
CANADA / JUDGMENT

A.R. v. A.V.R.

2016 BCSC 1893

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1893 A.R. v. A.V.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.R. v. A.V.R.,

2016 BCSC 1893

Date: 20161014

Docket: E141600

Registry: Vancouver

Between:

A.R.

Claimant

And

A.V.R.

Respondent

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Claimant:

R.A. Henderson

Respondent appearing on his own behalf:

A.V.R.

Place and Dates of Trial:

Vancouver, B.C.

April 4-8, June 27-30 and

August 11-12, 2016

Place and Date of Judgment:

Vancouver, B.C.

October 14, 2016

1. INTRODUCTION

- [1] The action involves a divorce where there are two young boys of the marriage.
- [2] The parties agree that they should be divorced. The primary issues for resolution are custody, guardianship, parenting responsibilities, and parenting time with respect to the two young boys and child support.
- [3] The claimant mother is asking that the respondent father's parenting time with the two boys be relatively limited (unless otherwise agreed) until June 2018, at which time the father could apply for a review.
- [4] The mother's request aligns generally with the recommendations of Dr. R. England, who prepared a "section 211 report" and testified at trial.
- [5] For the reasons that follow, the mother will, with some modifications, be granted the relief she seeks including child support.

2. FACTUAL BACKGROUND

- [6] The mother is 36 years old and for many years has worked as an occupational therapist. She has a Bachelor of Science from Simon Fraser University and Master of Occupational Therapy from the University of British Columbia. She earns approximately \$75,000 per annum.
- [7] The father is 38 years old. He is a few courses short of a high school diploma. In 2015, he earned approximately \$75,000 from sales, working for Rogers Communications and as an insurance salesperson. Currently, he works for Rogers Communications and will likely continue to do so for the foreseeable future. His past work history is not as stable as that of the mother.
- [8] The parties married in April 2007. They separated in May 2014 and have remained so.
- [9] The parties have two young boys, M, who is five years old (born February 9, 2011) and N, who is three years old (born September 12, 2013). Each boy is generally in good health.

- [10] Starting in the spring of 2009, the parties lived in a house owned by the mother's mother and step-father in the 100 block of West 23rd Avenue in Vancouver. Prior to this time, the parties lived in an apartment owned by the mother's mother and step-father. The mother still lives in the West 23rd Avenue house with the two boys.
- [11] Throughout their marriage, the father, while not physically abusive, was often verbally abusive and volatile.
- [12] The father says the mother's family, in particular, her step-father, tried to control the relationship that he had with his spouse and that this behaviour created conflict and problems in the marriage. These assertions are contradicted by the fact that the step-father, at the request of the father and mother in 2010, helped the father establish a mobile phone business, Westwind Communications Inc. ("Westwind").
- [13] Westwind became an authorized dealer of Wind Mobile and operated several stores.
- [14] The step-father, father, and mother contributed approximately \$135,000, \$15,000, and \$10,000 respectively to Westwind. The step-father also had significant business experience, and accordingly, was involved with the business. However, the father had primary carriage of the day-to-day business operations.
- [15] In the end, Westwind's mobile phone business failed. In December 2013, the father ended the Westwind business relationship he had with the step-father.
- [16] Before the birth of their first son, the father would often stay out late at night. In particular, he enjoyed billiards and late nights with friends and acquaintances.
- [17] With the birth of their first son, M, in 2011, the mother had presumed that this behaviour would change. Other than for a short period, the father's behaviour did not change.
- [18] As their son grew out of infancy, the parties fought over parenting styles. The father was often not present or not helpful.
- [19] In 2012, the father started to withdraw cash from the parties' bank accounts and take advances on their credit cards. At first, the mother accepted the father's explanation that Westwind was not doing well. She understood the money would be returned. The father also gave various explanations, including that he was making a loan to a friend.
- [20] Many of the withdrawals and advances were made in the evening and were made from cash machines located in or near casinos, or medical marihuana stores.
- [21] In 2013, as a result of the cash withdrawals and advances, and the father's late nights, the mother became suspicious and concerned that the father had a gambling problem or a substance abuse problem, or a combination of both. Dr. England shares these concerns.

- [22] The father was also selling phones "under the table". This entailed using the withdrawals and advances to purchase the "under the table" phones, which he then resold. The father did not report to the tax authorities or disclose in his Form F8 financial information the income he made from the "under the table" sale of phones.
- [23] After M was born, the father and mother hired a nanny to provide additional help and to facilitate the mother's return to work as an occupational therapist on a full-time basis.
- [24] I accept the mother's testimony that the father wished to have a second child. As noted, N was born in September 2013. Although the mother had wished to take a year's maternity leave following N's birth, the family lacked sufficient funds to support a year's absence. The father had not repaid his various cash withdrawals and advances. So instead, the mother returned to her work as an occupational therapist.
- [25] The mother decided to end the marriage and in May 2014 the parties separated. I accept the mother's testimony that she did not wish the marriage to fail. As she explained, the father was not helping with the boys. The father was out late at night. The father was verbally abusive and lost his temper. She felt her boys were suffering emotionally. They had little money as a result of the father's activities.
- [26] The mother wanted a stable environment for herself and the boys and the marriage did not provide that. The father continued to say he would change, but did not. The point came when she could no longer carry on with the marriage.
- [27] With the separation, the father moved to East Vancouver. The father's mother and father also live in East Vancouver. During the father's current Wednesday afternoon/evening parenting time, the boys often see their paternal grandparents at the grandparent's home. Other members of the father's family may be present as well. This relationship with the father's family has existed since the first boy was born.
- [28] The mother's mother and step-father often help her with the care of the boys. The boys also visit them regularly at their apartment in the 400 block of West 13th Avenue in Vancouver. This relationship with the mother's mother and step-father has also existed since the first boy was born.
- [29] After separation, as noted, the father lived in East Vancouver, not far from his parent's home. In spring of this year, the father moved to Surrey, B.C. to live with Ms. R.S. in a home she owns with her parents. Her parents live in a different house in Surrey. The father says the mother knew he was moving, although he did not tell her where. During argument, the father apologized for not giving the mother his new address or telling her it is in Surrey.
- [30] The father's new relationship with Ms. R.S. is serious, and she and the father hope to marry. Ms. R.S. would like to have children.

