

**WALSH FAMILY LAW NEGOTIATION COMPETITION**  
**MARCH 2024**

**GENERAL FACTS**

*Background*

Carmen and Bo were high school sweethearts. They met in 1998 when they were both in grade 11 at Eastview Secondary School in Barrie, and they became a couple almost immediately.

After high school, Carmen and Bo both went to the University of Alberta and they both graduated in 2004 (Bo with a Bachelor of Computer Science degree, and Carmen with a Bachelor degree in Marketing and Communications).

After they graduated, Carmen obtained a scholarship to complete a Masters of Strategic Communication at Columbia University in New York City. Bo went with Carmen to New York, and they lived together while they were there. Bo could not work full time in New York because of his legal status, but he was able to earn a bit of income by doing some freelance web design remotely for an Alberta-based company. While they lived on a tight budget and had a tiny apartment, they really loved their time in New York.

When Carmen finished her Masters degree in 2006, she and Bo decided to move back to Canada. They chose Toronto because it was relatively close to their families in Barrie, and an urban centre with a roster of exciting employment opportunities for Carmen.

When they arrived in Toronto, Bo continued doing freelance web design work while he looked for a permanent position that offered a regular paycheque and benefits. Carmen obtained a part-time job at a medium-sized advertising firm in Toronto and also did freelance copyrighting work. Their incomes were modest, but they were happy as they pursued their careers of choice.

In 2009, Carmen and Bo decided to get married. They had a small civil ceremony on August 12, 2009.

Shortly after they got married, Carmen obtained a full-time copywriting position at Waystar RoyCo, a large multi-national media conglomerate. Since March 2020, Carmen's work has been entirely remote.

Bo was unable to find a fulltime job in web design, so he decided to go back to school to become a teacher. He got into OISE, and graduated in 2012. Carmen supported Bo financially while he was in school.

After Bo graduated from OISE, he got a fulltime job teaching high school with the Toronto District School Board. He still has this position today. He also still does some freelance web design in his free time.

Once Bo and Carmen both had stable employment, they decided to purchase a small home in Leslieville, which is in the east end of Toronto. Carmen's parents, who are quite wealthy, helped out by contributing \$300,000 towards the down payment. Bo's parents would have also liked to help out, but they did not have the resources to do so.

Unfortunately, in May 2023, with the rise of ChatGPT and a shocking change in management at Waystar RoyCo, there were massive layoffs of copywriters at the company - including Carmen. Carmen did not work for the rest of 2023. In January 2024, she started doing some freelance work.

### ***The Children***

Shortly after Bo and Carmen moved into their new home, they decided that they wanted to start trying to have children. Carmen became pregnant almost immediately, and had a healthy and uncomplicated pregnancy. She gave birth to a daughter, Ellen, on June 30, 2013.

Carmen took maternity leave until the end of December 2013. Bo (as a teacher) was home for July and August and he returned to work in September 2013. When Carmen returned to work, they enrolled Ellen in full-time daycare.

Bo and Carmen both wanted more than one child, and they started trying again shortly before Ellen's first birthday. Carmen got pregnant again fairly quickly, and she gave birth to another daughter, Hannah, on July 10, 2015. Bo and Carmen were both home with Hannah during the summer until Bo returned to work in September. After that, Carmen stayed home on maternity leave until the end of December at which point Hannah started full-time daycare.

In September 2017, Ellen started junior kindergarten at the local public school, Hawkins Elementary and Junior School. Hannah started junior kindergarten at the same school in September 2019.

In March 2020, Covid-19 hit. In order for both Bo and Carmen to keep working while schools were closed, Carmen's mother moved in with them to help look after the children. Carmen's mother lived with them until schools re-opened in September 2020.

When the next wave of Covid-19 hit, Bo and Carmen created a "bubble" with three other neighbourhood families to help each other out and manage online learning/childcare needs during the uncertain times. The families all became very close and maintained their strict "bubble" for the entire 2020/2021 school year. In July 2021, they stopped adhering to a strict "bubble" but all remained very good friends ... that is until recently.

While the disruptions to in-person learning were challenging for all of the children, Ellen in particular had a very hard time. In late 2021, Ellen was diagnosed with Autism Spectrum Disorder (ASD) Level-1 and Attentive Deficit Hyperactivity Disorder (ADHD).

## *The Beginning Of The End*

On January 5, 2023, Bo and Carmen put the kids to bed and went to the living room to watch a movie on Netflix. When the movie ended, Bo started telling Carmen that one of the previous "bubble" neighbours had told him how he and his partner had been engaging in a swinging relationship with the other "bubble" family through the lock-downs and had recently started that back up again with a few other couples as well.

