
CANADA / JUDGMENT

B.K. v. J.B.

2018 BCSC 2290

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Supreme Court of British Columbia

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2018 BCSC 2290 B.K. v. J.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.K. v. J.B.,

2018 BCSC 2290

Date: 20181221

Docket: E132511

Registry: Vancouver

Between:

B.K.

Claimant

And

J.B.

Respondent

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

Counsel for the Claimant:

D. Montgomery

Counsel for the Respondent:

S.R. Bunn

Place and Date of Trial/Hearing:

New Westminster, B.C.

September 13, 2018

Place and Date of Judgment:

New Westminster, B.C.

December 21, 2018

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OVERVIEW

- [1] The central issue in this application is parenting time with D., who is now 7 years old. D. is the only child of the claimant, B.K., and the respondent, J.B., who were in a two-and-a-half year common law relationship which ended in August 2013. D. lives with his mother in Vancouver. D.'s father, J.B., lives in Calgary, Alberta, and travels regularly to see D. for parenting time in accordance with the order of Madam Justice Iyer pronounced on August 21, 2017 (the "2017 Order").
- [2] In this application, J.B. seeks to vary the 2017 Order to allow increased parenting time, including overnight stays, and the right to take D. outside of British Columbia during his parenting time.

ORDERS SOUGHT

- [3] This Notice of Application ("NOA") was filed on February 14, 2018, nearly six months after the 2017 Order was made. In it, Mr. B. seeks the following orders:
1. That the Order granted by the Honourable Madame Justice Iyer, on August 21, 2017, and filed October 10, 2017, be amended or varied.
 2. In the alternative, that the Order granted by the Honourable Madam Justice Iyer on August 21, 2017, and filed October 10, 2017, be set aside, and that the matter be set for hearing before Madame Justice Iyer with respect to the terms of that Order.
 3. In the further alternative, that the Order granted by the Honourable Madam Justice Iyer on August 21, 2017 and filed October 10, 2017, be set aside, and that the matter be set for hearing before a Justice of the Supreme Court.
 4. An Order granting leave to bring this application, should leave be necessary.
 5. Under the FLA, the Applicant, [J.B.], can exercise overnight parenting time with [D.] on nights during his parenting time if [D.] does not have school the following day ('Non-School Night').
 6. The Applicant's overnight parenting time with [D.] is to be integrated gradually on the following schedule:
 - a. The Applicant is to have extended parenting time on Non-School Nights until 6:30pm during the first 2 periods of parenting time after the granting of this Order.
 - b. The Applicant is to have overnight parenting time with [D.] each Saturday night during the 3 periods of parenting time following those set out in 6(a) above.
 - c. Thereafter, the Applicant is to have overnight parenting time on each and every Non-School Night during his parenting time.

7. On the final day of the Applicant's parenting time, the Applicant will return [D.B.] to the Claimant, [B.K.], at:
 - a. 5:00pm on any day preceding a school day, or
 - b. 6:30pm on any Non-School Night.
8. Upon request, the Applicant is to have parenting time on any Professional Development Day, or other school holiday attached to a weekend where the Applicant is exercising parenting time.
9. Under the FLA, the parties will share parenting time equally on school holidays, including Christmas, Easter, Thanksgiving, and during the summer holiday.
10. Under the FLA, the Applicant can exercise parenting time with [D.] from 3p.m. to 5p.m. on school nights, or from 3p.m. to 6:30p.m. on Non-School Nights, as agreed between the parties.
11. Under the FLA, the Applicant is free to initiate Facetime or telephone contact with [D.], provided such contact is not unreasonable or excessive.
12. Under the FLA, the Applicant may attend any of [D.]'s personal, school, or extra-curricular events or activities occurring outside his parenting time, including volunteering at any such events or activities, upon providing two weeks' advance notice to the Claimant. Where 2 weeks notice is not possible, the Applicant must provide the Claimant with such other notice as is reasonable in the circumstances.
13. The Applicant is able to take [D.] outside of the Province of British Columbia during his parenting time.
14. Under 40(2) of the FLA, the Applicant can reasonably request of the Claimant, and the Claimant is to provide, information on [D.]'s health, dental care, mental and emotional care, education, birthday parties, and events.
15. Under the FLA, the Applicant can attend at [D.]'s school upon the provision of 1 week's prior notice to the Claimant.
16. The Applicant is not required to provide his address to the Claimant during his parenting time.
17. The Claimant is not to unreasonably deny reasonable requests for parenting time.
- [4] Ms. K. opposes all of the orders sought.
- [5] Counsel for Mr. B. advised the Court at the hearing of this application that he is no longer seeking the orders set out in paragraphs 2 and 3 above.

ISSUES

- [6] This application raises the following issues:
1. whether the respondent requires leave to bring this application, and if so, whether leave should be granted;
 2. whether the applicant has shown a material change in circumstances or new evidence of a substantial nature; and
 3. whether it is in the best interests of D. to grant the orders sought.