[31] The mother and Ms. R.S. have a respectful relationship. The mother is comfortable with Ms. R.S. being in her boys' lives. Ms. R.S. has taken a positive and caring approach towards the boys and they refer to her as "Auntie [R]".

[32] In preparing her section 211 report, Dr. England interviewed the father, the mother, and Ms. R.S. and each of them answered questionnaires.

3. Credibility of the Parties

a) Father's Credibility and Reliability

[33] I do not find the father to be a credible or reliable witness. First, his testimony regarding the sale of "under the table" phones reflects deception. In cross-examination, the father testified that he had bought and sold "under the table" phones and did not report the income generated from re-selling the phones (other than activation fees reported by Westwind) for income tax purposes.

[34] In legal argument, the father did not challenge the Court's stated understanding that the "under the table" phones generated income that was not reflected in the relevant tax returns. Given that income tax information forms part of the Form F8 Financial Statement, this omission could have misled the Court.

[35] A second area of cross-examination showed the father's willingness to make self-serving statements regardless of their truth. In cross-examination, counsel for the mother put a medical-legal report to the father. It was prepared in relation to a 2010 motor vehicle accident for which the father was making a claim. It served to contradict portions of the father's previous testimony at trial.

[36] The medical-legal report was dated April 26, 2013 and based on a September 17, 2012 assessment date. In cross-examination, the father testified:

Q All right, paragraph 40 [as read in]:

[The father] noted that he has learned to better manage his pain, but that he often becomes irritated at home and at work. "I am not always the funnest guy to be around." He noted that he feels like a failure as a father as he struggles to spend time with his young son. Said [the father], "I find it hard keeping up with him. I can't bathe him, I can't take time off. If I don't work I can't get paid. I have always been a motivated person. I do feel depressed but my son keeps me going. It helps that we have a live-in nanny now but she works from 8 a.m. to 4 p.m. and sometimes tends to work more when I am having a bad day." [The father] said that his inability to participate in his son's care has taken a toll on his wife. "I feel sorry for my wife. My son cries at night and she is the one who has to get up. It is making her tired. It has been quite the journey. She is about to lose it, too. She has a huge caseload, as well."

So I am going to suggest to you, sir, that the statements made in quotations were accurate statements made to Dr. Gouws as it pertained to your participation in the family at that time.

A My Lord, I can answer this one clearly. What I wrote there -- what is written there is semi-accurate and semi not. The reason why that is written out like this is I had stated to the courts, and I'll say there from beginning, when we started our business our life had changed. I had so many issues, so many concerns happening with my in-laws it was unbelievable.

When I spoke to this doctor I was so much stressed because my home life was going so bad that I needed to talk to somebody, and if I started telling this doctor, who is going to go to ICBC with this report and tell them how I really felt and what was bothering me, it wouldn't work to my advantage on the ICBC case. So I basically disguised it by saying things like this, and if that is considered wrong then I have to stand behind it. This over here is accurate, it is what I said. This part --

THE COURT: Sorry, you are pointing at paragraph 40?

A Yes.

THE COURT: Okay.

A Yes, My Lord, so it is accurate on what I said. The meaning behind it is not what I was basically intending to say it. And the reason why, because it was the first time that I could've actually spoken to someone else outside, telling them the troubles that I had. When I said I can't bathe him or I can't take time off of work and I can't -- it's hard keeping up with him, is inaccurate. I had added those in there, it would have helped better my case with ICBC at that point on that level but still talk to someone about the troubles that I was having at my house. And I know that's wrong. I -- it's wrong of me to do what I did, but I did it and I have to admit that 40 was said, I actually remember that.

MS. HENDERSON:

Q If I could take you to paragraph 45, please [as read in]:

[The father] said that he and his wife lead busy lives. She works as an occupational therapy for OT Works. [The father] said that his wife became pregnant after he was involved in the motor vehicle accident and said that his pain levels, coupled with his wife's pregnancy, increased his stress levels. He noted that he tries to do what he can around the house and help care for his son and, "On a good day I can lift him, I can only carry him for 10 to 20 minutes and I first have to loosen up. On a bad day I can't pick him up."

Did you make those statements to Dr. Gouws?

A I did make those statements as well, My Lord, once again to help better my case to try to get -- with ICBC, I -- I can't deny that. I did do that.

Q So you lied to Dr. Gouws in the context of the assessment?

A I -- I exaggerated the truth, I can't say I didn't, but I -- I did say that statement, I did say it.

