

CANADA / JUDGMENT

B.K.N. v. H.S.N.

2024 BCSC 1576

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1576 B.K.N. v. H.S.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.K.N. v. H.S.N.,

2024 BCSC 1576

Date: 20240828

Docket: E67583

Registry: New Westminster

Between:

B.K.N. aka B.K.B

Claimant

And

H.S.N.

Respondent

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Claimant:

F. Jhuty

M. Ali-Costain

Counsel for the Respondent:

K. Gill

Place and Date Hearing:

New Westminster, B.C.

July 22 and 26, 2024

Place and Date of Judgment:

New Westminster, B.C.

August 28, 2024

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Introduction

- [1] These matrimonial proceedings began in 2023. Issues between the parties in the action include: an order for divorce, orders respecting children, orders for spousal support, and orders for division of property.
- [2] The focus of the two applications now before this Court include: first, whether to vary a previous order of this Court in respect of occupation of the residence at 13066-73A Avenue in Surrey, British Columbia ("Home") and/or parenting responsibilities under s. 41 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]; second, interim parenting arrangements; third, whether the respondent is entitled to compensation for breach of a previous court order and/or agreement; fourth, what arrangements for counselling for the children should be made; and finally, whether the respondent's parenting arrangements should be reviewed upon completion of a s. 211 report. The parties agree that moving forward they will communicate with each other by way of email with the exception of an emergency involving the children.

Issues

- [3] For the reasons that follow, I make the following orders:

- a) The claimant's application to vary the order of Associate Justice Krentz, dated November 29, 2023 is dismissed.
- b) Pursuant to s. 40(2) of the FLA, the parties will share equally all of the s. 41 parental responsibilities for the children.
- c) The respondent's application for graduated parenting time is granted on the following terms:
 - i. After Labour Day, the respondent will have the following parenting time for the month of September:
 - (1) Tuesday and Thursday from 6:30 PM to 8:30 PM.
 - (2) Saturday from 2:00 PM to 6:00 PM.
 - (3) Such other parenting time as agreed to between the parties or directed by the parenting coordinator.
 - ii. Starting October 1, 2024:
 - (1) Tuesday and Thursday from 6:30 PM to 8:30 PM;
 - (2) Every other weekend from Friday at 6:30 PM to Sunday at 8:00 PM;
 - (3) Such other parenting time as agreed to between the parties or directed by the parenting coordinator.
 - iii. Starting November 4, 2024, equal parenting time on a week-on/week-off basis or as otherwise agreed between the parties or directed by a parenting coordinator.
- d) The claimant's request that the respondent's parenting arrangements be reviewed upon completion of a s. 211 report is dismissed. Either party is at liberty to apply to vary the parenting arrangements in the event that there is a material change in circumstances.
- a) The respondent's application for relief pursuant to ss. 61(2), 228 and 230 of the FLA is dismissed.
- b) By consent, under s. 225 of the FLA, the parties will communicate with each other by way of email with the exception of an emergency involving the children.
- c) By consent, the parties will enroll the children in counselling.
- d) The parties will share equally the cost of individual counselling for the children.
- e) Each party will send to the other the names of three counsellors for the children. If the parties are unable to agree on the identity of the counsellor, the parties may apply to court for the determination of that issue upon a proper evidentiary record which must include with respect to each proposed counsellor, at least: their name, their credentials, their areas of practice, their availability and their cost.

- f) The respondent will have his costs of both applications in the cause.

Background Facts

Relationship History

- [4] The claimant was born on April 8, 1977. The respondent was born on April 16, 1977. The parties were married on November 21, 2003 in India.
- [5] There are two children of the marriage:
- a) A.N., born December 2010 (age 13); and
 - b) J.N., born July 2015 (age 9).
- (collectively, the "Children")
- [6] The parties jointly own a property located at 13066-73A Avenue in Surrey, British Columbia ("Home"). The Home contains a number of separate suites.
- [7] The parties separated in the Spring of 2023. While the date of separation is in dispute, it is common ground that the parties continued cohabiting until on or about May 21, 2023.