BACKGROUND

- [7] In the five years since the parties' separation, this is the third application made by Mr. B. seeking increased parenting time, overnight stays with D., and travel with D. outside of British Columbia.
- [8] On January 5, 2015, the parties attended a judicial case conference before Madam Justice Gerow (the "JCC"). At the JCC, the parties consented to an order which, amongst other things, provided for Mr. B. to have parenting time on one week's notice at least once per month for up to three consecutive daytime visits, with further parenting time as agreed to by the parties (the "JCC Order").
- [9] In June 2015, Mr. B. sought to vary the JCC Order. The matter was heard by Madam Justice Holmes (as she then was) and her reasons for judgment are indexed at B.K. v. J.B., 2015 BCSC 1481. At the June 2015 hearing, Mr. B. sought a variation of the JCC Order to provide explicitly for overnight parenting time during the three-day periods. He also sought orders to permit him to take D. outside of British Columbia, and to modify the times for his Skype visits because of a change in his work schedule: B.K. v. J.B. at para. 2.
- [10] Madam Justice Holmes granted Mr. B.'s application to vary the JCC Order to change one of the days and the times of his Skype parenting time during the week, but dismissed Mr. B.'s application for overnight parenting time and declined to permit him to take D. outside of British Columbia (the "2015 Order").
- [11] In July 2017, the parties appeared before Madam Justice Iyer. Mr. B. sought 13 orders, primarily seeking longer parenting time on weekends and during school holidays, overnight parenting time, authorization to take D. to Calgary for regular parenting time, and direct contact with D. through FaceTime rather than Skype. At the same hearing, Ms. K. sought 29 orders. Amongst other things, she sought details of Mr. B.'s parenting time with D., the granting of all parental responsibilities for D. to herself, orders relating to financial matters and document disclosure, as well as orders relating to Mr. B.'s interactions with Ms. K.

- [12] Madam Justice Iyer dismissed Mr. B.'s application to vary the 2015 Order with respect to overnight parenting time and his ability to take D. outside of British Columbia. However, she allowed Ms. K.'s application in part to vary the 2015 Order with respect to Mr. B.'s Skype time with D.
- [13] Madam Justice Iyer varied the JCC Order by permitting Mr. B. to exercise parenting time with D.:
- a) on weekends (which may include statutory holidays falling on a Monday or Friday if Mr. B. gives advance notice that he wants those days) from 9:00 a.m. to 5:00 p.m., up to twice per month, upon one week's advance notice to Ms. K.;
 - b) up to five consecutive days during the Christmas and spring breaks from 9:00 a.m. to 6:30 p.m., upon two months' advance notice; and
 - c) in the summer, "two periods of visits of up to seven consecutive days upon two months' advance notice, from 9:00 a.m. to 6:30 p.m., taken between July 1 and August 20".
- [14] The 2017 Order was an interim order, not a final order, as Madam Justice Iyer confirmed by an order of her own motion (*ex mero motu*) dated May 23, 2018.

IS LEAVE REQUIRED?

- [15] Mr. B.'s failure to make full and timely financial disclosure to Ms. K. resulted in the following order being made at para. 18 of the 2017 Order (the "Leave Order"):
18. Pursuant to s. 221(1) of the Family Law Act, Mr. [B.] shall not make any further applications or otherwise continue this proceeding without leave of the court, until he has made full financial disclosure and paid Ms. [K.] the \$1,900 owed to her.
- [16] In her Oral Reasons for Judgment dated August 21, 2017 (the "2017 Decision"), Madam Justice Iyer set out two primary reasons for requiring Mr. B. to seek leave prior to making any further applications. First, Mr. B. had failed to pay Ms. K. \$900 in outstanding costs ordered against Mr. B. by Madam Justice Holmes (see *B.K. v. J.B.* at para. 67). Second, Mr. B. had failed to provide full financial disclosure to Ms. K. causing Madam Justice Iyer to impose a further penalty of \$1,000 pursuant to s. 213(2)(d)(ii) of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [17] The parties disagree about how to interpret the Leave Order, and whether Mr. B. has satisfied its requirements. The interpretive disagreement is whether the requirements to make full financial disclosure and pay Ms. K. the \$1,900 (the "Conditions") are requirements for granting leave or for dispensing with leave altogether.
- [18] Mr. B. argues that he may seek leave to bring this application regardless of whether he has satisfied the Conditions. Mr. B. submits that if he satisfies the Conditions, he does not require leave at all. In any event, Mr. B. says that he has satisfied, or at least substantially satisfied, the Conditions.

- [19] Ms. K. argues that Mr. B. requires leave to bring this application, which can only be granted once the Conditions have been met. Ms. K. submits that Mr. B. has not satisfied the Conditions, and that therefore Mr. B. is barred from bringing this application.
- [20] A plain reading of the Leave Order indicates that leave is only required in the event that Mr. B. has not satisfied the Conditions. Once the Conditions are satisfied, the requirement to seek leave prior to the filing of any further applications, or to otherwise continue the proceeding, ceases. This interpretation is also consistent with s. 221(2)(a)(ii) of the FLA.
- [21] Section 221 of the FLA provides as follows:

Misuse of court process

221 (1) A court may make an order prohibiting a party from making further applications or continuing a proceeding without leave of the court if satisfied that the party

- (a) has made an application that is trivial,
 - (b) is conducting a proceeding in a manner that is a misuse of the court process, or
 - (c) is otherwise acting in a manner that frustrates or misuses the court process.
- (2) If an order is made under subsection (1), the court may do one or more of the following:
- (a) make the order apply
 - (i) for a specified period of time, or
 - (ii) until the party has complied with an order made under this Act;

[22] On the evidence before me, I find that Mr. B. has met the Conditions required in the Leave Order.

[23] First, Ms. K. admits that Mr. B. has paid her the \$1,900 "as of approximately December 18, 2017."

[24] Second, though disclosure issues have been ongoing, I find that Mr. B. has provided sufficient disclosure to satisfy the requirement in the Leave Order. The evidence indicates that, sometime following the 2017 Order, Mr. B. provided several packages of disclosure. Ms. K. took the position that the disclosure was incomplete and inadequate. Counsel for Mr. B. then addressed Ms. K.'s concerns by pointing out where in the disclosure she could find certain information. Counsel for Mr. B. also explained why certain documents were simply not available.

[25] I am satisfied that Mr. B. has complied with the requirement to make financial disclosure as contemplated by Madam Justice Iyer.