[37] In sum, the father is not a credible or reliable witness. He is willing to make statements that suit his purposes regardless of their truth. As noted, the father's Form F8 Financial Statement is inaccurate and, in its present form, could lead the Court to underestimate his actual income.

b) Mother's Credibility and Reliability

[38] I found the mother's testimony to be credible and reliable. She had a good recollection of events and was not challenged successfully in cross-examination.

c) Ms. R.S.'s Credibility and Reliability

[39] I also found Ms. R.S. to be a credible and generally reliable witness. Her testimony was forthright. The key limitation with respect to her evidence is that her understanding of the relationship between the father and the mother comes primarily from the father and she is very supportive of him. For example, although she had access to Dr. England's report, she only read those portions of the report that pertained to herself.

4. DR. R. ENGLAND'S SECTION 211 REPORT AND RECOMMENDATIONS

[40] By a January 6, 2015 Order, Dr. R. England was appointed "under s. 211 of the Family Law Act to conduct a full assessment of the needs of the Children and the ability and willingness of the parties to satisfy these needs". Her report is dated October 9, 2015.

[41] With respect to the mother's and the father's respective abilities and willingness to exercise basic parenting responsibilities, Dr. England states in her report:

In this family situation, both parents have the ability and willingness to exercise many of the basic parenting responsibilities to satisfy the needs of the children. They both impress as intelligent and functional individuals who would be well able to attend to daily tasks, and respond appropriately in unexpected situations.

Both [the father] and [the mother] present with certain strengths that they bring to parenting of their children. Both parents impressed as very warm and engaging individuals, and this was evident during both of the parent-child observation sessions. They were also attentive to setting limits and promoting good behaviours. There is no question that both parents deeply love their children and want the best for them.

[42] With respect to Ms. R.S., Dr. England states:

With respect to the father's current partner, [Ms. R.S.], she presents as a warm and caring individual by nature. She impressed as someone who shuns conflict, and values harmony and cooperation. As such, she is likely to offer a dampening role in the family in terms of acrimony, in addition to providing child care assistance to the father. At the same time, she is much younger than the father, and also impressed as somewhat naïve. She appears to be strongly oriented to look on the positive side of things, and as such may not sufficiently attentive to potential problems, which could impact the children.

[43] With respect to the boys, Dr. England states:

At present, both children are quite young, and appear to be well adjusted. Neither child has any special needs and they both present as happy, confident, curious, and delightful little boys.

[44] In her report, Dr. England raises concern regarding past sexual abuse of the father. She states:

When asked about abuse history, [the father] reported an extensive and somewhat complicated history of incest in the family. Many years ago his paternal grandfather, who lived in the home, molested one of his sisters. His sister disclosed this while she was still a child, and [the father's] father "kicked him out." Later this same sister was sexually molested by an uncle, but she kept quiet about this for several years. Just over a year ago, one of [the father's] male cousins reported that he was sexually abused by an older male cousin. This triggered an outburst in the family, and the disclosing cousin was accused of lying. In order to support his cousin, [the father] disclosed that he was also abused by the same older male cousin, and [the father's] sister came forward about the sexual abuse from her uncle. The extended family is now very fractured and embroiled in conflict. [The father] said relatives of the two perpetrators have made threats to the other family members, and a criminal case is proceeding. With respect to his own abuse, [the father] said it began when he was six years old by a male cousin who was approximately seven years older, and went on for three years. The abuse consisted of "kissing and stroking" and mutual masturbation. The cousin told him "I needed to keep this quiet" which is why he never reported it until recently. [The father] has not discussed his abuse with anyone and reported no awareness of it having any impact on him.

[45] During legal argument, the father stated that the sexual abuse had had no effect on him. He stated that with the recent allegations involving his older cousin, he had been seen by persons associated with victim services and, apparently, there were no concerns regarding his well-being.

[46] Dr. England has unresolved concerns involving the father relating to gambling, substance abuse, anger management, and deception. She states:

Many more concerns have been raised about [the father's] functioning and the implications this may have for parenting. He asserts that he has been the target of a campaign largely fueled by his wife's stepfather. The allegations raised regarding his functioning include; gambling, substance abuse, a problem with anger, and deception. With respect to parenting, overall the concern is that [the father] is not sufficiently attentive to the children's needs such as; ensuring proper diet, adequately monitoring their activities, and refraining from inappropriate communications.

Overall, the writer remains concerned regarding some issues with respect to [the father], such that some of the issues raised by [the mother] still remain in question. [The father] presents as a very personable and engaging individual, who has likely gained much in life through his interpersonal presentation and charm. It is easy to understand how well suited he is to a career in sales and how this, coupled with some hard work, translates into him being perceived very

positively by others. At the same time, he was difficult to interview because as topics were probed more deeply, contradictions would occur, such that initial statements would be retracted, and the same topic would have to be explored once again from the beginning, sometimes concluding with a very different result.