Ministry of Child and Family Development ("MCFD")'s First Involvement

- [8] On or about May 14, 2023, there was an altercation in the Home between the claimant and the respondent ("Incident").
- [9] On or about May 16, 2023, the Surrey RCMP contacted the MCFD regarding the Incident.
- [10] As noted, the parties separated on or about May 21, 2023. As will be described in more detail below, the claimant initiated family law proceedings on June 7, 2023 and obtained an ex parte protection and other orders from the court on June 9, 2023 (collectively, the "June 2023 Orders"). She served these materials on the respondent on June 15, 2023.
- [11] On June 29, 2023, the MCFD contacted the claimant and she notified them about the June 2023 Orders.
- [12] On or about August 31, 2023, the MCFD notified the claimant that they had closed their investigation.

Procedural History

- [13] On June 5, 2023, the claimant filed the within notice of family claim. In her notice of family claim, the claimant alleges that both she and the Children have been victims of family violence perpetrated by the respondent.

[14] Two days later, and before serving the notice of family claim, on June 7, 2023, the claimant filed an ex parte application seeking various orders. Like the notice of family claim, the notice of application alleges that both the claimant and the Children have been victims of numerous instances of family violence perpetrated by the respondent.

[15] The claimant's ex parte application was heard on June 9, 2023. On the basis of submissions and evidence led that day by the claimant, Associate Justice Krentz granted:

- a) Protection orders pursuant to ss. 183 and 188 of the FLA; and
- b) The respondent had liberty to apply to set aside or vary those orders upon five business days notice to the claimant.

[16] Associate Judge Krentz also made various interim orders including:

- a) On an interim and without prejudice basis, the claimant shall have sole parental responsibilities under s. 41 of the FLA;
- b) Pursuant to s. 90 of the FLA, the claimant is to have exclusive occupancy of the Home;
- c) The claimant has liberty to retain the services of a locksmith and any other service technician required to change the locks, keypads, security cameras, and remotes granting access to the upstairs of the Home;
- d) The claimant is permitted to collect the rent from the tenants in the suites of the Home and will utilize those funds towards the mortgage and utilities of the said Home;
- e) The claimant will have her costs of this application, payable in any event of the cause; and
- f) The respondent has liberty to apply to vary or set aside this order upon 5 days notice to the claimant.

(collectively, the "June 2023 Orders")

[17] The respondent was served with the notice of family claim, notice of application and supporting materials, and orders made by Associate Judge Krentz on June 15, 2023.

[18] In July 2023, the respondent retained counsel and made efforts to set dates in court to address matters. He also attempted to resolve matters without recourse to the courts. He received relatively few dates from claimant's counsel for hearing his proposed court application.

[19] Ultimately, the respondent brought an application, filed October 25, 2023, seeking various orders including:

- a) An order to set aside the protection orders made on June 9, 2023;
- b) An order to set aside the order of exclusive occupancy of the Home made on June 9, 2023;

- c) An order to set aside the interim order in respect of parenting responsibilities made on June 9, 2023; and,
 - d) Costs payable by the claimant.
- [20] In his notice of application, the respondent denied the allegations of family violence and raised allegations that the claimant perpetrated family violence against him and the Children.
- [21] That respondent's application was ultimately also heard by Associate Judge Krentz on November 29, 2023 and judgment was pronounced on the same date. After the benefit of hearing from both the claimant and the respondent, Associate Judge Krentz determined that he was not satisfied with the disclosure from the claimant at the time of the June 9, 2023 hearing and that the claimant had failed to disclose material facts.
- [22] Based on what he reviewed in November 2023, Associate Judge Krentz ordered that the protection order be vacated effective immediately.
- [23] Associate Judge Krentz determined there was a practical impossibility for the parties to continue to reside together and that the Children should not be exposed to the conflict any longer and so he made a number of conduct orders which are not at issue in this proceeding.
- [24] Associate Judge Krentz also terminated the orders:
- a) Granting sole parental responsibilities to the claimant;
 - b) Granting exclusive occupancy of the entire Home to the claimant; and,
 - c) Awarding the claimant costs of her application in any event of the cause.
- [25] In place of those orders, he made the following orders:
- a) The claimant shall have exclusive occupancy of the first floor or the main floor of the Home;
 - b) The respondent shall have exclusive occupancy of what has been described as Unit C of the Home; and,
 - c) Costs in any event of the cause to the respondent for this application.
- (collectively, the "November 2023 Orders")
- [26] Following this hearing, the parties exchanged proposals for the respondent to begin having parenting time with the Children. Although the parties agreed that the respondent would have specific parenting time starting December 9, 2023, for a variety of reasons which are explained in more depth below, that did not come to pass.
- [27] As is set out in more detail below, shortly after an agreement was reached between the parties on specific parenting time, the MCFD became involved for a second time.

