***Klaprat v. Klaprat*, 2020 MBQB 1**

This decision concerns a Mater's Report on a *Family Property Act* accounting. Master Clearwater notes that this reference was unusual in that it was a reference pursuant to *The Partnership Act* as well as a general reference order under *The Family Property Act*. The *FPA* reference portion of the reference order was not the subject of any dispute at the contested hearing.

The partnership at issue was held 55% by the husband and 45% by the wife. The reference order was for an accounting and valuation of the parties' partnership assets and debts as of the date of dissolution of the partnership – the same date as the date of separation.

The only issues by the time of the hearing were the value of a grain truck deb, the value of a forage on the farm, and the value of partnership farm equipment. Expert reports (competing chartered accountant reports) on the values of the matters at issue were heard by Master Clearwater. A liquidation and auction value report on the farm equipment and auction values were also entered.

The task of the court is to ascribe value, as close as it can, to the fair market value at a specific point in time. In defining fair market value, the court is to assess the likely value of any asset or debt on the valuation date alone, if the respective asset or debt was sole to an arm's length purchaser in the available market.

On the whole, Master Clearwater preferred the evidence of the petitioner, where it was challenged, which was not often. The respondent's evidence appeared more self-interested to her Honour, and at times was absolutely refuted by other evidence.

Master Clearwater determined the total value of the partnership and entitlements to each party based on their respective sharing of the partnership.

***James v James*, 2020 MBQB 6**

This decision concerns the determination of the wife's claim for spousal support. The couple cohabitated for a period of 16 years. They were both aged 64 at the date of separation. Both had been married previously, once for the wife and twice for the husband. Both had adult children from their prior marriages.

Post-separation, the wife found casual employment as a caterer in rural Manitoba and as a cleaner of rooms at a bed and breakfast. She had some additional casual employment at a personal care home, but by trial had apparently received no hours from that employment. The husband was employed at a Rona.

The wife received OAS and CPP, her share of the husband's pension (transferred to her as an annuity - $106,409) and some GST benefits. The husband received OAS and CPP as well.

The couple had been involved in a motorcycle accident approximately a year prior to separation. They each suffered significant injury, which required hospitalization. Both were off work for some time. The wife for 6 months, the husband for 6 weeks and then a return to partial duties at work.

The wife's income-earning history was very low (a few thousand annually). Her anticipated income was $23,110 – comprised of OAS, CPP, GST income and the withdraw from the annuity reference above. The wife ascribed no amount to employment income (which had been negligible, a couple of hundred dollars). The amount withdrawn from the annuity was the minimum permitted, given her concerns regarding her future financial circumstances.

The Court found it was not reasonable for the wife to withdraw only the minimum amount of the annuity (which would have left her with over $16,000 by the time she was 100 years old) given her financial circumstances and the amount available to her to withdraw. The Court ascribed an additional $7,388 to the wife's income – the annual amount permitted to be withdrawn from the annuity. Additionally, a modest amount of employment income was added to her income -- $300 per month, $3,600 per year. Her total income was therefore $30,600.

The husband made a change in employment following the motorcycle accident, which resulted in a lower wage ($27 to $18 / hour), because, he claimed, he could no longer handle the physical aspect of that prior employment. The Court accepted this explanation.

The husband was not withdrawing any sum from his pension, saving it until such time as he was no longer working. The Court found it was not reasonable for him to do this, just as it was not reasonable for the wife to withdraw the minimum available to her. The same maximum amount available to the wife was added to the husband's income – a total annual income of $62,168.

The husband disputed the wife's claim to spousal support on entitlement and quantum. The Court stated a disparity in income does not automatically lead to entitlement. If the disparity does not relate to a compensatory or non-compensatory basis for entitlement, there is no entitlement. The Court found the basis for support, in this case, was clearly non-compensatory – an inability of the claimant to meet their basic needs by reason of the end of cohabitation. In this case, where the recipient had become used to the income earning capacity (and lifestyle provided by same) of the payor, and there is significant income disparity, entitlement to support on a non-compensatory basis is present.

Following an analysis of the expenses and surpluses available to each party, the court found that the husband did have an ability to pay, but the wife had no need. She argued she was living a very minimal lifestyle, with minimal expenses – the Court agreed.

Following an analysis of factors which suggested spousal support quantum at the high and low end of the applicable SSAGs range, the Court determined that the quantum should be at the low end of the range - $600 per month.

Concerning duration, the Court held that the "rule of 65" would apply – duration would be until further order of the court with no set end date. The Court made the support effective as of the date the husband was made aware of the wife's spousal support claim – one month after the filing of her Petition for Divorce.

***Manzo v Huerta*, 2020 MBQB 13**

This decision concerns a Master's Report on cohabitation and separation dates. The application commenced proceedings seeking a declaration that the respondent was never his common-law partner, that his property was never the respondent's homestead, and an order directing the homestead notice be vacated.

The original reference order was for a recommendation as to whether the parties ever cohabitated in a conjugal relationship, and if so, identifying the dates of cohabitation and separation. Master Berthaudin was of the view he did not have jurisdiction to make such a determination. The matter was referred back to the Judge and the Order was amended. The Master was to instead set forth a recommendation identifying the date of cohabitation and separation. The applicant's position was neither date existed as cohabitation never occurred.

During the period at issue (17 years, according to the Respondent), the applicant was a resident of Rankin Inlet, Nunavut, the respondent, a resident of Winnipeg. Both continued to reside in those communities when the matter came before the Court.

