
CANADA / JUDGMENT

B.A.C. v. K.C.

2018 BCSC 2111

COURT

Supreme Court of British Columbia

DECIDED

30 November 2018

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2018 BCSC 2111 B.A.C. v. K.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.A.C. v. K.C.,

2018 BCSC 2111

Date: 20181130

Docket: E160485

Registry: Vancouver

Between:

B.A.C.

Claimant

And

K.C.

Respondent

Corrected Judgment: The Claimant's name was removed from para. 188 and

The Respondent's name was removed from para. 189 on December 5, 2018

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Claimant:

M. Guy

Counsel for the Respondent:

R. DeBou

Place and Date of Trial:

Vancouver, B.C.

August 13-16, 20, 27-30, October 29-31, November 1-2, 5-8, 2018

Place and Date of Judgment:

Vancouver, B.C.

November 30, 2018

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Introduction

- [1] The claimant ("Mr. C") and the respondent ("Ms. C") cohabited for approximately 12 years and were married for nine of them. They have two children: a boy and a girl. The boy, "Ro", was born in November 2007 and was almost 11 years old at the time of trial. The girl, "Ia", was born in September 2009 and turned nine years old during the trial.
- [2] Mr. C is 46 years old. He is a professional accountant in private practice. Ms. C is about to turn 43. She is employed as a booking clerk in a hospital.
- [3] Mr. C and Ms. C separated on October 10, 2014, although they continued to share the same residence until November 17, 2014. In this period, they both retained counsel who practice collaborative family law with a view to negotiating a comprehensive separation agreement. Their negotiations were successful. Mr. C and Ms. C signed a separation agreement in February 2015 (the "Separation Agreement"). It includes a lengthy parenting plan (the "Parenting Plan"), under which Mr. C. and Ms. C settled the terms of a co-parenting

arrangement. The Parenting Plan provides for the children to spend six overnights in every two weeks with Mr. C, and the balance of their time with Ms. C (the "parenting schedule"). As well as their counsel, the parties were assisted in the negotiation of the Parenting Plan by a parenting coach. They were assisted by a business valuer in negotiating the financial terms of the Separation Agreement.

- [4] Unfortunately, after the Separation Agreement was concluded, relations between the parties deteriorated. In November 2015, Ms. C retained her trial counsel. Through him, she took the position that the Separation Agreement had been obtained without proper financial disclosure and through coercion, duress and undue influence. On her behalf, her counsel pre-emptively rejected negotiation, mediation or arbitration, advising that court proceedings would be required. The allegations of coercion, duress and undue influence were ultimately abandoned at trial.
- [5] In February 2016, Ms. C denied Mr. C access to the children for his parenting time. In response, Mr. C retained counsel and commenced this action seeking a divorce and enforcement of the parenting arrangements set out in the Separation Agreement and Parenting Plan. In May 2016, Ms. C counterclaimed for an order setting aside the Separation Agreement and Parenting Plan. This has been acrimonious litigation featuring various interlocutory applications, correspondence that has tested the bounds of civility and, at one stage, a protection order.
- [6] As the trial approached, Mr. C's relationship with Ro deteriorated. Ms. C attributes the deterioration to an alleged act of violence by Mr. C against Ro at Mr. C's house in October 2017. At some point in the spring of 2018, Ro began refusing to get out of the car when his mother drove him to Mr. C's house for parenting time. By the conclusion of trial in early November 2018, Ro's recent interactions with his father consisted of eating a piece of pie together in June and two brief visits to his father's house in the fall of 2018. Ms. C's position is that Ro is afraid of his father and she can only encourage and cannot force him to visit his father if he does not want to. Mr. C's position is that Ro's current refusal to go to his house overnight is a product of Ms. C's failure to shield Ro from her own anxieties.
- [7] The fundamental issues in this case are:
1. Should portions of the Separation Agreement pertaining to support be set aside for lack of financial disclosure?
 2. Are changes in the parenting arrangements necessary in the best interests of Ro and Ia?
 3. What are the amounts of child support and spousal support presently payable and is there money owing to either party by reason of past over or underpayments?
- [8] Both parties accuse the other of misconduct in the litigation and seek special costs. They have agreed that argument on the issue of costs should be deferred until after I have given judgment on the substantive issues.

- [9] The parenting issue is the most substantial. I should say at the outset that both parties are competent parents who love their children. I have no doubt that each is attempting, in his and her own way, to act in the children's best interests. Unfortunately, the parties' dispute has gotten in the way of this.

Witnesses and credibility

- [10] While there are only modest direct conflicts in the evidence, Ms. C's contention that Mr. C is a liar whose evidence cannot be trusted is fundamental to her case on all issues. It is therefore necessary that I comment generally on his evidence and that of the other witnesses. I do so in light of the factors canvassed by Dillon J. at para 186 in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296 and by Ballance J. in *Erickson v. Sibble*, 2012 BCSC 1880 at paras. 6 to 8.
- [11] Mr. C's evidence in chief lasted one and one-half days and he was cross-examined for four and one-half days. The cross-examination was often rambling and repetitive - it is fair to observe that counsel was persevering while seriously ill for a part of the cross-examination - and Mr. C became testy and argumentative at times. I found this understandable though regrettable. In closing argument, Mr. DeBou suggested that Mr. C "bristled with anger" under cross-examination. I do not agree. I formed the impression of Mr. C that he is stubborn and exasperated with Ms. C. He tends to be dismissive of opinions he does not agree with. His evidence was naturally coloured by his frustration with the litigation in which he has become embroiled, and his loss of contact with Ro, which he blames on Ms. C. Having said all this, I find him to be generally a truthful and reliable witness. He has a good memory, made appropriate concessions, and his evidence is generally consistent with the documentary evidence.
- [12] Ms. C was a difficult witness, in large part because she is deeply invested in her case and determined to ensure that nothing is overlooked. She has come to believe that Mr. C is dangerous and that she must protect her children from him. All this made her argumentative, opinionated and defensive. She tended to exaggerate, often probably unconsciously. Some of her evidence is unreliable.
- [13] Mr. C's mother, V.C., and his girlfriend, T.I., were called by Mr. C. V.C. is a retired nurse who, while naturally sympathetic to her son's position, displayed common sense and gave evidence with an even hand. T.I. is an Italian citizen who met Mr. C while he was on vacation in Italy and came to visit him in Canada afterwards. The visits have been repeated. While she can only come for months at a time on a visitor's visa, she has lived with Mr. C more than half the time since the relationship began in the fall of 2016. In giving evidence, some of her language was exaggerated. I attribute this to the fact that English is not her mother tongue and found her to be generally a truthful witness.

- [14] Mr. C tendered in evidence without objection two expert reports: a report of Dr. Nicola Aubé obtained pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]; and a "Hear the Child" report of Arlene Henry, Q.C. Neither witness was called for cross-examination.
- [15] Ms. C challenges Dr. Aubé's report, contending that, read as a whole and in the light of the evidence, it is unbalanced and amounts to advocacy for Mr. C. The primary method of challenging a s. 211 report is through cross-examination; *Hejzlar v. Mitchell-Hejzlar*, 2010 BCSC 1139 at para. 15. I do not think a blanket allegation that a report is unbalanced is appropriate in the absence of cross-examination. In any event, I do not at all accept this characterization of Dr. Aubé's report. Having read the report carefully in the light of all of the evidence, I have no reason to view Dr. Aubé as anything other than a well qualified, impartial expert, "the eyes and ears of the court", whose observations and conclusions deserve to be taken seriously; *Shapiro v. Simpson*, 2016 BCSC 211 at paras. 101-103.
- [16] Ro's counsellor, Nancy deVries, was called by Ms. C and gave helpful evidence. She has a Masters Degree in Clinical Psychology and 22 years of experience as a registered clinical counsellor. Ms. deVries did not prepare an expert report and was not called as an expert, but her evidence included opinion evidence that was not objected to. She gave her evidence with an even hand and not as an advocate for either party. Ms. deVries' evidence presents certain difficulties, in that she disagreed with some of Dr Aubé's conclusions without having read the entire report stating the basis for those conclusions, and I have taken this into account in considering her evidence.
- [17] Ms. C's sister, E.J., was called by her as a witness. She has a close relationship with the children and usually drops them off and picks them up from school for Ms. C. I found her essentially truthful although there were questions she did not want to answer on cross-examination, possibly because she felt that the answers would not reflect well on Ms. C.

First issue: Validity of Separation Agreement

Overview

- [18] The Separation Agreement is comprehensive. It provides for custody, guardianship and shared parental responsibilities, the division of family property and debt, payment of spousal support for a fixed period, and payment of child support by Mr. C in an amount to be adjusted annually. It contains the Parenting Plan which sets out the details of the co-parenting arrangement over 13 pages.
- [19] On July 15, 2015, Ms. C registered the Separation Agreement in the Provincial Court registry, making it enforceable as if it were an order of the Court, for certain purposes.
- [20] On retaining her trial counsel, Mr. DeBou, Ms. C took the position that the Separation Agreement and Parenting Plan were obtained improperly. As Mr. DeBou put it in an email to Mr. C on November 20, 2015:

The separation agreement was made on your terms, without proper disclosure, without a proper business evaluation and only obtained through your coercion, duress and undue influence upon my client, represented or not. That is why I am advising you that we will be going to court.

In her evidence, Ms. C could not say that this email was sent on her instructions, but I have no doubt that it was.

- [21] On February 5, 2016, Mr. C was one day late in making a substantial capital payment required under the Separation Agreement. Mr. DeBou immediately took the position that the Separation Agreement was at an end, and that Ms. C would not surrender the children for Mr. C's parenting time on February 5. Mr. C promptly retained counsel and on February 17, 2016, he commenced this action seeking an order enforcing the Separation Agreement. Ms. C retreated from her positions that the Separation Agreement was at an end and Mr. C should be denied parenting time, but not from the position that the Separation Agreement was obtained improperly. On May 30, 2016, she filed a counterclaim seeking an order that the Separation Agreement be set aside in its entirety on grounds that she had received inadequate legal advice and insufficient financial disclosure from Mr. C, that she made the agreement under duress, and that the agreement was unconscionable.
- [22] At trial, Mr. DeBou did not give an opening. He advised me in final argument that Ms. C is not pursuing an allegation of duress. Nor is she pursuing the allegations of inadequate legal advice and unconscionability. Ms. C no longer seeks to set aside the Separation Agreement in its entirety. Her claim is now confined to varying parts of the Parenting Plan and those parts of the Separation Agreement that relate to support. The attack on the support provisions is based only on an allegation of inadequate or inaccurate disclosure by Mr. C of his income.
- [23] Mr. C still seeks an order confirming and enforcing the Separation Agreement. In this part of these reasons, I deal with the validity of the Separation Agreement generally and the financial disclosure issue. I will address the parenting issues separately.