- [26] I do not read the Leave Order as requiring Mr. B. to provide disclosure on a continuous basis, or to the complete satisfaction of Ms. K. Otherwise, the terms of the Leave Order would never be satisfied as long as the parties remained in litigation or remained at an impasse where one party insists on production of documents which the opposing party says they are unable to produce.
- [27] If Ms. K. believes that there are still further documents that need to be produced by Mr. B., there are other avenues available to her in the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR]. For the purposes of considering whether Mr. B. has met the Conditions in the Leave Order, I find that he has. As such, Mr. B. does not require leave to bring this application.
- [28] I turn now to the substantive matters before me.

PARENTING TIME

- [29] Of the orders sought in this application, paragraphs 5-13 were all addressed by Madam Justice Iyer at the hearing resulting in the 2017 Order. Paragraph 16 seeks to vary paragraph 3 of the JCC Order. Paragraphs 14, 15, and 17 are new in that neither party sought these orders at the hearing before Madam Justice Iyer.

LEGAL FRAMEWORK

- [30] By seeking the orders set out in paragraphs 5-13 of Part 1 of the NOA, Mr. B. seeks to vary the current parenting regime as set out in paragraphs 1-5 of the 2017 Order. To do so, Mr. B. must satisfy the requirements of s. 216 of the FLA, which sets out the test for variation of an interim parenting order.
- [31] The 2017 Order was an interim order. Interim orders are "primarily designed to maintain the status quo and to provide short-term solutions until issues regarding the best interests of a child can be fully canvassed at trial": *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403 at para. 22.
- [32] The test for varying an interim order is set out in s. 216 of the FLA, which provides in relevant part as follows:
- (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).

- [33] Madam Justice Holmes set out the proper approach to s. 216 in *B.K. v. J.B.* at paras. 28-34. The analysis begins with the assumption that the order the applicant seeks to vary reflected the best interests of the child. The analysis then proceeds in two stages.
- [34] At the first stage, the applicant must pass the threshold of establishing a material change in circumstances or new evidence, as required by s. 216(3) of the FLA. A change will not be material "unless it relates to the child's best interests": *B.K. v. J.B.* at para. 32. A material change is one that "was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order": *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 13.
- [35] At the second stage, the court must consider whether the variation order should be granted, having regard to the factors set out in s. 216(4) of the FLA. The factors in s. 37(2) of the FLA, which are to be considered in determining the best interests of the child, "permeate" the analysis under s. 216(4): *B.K. v. J.B.* at para. 30.
- [36] Section 37(1) of the FLA provides that in making an order respecting parenting arrangements or contact with a child, "the parties and the court must consider the best interests of the child only." Section 37(2) sets out a number of factors to be considered in determining the best interests of a child.

POSITIONS OF THE PARTIES

- [37] Mr. B. submits that the relevant time period for determining whether there has been a material change of circumstances or evidence as required by s. 216(3) of the FLA starts from the JCC Order (January 5, 2015) as opposed to the 2017 Order (August 21, 2017). Regardless of the starting point of the analysis, Mr. B. argues that there has been a material change of both circumstances and evidence. Specifically, at paragraph 25 of Part 2 of the NOA, he states:
25. [D.] has experienced changed circumstances since the matter was heard on July 21, 2017, on factors which were material to the decision made by Madame Justice Iyer, including that:
- a. He is no longer experiencing any school refusal.

- b. He is a happy and productive student, and his school performance is strong.
- c. He is no longer attending Play Therapy.

[38] With respect to the latter, Mr. B. alleges that Ms. K. withheld information from the court relating to D.'s play therapy and school refusal. According to Mr. B., this evidence suggests that D. was doing much better than Madam Justice Iyer was led to believe and that, had Madam Justice Iyer been aware of this fact, it is unlikely that she would have denied the orders sought by him at the 2017 hearing.

[39] Finally, Mr. B. argues that, having regard to the factors set out in s. 216(4) of the FLA, it is in the best interests of D. for the court to grant the parenting orders sought.

[40] Ms. K. submits that there has not been a material change of circumstances or new evidence such that the 2017 Order should be varied. She submits that Mr. B. is essentially re-arguing the application that was before Madam Justice Iyer. Further, she argues that granting the orders sought would not be in the best interests of D. Although Ms. K. supports D.'s relationship with Mr. B., Ms. K. argues that Mr. B. should not be granted overnight visits at this time. Ms. K. alleges that Mr. B. is violent, causes D. to have anxiety and episodes of cyclical vomiting syndrome ("CVS"), does not have suitable overnight accommodations in Vancouver, and is generally not yet capable of properly caring for D.

MATERIAL CHANGE & NEW EVIDENCE

[41] I disagree with Mr. B. that the relevant time period for the material change analysis for all of the orders sought starts from the JCC Order. "A function of the material change threshold is to prevent parties from re-litigating issues that were already considered and rejected": *Dedes v. Dedes*, 2015 BCCA 194 at para. 25 citing *Gordon* at para. 15. In the 2017 Decision, Madam Justice Iyer considered and rejected Mr. B.'s application for overnight visits and travel with D. to Alberta. Any variation of the 2017 Order must therefore be based on any new facts or evidence which have emerged since the 2017 Order.

[42] One of the factors central to Madam Justice Iyer's decision to deny Mr. B. overnight visits and travel with D. to Alberta was D.'s difficulties in adjusting to kindergarten ("school refusal"). D. was enrolled in kindergarten in September 2016, but struggled increasingly with school refusal in early 2017. Ms. K. removed D. from kindergarten, and returned him to preschool in March 2017. D. was about to start kindergarten again in September 2017, a few weeks following the 2017 Order. Madam Justice Iyer found it reasonable to assume that the return to kindergarten would be "stressful" for D. (para. 21). Adding overnight visits and trips to Alberta would be a "significant change" for D., which Madam Justice Iyer found was not in his best interests at the time (para. 21).