The parties began dating around 2000/1. For the first couple of years, the applicant would travel to Winnipeg for work every two months or so. He estimated he was in Winnipeg between 5 and 14 years per year during those years. His employer paid for him to stay at a hotel. Occasionally, he would stay with the respondent and her children. She claimed she would sometimes stay with him at the hotel. They would go on dates – movies, restaurants.

The parties became engaged in 2004. According to the applicant, the relationship ended in 2005 (without them ever marrying). The respondent claims the relationship never ended. According to the applicant, the relationship resumed in 2006 but ended again a year later. From 2007 to 2009 they communicated only about the property – a home the applicant purchased in

Winnipeg in 2005 and allowed the respondent and her children to reside there. He claims to have planned to live there upon his retirement – but never with the respondent or her children. She claims they did intend to live together. She sold her home prior to moving into the own by the applicant. The applicant paid the mortgage, taxes, insurance; the respondent paid utilities. The applicant claims he allowed her to reside there as he made a promise to until her children graduated high school, and he wanted to be sure the property (and his investment) was maintained.

The respondent was on the applicant's health insurance policy from 2008 to 2011. He claimed to do this to assist her with the children's dental needs. She claimed they considered themselves to be common-law spouses, and this is evidence of that.

The applicant married a woman in July 2011. She did not move to Rankin Inlet until 2012, with her two children. They separated six months later in early 2013 and were divorced in November 2014.
Following his divorce, the applicant and respondent began dating again, at some time in 2013. They travelled to a wedding in Atlanta that year and purchased a timeshare property together. The applicant claims they spoke rarely and only about the property for the next few years following a conversation the respondent initiated about future marriage, which he was not interested in. She denied this.

They travelled separated to Guatemala (their home country), saw one another and had sexual relations.

The respondent never travelled to Nunavut over the course of the alleged 17-year relationship. The applicant never filed his income tax returns as anything but "divorced" or "single" – except for the years of his brief marriage.

Based on all of the evidence available to him, Master Berthaudin concluded that there were no cohabitation or separation dated to recommend for the purposes of an *FPA* accounting. The parties never resided in the same province, let alone the same home. The parties shared company sporadically over 17 years. They clearly had an economic arrangement with each other and appeared to care greatly for one another from time to time. They did not however cohabit in a conjugal relationship.

***Doyle v Suche*, 2020 MBQB 17**

An agreement with respect to an assessment report was made, the report was prepared and released to the parties. The respondent's claim was that the petitioner had resiled from that agreement concerning the report, and the report ought to be released.

A report was agreed to by an assessor agreed to by both parties, the cost to be shared equally. The assessment was prepared and an invoice issued. The petitioner took issue with the report methodology and conduct of the assessor and refused to pay. The respondent desired the report's release and paid her share of the costs. She then paid the petitioner's share as well, in hopes it would lead to the release of the report. The petitioner withdrew his consent to the release of the report and commenced a civil action against the assessor, as well as a civil injunction preventing the report's release. The General Division judge denied the injunctive relief but did order that the assessor was not to release the report until the time for appeal expired, or final determination on appeal. An appeal was filed by the petitioner.

The petitioner submitted that the assessor breached her contract and the assessment was so flawed due to the assessor's conduct that its release would cause serious harm to him and the children. He utilized a separate cause of action against the assessor in the General Division – instead of bringing his concerns to the Family Division case management judge. His position was that as long as the matter is proceeding through the General Division, the report should not be utilized for the family proceedings. He suggested there was still time before trial for another report to be completed and the parties should share the costs of that assessment.

The respondent made a request in correspondence to the case management judge seeking motions time on the issue of the report's release. The judge denied that request (at this point trial was 15 months away). Another, later request was made, this decision is a consequence of that further request.

The petitioner's position was the matter of motions time on this issue had already been determined, and denied, by the prior judge until the civil proceedings were resolved. Madam Justice Mirwaldt, in this decision, states that the prior judge's letters exchanged with counsel were not decisions of the court, but in response to evolving events at the time and his denial to hear motions was not tantamount to a decision on the merits of each party's position on whether the assessment report should be released.

The court found that the petitioner's withdrawal of his consent to the assessment after it was completed, was too late. Allowing this to occur would invite every parent who suspected that an assessor may make unfavourable findings against them to withdraw unilaterally withdraw from the process and suppress the report. The usefulness of assessments would be severely compromised as a result.

If a party has issues with an assessment, those issues ought to be raised in the family proceedings by seeking time before the case conference judge. Similarly, a negative assessment can be challenged at trial. A *voir dire* before the trial judge to challenge the admissibility of the report may be sought. An assessor is open to cross-examination. Launching a separate civil action was used to intimidate the assessor, frustrate the ability of the respondent to use the report, and to avoid the rules and practices of the Family Division. The

Court further held that the petitioner's conduct was egregious and unacceptable. The behaviour of the petitioner "cannot stand … it must be condemned."

Madam Justice Mirwaldt ordered disclosure of the assessment report as necessary.

***Ruchotzke v. Ruchotzke*, 2020 MBQB 25**

This is a decision in a mobility case. The mother wished to move with her two children (ages 13 and 10) from Ashern to Carberry, Manitoba (a distance of approximately 250 km). The father was opposed. The parents had shared care and control for many years. An assessment by family conciliation recommended the children spend more time with their mother and supported the move. The assessor found the father was not meeting the children's needs by his failure to support their relationship with their mother. The mother was found to be more family-focused, whereas the father was adult-focused.

