no legal obligation to do so, and V.M.Y. is under

a duty to provide for his children financially. The children require support to fund their activities, detailed in S.H.G.'s plan of care and her sworn financial statement of May 3, 2019.

121 Finally, because V.M.Y. chose not to participate in this trial, there is no evidence that a retroactive award would cause financial hardship.

122 Similar factors are considered when deciding awards of retroactive spousal support, except the need of the recipient spouse is considered instead of the circumstances of the child: *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, paras. 204-207. For the same reasons, spousal support should be paid from November 1, 2016.

2. Amount of Table Child Support and Section 7 Expenses

123 V.M.Y. owes the following child support for A.B. and C.D. since November 1, 2016, based on the Federal *Child Support Guidelines* for V.M.Y.'s imputed income of CAD$208,766:

(a) November 2016 to November 2017: 13 months at $2681.93/month=$34,865.00

(b) December 2017 to December 2019: 25 months at $2,782.19/month=$69,555.00.

124 Commencing January 1, 2020, V.M.Y. is to pay child support for the two children at $2,782.19 per month, based on his imputed income of CAD$208,766.

125 I find these expenses to be reasonable and necessary given the income of this family and A.B.'s special needs, under section 7 of the Federal Child Support Guidelines:

(a) For 2017: Camp $521x2=$1,042; Art (A.B.) $469; Dance (A.B.) =$803; Tutor (A.B.) $3,477; Self Defence (C.D.) $347; Tae Kwon Do (C.D.) $876 =$7,014

(b) For 2018: Camp $521x2=$1,042; Art (A.B.) $469; Dance (A.B.) =$803; Tutor (A.B.) $3,477; Self Defence (C.D.) $347; Tae Kwon Do (C.D.) $876 =$7,014

(c) For 2019: Camp $521x2=$1,042; Art (A.B.) $469; Dance (A.B.) =$803; Vocal (A.B) $2,500; Tutor (A.B.) $3,477; Self Defence (C.D.) $347; Tae Kwon Do (C.D.) $876 =$7,014; swimming (C.D.) $608 = $10,122.00.

126 S.H.G. has incurred section 7 expenses of $24,150.00. She has a right to be reimbursed in accordance with relative income. V.M.Y. is to pay arrears calculated at 85% of section 7 expenses to December 2019, which is $20,527.50, based on the imputed incomes of both parties.

127 The lunch claims are not section 7 expenses and are disallowed.

128 V.M.Y. is to pay 85% of future section 7 expenses.

3. Amount of Spousal Support

129 I provide the parties with Divorcemate calculations, based on the imputed income of V.M.Y. at $208,766 and the imputed income of S.H.G. at $33,516.

130 At the high end of the range, V.M.Y. is to pay $3,889.00 monthly for 12 months in 2019

($46,668.00); $3,894.00 monthly for 12 months in 2018 ($46,728); $3,894.00 monthly for 12 months in 2017 ($46,728.00); and $3,942.00 monthly for 2 months in 2016 ($7,884.00). I calculate this to be spousal support arrears of $148,008.00.

131 Commencing January 1, 2020, V.M.Y. is to pay spousal support monthly in the amount of $3,889.00.

Issue #7: Should the court grant security for support?

132 Section 15.2(1) of the *Divorce Act* permits an order "securing" spousal support. Section 15.1(4) of the *Divorce Act* governing child support permits "terms, conditions or restrictions in connection with the order" as the court "thinks fit and just". Taken together, both sections allow for security for child and spousal support: *Milutinovic v. Milutinovic*, 2018 ONSC 4310, per J.P.L. McDermot, J. at para. 102.

133 The factors relevant to determining whether security should be required for support were set out in *Boisvert v. Boisvert*, 2007 CanLII 24073 (ON SC), at paras. 78-79:

(a) When the payor has a history of dissipation of assets: unable to handle money;

(b) When the payor is likely to leave the jurisdiction and become an absconding debtor;

(c) When the payor has refused to honour a support obligation; (whether required by order, contract or obligation, refuses to pay at all);

(d) When the payor has a poor employment history or has indicated they will leave employment (payor has extravagant lifestyle and has been uncooperative with the spouse in the past);

(e) When the payor has declared that he will not pay an eventual support order;

(f) Other conduct such as lying to the court, violating earlier court orders, and removing assets in contravention of an agreement.

134 V.M.Y. is out of the jurisdiction. He has repeatedly breached court orders, including a support order by Justice Stewart, has failed to provide income information and has been uncooperative on financial issues in the past, he misled the Hague Court about the availability of the matrimonial home in Ontario if the children were returned to Canada, he has failed to provide child or spousal support, and he has violated court orders in this case. As a result, I order that the proceeds of sale held for V.M.Y. are to be held as security for child and spousal support owing to S.H.G., to be paid from V.M.Y.'s portion of the proceeds of sale.

135 I order that the entirety of V.M.Y.'s share of the proceeds of sale are to be paid for the benefit of S.H.G. as she directs, for security for child and spousal support.

Issue #8: What payments are required for equalization and property issues?