[43] Also relevant to Madam Justice Iyer's decision to refuse overnight visits and out-of-province travel was that Mr. B. had not provided a "realistic transition plan" (para. 22). To address this concern, Mr. B. has provided a transition plan on this application.

Progress at School

[44] Mr. B. submits that there has been a material change of circumstances since the 2017 Decision such that D. is no longer experiencing school refusal, and is doing well at school.

[45] The evidence establishes that D. did better than expected upon returning to school in the fall of 2017. D.'s progress at school is confirmed by emails sent to Mr. B. from D.'s teacher. One email sent to Mr. B. on November 8, 2017 reads in relevant part as follows (D.'s teacher responds to Mr. B.'s questions in the underlined text):

How is [D.] progressing? - Great! I'm happy to have him in my class. We learn a letter a week! We are on letter f this week. He is learning patterns right now for math.

Has he had any anxiety or school refusal? - None at all, he loves coming to school every day! I always see a big smile and "Hi Ms. Lui" from him.

Is he on par with where he should be? - Yes, he is! =) I have no concerns with his learning.

Is he excelling in any areas? - He is a great role model for the class because he is able to teach others how to share toys in class. As well, he loves all aspects of school. He is a great listener too.

[46] In a further email dated April 2, 2018, D.'s teacher provides another positive report:

[D.] is doing very well in my class! He enjoys coming to school with no refusal and is friendly with all classmates! He loves participating and is socializing as what should be expected. He loves being Funky Monkey and is always so excited when it's close to his turn again. [D.] also knows the rules of the class and school well so definitely is an [sic] role model to our class. He is currently learning/finishing up on the salmon life cycle and enjoys it very much!

[47] Counsel for Ms. K. did not object to these emails being relied on as evidence at the hearing, which was proper because the emails are admissible under Rule 10-4(13) of the SCFR.

[48] Ms. K. does not seriously dispute D.'s progress at school. Ms. K. deposes that D.'s feelings about school "are still fragile at times", and that D. "has occasionally shown some resistance to attending school", particularly after weekends with Mr. B. However, Ms. K. agrees that D. "is doing very well academically and socially at school."

Play Therapy

[49] Mr. B. also submits that evidence of a substantial nature related to the school refusal has come to light, evidence which was not disclosed by Ms. K. to Madam Justice Iyer.

[50] In support of her contention that D. was experiencing school refusal, Ms. K. led evidence at the 2017 hearing that D. required play therapy to address these concerns. In her affidavit made June 27, 2017, Ms. K. stated that in late 2015 she proposed that D. attend play therapy, but Mr. B. refused to consent. As Ms. K. explained at paragraph 234 of her June 27, 2017 affidavit, D. ultimately began play therapy in May 2017:

It has taken nearly two years of requests, large amounts of correspondence, suggestions of various therapists, extreme school refusal behaviour, and a pediatrician's support for [Mr. B.] to finally consent to therapy for [D]. He began seeing Liliana Cortes May 20, 2017. [Mr. B.] was included in the initial parent goal setting session prior to this by conference call.

- [51] What Ms. K. did not say in her affidavit, nor in any submissions made by her counsel to Madam Justice Iyer, was that around March 2017 D. had started play therapy sessions at PEACE play therapy, at a frequency of approximately one session per week. Thus, by the time of the 2017 hearing, D. had already attended approximately 20 sessions at PEACE play therapy. However, the only sessions reported by Ms. K. to the court were the three sessions attended by D. with Ms. Cortes, on May 20, June 5, and July 10, 2017.
- [52] Ms. K. never disclosed to Mr. B. or the court that D. was attending play therapy sessions at PEACE. Mr. B. only learned of this in March 2018, through Ms. K.'s affidavit made March 6, 2018.
- [53] Mr. B. argues that the fact that Ms. K. decided in August 2017 to discontinue play therapy with Ms. Cortes altogether is an indication that she was aware that D. was unlikely to experience further school refusal. But instead of disclosing this, she misled the court into believing that D. would have significant difficulties adjusting to school, which was a significant factor in the court denying Mr. B. overnight parenting time or out-of-province trips with D.
- [54] Counsel for Ms. K. essentially concedes that evidence regarding D.'s play therapy had not been disclosed to the court in 2017. Ms. K. provides no satisfactory explanation for her failure to disclose this material information to Madam Justice Iyer. Instead, Ms. Montgomery simply submits that Ms. K. had been ill-served by prior counsel and that Ms. K. should not be blamed for that.
- [55] Even if I were to accept Ms. K.'s contention that she was acting on the advice of her previous counsel, I find Ms. K.'s actions inexcusable. Ms. K. was aware when she swore her affidavit that it would be relied on by the court. Her decision not to disclose the treatment sessions at PEACE therapy was deliberate and tactical.
- [56] This information was material to the issues considered by Madam Justice Iyer, as it revealed that D. had much more support leading up to his transition back to school in September 2017 than the evidence put forth by the claimant.

Post-Hearing Conduct

- [57] Mr. B. also argues that there was improper conduct on the part of Ms. K. and her then counsel Ms. Law following the pronouncement of the 2017 Order. In his affidavit filed February 14, 2018,[1] Mr. B. sets out the events that transpired following the release of the 2017 Decision. Evidently, the parties were unable to agree to the terms of the order for entry. On September 29, 2017, Ms. Law wrote to Mr. Bunn, Mr. B.'s counsel, stating:

if you would like to settle the terms before Madam Justice Iyer, I would be happy to do so. Please provide your availability as to when you would like to appear before Madam Justice Iyer.