Carmen initially thought that Bo was telling her this because he thought it was funny, but as he kept talking she realized that he was actually trying to tell her that he wanted to explore having an open relationship himself.

Carmen was horrified. She told Bo that she was not even remotely interested in an open relationship, and that she could not even believe he had suggested this. She left the room, went into the kitchen, and poured herself a large glass of red wine.

Bo initially seemed to accept that this was a non-starter for Carmen. However, he tried to broach the subject with her again a few weeks later, and told her that it was something that he *really* wanted to try. Carmen got very upset, and told Bo that she had no interest in having sex with other people, and he needed to stop bringing it up. She stormed out of the room, went into the kitchen, and poured herself a large glass of red wine. And, after she finished the first glass, she poured herself another.

For a while, Carmen and Bo tried to pretend that everything was fine. But things came to a head in July 2023. The family had just purchased a new iPad and it had synced with Bo's cellphone. While Carmen was watching a show, she saw a text message come through from a female neighbour (one of the previous "bubble" neighbours) asking Bo if he could come over later that night after Carmen was asleep.

When Carmen confronted Bo about her discovery, he admitted that he had been flirting via text message with a couple of women in the neighbourhood, but he hadn't had any physical relationship with anyone. However, instead of apologizing, Bo started yelling at Carmen that their LCBO bills had tripled in recent months, and that she always seemed to have a big glass of wine in her hand.

After a huge argument, Carmen and Bo realized that they needed to get professional help, and quickly arranged an appointment with a marriage counsellor.

### *The Separation*

Carmen and Bo spent many months discussing their competing goals and desires – both directly and with their therapist. However, they were never able to find a way to reconcile Bo's sexual curiosity with Carmen's need for a traditional, monogamous, marriage. Bo and Carmen also had diametrically opposing viewpoints when it came to Carmen's alcohol consumption.

On October 1, 2023, after a particularly heated session with their therapist, Bo and Carmen agreed that their marriage wasn't working anymore, and that they needed to separate.

Given the reality of their variable rate mortgage and the hike in interest rates, Bo and Carmen agreed that, for the time being, it was not financially feasible to physically separate.

With the help of their therapist, Bo and Carmen agreed that it made sense for Carmen to remain in the master bedroom upstairs because Hannah would often take up in the middle of the night and insist on cuddling with mommy, and that Bo would move into the guest bedroom in the basement. They also both retained experienced family law lawyers to help them try to deal with the financial issues and work out a parenting plan.

## **Negotiation One: March 2024**

Although Carmen and Bo were initially optimistic that they would be able to separate amicably, they were ultimately unable to make any progress on their own. They both blame each other for breaking up the family, and things have deteriorated to the point that they can barely stand to be in the same room.

Hannah is now almost nine years old and Ellen is almost 11 years old. The children still have no idea what is going on between their parents. All they know is that daddy is sleeping in the basement, and that mommy and daddy can barely even talk to each other without fighting.

Neither Bo nor Carmen is prepared to move out of the home until they have an appropriate parenting in place plan (at least on a temporary basis). Bo has also told Carmen that he is not comfortable leaving the children alone with her until she gets help with her drinking. Carmen has told Bo that she doesn't have a problem, and that she is offended at his suggestion that she would ever do anything that would put the children at risk.

Recently, Carmen started threatening to move with the children to Barrie to live with her parents. Bo doesn't know whether Carmen is serious about this, or whether she is making these threats to try to upset him. Either way, he has repeatedly told Carmen that while she is certainly welcome to go to stay with her parents, there is no way in hell that he will let her take the children with her (and, when Bo really wants to get Carmen riled up, he also makes sure to mention that he doesn't think that she be allowed to drive anywhere with the children until she gets help with her drinking).

Bo wants a 50-50 schedule. He has always been an active and involved parent, and he sees no reason why the children should not be with him at least half of the time. He does not particularly care what the schedule actually looks like as long as it ensures that the children spend equal time with both of their parents.

Carmen wants the children to reside primarily with her in the matrimonial home. She knows that Bo is a good dad. However, she thinks that she has always been the children's primary parent, particularly since March 2020 when her work went entirely remote, and she sees no reason why that should change now that they have separated. Furthermore, since Carmen works limited hours doing freelance work only, she has greater flexibility over her schedule in order to manage the busy needs of three children.