The father sought a report from the children's therapist on the effect of a movie and his parenting involvement with the children. The therapist only met with the father and children. The mother was not informed of the report and no request was made to meet with her. The report was sent to the father's lawyer – but not the mother's. Upon learning about this, the mother requested her own report. The therapist met with the mother and children and sent his report to only the mother. The father had no knowledge of the report until partway through trial.

Madam Justice Allen cites and reviewed the leading mobility cases. Concerning the mother's report from the therapist, Justice Allen found that this report should have been disclosed as part of the discovery process and failure to do so was a breach of the QB Rules. Therefore, only portions of the report were allowed to be tendered during the therapist's testimony. Other portions were disallowed and redacted. Justice Allen was troubled by the therapist reports and the manner of their request, preparation and release.

Justice Allen found that despite having a shared care arrangement, the situation was in fact more akin to a parallel parenting arrangement whereby the children's world does not allow of even contemplate connection to the other parent while in the care of the other. The father did not allow the children easy contact or communication with their mother when in his care.

The double bind issue (i.e. would the relocation parent move, even if their request was denied) was led at exams and read in at trial, without objection. Justice Allen said this never should have occurred and she was disregarding all the mother's answers as to her alternate plans.

Turning to the factors from *Gordon v Goertz*, Justice Allen found the mother's treatment of the children's relationship with their father to be healthy and open, but not reciprocated by the father. The Family Conciliation assessment report supported the move.

The move was only 2.5 hours away. Maximum conduct between children and parents is promoted, but no absolute. The older of the two children had a clearly communicated desire to move. She wanted a fresh start having experienced bullying and difficult social relationships in school.

The mother's principal reason for the move was economic – her partner's business and her employment. The move also provided the children were better education and social opportunities.

Justice Allen found that even if the children remained in Ashern, the assessor recommended they spend more time with their mother. A disruption of 2.5 hours is far less than many mobility cases. The assessor ultimately found that although there were risks associated with a move, the risks for the children remaining in their community were greater given their current struggles. Justice Allen determined it was in the children's best interests to be permitted to relocate with their mother, step-father and step-siblings.

***Garant v. Klassen*, 2020 MBQB 28**

This is a second relocation decision. The mother of a seven-year child wishes to relocate to Pasadena, California from Morris, Manitoba. The father lives in Winnipeg and has regular periods of care and control. The mother had a boyfriend in Pasadena and a two-year child with him. They were dedicated to unifying their family.

The mother's plan should she be permitted to relocate included that she would facilitate liberal and generous contact between the father and child, including daily video chats, the child travelling to Manitoba at minimum three times per year, a reduction in child support to offset the father's cost of maintaining contact with the child, generous periods of care and control for the father in California if he was able to travel there.

A family conciliation assessment was completed. The assessment acknowledged the strong connection between the child and both parents. Concluded the move would not be in the child's best interests and was not recommended.

Justice Johnston agreed with the assessment report. Relocation would cause considerable disruption to the child's relationship and connection with her family, school and community, this disruption would be very consequential, and not in her best interests.

The mother had a track record of failing to follow past promises with respect to contact between the father and child. Justice Johnston shared concerns expressed by the father concerning the enforceability of the mother's promises.

With respect to the mother's suggestion on a reduction of child support, Justice Johnston notes that those funds are not hers to give away, they are for the benefit of the child, not her personal resource to give away as she pleases.

The mother's desire to relocate was not "child-focused", but rather to facilitate her own wishes and desires. Permission to relocate was denied.

***Shuttleworth v. Haywood*, 2020 MBQB 29**

A third relocation decision. The mother in this case wished to relocate to Dauphin, Manitoba from Winnipeg. She claimed she would be fired from her job if she did not move. She took this job prior to the pronouncement of a Final Order, knowing it would involve an eventual move to Dauphin. This was a variation proceeding with respect to that Final Order. The father objected to the proposed move and instead sought a variation establishing a shared care regime.

Justice Thomson found a material of change of circumstances to be the children's matured ages – the older child's views had become relevant – and the immediacy of the mother's request to move – what had previously been anticipation to move, was now demanded by her employer, or so she suggested.

From an assessment completed by Family Conciliation, the parties' older child had expressed a desire to remain in Winnipeg and to have equal time with his father. The father's periods of care and control in the months leading up to the hearing had been greatly enlarged. From a period of March 2019 to October 2019, the father reportedly had 120 overnights out of a possible 245.

Justice Thomson found that the mother had paid little attention to the effect that relocation would have on her children. She testified that she expected "no complications" and gave no evidence on her personal knowledge of her children's wishes or feelings on the proposed move. The assessment report indicated that the move would adversely impact the children's relationship with their father and added that their removal from friends, school, and lifelong community would be a traumatic experience for them.

The father sought a shared care regime and his time with the children had expanded since the time of the Final Order. However, Justice Thomson found the father's plan concerning shared care was aspirational and underdeveloped. He did not present a plausible plan to establish such an arrangement. He remained living in his parent's basement, forty minutes from the mother's home. He agreed that it would be better for the children if he lived closer to the mother, but he had taken no steps to do so.

Justice Thomson denied the relocation and also a shared care regime – the current arrangement had proven beneficial to the well-being and development of the children over the preceding seven and one-half years and should remain in place.