[28] On March 21, 2024, the respondent filed his response to family claim and counterclaim. In his response to family claim, the respondent again denies the allegations of family violence.

[29] On May 15, 2024, the parties attended a judicial case conference where various orders were made by consent. For the purpose of this application, I highlight that these consent orders included:

- a) An order as to the timing of the present application; and
- b) An order that the parties jointly commission and retain a s. 211 report writer to prepare a s. 211 report. The specific s. 211 report writer is to be agreed upon between the parties with costs of the agreed upon appraisal to be shared equally by the parties on an interim without prejudice basis.

[30] So far, no s. 211 report has been prepared.

MCFD's Second Involvement

[31] On or about December 12, 2023, the claimant notified the MCFD of the November 2023 Orders. The MCFD reopened their file.

[32] On or about December 22, 2023, a social worker from MCFD advised the claimant to cease facilitating the respondent's exercise of parenting time until further approval was received from a social worker. The claimant signed a safety plan created by the MCFD to the same effect ("Safety Plan").

[33] Both parties complied with the Safety Plan.

[34] On or about July 3, 2024, the MCFD advised the claimant that there was no further need for MCFD involvement and that they would be closing the file.

Should the November 2023 Order Be Varied?

Position of the Parties

[35] The claimant seeks exclusive occupancy of the Home and sole parenting responsibilities under s. 41 of the FLA. Her notice of application fails to acknowledge the November 2023 Order, does not plead s. 216 of the FLA, and fails to set out any change in circumstances since the November 2023 Order was made ("Deficiencies"). Orally, her submission was that the changes in circumstance were four-fold in this case. Specifically:

- a) The Children's refusal to see the respondent in December 2023;
- b) The Safety Plan that was put in place by the MCFD in December 2023 (and which is no longer in place);
- c) The allegations that the respondent perpetrated family violence against the Children; and
- d) The longer period of time that the respondent has been without parenting time.

- [36] The respondent argues that in light of the Deficiencies, the Court should not entertain the claimant's application. If this Court is prepared to consider the application on its merits, the respondent argues there has been no change in circumstances, and no fresh evidence that would justify this Court changing the November 2023 Order. Finally, the respondent argues that the claimant's application should be dismissed because shared residency of the Home is not a practical impossibility in the circumstances of this case, and the best interest of the Children augurs in favour of shared parenting responsibilities.
- [37] Given all of the issues have been fully argued before me, I am prepared to address the merits of the claimant's application.

Analysis

Parental Responsibilities

[38] Section 216 provides in relevant part:

216 (1) Subject to this Act, if an application is made for an order under this Act, a court may make an interim order for the relief applied for.

- (3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:
- (a) a change in circumstances has occurred since the interim order was made;
 - (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
- (4) In making an order under subsection (3), the court must take into account all of the following:
- (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
 - (b) the length of time that has passed since the interim order was made;
 - (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
 - (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
 - (ii) would not necessarily reflect the final arrangement between the parties;
 - (d) whether a trial has been scheduled;
 - (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

- [39] With respect to the first stage of the test, being the question of whether there has been a change in circumstances, in cases such as *N.E.G.B. v. T.A.S.*, 2024 BCSC 647 at para. 13, the court has applied the following criteria first articulated in the context of an application to change an order respecting parenting:
- [32] The first step in the analysis set out in *Gordon v. Goertz* is to "determine whether there has been a material change in circumstances since the making of the prior order": *Boychuck* at para. 14. The Court in *Gordon* explained what is necessary to establish a material change in circumstances:
- [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued....
- [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.
- [Emphasis in original.]
- [33] At para. 13, the Court summarized what the applicant must establish before proceeding on the merits of the application:
- [13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
- [34] Absent a material change in the needs or circumstances of the child, the inquiry can go no further. It is only after this threshold is met that the judge on the new application can embark on a fresh inquiry into the best interest of the children.

Williamson v. Williamson, 2016 BCCA 87, citing *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 1996 CanLII 191.