Making of the Separation Agreement

- [24] The parties negotiated the Separation Agreement through a process in which each was independently represented by a lawyer practising collaborative family law. They both wished to avoid litigation. The negotiations lasted from November 13, 2014 until the agreement was signed on February 4, 2015. Drafts of the Separation Agreement and Parenting Plan were exchanged.
- [25] To address the financial issues, the parties jointly retained and were assisted by an accountant and business valuer, Ron Tidball. Mr. C provided information concerning his assets and income to Mr. Tidball, who reported to the parties and their counsel collectively.

[26] Privilege was waived in this litigation. Ms. C's communications to her lawyer reveal that she read the draft agreement closely and provided comments which led to corrections and changes in the concluded Separation Agreement. Apart from these matters of detail, on February 2, 2015 she advised that she was generally content with the agreement.

[27] The Separation Agreement contains extensive recitals bearing on the parties' intentions and the process by which it was made. The recitals include:

RECITALS:

H. [B] and [K] intend this Agreement to be:

1. a settlement of custody, guardianship of and access to the Children.
2. a settlement of child support and maintenance for the Children as provided for herein;
3. a final settlement of spousal support; and
4. a final settlement of each of the parties' respective rights in or to the property of the other or to the property held by them jointly.

I. [B] and [K] have each sought independent legal advice and have been fully advised and informed by their respective lawyers of their respective rights and liabilities towards and against each other and regarding the property and the estate of the other.

J. [B] and [K] have been fully advised as to their entitlement to discovery and other legal means by which they may obtain further information with respect to the other's property and financial affairs. [B] and [K] are each fully satisfied with the financial disclosure that they have received from the other and are not requesting or requiring further financial information prior to the execution of this Agreement. Neither party will ever use the lack of disclosure to try to vary or overturn the terms in this Agreement.

N. [B] and [K] have been fully advised by independent counsel of the law pertaining to the division of assets and debts, child support and spousal support and are aware of the relevant provisions of the Family law Act, SBC 2011 as they pertain to their separation, and its amendments (the "Family Law Act"), and specifically the provisions of Parts 5 and 6.

O. It is the desire of [B] and [K] to settle all maintenance and property matters between them pursuant to the terms of this Agreement in contemplation of corollary relief pursuant to the Divorce Act (Canada) and in contemplation of claims pursuant to the Family Law Act and amending acts thereto and to all acts in substitution thereto.

Q. [B] and [K] have been fully advised by independent counsel of the law pertaining to the setting aside of separation agreements including, but not limited to, non-disclosure, fraud, misrepresentation, coercion, duress, undue influence and unconscionability.

R. [B] and [K] have entered into this Agreement using the collaborative process. It is their intention to resolve all matters between them without court intervention.

S. [B] and [K] are aware that the law provides for judicial intervention in some circumstances if this Agreement is found to be significantly unfair now or in the future. However, neither party intends to invoke the discretion of the Court to review the fairness of the Agreement or to set it aside. [B] and [K] have attempted to resolve all matters equitably between them, and they both agree that this Agreement is fair as of the date of its execution and for all future purposes. [B] and [K] have taken into account future circumstances and changes that may occur. Both [B] and [K] acknowledge that some degree of change in their circumstances is foreseeable and they are aware that there could be significant changes to their health, job markets, parental responsibilities, housing markets and the value of assets, and such changes were contemplated as being possible by them in coming into this Agreement. In the event that either of [B] or [K] applies to override or vary the provisions of this Agreement, it is the intention of [B] and [K] that this paragraph will once and for all finally establish the fact and principle that the Agreement is regarded by both as fair and not subject to judicial intervention.

T. [B] and [K] have been advised of each other's financial situation, estate and prospects and enter into this Agreement without undue influence, fraud or coercion. [B] and [K] have each received independent legal advice from his or her own lawyer regarding the legal effect of this Agreement and the alternatives to signing this Agreement.

[Emphasis added.]

[28] The parties confirmed the recitals in the following provisions of the Separation Agreement:

THEREFORE, [B] and [K] agree as follows:

1. CONFIRMATION OF RECITALS

1.1 The recitals of this Agreement form part of this Agreement.

1.3 [K] warrants that the statements of fact and representations contained in the Recitals are true so far as they concern her, and acknowledges that [B] is relying on them and that they form part of this Agreement.

[29] The Agreement requires Mr. C to pay Ms. C monthly spousal support of \$1,100 until the earlier of Mr. C's death, Ms. C's death, or June 20, 2024. It also provides:

32.6 [K] acknowledges that after the terms of this Agreement are carried out, she will be fully capable of meeting her financial needs. [K] acknowledges that the implications of accepting a termination of spousal support have been explained to her by her independent legal counsel.

32.7 The parties acknowledge that:

- (a) This Agreement has been negotiated in an unimpeachable fashion and fully represents the intentions and expectations of the parties. The parties agree that the terms of this Agreement constitute an equitable sharing of the economic consequences of their relationship and its breakdown, and reflect each of the party's own particular objectives and concerns. Among other considerations, they are depending upon this termination of spousal support, in particular, in order to plan their future lives.
- (b) The terms of this Agreement substantially comply with the overall objectives of the Divorce Act (Canada) and the Family Law Act (British Columbia) now and in the future and the parties' need to exercise their autonomous rights to achieve certainty and finality.

[30] The Agreement contains the following further acknowledgment:

38.5 [B] and [K] acknowledge the following:

- (a) They have each received thorough, independent legal advice with respect to the legal effect of this Agreement and with respect to the alternatives available to him or her in lieu of signing the Agreement.
- b) They have executed this Agreement each of their own free will and were not subjected to any pressure or intimidation by the other of them or anyone else on his or her behalf; and
- c) They have a general knowledge of the other's financial affairs and they have been fully advised as to their entitlement to discovery and legal means by which they may obtain further information with respect of the other's financial affairs and each is satisfied, on the basis of information which they now have to accept this Agreement as a final settlement of any claims they may have against the other.

[Emphasis added.]

[31] Ms. C's signature on the Separation Agreement was witnessed by her lawyer, Ms. Redmond.

[32] Schedule "E" to the Separation Agreement is a Solicitor's Certificate of Independent Legal Advice, signed by Ms. Redmond. She states:

THIS IS TO CERTIFY THAT I have been retained by [KC] of Burnaby, in the Province of British Columbia, separate and apart from [BC] to advise her with regard to signing the Separation Agreement and that, I have fully read over and explained to her the Separation Agreement and advised her of the nature and effect thereof; and she expressed herself to me as fully understanding the Separation Agreement and its effect on her in light of her present and future circumstances, and she stated to me that she signed the Separation Agreement willingly and not under any duress or stress by [BC] and without any pressure or undue influence or deception on the part of [BC] or anyone on his behalf.

I BELIEVE THAT upon signing the Separation Agreement, she was fully advised and informed with regard to all the foregoing matters mentioned and may fairly be said to have acted independently therein.

[Emphasis added.]

[33] Ms. C signed an endorsement on the Certificate of Independent Legal Advice, confirming that she had read it and that the statements in it said to have been made by her were true. In cross-examination, she testified that she read and understood the certificate and that the statements attributed to her are true.

Analysis

[34] The passages I have quoted from the Settlement Agreement are clear and unambiguous. By endorsing the Certificate of Independent Legal Advice, Ms. C warranted that she was not subject to duress, pressure or undue influence. Her claim that she executed the agreement under duress was therefore implausible from the outset and she was right to abandon it. In her evidence, Ms. C complained that Mr. C pressured her to sign the Separation Agreement and she eventually went along with it. In the circumstances, whatever pressure was exerted could not have amounted in law to duress.

[35] I should add that Ms. C's evidence of pressure exerted on her was, at best, tenuous. She said that Mr. C was pressing her for a quick decision, but her own correspondence with her lawyer shows that she, too, wanted to resolve matters quickly. In the end, the negotiations were concluded according to Ms. C's timetable, not Mr. C's.

[36] A written, witnessed agreement respecting spousal support is binding and may be set aside only on grounds specified in s. 164(3) or (5) of the FLA. Subsection (3) deals with the deficiencies in the making of the agreement, and subsection (5) deals with subsequent developments.

[37] Where a party seeks to vary a spousal support agreement on the basis of insufficient financial disclosure, the relevant part of subsection (3) requires that the court be satisfied that "when the parties entered into the agreement: (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement".

[38] Subsection (5) permits the court to set aside an agreement respecting spousal support on the ground of developments since the agreement was made, if it has become significantly unfair on consideration of certain factors, namely:

- a) the length of time that has passed since the agreement was made;
- b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
- c) the intention of the spouses, in making the agreement, to achieve certainty;
- d) the degree to which the spouses relied on the terms of the agreement; and

- e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

[39] At trial, Ms. C relied only on an allegation of undisclosed income. She maintains that Mr. C failed to make full disclosure of his income in the negotiations and has continued not to make full disclosure in this litigation. According to his tax returns, Mr. C's line 150 income was \$116,003 (excluding capital gains on the sale of a property) in 2015, \$83,974 in 2016, \$108,347 in 2017, and he estimates his 2018 income at \$90,960 in his F8 Financial Statement made in August 2018. Mr. C testified that his annual income was correctly stated in the Separation Agreement and in the tax returns he has filed since the Separation Agreement was made.

[40] Ms. C's allegation is unsupported by anything more than suspicion and statements attributed to Mr. C that were made before the parties separated. Ms. C says that Mr. C often said that he had an income of \$200,000 a year, and that he claimed that he had cash income not recorded in the books of his accounting practice. In an email to Ms. Redmond on December 9, 2014, while the Separation Agreement was being negotiated, Ms. C. stated:

I know that [B's] business does trade deals along with cash deals so the amount that is being put forth for her (sic) earnings are not 100 percent. I will would (sic) like to put down on paper that he does make \$150,000 per year as that is what his match profile states too. (mind you his profile does write out between \$100,000.00 - \$150,000.00) I know that he has had job offers in the past to make \$130,000.00 per year and to work less hours and he would not accept those jobs as stated he lives a \$200,000.00 income and needs to pay for that "life style" NOTE: he does billings at \$400.00 per hour like lawyers do too therefore the numbers with the downtown office, Burnaby office and off course (sic) we did forget the Surrey Office (his latest venture) do not add up.