- [58] However, on October 3, 2017, Ms. Law changed her position and advised Mr. Bunn that she intended to proceed without his consent if he did not sign the order before the end of that day. Back-and-forth communication ensued between the parties with counsel for Mr. B. asking that the parties attend in court to settle the terms of the order, and counsel for Ms. K. threatening to enter the order unilaterally. Unbeknownst to Mr. B. or his counsel, on October 5, 2017, Ms. Law wrote to the court seeking to have the order entered without Mr. B.'s consent. Further, on October 6, 2017, Ms. K. directly wrote to the court asking that the order be entered. This letter contained new allegations from Ms. K. that Mr. B. had violated a court order on September 14, 2017.
- [59] On October 20, 2017, Ms. Law notified Mr. Bunn that the order had been filed. This resulted in a flurry of activity from counsel for the respondent to have the order, which had been incorrectly filed as a "final order", set aside. He was unsuccessful, although Madam Justice Iyer eventually corrected the order on her own motion to reflect that it was an interim rather than a final order.
- [60] Ms. Montgomery concedes that Ms. Law's and Ms. K.'s conduct in communicating with the court without notifying the respondent or his counsel was improper. However, she argues that this conduct was immaterial to the parenting orders sought to be varied in this application.
- [61] I agree with Ms. Montgomery. While the claimant's and her counsel's conduct is troubling, I am unable to conclude on the evidence that these improper communications had any material impact on the terms of the 2017 Order that was ultimately endorsed by Madam Justice Iyer and entered by the Registry. Indeed, there is nothing discernable from the affidavit evidence or submissions of counsel that sets out the difference between the terms of the order that Mr. B. was seeking to have entered, versus the terms which were ultimately entered.
- [62] I conclude that Mr. B. has satisfied the threshold under s. 216(3) of the FLA to show a material change in circumstances and evidence since the 2017 Order. I turn now to the best interests of D. as they relate to the analysis under both s. 216(3) and s. 216(4) of the FLA.

Best Interests of the Child

- [63] In refusing Mr. B.'s request for overnight parenting time and travel outside of British Columbia, Madam Justice Iyer provided the following reasons:
1. evidence of D. experiencing school refusal and the concomitant concern of overnight parenting time adding an additional stressor on D.;

2. Madam Justice Holmes' consideration of the evidence regarding an allegation and a denial of family violence, including the fact that she found no basis to disregard Ms. K.'s concerns;
3. the lack of reliable evidence about D. as opposed to his parents' conflicting perceptions of him;
4. the lack of an independent assessment of D.'s needs, including the lack of reports from D.'s physicians or therapists;
5. D.'s CVS and whether or not it is exacerbated by one or the other parent;
6. Mr. B.'s failure to provide any transition plan or schedule for commencement of overnight visits; and
7. the necessity of a successful transition to overnight visits being a precondition for an order permitting travel outside of British Columbia.

[64] I have already addressed the issue of school refusal.

[65] I turn next to the allegations of family violence.

Family Violence

[66] In concluding that D.'s request for overnight visits, the cessation of breastfeeding, and the passage of time, did not constitute a change of circumstances or new evidence that was material to D.'s best interests, Madam Justice Holmes noted the following at para. 46 of B.K. v. J.B.:

[46] This interim application is not the occasion for a consideration of whether or not the family violence took place as Ms. K. deposes - and I make no such finding concerning that matter. Nonetheless, the evidence gives some cause for concern that D. may have been affected in the way and for the reasons Ms. K. gives. In the larger context, this in turn diminishes the extent to which D.'s reported request for overnights with Mr. B., the end of breastfeeding, and the simple passage of time may be viewed as a material change in circumstances or new evidence of a substantial nature since the interim orders.

[67] Sections 37(2)(g) and (h) of the FLA specifically require the Court to consider family violence when assessing what is in the best interests of the child. Section 37(2)(h) has the added component of requiring the Court to look at the conduct of a person responsible for family violence. However, pursuant to s. 37(4), the Court may only consider a person's conduct when making an order respecting care and time with children when that person's conduct "substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor".

[68] The factors to consider when assessing family violence are set out in s. 38 of the FLA.

[69] There are two types of family violence alleged by Ms. K.: violence directed towards D. and violence directed towards herself.

[70] In *Leveque v. Leveque* (1983), 54 B.C.L.R. 164 (C.A.) (also known as *L. (B.J.) v. L. (E.J.)*), the Court dealt with an appeal by the father who was denied unsupervised access even though the trial judge had held that allegations of "sexual misbehaviour" had not been proven on a balance of probabilities. In allowing the father's appeal and remitting the matter for a rehearing, the Court held at 167:

When the welfare of children is concerned, the question is not so much whether specific allegations of misconduct with a third party have been proven, but whether on the whole of the evidence there arises a real risk to the children if access is given without protection against that risk. The degree of risk can only be determined by carefully weighing all the evidence, and that must necessarily involve the credibility of the witnesses and the judge's assessment of the character of the parties.

[71] In *N.D.T. v. T.F.T.*, 2016 BCSC 134 at para. 103, Mr. Justice Saunders adopted the approach set out in *Leveque* and related it to the best interests of the child principle found in s. 37(3) of the FLA:

[103] It has long been recognized, however, that in cases dealing with the well-being of children a court is not obliged to reach specific factual conclusions as to what has transpired while children have been in their parents' care, in making an order respecting parenting arrangements: see *Leveque v. Leveque*, (1983), 54 BCLR 164 (BCCA) at para. 13. This principle is recognized implicitly in [s. 37(3)] of the Family Law Act, which provides only that the best interests of a child be advanced through an order that protects a child's physical, psychological and emotional safety, security and well-being to the greatest possible extent. This wording contemplates that evidence in family cases is often of a type that may be only suggestive of the truth, and that resists specific conclusions being drawn

[72] In support of her opposition to Mr. B. having overnight parenting time, Ms. K. asserts that Mr. B. has a "propensity for nighttime violence". This she bases on her own (uncorroborated) experiences while the parties were together.

