
CANADA / JUDGMENT

B.D. v. A.A.K.

2019 BCSC 1516

COURT

Supreme Court of British Columbia

DECIDED

9 September 2019

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2019 BCSC 1516 B.D. v. A.A.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.D. v. A.A.K.,

2019 BCSC 1516

Date: 20190909

Docket: E50417

Registry: New Westminster

Between:

B.D.

Claimant

And

A.A.K

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 21 on November 19, 2019.

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for Claimant:

L. Donaldson

Counsel for Respondent:

A. Sarkaria

Place and Date of Trial/Hearing:

New Westminster, B.C.

March 13 - 14, 2019

Place and Date of Judgment:

New Westminster, B.C.

September 9, 2019

Introduction

- [1] This is a family matter. In order to preserve the privacy of the children referred to in these reasons, I have identified the parties and the children of the marriage only by their initials.
- [2] These reasons respond to two applications. The first is an interim application by the respondent, A.A.K. ("A.K."), for a review and amendment of a separation agreement entered into between the parties and dated February 15, 2016 (the "Agreement"), resulting in an increase of his parenting time. The respondent seeks a shared 50-50 parenting plan based on a "week-on, week-off" rotation. The orders sought in paras. 1-4, 11, 12 in the notice of application did not proceed before this Court. The orders sought in para. 7 were agreed to be submitted in response to the notice of application of the claimant.
- [3] Currently, the respondent has parenting time for one weekday overnight and every second weekend.
- [4] The respondent is asking the Court to vary the Agreement on an interim basis pending the trial set for March 2, 2020. The claimant opposes that application and submits that it is not possible for the Court to make the findings sought by the respondent because of the conflicting evidence contained in affidavits and the credibility issues that have arisen and are now before the Court. The claimant also submits that there is a lack of consideration of the best interests of the children in the material filed in support of the application of the respondent. The claimant says that the status quo should be maintained pending the trial.
- [5] The parties agree there is no requirement for the applicant to meet the threshold test of demonstrating a material change in circumstances because the Agreement provided for a review of the parenting arrangements. However, based on the applicable legislation, ss. 37(2) and 44(4) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the court is required to set aside an agreement or replace the agreement with an order if the court is satisfied that the agreement is not in the best interests of the children. The burden in this case is for the respondent to satisfy the Court that it is in the best interests of the children to make the substantial change in the parenting schedule sought by the respondent.

- [6] The claimant, B.D., opposes the application for an increase in parenting time. She argues it would be contrary to the best interests of the children of the marriage, having regard to the factors set out in s. 37 of the FLA.
- [7] In her own application, B.D. also seeks an order to enforce the Agreement between the parties.

Background Facts

- [8] The parties were married on January 23, 2005 and separated in July 2012. There are two children of the marriage: E.K., born April 2, 2009 and E.D.K., born July 15, 2011. At the time of separation, E.K. was three years old and E.D.K. was one year old.
- [9] A.K. swore that he has experienced mental and physical health problems as a result of being in six serious motor vehicle accidents between 2008 and 2015. He has, as a result, been prescribed a number of medications including oxycodone and medical marijuana to manage symptoms. In September of 2009, he lost a job as a journeyman mechanic where he earned \$50-\$60,000 per annum. Thereafter, he obtained employment as a general labourer but quit that job in December of 2011 based on medical advice. The effects of the medication caused a serious deterioration in the mental health of A.K. in July 2012 and as a result he was hospitalized. There is a dispute between the parties over whether the psychotic incident which gave rise to the hospitalization was caused by prescribed or non-prescribed substances.

Separation Agreement

- [10] On or about February 15, 2016, the parties entered into the Agreement which was subsequently filed in this Court, and therefore became enforceable as a Court Order. On February 18, 2016, at the time the Agreement was entered into, A.K.'s income was declared as \$13,867.80 and he was unemployed. B.D. was employed as a pharmacy manager and her income in 2015 and 2016 was \$76,204.67. In the Agreement, the parties agreed to retain a child therapist within 30 days of signing the Agreement. A.K. agreed to retain a parenting coach within 30 days of signing the Agreement, a parenting coach with whom he would meet at least once a month for a period of at least one year. A.K. also agreed to engage a medication review every two months by his treating psychiatrist, the results of which could be provided to B.D. upon her request. B.D. was also to retain a counsellor within 30 days of the signing of the Agreement.
- [11] In the Agreement, at page 11, para. 22, the parenting time of A.K. was to commence on February 20, 2016, as follows: Sundays at 9 AM to Sundays at 5 PM every second weekend unsupervised and Tuesdays at 11:30 AM to Wednesdays at 8:30 AM to be supervised by one of a list of persons agreed to as supervisors. The supervised time was to become unsupervised beginning on August 20, 2016. The parenting time was to continue, on that basis, until February 24, 2017. Thereafter, the parenting time would be extended from

Fridays at 3 PM to Sundays at 5 PM every second weekend unsupervised and Tuesdays at 2:30 to Wednesdays at 8:30 AM every week unsupervised. Then, commencing August 25, 2017, A.K would have parenting time from Fridays at 2:30 PM to Mondays at 8:30 AM every second weekend and Thursdays at 2:30 PM to Fridays at 9 AM every other week. Regular parenting time exercised by A.K. was to be permitted to be reviewed 18 months after the Agreement was signed. The Agreement also provided the parties with defined parenting time on Mother's Day, Father's Day, spring break, summer holiday and Christmas vacation as well as particulars of travel.