[Emphasis in original]

[41] It appears from the email that Ms. C felt she had reason to believe that Mr. C's annual income exceeded \$100,000, but she was not sure by how much.

[42] Notwithstanding her understanding of Mr. C's sources of income, and her ability to investigate his circumstances through Mr. Tidball or, if she wished, in litigation, Ms. C subsequently agreed to the following in the Separation Agreement:

GG. [B] is the owner of 100% of the shares of [B.A.C. Ltd] ("BACA").

JJ. [B] is employed as an accountant with BACA and derives the majority of his income from BACA. The parties agree that [B's] annual income for the purpose of determining child and spousal support is currently \$110,000.

[Emphasis added.]

- [43] Clause 38.5(c) of the Separation Agreement expressly contemplates the possibility of undisclosed income. Ms. C agreed that she had a general knowledge of Mr. C's financial affairs, had been fully advised as to her entitlement to discovery and legal means of obtaining further information, and had decided to make a final settlement on the basis of the information available. I am not persuaded that Mr. C was in receipt of undisclosed income in excess of that contemplated in the Separation Agreement, or at all.
- [44] There is no reason to believe that the Agreement has become significantly unfair in its operation by reason of undisclosed income or other circumstances arising since it was made. Recital J and clauses 32.6 and 32.7 of the Agreement forcefully and thoroughly state the parties' intentions that the Agreement would finally settle Ms. C's claim for spousal support.
- [45] Ms. C observes that Mr. C estimated annual expenses totalling approximately \$169,000 and \$148,000 in his F8 Disclosure Statements filed in this action in 2016 and 2018. I decline to infer from these statements that Mr. C is funding his expenses from hidden sources of income. It should be noted that Mr. C estimated that he was incurring expenses well in excess of his income in both statements, as did Ms. C. Both parties have substantial debt and Mr. C now records fewer financial assets and substantially greater debt than he recorded in 2016. It appears that both parties are going into debt to which the expense of this litigation has no doubt contributed.
- [46] In short, there is no good reason in this case to permit Ms. C to contradict her considered agreement as to Mr. C's annual income. As her counsel acknowledged in argument, this is a case of "buyer's remorse". However, the fact that Ms. C now regrets the agreement she made is not a reason not to give effect to it.
- [47] Accordingly, Ms. C's claim to set aside the provisions of the Separation Agreement pertaining to spousal support is dismissed. Mr. C is entitled to an order declaring that the Separation Agreement, apart from those provisions addressing the parenting arrangements and the Parenting Plan, is a valid and binding agreement. I now turn to the parenting arrangements.

Second issue: Should the parenting arrangements be changed?

Overview

- [48] Ro has just turned 11. Since the separation in October 2014, he has developed an anxiety disorder. He often expresses extreme reluctance to go to school and, as I have noted, currently refuses to go to his father's house for parenting time. Dr Aubé states:

[Ro] is distinctively a bright child and, as every protagonist interviewed depicted him, he is also very sensitive and quite perceptive. [Ro], who meets the criteria for General Anxiety Disorder, has endorsed maladaptive behaviours that are impacting his cognitive ability, his emotional stability and his social interaction with peers. It is also affecting greatly his self esteem, his ability to deal

with stress and his responses to problem solving. The genesis of his anxiety stems from his tarnished relationship with his dad and somehow a co-dependent relationship with his mom. The sad aspect of this sombre scenario is the fact that [Ro] has learned to respond to this stress by becoming manipulative and using this negative energy and attention to gain power. He gets especially annoyed and may even reject his dad because his father does not buy into all of his drama. It is quite revealing when [Ro's] school counsellor related that he triggers his distress for avoiding academic tasks or commitments. I suspect that he gets more attention from mom when his emotions are dysregulated.

[Ro] is distinctively a child in pain and in great need of psychotherapy. Fortunately, he has responded well to counselling.

[Underlining in original.]

- [49] Ms. deVries is Ro's counsellor. She disagrees that Ro is triggering his own distress. She agrees that he is a child in pain. She says that he loves both his parents and, notwithstanding his apparent rejection of his father, wants a relationship with both parents. She attributes his behaviour, in part, to the ongoing conflict between Mr. C and Ms. C.
- [50] Ro's sister, Ia, is nine years old. By all accounts, she is coping much better with the stress of the ongoing conflict between the parents.
- [51] The parties agree that the circumstances have changed since the Parenting Plan was made, and that there must be changes in the Parenting Plan. They disagree as to what those changes should be.
- [52] The current parenting schedule is that Mr. C has the children overnight six nights out of every two weeks: Mondays, Tuesdays, and every second weekend beginning on Saturday morning.
- [53] Ms. C seeks an order giving her custody and sole guardianship of both children. She seeks a reduction in the amount of parenting time the children have with Mr. C, either to four nights in every fourteen, or to one night a week on weekends. She would continue to permit Ro to refuse to see his father during his parenting time until Ro decides otherwise.
- [54] Mr. C seeks an order maintaining the parenting schedule set out in the Parenting Plan with the addition of a single night of parenting time to Mr. C in every two weeks. This would be a "2/2/5/5" arrangement under which Mr. C would continue to have parenting time every Monday and Tuesday night, and every second weekend from Friday night onwards.
- [55] Mr. C attributes Ro's refusal to come to him to Ms. C's presence during the transitions. Mr. C would deal with this by having the transitions take place at school and requiring that Ms. C or her sister, E.J., stay away.

- [56] The parties agree that the Court should order that Mr. C attend for counselling with Ro. Ms. C seeks a broader (and substantially more expensive) regimen of counselling in which all family members would be involved.
- [57] Counsel for the parties agree that civil communication between the parties has been a problem and should be addressed by an order of the Court. In their submissions they identified various aspects of the Parenting Plan that they maintain are not working.
- [58] This much is obvious and was acknowledged by both counsel in final argument. The children have been permitted to know much too much about their parents' dispute to the point of being drawn into it. I find that this has contributed to Ro's anxiety and distress.

Law bearing on the parenting issues

1) Analytical framework

- [59] The parties seek orders under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the FLA. Both statutes direct the court to have sole regard to the best interests of the children. The court may apply the analytical framework set out in the FLA and make an order pursuant to the FLA in a divorce proceeding; *B.D.M. v. A.E.M.*, 2014 BCSC 353 at paras. 115 to 120.

- [60] Section 37 of the FLA provides:

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (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.
- [61] Section 16 of the Divorce Act addresses orders for custody and access in less detail. It includes the following:

Factors

- (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.

Past conduct

- (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.

Maximum contact

- (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.

[62] This case contains allegations of family violence on the part of Mr. C. Family violence is defined in s. 1 of the FLA and the definition includes the following:

"family violence" includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

- (d) psychological or emotional abuse of a family member, including
- (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
- (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
- (iii) stalking or following of the family member, and
- (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[63] Section 38 provides:

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

[64] The Parenting Plan is an agreement within the scope of s. 44 of the FLA. Sections 44(3) and (4) provide:

- (3) A written agreement respecting parenting arrangements that is filed in the court is enforceable under this Act as if it were an order of the court.
- (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

- [65] The parties cited cases suggesting that the court should be reluctant to change a parenting arrangement contained in an agreement absent a material change of circumstances; *E.G. v. F.G.B.*, 2004 BCSC 564 at paras 22 to 24; *Leiding v. Leiding*, 2016 BCSC 2567 at paras. 29 to 32. Prior to the enactment of the FLA, the Court of Appeal held that a material change of circumstances is not required where the court is being asked to vary a parenting arrangement contained in an agreement and the agreement is only a factor to be taken into account; *Henderson v. Henderson*, 2005 BCCA 277 at paras. 38 to 42. The mandatory wording of s. 44(4) supports this view under the FLA. While variation of a court order requires a material change of circumstances, considering s. 44(4), it has been held that a material change of circumstances is not required in respect of a parenting arrangement contained in an agreement, even if the agreement has been filed with the court under s. 44(3); *Nijar v. Gill*, 2017 BCSC 1362 at paras. 102 to 113; *S.C.B. v. K.M.B.*, 2018 BCSC 1148 at paras. 51 to 53. *E.G. v. F.G.B.* was decided under an earlier statute, and, in my opinion, the view expressed in *Leiding* is an obiter dictum. I adopt the reasoning in *Nijar* and *S.C.B. v. K.M.B.* and conclude that a material change of circumstance is not required in this case.
- [66] If I am wrong about this, it makes no difference because the parties have agreed that, if a material change of circumstances is required, the requirement is satisfied in the circumstances of this case.
- [67] To summarize, in considering the parenting issue, I must consider only the best interests of the children and take into account all of the considerations listed in s. 37(2) of the FLA. I am only to consider past conduct of the parties to the extent that it substantially bears on these considerations. If family violence is proved, I must assess it considering the factors set out in s. 38. I should consider the arrangements agreed by the parties in the Parenting Plan as a factor, but not be governed by them. I should try to maximize the contact the children have with each parent, to the extent consistent with each child's best interests and take into account the willingness of each parent to facilitate contact with the other.
- 2) Views of the child and hearsay
- [68] Section 37(2)(b) of the FLA directs me to have regard to the children's views, unless it would be inappropriate to consider them. These children are aged 11 and 9 and it is appropriate to consider their views, as one consideration among the others. It would not have been in the children's best interests to bring them to court - it would have drawn them further into their parents' conflict, which is already causing them distress - and neither party sought to do so. Instead, the parties tendered hearsay evidence of the children's statements through the expert reports of Dr. Aubé and Ms. Henry, the testimony of Ms. deVries, and the testimony of the various lay witnesses who testified. The lay witnesses were T.I. (father's new partner), V.C. (father's mother), E.J. (mother's sister), and the parties.
- [69] Section 202 of the FLA provides:

Court may decide how child's evidence is received

202 In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:

- (a) admit hearsay evidence it considers reliable of a child who is absent;
- (b) give any other direction that it considers appropriate concerning the receipt of a child's evidence.

[70] Broadly speaking, the evidence of what the children reported was apparently tendered for two purposes: first, as evidence of their desires and state of mind at various times; and second, as evidence of events reported by them. The second purpose is problematic, especially in relation to allegations that are disputed by another witness, because the court cannot make its own assessment of the reported statement and the child cannot be cross-examined. While no one objected to any of this evidence when it was tendered, I was concerned as to what use I should make of it and I requested submissions on this question in final argument.

