
CANADA / JUDGMENT

B.T. v. B.L.

2010 BCSC 1813

COURT

Supreme Court of British Columbia

DECIDED

20 December 2010

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2010 BCSC 1813 B.T. v. B.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.T. v. B.L.,

2010 BCSC 1813

Date: 20101220

Docket: E081359

Registry: Vancouver

Between:

B.T.

Claimant

And

B.L.

Respondent

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for Claimant:

J. Fiddes

Counsel for Respondent:

J.A.W. Schuman, Q.C.

N. Allen

Place and Date of Trial:

Vancouver, B.C.

October 18-22 and

October 25-27, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 20, 2010

- [1] The parties are the parents of a minor child, G. The only issues before me are access to and custody and guardianship of G.

Background

- [2] B.T. and B.L. met in 2002 and lived together off and on until they married in Thailand in April 2005. G. was born in September 2005. The parties separated in November 2007 after a 30-month marriage.
- [3] B.T. is 47 years old. She earns her living as an actor and as a voice-over artist. In addition, she owns some rental properties which add to her income.
- [4] B.L. is 44 years old. At all relevant times he has been a realtor and developer. His friends describe him as someone who lives "large", enjoys a comfortable lifestyle which includes travel and an interest in food and wine, owns expensive cars and has the use of a recreational property at Anderson Lake.
- [5] Notwithstanding efforts at marriage counselling, from an early point in the marriage the parties had difficulty getting along. B.T. cited financial conflicts and unequal abilities to bear household expenses. She adduced evidence which she says shows that B.L. is self-centred; a characteristic she says did not change after their child was born. She had very little income to rely on after G.'s birth and struggled to manage the household. Meanwhile, she says, B.L. bought and sold expensive cars and took trips with his buddies but held her accountable for her inability to stay out of debt.
- [6] I need not join in any blaming for the quarrels which occurred except to say that it appears the marriage was doomed from the outset. It appears that the marriage took place at least partly because of the pregnancy, and once G. was born, the relationship deteriorated almost totally.

- [7] I am satisfied that both parties are capable, loving parents who see G. as vitally important in their lives. There was a substantial amount of evidence given over the eight days of this trial with respect to the capacities of both parties to parent G. The evidence of the witnesses called by both parties was reasonably consistent as it related to G. and his care.
- [8] Both parties appear to be aware of the value of consulting each other with respect to G.'s activities and needs. While they have had difficulty communicating in this regard in the past, both are now doing more to keep the other party informed.
- [9] There have been two violent incidents about which evidence was given in this proceeding. Neither incident brings credit to the parties but I am satisfied that no such behaviour will occur in the future and I am equally satisfied that neither incident is relevant to or would threaten G.'s best interests.
- [10] The first incident was an assault by B.T. on B.L. He did not request the assistance of the police although he did suffer some injury as a result of the punch and bites he suffered during the assault. The second incident occurred post-separation. B.L. shoved B.T. She fell to the ground and does not appear to have been injured. She called the police; B.L. was arrested and charged and ultimately entered into a restraining order and a peace bond.
- [11] I find that both of these incidents, while reprehensible, were out of character for the parties. While they do not have a friendly relationship with each other at this point, they are capable of sufficient self-control that they will not again express their mutual dislike in this way.

Issues

- [12] The parties have been able to resolve the financial issues in this action by way of a consent order, which they spoke to before me. That order will be incorporated as part of the final order in these proceedings.
- [13] I granted the parties' divorce at the end of the trial in this matter since the requisite questions had been asked. With respect to s. 11(1)(b) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), I am satisfied that reasonable arrangements for G.'s care are in place.
- [14] As I indicated above, the only outstanding matters between the parties relate to access to and custody and guardianship of G.
- [15] In summary, B.T. seeks joint custody and joint guardianship and an order that G.'s primary residence be with her and that she have the final authority in decisions regarding G. B.T. would like the greater part of G.'s time to be spent with her and argues that it is in G.'s best interests to do so. In her pleadings, B.T. claimed sole custody but her position changed during the proceedings.
- [16] B.L. seeks joint custody and guardianship on the Joyce model, with G. spending equal time with each parent. He asks that neither parent have final authority over decisions regarding G. but instead that a parenting coordinator be appointed to assist the parties to deal with

issues concerning G. on which they cannot agree. If the parenting coordinator does not have jurisdiction to impose a decision on the parties, B.L. further seeks B.T.'s agreement to attend mediation with the parenting coordinator. Mediation is to be used before the parties proceed to court.