- [12] With respect to child support, the Agreement provided that B.D. was to continue to receive \$496 per month from the children's portion of Canada Pension Plan ("CPP") disability benefits paid to A.K. A.K. was also responsible to pay \$184 a month for child support or such other amount determined by recalculation. The Agreement also provided that A.K. would maintain a life insurance policy of not less than \$250,000 naming the children of the marriage as policy beneficiaries. A.K. was responsible for paying all the premiums for the life insurance policy. Paragraph 34 of the Agreement provided that B.D. may claim the Canada Child Tax Benefit ("CCTB") in each tax year for so long as the children or any of them were a "child" within the meaning of s. 146 of the FLA. Paragraph 35 provided that B.D. may claim the Dependant Credit or Equivalent to Spouse, Canada Revenue Agency tax credits relating to children. Further, the Agreement provided that the parties would pay section 7 expenses including Kumon K level and swimming lessons and medical or dental expenses exceeding the parties extended health benefits at the rate of 21% for A.K. and 79% for B.D.
- [13] The Agreement also provided for property and debt division, which is not the subject of this application, as well as pension division.

Parenting Coordinator

- [14] Pursuant to the Agreement, Sandra M. Jennings was appointed as parenting coordinator. Later, Ms. Jennings rendered two written determinations. In the first, dated August 23, 2016, at para. 3, the following appears:
3. The mediated Agreement contained three provisions relating to the concerns around [A.K.'s] usage of marijuana and prescription medications, as follows:

Paragraph 9: [A.K.] shall engage in a medication review every two months with his treating psychiatrist. [B.D.] may obtain the medication review's results from the psychiatrist at her request.

Paragraph 20: [A.K.] shall not consume marijuana or other substances as defined by the Controlled Drugs and Substances Act during his parenting time.

Paragraph 21: [A.K.] shall store any medication and paraphernalia in his possession in a locked cabinet during his parenting time.

- [15] The issue determined at the first determination, as stated by the parenting coordinator, was "whether the commencement of unsupervised overnight parenting time as set out in paragraph 22.b. of the Agreement should be delayed six months to January 22, 2017, as requested by [B.D.] in her July 26, 2016 email."
- [16] The jurisdiction of the parenting coordinator arose pursuant to a parenting coordination agreement dated April 15, 2016 and para. 15 of the Agreement made February 15, 2016. Both parties made submissions to the parenting coordinator. One of the features of the review, which led to the determination, was that Dr. Leech-Porter refused to provide the medication reviews provided in the Agreement on the basis that he opined there was no psychiatric basis for such reviews, despite the fact that the parties agreed to bi-monthly medication reviews. I am unable to locate a request for the doctor's opinion in the materials filed by the respondent.
- [17] Ultimately, after review of the factual presentations of both parties and their submissions, the parenting coordinator concluded that it was in the children's best interests that any increase in unsupervised overnight parenting time should be delayed. The parenting coordinator expressed this view because of the lack of appointment of the therapist for the children for an extended period of time. Further, Ms. Jennings concluded that the meetings between A.K. and the parenting coach he had selected had not reached a sufficient duration to obtain the therapeutic relationship necessary. The parenting coordinator also noted, in paras. 71-72 of her determination issued on August 23, 2016:
71. It is [A.K.]'s responsibility to undergo a bimonthly Medication Review. He advised on July 12, 2016 and confirmed in his July 29, 2016 email that Dr. Leech-Porter required payment from [B.D.] for these. [A.K.] is to ensure the protocol and payment requirements for obtaining these has been communicated to [B.D.]. There should be no inordinate delay in her obtaining these when requested.
72. [B.D.] has concerns about [A.K.]'s medication usage, and this was discussed in mediation, when the Agreement was finalized. She has not had the benefit of reviewing several Medication Reviews or the opportunity to satisfy herself concerning medication usage. I agree that compliance with this is required.
- [18] Finally, at paras. 73-74 of the first determination, the following appears:
73. This is a matter of what is best for the Children, not what is best for the parents. The underlying concerns reflected in the Agreement were that [A.K.] needed parenting coaching and the children needed support in the midst of stress and confusion of their parents' separation.
74. I am of the view that substantial compliance with paragraphs 7, 8 and 9 of the Agreement is in the Children's best interests to ensure a smooth transition for the Children to unsupervised overnight parenting time, which will be delayed as I have directed.