There may be a few different factors operating to account for this. One factor is that [the father] presented [as] mildly impulsive, such that he would respond quickly without appearing to consider what he was saying. A second factor was that he appeared to be under a higher level of stress such that the process of being interviewed may have been more difficult for him. He had been hospitalized recently and has significant concerns about his health, he is under a high level of scrutiny with respect to the allegations and the upcoming trial, and he has his children in his care so much less than he would like which is causing him distress. A third factor, is that [the father] may have such a longstanding history of simply saying with conviction whatever he thinks needs to be said in the moment, that the 'truth' of a statement takes second place to a more functional use of language as a tool to achieve certain ends. This suggests not so much a calculated use of deception, but rather an approach that is very much in the moment, coupled perhaps with an over confidence in his abilities to make a good presentation. What occurs with probing are inconsistencies, some of which may actually be quite innocuous, but are the result of this style of short term focus. Finally, a fourth factor may be that [the father] is working hard to conceal certain facts, such that he is having to juggle what can be said to whom, with the result that inconsistencies and contradictions occur. This last factor relates to the concern regarding deception. In this assessment, certain opportunities to resolve issues were denied the writer. This included [the father's] lack of provision of hair sample testing, and his retraction of consent for the writer to interview Dr. Wesley Buch.

[47] I note that since Dr. England prepared her report, the father has taken a "hair sample" drug test. The test was negative for many types of common illicit drugs.

[48] Dr. England also draws the following conclusion as to the potential impact on the father of the past sexual abuse that he experienced:

If he were to make a stronger emotional connection to his abuse and all the possible connections that can be made to it, it may result in him being more vigilant with respect to his own children.

[49] With respect to the views of each child, N was too young to be interviewed and M was "able to respond to some questions but only to a very limited extent". From her observation of each of the boys, Dr. England stated that each impressed as "warmly attached" to both parents and that "they would both likely desire consistent contact with both parents, and not a long period of absence from either parent."

[50] Dr. England testified at trial and was cross-examined by the father. Dr. England's analysis and recommendations did not change under cross-examination. She did add that each party should be respectful of the other's cultural and religious backgrounds, and provide the boys with appropriate exposure to each.

[51] I found Dr. England to be a reliable expert, sensitive to the best interests of each boy and the dynamics of the family relationships. I am satisfied with her explanation that her report focused more on the father than on the mother, because more concerns were raised with respect to him. I am also satisfied that although the father and Ms. R.S. may have felt that matters were rushed with them or that Dr. England was brusque, that Dr. England undertook a proper and attentive analysis using her experience and expertise.

[52] Regarding parenting time, Dr. England recommends the following:

At the present time it is recommended that the current parenting plan remain in effect with some minor changes. On the Wednesdays, it is recommended that [N's] time be extended by one hour (3:00 pm - 6:30 pm), with [M's] time remaining the same (3:00 pm - 8:00 pm). Similarly it is recommended that the Saturday access be increased by one hour so that it is 10:00 am to 6:00 pm for both children. Finally, it is recommended that Saturday access occur three weeks out of every four, and on the fourth week, [the father] would have access instead on Fridays from 3:00 pm to 6:30 pm for [N], and 3:00 pm to 8:00 pm for [M].

This plan generally keeps the parenting time constant, while providing [the mother] with one uninterrupted weekend per month, in addition to a slight increase in time for [the father] on Wednesdays and the Friday access in order to help those times be a little less rushed, and give him time to feed the children dinner.

Once [N] begins Kindergarten, it is recommended that the Wednesday access be increased to an overnight for three weeks out of four. The Friday access on the fourth week could be increased 8:00 pm for both children.

With respect to holidays, it is recommended that special single event days (e.g., Mother's Day, Father's Day, and parent birthdays) be assigned to the respective parent, other single event days (e.g., Halloween and the children's birthdays) be alternated, and longer holidays (e.g., Winter Break, Spring Break) be either divided and shared, or alternated as the parents see fit.

[53] Dr. England states that there should be no overnight stays at the father's parents' home until supported by qualified expert opinion.

[54] When counsel for the mother asked Dr. England about overnight stays with the father before N starts kindergarten (September 2018), she stated:

I just felt too uncertain. There were too many issues that were potentially problematic. Particularly for young children that I couldn't put to rest in my mind. So say for example with substance abuse it is a complete unknown to me. If I had been able to have, say an assumed fact that this was not a problematic area that might have made a difference but I don't know that. There are so many allegations about what the truth may be.

I think, really what is going to be so important is what is going to emerge as facts from a trial that I didn't have the opportunity to be able to consider. So for example, one of the things that makes co-parenting difficult is if a parent can't rely on what is said by the other parent and there was

enough indicators of that even throughout my assessment with [the father] where it was hard to know what he would say - did that reflect truth or was that just a statement that was being made in the moment. And the other factor that is related to that is the age of the children. If parents are unable to exchange information or rely on information that one gives to the other one but the children are older and they are able to convey what their experience is in each household then that reduces risk somewhat. But [N] is not really very verbal. [M] he might make statements but it is hard to know, so I cannot really feel assured of knowing what might go on.

[55] Dr. England recommends that the mother and father utilize the "Re-unification and Co-parenting in High Conflict" ("REACH") programme. Dr. England summarized the REACH programme as follows:

This programme is a multidisciplinary team made up of both psychologists and lawyers who work with families with needs similar to those in this family situation. Parenting concerns can be forwarded to the team and consultation provided to parents on issues that arise. With the addition of legal professionals as part of the team, adjustments can be made to the parenting plan and reports can be provided to the Court as needed.

[56] During her testimony, I asked Dr. England about the REACH programme. While I am satisfied that the REACH programme could be beneficial, the associated expense is not affordable for the parties. Neither party suggested otherwise.

[57] She recommends the "Joyce model" for decision-making with the mother having the final determination, subject to court review.

[58] Dr. England also recommends that the father "undergo extensive individual counselling to address the concerns that have been raised".