***Dunning v Estate of Ivan Solic et al.*, 2020 MBQB 37**

In this decision, the petitioner sought a declaration that she received Homestead rights to a residence she shared with her common-law partner and that those rights were retroactively received by her to the beginning of the parties' cohabitation in 1992 – regardless of the fact that common-law partners obtained status to rights under *The Homestead Act* until June 30, 2004, with the coming into force of Bill 53.

The petitioner and her common-law partner began cohabitating in 1992 in a house owned solely by him. In 2002, the common-law partner transferred title to the house from his sole name into the joint names of himself and his son, as joint tenants. The petitioner registered her Homestead Notice of title to the property in 2008. The petitioner's common-law partner died in 2014.

Very shortly after his father's death, the son filed a request with the Land Titles Office to have title to the house transferred to his sole name as the surviving joint tenant and sought to vacate the petitioner's Homestead Notice. He filed a Notice of Application with the Office of the Registrar-General of Land Titles seeking this relief, and later a Notice of Application with the General Division of the Queen's Bench, seeking essentially the same relief. A month later, the petitioner filed a petition in the Family Division seeking a family property accounting between herself and the estate of her deceased partner.

The Registrar-General rendered a decision in relation to the son initial Application, accepting the survivorship registration, subject to existing encumbrances, including the Homestead Notice; vacating the Homestead Notice, and issuing title to the petitioner to a life estate during the term of her life to an undivided one-half interest; that the son be recognized as the registered owner of the remained on the petitioner's death; that the son be recognized as the owner of an undivided one-half interest.

Justice Thomson found no evidence of a severance of the joint tenancy between the son and father and noted that it is well-settled law that a deceased's interest in land held in joint tenancy is extinguished upon their death, absent a severance during the course of their lifetime.

Justice Thomson found he was unable to conclude that the petitioner's common-law partner homestead rights, acquired subsequent to the transfer of title into the father and son's names jointly, trumped those of the surviving joint tenant. The result otherwise would be to defeat

the surviving joint tenant's right to survivorship, secured by him years before common-law homestead rights had even been created.

Justice Thomson further found that *The Homestead Act* did not provide provisions addressing conflict between homestead and joint tenant survivorship rights. The *Act* does not seem to anticipate a situation such as this. Justice Thomson did not that some provinces in Canada do have legislation that explicitly deals with this type of scenario – in fact, legislation going both ways.

Justice Thom dismissed the petitioner's application, vacated the homestead notice. Title to the property would be held by the son solely by way of survivorship and unencumbered by any homestead notice.

***Adnum v. Fleury*, 2020 MBQB 42**

This decision of Justice Abel deals with the mother's motion for summary judgment concerning final-decision making authority; the ability to travel with and obtain the children's passports without the consent of the father; child support and daycare expenses.

Justice Able reviews the test on summary judgment from *Dakota Ojibway Child and Family Services v MBH*, 2019 MBCA 91 and the applicable Queen's Bench Rule – 70.18(2).

In deciding whether a fair and just adjudication of the matter can be accomplished and there is no genuine issue requiring a trial, Justice Abel notes that the main issues are a determination of the father's income and corresponding child support obligation. Justice Abel held there was no genuine issue requiring a trial on this issues. The father filed no affidavit and provide no evidence whatsoever. He could not demonstrate why the summary judgment process would preclude a fair disposition of the matter or the presence of a genuine issue requiring a trial.

Summary judgment in favour of the mother was granted.

***Bonnefoy v Geisler*, 2020 MBQB 45**

This decision concerns Queen's Bench Rule 24 – dismissal for delay. In these proceedings, a petitioner had been filed in August of 2012, an Answer in December of 2012. The parties' child was now 21 years old. The last court hearing had occurred in November 2015, a motion brought by the petitioner to travel with the child, and resulted in a consent order. In March 2017, the petitioner filed a motion to sever a cohabitation date dispute from the rest of the pleadings, the motion was deemed abandoned. Later, in July of 2017, the respondent filed a motion seeking security for costs and dismissal or stay of the petitioner's motion. Similarly, this did not proceed and was deemed abandoned. In November 2018, the respondent's motion, the subject of this decision, was filed.

Rule 24 states the court may, on motion, dismiss all or part of an action if it finds that there has been significant delay in the action and that delay has resulted in significant prejudice to a party. If three or more years have passed without significant advance in an action, the court **must** dismiss the action unless one of several conditions are present. Justice Thomson provides a definition of significant advance as meaning "moving the litigation closer to trial in a meaningful way."

Justice Thomson lays out the two "routes" to pursue a claim of dismissal for delay pursuant to Rule 24. The first is to establish some delay which resulted in significant prejudice; the second to establish inordinate and inexcusable delay, triggering a presumptive (and rebuttable) significant prejudice.

These parties had not attended a case conference in 2015. Motions had been filed but deemed abandoned with no attempt to extend timelines, despite that being an option available. Communication between counsel in the interim was found to be scant. None of the exceptions provided for under R24.02(1) were present in this case.

Justice Thomson found he had no option but to dismiss the petition for long delay, noting that the Rules do not provide for discretion regarding disposition under Rule 24.

***Flood v Dale*, 2020 MBQB 64**

This decision concerns the enforcement of a family arbitration award and section 49 of *The Arbitration Act*. Both parties signed an arbitration agreement, were represented by counsel and received independent legal advice. The issues at arbitration were care and control, decision-making, and travel/passport issues.

Madam Justice Horst reviewed the application of section 49 of *The Arbitration Act* and the enforcement of arbitration awards. The *Act* allows enforcement by way of the Queen's Bench permitting the matter to proceed directly to a judge for determination, without case management of intervening processes. Per the *Act*, the Court shall give judgment unless: a 30 day appeal period has yet to lapse, an appeal or application set aside the award is pending, or the award has been set aside or the arbitration declared invalid.