- [19] Subsequently on July 13, 2017, the parenting coordinator made a second determination. That determination became necessary when, as stated in para. 6 of the determination, "[i]n September 2016, the Ministry of Children and Family Development ("MCFD") became involved with [A.K.] after it came to light that he had been videotaped in August 2016 by the Surrey Creep Catcher group. [A.K.] signed a Safety Plan with MCFD on September 6, 2016 agreeing that his overnight parenting time would continue to be supervised."
- [20] Again, after the factual submissions and legal submissions from both parties, the parenting coordinator concluded that A.K. would have summer parenting time with the children for specified weeks and that otherwise his parenting time would be suspended for the summer months of July and August except for the weeks specified and that the regular parenting time schedule would resume on Friday, September 8, 2017 at 2:30 PM.
- [21] In the reasons given by the parenting coordinator in the second determination, it was noted that A.K., at that time, had three overnights with the children of the marriage in a two-week period, which would increase to four overnights in a two-week period in August 2017. The section 211 report, which will be referred to below, recommended limited parenting time. It was noted in the second determination of the Parenting Coordinator dated July 13, 2017 at para. 49(e) that "there is no evidence from [A.K.] that he will be able to manage caring for the children the girls for extended periods without the benefit of medication and marijuana"; it being remembered that para. 20 of the Agreement specified "[A.K.] shall not consume marijuana or other substances as defined by the Controlled Drugs and Substances Act during his parenting time."
- [22] The Agreement provided that A.K. should designate specific weeks for summer parenting time not later than April 30 each year. The parenting coordinator found that because A.K. had delayed designating specific weeks and therefore not complied with that provision, there were difficulties created for B.D. making advanced summer vacation plans.
- [23] That difficulty precipitated the second determination by Ms. Jennings. The parties continued to have conflicts in their dealings with one another and had grave difficulties establishing any change in the parenting schedule for a variety of reasons.

Suitability for Summary Disposition

- [24] This Court was advised that the parties have a scheduled trial date in March 2020 to deal with the issues in this case. This Court is therefore reluctant to begin a detailed factual analysis which would, among other things, require credibility findings.
- [25] Mr. Justice Riley discussed suitability for summary determination in *Walsh v. Walsh*, 2018 BCSC 199 at para. 24:
- [24] Not all conflicts in evidence are a bar to summary disposition: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at para. 55. On the one hand, it would be inappropriate for a chambers judge to resolve a conflict on essential facts

where the "only evidence" consists of contradictory affidavits requiring a credibility assessment: *Lalli v. Lalli* (1998), 84 A.C.W.S. (3d) 74 (B.C.S.C.) at para. 30, citing *Jutt v. Doehring* (1993), 82 B.C.L.R. (2d) 223 (B.C.C.A.). On the other hand, a chambers judge is not precluded from making necessary findings where he or she is able to do so by carefully considering the affidavits in conjunction with all the other evidence, including contemporarily-created documents, the subsequent conduct of those concerned, and all the other surrounding circumstances: *Lalli v. Lalli* at para. 28, citing *Bank of British Columbia v. Anglo-American Cedar Products Limited* (1984), 57 B.C.L.R. 350 (C.A.) at p. 352. Thus, where there is a conflict in the evidence, "it requires careful review by the court of that conflict, in the context of all the evidence, to see if essential findings of fact can be made, and if it is just to do so in the circumstances": *Lalli v. Lalli* at para. 26.

[26] See also Rule 10-3(7) of the Supreme Court Family Rules.

[27] There are, on the facts as presented above, significant factual conflicts such as those between the claimant and the respondent over the circumstances that gave rise to the psychotic episode experienced by the respondent following which he was hospitalized, and the alleged ongoing use by the respondent of non-prescription medications. The admitted extensive use by the respondent of marijuana on a daily basis is also an issue which could have a profound effect on the care of the children during parenting times with the respondent. This Court has no ability to resolve or decide the stated conflicts or difficulties without making findings on disputed facts which would, of necessity, include findings or inferences of credibility.

[28] Not every such issue would be a difficulty for this Court. For instance, when the respondent was involved in a Creep Catchers incident, his explanation that he thought he was buying a refrigerator from a 14-year-old girl beggars acceptance as credible when one examines the digital messages between A.K. and the "girl." Apart from this issue, however, the factual findings necessary to resolve parenting issues are best left for the upcoming trial.

[29] In these circumstances, the maintenance of the status quo is the preferred course of action until the court has a full opportunity to examine the facts in circumstances where findings of fact and credibility may be made within the jurisdiction of the court.

[30] The Court has been advised that the parties have scheduled a trial to commence on March 2, 2020. While that date is not immediate and there is a delay between this application and the trial date, I find the respondent's application is not appropriate for summary disposition. The application for increased parenting time brought by A.K. is therefore dismissed with costs following the event.

Claimant's Application

[31] The claimant filed a notice of application on February 28, 2019, seeking the following declarations and orders:

1. A declaration that the Respondent has breached and continues to be in breach of the Separation Agreement dated February 15, 2016, (the "Separation Agreement");
2. An order that the Respondent be fined \$5,000 for each breach of the Separation Agreement, or an amount deemed appropriate by this Honourable Court;
3. An order that the Respondent, [A.K.], is found to have an annual income of \$50,000.00 for the purposes of calculating child support under the Federal Child Support Guidelines;
4. An order that the Respondent, [A.K.], pay to the Claimant, [B.D.], the sum of \$781.00 per month in ongoing child support for the support of the [children of the marriage] commencing August 1, 2018 and continuing on the 1st day of each and every month thereafter until further Order of the Court or agreement of the parties;
5. An order that the Respondent, [A.K.], pay to the Claimant, [B.D.], child support arrears in the amount of \$4,320.03 (as of March 2019);
6. An order that the Claimant is entitled to receive any and all Canada Pension Plan Benefits the Children are entitled to from 2016 and continuing for so long as the Children are considered "children" under Family Law Act and/or Divorce Act;
7. An order that the Respondent pay to the Claimant the Canada Pension Plan Benefits he received for the benefit of the Children since August 2017;
8. An order that the claimant is entitled to receive the Child Tax Benefits from 2016 and continuing for so long as the Children are considered children under the Family Law Act and/or the Divorce Act and for so long as the Children or either of them are entitled to Child Tax Benefits;
9. An order that the Respondent provide to the claimant within 14 days of the date of any order made, the following:
 - a. monthly statements for any and all bank and investment accounts in the name of the Respondent, whether solely or jointly, from January 2016 to March 2019;
 - b. monthly credit card statements for any and all accounts in the name of the Respondent, whether solely or jointly, from January 2016 to March 2019;
 - c. annual financial statements for Other People's Money from January 2016 to March 2019;
 - d. monthly statements for any and all bank and investment accounts in the name of Other People's Money, whether solely or jointly, from January 2016 to March 2019;
 - e. any and all documents relating to monies received by the Respondent for Child Tax Benefits, from 2017 to 2019;
 - f. any and all information and documents relating to the Canada Pension Plan Disability benefits payable to either the Respondent or the Children, from 2016 to 2019;