The statutory provisions

[17] I have set out below the relevant provisions of the Divorce Act and of the Family Relations Act, R.S.B.C. 1996, c. 128:

Divorce Act

Order for custody

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

...

Joint custody or access

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

Access

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

Terms and conditions

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

...

Factors

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

Past conduct

- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

Maximum conduct

- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Family Relations Act

Part 2 - Child Custody, Access and Guardianship

...

Best interests of child are paramount

24 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

- a) the health and emotional well being of the child including any special needs for care and treatment;
- b) if appropriate, the views of the child;
- c) the love, affection and similar ties that exist between the child and other persons;
- d) education and training for the child;
- e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

...

- (3) If the conduct of a person does not substantially affect a factor set out in subsection (1) or (2), the court must not consider that conduct in a proceeding respecting an order under this Part.
- (4) If under subsection (3) the conduct of a person may be considered by a court, the court must consider the conduct only to the extent that the conduct affects a factor set out in subsection (1) or (2).

The Evidence

The claimant

- [18] B.T. and her partner, Mr. Keenan, gave evidence on her behalf.
- [19] B.T. loves her son and is a caring parent. She schedules a range of enjoyable activities for G. and it is clear to me that the life G. enjoys is one which will develop his abilities and provide important skills such as physical activity, music and art. The parties agree that these activities are important.
- [20] Mr. Keenan appears to enjoy contact with G. and will contribute to his life in a positive way without attempting to usurp B.L.'s role as father.
- [21] B.T. has a long term nanny to assist in caring for G. since her work sometimes requires her to travel on relatively short notice. B.L. does not object to B.T.'s use of the nanny, who appears to be a stable presence in G.'s life.
- [22] Much of B.T.'s evidence concerned her willingness to and interest in sharing joint custody with B.L., but when what she said is scrutinized closely, it reveals a pattern of unwillingness to genuinely share G. with his father. B.T. said both in testimony and in various emails to a number of people that she is tired of negotiating with B.L. over G. That is why she wants to be the final arbiter over decisions concerning G.
- [23] On occasion B.T. has enrolled G. in activities without consulting B.L. I understand that occasionally this might happen when there is a limited time to obtain access to the activity but of course this is not a desirable way to proceed. B.L. has also taken G. to doctors and consultants with either no or minimal consultation with B.T. and this has angered her.
- [24] B.T. also gave evidence of incidents in which she has encountered B.L. on the street or in a restaurant and he has seemingly been unwilling to be pleasant to her.
- [25] She gave extensive evidence concerning the difficult times both during their marriage and post separation which seemed designed to draw a picture of B.L. as an impatient, self-centred individual who, by inference, is a bad parent. However, she could not proffer examples in which B.L. had demonstrated these flaws in caring for G.
- [26] This evidence was of marginal relevance and of little assistance as I consider that it reflects the adults' acrimonious relationship and marriage breakdown and not B.L.'s ability to parent G.
- [27] B.T. also pointed to what she characterized as B.L.'s alarmist nature in dealing with some of G.'s childhood illnesses and behaviours. For example, B.L.'s mother observed some of G.'s behaviours which caused her to ask B.L. to consult a specialist to determine if G. were autistic. B.L. took G. to a locum standing in for the regular family physician who referred G. to a paediatrician. The paediatrician wrote what appears to be a relatively simplistic diagnostic letter opining that G. displayed symptoms of autism spectrum disorder. B.T. was not involved in these consultations. It was not until B.L. had the pediatrician's letter in hand that he advised G.'s mother of his concerns. She was angry and alarmed and, at the same

time, convinced G. was not autistic.