Madam Justice Horst held there is no discretion by the judge unless one of the exceptions contained within the *Act* are met – that was not the case in this matter. The award was made by an experienced family law lawyer and arbitrator and was consistent with the law. It was the position of the mother that the award should not have been enforced by the court because there had not been strict compliance by either party. Justice Horst clarified this was not a ground to not enforce an award under the *Act*. Just like no one would argue that a Court Order

was unenforceable because a parent may be late or early to an agreed-upon exchange of children from one parent's care to the other, the same applies to an arbitration award.

Pursuant to the *Act*, the award was enforced by way of a Variation Order of the Court of Queen's Bench providing for the same terms as the arbitration award.

***Gray v Gray*, 2020 MBQB 69**

This decision concerns a father's motion of summary judgement on property issues and interim child support. The mother sought an order for interim spousal support and a prohibition on communication pursuant to *The Family Maintenance Act*. The father had primary care and control pursuant to an interim order

Like in the *Adnum v. Fleury*, 2020 MBQB 42, decision reviewed above, Justice Abel again lays out the test for summary judgment from *Dakota Ojibway CFS v MBH*, 2019 MBCA 91. With respect to the father's request for summary judgement on the property issues in dispute, Justice Abel found the mother had not challenged any of the information set out by the father in his Comparative Family Property Statement. As such, summary judgement was found by the Court to be a fair and just method of adjudication – there being no genuine issue requiring a trial. The mother was incapable of meeting her evidential burden of establishing that the record, facts or law precluded a fair disposition or that there was a genuine issue requiring a trial – she in fact conceded that during argument. An equalization of $4,648 was owing to the mother by the father.

The Court had no difficulty determining the issues of child support payable by the mother and easily dismissed a claim she raised for undue hardship with respect to exercising access to her children.

Concerning the mother's claim to interim spousal support, the essential question to be answered by the Court is reasonable needs pending trial, having regard to the other spouse's ability to pay. The father's expenses exceeded his income by $3,500 per month. Justice Abel found he had no did not have the means to pay interim spousal support. The mother failed to provide an updated financial statement facilitating an analysis of her expenses – although she claimed she had a deficit of $767 per month. Justice Abel found without a financial statement it was difficult to determine where this number came from. Despite this, Justice Abel was willing to accept there did exist a deficit, and a need by the mother to interim spousal support and so ordered. Justice Abel reviewed the factors suggesting a support quantum at the low and high end of the applicable ranges suggested by the SSAGs. Ultimately, the Court found the presence of factors suggesting the higher end of the ranger (limited income of the mother, her compelling needs, the absence of any property to be divided, the mother's primary care of the children during the marriage impact her income earning capacity) and factors suggesting the lower end of the range (the parties' debts exceeding their assets and the father continuing to

carry those debts). These factors suggested to Justice Abel on an interim basis that the mid-range of support would be appropriate ($300).

With respect to the mother's request for a prohibition on communication, Justice Abel found a lack of evidence to support the need for such relief. He found such an arrangement would make arrangements for periods of care difficult and shared parenting (if eventually ordered) similarly difficult. Justice Abel dismisses the mother's claim but does advise the parties to communicate by way of email or text (although not ordered to do so) and to maintain respectful communication.

***Dueck v Dueck*, 2020 MBQB 89**

In this case, the father had previously assaulted the mother in front of the child (age 5) a month after their separation. He plead guilty and was sentenced to two years of probation. Despite this assault, the mother agreed to a reviewable interim order to facilitate contact between the father and child. She had followed the order consistently and was supportive of the father's periods of care. A Family Conciliation Assessment was completed with did not include a recommendation for shared care. The father's counsel contacted Family Conciliation, and a revised assessment was released which then included a recommendation for shared care. It was claimed that the assessor forgot to include the father's desire for shared care, despite the fact it was mentioned twice in the first assessment report. In her decision, Madam Justice Horst expressed serious concern about the amendment to the assessment and the opinions expressed therein as a result.

The father brought a motion to increase his periods of care and control. Madam Justice Horst did not accept the father shared equally in the care of the child prior to his assault of the mother. She found he was either working or under the influence of drugs or alcohol a significant portion of the time. The mother was the primary caregiver.

The Court found the impact of domestic violence on the child was clear. The Assessment Report recorded the child stated her father used to be "mean" to the mother and was aware of the domestic violence to at least some extent. The father had recently made some positive steps – AA, DV workshops, and clean drug tests. He had not continued with outpatient counselling as recommended by his residential treatment program.

The father sought shared care on a 2-2-3 schedule. The mother suggested the arrangement be expanded to one mid-week overnight and alternate weekends Friday to Sunday.

Madam Justice Horst found it was impossible for the parties to co-parent where they remain legally prohibited from communicating with one another. Co-parenting requires the ability for two parents to communicate regularly about their child's care and care arrangements – that

was simply not possible here. Parallel parenting following the schedule suggested by the mother was found by the Court to be in the child's best interests.

***Peters v Peters*, 2020 MBQB 94**

This decision relates to a father's motion to terminate spousal support, for a retroactive reduction of his child support obligation and a remission of arrears of child and spousal support – he owed $33,000. The mother claimed the father was intentionally underemployed.