- g. any and all documents relating to rentable agreements between the Respondent and any tenants living in the Respondent's property, from 2016 to 2019;
- h. Notices of Assessment for the years 2015, 2016, and 2017 tax years.
10. An order that the Respondent be fined \$5,000.00 for failure to comply with disclosure requirements pursuant to the Supreme Court Family Rules or an amount deemed appropriate by this Honourable Court.
11. An order that, within 14 days of the date of any made, the Claimant and Respondent retain the services of Sandra Jennings or another Parenting Coordinator agreed to by the parties to act as Parenting Coordinator for a period of at least two years, with the cost of the Parenting Coordinator to be paid by the Respondent;
12. An order the Respondent is prohibited from making an application, without leave of the court, respecting any matter over which a Parenting Coordinator has authority to act under the Separation Agreement or any order made as a result of this application;
13. An order that the Respondent provide PharmaNet records to the claimant every two months on an ongoing basis commencing [March 1, 2019];
14. An order that the parties have parenting time pursuant to paragraphs 22(e) and 26(a) to (f) of the Separation Agreement;
15. An order that the parties will share the school professional development days and statutory holidays equally, with the Claimant having the first professional development day in 2019 following the making of any Order made upon this application and the Respondent having the next professional development day or statutory holiday and that the parties alternating professional development day and statutory holidays thereafter;
16. A declaration that the Respondent wrongfully denied the Claimant parenting time on September 24, October [2, 3,] 8, 19, November [4-7,] 9 - 12, and February 11 and 12, 2019;
17. An order that the Respondent be fined \$5,000.00 for wrongfully denying the Claimant her parenting time, or an amount deemed appropriate by this Honourable Court;
18. An order that the Claimant have seven days of compensatory parenting time in 2019 in addition to her regular parenting time under the Separation Agreement of the as a result of the Respondent's wrongful denial of the Claimant's parenting time;
19. An order that the Claimant will advise the Respondent of the dates on which she will have her compensatory parenting time by or before April 1, 2019;
20. An order that the Respondent shall not make negative or disparaging comments about the Claimant during their communications; and
21. An order that the Claimant have her special costs of and incidental to this application, payable forthwith.

- [32] The Court has made rulings below on the orders sought in paras. 1, 2, 3, 4, 5, 6, 7, 8, 9(a) - (g), 10, 11, 12, 13, 14 and 15 (not yet discussed), 16, 17, 18, and 19. The order sought in para. 20 above was by consent subject to it being an order which is mutually applicable.

Analysis

- [33] In contrast to the factual basis for the orders sought by the respondent, a number of the orders sought by the claimant are based on facts which are admitted or not otherwise seriously in dispute. It is the application of law to those facts which is required for the Court to decide the issues involved in the orders sought by the claimant. Therefore, the Court has an appropriate jurisdiction to determine those issues on a summary basis.

Mediation - 20 July, 2018

- [34] After some discussions between the parties and the refusal of A.K. to re-engage the parenting coordinator appointed in this case, the parties agreed to attend a mediation which occurred on July 20, 2018. Minutes of Settlement evidencing the results of that mediation were attached to the twelfth affidavit of A.K. as Exhibit 17 (page 207).
- [35] Issues which can readily be addressed in these reasons are amounts that A.K. agreed to pay to his share of parenting coordinator fees owing (\$2,294.89), costs payable to B.D. based on the second determination of the parenting coordinator (\$1,000.00), and \$4,776.00 representing retroactive child support payable by A.K. to B.D. for a total of \$8,070.89, which sum was agreed by B.D. to be paid by September 30, 2018. A.K. has not paid these sums to B.D. and she is entitled to be paid these amounts forthwith.
- [36] At the mediation, A.K. also agreed to pay child support in an increased amount of \$781.00 per month commencing August 1, 2018, by bank transfer, based on a "stated guideline income of \$50,000". The increase was agreed to because A.K. had not included the rental income A.K. received from household tenants in previous disclosure to B.D. and had not reported that rental income in his income tax returns. Despite agreeing to pay the amount of increased child support at the mediation, A.K. has paid less than the agreed amount of child support since August 2018 and has paid no child support at all since October 2018. As at February 2019, B.D. submitted that A.K. owes B.D. arrears of child support of \$4,320.03; that figure, assuming no further monthly payments for child support, should be approximately \$9,006.00 by September 1, 2019. If the respondent has made payments towards the agreed child support, he is entitled to a credit for the total amount of such payments. If the parties are unable to agree on the amount of arrears based on the Minutes of Settlement, this Court will hear further submissions to fix the amount or arrears of child support. Such arrears shall be paid forthwith by A.K. to B.D.
- [37] As a result of the foregoing reasons, the orders sought in paras. 3, 4 and 5 of the notice of application of the claimant are granted.