Carmen has proposed the following schedule:

	<u>Mon.</u>	<u>Tues.</u>	<u>Wed.</u>	<u>Thurs.</u>	<u>Fri.</u>	<u>Sat.</u>	<u>Sun.</u>
<b>Week 1</b>	Carmen	Carmen	Bo from 5-7pm	Carmen	Carmen	Carmen	Carmen
<b>Week 2</b>	Carmen	Carmen	Bo from 5-7pm	Carmen	Bo starting at 5pm	Bo	Bo until 7pm

With respect to the holidays (excluding summer vacation), Carmen and Bo largely agree that they should be divided equally.

For summer, Carmen is proposing that the regular schedule continue and each parent can have one uninterrupted holiday week. Bo (who only has his freelance work in the summer) wants a "week on/week off" arrangement during the summer plus a two-week uninterrupted holiday period for each parent.

Ellen is currently repeating Grade 7 at Hawkins Elementary and Middle School. Online learning during the pandemic was extremely difficult for Ellen and she fell behind her peers academically. Prior to the separation, Bo and Carmen had agreed with the school's recommendation for Ellen to repeat the seventh grade and had also agreed on a new behavioural therapist who has been wonderful with Ellen. Until very recently, Ellen had been doing exceptionally well academically and behaviourally at school.

Carmen is now pushing to move Ellen to a new school (McKinley Institute) for the start of Grade 8 in September 2025. McKinley is still a public school but offers a specialized stream for children with a variety of behavioural and social exceptionalities. McKinley Institute goes from Grade 7 to Grade 12 and is a 20-30 drive away from the matrimonial home. There is no bus option until Grade 9.

Bo feels strongly that Ellen should remain in her current school with the supports they offer until Grade 8 and they can reassess for high school. He thinks Ellen has been doing exceptionally well and her recent struggles can be attributed to the stressful and uncertain environment caused by her parents' separation.

Carmen's and Bo's lawyers have arranged to meet to try to negotiate a temporary parenting schedule and to discuss Bo's concerns about Carmen's drinking. If there is time, they will also need to discuss how Carmen and Bo will make major decisions about the children's health and education.

Shortly before the meeting, Carmen's lawyer told Bo's lawyer that, if there is no resolution on the parenting issues, Carmen will be commencing a Court Application immediately and bringing an urgent motion for temporary exclusive possession of the matrimonial home and primary residence.



## **Negotiation Two: May 2024**

Unfortunately, the meeting between Carmen's and Bo's lawyers did not result in a settlement. The following week, Carmen commenced a Court Application and brought an urgent motion. However, the motion judge decided she did not meet the test of urgency for a motion prior to Case Conference and arranged for the parties to attend a Case Conference the following week.<sup>1</sup>

At the Case Conference, the presiding judge sent a clear message to Carmen and Bo that they were doing enormous damage to their children, they needed to find a way to love their children more than they hate each other, and the cost of litigating their dispute would bankrupt both of them.

While both of their lawyers had already given them this exact same advice, hearing it from a judge helped both Carmen and Bo wake up and realize that they needed to find a way to resolve things for the sake of their kids.<sup>2</sup> After further discussions between their lawyers, and with strong encouragement from the Case Conference judge, Carmen and Bo agreed to try to start over, and to hire a highly regarded parenting mediator to help them with their communication skills.

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<sup>1</sup> See Rules 14(4) and 14(4.2) of the *Family Law Rules*, O.Reg. 114/99, which provide that a motion cannot be heard before a Case Conference unless there is "a situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice."

See also *A.B. v. N.L.A.*, 2013 ONSC 2990 (S.C.J.), where Justice Czutrin explained the rationale behind the rule that a motion generally cannot be heard prior to a case conference:

[97] The *Family Law Rules* enacted in 1999 sought to change the direction of what was seen as a very adversarial family process. The most significant change was the requirement of a case conference before evidence could be exchanged by way of affidavits. The goal was to have a judge meet with the parties, prior to the exchange of accusatory affidavits, so that a judge might assist the parties in resolving as many issues as possible prior to any motions being brought, or to avoid motions entirely. This was the birth of the required case conference prior to any motions or exchange of affidavit evidence.

<sup>2</sup> Experiencing first hand just how much time and money it actually takes to litigate a family law case also served as a wake up call for Bo and Carmen.

As a show of good faith, and on a strictly without prejudice basis, Carmen also agreed not to drink for 3 weeks, and to undergo random alcohol testing during that time with a handheld device that her lawyer would arrange for her. If Carmen did not test positive for alcohol during that time, Bo agreed to stop alleging that she had a drinking problem.