[59] With respect to substance abuse, as noted, the father passed a drug test. He also says that he is not using drugs. With a review in or after June 2018, the Court will have a longer history to assess whether drug use or other activities such as gambling, remain of concern.

5. JOINT CUSTODY AND GUARDIANSHIP

a) Parties' Positions

[60] Counsel for the mother provided a summary of orders the mother seeks relating to joint custody and guardianship:

1. Joint custody and joint guardianship of the children, [M], born February 9, 2011, and [N], born September 12, 2013 ("the Children") on the following terms:
 - a. The Children will reside primarily with the Claimant;
 - b. The Respondent will have parenting time as follows:
 - i. Every Wednesday from 3:30 p.m. until 8:00 p.m. for [M] and 3:00 p.m. to 6:30 p.m. for [N];

- ii. Three out of every Saturdays from 9:00 a.m. until 6:30 p.m.;
- iii. Father's Day from 9:00 a.m. until 6:30 p.m.;
- iv. Every Christmas Eve from 9:00 a.m. to 8:00 p.m.;
- v. Such other times as mutually agreed by the parties:

(Hereinafter referred to as the "Regular Parenting Schedule")

- c. The Claimant shall be at liberty to exercise 3 one week (7 days) with the Children as vacation time. The Regular Parenting Schedule shall be suspended during those vacation periods. The Claimant shall give the Respondent at least one month's notice of her intended vacation dates [There would be make-up times for the Respondent];
 - d. The Respondent shall cooperate in executing travel authorization and obtaining passports for the Children upon the request of the Claimant;
 - e. The issue of the Respondent having overnight parenting with the Children and vacation time shall be reviewed no sooner than June 2018 with such review to consider the best interests of the Children and whether the Respondent has addressed the issues raised in the section 211 report;
2. Joint guardianship shall be shared on the following terms:
- a. The Claimant shall consult with the Respondent on guardianship issues as they arise from time to time and they parties shall use their best efforts to reach agreements on those guardianship decisions;
 - b. In the event there is an inability to reach an agreement on a guardianship issue, the Claimant shall have the right to make that decision subject to the Respondent having the ability to seek a judicial review of that decision under the Family Law Act;
 - c. The Respondent shall have the right to obtain information regarding the Children directly from their doctors, dentists and educators or such other professionals as may become involved with the Children;
- [61] The father would like far greater parenting time with the boys and says that, without more time than the mother suggests, the boys will not get to know him. Consequently, neither of them will have the benefit of him as their father.
- [62] The father requests "[a] healthy incremental increase in parenting time growing to the end result of Shared Custody". As well, he requests "shared guardianship".
- [63] The father says that the mother should not have final say under the Joyce model.
- b) Legal Principles

[64] In this case, both parties rely on the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) (custody), as well as the provincial Family Law Act, S.B.C. 2011, c. 25, (guardianship, parental responsibilities and parenting time) in their pleadings (together, the "Acts"). At trial, counsel for the mother noted that this proceeding was brought pursuant to both Acts, but emphasized the determination of parental responsibilities and parenting time as the primary issues at stake.

[65] Section 16 of the Divorce Act governs custody orders. The relevant provisions read:

16 (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

- (4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.
- (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.
- (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.
- (7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.
- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[Emphasis added]

- [66] Section 37 of the Family Law Act requires the court, in making orders for guardianship and parenting arrangements (which includes parenting responsibilities and parenting time), to consider only the best interests of the child. The best interests must include consideration of the following:
- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
 - (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
 - (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
 - (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [67] In *M.A.G. v. P.L.M.*, 2014 BCSC 126, Justice Fleming set out other key Family Law Act provisions including those relating to the presumption of guardianship and allocation of parental responsibilities and parenting time between guardians. Justice Fleming stated:

- [43] Pursuant to s. 39 of the FLA, each parent, while together and after separation, is a guardian of the child, unless otherwise agreed or ordered. Under s. 40(2), each guardian may exercise all parental responsibilities with respect to the child, in consultation with the child's other guardian(s), unless to do so would be inappropriate or unreasonable in the circumstances. Section 40(3) provides for the allocation of parental responsibilities between guardians by agreement or order based on the best interests of the child, as defined by the factors set out in s. 37. There are no presumptions regarding the allocation of parental responsibilities, including no presumption of an equal or shared allocation: s. 40(4). Parents who are guardians also exercise parenting time with their children. A parent who is not a guardian has contact instead.
- [68] In addition, ss. 41 and 42 of the Family Law Act address parental responsibilities and parenting time, respectively.
- [69] In family matters, the court may often make orders under either or both of the Acts. As the above provisions demonstrate, the Acts share the same underlying purpose and have the best interests of the child as their only consideration in making orders either for custody or guardianship: see *B.D.M. v. A.E.M.*, 2014 BCSC 453 at paras. 111-113.
- [70] The question of which Act to apply when dealing with overlapping requests for custody and guardianship has arisen on several occasions in British Columbia. Recently, Justice Fitzpatrick addressed this issue in *Jafari v. Moradi*, 2016 BCSC 1331, where the parties relied on both Acts. Justice Fitzpatrick considered the compatibility of custody and guardianship orders as follows:
- [113] The FLA is similar to the Alberta legislation in the area of guardianship. The lawyer and author, John-Paul Boyd, argues that the FLA is more akin to the regime in Alberta (John-Paul Boyd, "A Regime of Peaceful Coexistence, Part 2, Disentangling Custody and Guardianship Under the Divorce Act and The Family Law Act" (2013) 71:3 *The Advocate* 359 at 366 (Hein Online)). Boyd considers the case of *V.L. v. D.L.*, 2001 ABCA 241 [V.L.], which I also find to be illustrative of the fact that guardianship and custody can coexist. As Russell J.A. for the Alberta Court of Appeal noted, the Alberta legislation presumes joint guardianship following separation or divorce and "[t]his implies that guardianship is not dependent upon custody; absent a finding of unfitness or court declaration to the contrary, a non-custodial parent with or without access, retains certain rights and responsibilities": *V.L.* at para. 48. Section 39 of the FLA has a similar presumption that "each parent of the child is the child's guardian."
- [71] Turning to the facts in *Jafari*, Fitzpatrick J. noted that both parties were unrepresented and therefore unable to make submissions as to the relationship between the provisions of the Acts. In addition, both parties relied principally on the Divorce Act. She therefore adopted her earlier analysis in *Rana v. Rana*, 2014 BCSC 530 at para. 115, and determined "that the custody/access issues should be decided under the Divorce Act with guardianship orders supplementing the relief, as necessary".