Canada Pension Disability Benefits

- [38] In the Agreement dated February 15, 2016, at para. 31, the following appears: "[B.D.] shall continue to receive \$496 per month from [A.K.'s] Canada Pension Plan disability benefits."
- [39] It is also important for these reasons to note that the provisions of the Agreement in particular at para. 22 anticipate that the parenting time of A.K. was to increase over time. A.K. confirmed that understanding in para. 13 of his twelfth affidavit, where A.K. swore: "The Agreement was negotiated in light of the s. 211 report. The plan was to give me gradually increasing parenting time."
- [40] At that time, B.D. was receiving CPP disability benefits due to the children and B.D. received those benefits from 2016 to August 2017, when, as a result of actions of the respondent, Service Canada stopped paying to A.K. these CPP payments due to the two children. At para. 48 of the affidavit of A.K., the contents of para. 31 of the Agreement (Tab 8, page 100) is repeated. However, A.K. then alleges that because he had the children for regular overnight parenting time from February 2016, he was statutorily entitled to receive CPP benefits, and that "the Child's benefit is to be paid to the disabled contributor who has any custody and control of the children". He cites the authority for that proposition as a letter dated July 19, 2018 from Service Canada. Based on that authority, A.K. submits that because he had the children spending overnights with him from February 2016 to July 2017, B.D. should repay to him \$496.00 for those 18 months.
- [41] This submission is contrary to the provisions of the Agreement. A.K. was receiving disability benefits from the federal government in February 2016, which he was entitled to receive regardless of whether he had children or not: see *Wadden v. Wadden*, 2000 BCSC 960. In that case, pursuant to a Settlement Agreement, the CPP Disabled Contributor's Child's Benefit (the "DCCB") was initially mailed to the father; later, it was agreed that the benefit should be paid directly to the mother, although the father was the disabled person entitled to a disability pension. At para. 5 of *Wadden*, Mr. Justice Hunter, as he then was, stated: "The DCCB payments to the children do not reduce the father's Disability Benefit entitlement. In other words, whether he had one child or ten children or no children, his monthly disability benefits remain the same". Mr. Justice Hunter canvassed the case law considering the same point of law and found that the majority of previous cases were in support of the proposition that the DCCB payments were not a form of child support and that the DCCB payments were payable to the child. As a result, the DCCB payments could not be calculated as "child support" paid by the payor to the payee of such support. In the words of one of the considered authorities, *Corkum v. Corkum* (1998), 36 R.F.L. (4th) 367 at 371 (N.S.S.C.), "the entitlement belongs to the dependant, and is not even placed in the hands of the pensioner unless the pensioner has custody." In *Griffiths v. Griffiths*, 1999 ABQB 193, the Court followed *Corkum* and adopted the proposition that "[w]hat is not debatable is that the Guidelines do not make CPP payments resulting from the parent's death or disability a relevant consideration to determine the Table amount of child support."

- [42] The reasons in Wadden, at para. 21, conclude that: "it is clear that the Guidelines do not make these DCCBs a relevant consideration in determining the Table amount of child support. Therefore, the father cannot reduce his maintenance payments by the amount of the DCCBs."
- [43] In the case at bar, in para. 31 of the Settlement Agreement, A.K. agreed that the DCCB payments for the children of the marriage in the amount of \$496.00 per month would be paid to B.D. Thereafter, until July 2017, A.K. complied with the Settlement Agreement and the DCCB payments were made by Service Canada to B.D.
- [44] In July 2017, A.K. changed his mind and decided not to make the payments aforesaid, but there was no change in the statutory or regulatory basis for the payment of those benefits that A.K. had a disability recognized by the federal government. To the contrary, in the Agreement, A.K. agreed to have the sum of \$496.00 per month from the CCP DCCBs paid to B.D. for the children. Exhibit 22 to the affidavit of A.K. reflects the change caused by the actions of A.K. to change the payee of the child benefit, but that document has no effect whatsoever on the Agreement, which provides that the DCCBs are to be paid to B.D. Exhibit 22 simply confirms that A.K. has breached and continues to breach para. 31 of the Agreement.
- [45] As a result of para. 31 of the Agreement, and given the contents of Exhibit 22, A.K. has, since July 2017, received \$489.28 per month due to B.D. The DCCB payments amount to \$13,210.56 for the 27 months from July 2017 to September 1, 2019. That amount is due and payable forthwith by A.K. to B.D. as of September 1, 2019.

Child Tax Credit

- [46] In paras. 34 and 35 of the Separation of Agreement, the following appears:
34. [B.D.] may claim the Canada Child Tax Benefit ("CCTB") in each tax year for so long as the Children, or any of them are a "child" within the meaning of section 146 of the Family Law Act.
35. [B.D.] may claim the Dependant Credit or Equivalent to Spouse, Canada Revenue Agency, tax credits relating to the Children.
- [47] In or about August 2017, as a result of actions taken by A.K., the Canada Revenue Agency ("CRA") contacted B.D. and demanded that she repay Child Tax Credits which had been paid to her in the amount of \$8,000.00. Based on that demand, B.D. paid the sum of \$8,000.00 to the CRA. Thereafter, the CRA began paying the Child Tax Credit to A.K. However, A.K. had agreed in paras. 34 and 35 of the Agreement that the Child Tax Credit was claimable by B.D.