136 When the parties are separated and there is no reasonable prospect of reconciliation that they will resume cohabitation, the party whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them: *Family Law Act*, R.S.O. 1990, c. F.3, s. 5. I find that V.M.Y. is entitled to an equalization payment, but V.M.Y. owes money for post-separation adjustments and in relation to S.H.G.'s beneficial ownership interest in the matrimonial home.

137 S.H.G. prepared a net family property statement. The court questioned S.H.G. about the net family property statement and the supporting documents.

138 On the financial issues, I have drawn adverse inferences against V.M.Y. as a result of his failure to provide the most basic financial disclosure. This includes the failure to provide an updated financial statement, or personal tax returns or financial statements/tax returns for his businesses, his failure to attend his scheduled questioning, his failure to answer undertakings and his failure to adduce any evidence because he chose not to attend the trial. V.M.Y. failed to provide support for the assets, liabilities, deductions and exclusions on his net family property statement.

139 The first step in drawing an adverse inference is establishing the evidence that is the basis for the inference to be drawn. Then the court must consider whether the conclusion it is being asked to reach is logical and reasonably probable from the facts established.

140 V.M.Y. failed to provide disclosure of the following items relevant to his net family property: the valuation date value of the matrimonial home, 100 Overland Drive; the value of his company, No Protection Limited; evidence to establish the business valuation or income valuation relating to Thefarmacy.co (U.S. or Canadian versions), Sweatshop media (UK), or No Protection Limited; evidence of his alleged debt to his parents; and evidence of any alleged tax arrears owing to the Internal Revenue Service.

141 I make these findings based on the testimony of S.H.G., admissions, and adverse inferences:

(a) The value of the matrimonial home was $1,136,500 on the valuation date;

(b) The value of the JP Morgan Chase acct. 8169 was $10,000 on the valuation date;

(c) V.M.Y. removed $62,813.51 from the parties' TD joint account ending 869 after separation, a post-separation adjustment.

142 I discuss more issues below.

Resulting Trust and Value of the Matrimonial Home

143 I find that S.H.G. is the beneficial owner of 50% of the Toronto matrimonial home by the doctrine of resulting trust. In October 2007, the parties bought a house in California for $780,380.00. They financed the purchase of the house by using USD$196,879.60 from S.H.G.'s parents in the form of a loan; USD $70,000 from the parties' savings, which included S.H.G.'s savings from her sole Barclay's account; and USD $50,000 gifted from V.M.Y.'s parents.

144 On October 11, 2007, title was transferred from V.M.Y.'s name to V.M.Y. and S.H.G.'s names jointly. This was done to reflect S.H.G.'s interest in the property.

145 Shortly after the parties moved to London, in early 2013, they sold the California home and deposited the proceeds of sale ($329,759.91 USD) into their joint account.

146 In November 2014, the parties bought a matrimonial home in Toronto for $755,000, using all of the net proceeds of sale from the California home which they jointly owned, paid from their joint bank account. The Toronto matrimonial home was registered in V.M.Y.'s name alone, even although the

proceeds from the previous jointly owned California home, which included substantial amounts from S.H.G. and her parents, were used to purchase the Toronto home.

147 The Agreement of Purchase and Sale originally listed both S.H.G. and V.M.Y. as buyers but S.Y.'s name is stroked out. I accept her evidence that they were informed at the time that since S.Y. was a British citizen with no status in Canada, she could not be on the mortgage and thus could not be on title. I find as a fact that V.M.Y. later said that he would transfer title to him and S.H.G. jointly, but he never did.

148 The first step in equalization is to determine trust claims. I find that S.H.G. is a beneficial owner of a one-half interest in the Toronto matrimonial home, based on a resulting trust and the statutory presumption in section 14 of the *Family Law Act* which V.M.Y. has not rebutted: *Korman v. Korman*, 2015 ONCA 578. I find based on her evidence that S.H.G. did not intend to gift the house, or the proceeds, to V.M.Y.. Rather, this bears the classic hallmark of a domestic resulting trust through financial contribution to the initial acquisition of a property and a later gratuitous transfer of title to the property, established through tracing the proceeds of sale of the jointly owned California property to the purchase of the Toronto home: *Kerr v. Baranow, supra*, at paras. 16-19.

149 At the same time, to purchase the house, the mortgage was assumed solely in V.M.Y.'s name, and discharged in full on the sale of the property. The issue arises whether this was a gratuitous payment by V.M.Y., so that the discharge of the mortgage would come only from his share of the proceeds and S.H.G. would receive a disproportionate value. The assumption of the mortgage was intimately bound up with the purchase of the house, and the mortgage was discharged on its sale. S.H.G. should in equity assume liability for 50% of the mortgage: *Chechui v. Nieman*, 2017 ONCA 669.

150 The sale proceeds of $301,782.66 are being held in trust by the real estate lawyer. S.H.G. is entitled to one-half of the net proceeds of sale, reduced by any unpaid share in the expenses of upkeep which has been proved. As V.M.Y. did not prove any such expenses other than the mortgage already discharged from the proceeds, 50% of the proceeds of the matrimonial home sale are to be held for S.H.G.