- [72] In the case at bar, the parties have relied on the Divorce Act with respect to the joint custody order, and the Family Law Act for the remaining orders regarding guardianship, parental responsibilities, and parenting time.
- [73] With reference to the emphasis in the parties' pleadings on the Family Law Act and the case law that has already examined this topic, I rely on the Divorce Act to decide the issue of custody and the Family Law Act for the remaining orders relating to guardianship, parental responsibilities, and parenting time. As was noted in Jafari, guardianship and custody, while similar in nature, are not dependent on one another. In this case, the parties have each requested joint custody and guardianship, minimizing the distinctions between the two concepts.
- [74] I turn now to a consideration of the best interests of the children.
- c) Best Interests of the Children
- [75] I have considered the best interests of each child by reference to the "condition, means, needs and other circumstances" of each. In particular, I have referred to the relevant factors from s. 37 of the Family Law Act in setting out the needs and circumstances of each child, as they provide useful particularity.
- [76] As stated, I will for the most part order the arrangements the mother seeks, which generally align with Dr. England's recommendations. Joint custody and guardianship are appropriate here. I found Dr. England's report and testimony to be helpful, with recommendations based on sound analysis and insights. Her expertise and recommendations buttress many of my views I formed after hearing the evidence, in particular, those relating to the appropriate parenting time for the mother and father respectively.
- [77] In considering the best interests of each child, the key aspect is their very young ages. It would be unwise to attempt to make a plan that would see them through until they are no longer children of the marriage. Pragmatically speaking, a series of reviews will be necessary in order to serve the best interests of each boy.
- d) Joyce Model
- [78] With the mother's historical care and responsibility for each boy, I will order the Joyce model as the mother proposes. Consonant with Dr. England's testimony and the Court's own view, I encourage the father and mother to accommodate the other's religious and cultural backgrounds.
- e) Parenting Time

- [79] Parenting time is defined in s. 42(1) of the Family Law Act as that "time that a child is with a guardian, as allocated under an agreement or order". During this parenting time and subject to an agreement or order that provides otherwise, s. 42(2) states that "a guardian may exercise the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child."
- [80] At the outset, I find that the boys are too young to have their views considered. To the extent that either of the boys has said something about either parent or their wishes, their ages make any such statements unreliable. For example, although there was evidence as to statements that M made, I have not considered any such statements in reaching my conclusions.
- [81] The mother has taken care of the boys and maintained their needs and other circumstances. She has attended to each boy's health and well-being. The mother, with the help of the nanny, has provided the day-to-day care of the boys. The mother's home has been a safe and secure childhood environment for them. I note that the father and Ms. R.S. have a home which may also provide such security.
- [82] Given the young age of each boy, stability is of particular importance, especially when addressing of the identified concerns regarding the father.
- [83] There was evidence of the boys bonding with the mother's step-father, mother, her biological father, and other members of the mother's family. In particular, the boys see the mother's mother and step-father frequently and on a regular basis.
- [84] The father's parents (in particular his mother) and other members of his family, also have a bond with each boy. As noted, the boys are usually at their paternal grandparents' home every Wednesday afternoon starting around 3:30 p.m.
- [85] I have also considered the father's past conduct. There is evidence of past substance abuse, gambling, and deception, each of which is relevant to the father's ability to act as a parent. Substance abuse has obvious relevance to a determination of the best interests of the children. Deception may frustrate effective co-parenting. A gambling addiction, like any addiction, may cause a parent to place his or her interests ahead of those of the child.
- [86] I have also considered the principle of maximum contact. With this principle in mind, I will include more parenting time for the father than the mother suggests and allow for a future general review of parenting time.
- [87] I will add to the father's parenting time, the Friday time Dr. England proposes for those one out of four weekends when the mother will have the boys exclusively. On those weeks when the father does not have Saturday parenting time, on the preceding Friday he will have parenting time from 3:00 p.m. to 6:30 p.m. with N and 3:00 p.m. to 8:00 p.m. with M.

[88] I will also order that if a future review of parenting time is necessary (the parties cannot otherwise agree), that future review of parenting time will be unrestricted. This would allow the court to consider the best interests of each boy at that time. At the time of such future review, there will also be a more reliable and further history of the father's conduct. This review may result in significantly more parenting time for the father, including overnight stays. The boys are young and matters are still at an early stage. The review may occur in or after June 2018. June 2018 is several months before N will start kindergarten.