[71] Prior to the enactment of s. 202, Dillon J. considered the admissibility of a child's hearsay reports of abuse in a child protection case, *S.F.R. v. E.C.R.* (1997), 41 B.C.L.R. (3d) 239 at paras. 42 to 43. Applying common law authorities, she held that the child's out of court statements were admissible if the tests of necessity and reliability were met. Necessity was satisfied given the age of the child (six years at the time of trial) and the nature of the proceedings. The real issue was reliability. She stated:

[43] The indicia of reliability have been established in *R. v. Kahn*, *supra*. and in the cases that have applied *R. v. Kahn*. They include: timing of the statement; demeanor of the child; personality of the child; intelligence and understanding of the child; absence of motive of child to fabricate; absence of motive or bias of the person who reports the child's statement; spontaneity; statement in response to non-leading questions; absence of suggestion, manipulation, coaching, undue influence or improper influence; corroboration by real evidence; consistency over time; and statement not equally consistent with another hypothesis or alternative explanation.

[72] In *D.A.M. v. D.M.T.*, 2013 BCSC 359 at para. 23, Fisher J. considered *S.F.R.* and other authorities and concluded, as a general proposition, that the necessity requirement is satisfied in family law cases involving allegations of physical and sexual abuse against children.

[73] *N.N.K. v. S.F.L.*, 2014 BCPC 297, was a child protection case involving allegations of abuse of a child aged 12 years at the time of trial. Harrison P.C.J. considered s. 202 of the FLA and held that it "may to some degree reduce the necessity requirement in the best interests of a child who is absent" (at para. 55). He found that the necessity requirement was satisfied and addressed reliability by considering the indicia of reliability listed by Dillon J. in *S.F.R.* In the result, he admitted the child's hearsay reports of abuse to social workers who were independent witnesses, but not statements reported by the mother who was a party.

- [74] I conclude that the necessity requirement is not an issue in this case by virtue of s. 202 and the fact that it was in the children's best interests that they not testify.
- [75] I conclude that I should consider the indicia of reliability canvassed by Dillon J. in assessing the weight I should give to reports of events attributed to the children by other witnesses. All other things being equal, I should ascribe greater weight to reported statements contained in the expert reports and in the evidence of Ms. deVries, and approach with caution statements reported by the other lay witnesses. This is because: Ms. C's reports are coloured by partisanship and, to a lesser extent, the same is true of the other lay witnesses; the experts are trained to interview witnesses without coaching, leading or influencing the children's statements, while the lay witnesses are not; and the children's statements to their parents are likely to be coloured by what they think the parents want to hear, while this is much less likely in the case of the children's statements to the experts.

The development of the parenting dispute

- [76] Under the heading "Conflict Resolution", the Parenting Plan establishes a hierarchy of steps to be taken to resolve disagreements: first, working with a co-parenting/divorce coach or other objective third party; second, meeting and conferring with a mediator; third, lawyer-assisted negotiations; and finally:

Only in the event that we still cannot agree will we submit the matter to a Court of competent jurisdiction. We understand that this is an extraordinary step and will be resorted to only when there is no other way to resolve the problem.

- [77] In November 2015, Mr. C sought to follow the Parenting Plan in this regard and, through Mr. DeBou, Ms. C flatly refused.
- [78] As I have noted, on February 5, 2016 Ms. C refused to surrender the children to Mr. C for parenting time. The refusal was temporary. By February 23, Mr. C had commenced this action and filed a court application, and Ms. C had reluctantly agreed to adhere to the Parenting Plan until the matter could be heard in chambers.
- [79] On May 30, 2016, Ms. C filed her counterclaim seeking an order that the Separation Agreement be set aside. She was then seeking a reallocation of property as well as increased spousal and child support. Concerning parenting, she maintained that the children were experiencing anxiety under the current parenting regime. She sought sole custody, joint guardianship, and a new parenting plan providing Mr. C with reasonable access for co-parenting.
- [80] The action was set for trial in 2017, but the trial had to be adjourned to accommodate the illness of Ms. C's counsel. In May 2017, Mr. DeBou wrote to opposing counsel:

[Ro], and to a lesser extent, [Ia], have issues that need to be addressed. Whatever it may say in either of Ms. Fabbro or Ms. Redmond's files, the fact is, Ms. [C] did feel pressured and coerced. Further, during the passage of time in what is a very acrimonious divorce (and without laying blame on either side), the children are feeling the stress of it.

- [81] In the spring and summer of 2017, the parties could not agree on vacation dates proposed by Mr. C. Ms. C insisted on dealing with the matter through counsel, and there were difficulties scheduling an application due to the illness of counsel. In the end, summer vacation dates seem to have been agreed. Mr. C wished to take the children to New York City for several days over the Canadian Thanksgiving weekend and this was eventually agreed in a court order. The trip took place and it is plain from Ms. Henry's report that Ro enjoyed himself.
- [82] Shortly after the trip, during the children's parenting time with Ms. C, Ro told her that there had been an episode at Mr. C's home when Mr. C had choked him. She testified that Ia was present and confirmed Ro's account of the incident. I address this allegation below.
- [83] Ms. C believed Ro. She did not communicate with Mr. C but instead contacted counsel. She took Ro to see his counsellor, Tanya Heal. It is to be inferred that Ro said something to Ms. Heal that caused her to make a report to the Ministry of Children and Family Development ("MCFD"), because while Ms. C says that she did not report the incident, somehow the MCFD became involved for a time.
- [84] Counsel for Ms. C applied without notice for a protection order that was made by Russell J. on October 27, 2017 (the "Protection Order"). The materials put before the court to obtain the order are not in evidence before me. It is plain from the correspondence that followed, however, that the alleged choking incident was important to the application. The Order was made on a Friday night and Mr. C was notified immediately.
- [85] The Protection Order prevented Mr. C from communicating with or contacting the children or Ms. C, or being present within a one-block radius of Ms. C's residence and the children's school. It effectively overturned the co-parenting arrangements while it remained in force. Ms. C told the children that an order had been obtained because of what their father had done, and that he would no longer be able to see them, and would be getting help for his problem. She reported to her lawyer that Ia said she missed her father "but also understands that he needs help". In my view, while it was necessary for Ms. C to tell the children that they would not be seeing their father, she should have refrained from mentioning the order and commenting on his conduct.
- [86] That weekend would have been Mr. C's parenting time, and he was to host a birthday party for Ro at a neighborhood facility. Through counsel, Mr. C proposed that V.C., Ro's grandmother, host the party in his place. Ms. C rejected the proposal. She took over the arrangements to host the party and V.C. was not invited. V.C. told Ms. C that she would like to speak with Ro to wish him a happy birthday. Ms. C said that it would be inappropriate for V.C. to speak with Ro at this point. V.C. did not accept this and sought Ro out at school to tell him that she had not forgotten his birthday. She told him that he could call her at any time

and he replied that he could not, because his mum would not let him. I accept this as an accurate report because it is consistent with Ms. C's other conduct in this period. I find that Ms. C was attempting to block communication between the children and Mr. C's extended family.

- [87] On November 10, 2017, Dley J. ordered that the expert reports be prepared on an expedited basis and the Protection Order remain in place on for the time being.
- [88] Ms. Henry's report was provided on December 14, 2017 based on interviews that had taken place in late November and early December. Ms. Henry reported that both children said they wished to maintain the existing parenting schedule. Neither child reported a choking incident. Ro referred to "certain things which I don't want to talk about coz it is sad for me and sometimes for mom; sometimes she cries". He complained that his father yelled at him a lot. Ia said that she missed her dad a lot and was looking forward to seeing him a lot.
- [89] On December 15, 2017, Weatherill J. ordered that the Protection Order be stayed on conditions including a requirement that Mr. C enroll in an anger management program and go for counselling. He did so.
- [90] Ms. Heal had resigned as Ro's counsellor. By consent, Weatherill J's order provided for the appointment of a replacement counsellor. Ms. deVries was chosen and first met Ro in February 2018.
- [91] On December 18, 2017, Ms. C emailed her social worker contact at MCFD to advise of Weatherill J's order and "also to ask for an explanation from MCFD why they do not connect with the victim and the mother before closing a file". She received a prompt reply from the social worker that she had interviewed Ro and Ia privately and individually, and could not share the results due to reasons of confidentiality.
- [92] Co-parenting resumed according to the parenting schedule in the Parenting Plan. The children spent time with their father at Whistler over the 2017 Christmas break. One day there, Ro had a fall while skiing and was brought down from the mountain in a ski-stretcher. There was some concern that he had hit his head. Mr. C and T.I. watched him closely for symptoms of a concussion that night and concluded that he was fine. The next day he wanted to go skiing again and did.
- [93] T.I. testified that Ro called his mother and told her that he had a concussion and, after that, she called him many times, every half hour or so. T.I. was not cross-examined on this evidence, but Ms. C provided quite a different account of events. She denied making many telephone calls, and said that her telephone records would confirm this. The telephone records were not tendered in evidence. She testified that, a week or so following the children's return, they mentioned to Ms. C that Ro had fallen while skiing and hit his head, and she took him to a doctor for assessment. Ms. C testified that the doctor told her that Ro might have had a concussion, but it was impossible to say. He gave her a pamphlet concerning concussion. Ms. C took this incident as a further indication of poor parenting by

Mr. C. I do not think that it was.

- [94] I accept T.I.'s evidence that Ms. C called Ro many times while they were in Whistler. I doubt that Ro mentioned a possible concussion. I think it more likely that he complained to his mother that he was experiencing headaches - he had a history of migraine headaches - and her reaction was to call frequently. T.I.'s evidence that Ro complained of a concussion was an assumption on her part. In my view, Ms. C's lack of confidence in Mr. C's parenting while the children were with him in Whistler was an over-reaction on her part.
- [95] In February 2018, Mr. C had the children for two weeks over spring break. They went with T.I. to Tofino for four days. Mr. C had planned to take the children to Disneyland, but Ms. C would not release their passports. By all accounts, the visit went well. Ms. deVries saw Ro immediately following their return. She found him much more confident and strong than he had been. The next session, when he came in with his mother, she found that he was not confident at all.