151 V.M.Y., through his father B.Y. as power of attorney, accepted an offer to purchase the matrimonial home for $1,136,000 to close on April 20, 2017. This is the value closest to the date of separation. S.H.G. learned of the sale when a neighbour emailed her a picture of the sold sign in March 2017. There was a matrimonial home designation on the property obtained in October 2016, although neither of the Y.s advised S.H.G. of the proposed sale. In V.M.Y.'s Hague Application of June 2017 he advised the court that he was residing in the matrimonial home and advised the court that the home was available to S.H.G. and her children to come back to. He did not advise the Hague court of the sale.

152 V.M.Y. had six lawyers during this litigation. S.H.G.'s lawyer began requesting copies of the Agreement of Purchase and Sale, writing to the first two lawyers March 20 and March 22, 2017, his third lawyer on April 24, 2017, and his fourth lawyer on October 26 and October 31, 2017; none of them provided the agreement.

153 The offer was extended to May 10, 2018. Although S.H.G. clarified in November 24, 2017 that she was prepared to agree to list the home, she was never advised that the existing offer was extended to May 10, 2018; I accept her testimony that had she been advised, she would have accepted the offer. As a result, I set the value that should have been obtained at the value of the offer open until May 10, 2018, at $1,136,000.00.

Other Property Issues

154 Although S.H.G. argued that V.M.Y.'s shares in the jointly held company, the Farmacy.co, on the valuation date had a value of $306,953.25. V.M.Y. did not provide a valuation for this company. On the evidence before me, V.M.Y. transferred 90% of the value of his shares in a different, post-separation corporation, Fresh Farms LLC, to his parents in consideration for all the expenses and loans that supported B.Y.'s civil claim, pursuant to an agreement between son, mother and father dated July 12, 2018. At the time of the share transfer, the alleged value of B.Y.'s civil claim was $552,515.85, equivalent to the value of 90% of the shares. The value of 100% of the shares of Fresh Farms LLC was thus $613,906.50 ($552,515.85/.9). Half of that value is $306,953.25. However, that is the value not of the jointly held company, the Farmacy.co, but of a different corporation, Fresh Farms LLC. As a result, the only evidence is that the value of the Farmacy.co is 0 for both parties.

155 I attribute 0 to the liability of V.M.Y. on the joint loan to S.H.G.'s parents, since there is no evidence from V.M.Y. of an intent to repay this loan.

156 I separately provide the parties with a net family property statement. The equalization payment owing by V.M.Y. to S.H.G. is $26,060.83.

157 The proceeds of sale of the matrimonial home, after discharge of the mortgage and payment of fees, are $301,782.66, now held in trust. Each party is entitled to $150,891.33.

158 There are post-separation adjustments based on moneys removed from the joint accounts after separation. V.M.Y. removed $62,846.80 from TD Account 869 and owes S.H.G. $31,423.40. S.H.G. removed $30,500 from the same account after separation and owes V.M.Y. $15,250.00.

159 On a net basis, V.M.Y. owes S.H.G. $26,060.83 (equalization) plus $31,423.40 (post-separation adjustment owed to S.H.G.) - $15,250 (post-separation adjustment owed to him), total $42,234.23.

Issue #9: Should the court award S.H.G. damages for intentional infliction of mental suffering, invasion of privacy, and punitive damages?

160 The cross-claim of S.H.G. against V.M.Y. proceeded together with the family law trial. S.H.G. seeks damages of $150,000 for nuisance, harassment, intentional infliction of mental suffering and invasion of privacy, and $300,000 for punitive damages. The other matters raised in the civil lawsuit settled at the outset of trial.

161 In January 2019, V.M.Y.'s father, B.Y., began a civil claim in unjust enrichment against V.M.Y. and S.H.G. claiming damages of $552,515.85 for principal amounts allegedly loaned to the defendants. The civil trial was ordered to be heard together with the family law proceeding. S.H.G. filed a defence and counterclaim and a cross-claim.

162 At the outset of trial, I granted the father B.Y., who was represented by counsel, leave to withdraw the civil claims against his son. On consent, the civil claim against S.H.G. and the counterclaim against B.Y. were dismissed without costs. The questioning of B.Y. in the civil matter was, on consent, admitted into evidence as cross-examination at the family trial.

163 The crossclaim by S.H.G. against V.M.Y. for intentional infliction of mental suffering, the tort of invasion of privacy and punitive damages was tried with the family law claims.

164 The test for intentional infliction of mental suffering as set out by the Court of Appeal in *Piresferreira v. Ayotte*, 2010 ONCA 384, para. 27 is:

(a) flagrant or outrageous conduct;

(b) calculated to produce harm; and

(c) resulting in a visible and provable illness.

165 I find that V.M.Y.'s conduct was calculated to produce the kind of harm suffered by S.H.G., or he knew that it was substantially certain to follow: *Piresferreira v Ayotte*, 2010 ONCA 384 at para 78.