- [40] Some of the alleged changes in circumstance fail this threshold inquiry. In particular:
- a) The Safety Plan that was put in place by the MCFD in December 2023 (and which is no longer in place).
 - b) The allegations that the respondent perpetrated family violence against the Children.

- c) The longer period of time that the respondent has been without parenting time.
- [41] The obsolete Safety Plan fails the first step. It has no effect on the condition, means, needs or circumstances of the Children nor on the respondent's ability to meet the needs of the Children.
- [42] The allegation that the respondent perpetrated family violence against the Children was before Associate Justice Krentz when he made the November 2023 Order. That those allegations might be repeated or given more detail by the claimant or the Children at some future point could have reasonably been contemplated by Associate Justice Krentz. It thus fails both the first and third stage.
- [43] The fact that a longer period of time has passed without the respondent having any parenting time does not, without more, effect the condition, means, needs or circumstances of the Children nor the respondent's ability to meet the needs of the Children.
- [44] The more difficult question is whether the Children's refusal to see the respondent in December 2023 is a material change permitting this Court to embark on a fresh inquiry into their best interests.
- [45] I conclude that it is because the Children's refusal to see the respondent could potentially impact his ability to meet their needs. It does materially affect the Children and was likely not foreseen by Associate Justice Krentz. At the time this application was heard, it had been eight additional months since the November 2023 Order was made. The order itself was an interim order that did not necessarily reflect the final arrangement between the parties. No trial has yet been scheduled.
- [46] In approaching the question of whether there will be any potential adverse effect, on a party or a child of a party, of either making or declining to make an order, I conclude I must embark on an inquiry into the best interests of the Children in light of this change. I will do so below in the course of addressing both parenting responsibilities and parenting time.

Occupancy of the Home

- [47] As noted above, the November 2023 Order dealt expressly with occupancy of the Home.
- [48] The same analysis of s. 216 is therefore applicable. For the same reasons set out above, three of the alleged changes in circumstance fail that test. In particular:
- a) The obsolete Safety Plan fails the first step.
- b) The allegation that the respondent perpetrated family violence against the Children fails both the first and third step.
- c) The fact that a longer period of time has passed without the respondent having any parenting time fails the first step.

- [49] For the same reasons set out above, I conclude the Children's refusal to see the respondent in December 2023 is a change in circumstance for the purpose of s. 216.
- [50] Turning to the balance of the considerations in s. 216(4), at the time this application was heard, it had been eight months since the November 2023 Order was made. The November 2023 Order was not intended to necessarily reflect the final arrangement between the parties. As noted above, property division is a live issue in this action and one which cannot be resolved until trial. Presumably, occupancy of the Home may change following a determination of that issue. No trial has been scheduled at this time.
- [51] Like the question of parenting responsibilities, this aspect of this application falls to be determined at the final stage of s. 216(4), that is the question of potential adverse effects on any parties, including the Children, in either making or refusing to make the order sought.
- [52] As recognized by Associate Judge Krentz, the respondent is experiencing significant prejudice by being excluded from the Home. He is incurring the additional expense of rent. He is staying with his brother and his mother at their residence in Richmond which is both farther from his daily life and also not large enough to accommodate him comfortably.
- [53] Meanwhile, there is an empty rental unit in the Home that the respondent could be occupying. I am not able to find that having him reside in a separate unit in the Home causes the claimant or the Children any significant prejudice. I say this even though A.N. expressed some discomfort to the MCFD at the notion that the respondent might live in a separate suite in the Home and even if the Children are refusing to spend time with the respondent as has been alleged. Upholding this aspect of the November 2023 Order does not require the Children or the claimant to spend time with him. While I accept that sharing a single unit would be a practical impossibility, I find that the balance of convenience favours permitting each party to occupy a separate unit in the Home. For that reason, I decline to vary this aspect of the November 2023 Order.

Parenting Arrangements

Position of the Parties

- [54] The respondent seeks a graduated return to equally shared parenting time and an order that the parties jointly exercise all parenting responsibilities.
- [55] The claimant argues that the respondent should have no parenting time until after a s. 211 report is prepared. The claimant seeks sole parenting responsibilities under s. 41 of the FLA.

Legal Principles

- [56] Parenting arrangements (s. 40 of the FLA) refer to both parenting time (s. 42 of the FLA) and parenting responsibilities (s. 41 of the FLA).