Ro's refusal to go to his father's house overnight in 2018

- [96] At some point following the Tofino trip, in the spring of 2018, when his mother drove the children to their father's house for parenting, Ro began refusing to get out of the car. Ms. C would be driving the car, usually or always accompanied by her sister, E.J. Mr. C would come out to the car and try to persuade Ro to come out. Ro would start to cry. T.I. witnessed these scenes; she described them as "like a drama show". Eventually, Mr. C refused to participate. He told Ro that he was welcome to come in when he wished, but that he (Mr. C) would not come to the car and try to persuade him.
- [97] Through all this, Ia was content to continue going to Mr. C's house for parenting time, according to the parenting schedule in the Parenting Plan.
- [98] The parenting schedule assigns every second weekend to Ms. C with Mr. C taking over parenting on Monday and Tuesday. On school days, Ms. C drops the children off at school on Monday mornings and Mr. C picks them up at the end of the day. Sometimes V.C. picks up the children on Mr. C's behalf. One of the manifestations of Ro's anxiety disorder is a reluctance to go to school and both parents testified to their difficulties in persuading him to get out of the car when they dropped him off. Sometimes he will throw up and cry. His reluctance is reflected in a long record of late arrivals maintained by the school.
- [99] It appears that Ro often enjoys school once he is there. He told Ms. Henry that he has been going there since kindergarten, has friends there, and looks forward to school activities such as a musical concert and an opportunity to be vice-principal for a day. The difficulty lies in getting him there.
- [100] Ms. C and E.J. testified that Ro was particularly reluctant on Mondays, saying that he did not want to go to his father's house. His attendance record in 2018 does not support the hypothesis of a particular reluctance to attend school on Mondays.

- [101] V.C. testified that her efforts to pick up Ro for parenting on Mondays and Tuesdays after the spring of 2018 were thwarted by the presence of Ms. C or E.J. As she put it, when either was there, he had a choice and he chose to go with them. One time, when neither was there, Ro insisted that E.J. had told him that she was coming, and he would not go with V.C. Eventually, E.J. turned up and Ro went with her.
- [102] I find that the presence of Ms. C or E.J., or both of them, triggers or contributes greatly to the anxiety Ro feels in transitioning from his mother's to his father's care. In the context of the ongoing dispute between his parents and Ro's close relationship with his mother, going to his father in their presence has come to seem a betrayal of his mother. This has contributed substantially to Ro's refusal not to go to his father's house overnight, a refusal that manifested itself in the months leading up to the trial, well after the alleged choking incident in October 2017.
- [103] In the spring of 2018, the parties agreed on an order for the appointment of a parenting coordinator, Kathleen Ouellette. Through Ms. Ouellette, they negotiated an allocation of summer vacation time under which Ms. C would have the children in July, and Mr. C would have them in August. Ms. C took them on a family holiday to Hungary. Mr. C's parenting time was disrupted by the trial, which began on August 13, and Ro's continuing refusal to come to his house overnight.
- [104] The trial was adjourned between August 30 and October 29. In this period, Ro agreed to visit his father twice: once for his father's birthday party, in September, and the second for Hallowe'en, on a Wednesday evening just after the trial had resumed. Notably, the second visit was proposed by Ro to his father in the schoolyard, to show off his Hallowe'en costume, when Mr. C came to pick up Ia on the Tuesday afternoon. The visit lasted about 90 minutes and the evidence includes photos of the children at their father's house, showing off their dance moves and enjoying themselves.

Alleged family violence

- [105] While counsel did not direct me to the provisions of the FLA addressing family violence, allegations of family violence on the part of Mr. C are central to her case on parenting.

These are:

- a) Allegations of swearing and verbal abuse prior to the separation;
- b) The "pot throwing incident" on Valentine's Day 2014;
- c) An allegation that Mr. C choked Ms. C during an argument later in 2014;
- d) The alleged choking of Ro by Mr. C in October 2017;
- e) An allegation that Mr. C encouraged Ro to silence his sister by threatening her with a knife;
- f) An allegation that Mr. C hurt Ro by tugging him by the ear.

[106] There is also a generalized allegation that Mr. C is a bad tempered man who yells at Ro and intimidates him. While I don't take this allegation as amounting to an allegation of family violence (requiring "psychological or emotional abuse of a family member"), I do address it in these reasons.

1) Allegations of swearing and verbal abuse prior to the separation

[107] Mr. C describes himself as boisterous, excitable and loud. He says that he has recently come to understand, through anger management counselling, that he may be perceived by others as intimidating. V.C. and T.I. agree that Mr. C is a loud individual. They view his loud exterior as concealing a soft heart. In describing her initial meeting with Mr. C, Dr. Aubé commented:

In some ways, it felt as if he comes with a bolder, undaunted and audacious presentation to hide his disquietude and perhaps some personal weakness.

[108] Be that as it may, Ms. C testified and Mr. C acknowledged that, in the period leading to the separation, there were loud arguments in which he swore at her. He admitted that it was possible that he called her "a fucking bitch". Mr. C admitted that some of their arguments took place in front of the children. He testified that it was a stressful time and both of them were swearing at each other.

[109] While I accept that both parties were angry with one another and said so, I am satisfied that Mr. C was louder and verbally more aggressive. He views name-calling as an appropriate verbal tactic and counselled Ro to respond with name-calling to a schoolyard bully. In text messages after the separation, he called Ms. C a gold digger, and a gypsy. I accept that he engaged in verbal abuse during some of his arguments with Ms. C leading up to the separation, and that these arguments took place in the presence of the children.

[110] I think it likely that Mr. C's verbal abuse amounted to family violence as it is defined in the FLA, albeit at the low end of the spectrum. I view it as an unfortunate and inappropriate response to the stress of the separation. I do not find that the children suffered any harm as a result.

2) The pot throwing incident

[111] On February 14, 2014, Ms. C was attempting to open a drawer in the kitchen that was stuck closed. She became very frustrated and called on Mr. C to help. He was also unable to open the drawer. Eventually, he had it part-way open and was throwing pots and pans from the drawer behind him, to get them out of the way. He was angry. Ms. C was standing behind him. One of the pots he threw struck her on the leg, and she fell down. The children were present or in the next room; Ro was present after Ms. C was hit.

[112] Mr. C testified that he did not intend to strike Ms. C and, in cross-examination, counsel said that he was not suggesting otherwise. I accept that Ms. C was struck inadvertently and find that Mr. C was not engaged in abusive or threatening conduct. In these circumstances, I find that this was not an episode of family violence as it is defined in the FLA.

3) Alleged choking of Ms. C by Mr. C

[113] In her evidence in chief, Ms. C testified that, during an argument in the spring or summer of 2014, Mr. C approached her and put his hands on or around her neck, threatening her. She said that she told him to go ahead, and he turned around and left the house instead. This allegation was not put to Mr. C in cross-examination, but I permitted him to give rebuttal evidence and he could have addressed it then. He did not. Instead, I have from Mr. C a general denial in his evidence in chief that he was ever physically violent.

[114] In assessing this evidence, I take into account Ms. C's tendency to exaggerate. For example, she sometimes says that she suffered a broken toe in the pot throwing incident, but does not in fact know whether her toe was broken. She reported this incident to Dr. Aubé by stating that Mr. C had tried to choke her, but that is an overstatement of her own evidence. I find that she was not at this time or subsequently physically fearful of Mr. C. What most likely occurred was a close confrontation in which Mr. C and Ms. C were facing one another in the middle of a heated argument. Mr. C may well have placed his hands on her shoulders, close to her neck. I am not satisfied that he placed his hands around her neck as though he was about to choke her, or that he actually choked her. I am not satisfied that this was an episode of physical abuse qualifying as family violence.

[115] I think that Ms. C drew on her memory of this incident as confirming her understanding of Ro's complaint that he was choked by Mr. C in October 2017. Until then, I doubt that this incident had seemed terribly important to her. Had it been important, I think she would have made it part of her counterclaim to set aside the Separation Agreement that she had suffered physical abuse at Mr. C's hands. She did not do that, and she did not seek a protection order at a time when this incident was much fresher than it was in October 2017.

4) Alleged choking of Ro by Mr. C

[116] This allegation arises from a confrontation between Mr. C and Ro at his house. Mr. C had sent Ia to her room from the supper table. He went upstairs to talk to her. Ro followed him up and tried to intervene in Mr. C's disciplining of Ia. Mr. C physically removed Ro by lifting him up and out of the room. The question is how.

[117] On Mr. C's account, he put his arm around Ro's shoulders from behind and lifted him away. In my view, this would not amount to physical abuse constituting family violence. Ro has provided more or less elaborate accounts of the event, stating that Mr. C choked him. In one version narrated to Ms. deVries, he stated that the incident was preceded by Mr. C's dangling a knife in a threatening manner at the dinner table.

- [118] T.I. testified that she has not seen any violence by Mr. C against Ro, but she cannot say that she witnessed this incident. Ia was present and is reported by Ms. C and E.J. to have confirmed Ro's story. She did not report it to Dr. Aubé or Ms. Henry. In all the circumstances, I do not consider Ms. C and E.J.'s reports of what they were told by Ro and Ia as reliable evidence of what actually occurred.
- [119] Ms. deVries testified that she was able to address the incident with Mr. C and Ro together, in the room where it happened. Mr. C provided his account and Ro provided his. Her own assessment is that it is possible that it occurred as Mr. C says, but Ro's anxiety led him to interpret it otherwise.
- [120] Dr. Aubé states, in her report:
- I am uncertain about what really happened in October 2017, between [Ro] and his dad. Although I do believe that [Ro's] response was influenced by his mother's reaction, it seems evident that there was a skirmish between son and father and it may not have been handled in the best manner, during and after the incident. I suppose that this incident has been over-reported and perhaps exaggerated.
- [121] I find that what occurred was, as Dr. Aubé put it, a skirmish between Mr. C and Ro, but it was not an episode of physical abuse constituting family violence.
- [122] Unfortunately, what has occurred through repeated reporting is that Ro has come to believe a more dramatic story, the details of which have changed from time to time. Ro's account of the dangling of the knife in a threatening manner at the dinner table is entirely unbelievable. Ro has, at times, expressed fear of his father in a vivid and disingenuous way, referring to his fear of a "killer dad", and dropping to his knees in public to plead that he not be taken to his father's house. Ro has done this in an expression of loyalty to his mother, who has encouraged him to believe the worst of his father. Ro is confused in his relationship with his father. Sometimes he is afraid of him and at other times - such as at spring break and Hallowe'en of 2018 - he is not.
- 5) Allegation that Mr. C encouraged Ro to silence his sister by threatening her with a knife
- [123] The only evidence in support of this allegation is Ms. C's account of something told to her by Ro and Ia. The expert reports do not mention it. Mr. C denies it. It is implausible, and Ms. C's evidence of the children's report is not a reliable guide to what actually occurred. I accept Mr. C's evidence and find that there is no merit to this allegation.
- 6) Allegation that Mr. C hurt Ro by tugging him by the ear
- [124] E.J. testified that, at a family party, she saw Mr. C pull Ro by the ear to get him to participate in a photo, until V.C. intervened by placing herself between them. She said that she thought nothing of it at the time, but afterwards tried pulling her own ear and it hurt. This allegation was not put to Mr. C.