166 The Ontario Court of Appeal recognized one aspect of tortious invasion of privacy in the form of intrusion upon seclusion in *Jones v. Tsige*, 2012 ONCA 32 (CanLII), 108 O.R. (3d) 241. Sharpe, J.A. also referred to other forms of invasion of privacy described in the seminal article of William L. Prosser, "Privacy" (1960), 48 *Cal. L. Rev.* 383, and adopted by the American Law Society in the *Restatement (Second) of Torts* (2010). Prosser's "four-tort catalogue", as Sharpe, J.A. called it, is as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. (*Jones v. Tsige* at para. 18)

167 The Court of Appeal held that the first was the tort most relevant to the facts before it and went on, as I have mentioned, to recognize the tort of intrusion on seclusion as part of Ontario law. The Court also noted that the fourth form of invasion of privacy, that is, appropriation of the plaintiff's name or likeness, was already actionable in Ontario: *Jones v. Tsige* at paras. 24, 27, citing *Athans v. Canadian Adventure Camps Ltd.*, 17 O.R. (2d) 425, [1977] O.J. No. 2417 (H.C.J.).

168 Since *Jones v. Tsige*, this Court has recognized the second form of invasion of privacy, that is, public disclosure of private facts. The two principal cases that have dealt with this are *Jane Doe Doe 464533 v. N.D.* ("*Jane Doe 2016*") and *Jane Doe 72511 v. N.M.*, 2018 ONSC 6607, [2018] O.J. No. 5741 ("*Jane Doe 2018*"). (In both instances, there was default judgment for the plaintiff; because the default judgment was set aside in *Jane Doe 2016*, the cause of action was recognized anew in *Jane Doe 2018*.) In each of these cases, the defendant had published intimate videos of his partner on internet pornography sites. The elements of the cause of action, as set out in *Jane Doe 2018*, at para. 99, are as follows:

(a) the defendant publicized an aspect of the plaintiff's private life;

(b) the plaintiff did not consent to the publication;

(c) the matter publicized or its publication would be highly offensive to a reasonable person; and

(d) the publication was not of legitimate concern to the public.

169 In so describing the elements of the tort, this Court has followed the American *Restatement*, with a subtle but important modification. It need not be the matter itself that is highly offensive to a reasonable

person: it is enough if the fact of its publication is offensive: *Jane Doe 2016* at para. 46, *Jane Doe 2018* at paras. 81, 98-99.

170 With these three torts all recognized in Ontario law, the remaining item in the "four-tort catalogue" of causes of action for invasion of privacy is the third, that is, publicity placing the plaintiff in a false light. I hold that this is the case in which this cause of action should be recognized. It is described in s. 652E of the *Restatement* as follows:

> *Publicity Placing Person in False Light*
>
> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

171 I adopt this statement of the elements of the tort. I also note the clarification in the *Restatement*'s commentary on this passage to the effect that, while the publicity giving rise to this cause of action will often be defamatory, defamation is not required. It is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been. The wrong is in publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person's privacy right to control the way they present themselves to the world.

172 It also bears noting this cause of action has much in common with the tort of public disclosure of private facts. They share the common elements of 1) publicity, which is 2) highly offensive to a reasonable person. The principal difference between the two is that public disclosure of private facts involves true statements, while "false light" publicity involves false or misleading claims. (Two further elements also distinguish the two causes of action: "false light" invasion of privacy requires that the defendant know or be reckless to the falsity of the information, while public disclosure of private facts involves a requirement that there be no legitimate public concern justifying the disclosure.)

173 It follows that one who subjects another to highly offensive publicity can be held responsible whether the publicity is true or false. This indeed, is precisely why the tort of publicity placing a person a false light should be recognized. It would be absurd if a defendant could escape liability for invasion of privacy simply because the statements they have made about another person are false.

174 Moreover, it is likely that in the course of creating publicity placing a person in a false light, the wrongdoer will happen to include true, but private, facts about the person whose privacy is invaded. In this case, for instance, the defendant has publicized falsehoods about the plaintiff, but he has also publicly aired private facts about her present living situation with the children and her parents (including videos of their home) and details of access visits which is a true, but private matter.

175 I find that the false light in which V.M.Y. has placed S.H.G. would be highly offensive to a reasonable person. I have set out detailed findings of the false light publicity throughout this decision. V.M.Y. has and continues to make serious allegations online about S.H.G. and her family, including that she is a kidnapper, abuses the children, drugs the children, forges documents, and defrauds governments. I find these statements to be false on the evidence before me.

176 V.M.Y. has posted a video online of a person displaying posters of S.H.G. and her parents and the allegations at various locations in London, England. He established an online petition to persecute S.H.G. and her parents and enlisted the help of members of the public. He has spread his allegations on the internet and distributed them and links to the sites to friends, family members and business relations of S.H.G. and her parents, members of the Armenian community and her church in London, England, as well as to S.H.G.'s fellow employees.

177 V.M.Y.'s conduct has caused a visible and provable illness. S.H.G. testified that she has sought medical assistance from her family doctor as a result of V.M.Y.'s conduct. She saw Dr. Rajpal because she was having nightmares, feeling ill and was undergoing mental stress.

178 In addition, S.H.G. reports feeling hyper-vigilant. She feels like someone could be following her. She is concerned that someone could do her or her parents harm or could take the children away from her. She fears that the children could search her name, their names, her parents' names or her brother's name and obtain access to the material that V.M.Y. has posted.

179 S.H.G. explained that the posting of the videos online about the children, and the flyers distributed in London, England, including at the Armenian church were particularly threatening, and she feels as if there is no safe haven for her. The videos made her want to throw up. They made her sick. As a result, S.H.G. was prescribed medication for her sleep.