- [48] B.D. then took steps to prove to the CRA that the children of the marriage resided with her the majority of the time and that under the Agreement she was entitled to claim the Child Tax Credit. A.K. submitted that B.D. obtained letters from a doctor and a dentist to stop the benefits flowing to A.K. The contents of para. 52 in the twelfth affidavit of A.K. is clearly inadmissible as hearsay, and it is not admissible for the truth of its contents.
- [49] After the CRA obtained the information noted above from B.D., the CRA concluded that B.D. was entitled to receive the Child Tax Credit. It is very significant evidence in support of the correctness of that conclusion that the CRA, an organization with specialized expertise on issues of entitlement to the Child Tax Credit, issued a full \$8,000.00 refund to B.D.
- [50] B.D. is entitled to receive from A.K. the Child Tax Credit from August 2017 to whatever date the CRA began again to pay the Child Tax Credit to B.D.
- [51] As a result of the foregoing reasons, the orders sought in paras. 1, 6, 7 and 8 of the notice of application of the claimant are granted.

Non-Disclosure of Tenancy Income

- [52] B.D. also submits that A.K. has continued to rent a portion of his home to tenants but has failed to disclose recent rental income to B.D. or in his income tax returns. A.K. took two different and inconsistent factual positions before this Court. Initially, he asserted that he miscalculated his rental income at the mediation based on his memory, and that all of his tenants had terminated their tenancies immediately after the mediation or at least by September 1, 2018. He stated he was currently renovating the rental accommodation in the basement of his home and was going to offer that space free of rent to his stepchildren on a long-term basis.
- [53] In the 13th affidavit of the respondent, sworn March 6, 2019, the respondent asserts he has provided copies of rental contracts, and that there were seasonal workers renting rooms from time to time and that as at March 7, 2019 he was attempting to rent the renovated space to other tenants.
- [54] The conflict between these two positions creates a significant loss of child support otherwise payable for the benefit of the children of the marriage, the first responsibility of the respondent. The complainant did not indicate any effort to re-rent the rental accommodation after September 1, 2018. It is obvious that A.K.'s decision not to continue to rent the renovated space but retain it unrented for the future use of step-children caused a deliberate reduction in income. In these circumstances, the Court should not consider a reduction in child support payable by the respondent.
- [55] In these circumstances, based on the ongoing failure of A.K. to make timely or fulsome disclosure of tenancy income, the income of the respondent agreed at the mediation for the purposes of child support or \$50,000.00 shall remain unchanged for the purposes of this judgment.

- [56] As a result of the foregoing reasons, the orders sought in paras. 9 (a) to (g) of the notice of application of the claimant are granted. With respect to the order sought in para. 9(h), the respondent shall provide the Notice of Assessment for the year 2019 to the claimant within seven days of receipt thereof by the respondent from the Canada Revenue Agency.

The Creep Catchers Incident

- [57] The 12th affidavit of the respondent refers at paras. 20-22 to an incident where the respondent swears that he answered an ad to buy a refrigerator from a 14-year-old girl on the internet.
- [58] The respondent's affidavit contains the following statement: "I answered an ad to buy a refrigerator on the internet. The seller claimed to be a 14-year-old girl. I did not think there was anything wrong with buying a refrigerator from a 14-year-old."
- [59] In response to this explanation, the claimant produced a series of internet posts from the phone of the respondent, attached as Exhibits "H" and "I" to her 7th affidavit. Exhibit H begins with the screen shot from the respondent's cell phone where he writes in an internet post: "I have black hair [and] a clean shaven face .dark brown eyes, well hidden tattoos and a caramel complexion, who is mature, sane and ready for fun." Then the post continues: "I am a high energy kind of guy that likes to laugh and have a good time. I am single, honest and very healthy. I like to read."
- [60] It is to this internet post that the "14-year-old" responds, with: "Well, u sound pretty cool but before we text and hang out, I have to tell u I'm really 14 [sic]".
- [61] To this point in the internet conversation, there is no mention of the sale or purchase of a refrigerator. The "14-year-old" refers to texting and "hanging out".
- [62] While not every word in Exhibit "H" is legible, there is no reference by the "14-year-old" to the sale of a refrigerator or to the word "fun" as alleged by the respondent in para. 20 of the respondent's 12th affidavit.
- [63] Later, in Exhibit "H", the respondent and the "14-year-old" discuss exchanging photographs and meeting in a coffee bar in a mall. The sole and only mention of a refrigerator in Exhibit "I" is by the respondent where he responds to a text question "What r u doinn [sic]". The respondent replies: "I am looking for a Fridge. Mine is broken." The respondent follows with the question: "What are you doing". The response the respondent receives from the "14-year-old" is: "At mall walking around". The response of the "14-year-old" makes no mention of the alleged purchase or sale of a refrigerator.
- [64] The balance of the internet conversation between the respondent and the "14-year-old" is comprised of an exchange of photographs between the respondent and the "14-year-old" and arrangements to meet at a coffee shop in a shopping mall located in Surrey, B.C. Again, there was not a single mention of a refrigerator.