[73] Both parties agree that their common law relationship was beset by conflict. Ms. K. alleges that Mr. B. was physically and emotionally abusive toward her and D. While Mr. B. denies any abusive conduct towards D., he does acknowledge that some form of family violence did occur between himself and Ms. K. during the relationship, stating:

Although all that she says has embellished to the greatest degree, I have already acknowledged my wrong doings in sworn evidence to the courts. I have already taken responsibility for my actions and taken countless parenting courses as well as an Anger Management course at her request.

- [74] I am not in a position to, and need not, resolve these disputes about past family violence. The parties' relationship, and any family violence that occurred during it, is now dated. The parties separated in August 2013. Mr. B. lives in Alberta. Given their limited contact, it is highly unlikely that the toxic pre-separation dynamic between the parties will recur. Since the separation, Mr. B. has taken a number of steps to address concerns expressed by Ms. K., including completing an anger management program.
- [75] I give very little weight to Ms. K.'s evidence that Mr. B. was given a harassment warning by the police in December 2016. Her complaint to police was precipitated by Mr. B. attending at the lobby of the building to pick up D., rather than the top of the walkway, "sometimes lingering unnecessarily, holding the door open, and greeting [D.] unnecessarily loudly". Ms. K. found this to be "intentionally intimidating". I disagree with Ms. K.'s characterization of this incident. The incident at best was insignificant.
- [76] I turn then to the allegation of violence directed towards D.
- [77] Ms. K.'s characterization of D.'s exposure to family violence during the marriage is inconsistent and has changed over time. For example, in her Affidavit #3 (which is not relied upon on this application but is quoted in Mr. B.'s Affidavit #10, which is in evidence) Ms. K. alleged at paragraph 12: "He dropped [D.] carelessly without warning into my lap to nurse a while later (I was sitting, and [Mr. B.] was standing)." At paragraph 22, in the same affidavit, she stated: "He threw [D.] at me from a standing position to where I was lying in bed." In her Affidavit #9, Ms. K. alleged: "On two occasions when we were cohabiting, the Respondent threw [D.] across the room at me in anger when [D.] was an infant."
- [78] More recently, Ms. K. alleges that on August 12, 2018 Mr. B. injured D. by pulling on the neck of his hoodie, "yank[ing] him backward". This incident, and the ensuing events, are described by Ms. K. in paragraphs 23-31 of her Affidavit #9 made September 7, 2018:
23. On or about August 12, 2018, [D.] returned home from spending time with the Respondent [Mr. B.]. He had red marks on his neck. I asked [D.] what caused the marks. [D.] told me that on three separate occasions that day, the Respondent grabbed the neck of his hoodie jacket and yanked him backward in anger.
24. [D.] said that on one of these occasions the Respondent wanted him to share a Nerf gun toy with the Respondent's girlfriend [Ms. P.]'s nephew, [H]. [D.] said that the Respondent angrily yanked him by his hoodie and then restrained him tightly by the neck of his hoodie until [D.] gave the toy to the Respondent "nicely".
25. [D.]'s words rang true for me. Much of the abuse the Respondent directed toward me involved choking, restraining and pulling my hair and clothing. [D.] was afraid, crying and pale as he told me about his day.

26. I immediately took him to the University of British Columbia Urgent Care Clinic as it was Sunday evening. Dr. Anthony examined [D.] I was present during this examination. Dr. Anthony asked [D.] directly to explain what happened.
 27. [D.] told Dr. Anthony the same thing [D.] told me. Attached to this my affidavit as Exhibit "H" are true copies of medical reports from UBC Urgent Care Clinic from August 12, 2018 and a photograph of [D.]'s injuries taken on August 12, 2018.
 28. I reported this to the Ministry of Children and Family Development on August 15, 2018.
 29. I also reported to the Vancouver Police Department on August 25, 2018.
 30. [D.] met with a police officer on August 25, 2018 and told the police officer the same thing he had told me and Dr. Anthony: that the Respondent had yanked him by the neck of his hoodie on three separate occasions.
 31. The police and MCFD are currently investigating.
- [79] Mr. B. provides the following response in his Affidavit #9, made August 29, 2018:
17. On August 25, 2018 I received a call from the Vancouver police. They told me, and I believed them when they did, that [Ms. K.] had filed a complaint against me alleging that I had abused [D.] on August 12, 2018. The police informed me that the complaint was based on a comment by [D.] to his mother that I had pulled his hoodie in the park and on red marks on [D.]'s neck.
 18. On August 12, 2018 [D., H., Ms. P.,] and I went to a Vancouver park and had a barbeque. The boys were playing, as six year olds will do. It was a beautiful day, and there were hundreds of people in the park. [D.] wasn't paying attention and got too close to the burning barbeque, so I reached out, grabbed his hoodie, and pulled him back from the barbeque.
 19. During the same trip, when we were in our vehicle, [D.] complained that the seat belt was too tight. We looked at it and it was causing him discomfort, and [D.] asked me to buy one of "those fuzzy things" to cover the seat belt. We adjusted the seatbelt the best we could, but noticed at [sic] that it had left some very minor red marks on his neck.
- [80] J.P., Mr. B.'s current partner, corroborates Mr. B.'s account of this incident, and notes that the car seat that D. was using had been recently purchased.
- [81] Ms. K. asserts that D. has been using the same car seat for over a year. However, this evidence is not credible. Ms. K.'s evidence indicates she minimized her interaction with Mr. B. during exchanges. It is not plausible that she would have gotten close enough to Mr. B.'s vehicle to know that D. was using the same car seat over the years. Indeed, the 2017 Order stipulates that Ms. K. is to stay inside her residence during the exchanges.
- [82] I also find it implausible that the incident as described by Ms. K. would cause the red mark on D.'s neck.