- [57] Pursuant to s. 37(1) of the FLA, the court must only consider the best interests of the Children when making an order respecting parenting arrangements under Part 4 of the FLA. Section 37 sets out a mandatory and non-exhaustive list of factors for a court to consider in assessing the best interests of the child.
- [58] In cases like this where family violence is alleged, the factors set out in s. 38 of the FLA must also be considered.
- [59] Those two statutory provisions provide:

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 the person's 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 the person's 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.

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.

Best Interests of the Children

- (a) the child's health and emotional well-being

[60] The claimant argues that resumption of the respondent's parenting time with the Children puts their emotional and psychological safety at risk absent a s. 211 report and individual counselling for the Children.

[61] The respondent agrees that the Children would benefit from counselling but does not agree that his parenting time should be suspended until a s. 211 report is prepared and the counselling takes place. He raises concerns that the claimant is alienating the Children from him.

[62] Although there is an order that a s. 211 report be prepared, the parties have so far not obtained one. Although they agree the Children would benefit from counselling, they have so far been unable to agree on a counsellor. No trial date has been set.

[63] While I address the allegations of family violence below, I find that here is little evidence to support that the Children's health or emotional well-being would be put at risk from spending time with both of their parents. As I will explain in more detail below, I am concerned that continuing a complete suspension of their parenting time with the risks

damaging their relationship with him which is not in their best interests. This is especially so given the lack of alacrity with which these parties have arranged for the s. 211 report to be prepared, for a counsellor to be retained, or a trial date to be set.

(b) the child's views, unless it would be inappropriate to consider them

[64] The claimant argues that the Children refused to see the respondent in December 2023 and that this is indicative that they do not wish to see him.

[65] The respondent argues the claimant wrongly denied him parenting time in December 2023 and that the Children's behaviour at that time is indicative of her alienation of the Children from him.

[66] The specific chronology of missed parenting time is as follows:

- a) On or around December 8, 2023, the parties, through their counsel, arrived at a without prejudice agreement for the respondent to have some specific parenting time with the Children.
- b) On December 9, 2023, the respondent was supposed to have his first parenting time with the Children since separation. Instead, the claimant e-mailed the respondent to advise that the Children were refusing to go and that she could not force them into the vehicle. She suggested that they should first start counselling and follow the recommendations of the counsellor for future visits. She noted that the respondent had not consented to her proposed counsellor.
- c) On December 12, 2023, the claimant re-engaged with the MCFD. As well, the respondent was scheduled to have parenting time with the Children. The respondent went to the appointed meeting place inside the library. The claimant had brought two of the parties' friends with her and those friends asked the respondent to go outside and collect the Children from the car. When the respondent went to the car, the Children hid their faces and refused to come out.
- d) On December 14, 2023, the respondent was scheduled to have parenting time with the Children. Instead, he received correspondence from the claimant's counsel advising him that the parenting time was cancelled due to a Christmas concert at the claimant's school which she was required to attend and at which J.N. was performing.
- e) On December 16, 2023, the respondent was scheduled to have parenting time with the Children. The respondent went to the appointed meeting place at Tim Hortons and the claimant was outside of her car a few feet away. The claimant told the respondent to get the Children from her car. When he went to her car, it was locked and the engine was running. The Children's behaviour was similar to that exhibited on December 12, 2023.

- f) On December 19, 2023, the respondent was scheduled to have parenting time with the Children. Instead, he received an e-mail from the claimant advising that the Children were sick and could not attend.
- g) On December 21, 2023, the respondent was scheduled to have parenting time with the Children. Instead, he received an e-mail from the claimant advising that the Children were sick and could not attend.
- h) On December 22, 2023, the claimant signed the Safety Plan with the MCFD.
- i) On December 23, 2023, the respondent inquired whether he could have a short visit with the Children to give them their Christmas presents. The claimant declined stating "could not sleep well due to sickness. I won't be able to drive today".
- j) On December 26, 2023, the respondent was scheduled to have parenting time with the Children. He attempted to change the meeting place but the claimant never responded and he was not able to exercise his parenting time then or ever.

[67] This chronology raises a number of concerns.

[68] First, it appears that on December 9, 12 and 16, if the claimant is to be believed that the Children did not wish to see the respondent, then the claimant allowed a 9-year-old and a 13-year-old to call the shots about whether or not they will see their father. She was apparently unwilling to exercise her own parental authority to encourage or compel the Children to attend or to impress upon them the importance of maintaining a relationship with their father. She visited no consequences on them for their refusal to go into the respondent's care.