- [65] The respondent asserts at para. 21 of his Affidavit #12 that the Ministry of Children and Family Development began investigating him as a result of the reporting of the Creep Catchers Incident. He states that the investigation ended on October 3, 2017 with a file closing letter from the Ministry (Exhibit 7). That letter states that the Ministry staff member fulfilled the duty to investigate all child protection reports and completed the "steps of [the] assessment and found that the child is not in need of protection". "Child" is referred to in the singular in the letter. As noted above, there are two children of the marriage in the case at bar. There is a conflict on the evidence here which would prevent the Court from making a finding that the Ministry investigated the situation of these two children or that any investigation of issues relating to these two children is reflected in the said letter.
- [66] The respondent also asserts that the Children's Foundation and the Family Preservation program reported no problems with the respondent having access to the children in this case. The report filed as Exhibit 8 of the said affidavit simply notes that the respondent reported he "was publicly humiliated by the incident involving Creep Catchers". Nothing suggests either of the noted organizations conducted any investigation on the factual background of the Creep Catchers incident.
- [67] It is indeed curious that in the 13th affidavit of the respondent, sworn after the 7th affidavit of the claimant, there is no reference to the Creep Catchers incident nor the evidence of the internet posts so clearly in complete contradiction to the "explanation" offered by the respondent. The submission of the respondent concerning some arrangement to purchase a refrigerator from the "14-year-old" is simply untrue and without support in the evidence.
- [68] The "explanation" that he was interested in buying a refrigerator from a 14-year-old is an attempt to avoid the only reasonable conclusion a reasonable third party would draw, which is that the respondent was attempting to form an illicit relationship with a 14-year-old girl. The credibility of the respondent is completely shattered as a result and reduced to nothing by the contents of the internet communication.
- [69] As an aside, the 13th affidavit of the respondent contains a series of statements which are clearly inadmissible as argument, statements of which the respondent had no factual knowledge and was speculating, and other statements not otherwise admissible. Counsel supported the inclusion of such material as being statements the respondent wished to include in his affidavit. That submission is in direct conflict with Rules 10-4(12)-(13) of the Supreme Court Family Rules, B.C. Reg. 169/2009, in a case where the party is seeking a final order. The submission also puts into serious question the role of legal counsel as a gatekeeper to avoid putting clearly inadmissible materials before the Court, simply based on instructions from a client.

Parenting Time

- [70] The parties have a significant disagreement in relation to the allocation of parenting time based on the provisions of the Agreement and the Minutes of Settlement.

- [71] One issue was the definition of the term "week" or "day". These are clearly the sort of issues which should have been resolved by the parenting coordinator without the time and expense of a two day chambers application.
- [72] The position of B.D. is that A.K. has breached the terms of the Agreement in relation to the regular parenting schedule on several occasions and that A.K. has misinterpreted the terms of the Minutes of Settlement with respect to Professional Development Days and statutory holidays during the regular parenting schedule.
- [73] Despite this, B.D. asserts she has continued to comply with the terms of the Agreement and attempted to resolve these matters directly with A.K. without success.
- [74] B.D. asserts that A.K. has wrongfully, in breach of the Agreement or the Minutes of Settlement, refused to return the children to B.D. on:
1. September 25, 2018 - a Professional Development Day;
 2. October 8, 2018 - Thanksgiving Monday;
 3. October 18, 2018 - a Professional Development Day;
 4. November 9, 2018 - a Professional Development Day;
 5. November 10, 11, and 12 - the Remembrance Day Weekend; and,
 6. February 11 and 12 - school closure days caused by adverse weather.
- [75] Counsel for A.K., while making submissions, acknowledged that A.K. did not properly interpret the words "consecutive" and "alternate", and kept the children for every professional day or other holidays when, if alternated, B.D. should have had nearly identical parenting time. This is also true when A.K. kept the children for the entirety of the Remembrance Day Weekend and during school closure days caused by snow on February 11 and 12, 2019.
- [76] B.D. has had to incur additional legal fees because A.K. has refused to engage the parenting coordinator to deal with parenting time and has refused to follow the terms of the Settlement Agreement. In para. 26 of the application response of A.K., he suggested that he was forced to pursue a fair and equitable shared parenting schedule through the courts. The behaviour of A.K. with respect to denial of parenting time to B.D. on the out-of-school days noted above defeats the suggestion that A.K. was attempting to act fairly. His conduct was clearly unfair and not equitable. Under s. 61 of the FLA, the Court has jurisdiction to make an order for compensatory parenting time or to impose a fine.
- [77] In the circumstances of this case, I have decided to award the claimant nine additional days of parenting time. The claimant shall designate the nine additional days of parenting time on or before September 30, 2019 and all such days shall occur prior to January 30, 2020.

- [78] As a result of the foregoing reasons, the orders sought in paras. 14, 15, 16, 18 and 19 of the notice of application of the claimant are granted. The order for a fine sought in para. 17 is addressed below. In the order sought in para. 18, there was noted to be a miscounting of days; erroneously seven, later corrected to be nine days.