- [83] The placement of the seatbelt depicted in a photograph of D. taken prior to the alleged incident, as well as a photograph of the location, size and dimensions of the red mark on D.'s neck, are consistent with the evidence of Mr. B.
- [84] Given my significant concerns about Ms. K.'s credibility, I am unable to rely on her assertion that the Ministry and the police are investigating the August 12, 2018, incident. No Ministry file number is given and no Ministry file has been produced. While Mr. B. admits that he was contacted by the police in relation to this incident, there is no credible evidence that the police investigation is ongoing.
- [85] Ms. K.'s account that Mr. B. yanked D. by the neck of his hoodie on three separate occasions is also suspect given the timing of the allegation, which was made only weeks before the hearing of this application.
- [86] I also reject Ms. K.'s allegation that Mr. B. is driving while impaired during his parenting time with D. The allegation is based on speculation arising from D. purportedly reporting to Ms. K. that Mr. B. has a bottle of mouthwash in his vehicle, and D. asking his mother what a "Mexican Bulldog" drink is.
- [87] Having regard to all of the evidence and allegations of family violence, I find that D. is not at real risk of harm if Mr. B. is permitted to have overnight parenting time with D.

D.'s CVS Episodes

- [88] It is common ground that D. was diagnosed with CVS in 2016. The parties agree that on April 12, 2017, D.'s pediatrician, Dr. Vuksic, advised them by tele-conference that the CVS is well-controlled by medication. Stress is the main trigger.
- [89] However, Ms. K.'s characterization of D. (in the words of her counsel) as being "one fragile sick boy" is not supported by the minimal medical evidence provided.
- [90] Ms. K. asserts that the CVS episodes occur mostly at night, are exacerbated by contact with Mr. B., and that Mr. B. is unable to provide proper care for D. when he is experiencing a CVS episode.
- [91] It is Ms. K.'s evidence that between February 15, 2018 and August 15, 2018, D. experienced 13 episodes of CVS, 12 of which are correlated to visits with Mr. B. Ms. K. says that the CVS episodes occur "during or just after the Respondent's parenting time." However, at the hearing, counsel for Ms. K. acknowledged that all of the CVS episodes occurred while D. was in Ms. K.'s care. Only two episodes occurred during the night.
- [92] Mr. B. says that Ms. K.'s concerns about the severity of the CVS are exaggerated, and points to her consistent failure to send D.'s medication for CVS with D. during his parenting time visits.

- [93] Based on the evidence, it is equally logical to infer that Ms. K. is the cause of D.'s episodes because the episodes have all occurred in her care.
- [94] Mr. B. and J.P. aver that they have educated themselves about CVS. Mr. B. argues that one party's lack of experience for caring for the needs of the child is not a valid ground to deny parenting time: *M.F.N. v. J.M.Y.N.*, 2012 BCSC 1033.
- [95] The only medical evidence regarding D.'s CVS is that it is well-controlled with medication and can be triggered by stress. Ms. K. acknowledges that D. should outgrow the CVS in a few years. There is no doubt that the high conflict nature of the parties' relationship is likely a significant trigger for D.'s CVS episodes. As such, it is important to set up a parenting regime that will minimize the conflict.

D.'s Relationship with Mr. B.

- [96] The parties provide conflicting evidence on D.'s relationship with Mr. B., and Mr. B.'s ability to care for D.
- [97] Ms. K. makes a myriad of complaints about Mr. B.'s parenting. These range from forgetting D.'s stuffed bunny, to telling a scary Easter story, to forcing D. to ride his bike without training wheels, to dropping off D.'s birthday present at his school unannounced. These allegations are marred by internal inconsistencies in Ms. K.'s affidavits and are not supported by the other evidence in this case.
- [98] For example, Ms. K.'s allegation that D. does not wish to see Mr. B. is contradicted by her account that D. sometimes goes happily to see his father and other times it is a struggle. This is consistent with Mr. B.'s and J.P.'s evidence. They also note the vacillating nature of D.'s emotions, stating that sometimes D. is reluctant to go with his father, and other times is resistant to returning home to his mother. This is not surprising given D.'s age and the tensions surrounding the parenting time exchanges.
- [99] Ms. K. alleges that D. told her that he is scared of riding his bicycle with training wheels when he is with his father, as Mr. B. does not like it and D. is afraid he will use his "angry voice". However, a video taken approximately six months prior to this alleged complaint paints a different picture. In it, D. can be seen confidently riding his bicycle (without training wheels) with his father.
- [100] Ms. K. also argues that Mr. B. has inadequate accommodations for D. such that it is not in D.'s best interests to have overnight parenting time with Mr. B. When Mr. B. comes to British Columbia, he resides in a trailer that is located in Vancouver. Ms. K. argues that the trailer in which Mr. B. resides has no running water and inadequate bathroom facilities.

[101] The evidence does not support Ms. K.'s claims. Ms. K.'s evidence is countered by the evidence of both Mr. B. and J.P., who are in a long-term relationship. Both Mr. B. and J.P. aver that the trailer is clean and well-maintained, and has running water and proper toilet facilities. They also state that the photograph of a trailer attached to Ms. K.'s affidavit depicts someone else's trailer, not theirs.

[102] Given my concerns about Ms. K.'s credibility, I prefer Mr. B.'s evidence to that of Ms. K.

Summary

[103] I find that the first stage of the threshold inquiry has been met. That is, the evidence establishes a material change in circumstances or new evidence, which relates to D.'s best interests.