- [28] Happily for all concerned, G. is not autistic. G. had speech delay, as many small children do, for which the parties obtained speech therapy. From the reports in evidence, G. is a happy, voluble, social five year old.
- [29] On another occasion, B.L. took G. to the emergency room at Children's Hospital when G. was suffering from stomach cramps. He did consult B.T. from the clinic he had first attended. She wanted B.L. to bring G. home for her to deal with. B.L. carried on to the E.R. and G. was diagnosed with constipation.
- [30] When G. displayed some bumps on his skin, B.L. took him to the doctor who advised him not to be concerned.
- [31] B.T. says these incidents indicate that, as a parent, B.L. operates in a climate of near-hysteria with respect to normal vicissitudes of childhood. She referred to B.L.'s counsellor's term: "over-catastrophizing".
- [32] I do not find that these incidents demonstrate that B.L. lacks the capacity to parent G. While B.T. may be better at determining what is a proportionate response to a particular condition, this skill was likely acquired because she has spent more time with G. It would be more alarming if B.L. were to dismiss G.'s medical issues than it is that he occasionally over-reacts to them.
- [33] B.T. is also resentful that B.L. has repeatedly raised concerns, with her and with others, that she will steal G. away from him and go to the United States where she will stay. She denied having any intention of moving to the U.S. and points to the fact she owns her house and other property here, she has family in Canada and was born in Ontario. She says she has not given B.L. any reason to have such fears.
- [34] I accept B.T.'s assurance she does not intend to deprive G. of B.L. or B.L. of G. and I also accept that the concerns B.L. has voiced on this topic in the past are not founded on anything B.T. has done or threatened to do. Nonetheless, I understand the parties will consent to an order that G.'s residence not be moved out of the Lower Mainland by either party without an order of this Court obtained in advance. That should be sufficient to settle this issue between the parties.
- [35] The parties have sometimes been able to work together for the benefit of their son. They were able to hold a joint birthday party for G.'s third birthday in 2008 at the local community centre. This was a success. However, the following year, B.T. felt she had been snubbed by B.L. when he was with a client. This left her feeling she could not handle a joint birthday party and she advised B.L. to hold his own.

- [36] Other than as I have noted, I decline to consider B.T.'s version of the history of B.L.'s behaviour over the time the parties have known each other. None of the complaints she raised is relevant to my mandate to consider only G.'s best interests and behaviour which impacts his best interests.
- [37] The one issue which I find to be genuine is that B.L. appears to be an anxious person who reacts strongly to stress in his life. According to the s. 15 report, he may be unable to express anger appropriately. However, I note the s. 15 report raises some of the same concerns with respect to B.T. and her difficulty in appropriately expressing anger. The parties also seem to share a propensity to a:
- paranoid orientation in that they tend to be excessively sensitive and overly responsive to the opinions of others, feel that they are getting a raw deal out of life, and tend to rationalize and blame others for their own difficulties. They tend to be seen as suspicious and guarded, and commonly exhibit hostility, resentment, and an argumentative manner. (See Exhibit 10, Tab 1 at page 7 re: B.T., at page 13 re: B.L.)
- [38] I accept B.T.'s evidence that she wishes to provide a caring, secure environment for G. in which she is able to minimize any conflict between her and B.L.. But she has on occasion, for example in declining to hold a joint birthday party for G. in 2009, put her own hurt feelings ahead of G.'s best interests.
- [39] The interpersonal dynamics between B.T. and B.L. will no doubt improve over time as both parties gain distance from the destructive behaviour patterns of the past. As well, and despite B.T.'s protestations, she has been able to negotiate solutions to issues respecting G. with B.L. It is true some of these negotiations have required the assistance of counsel, but they have concluded successfully.