Medication Reviews

- [79] Para. 9 of the Agreement states: "[A.K.] shall engage in a medication review every two months from his treating psychiatrist. [B.D.] may obtain the medication review's results from the psychiatrist at her request."
- [80] Hence, medication reviews were to be engaged every two months by A.K., from his treating psychiatrist. Medication reviews were provided by A.K. to B.D. on July 16, 2016, April 16, 2017, February 20, 2018, July 20, 2018 and January 2019. No further medication reviews have been provided. The purpose of the medication reviews was to provide assurance to B.D. that she might come to appreciate the nature of the ongoing medication usage by A.K. in relation to the safety of the children of the marriage.
- [81] A.K. asserts that B.D. is required to get the medication reviews from Dr. Leech-Porter. A.K. was required to engage medication reviews every two months. Dr. Leech-Porter wrote a letter dated October 3, 2018, which by its inappropriate contents reveals that the doctor did not appreciate that B.D. was required to engage the medication reviews every two months for the purpose of requiring assurance of safety to the children of the marriage. Dr. Leech-Porter's role as a physician, and as a professional, even if not an expert witness, is to provide neutral, accurate information to the court. This doctor has clearly strayed from his field of medical expertise into the characterization of legal claims, and outside of his role of providing medication reports.
- [82] Dr. Leech-Porter described the case advanced by B.D. as imposing "incredible demands", and how A.K. is "naturally upset with the unreasonable demands of his ex-wife and her lawyer". The doctor has entered the fray as an advocate, a role entirely out of keeping with his professional credentials. He has no basis in his professional capacity as a doctor to judge the reasonableness of the position of a party in high-conflict family litigation. The basis for the opinion that demands by B.D. were "incredible" or "unreasonable" cannot be given any weight or other evidentiary value. Overall, it is difficult to give much evidentiary weight to the correspondence of Dr. Leech-Porter because of his unsolicited opinions on matters of law clearly outside of his professional expertise.
- [83] The failure of A.K. to engage medication reports every two months has been an ongoing breach of the Settlement Agreement by A.K. which requires resolution.
- [84] Counsel for B.D. proposed an alternative to the medication reviews being prepared by the doctor, which would avoid any opportunity for a repetition of the inappropriate comments of Dr. Leech-Porter in the future. Counsel proposed that A.K. provide, immediately following delivery of these reasons, a complete copy of his PharmaNet records from January

1, 2019 to March 1, 2019 and a further complete report every two months thereafter. This order was not opposed in submissions and would avoid the cost and aggravation of the parties dealing further with Dr. Leech-Porter. The Court therefore orders that the respondent shall provide a full copy of his PharmaNet printout every two months commencing on January 1, 2019. To comply with this order the respondent shall provide to the claimant a full copy of his PharmaNet printout as at March 1, 2019, for the period ended May 1, 2019, for the period ended July 1, 2019, for the period ended 1 September 2019 and for every two months thereafter on the first day month of the third month thereafter.

- [85] Based on the foregoing reasons, the order sought in para. 13 of the notice of application of the claimant is granted.

Appointment of Parenting Coordinator

- [86] The appointment of Ms. Jennings as a parenting coordinator occurred on April 1, 2016, by consent of the parties as evidenced by a Parenting Coordinator Agreement.
- [87] The Agreement required that, before any application to court, the parties would return to mediation if the parenting coordinator was unable to address an issue arising in the Agreement. The Agreement required the parties to take certain steps, such as: retaining a child therapist; retaining a parenting coach for the respondent; and, providing bi-monthly medication reviews about the respondent to ensure that the best interests of the children were protected consistent with the s. 211 report.
- [88] On two occasions as noted above, determinations were made by the parenting coordinator which were contrary to the positions taken by the respondent. The first determination, dated August 23, 2016, noted several failures by the respondent to abide by the provisions of the Agreement. The second determination of July 13, 2017 was made pursuant to a demand by the respondent for speedy determination concerning regular and specified parenting time. That determination confirmed the claimant's interpretation of the Agreement and ordered that the respondent pay the fees of the parenting coordinator based on the respondent's non-compliance with the directions of the parenting coordinator and the timetable fixed for summer parenting schedules. No appeal nor attempt to set aside the determinations of the parenting coordinator was made by the respondent.
- [89] The respondent then refused to re-engage with the parenting coordinator. There were two attempts at mediation which were also largely unsuccessful because the respondent ignored the agreed conclusions of the mediations.
- [90] The respondent commenced this application which has proven unsuccessful from his position and he has demonstrated a series of breaches of each of the agreements which he has made.

- [91] In these circumstances, further proceedings before the Court should be avoided because of the apparent inability of the respondent to comply with the agreements he has made. The Court therefore orders pursuant to s. 15 of the FLA that, within 14 days of the date of these reasons, the parties retain the services of Sandra Jennings as the parenting coordinator for the parties for a period of two years, with the costs of such parenting coordinator to be paid initially by the respondent unless the parenting coordinator exercises her discretion to make a different order. The respondent is also prohibited by order of this Court to make any application, without leave of this Court first had and obtained, respecting any matter over which a parenting coordinator has authority to act under the Agreement or any order made as a result of this application.
- [92] Based on the foregoing reasons, the orders sought in paras. 11 and 12 of the notice of application of the claimant are granted.

Fine for Failure to Comply with the Agreement

- [93] Given the consistent pattern of breaches of the Agreement by the respondent, the Court imposes a fine of \$2,500.00 payable forthwith by the respondent to the claimant. The orders sought in paras. 2, 10, and 17 of the notice of application of the claimant are granted to the extent of \$2,500.00.

Costs

- [94] The claimant has been substantially successful on both applications. Costs shall be paid by the respondent to the claimant forthwith after assessment, as a matter of more than ordinary difficulty, for a two-day hearing pursuant to Appendix B of the Supreme Court Family Rules.

"Ball J."

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