The parties had a consent Final Order from 2016. The father's position was that his income had been for years less than the $80,000 set out in the Final Order. He claimed his income fluctuated between $28,000 and $56,000 since the time of the Order.

Justice Thomson found the father's financial disclosure to be chronically incomplete. He disregarded the case conference judge's specific directions on what materials needed to be disclosed prior to the hearing of this motion. The father had repeatedly secured and then left numerous employment positions over the course of the years following the Final Order. At times he left for a higher income, but typically he left for lower-paying positions. He provided no evidence of job search to locate suitable employment. His work history demonstrated an ability to earn an income around the amount set out in the Final Order ($80,000). He had only a few months before this motion obtained a job earning $56,000 per year. He left after three months for a lesser paying job. Justice Thomson found the circumstances were an invitation to impute the father's income.

In imputing income to the father, Justice Thomson reduced his income from the $80,000 set out in the 2016 Final Order and utilized his income of $56,000 as of November 2019, when he obtained the realistic employment he subsequently left without any good reason. Justice Thomson declined to deal with arrears prior to this date as he found the father was underemployed and failing to meet his obligations to his child. Arrears for the period from November 2019 to the motion were reduced according to the father's reduced income – an approximate reduction of arrears by $2,000.

***Muense v Muense*, 2020 MBQB 105**

This decision involved an application requesting the return of two young children to Germany by their father pursuant to the Hague *Convention on the Civil Aspects of International Child Abduction*. The mother opposed the father's application.

Both parties were German citizens. The mother resided in Morden, Manitoba. The parties met online. The father travelled to Morden and they met in person. They married a few weeks later. During the first five years of marriage, they moved between Canada and Germany regularly.

The father eventually applied for permanent resident status in Canada (a status the mother already had).

The parties' two children were born while they were living in Germany, they wanted them to have German citizenship. Between the births of the two children the parties moved back to Canada for a year or slightly more, and then back to Germany. While in Germany, the parties resided in the paternal grandmother's home and then eventually in an apartment purchased by the grandmother for the parties. The father lived there to the day of the hearing. The mother was the primary caregiver of the children while the father worked.

In early 2019, the mother moved to Morden with the children with the father's consent. They were experiencing marital difficulties. The father's position was this was a temporary stay to visit family. The mother's position was the move was meant to be permanent, with the father to follow and their cohabitation to resume, or if that was not possible, for him to reside in Morden so he could be near the children. By July of that year, the father claimed it had been clear the mother and children would not be returning to Germany. Not until early 2020 (nearly one year later) did he claim to become aware of the possibility of making a Hague Abduction Convention request for return. In February, the mother received a request to return from the father's German counsel and refused. She initiated child support proceedings in Manitoba. The father submitted his request for return in March 2020.

In her decision, Madam Justice MacPhail thoroughly reviewed the process for Hague Abduction requests for return in Manitoba, including the role of the Department of Justice (Family Law Branch) as the Central Authority for purposes of the Hague Abduction Convention; the Convention itself and applicable Articles of the same; and, importantly, the habitual residence of the child test – somewhat recently dealt with by the Supreme Court in *Office of the Children's Lawyer v Balev*, 2018 SCC 16, by which the habitual residence of a child is determined through use of the "hybrid approach". The hybrid approach recognizes the child is the focus of the analysis, while at the same time acknowledging that it may be necessary to consider parental intention in order to properly assess the child's connections to a country. The Ontario Court of Appeal decision of *Ludwig v Ludwig*, 2019 ONCA 680 is quoted from by Madam Justice MacPhail quite extensively as it provides a very helpful step-by-step analytical framework for Hague Convention applications.

In this decision, Madam Justice MacPhail finds the children were allegedly wrongfully retained in Canada on July 1, 2019 – the date the father says his consent to the children's temporary travel to Canada expired.

Reviewing all of the relevant facts with respect to the children's habitual residence immediately prior to the alleged wrongful retention, the Court found that the children were habitual residents of Germany and that the Convention, therefore, applied to their wrongful retention in Canada.

Article 13 of the Convention provides certain exceptions to the mandatory return of children found wrongfully retained. One such exception is if the parent seeking return consent to or subsequently acquiesced to the removal or retention. The mother claimed this was the case here. The onus was hers to establish an exception under Article 13. The Court found that the eight months it took the father to submit his request for return did not in and of itself constitute acquiescence. However, when taken with his other actions/inactions (for instance, he met with a lawyer in Germany and signed various documents facilitating the mother's care of the children in Canada; he provided no evidence of requests for the return of the children between July 2019 and February 2020; in December 2019 he told the mother he'd be moving to Canada to "be there" for the children), the delayed application provided additional evidence of his acquiescence of the children's retention in Canada.

The Court found the father subsequently acquiesced to the wrongful retention of his children in Canada and therefore an exception to the mandatory return requirement of the Convention was present. The father's application for the children's return to Germany was dismissed.

***Sayco v. Simard*, 2020 MBQB 113**

This decision of Justice Thomson concerns a father's application to set aside a protection order obtained before a JJP by the mother and the parties' daughter.

The parties separated prior to their child's birth but continued to reside together in the father's home – the applicant in a separate bedroom with the child, the respondent on the second floor. The mother and child left the home and obtained a protection order four days later and soon after initiated family division proceedings concerning custody. A consent order was pronounced soon after permitting the father to have supervised visits with the child as well as protective relief pursuant to the *Family Maintenance Act*. Between then and the hearing of this matter, two more interim *FMA* consent orders had been made enlarging the father's periods of care and control, with supervision, drug testing by the father, and other related terms.