The respondent

- [40] B.L. gave evidence and called a number of witnesses.
- [41] B.L.'s witnesses were virtually unanimous about his devotion to his now five year-old son. He loves his child, is affectionate with G., plays with G., cooks for G., includes G. in his social activities and works from home when he has access time with G.
- [42] B.L. began wanting more time with G. in January 2008, shortly after his separation from B.T. in November 2007. B.T. did not wish to increase B.L.'s parenting time. Originally, he had eight days a month with G. but B.T. permitted him two more days for a total of ten days a month. This was part of an informal agreement which was unfortunately not confirmed and which led to conflict between them following a judicial case conference at which B.L.'s expectations were apparently not met.
- [43] Ultimately, B.L. made application to this Court for more access and in March 2010, was granted an order for interim access which brought him to 12 days per month with G.

- [44] In his evidence, B.L. did not criticize B.T. It is clear he respects her ability as a mother. However, it is also clear that he resents her exercise of de facto control over the amount of time he is able to spend with G.
- [45] B.L. believes that both parents have qualities important to G. B.T., in his view, offers the creative, artistic side to G. while he can offer skills in business, finance, and organization.
- [46] B.L. controls his hours of work and is able to work from home when G. is with him. Since the parties separated, he has lived close to B.T. and currently lives about eight blocks away. G. has his own room in each parent's house.
- [47] G. and B.L. have a regular routine and, as the s. 15 report notes, G. appears happy and well-adjusted at each home.
- [48] B.L. gave detailed evidence about this routine with G., including the foods he makes for a finicky eater, how he incorporates vegetables into muffins and sauces so that G. will eat them, the activities he takes G. to, G.'s play dates and swimming. G. appears to have a circle of friends which includes children from school and B.L.'s friends' children.
- [49] G. has cousins in Kerrisdale who he sees regularly and other cousins and a grandmother in Sechelt. G. sees his grandmother at least once a month and his cousins on family occasions like Thanksgiving and Christmas.
- [50] B.L. has a close relationship with Ms. Heathcote of whom G. is very fond. When she visits, she and G. do many of his activities together.
- [51] B.L. expressed a willingness to move on with his life and to have a reasonable relationship with B.T. and Mr. Keenan for G.'s sake.
- [52] He agrees that since the separation he has harboured a fear that B.T. will take G. to the U.S. and not return. Adding to this concern is the fact that both B.T. and G. have dual Canadian and American citizenship and Mr. Keenan has interests and family in Florida. But as I have noted above, these fears were not based on anything B.T. has done or said.
- [53] From B.L.'s evidence, I find that he is also a caring and loving parent who very much wants to share his son's life. I find it is likely that before B.L. became a single parent, he lived a more self-absorbed life and it is his time with G. which has made him into the loving parent he has become.
- [54] I believe that he is motivated to try to maintain a civil relationship with his child's mother because he does understand that the absence of conflict between him and B.T. is in G.'s best interests.

Other witnesses called by the respondent

- [55] B.L. called a number of other witnesses: Robert Stockdale, Ulla Friis-Graham, Jane Heathcote, Adrian Alleyne, Paul Quinn, Nadine Goodine, Mrs. Patricia Lilly and Larry Sugar.