[125] While this kind of physical intervention does not strike me as particularly kind or effective parenting, I do not think I could characterize a single instance of it as family violence.

7) Summary with respect to allegations of family violence

[126] To summarize, I have found that the allegations of family violence are largely not made out. Ms. C believes them, and the actions she has taken in the conduct of this action in light of her belief have exacerbated the dispute and played a significant part in tarnishing Ro's relationship with his father.

[127] The exception is that Mr. C's verbal abuse of Ms. C in the months prior to their separation in October 2014 constituted family violence at the low end of the spectrum. It was situational, took place more than four years ago, and was not directed towards the children. Mr. C has since attended anger management counselling.

Communication within the family

[128] The Parenting Plan begins with a statement of purpose that has an ironic air in light of the parties' subsequent disagreements and difficulties in communicating:

The purpose of this plan is to help us; [KC] and [BC], better meet our responsibilities as parents and to help our children, [Ro] and [Ia], adjust to our divorce. Our children need to experience love and affection from both of us. We understand that our level of cooperation in our parenting partnership is the single biggest predictor of success in our child's future. We need to support each other's parenting. This means that we will give our children messages that they are loved and appreciated in both our homes.

We both support our children's need to love each of us and our wish to provide them with the love and care they needs from both of us. We agree to cooperate with each other in developing mutually acceptable plans for [Ro] and [Ia] to spend quality parenting time with both of us and to make decisions regarding their education, health, and other aspects of their care and development.

[Emphasis added.]

[129] Under the heading "Parental Responsibilities and Authority", the Plan states:

Both parents will at all times exert every effort to maintain free access and unhampered contact between [Ro] and [Ia] and the other parent, and agree to foster a feeling of affection between the other parent. Neither parent will do anything to estrange the children from the other parent, distort their opinion of either parent, or impair their love and respect for each of them.

Both parents will respect the parenting arrangement whereby [Ro] and [Ia] reside with both parent as agreed to in the parenting time schedule.

Both parents will respect the other parent's privacy and autonomy over his or her own residence, even while [Ro] and [Ia] reside with the other parent. Both parents will not enter into the others' residence without an invitation.

Both parents will make efforts to support contact between [Ro] and [Ia] and each of their extended families.

Both parents agree to keep adult matters, such as legal and financial issues firmly between us and away from our children.

[Emphasis added.]

[130] Unfortunately, the parties have found themselves unable to abide by their agreement to keep adult matters away from their children. Both children reported to Dr. Aubé that Ms. C told them that dad lies in court and talks about other aspects of the court proceedings. I accept that this has occurred. Ms. C's advice to her children, at the time of the Protection Order, that their father "needed help" was itself distinctly unhelpful. On the other side, Ro reported to Dr. Aubé that dad says that mom is stupid and calls her "the B word". This kind of name-calling by Mr. C is consistent with other conduct of his that I have reviewed. I accept that Ro's report is accurate. I find that both parents have discussed one another in demeaning ways within earshot of the children.

[131] In a related vein, T.I. testified that Ro has questioned her about her finances, her ex-husband, and why she was not paying rent to stay in Mr. C's house. I accept this evidence and infer that these questions were prompted by questions posed by Ms. C, who acknowledges having asked the children how T.I. could afford to come to Vancouver on a regular basis. Engaging the children to pry into T.I.'s circumstances and her relationship with Mr. C is another failure on Ms. C's part to separate the children from adult matters.

[132] Ms. deVries testified that the hostility between the parents is very difficult on the children. In a letter written to the parties in June 2018, she advised:

I have many concerns about the dynamics in your family. [Ro's] distress is just one of them. Another issue is your lack of co-parenting. The more you both are in opposition with one another and the longer the time goes on that you are not collaboratively working together towards common goals, the more distress [Ro] experiences. After meeting [Ia] on several occasions, I observe that she is also struggling but expresses her unhappiness in a different way.

She testified, at one point, that Ro needs a rest from both of his parents, by which I understood her to mean that he needs a rest from their conflict. I agree with Ms. deVries.

[133] The Parenting Plan provides that the parents are to communicate regularly by meeting, telephone, email or text messaging. As their dispute has deepened, Mr. C has refused to meet with Ms. C or attend meetings at which she was present. In the last year, it is my impression that there have been very few telephone conversations. A selection of their texts was put in evidence. As might be expected, it reveals that, from the time of the separation,

the parties had difficulty communicating in this medium in a manner that was civil, to the point, and matter of fact. At various times, Ms. C insisted on communicating through counsel.

[134] Under the heading "Parent to Child Communication", the Plan provides:

Telephone communication between the off-duty Parent and the children will be allowed daily in such a way that is respectful of and sensitive to the activities with the on-duty parent in their home. Open communication anytime is encouraged.

The children may call the off-duty Parent any time he or she wishes and the on-duty parent will support them in making the call as necessary.

[B] and [K] will respect Children's right to privacy during telephone conversations.

[135] Mr. C complains that frequent telephone calls between Ms. C and the children, especially Ro, during his parenting time have exacerbated Ro's anxiety. Ms. C says that it contributes to Ro's anxiety if he is unable to contact her at will during his father's parenting time. Both parents complain that they have been blocked from telephoning the children while in the other's care. The children were asked about this topic by Ms. Henry when she interviewed them in late 2017. Both reported that they were able to call either parent from the other's home.

[136] The children had cell phones given to them by Mr. C and T.I., who testified that they took the phones away during the Tofino trip in February 2018. Mr. C testified that he has become unable to reach the children on their phones while they are at their mother's house. It appears to me that both parents have effectively blocked incoming calls from the other parent, but I do not have the sense that the children are unable to call out. Calls from the 'outside' parent to the children while they are with the caring parent are disruptive in the circumstances of this case, and I think this is a reasonable compromise in the circumstances.

Views and needs of the children

[137] With everything that has happened, it is striking that the children both want a relationship with both parents and to spend roughly equal time with both parents. They both said as much to Ms. Henry and to Dr. Aubé. Ms. deVries testified that children deserve a relationship with both parents, and that Ro wants a relationship with both parents. I share her view.

[138] Ia is able to express her love and need to both parents, and to receive and understand their loving responses.

[139] Ro experiences great difficulty expressing himself with his father. He sends ambivalent messages and receives ambivalent responses. He told Ms. Henry that he does not know whether his father loves him. Dr. Aubé states:

I have no doubt that [Mr. C] is a devoted father and that he wants the best for his children. This being said, I do believe that he has sent ambiguous messages to [R]. I suppose that his huskier presentation, brisk manner and low tolerance of frustration have impacted [R], who has received from his father a message that dad was disappointed regarding his performance. I also believe that [Mr. C's] limited ability to hide his discontent, has expressed, to [R], annoyance and irritation that could have been easily interpreted as anger. It is utterly meaningful, when young [R] says that "he wishes that his dad would reconsider him", because he believes that dad sees him as worthless. Sadly, [R] feels that he has failed his father.

Consequently, [R's] self-perception is affected by his inability to feel that he can please his father. This maladaptive relationship between [Mr. C] and his son is also affecting [R's] identification. It is not easy to identify with a model who does not appreciate you. It has also been very complex for [R] to build and solidify strong bonding with his dad, which could be interpreted as disloyalty towards his mom.

[140] Similarly, Ms. deVries testified that Ro has told her that he feels that his dad doesn't like him, wants him to be a different kind of boy, and gets frustrated with him very quickly.

[141] Despite his ambivalence, Ro unambiguously told Ms. Henry in late 2017 and Dr. Aubé in April 2018 that he liked the present parenting schedule and did not wish to change it. These statements were widely separated in time and both post-date the alleged choking incident. I conclude that Ro's allegation that he was choked by his father has not displaced his desire to spend time with his father, in his father's care.

[142] Ro's subsequent refusal to spend parenting time with his father might seem to suggest that he has changed his mind. Ms. deVries cautioned that a child's behaviour is often confusing and erratic when the child does not have a secure relationship with the caregiver. As recently as October 2018, Ro wanted to spend time with his father at Hallowe'en.

[143] Notably, when E.J. was invited by Mr. DeBou to advise the Court of her view as to the role Mr. C should be playing with the children, she responded that it would be nice if he were more involved. This is significant evidence coming from Ms. C's sister, a person in close contact with both children. I agree with E.J.

[144] I conclude that Ro both wants and needs a secure relationship with his father. This is true at present, and will become an even more pressing need over the long term as Ro enters into adolescence. As both Dr. Aubé and Ms. deVries pointed out in different ways, Ro needs to know that Mr. C wants this relationship with him, and appreciates him for who he is. In order to reestablish this necessary relationship, Ro needs to spend time with his father, despite his difficulty in transitioning from his mother's care to his father's care.

Children's relationship with their father and his parenting abilities

- [145] Mr. C resides in the matrimonial home. The children have bedrooms there and are used to spending time there. From the separation in 2014 until earlier this year, apart from vacations away from home, both of them spent more than 40% of their overnights there, and Ia still does.
- [146] I find that Mr. C is a competent and caring father to both his children. He is not without fault. He is loud and perceived by his son as short-tempered. Ro's perception is understandable.
- [147] While Ia's relationship with her father is essentially healthy, Ro's relationship with his father is filled with ambiguity. Sadly, much of the ambiguity seems to be grounded in misunderstanding. Neither seems wholly to appreciate the love felt by the other.
- [148] Mr. C attended five joint counselling sessions with Ro and Ms. deVries and then withdrew. He seems to have felt that the sessions were unproductive, and Ro was refusing to come home with him. Ms. deVries testified that the final session, in July of 2018, was incredibly painful and distressing. It looked to her that Mr. C was giving up and Ro was distressed. If Ms. deVries thought that Mr. C was giving up, Ro almost certainly felt that as well. Dr. Aubé had recommended that Ro's counselling sessions with Mr. C continue.
- [149] Mr. C has much to offer his son. Ms. deVries commented that he's good at offering structure to Ro. He needs to show his son that he appreciates him for who he is, while continuing to offer appropriate parental guidance. Based on a psychoeducational assessment that was not put in evidence, Ms. deVries believes that Ro is in the bottom 15% for working memory and struggles with reading, writing and mathematics. He is easily stimulated and easily overwhelmed by loud noises. None of this is to say that Ro is not a bright, sensitive and interesting person, but Mr. C's description of his son did not acknowledge these challenges. Mr. C is a loud person who needs to work at being quieter and more appreciative in his relationship with Ro.