The question for Justice Thomson was whether the father had established on a balance of probabilities that it was fit and just that the protection order be set aside for both or either of the mother and child.

In making this determination, Justice Thomson provided a fulsome review of the applicable provisions of *The Domestic Violence and Stalking Act*.

In seeking her application, the mother alleged three specific incidents of assault committed against her over the period of approximately 6 months, as well as more general allegations of threats made by the father to kill her, their daughter, and himself. The mother's evidence described a situation of cyclical abuse, the father's erratic and, at times, drug influence

behaviour, his emotional abuse, control, and manipulation. The father for his part, denied all of the allegations of abuse, claiming instead that the mother was the aggressor and that she had fabricated the allegations to deny him a role in his daughter's life. The Court heard of the father's serious drug use, including a history of overdoses from fentanyl and associations with drug dealers and users.

The mother had an audio recording of an alleged incident of domestic violence from September 2019 – the event that triggered her move from the home with the child and her application for a protection order. The audio recording was of the father choking the mother while the child was in her arms, as well as him standing outside of her room while she and the child were barricaded inside to protect themselves from him.

Child and Family Services was actively involved with the parties since soon after the mother's move from the home. The Agency's file was closed shortly before this hearing. The social worker testified there were no current protection concerns respecting the father's contact with the child at visits. There was no evidence of active "hard" drug use by the father. There was no record of the father having a past criminal record for violence, nor of directing his violence towards the child – however, Justice Thomson does not the issue of the child being harmed, emotionally or psychologically by exposure to domestic violence against her mother. The father had been having on-going, supervised visits with the child since soon after the protection order was obtained. Visits notes were filed by consent, reviewed by the Court and raised no concerns.

Ultimately Justice Thomson sound it was fit and just that the protection order should be set aside as it applied to the father's daughter. However, the father had not met his onus of demonstrating it was fit and just to set aside the order with respect to the mother.

***Zheng v. Yang*, 2020 MBQB 146**

This decision concerns the determination of the father's income for support purposes, a spousal support claim, and the classification of monies provided by the father's mother, i.e. whether those monies were in fact loaned or gifted.

The petitioner (father) came to Canada from China in 2000 aged 19. From 2000 to 2008 he was in Canada on a student visa and prohibited from working. His parents regularly sent him money for tuition and living expenses. Later, he obtained a work permit and worked various minimum wage positions, while his parents continued to send him money for rent and expenses. His permit expired in 2011 and he was unemployed. Once again, his generous parents continued to support him financially from China.

The respondent (mother) obtained PR status in 2007, studied English and worked at a Subway and grocery store. Her income was supplemented by some support from her parents also living in China.

The parties met and soon began cohabitating. The respondent working, the petitioner still unemployed. The petitioner's parents began supporting both parties from that time. The petitioner's mother telling the respondent not to worry about her son's unemployment and that she and her husband would ensure they were taken care of financially. The petitioner's parents provided a sum of $300,000 for the purchase of a family home. According to the respondent, there was no discussion at the time about the sum being a loan or requiring repayment.

The parties had two children. The respondent was the primary caregiver. The petitioner began working as a part-time pizza delivery driver – which he continued to do at the time of trial. His mother continued to provide financial assistance to the parties throughout the marriage. Upon separation, the Petitioner moved into an apartment, paid for by his mother. The respondent and the children remained in the family home – mortgage and taxes were paid by the petitioner's mother up to the time of trial.

In determining the petitioner's income, he conceded to the mother's argument that all of the money he received from his mother to support him and later her, should be properly included in determining his income for support purposes. Justice Thomson notes this is not an imputation of income, but a simple determination of what his actual income was. Justice Thomson referred to various banking statements, that although incomplete, suggested the mother had provided the son with $48,000 in the last six months of the parties cohabitation. The father's income from pizza delivery ($20,360) and the sums received from his mother (grossed up to $72,660) were added and he was ordered to pay child support accordingly.

As the mortgage and taxes had been paid by the petitioner's mother, while the respondent and the children resided in the home, and no child support was paid. Justice Thomson, having attributed the sums sent by the petitioner's mother as income in his hands for support purposes provides the petitioner with a "credit" for these payments and no arrears of support were therefore found owing.

The respondent similarly conceded that amounts received by her from her family in China should be added to her income for spousal support income determination purposes. She received on average, $18,000 per year which was added to her employment income to determine her total income.

The respondent's claim to spousal support was on a compensatory and non-compensatory basis. Justice Thomson found this was a short-term marriage of four years (five years cohabitation); the parties were still relatively young (late-thirties); had a comfortable lifestyle

during marriage, which had diminished for both since separation. The respondent had moved steadily toward economic self-sufficiency. The disparity in the parties' incomes had narrowed each year since separation but was initially broad. Justice Thomson found there had been no real long-term or sustained economic disadvantage to the respondent from the marriage or its breakdown. The Respondent's role as the children's primary caregiver had delayed her entry into full-time work and it took her time to recover from that disadvantage. The Court found the petitioner ought to have paid support (both child and spousal) immediately following separation and that his spousal support obligation remained unfulfilled. The respondent's proper share of equity in the former family home was to be preserved (see below). Justice Thomson found the respondent had entitlement, but minimal quantum and duration. A lump sum of $15,000 was ordered payable by the petitioner.