- [56] I will not set out their evidence since it was largely similar. All of the witnesses have had experience with B.L. and G. They all say that B.L. is a loving father who pays careful attention to his child, feeds him well, has a good routine and includes him in his social activities.
- [57] Mrs. Lilly explained the concerns she felt about G.'s behaviour based on her long career as a public health nurse. She raised these concerns with B.L. only after she had talked to an expert in the field of autism. She regretted not discussing her concerns about G.'s behaviour with B.T., but explained this omission by giving evidence of a prior conversation between them concerning how often the television was on in the house and how that might impact G.'s delay in speaking. That conversation did not go well and she wanted to avoid a similar situation.
- [58] I found Mrs. Lilly to be a reasonable, interested grandmother whose intervention was well-intentioned and honest. She is no doubt a positive influence in both B.L.'s and G.'s lives.
- [59] Mr. Quinn agreed that B.L. expressed his frustrations to him about his and Ms. Tyson's failure to settle the matrimonial action. He also agreed that he directed B.L. not to criticize B.T. as a way of making himself look like a better father.
- [60] Mr. Quinn also gave evidence about a conversation he had with B.T. in which she stated she did not want to share custody with B.L.
- [61] In rebuttal evidence, B.T. attempted to explain the context of this comment. She says it arose from her belief that B.L. was telling others that she was using G. as leverage to obtain a good financial settlement and that she was trying to take him away from Vancouver. Her response was: "How can I share custody with that man?"
- [62] Not much turns on this since both B.L. and B.T. were reacting emotionally at the time they made these comments. As well, B.T. said essentially the same thing in her evidence. She testified that she was tired of negotiating with B.L. That was her rationale for initially seeking sole custody and the reason she continues to seek to be the final decision-maker respecting G., that his primary residence be with her and that she have more time with him. I consider that evidence to be an unambiguous declaration that she would prefer not to have to co-parent with B.L.

The emails

- [63] I was given two volumes containing emails between the parties and occasionally between one party and one of the witnesses.
- [64] I have perused the emails but have not relied on them. In many instances, they are nothing more than previously consistent statements which are not only not admissible but if admissible, for some other reason, are self-serving and unhelpful.

- [65] The other reason I have not given weight to the emails is that it is my impression that some, perhaps many, were concocted for later use in litigation. I am aware some were written on the advice of counsel.
- [66] It is for these reasons I do not consider them to be reliable evidence and I have not accorded weight to them.
- [67] It is an unfortunate development in family law that trial judges are expected to wade through volumes of such material. In my view, using email in this way discourages parties from the honest exchange of information using a method which could remove the possibility of escalation which often occurs in face-to-face exchanges.

The s. 15 report

- [68] Dr. Rebecca England prepared a s. 15 report pursuant to a March 2010 order of Madam Justice Loo.
- [69] Dr. England is a clinical and forensic psychologist who is registered to practise with the College of Psychologists of British Columbia with expertise in assessing and treating children, adults, and families. She also has post-doctoral certification from the University of Washington to conduct court-ordered parenting evaluations. She has provided expert evidence in Provincial and Supreme Court in British Columbia and in Superior Court in Washington State.
- [70] Dr. England was not called to give evidence at trial.
- [71] She performed the usual standardized psychological tests: the Minnesota Multiphasic Personality Inventory ("MMPI") and the Personality Assessment Inventory ("PAI").
- [72] Both tests assess major patterns of personality and psychological and behavioural problems by comparing individual results against large scale validation studies. As a result the tests provide descriptions of test subjects whose response patterns are similar to those of the individuals being assessed. Therefore, the test results are necessarily generalizations. Dr. England comments that where test results were inconsistent, she used her clinical judgment to select the most reasonable hypotheses for the report.
- [73] I did not understand either party to take exception to the report other than B.T.'s counsel notes that Dr. England seemed to take joint parenting as a starting point and then look for problems which would cause her to weigh custody in favour of one or the other parent.
- [74] I found the report to be fair and balanced and while I would have appreciated hearing some cross-examination on the more esoteric points in her report, I am able to assess its value without having heard from Dr. England. I am also not inclined to draw an adverse inference from the claimant's failure to call her as a witness.