Children's relationship with their mother and her parenting abilities

- [150] In early 2015, Ms. C bought a house that is about a ten minute drive from the matrimonial home. The children both have bedrooms there. Apart from vacations, they spend more than half their overnights there.
- [151] I find that Ms. C is a competent and caring mother to both her children. She is not without fault. She shares Ro's anxious disposition, though to a lesser degree. She is by preference a non-confrontational person engaged in an intense dispute with her former partner. It was plain from her testimony and her demeanor in giving evidence that she is angry and distressed. She has communicated her distress to her children.

[152] Ro has a more secure attachment with his mother than his father. Ro's attachment with his mother is a part of the problem in this case. Dr Aubé states:

[Ms. C], preoccupied by the welfare of her son, has given [R] ammunition to exacerbate his distress. Because she has shared, inadvertently, her own distress with both children, they both feel they need to protect her. This being said, despite the fact that [Ms. C] needs to learn to have better boundaries between her own emotions and her children, there is no doubt that she is a devoted parent.

[153] I share Dr. Aubé's view, although I think she has underestimated the extent of the problem here. It is illustrated by Ms. C's response to Dr. Aubé's report and recommendations. Ms. C forcefully rejects Dr. Aubé's report. She tendered a 43 page critique of the report she had authored that I declined to accept in evidence. In her testimony, she criticized Dr. Aubé's summary of what she had said during her interview. The thrust of this criticism was not that Dr. Aubé had misstated her evidence in summarizing it, but that she had not included enough of it. Her central criticism of the report was that Dr. Aubé had not interviewed Ro in Mr. C's presence, because he would not get out of the car after Ms. C had driven him over for the interview. In her view, this undermined the entire report.

[154] Dr. Aubé reported on the attempted interview in her report. She noted:

[Ro] refused to leave his mom's car when his mom drove him to his dad's home. I was able to talk to [Ro] in front of his father's house in Burnaby, where he confirmed that he did not want to come to his dad's house. Interestingly, when asked, he did not have any reason to explain his choice; he just refused to leave his mom's car. He clearly did not look terrified, or fearful; actually, on the contrary, he seemed pleased by the "power game" he was directing. Although he was asked, in different formats, to join his sister at their dad's home, and was offered to be driven back to his mom's after the observation session, [R] remained in his mother's car.

[Emphasis added.]

[155] Ms. C was present and described the same event from her point of view. She said that, when Dr. Aubé approached the car to speak with Ro, he locked the doors. She unlocked the doors remotely, he locked them again, and they went back and forth. When Dr. Aubé returned from her unsuccessful attempt, she said to Ms. C, "I think he's playing games with us". Ms. C viewed this as an "astonishing" and inappropriate remark. I think it was a statement of the obvious.

[156] Ms. C is unable to give credence to Dr. Aubé's clinical assessment, on this occasion, that Ro did not look terrified or fearful, but on the contrary seemed pleased with himself. More broadly, she is unable to bring herself to accept the opinion of an independent professional that does not accord with her own understanding of her son's behaviour. Most significantly, she does not accept that her own failure to shield her children from her own reactions to Mr. C is damaging her children.

[157] Having said that, I accept Ms. deVries' evidence that it would be damaging to Ro to limit his mother's parenting role. She is his most secure attachment.

Assessment of the orders sought by the parties in the children's best interests

[158] To this point, I have considered the various matters listed in s. 37(2) of the FLA: the children's health and emotional well-being, their views, the nature and strength of their relationships with their parents, the history of their care, their need for stability, the parenting abilities of the parties, family violence to the limited extent it is made out, and communication and cooperation between the parents. I am now in a position to address the orders sought by the parties.

1) Decision-making and communications

[159] In my opinion, the sharing of parental responsibilities set out in the Parenting Plan should be maintained. The change sought by Ms. C - awarding her sole custody and joint guardianship - is not justified in the circumstances of this case. Both parties are committed and devoted parents, and both should continue to share responsibility as they originally agreed. This will contribute to providing to the children the stability they need.

[160] The weakness of a co-parenting arrangement is that it requires the parents to cooperate. They acknowledged the need for cooperation in the Parenting Plan. Despite their difficulties and differences, they have managed to keep their children well fed, clothed, housed, in school, and engaged in a variety of activities. I am satisfied that they can continue to do so in their children's interests, but it is necessary that steps be taken to improve the parties' communications. Both counsel recommended that the parties be directed to communicate through one of the Family Wizard Programs and I so order. The program chosen should include a "tone detector" and the parties are ordered not to communicate by text or email.

[161] I order that the parties are not to denigrate or speak poorly of one another or discuss the legal proceedings in speaking with the children or within earshot of the children.

[162] Mr. C's complains that Ms. C's telephone calls to Ro during his parenting time were excessive and interfered with Ro's adjustment to his care. I think there is substance to this complaint. Both parents should refrain from intervening in their children's relationship with the other parent. I order that the parties are not to telephone or initiate text messages to the children while they are in the care of the other parent. This order does not prevent the children from initiating telephone calls or texting from the other parent's care.

2) Parenting schedule

- [163] Mr. C seeks a change from the current parenting schedule to a 2/2/5/5, schedule, with the differences being that Mr. C would have the children for one more night every two weeks and all transitions would take place through the school, at least when school is in session. This is what Dr. Aubé recommended.
- [164] Ms. C seeks a reduction in Mr. C's parenting time to four nights in every fourteen, or alternatively to two nights in every fourteen. Counsel for Mr. C, Ms. Guy, invited me to infer that the real reason for the proposed change is that either alternative would lead to an increase in the amount of child support payable. No better explanation for the proposal was offered by Mr. DeBou.
- [165] I reject Ms. C's proposal and agree with Mr. C's proposal for the following reasons. As I have stated, the children both want and need a relationship with both parents, and they cannot maintain that relationship without spending significant time with both. Stability and the children's wishes favour the present arrangement. Shifting the transition, every second week, from Saturday morning to Friday night, as proposed by Mr. C, is not a big change. Transitioning from his mother to his father has been a big problem for Ro, and this will make it easier. Ms. deVries testified that the current transitional arrangements are not working, and that school pick-ups work better. I address the transitional arrangements below.
- [166] The tensions and ambiguities in Ro's relationship with his father should be addressed by counselling. Counselling was taking place with Ms. deVries until July of this year, when Mr. C withdrew from them. I order that counselling sessions resume at least monthly, at Mr. C's expense, for 12 months or until further order of the court unless Ms. deVries advises Mr. C in writing, with a copy to Ms. C, that in her opinion, counselling is no longer required. If Ms. deVries is of the opinion that counselling should continue at the end of the 12 month period, she may advise the parties of her opinion in writing, and the matter may be addressed in an application to court if necessary.
- [167] In her evidence, Ms. deVries suggested that the family would benefit from a much more elaborate program of counselling involving the entire family that is offered by some of her colleagues under the name, reConnect. She said that the cost can be as low as \$12,000, with great effort and cooperation on the part of everyone involved, although it can often be as high as \$30,000. Ms. deVries testified that, as a single therapist, she does not have the "bandwidth" to address all aspects of the complicated family dynamic in this case. In argument, Ms. C suggested that I order that the parties undertake the reConnect program, with the cost to be allocated proportionately to the parties' incomes.
- [168] I am not persuaded by Ms. deVries' evidence that more extensive and intensive counselling than she is able to offer is required at this time. If more counselling is required, I do not have sufficient evidence to enable me to make an informed assessment of whether the reConnect program is the most appropriate alternative. I give the parties liberty to apply in this regard, on the basis of a material change of circumstances.

3) Transitions

[169] The immediate problem, lying at the heart of the parenting dispute as it emerged at trial, is that Ro has been refusing to see his father. I view this as stemming in part from Ro's difficulties with transitions, exacerbated by the dispute embodied in this lawsuit and his mother's reaction to it.

[170] To this point, Ms. C has approached the dispute on the footing that the parenting schedule may be set aside. I have decided against her on this point. With this decision, the temperature of the dispute should drop, and it is to be hoped that Ro's anxiety associated with the transitions will reduce. It is also necessary to address the manner in which transitions take place.

[171] Ms. deVries testified that, during her counselling sessions with Ro and Ms. C, Ms. C encouraged her son to go to his father's house. While I accept that Ms. C has offered verbal encouragement, I find that the message conveyed by the whole of her conduct has been different. Neither Ms. C nor E.J. could explain why they made themselves available to Ro when he was to be picked up from school to go to his father's house. The message was that they were supporting him in his refusal to go with Mr. C. Confronted with a choice between his mother, who loves him unconditionally, and his father, of whom he is unsure, Ro has chosen his mother. Ro is not well served by the choice that has been forced upon him, and he should not be offered a choice when he is scheduled to go into his father's care.

[172] To prevent Ro from being put in a position in which it appears to him that he is being asked or permitted to choose, I make the following orders pertaining to transitions from Ms. C's care to Mr. C's care:

- a) Transitions during school days will take place at the school. Ms. C or E.J. will drop the children off at school in the morning and Mr. C or his designate will pick them up at the end of the day.
- b) On transitional days when school is not in session, the transition will take place at V.C.'s home or the office of a neutral third party, such as Ms. deVries. Ms. C or E.J. will drop the children off and Mr. C or his designate will pick them up.
- c) Ms. C and E.J. will not be present or visible after dropping the children off for a transition to Mr. C's care, and will not make themselves available to the children even if the children request it.
- d) These transitional arrangements may be varied by written agreement of the parties or further order of the court.

4) Other issues with the Parenting Plan

[173] The Parenting Plan is a thoughtful, thorough document. The parties agreed to it. Except to the extent addressed in these reasons, it should remain in place. Apart from the central parenting issues I have addressed, the parties raised the following further issues.

(a) Parenting time spent with extended family

[174] The Plan provides the following qualified right of first refusal in relation to parenting time:

If either parent is not able to care for the children during his or her parenting time for a period of time that extends overnight, then they will give the other parent the option of caring for the children prior to arranging third party care. If the other parent is unable to provide care, then the on-duty parents will be responsible for arranging alternated [sic] approved child care.