Concerning the monies provided by the petitioner's parents for the purchase of the family home, the petitioner's argument was this sum represented a "loan" he would have to repay to his parents – thereby reducing the equity in the home available to the respondent on an accounting. Justice Thomson provides a thorough and helpful review of the presumption against advancement to adult children by their parents – a presumption that can be rebutted on the evidence. Whether a transfer was a loan or gift depends on the actual intention of the donor at the time the advancement is made. "After-the-fact" evidence of intention should be viewed with skepticism and a document signed after a transfer cannot convert what was a gift into a loan. Fairness implications are at play where a debt constitutes a credit in an equalization calculation with the effect of reducing the family property of the spouse claiming the debt. The spouse should not receive a credit for a debt if they will never be called upon to actually pay that debt. This was a risk from this respondent's perspective.

Justice Thomson finds that the respondent had never been told of the existence of a purported loan agreement between the petitioner and his parents disclosed by the petitioner during litigation. The "agreement" included no rate of interest or schedule for repayment. Only the petitioner and his parents signed the document. The respondent claimed the document and loan were fraudulent. At the time of purchase, the mortgage lender and real estate lawyer were never told of the existence of the alleged loan.

The parties agreed that all of the monies advanced to the son by his parents over a 20 year period (from when he first came to Canada to trial – an amount totally hundreds of thousands of dollars) were gifts with the sole exception of the $300,000 for the purchase of the family home. Justice Thomson found the petitioner and his mother's testimony to be "murky" and lack particularly. He questioned how the parents or their son ever thought he would be capable of repaying the loan given they continued to support him. There had never been a demand for repayment and the petitioner only made one $1000 payment post-separation. In the very same period his parents had provided him with tens of thousands of dollars – an arrangement Justice Thomson found very odd indeed.

Ultimately the petitioner's mother inadvertently disclosed the true intentions behind the "loan agreement". She explained that China had high incidences of "marriage fraud" and the loan agreement was a contrivance intended to allow the recoup of monies subject of the gift in the event the couple someday split. Justice Thomson was convinced that but for the separation of the parties, the document would never have seen the light of day. The monies were in fact a gift, not a loan.

***Ducharme v. Burym*, 2020 MBQB 160**

This decision concerns a dispute on custody arrangements for the parties' four children. During the course of the marriage, the mother was the primary caregiver. The parties had a week-on/week-off arrangement but struggled with it. A family conciliation assessment report was completed. It was positive for the mother, but raised concerns about the father, including his involving the youngest child (age 8) in issues relating to the separation. The assessment recommendation was a reduction in the father's periods of care and control and that he attend counselling. The parties adjusted their arrangement accordingly.

At trial, the father sought sole custody or shared care. Madam Justice MacPhail writes that it was clear to her that the father wanted more time with the child, but that his claim for sole custody or shared care was clearly connected to the issue of child support and his need to receive it from the mother in order to meet his financial needs. The Court found the mother worked hard to make shared care work, despite the father's challenging behaviours. While she had primary care and regularly updated and communicated with him. The father was found to be unwilling, or unable, to communicate appropriately with the mother and be involved in a functioning co-parenting arrangement.

The Court found the father exhibited behaviours at times completely inappropriate and others extremely disturbing. He was found to be incapable of controlling his impulses and had made inappropriate comments to the children on numerous occasions. One of his children had made comments of suicidal ideation when the parents were arguing. The father spoke to the child and the mother heard him say "if something happened to you, I would never forgive your mother." The father frequently told the children about his financial woes, which caused them in turn to ask their mother why she was making their father pay her money and not giving him half of their assets. The father regularly used the children to pass messages and information to the mother, instead of telling her directly in an appropriate manner.

Justice MacPhail awarded the parties joint custody of the children with primary care and control and final decision-making authority to the mother. The father was provided with periods of care and control on alternating weekends and every Wednesday evening.

Madam Justice MacPhail found the father to be underemployed. He had failed to disclose his income for 2020. He told the court he could work as much as he wanted and had no trouble

getting work. He worked less than he could because he was "working on his house", getting "his mental health back" and wanted to spend more time with the children. The mother, generously, noted the Court, was willing to accept the father's income as listed on his most recently available income tax return. As a result, the Court did not allow the father to deduct $700 in union dues from his income in determining his support obligation.

The parties sought the use of recalculation. Madam Justice MacPhail could not make that order however as the *Child Support Service Regulations* prohibit recalculation involving discretionary judicial decisions, such as certain imputations of income – including imputation of income under the *Divorce Act*.

***Fijala v. Fijala*, 2020 MBQB 162**

This decision concerns a mother's application seeking the deletion of any and all arrears, late penalty and/or cost recovery fees owing by her and an order for the respondent to pay her any overpayments. A consent variation order was made in May 2018 setting the quantum of the mother's child support arrears.

Shortly after the variation order was pronounced, the mother provided a lump sum of $3,000 to her adult son in satisfaction of some portion of her ongoing support obligation. After that, she provided a sum directly to the respondent in the amount of $3,300, representing the balance of her obligation to pay arrears under the variation order. Before the father could deposit this amount, the mother placed a stop payment on it. She claimed she did so because her son had told her that he withdrew $2,400 from the funds provided by her to him and had given them to his father, at his request. The mother was of the position that this action reduced her total amount of arrears owing to the father.

Justice Thom finds there was no satisfactory explanation between the $3,000 ongoing support payment paid to the son directly and the $2,400 transfer to the father by the child which supports the mother's position. This transfer should not have been considered a partial satisfaction of the mother's obligation to pay arrears pursuant to the consent variation order and her application as dismissed as a result.