- [75] The most striking aspect of the test results is, as I have commented earlier, the parties are remarkably similar. B.L. does show a greater degree of anxiety in his results, but the Rule Outs of anxiety disorders and a personality disorder, while not present in B.T.'s assessment, are not sufficiently concerning to Dr. England to affect her judgment of B.L.'s parenting capacity.
- [76] In addition to interviewing the parties, Dr. England spoke to Mr. Keenan and to three counsellors who were involved with the parties at different times between 2006 and 2009. None of these counsellors indicated child-related concerns.
- [77] The home visits with the parties were uneventful and both were positive. Perhaps G.'s time during the home visit with B.T. was slightly more positive but to be fair, she had substantial assistance that B.L. did not; both Juliet, the nanny, and Mr. Keenan were present and participated with G. at B.T.'s while B.L. was alone with G. for his home visit.
- [78] Certainly from Dr. England's assessment, G. is happy at both homes and very attached to both his mother and his father, such that both relationships are very important to G.
- [79] Dr. England recommends a parallel parenting situation based on 2-2-5-5- time with G.
- [80] Her description of how this would work reads as follows:

With this plan, one parent is assigned Mondays and Tuesdays, the second parent has Wednesdays and Thursdays, and they alternate the remaining three days (Friday, Saturday and Sunday). All transitions occur around the school day (commencing Monday morning with the drop off at school) and for the assigned days, each parent can make their own decisions on what, if any, extracurricular activities will take place. This plan is recommended as it reduces opportunities for conflict, allows for fairly frequent transitions which is particularly helpful for younger children, and allows both parents to be equally involved in both weekday and non-weekday time so they can each develop relationships with teachers, and any other adults involved in their child's life.

- [81] She also recommends that during the five-day period G. be permitted to call the other parent.
- [82] Dr. England also suggests that a review of the access schedule be instituted after three to five years so that its workability can be explored and, if necessary, the schedule changed.

The Parties' Positions

- [83] B.T. proposes joint custody, joint guardianship, primary residence and final decision making to her and an access schedule which would afford her greater time with G. According to her schedule, most of B.L.'s access time would be on weekends. This is consistent with her view that B.L. reacts better when he is not under the stress of work.

- [84] This proposal does not provide the normalization of time with G. which is desirable. It also means that B.L. does not have the same opportunity as B.T. to meet G.'s teachers and other adults in G.'s weekday life. I do not consider this to be in G.'s best interests.
- [85] B.L. counterclaims for joint custody, joint guardianship and equal parenting time on the 2-2-5-5 basis suggested by Dr. England. Instead of awarding final decision making power to one parent, he seeks to have a parenting coordinator appointed to assist the parties with issues on which they cannot agree, with leave to apply to the Court if the parties are not able to reach agreement with the help of the parenting coordinator. In the alternative, he seeks an order that G.'s primary residence be with him and that he have final decision making power.
- [86] Ms.Tyson raises a concern with the efficacy of a parenting coordinator and their ability to make decisions which are enforceable by the Court. If they do not have such power, then she sees little advantage to the role and suggests the parties might as well go to Court immediately as spend time and money on a parenting coordinator.
- [87] I do not have submissions on this point from counsel for B.L. and counsel for B.T. raised it in passing. I can only point out that if the parties are determined not to agree and one party is particularly uncooperative, then because I am seizing myself with any issues between the parties which linger following this trial, I will be aware of that fact and will attempt to be the final arbiter and to bring fairness to any intractable dispute. I have the power of costs, for example. But I remain of the view that if the parties do wish to put G. first and to minimize conflict between them, then the assistance of a parenting coordinator could stop disagreements at the outset without the need to go further.
- [88] In some instances, a parenting coordinator is appointed with the power to mediate but to impose a binding resolution once initial discussions have failed. It is open to the parties to agree to such a power being granted but I will not order it. As I see it, mediation would have to be consensual and thus any resolution would be reached with the parties having initially consented. If there is still disagreement with the decision of the parenting coordinator, then an application to court would be necessary but I would hope the dissenting party would follow the decision of the parenting coordinator until such time as the application to Court is made.
- [89] I will leave the argument on enforceability to an occasion I hope does not arise. If it does, it will be an argument in which the dispute will be clothed with facts and I will have complete submissions on the law.