[104] In arriving at this conclusion, I note that the evidence and the circumstances before me are different than they were before Madam Justice Iyer and Madam Justice Holmes. In addition to the passage of time, there is more evidence before me that enables me to make findings with respect to the family violence allegations and other concerns raised about D.'s well-being while in Mr. B.'s care.

[105] Also, Ms. K. has been less than forthcoming with the court. This raises serious doubt as to the credibility of her claims that D. has been subjected to family violence at the hands of Mr. B. or that he is at real risk of harm if overnight parenting time is permitted. Given my significant concerns about the veracity of Ms. K.'s complaints, I do not find it necessary to have independent assessments of D.'s needs. By the accounts of both parties, D.'s CVS episodes have shown significant improvement.

[106] Finally, I note that Mr. B. has provided this court with a transition plan for overnight parenting time.

SECTION 216(4) ANALYSIS

[107] I turn now to the considerations on the second stage of the inquiry. Having regard to the best interests of the child, I conclude that the evidence supports variation of the 2017 Order to allow for overnight parenting time.

[108] In considering the s. 216(4) factors, I note the following.

[109] At the time of the making of the 2017 Order, D. was entering kindergarten. He is now 7 years old and attending school full-time. Five years have passed since the parties separated, and 3.5 years since they arrived at the JCC Order in which it was agreed that Mr. B. would not have overnight parenting time with D., who was 3 years old at the time the JCC Order was pronounced. As Ms. K. put it in her June 27, 2017 Affidavit (when D. was only 5), "[D.] is old enough to participate in things that he is happy doing, and to express himself when he is not happy doing something."

- [110] Notably, despite the over 150 parenting time visits between Mr. B. and D. since January 2015, the only report of alleged violence is the August 12, 2018 incident, which I have already addressed.
- [111] In addition, D. is no longer experiencing school refusal and there is evidence that he is doing well in school. The evidence of D.'s success with play therapy shows that there is an effective means of support for D. to address any future anxiety related to school or other issues that might arise.
- [112] The 2017 Order was an interim order. Both Madam Justice Holmes and Madam Justice Iyer stressed upon the parties that they needed to proceed quickly to trial. However, both parties say that a trial is cost-prohibitive and they do not intend to take this matter to trial for final resolution. Not surprisingly, no trial has been scheduled for this family claim.
- [113] As such, it is highly likely that, while the order of Madam Justice Iyer was made for the purpose of a temporary arrangement, the parties are looking to have in place an order that will be for longer duration.
- [114] Finally, I note that given D.'s age and the high conflict nature of the relationship between the parties, it is important for an order to be put in place that will stabilize and normalize the relationship between D. and his father. The evidence does not support a finding that the making of this order will have an adverse impact on D. Rather, it supports the opposite conclusion. To that end, I find that the granting of overnight parenting time is in D.'s best interests. It is a logical extension of the daytime parenting time that D. currently has with Mr. B.
- [115] However, I agree with Madam Justice Iyer that it is important that there be a successful transition to overnight visits as a precondition for an order permitting travel outside of British Columbia. Thus, I decline to make an order permitting Mr. B. to exercise parenting time outside of British Columbia.

VARIATION OF THE 2017 ORDER

- [116] The following orders sought in the NOA are granted: paragraphs 1, 5, 6, 7, 8, and 12.
- [117] The orders sought in paragraphs 9, 10, 11, and 13 are dismissed, with leave to Mr. B. to bring a further application to have these matters reconsidered after August 31, 2019.

VARIATION OF THE JCC ORDER

- [118] Paragraph 16 seeks to vary paragraph 3 of a consent order made at the JCC. I do not believe that the circumstances warrant or support a variation of the JCC Order requiring Mr. B. to provide his address to the Claimant during his parenting time. It is in the best interests of D. that both parties know where D. is residing when he is exercising parenting time with the other parent.

[119] Paragraph 16 of the NOA is dismissed.

ADDITIONAL ORDERS SOUGHT

[120] As noted earlier, the orders sought by Mr. B. in paragraphs 14, 15, and 17 of the NOA were not previously sought. Thus, there is no requirement that Mr. B. establish a material change in circumstances or new evidence.

[121] Having regard to all of the evidence, I find that it is in D.'s best interests that the orders sought in paragraphs 14 and 15 be made. Ms. K. needs to accept the fact that Mr. B. is an integral part of D.'s life. Having both parents participate in D.'s life is important for D.'s emotional and physical well-being. Permitting Mr. B. to attend at D.'s school on a regular basis, and access to information about D.'s health, dental care, mental and emotional care, education, birthday parties, and events, is necessary to facilitate this.

[122] However, the evidence does not support the making of the order sought in paragraph 17 of the NOA. The high conflict nature of the relationship between the parties requires that parenting time be structured and predictable. This structure and stability is also important to decrease any stress on D. In time, it is hoped that the parties' post-separation dynamic will improve, and they will no longer require a rigid schedule. Until then, a fixed parenting schedule needs to be kept in place to minimize conflict and stress on D.

[123] As Mr. B. no longer seeks the orders sought at paragraphs 2 and 3 of the NOA, they are dismissed.

COSTS

[124] Costs are ordinarily awarded to the party that has achieved substantial success. In my preliminary view, Mr. B. has had substantial success, and is entitled to his costs for a matter of ordinary difficulty. However, if the parties wish to argue otherwise, or for a different costs award, they may do so by providing me with written submissions on or before 4:00 p.m. January 7, 2019, through Supreme Court Scheduling. Such submissions are to be no more than 10 pages in length.

"Shergill J."

[1] This affidavit indicates that it was made on January 23, 2017. However, from the content of the affidavit, it is evident that it was sworn in 2018.

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