[69] While A.N.'s views may be entitled to some weight depending on her maturity, neither of the Children are of an age where their views should be determinative on this issue.

[70] The correspondence on December 14, 19 and 21 raises additional concerns. The rationales offered for the denial of parenting time on these dates included a Christmas concert and the fact that the Children were sick. No explanation or evidence was presented to demonstrate that the respondent could not have managed J.N.'s attendance at the Christmas concert or the Children's ailments while they were under his care.

[71] By December 22, 2023, the claimant had apparently signed a Safety Plan that precluded her from facilitating the respondent's exercise of parenting time until further approval was received from a social worker. She did not advise the respondent of this fact on December 23, 2023. Instead, she relied on her own alleged illness to refuse parenting time. No response was given to his inquiry on December 26, 2023.

[72] Section 62 of the FLA provides in relevant part:

62 (1) For the purposes of section 61 [denial of parenting time or contact], a denial of parenting time or contact with a child is not wrongful in any of the following circumstances:

- (a)the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;
- (b)the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;
- (c)the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement, by a medical practitioner or nurse practitioner, indicating that it was not appropriate that the parenting time or contact with the child be exercised;
- (d)in the 12-month period before the denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child;
- (e)the applicant
- (i)informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and
- (ii)did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;
- (f)other circumstances the court considers to be sufficient justification for the denial. [Emphasis added.]
- [73] The claimant now says she reasonably believed the Children might suffer family violence if the agreed-upon parenting time was exercised. However, there was no fresh or new information between her agreement that the respondent have specified parenting time and that planned parenting time that would give rise to such a belief. The respondent had no contact with the Children in that period of time. Instead, the only intervening event between the agreement and the planned parenting time was the claimant's own contact with the MCFD which related to historic accounts of violence.
- [74] With respect to the alleged illness of the Children, even if they were ill, there is no evidence that it would not have been appropriate for them to have parenting time with the respondent in light of that illness.
- [75] The overall pattern of communications between December 9 and December 22, 2023 suggests that the claimant wrongly denied the respondent specified parenting time that had previously been agreed to between them. The chronology suggests that the claimant did not enter into the parenting time agreement in good faith. The claimant's communication with the respondent on December 23, 2023 was also not candid in the sense that she did not alert him to the existence of the Safety Plan which precluded his exercise of additional planned parenting time.

- [76] I accept that after December 22, 2023, there was a valid basis to deny parenting time (the Safety Plan); albeit, not the basis identified by the claimant in her communications to the respondent.
- (c) the nature and strength of the relationships between the child and significant persons in the child's life
- [77] Both parties depose that prior to separation they had a strong bond with the Children.
- [78] I am concerned that in the wake of the parties' separation the relationship between the respondent and the Children is being eroded by the complete lack of parenting time he has had with the Children in over a year.
- (d) the history of the child's care
- [79] Both parties claim to have been primarily responsible for the Children's day-to-day care prior to their separation.
- [80] The Children have been in the claimant's exclusive care since separation in May 2023.
- (e) the child's need for stability, given the child's age and stage of development
- [81] On an application for interim relief, caution is warranted and preserving the status quo is normally preferred absent a compelling reason to change: *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403 at paras. 22-24.
- [82] However, situations that have been unreasonably or unilaterally created by one party to the detriment of the other, to create a tactical advantage, do not give rise to a new "status quo": *T.T. v. S.Z.T.*, 2020 BCSC 1628.
- [83] In this case, the June 2023 Order was obtained by the claimant by failing to disclose material facts to the Court. That material failure to disclose is the reason the June 2023 Order was vacated. It is unfortunate that the claimant's lack of candor with the Court was not addressed for several months, until November 2023. At that time costs were ordered against the claimant in any event of the cause.
- [84] In December 2023, the parties reached an interim without prejudice agreement for the respondent to exercise parenting time. As I have set out above, the claimant wrongly denied the respondent parenting time between December 9 and December 22, 2023.
- [85] I do not find that the parenting arrangement that prevailed between June and December 2023, gave rise to a new status quo. Unfortunately, that parenting arrangement prevailed because of the claimant's actions including material non-disclosure to the Court.
- [86] The MCFD then became involved for a second time at the end of December 2023 and a Safety Plan was put in place. The parenting arrangement that prevailed between December 2023 and June 2024 complied with that Safety Plan. It was not the unilateral creation of the claimant.