The Law

- [90] The statutes I quoted above set out my mandate respecting access to and custody and guardianship of G. As is well-known, that mandate is the best interests of G. To make that difficult decision, I rely on the factors set out in the Divorce Act and the Family Relations Act.

- [91] Specifically, I have considered that G. should have as much contact with each parent as is consistent with his best interests, that he has a loving and affectionate relationship with both parents and that both parents have the capacity to care for him. I have not considered past conduct which in no way influences the parties' abilities to parent G.
- [92] I have found the s. 15 report helpful and also note that Dr. England's assessment accords with my impressions throughout the trial and my conclusions on the evidence.
- [93] I am aware that B.T. says that the animosity between the parties and their difficulties in communicating with each other make the prospect of co-parenting problematic. She blames these difficulties on B.L.. I am not satisfied the problems are so unilaterally caused nor do I believe that the two parties are incapable of managing a co-parenting regime. I also have a concern that B.T. sometimes puts her desire to retain power in her relationship with B.L. ahead of G.'s best interests.
- [94] Since the decision in *Robinson v. Filyk*, 1996 BCCA 733, 28 B.C.L.R. (3d) 21 (cited to B.C.L.R.), the courts have moved away from presuming that if parties have difficulty communicating, joint custody is not appropriate. In that case, the trial judge awarded sole custody to the father. On appeal, that order was upheld. However, despite the parties' communication difficulties, the Court of Appeal amended the trial judge's order of sole guardianship and awarded the parents joint guardianship. With respect to the existing presumption that joint custody could only be granted where the parents were able to work together, Huddart J.A. stated as follows at para. 22:

In *Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357 (Co. Ct.) I opined that a joint custody and joint guardianship order would be appropriate "where both parents are excellent parents, there is a history of co-operation with respect to parenting of the child and there is no valid reason to exclude a parent from having significant input into the raising of the child" (at 370)... It is now clear that legal and factual presumptions have no place in an enquiry into the best interests of a child, however much predictive value they may have. The Supreme Court of Canada has stated absolutely clearly that such presumptions detract from the individual justice to which every child is entitled.

- [95] In pointing out that the inquiry respecting the best interests of a child must be an individual one, Huddart J.A. further discussed the use of presumptions with respect to a custody disposition at paras. 28 and 29 of *Robinson*:

This clearly articulated approach to the enquiry about a child's best interests must extend to the choice between sole and joint custody under the Divorce Act. [In *Gordon v. Goertz*, [1996] 2 S.C.R. 27] Madam Justice McLachlin was discussing a presumption in favour of the custodial parent on an application for variation of a custody order upon proof of a material change in circumstances, which in the case before the Court was the proposed move of the custodial mother to Australia. The view expressed, however, is equally applicable to a presumption in favour of joint or sole custody. There simply can be none, whether the presumption comes from the judiciary as an institution or from the experience of an individual judge. Nor can there be concern about

parental rights unless those rights are necessary to advance the child's best interest.

The only issue is the child's best interest. "The child's best interest must be found within the practical context of the reality of the parents' lives and circumstances..." (Gordon, *supra* at 59).