[89] The father unequivocally states that he has changed his life and habits. To his credit, he has taken a drug test to show that he is currently drug free. A period of almost two years may further his argument and may allay concerns of the Court. Similarly, a further period will enable the Court to see if there is a gambling problem. With full and proper financial disclosure, if there were to be an ongoing gambling addiction, such will be apparent.

f) Parenting Coordinator

[90] At trial, there was discussion of a parenting coordinator. With the young ages of the boys and their routines for the next two years in large measure set, I will not order a parenting coordinator. The Joyce model will be in place. I am also cognizant of the significant costs of a parenting coordinator. Again, the matter can be revisited as part of a general review in or after June 2018.

g) Counselling for M and N

[91] Master Caldwell, on February 2, 2016, ordered that Ms. S. Lindfield be appointed to provide counselling services for the two boys. Apparently, Ms. Lindfield wished to postpone counselling sessions until after the trial. Counselling sessions may now proceed. The associated fees will be shared 55% by the mother and 45% by the father, subject to the annual review based on the exchange of income tax returns and related information.

6. DIVISION OF RRSPs

[92] The parties have few assets. The mother has an RRSP with a value of approximately of \$24,000. The father has an RRSP of approximately of \$7,000. At trial, there was little focus on assets. With the significant funds taken by the father during the course of the marriage, I will order that each party retain their respective RRSP without equalization.

7. CHILD SUPPORT

a) Retroactive Child Support

[93] With respect to retroactive child support the mother submitted:

On the issues of [base] support, we submit that the Respondent should have paid the following:

1. For the period of June 1, 2014 to December 31, 2014 - his income was stated to [be] \$40,000 and his base child support for two children should have been \$612 per month. He refused to pay any support until October 15, 2014. This leaves a short fall of 5 months at \$612 which is \$3,060.
2. For 2015, the Respondent's income was \$75,413. Despite the significant increase of his income he did not adjust his child support to the correct amount on that income which is \$1,142 per month. He paid \$612 per month which is a short fall of \$530 per month over a 12 month period. That total amount is \$6,360.
3. When the disclosure of the Respondent was made in late 2015 on his actual earnings the Claimant again attempted to have the Respondent increase his support to fall in line with his income as well as pay towards the section 7 expenses that she was incurring. The Respondent opposed the request and in a variation application, represented his income would be only \$50k. The court increased support pending the determination at trial on that issue and as of February 1, 2016, the Respondent has paid \$758 per month.
4. The Respondent did not produce his 2015 tax return or his year to date earnings for 2016 until after his evidence was tendered. What we see from the information provided is that he is on track for the same income in 2016 as he had in 2015, around \$73,000.
5. For the period of January 1, 2016 to August 1, 2016, the Respondent should have paid \$1,142 per month. Instead, he paid a total of \$612 in January and \$758 in February through to August for a total shortfall of \$3,218.
6. On base support, it is submitted that the Children are entitled to support at the Respondent's actual earnings and that the Respondent should be held to account and pay to the Claimant the underpayment of support which totals \$12,638. Effective September 1, 2016, we submit that his child support payments be made at the rate of \$1,142 per month.
7. With respect to section 7 expenses, we seek the following payments:

2014:

Nanny (June - Dec):

total cost: \$17,136

35% (Respondent's share)

\$5,997.67

Montessori (June - Dec):

total cost \$1,875

35% (Respondent's share)

\$656.25

2015:

Nanny:

total costs:\$27,800

45% (Respondent's share)

\$12,510

Montessori:

\$5,090

45% (Respondent's share)

\$2,290.50

2016:*

Nanny (average of \$2,315 per month) January - August:

\$18,520

45% (Respondent's share)

\$8,334

Montessori (Monthly cost \$1,085) January - August:

\$8,680

45% (Respondent's share)

\$3,906

* as modified to reflect expenditures to the end of August 2016 and not all of 2016

[94] I generally agree with the foregoing statements and calculations. As described below, I will make an adjustment regarding the father's share of the nanny's wages.

[95] The father's 2014 Guideline income of \$40,000 per annum is reflected in Justice Ker's October 9, 2014 Order made following a judicial case conference.

[96] With respect to 2015 and 2016, the father's 2015 Notice of Assessment (dated April 28, 2016) shows \$75,413 as his total income. For 2016, the father's year-to-date earnings as of July 2, 2016 are shown as \$42,225. I agree with counsel for the mother that child support for 2015 and 2016 should be based on the father's Guideline income as \$75,000.

[97] The father argues that a significant portion of his income is commission income and that this may fluctuate. He also says that he is not working 12 to 15 hours a day as he has in the past. I will rely on his recent earnings as reflected in the July 2, 2016 pay stub, which are consistent with the mother's counsel's suggestion that \$75,000 be used as the father's

Guideline income. I will also order an annual review of child support based on Guideline income after an exchange of tax returns and related notices of assessment (the exchange to occur on or before May 30 and the review on or before June 30).

[98] With respect to 2014 for the period from June 1, 2014 to October 15, 2014, the father says that upon separation, the mother had retained funds in a joint account and that this serves to offset any arrears in this regard. I found his explanation to be unreliable. I will not allow an offset and will order the amount claimed to be paid.

[99] The father argued that the nanny provides a benefit to the mother beyond the care of the boys. I accept that there is a benefit provided, and will have the father's share based on 80% of the nanny's salary.