- [87] However, the MCFD closed their file in July 2024. There is no parenting time order yet in place and yet the respondent has still not had any parenting time.
- [88] I am concerned that the parties' inaction may be dragging this interim period out. Although an order has been in place since May 2024 in respect of obtaining a s. 211 report, the parties have not yet done so. Although they agree a counsellor for the Children is desirable, they have also not retained one. They have not yet set a trial date. In these circumstances, I do not find that the need for stability argues in favour of either party having exclusive parenting time or responsibilities until some future unknown date. It does argue in favour of a graduated move to shared parenting time.
- (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 the person's responsibilities
- [89] If given an opportunity to exercise parenting responsibilities, I am satisfied that both parties are able to do so.
- [90] I am concerned that up until this time, the claimant has not exercised her own parental authority to encourage or compel the Children to attend parenting time with the respondent. With the exception of the period of time in which the Safety Plan was in place, that is not appropriate given the age of the Children.
- (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
- [91] Allegations of family violence are raised in this proceeding.
- [92] The definition of "family violence" in the FLA is:
- "family violence" includes, with or without an intent to harm a family member,
- (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,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (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;

[93] I must consider the allegations of family violence in light of the factors set out in s. 38 of the FLA:

(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.

[94] The allegations of family violence include the following:

a) The claimant alleges that throughout the relationship the respondent subjected her to physical, verbal, sexual and mental abuse. She alleges some of this abuse occurred in front of the Children. She also alleges he physically assaulted the Children many times. She says she did not report these instances of abuse when they happened because she feared it would get worse.

b) The respondent alleges that throughout the relationship the claimant physically hit the Children on several occasions including slapping them on their faces and subjecting them to aggressive verbal tirades, scolding, and swearing.

c) The claimant alleges that on May 14, 2023, she was preparing breakfast. She says the parties got into a dispute and the respondent burned her hand with a hot pan. When she first reported the Incident to the police, she stated that she was unsure whether the respondent's actions were intentional. In a later statement, she said his actions were intentional. She alleges that after the burn, she bit the respondent to get away and called the police. She says this incident occurred in front of the Children. In her various accounts of this incident as reported to police, the MCFD and in her affidavits, the claimant's description of the Incident varies. She says these variations can be explained by the trauma that recounting the incident causes her, her nervousness, and her feelings of being overwhelmed.

- d) The respondent says the claimant's versions of events in respect of the Incident are grossly mischaracterized, misrepresented and/or completely untrue. He alleges that the claimant would often be aggressive towards him without cause near the end of their relationship. He says that on the occasion of the Incident, he was in the kitchen making breakfast and she abruptly and angrily entered and started yelling at him. He lifted the cooking pan and she began screaming and yelling and he hurriedly tried to finish. She tried to grab the pan and then leaned down and bit his arm. He says the burn was self-inflicted.
 - e) Each party denies the allegations of violence raised by the other.
 - f) The Children were interviewed by MCFD in January 2024 and reported that the respondent had been physically violent with them and with the claimant. The respondent denies this.
- [95] I am not able to resolve the conflict in the evidence in respect of family violence by either party on the basis of the record before me.
- [96] As noted, both parties allege that the other has been physically and verbally violent towards the Children on occasion throughout the course of their relationship. Each party also alleges that the other has been physically and verbally violent towards them during the course of the relationship. Based on the record before me, it does appear that the parties had a somewhat volatile relationship, at least at the end of the relationship.
- [97] In 2024, the respondent completed the "Domestic Violence Intervention Program Caring Dad's Group".
- [98] I am satisfied that these competing allegations are a reason to engage the services of a counsellor to protect the Children's psychological safety. I do not find that any of the allegations are so serious that either party should be deprived of all parenting time or responsibilities while they arrange for a s. 211 report, counselling or the trial all of which may not occur for several months.
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs
- [99] There is no evidence before me that suggests that the actions of either party indicate they are unable to care for the Children or meet their needs. Indeed, both parties agreed to the other exercising parenting time as recently as December 2023 and there have been no additional actions or allegations of family violence since that time.
- (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

[100] The parties seem unable to cooperate on issues affecting the Children. This inability or unwillingness to cooperate is not a valid basis to deprive either party of parenting time with or parenting responsibilities for the Children. It is a reason to make a structured order so that they both parties understand their obligations to the Children and may exercise parenting time and responsibilities in light of those obligations.