This term is not meant to prevent either party from leaving [Ro] or [Ia] with extended family members.

[Emphasis added.]

This provision became an issue when Mr. C left the children with V.C. during a business trip to Poland that overlapped with his parenting time. When Ms. C found this out, she objected and removed the children from V.C.'s care.

[175] Ms. C's objection was not supported by the Parenting Plan. Under the Plan, the obligation to give the other parent the option of caring for the children is not engaged when the children are left with an extended family member. When this was raised with her in cross-examination, Ms. C's response was that the Parenting Plan should be changed. I do not agree. The children have affectionate relationships with both sets of grandparents and their aunt, E.J. It is not inappropriate for either parent to leave the children with them during parenting time.

(b) Travel consents and documentation

[176] The Parenting Plan provides that Ms. C will keep the children's passports and other documentation. Access to these materials is not to be unreasonably withheld. Each party is to provide the other with an annual travel authorization covering travel within Canada and the United States, with 48 hours' notice to be given in advance of travel to the United States. Travel elsewhere is to be addressed by notice and on consent of the other party, and consent is not to be unreasonably withheld.

[177] Obtaining timely travel authorizations and related documentation has been a persistent irritant between the parties. As I have noted, Ms. C's refusal to release documents prevented Mr. C's planned trip to Disneyland with the children during spring break of 2018.

[178] I order that:

- a) The children's passports and letters of permission (collectively, "Travel Documents") signed by each parent authorizing the other to travel with the children will be kept by the parenting coordinator, Ms. Ouellette, or another independent third party agreed by the parties in writing (the "Documents Custodian").
- b) Each party will provide to the other and the Documents Custodian at least 14 days' notice in advance of proposed travel outside Canada, and the Travel Documents will be made available within seven days and kept by the travelling parent until the trip is concluded.
- c) The Travel Documents will be returned to the Documents Custodian promptly after the trip is concluded.
- (c) Extra-curricular activities

[179] The Parenting Plan provides that both parents are to be involved in the children's schooling and extra-curricular activities. It specifically provides that the children will continue in current programs at the current locations unless otherwise agreed, and specifies that the children will attend soccer in Coquitlam and dance in Burnaby. It is the responsibility of the on-duty parent to arrange transportation.

[180] Ms. C resented driving the children to soccer in Coquitlam - a long drive from her home - during her parenting time. In November 2017, she took advantage of the opportunity afforded by the Protection Order she had obtained against Mr. C to remove both children from soccer. While she says that she did so because Ia was not enjoying it and Ro was "iffy", it is a decision she undertook without consulting with Mr. C and obtaining his agreement.

[181] The children have now been removed from soccer for a year and the world has moved on. The requirement in the Parenting Plan that the children will attend soccer in Coquitlam should be deleted.

Other parenting matters

[182] The Protection Order that was made by Russell J. on October 27, 2017 was made "until further order of the court". It was stayed on conditions by Weatherill J. on December 15, 2017. It has not been set aside. Neither party asked me to make a protection order and, on the evidence at trial, none is required. The order of Russell J. is set aside.

[183] I will be seized of any applications concerning parenting that are filed within two years of the date of this order.

Third issue: Support

[184] Ms. C's seeks to increase the spousal and child support payable by Mr. C. This is premised on her argument that he is in receipt of undisclosed income. That argument has failed. Spousal support is payable as provided in the Separation Agreement.

[185] Sections 9.1 to 9.3 of the Separation Agreement provide for an annual exchange of financial information and the adjustment of the child support payable, according to the Federal Child Support Guidelines, effective as of June 1 of each year. It expressly provides that, if the adjustment is made after June 1, it will be retroactive to June 1.

[186] Mr. C's income dropped after 2015. Adjustments should have occurred on June 1 of 2016, 2017 and 2018 but did not. After the initial period in which Mr. C failed to pay support, he caught up and continued paying support based on the \$110,000 annual income stated in the Separation Agreement. In May of 2018, he reduced his payments on the basis that he was entitled to a downward adjustment.

[187] I find that Mr. C has overpaid child support and a retroactive adjustment is required, and I accept Ms. Guy's calculation of the amount overpaid. Ms. Guy's calculation is as follows.

[188] According to his Income Tax Returns, Mr. C earned the following:

Year

Line 150

Spousal Support Paid

Adjusted Income

2015

\$116,002.96*

\$13,200.00

\$102,802.96

2016

\$83,972.76

\$13,200.00

\$70,772.76

2017

\$96,073.98**

\$13,200.00

\$82,873.98

*In 2015 it should be noted that Mr. C's line 150 for 2015 has been adjusted to remove the \$49,042.29 in taxable capital gains arising from the sale of the parties' second property.

**In 2017, adjusted for capital gains payable on stock option benefit.

[189] According to the Income Tax Return Summaries, Ms. C earned the following:

Year

Line 150

Spousal Support Received

Adjusted Income

2015

\$42,060.00*

\$13,200.00

\$55,260.00

2016

\$42,060.00

\$13,200.00

\$55,260.00

2017

\$41,114.90

\$13,200.00

\$54,314.90

*As Ms. C has not proffered a 2015 tax return, her 2015 line 150 income has been assumed to be the same as 2016.

[190] An adjustment of support, commencing with June 1, 2016, results in support payable as follows:

Adjustment date

Payable by Mr. C

Payable by Ms. C

Offset

June 1, 2016

\$1,513.96

\$837.90

\$676.06

June 1, 2017

\$1,073.75

\$837.90

\$235.85

June 1, 2018

\$1,281.93

\$843.72

\$438.21

[191] FMEP's records show that Mr. C has paid support in the following amounts:

Date Range

Amount paid

Amount payable

Difference

June 1, 2016 to May 31, 2017

\$12,000.00

\$8,112.72

\$3,887.28 overpayment

June 1, 2017 to May 31, 2018

\$11,237.00

\$2,830.20

\$8,406.80 overpayment

June 1, 2018 to November 1, 2018

\$1,422.00

\$2,629.26

\$1,207.26 underpayment

[192] The monthly child support payable by Mr. C to Ms. C until the next adjustment date, June 1, 2019, is \$443.21. The cumulative overpayment by Mr. C through November 1, 2018 is \$11,086.82 and he is entitled to an order that this amount be repaid to him.

Divorce

[193] The requirements of the Divorce Act are satisfied. I am satisfied that reasonable arrangements have been made for the support of the children, having regard to the Guidelines, and s. 11(1) does not prevent my granting an order of divorce.

Disposition

[194] To summarize, for these reasons, I make the following orders:

- a) I declare that the Separation Agreement, apart from the Parenting Plan, is a valid and binding agreement. Ms. C's claim to set aside the Separation Agreement is dismissed.
- b) I declare that the Parenting Plan is a valid and binding arrangement providing for the parenting of the children, except as expressly provided in this order.
- c) The provisions of the Parenting Plan permitting the parties to communicate concerning parenting matters by email or text messages are deleted. All of the parties' written communications will take place through a "Family Wizard" program to be agreed between the parties. The program chosen should include a "tone detector" feature.
- d) The parties are not to denigrate or speak poorly of one another or discuss the legal proceedings in speaking with the children or within earshot of the children.
- e) The parties are not to telephone or initiate text messages to the children while they are in the care of the other parent. This order does not prevent the children from initiating telephone calls or texting from the other parent's care.
- f) The Regular Parenting Schedule of parenting time in the Parenting Plan is amended to provide that, in week two, Mr. C will be responsible for parenting the children on the afternoon, evening and at night on the Friday of the second week.
- g) The Parenting Plan is amended to provide that, in respect of transitions from Ms. C's care to Mr. C's care:
 - i) Transitions during school days will take place at the school. Ms. C or E.J. will drop the children off at school in the morning and Mr. C or his designate will pick them up at the end of the day.
 - ii) On transitional days when school is not in session, the transition will take place at V.C.'s home or the office of a neutral third party, such as Ms. deVries. Ms. C or E.J. will drop the children off and Mr. C or his designate will pick them up.
 - iii) Ms. C and E.J. will not be present or visible after dropping the children off for a transition to Mr. C's care, and will not make themselves available to the children even if the children request it.

- iv) These transitional arrangements may be varied by written agreement of the parties or further order of the court.
- h) Mr. C will attend counselling sessions with Ro and Ms. deVries, at least monthly, at Mr. C's expense, for 12 months or until further order of the court, unless Ms. deVries advises Mr. C in writing, with a copy to Ms. C, that in her opinion, counselling is no longer required. If Ms. deVries is of the opinion that counselling should continue at the end of the 12 month period, she may advise the parties of her opinion in writing, and both parties have liberty to apply to the court as they think necessary.
- i) The parties have liberty to apply to vary or extend this order's provision for counselling on the basis of a material change of circumstances.
- j) The provisions of the Parenting Plan dealing with travel outside the Lower Mainland of British Columbia are amended to provide that:
- i) The children's passports and letters of permission (collectively, "Travel Documents") signed by each parent authorizing the other to travel with the children will be kept by the parenting coordinator, Ms. Ouellette, or another independent third party agreed by the parties in writing (the "Documents Custodian").
- ii) Each party will provide to the other and the Documents Custodian at least 14 days' notice in advance of proposed travel outside Canada, and the Travel Documents will be made available within 7 days and kept by the travelling parent until the trip is concluded.
- iii) The Travel Documents will be returned to the Documents Custodian promptly after the trip is concluded.
- k) The Parenting Plan is amended to remove the requirement that the children will attend soccer in Coquitlam.
- l) The Protection Order that was made by Russell J. on October 27, 2017 is set aside.
- m) I am seized of any applications concerning parenting that are filed within two years of the date of this order.
- n) Ms. C's application to increase the amounts of child support and spousal support payable by Mr. C is dismissed.
- o) The basic child support payable by Mr. C to Ms. C is \$438.21 per month until June 1, 2019, when the monthly amount will be adjusted pursuant to clauses 9.1 to 9.3 of the Separation Agreement.
- p) Ms. C will pay to Mr. C \$11,086.82 in respect of past overpayments of child support.
- q) Mr. C. and Ms. C, who were married at Vancouver, British Columbia, on August 6, 2005, are divorced from each other. The divorce will take effect on the 31st day after the date of this order.

r) The parties may schedule a further hearing to address costs.

"Gomery J."

The Honourable Mr. Justice Gomery

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Prepared on 29 October 2026 · Esheria