To try and build on the momentum that they had built at the Case Conference, Carmen and Bo have agreed to have their lawyers meet again in May 2024 to see if they can resolve the property issues.

Carmen wants to keep the matrimonial home to minimize any further disruptions to the children's lives. It is the only home they have ever lived in, and their school and friends are nearby.

Carmen thinks that the jointly owned matrimonial home is worth about \$1,750,000. She also thinks that she should be able to deduct 5% from the gross value for the commission that would have to be paid if the home were to be sold on the open market. Carmen and Bo still owe about \$900,000 on their mortgage, and Carmen also wants to repay her parents for the \$300,000 that they loaned her and Bo for their initial down payment.

Carmen's lawyers have told Bo's lawyers that Carmen is prepared to purchase Bo's interest in the home and take on responsibility for Bo's share of the \$300,000 they owe her parents for \$231,250, calculated as follows:

50% of the gross value of the home = \$875,000 ( $\$1,750,000 * 50\%$ )

*Less*

50% of the balance owing on the mortgage = \$450,000 ( $\$900,000 * 50\%$ )

*Less*

50% of notional commission = \$43,750 ( $\$1,750,000 * 5% * 50%$ )

*Less*

50% of the money that they owe Carmen's parents = \$150,000 ( $\$300,000 * 50%$ )

Bo thinks that the matrimonial home is worth significantly more than \$1,750,000. The Bank of Canada recently announced that interest rates will be decreasing in 2024 and since then, the value of similar homes in their neighbourhood have increased significantly over the last few months. Bo is confident that they would get at least \$2,000,000 on the open market. Money is tight for Bo, and he cannot afford to take a haircut on his most valuable liquid asset. Bo also does not understand why Carmen would be able to deduct notional commission when no commission will actually be paid if she buys him out.

Bo is certain that the \$300,000 that Carmen's parents contributed to the down payment on the matrimonial home was actually a gift. He thinks it is telling that the first time anyone even mentioned to him that this money would have to be repaid was right after Carmen's parents learned that he and Carmen had separated.

Bo's lawyers have told Carmen's lawyers that Bo is prepared to sell his interest in the matrimonial home to her for \$550,000 calculated as follows:

50% of the gross value of the home = \$1,000,000 ( $\$2,000,000 * 50%$ )

*Less*

50% of the balance owing on the mortgage = \$450,000 ( $\$900,000 * 50%$ )

Carmen and Bo have agreed on most of the entries on the Net Family Property statement, but they have not yet been able to resolve the following issues:

1. How to deal with the \$300,000 debt that Carmen claims they owe her parents; and
2. Whether Bo's pension should be divided at source or equalized in cash.

A Net Family Property worksheet showing both parties' positions will be provided with the confidential facts.

### **Negotiation Three: October 2024**

Things are looking up for Bo and Carmen, and they have made a lot of progress over the last several months. In particular:

- They settled the property issues on terms that allowed Carmen to keep the matrimonial home.
- The 3 weeks that Carmen had to abstain from alcohol was a real wake up call for her. While Carmen was able to stop drinking, it ended up being much harder than she thought it would be. She realized that she needed to get help, and started attending weekly AA meetings. She has not had a drink since.
- Bo rented a 3 bedroom house that is close to the matrimonial home and took possession on September 1, 2024.
- With the assistance of their mediator:
  - Bo and Carmen agreed on a specific schedule for the equal sharing of all holidays. For summer, they agreed to a "week on/week off" schedule.
  - They also agreed to share joint decision-making responsibility and they agreed for Ellen to remain at her current school until completing Grade 8 and then reassess for high school.
  - While Carmen was extremely reluctant, she ultimately agreed to implement the following residential schedule on a temporary and without prejudice basis, commencing September 1, 2024:

	<u>Mon.</u>	<u>Tues.</u>	<u>Wed.</u>	<u>Thurs.</u>	<u>Fri.</u>	<u>Sat.</u>	<u>Sun.</u>
Week 1	Carmen	Carmen	Bo	Carmen	Carmen	Carmen	Carmen
Week 2	Bo	Carmen	Bo	Carmen	Bo	Bo	Bo

- The schedule depicts where the children sleep that night. The parent who has the children for that night picks them up from school and drops them off at school the following morning. Bo manages all drop-off and pick-ups himself except for alternating Mondays when his mother helps him out (she comes from Barrie and stays Sunday night).
- To assuage Carmen's concerns, the parties agreed to review the regular schedule for the start of January 2025.