180 As a direct result of V.M.Y.'s conduct, S.H.G. is concerned that one of the anonymous people on the internet who have expressed support for V.M.Y. on his online petition could find the address of her parents' business online and track down her family. This prospect is terrifying to S.H.G.. She worries about the safety of her children. S.H.G. is waking up full of dread in the morning not knowing if someone who has viewed V.M.Y.'s postings and who believes V.M.Y.'s false claims will do something to S.H.G. or take her children.

181 The police and child welfare authorities in both Toronto and London have visited her home several times because of V.M.Y.'s unfounded complaints. V.M.Y. is not only interfering with S.H.G.'s use of her home, but also her use of her computer and the internet, where V.M.Y.'s allegations are posted.

182 V.M.Y. has actively sought an audience for a website that portrays S.H.G. as criminally abusive of A.B. and C.D. In his vindictive pursuit of his own perceived interest, he has been, at the very least, reckless of the false light in which his campaign would place her.

183 I also find that, to the extent that V.M.Y. happens to have included true statements about S.H.G. in the publicity he has created around their dispute, he is liable to her for public disclosure of private facts. The parties' parenting dispute is not a matter of legitimate concern to the public (save, of course, to the extent that it is the subject of a public judicial proceeding) and a reasonable person would find it highly offensive that the dispute has become the subject of a website and an online petition.

184 V.M.Y.'s conduct as detailed above is intentional; flagrant and outrageous; calculated to produce the harm that it has; highly offensive, causing distress and humiliation, and the tort of intentional infliction of mental suffering has been established. He has been explicit about his intent: to "ensure that the damage done is irreparable" to S.H.G. and her family. I find that the invasion of privacy was intentional, subjectively intended to cause harm, and without lawful justification.

185 S.H.G. has met the burden of proving V.M.Y.'s tortious conduct in respect of the tort of invasion of privacy (both public disclosure of private facts, and publicity placing a person before the public in a false light) on the facts as I have set out in this decision.

186 There is no claim for pecuniary damages; the only issue is non-pecuniary damages. The infliction of mental suffering and invasion of privacy are based on many of the same facts.

187 On damages for intrusion on seclusion, the Court of Appeal in *Jones v. Tsige* held at paragraphs 87-88 that damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest, in a range up to $20,000. The important distinction with the two invasion of privacy torts in issue here, however, is that intrusion on seclusion does not involve publicity to the outside world: they are damages meant to represent an invasion of the plaintiff's privacy by the defendant, not the separate and significant harm occasioned by publicity.

188 The two *Jane Doe* cases have recognized that the cap on damages for intrusion upon seclusion may not apply to the other forms of invasion of privacy: *Jane Doe 2016* at para. 58; *Jane Doe 2018* at paras. 127-132. In this case, as is in those, the "modest conventional sum" that might vindicate the "intangible" interest at stake in *Jones v. Tsige*, para. 71, would not do justice to the harm the plaintiff has suffered.

189 In *Jane Doe 2016*, at para. 52, Stinson J. turned to sexual battery cases for guidance in arriving at an award, and Gomery J. in *Jane Doe 2018*, at paras. 127-128 followed the same approach. In support of this approach, Stinson, J. pointed to the similarly of the psychological and emotional harm the plaintiff had suffered to that experienced by victims of sexual assault.

190 I likewise adopt the method of looking to the factors applied to decide damage awards for a tort causing harms analogous to those the present plaintiff has suffered for invasion of privacy. The harm arising from the invasion of privacy in the present case is akin to defamation. Accordingly, in arriving at an award of non-pecuniary damages, I am guided by the factors described by Cory J. in *Hill v Church of Scientology*, at para. 187, which I am adapting to the tort of publicity placing a person a false light:

a) the nature of the false publicity and the circumstances in which it was made,

b) the nature and position of the victim of the false publicity,

c) the possible effects of the false publicity statement upon the life of the plaintiff, and

d) the actions and motivations of the defendant.

191 In this case, the false publicity is egregious, involving alleged criminal acts including by S.H.G. against her children. The false publicity is widely disseminated on the internet, as well as through targeted dissemination to church friends and business associates. S.H.G. has suffered damage as a mother, as an employee, in the Armenian community, and in her church community. She is peculiarly vulnerable as the spouse of the disseminator of false publicity. The false publicity has had a detrimental effect on S.H.G.'s health and welfare, humiliation, caused her fear, and could be expected as well to affect her social standing and position. V.M.Y. has not apologized, nor has he retracted the outrageous comments despite court orders.

192 The damages for intentional infliction of mental suffering are intended to be compensatory. I award $50,000 compensatory damages for intentional infliction of mental suffering, relying on *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 (CanLII).

193 On the tort of invasion of privacy (false light and public disclosure of private facts), I award damages of $100,000, considering the conduct here and the range in the cases identified in *Rutman v. Rabinowitz*, 2018 ONCA 80 and *Mina Mar Group Inc. v. Divine*, 2011 ONSC 1172, and the increased potential for harm given that the publicity is by way of the internet, which is "instantaneous, seamless, interactive, blunt, borderless and far-reaching": *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (Ont. C.A.) at para. 31. I find that third parties have commented on the websites and signed the petitions in both the UK and the US, and that V.M.Y. has sent targeting e-mails and caused the distribution of flyers in the UK driving people to the websites in addition to the mere fact of publication.