[100] With respect to retroactive child support, the father has been aware of the s. 7 expenses and the mother has been seeking support from the outset. Child support is the right of the child: *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 60. As the Supreme Court of Canada in *D.B.S.* states at para. 107: "[p]ut simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct"

b) Future Child Support

[101] The amount of future child support will be the \$1,142 per month which the mother seeks. The share of s. 7 expenses will be based on their respective Guideline income. The father's share of the nanny's salary will be based on 80% of the nanny's salary.

8. COST OF DR. ENGLAND'S REPORT AND ATTENDANCE AT COURT

[102] The mother has paid for Dr. England's report. The father asked that Dr. England appear at trial and I made a ruling that she should: *A.R. v. A.V.R.*, 2016 BCSC 1182.

[103] The mother asks that the father pay \$9,250 towards the fee for Dr. England's report, which I understand will result in an equal sharing of the fee. I understand that Dr. England has not yet rendered an account for her day of testimony.

[104] I found that the section 211 report and Dr. England's testimony were helpful and served the best interests of each boy. I order that the father pay \$9,250 on account of Dr. England's report to the mother, and that he share equally in the reasonable and necessary fees and disbursements Dr. England may charge in connection with her testimony.

9. COUNSELING FOR THE FATHER

[105] I will not order counselling for the father. Counselling should be his choice.

10. SUMMARY OF ORDERS

[106] For convenience, the summary of orders is as follows:

1. the parties are divorced from each other with the divorce effective on the thirty-first day after the date of these Reasons;
2. in or after June 2018, either party is at liberty to have the parenting time reviewed, without restriction, under the Family Law Act.
3. joint custody and guardianship of the children, M, born February 9, 2011, and N, born September 12, 2013 are on the following terms:
 - a) the boys shall reside primarily with the mother;
 - b) the father shall have parenting time as follows:
 - i) every Wednesday from 3:30 p.m. until 8:00 p.m. for M and 3:00 p.m. to 6:30 p.m. for N;
 - ii) three out of every Saturdays from 9:00 a.m. until 6:30 p.m. On those weeks when the father does not have Saturday parenting time, on the preceding Friday he will have parenting time from 3:00 p.m. to 6:30 p.m. with N and 3:00 p.m. to 8:00 p.m. with M;
 - iii) Father's Day from 9:00 a.m. until 6:30 p.m.;
 - iv) every Christmas Eve from 9:00 a.m. to 8:00 p.m.; and
 - v) such other times as mutually agreed by the parties:(hereinafter referred to as the "Regular Parenting Schedule")
 - c) the mother shall be at liberty to exercise three, one week (7 days) periods with the boys as vacation time. The Regular Parenting Schedule shall be suspended during those vacation periods. The mother shall give the father at least one month's notice of her intended vacation dates. Make-up times for the father will be arranged by the parties acting reasonably;
 - d) the father shall cooperate in executing travel authorization and obtaining passports for the boys upon the request of the mother;
 - e) each party shall have the obligation to advise the other party of any matters of a significant nature affecting either boy.
 - f) each party shall have the obligation to discuss with the other party any significant decisions that have to be made concerning either boy, including significant decisions about the health (except emergency decisions), education, religious instruction and general welfare;
 - g) the parties shall have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;

- h) in the event that the parties cannot reach agreement on a significant decision despite their best efforts, the mother shall be entitled to make those decisions and the father shall have the right to apply for directions on any decision he considers contrary to the best interests of the boy under s. 49 of the Family Law Act; and,
- i) each guardian shall have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.
- 4. the father shall pay the mother \$1,142 per month as child support commencing September 1, 2016;
- 5. the father shall pay 45% of the cost of pre-school for N. The father's share being \$168.75 per month (except for no amount in July or August);
- 6. the father shall pay 45% of 80% of the nanny's salary, the father's share being \$833.40 per month;
- 7. the mother shall notify the father promptly should any of the expenses set forth in the two preceding subparagraphs cease or are reduced with the appropriate adjustment made;
- 8. the father shall pay to the mother retroactive base child support of \$12,332 (\$2,754 + \$6,360 + \$3,218);
- 9. the father shall pay to the mother retroactive s. 7 expenses of \$28,326.08 (\$4,798.13 + \$656.25 + \$10,008.00 + \$2,290.50 + \$6,667.20 + \$3,906.00);
- 10. child support shall be reviewed annually by the parties no later than June 30, with the parties to exchange copies of their respective tax returns and related notices of assessments no later than May 30.
- 11. following the annual review of child support, the adjustments, if any, shall be effective as of July 1.
- 12. the parties shall retain their respective RRSPs.
- 13. the parties shall facilitate M and N attending counselling with Ms. S. Lindfield as required by Ms. Lindfield with the father paying 45% and the mother paying 55% of Ms. Lindfield's fees;
- 14. the father shall pay to the mother \$9,250 on account of the cost of Dr. England's section 211 report. Further reasonable charges for Dr. England's attendance at court shall be shared equally by the parties; and
- 15. all other claims in these proceedings (including claims under the Notice of Family Claim and Counterclaim) are dismissed.
- 11. COSTS

[107] Counsel for the mother asked that a ruling on costs occur after the release of these reasons. I ask that within 60 days, the parties arrange through Supreme Court Scheduling, a 55 minute, 9:00 a.m. hearing before me at a date convenient for them.

"Funt J."

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