As their mediator does not deal with financial issues, Bo and Carmen agreed to have their lawyers meet again on October 1, 2024 to try to resolve child support and spousal support, at least on a temporary basis, if not a final basis. If there is time, they will also try to deal with any issues arising under the existing temporary and without prejudice residential schedule.

Both lawyers agree that under the current temporary and without prejudice residential schedule, Bo technically has the children more than 40% of the time, thus invoking section 9 of the *Child Support Guidelines*.<sup>3</sup>

Bo works full-time. He earns \$95,000 a year from his job as a teacher, and another \$20,000 a year from doing freelance web design.

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<sup>3</sup> Pursuant to section 9 of the *Child Support Guidelines*, SOR/97-175, where each spouse is exercising at least 40% of parenting time with a child over the course of a year, the court must determine the appropriate amount of child support based on: (a) the amounts set out in the applicable tables for each of the spouses; (b) the increased costs of shared parenting time arrangements; and (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought. See also *Contino v. Leonelli-Cotino*, 2005 SCC 63 (S.C.C.) at paras. 37-72.

Carmen's income, on the other hand, has been drastically reduced. Prior to May 2023, she was earning \$140,000 a year from her job at Waystar RoyCo. However, she is currently on track to earn approximately \$25,000 a year doing freelance work.

Carmen wants Bo to pay full Table child and spousal support in accordance with Bo's income for support purposes, the *Child Support Guidelines*, and the *Spousal Support Advisory Guidelines*. Just because Bo has one more night every 14 days (to technically bring him within the ambit of s.9 of the *Child Support Guidelines*), that does not mean that her child-related costs have diminished in any material way.

Bo does not agree that he should be paying any child or spousal support. Carmen has historically earned more than he has, and Bo thinks she is completely capable of earning more than the \$25,000 a year that she says she is earning right now. Furthermore, unlike Bo, Carmen can always get financial help from her wealthy parents.

There are three issues to deal with deal with under s.7 of the *Child Support Guidelines*.<sup>4</sup>

#### #1: Softball

Hannah is a gifted young athlete and has been exhibiting very promising skills in softball. She is eligible to try-out for a competitive team for the first time and her coaches all think that she is a shoo-in.

The costs for Hannah's current recreational softball are \$500 per year, whereas the costs for the competitive team are an estimated \$1,500 per year. Carmen played competitive sports herself growing up and very much wants Hannah to do the same.

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<sup>4</sup> Section 7 of the *Child Support Guidelines* provides that parents are required to share certain enumerated expenses (e.g. child care, uninsured medical expenses, and extraordinary extracurricular activities) in proportion to their respective incomes.

Assuming she makes the team, Carmen's position is that she and Bo should contribute to the costs proportionate to their current incomes. Money is tight for Bo and given the other existing expenses for their family, Bo does not think that the costs or rigors of competitive sport are reasonable for 8½ year old Hannah at this time. Bo has told Carmen that he will pay 50% of the costs of recreational softball but nothing more.

### #2: Horseback Riding

This year, Ellen's behavioural therapist recommended that Ellen start therapeutic horseback riding and the parties agreed to give it a try. Ellen immediately took a shine to horseback riding and has expressed that she would like to continue. Bo and Carmen have been delighted with the undeniable increase in Ellen's self confidence and the noticeable improvement of Ellen's behavioural issues at school.

Bo's position is that Ellen should ride at least once per week and that she should also attend a week of riding camp in the summer. It will cost approximately \$260.00 per month for Ellen to ride once a week (\$65.00 per lesson) and \$650.00 per week of summer camp. Bo takes the position that this expense should also be shared 50-50. Carmen is thrilled that Ellen enjoys riding, but she takes the position that Bo's proposed riding schedule is too much, both from a time perspective and a cost perspective.

### #3: Occupational Therapy

Finally, Ellen's school also suggested that Bo and Carmen obtain an occupational therapy assessment for Ellen, voicing concerns that she may require more targeted supports as she approaches high school. The occupational therapy assessment will cost \$800.00. Ongoing occupational therapy would cost an estimated \$90.00 per visit, although at this point, Bo and Carmen don't know what the recommendations will be in terms of frequency of visits.

Both Carmen and Bo would like to get the assessment but they disagree about how to divide the cost of the assessment and the cost of any ongoing therapy. Bo takes the position that this



expense should be shared 50-50, while Carmen maintains this expense should be share proportionally with her actual income.