(i) any civil or criminal proceeding relevant to the child's safety, security or well-being

[101] There are no other civil or criminal proceedings relevant to the Children's safety, security or well-being.

Parenting Responsibilities

[102] The parties will share equally all of the s. 41 parental responsibilities for the Children under s. 40(2) of the FLA.

Parenting Time

[103] The respondent recognizes that given it has been over a year since he has exercised parenting time with the Children, a graduated return to shared parenting is in their best interests.

[104] After Labour Day, the respondent will have the following parenting time for the month of September:

- a) Tuesday and Thursday from 6:30 PM to 8:30 PM.
- b) Saturday from 2:00 PM to 6:00 PM.
- c) Such other parenting time as agreed to between the parties or directed by the parenting coordinator.

[105] Starting October 1, 2024:

- a) Tuesday and Thursday from 6:30 PM to 8:30 PM.
- b) Every other weekend from Friday at 6:30 PM to Sunday at 8:00 PM.
- c) Such other parenting time as agreed to between the parties or directed by the parenting coordinator.

[106] Starting November 4, 2024, equal parenting time on a week-on/week-off basis or as otherwise agreed between the parties.

[107] The claimant's request that the respondent's parenting arrangements be automatically reviewed upon completion of the s. 211 report is dismissed. Either party may apply to vary the parenting arrangements in the event there is a material change in circumstances.

Respondent's Application for Compensation for Breach of November 2023 Order

- [108] The respondent seeks an order pursuant to ss. 228 and 230 of the FLA requiring the claimant to pay to the respondent \$5,000 plus legal fees as a result of the claimant's alleged non-compliance with the November 2023 Order.
- [109] He further seeks orders that he be compensated pursuant to s. 61(2)(d) and (g) for wrongful denial of his parenting time in December 2023.
- [110] The alleged breach of the November 2023 Order is said to arise from fresh, false allegations made by the claimant to the MCFD. The respondent says as a result of these allegations he was forced to sign the Safety Plan and this prevented him from moving back into the Home or seeing the Children without the approval of a social worker.
- [111] I am not able to resolve, on this application, whether or not the allegations made by the claimant to the MCFD were true or false. There was nothing in the November 2023 Order that prevented the claimant from contacting the MCFD. As the MCFD records show, the claimant had been advised to contact them should her circumstances change. The fact that the respondent signed a Safety Plan is also no basis to conclude that the claimant breached the November 2023 Order. This aspect of the application is dismissed.
- [112] The November 2023 Order did not address parenting time but the parties reached an agreement through counsel that did. I have found that the claimant's denial of the respondent's parenting time was wrongful between December 9 and December 22, 2023. It was not, however, wrongful after the re-involvement of the MCFD on December 22, 2023. There is no evidence before me of what specific expenses, if any, the respondent incurred as a result of these wrongful denials.
- [113] As I have noted, there has not yet been any order for parenting time imposed by the Court. The claimant also had some unresolved issues with the MCFD. In light of all of that, I am not satisfied that the circumstances that exist to date justify an order for payment of \$5,000 (or any other amount) for the benefit of the Children, as sought by the respondent under s. 61(2)(g) of the FLA. It is expected that the parties will comply with the orders made by this Court moving forward.
- [114] The respondent's application for relief pursuant to ss. 61(2), 228 and 230 of the FLA is dismissed.

Counselling

- [115] As noted above, the parties agree that the Children should be enrolled in counselling.
- [116] The parties will share equally the cost of individual counselling for the Children.
- [117] The parties have been unable to agree on the identity of a counsellor. Unfortunately, the record presented on this application is insufficient for this Court to assist the parties by selecting a counsellor.

[118] I am directing each party to send to the other the names of three counsellors for the Children. If the parties are unable to agree on the identity of the counsellor, the parties are at liberty to apply to the Court for a determination of that issue upon a proper evidentiary record which must include with respect to each proposed counsellor, at least: their name, their credentials, their areas of practice, their availability and their cost.

Costs

[119] The respondent has been substantially successful and will have his costs of both applications in the cause.

"Latimer J."

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