4. Should the court award S.H.G. punitive damages?

194 S.H.G. seeks $300,000 in punitive damages from V.M.Y.. As stated by Laskin J.A. in *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 at para. 79:

> To obtain an award of punitive damages, a plaintiff must meet two basic requirements. First, the plaintiff must show that the defendant's conduct is reprehensible: in the words of Binnie J. in *Whiten*, "malicious, oppressive and high-handed" and "a marked departure from ordinary standards of decent behaviour": see *Whiten*, at para. 36. Second, the plaintiff must show that a punitive damages award, when added to any compensatory award, is rationally required to punish the defendant and to meet the objectives of retribution, deterrence and denunciation.

195 The following guiding principles governing punitive damages are drawn from *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595:

(1) The court must rationally determine circumstances that warrant adding punishment to compensation in a civil action, and it is in the nature of the remedy that punitive damages will largely be restricted to intentional torts and breach of fiduciary duty (para. 67). In promoting rationality, the court should relate the facts of the particular case to the purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational (para. 71)

(2) the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it ...they are "the means by which the jury or judge expresses its outrage at the egregious conduct") (para. 68)

(3) punitive damages should be resorted to only in exceptional cases and with restraint, particularly when there has been a prior penalty imposed in a criminal or regulatory proceeding (para. 69)

(4) the governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation) (para. 74)

196 In considering proportionality, the court must consider:

(1) proportionality in accordance with the blameworthiness of the defendant's conduct, including whether the misconduct was planned and deliberate; the intent and motive of the defendant; whether the defendant persisted in the outrageous conduct over a long period; whether the defendant concealed or tried to cover up its misconduct; the defendant's awareness that what they were doing was wrong: whether the defendant profited from its misconduct; whether the interest violated by the misconduct was known to be deeply personal to the plaintiff (paras. 112-113);

(2) proportionality to the degree of vulnerability of the plaintiff (para. 114);

(3) proportionality to the harm or potential harm directed specifically at the plaintiff (para. 117);

(4) proportionality to the need for deterrence (para. 118).

(5) proportionality after taking into account the other penalties, civil and criminal, which have been or are likely to be inflicted on the defendant for the same conduct. Punitive damages are awarded "if, but only if" all other penalties have been considered and found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation.

(6) proportionality to the advantage wrongfully gained by a defendant.

197 I have no hesitation in finding that the long campaign of cyberbullying of S.H.G. is outrageous and egregious conduct at the extreme of reprehensibility, including:

* attacks on S.H.G., including posting S.H.G.'s image and those of her parents and children online. He has accused her of abusing the children, drugging the children, slapping the children, of defrauding the government, of forging documents, and other criminal offences,

* publicizing these attacks to members of her church, friends, her parents and their business associates, and the general public on the internet,

* attacks on the administration of justice in this case involving S.H.G., including on a judge, her lawyer and her witnesses at this trial,

* public attacks on her parents, whom she loves,

* publicly exposing her children to harm and ridicule on the internet,

* reporting unfounded allegations to the police, the school, government authorities and Children's Aid Societies, in Canada, the U.S. and the UK, and

* the continued flouting of court orders directed at stopping the conduct.

198 As a spouse and parent of their children, a stay-at-home mother dependent on V.M.Y. until the attacks began, S.H.G. was and remains a vulnerable plaintiff. There are no other penalties V.M.Y. is likely to face for this conduct. V.M.Y. knew the conduct was wrong; had been informed by the court that it was wrong; but he persisted in the conduct. The harm of such publicly distributed invective to S.H.G. and to the system of administration of justice, through attacks on a judge, a lawyer and witnesses in litigation, is severe.

199 This is the exceptional case. V.M.Y.'s conduct is reprehensible. The damage that he has inflicted upon S.H.G. is purposeful and premediated. On December 27, 2015, he threatened that if S.H.G. attempted to "take the children from [him]" or limit the time that he spends with the children he would

"ensure that the damage done is irreparable" to S.H.G. and her family. V.M.Y. has been undeterred by court orders regarding online content that is abusive of S.H.G..

200 V.M.Y.'s conduct must not only be punished but it should be denounced, and it should be deterred. A significant award of punitive damages may serve to deter V.M.Y., since the court orders have had no effect in deterring his conduct. It will also serve to warn other litigants, both represented and self-represented, that cyberbullying another party online, in family law proceedings where the interests of children are in issue, will not be tolerated.

201 I have considered the range of punitive damages and conduct in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, and in *Rutman v. Rabinowitz*, 2018 ONCA 80, and cases cited therein.

202 I consider the damages of $50,000 and $100,000 already awarded. As a result, I set the punitive damages at $150,000.00, having considered all the applicable factors, and having determined that an additional punitive damages award is required in this case to express the court's denunciation, deterrence, and punishment, and finding that this punitive damages award is proportional in light of the total award and the conduct in issue.

Divorce

203 There is no prospect that the parties will reconcile. They have been separated since September 19, 2016, and they both seek a divorce. The wife may obtain a divorce on an uncontested basis upon payment of the requisite fees and filing of the requisite documents.

Costs

204 S.H.G.'s costs submissions, limited to 5 pages not including the Bill of Costs and Offers to Settle, if any, are to be filed by January 10, 2020. V.M.Y.'s responding costs submissions, subject to the same page limits, are to be filed by January 22, with S.H.G.'s reply, if any, by January 29th.

ORDER

205 V.M.Y., V.M.Y., date of birth October 26, 1974, also known as V.M.Y., V.S., V.M.Y., is called V.M.Y. in this Order.

206 The final Order in this matter is set out below as edited for publication by removing the specific URLs for websites and the names of the websites and videos, the names and birthdates of the children, and the name of the family business:

1. V.M.Y. shall immediately remove [the URLs for seven listed websites] from the internet.
2. V.M.Y. shall immediately remove from the internet all videos and/or images referable to either or both of the children, A.B. and C.D.; to S.H.G.; to her family (in particular, her mother and father); and/or to the [family business] under his control, power and/or possession.
3. V.M.Y. shall immediately remove from the internet all posts in writing referring to either or both of the children, A.B. and C.D.; to S.H.G.; to her family (in particular, her parents); and/or to the [family business] under his control, power and/or possession.

4. V.M.Y. shall not post (directly or indirectly) to the internet any videos and/or images referable to either or both of the children, A.B. and C.D.); to S.H.G., to her family (in particular, her parents); and/or to the [family business];

5. V.M.Y. shall not post (directly or indirectly) to the internet any writing referring to either or both of the children, A.B. and C.D.); to S.H.G.; to her family (in particular, her parents); and/or to the [family business];

6. V.M.Y. shall not record his access via videoconferencing or telephone with either or both of the children, A.B. and C.D.).

7. V.M.Y. shall identify to S.H.G.'s lawyers in writing immediately all videos and images and posts in writing referable to either or both of the children, A.B. and C.D.); to S.H.G.; to her family (in particular, her parents); and/or to the [family business], that he has posted directly or indirectly to the internet.

8. There shall be no access by Skype, Facetime, or telephone by V.M.Y. with the children until paragraphs 1-7 have been complied with by V.M.Y., and proof of the removal of all of those items has been provided to S.H.G..

9. Once paragraphs 1-7 are complied with, then Skype or Facetime calls between V.M.Y. and the children may continue once per week so long as V.M.Y.'s video or audio calls are placed by V.M.Y. to the children under the supervision of an accredited agency that is experienced at supervising access visits, that S.H.G. approves in writing. S.H.G. shall not unreasonably withhold her consent. The supervisor will be responsible to ensure:

   (a) V.M.Y. does not videotape, audiotape or record the calls in any manner;

   (b) Each call occurs within 15 minutes of the scheduled time of the call;

   (c) V.M.Y. does not question A.B. and/or C.D. about S.H.G., S.H.G.'s activities or S.H.G.'s parents.

   (d) V.M.Y. does not make any derogatory or denigrating comments to the children about S.H.G. or her extended family.

   (e) V.M.Y. does not speak to the children in Armenian during the access calls;

   (f) If any of the above terms are breached by V.M.Y. during access calls or if the children indicate that they no longer wish to speak to V.M.Y., the supervisor shall be required to terminate the access call.

   (g) If following the commencement of supervised Skype/telephone access, V.M.Y. breaches paragraphs 4, 5, or 6 of this Order, then Skype/ telephone access or any access by way of video or audio calls shall be terminated permanently.

10. If V.M.Y. travels to London, England, he may have access to the children under the supervision of an agency that is experienced at supervising access visits, according to the following terms:

   (a) V.M.Y. will provide S.H.G. with written notice, including the name of the supervised access agency at least one week prior to the intended visit. Access will be subject to S.H.G.'s consent to the supervised access agency, and S.H.G. shall not unreasonably withhold her consent;

   (b) There will be no videotaping or audiotaping of access visits;

   (c) Access visits will occur on a site that is chosen and managed by the access supervisor, and close to the children's home;

(d) During access visits, V.M.Y. will not make any derogatory or denigrating comments about S.H.G., her parents or her extended family;

(e) During access visits, V.M.Y. shall not question the children about S.H.G. or S.H.G.'s family;

(f) V.M.Y. will be responsible for all costs of supervision of access visits;

(g) V.M.Y.'s access visit shall be terminated by the supervising agency if V.M.Y. breaches any terms of access;

(h) V.M.Y. shall exercise access at the allotted times and if he fails to do so, his access will be forfeited; and

(i) V.M.Y. shall be required to deposit his U.S. passport and Canadian passport with the access supervisor during all access visits and the access supervisor shall return these documents to V.M.Y. once the visits have been concluded and the children have been returned to the care of S.H.G.. If V.M.Y. fails to provide both the U.S. passport and Canadian passport to the access supervisor, his access visit shall be forfeited.

11. Access visits shall be graduated according to the following schedule:

(a) On either Saturday or Sunday from 3:00 p.m. to 6:00 p.m. on consecutive weekends for two weeks;

(b) If V.M.Y. complies with the terms provided above during the first two visits (two weekends), access shall be expanded to take place from 3:00 p.m. to 6:00 p.m. on two consecutive weekend days for the next six consecutive visits (three weekends) which will take place twice a month on alternate weekends;

(c) If V.M.Y. complies with the terms provided above during the first six consecutive visits, access shall be expanded to take place from 10:00 a.m. to 6:00 p.m. on two consecutive weekend days in alternate weekends.

(d) If V.M.Y. breaches any terms of access then the access shall revert to either calls or access visits from 3:00 p.m. to 6:00 p.m. on either Saturday or Sunday with all supervision terms and access terms as set out above to be in force until there is

11. The Accountant of the Superior Court of shall immediately release the $10,000, plus any accumulated interest, to S.H.G., which she paid to the credit of this action pursuant to the order of Justice Akbarali dated September 11, 2018.

12. A permanent restraining order pursuant to section 46 of the *Family Law Act* shall issue providing that except during scheduled access times, V.M.Y. shall be restrained from directly or indirectly contacting, threatening, intimidating, molesting, harassing, annoying or causing a third party to contact, threaten, intimidate, molest, harass or annoy S.H.G., her daughter or her son as follows:

(a) V.M.Y. shall not telephone, text, email or communicate with S.H.G. directly or indirectly for any purpose, except through her lawyers for the purpose of arranging access or to communicate about the children, or through her lawyers for litigation-related purposes.

(b) V.M.Y. shall not come within 500 metres of S.H.G.'s home or anywhere that S.H.G. or A.B. or C.D. happen to be, save and except for such access with A.B. and C.D. as is ordered by the court or agreed between the parties.

(c) V.M.Y. shall not come within 500 metres of or make contact with any official at A.B. or C.D.'s school, day care facilities, or anyone providing the children with extracurricular activities;

13. S.H.G. has sole custody of the children A.B. and C.D.

14. The primary residence of the children shall be with S.H.G., who may reside with the children in the United Kingdom.

15. V.M.Y.'s is to pay S.H.G. child support for A.B. and C.D. based on the *Federal Child Support Guidelines* based on his imputed income of CAD$208,766 from November 1, 2016 to December 31, 2019, calculated as follows:

    (a) November 2016 to November 2017: 13 months at $2681.93/month=$34,865.00

    (b) December 2017 to December 2019: 25 months at $2,782.19/month=$69,555.00.

16. Commencing January 1, 2020, V.M.Y.'s is to pay child support for A.B. and C.D. set at $2,782.19 per month, based on his imputed income of CAD$208,766.

17. V.M.Y. is to pay S.H.G. his portion of section 7 expenses calculated at 85% of $24,150.00 from November 2017 to December 2019, his portion of which is $20,527.50.

18. V.M.Y. is to pay S.H.G. 85% of future section 7 expenses commencing January 1, 2020.

19. V.M.Y. is to pay spousal support based on imputed income to V.M.Y. of CAD$208,766 and the imputed income of S.H.G. of $33,516, calculated as follows for the period to December 31, 2019 calculated as follows:

    (a) $3,889.00 monthly for 12 months in 2019 ($46,668.00);

    (b) $3,894.00 monthly for 12 months in 2018 ($46,728);

    (c) $3,894.00 monthly for 12 months in 2017 ($46,728.00); and

    (d) $3,942.00 monthly for 2 months in 2016 ($7,884.00.

20. Commencing January 1, 2020, V.M.Y. is to pay spousal support monthly in the amount of $3,889.00.

21. V.M.Y. is to pay S.H.G. an equalization payment of $26,060.83 for equalization of net family property under section 5 of the *Family Law Act*.

22. V.M.Y. is to pay S.H.G. $31,423.40 as a post-separation adjustment.

23. S.H.G. is to pay V.M.Y. $15,250.00 as a post-separation adjustment.

24. The amounts owing in paragraphs 21, 22 and 23 are to be set off against each other, so that V.M.Y. is to pay to S.H.G., or as she directs, the net amount of $42,234.23.

25. The proceeds of sale of the matrimonial home, after discharge of the mortgage and payment of fees, are $301,782.66, presently held in trust. Each party is entitled to $150,891.33.

26. The proceeds in trust to which S.H.G. is entitled, in the amount of $150,891.33, are to be paid out to her or as she directs immediately.

27. Pursuant to Sections 15.1(4) and 15.2(1) of the *Divorce Act*, the proceeds of the sale of the matrimonial home presently held in trust for V.M.Y., in the amount of $150,891.33, are to be held in trust for S.Y. as security for support and are to be paid out to S.H.G. or as she

directs in accordance with the support obligations set out in paras. 15-17 and 19-20 of this Order.

28. V.M.Y. is to pay S.H.G. $50,000.00 damages for the tort of intentional infliction of mental suffering.

29. V.M.Y. is to pay S.H.G. $100,000.00 damages for the tort of invasion of privacy (public disclosure of private facts and publicity placing the plaintiff in a false light).

30. V.M.Y. is to pay punitive damages to S.H.G. of $150,000.00.

31. S.H.G. may obtain a divorce on an uncontested basis upon payment of the requisite fees and filing of the requisite documents.

32. A support deduction order is to issue.

33. The approval of this Order as to form and content by V.M.Y. is dispensed with.

F. KRISTJANSON J.

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