Conclusion

- [96] The evidence in this case is strongly in favour of a co-parenting joint custody regime.
- [97] Such a finding does not stem from any presumption in favour of joint custody, it comes from my view that G.'s best interests require the balance in G.'s life that only loving care from both his parents can supply. A co-parenting regime will help to maintain that balance by preserving and enhancing G.'s strong relationships with both parents.
- [98] The principle of maximum contact with both parents has also influenced my decision to order co-parenting and joint custody.
- [99] Both parents are good parents, capable of giving to G. the childhood he deserves and is entitled to have. They will have to learn to talk to each other about G. and to consult on his various activities, his schooling, his religious education, his travels to see other family and the myriad other issues which emerge in raising a child.
- [100] B.T. may well have to continue negotiating with B.L. since she will not have the right to veto his position on issues relating to G. That is a reality which divorced parents must face where there is joint guardianship and where neither parent is given the power of final decision.
- [101] So it will be here.
- [102] The parties will share joint custody and joint guardianship on the modified Joyce model without final decision making authority granted to either parent. They will co-parent G. on the 2-2-5-5 visitation schedule put forward by Dr. England. The schedule will be that set out in the order proposed by B.L. I adopt the provisions of Schedule 'A' to B.L.'s submissions which I have attached.
- [103] I will not award primary residence to either parent but will order that the parties appoint a parenting coordinator or counsellor who will act as a resource to assist the parties to reach consensus on issues where they have been unable to do so without third party help. If the parties are unable to achieve resolution with the parenting coordinator, they may make application to appear before me.
- [104] The issues of holidays, birthdays, vacation and special events are dealt with in Schedule 'A'.
- [105] As an addendum to Schedule 'A', I order that B.L. make available to B.T. on two weeks' notice of such a request from her, one of B.L.'s scheduled Thursdays so that B.T. may travel with G. In return, B.T. will provide two of her days to B.L.

[106] I have not found it necessary to provide for the three-year review suggested by Dr. England as I believe providing for a review creates a degree of uncertainty and at the same time, an incentive on one parent's part to make unworkable the schedule I have ordered. Therefore, if the parties wish to change the co-parenting regime, they will either have to consent or meet the test for variation set out in the Divorce Act.

[107] I will remain seized of this matter for a period of two years from the date of this judgment.

[108] The consent order discussed above, which settles the financial matters between the parties, will form part of the final order.

[109] Costs follow the event. In this trial, it appears to me that B.L. has achieved greater success than B.T.. Subject to the submissions of counsel, he will have his costs on the usual scale.

[110] If counsel need to speak to the issue of costs, they may set down an appointment through the registry.

"L.D. Russell J."

The Honourable Madam Justice Russell

SCHEDULE "A"

Parenting Schedule

1. The parties will parent G. on the following two week rotating schedule:

(a) Week 1

(i) The Claimant will have G. in her care from Monday after school until Wednesday when she will drop G. off at school.

(ii) The Respondent will have G. in his care from Wednesday after school until the following Monday when he will drop G. off at school.

(b) Week 2

(i) The Claimant will have G. in her care from Monday after school until Wednesday morning when she will drop G. off at school.

(ii) The Respondent will have G. in his care from Wednesday after school until Friday morning when he will drop G. off at school.

(iii) The Claimant will have G. in her care from Friday after school until the following Monday when week 1 will begin again.

(c) During G.'s Kindergarten year the parties will exchange G. in the mornings at 8:30 a.m. on those days when G. has school in the afternoon only.

- (d) Each party will be at liberty to attend G.'s sport and school functions during their non-parenting time provided it does not directly interfere with the other party's parenting time with G.

(the "Regular Parenting Schedule").

2. During either party's parenting time with G., they will ensure that the other parent has reasonable communication with G. either by telephone or some other form of communication.
3. G.'s Christmas Holiday will be defined as the day G.'s school ends for Christmas to the day school begins after Christmas.
4. The Respondent will have G. in his care for 12 uninterrupted days over G.'s Christmas Holiday in 2010.
5. Beginning in 2011 and every year thereafter, G.'s Christmas Holiday will be shared by the parties as follows:
 - (a) The Regular Parenting Schedule will continue over G.'s Christmas Holiday, with the exception of Christmas Eve day, Christmas Day and Boxing Day (the "Three Christmas Dates") which will be shared by the parties with the parties alternating having G. in their care for the Three Christmas Dates each year.
 - (b) The Claimant will have G. in her care for the Three Christmas Dates in 2011 and each odd year thereafter and the Respondent will have G. in his care in 2012 and each even year thereafter.

("Christmas Holiday Schedule").

6. Notwithstanding the Regular Parenting Schedule, the parties will alternate having G. in their care on G.'s birthday with the Claimant having G. on his birthday in 2010 and the Respondent having G. on his birthday in 2011.
7. Notwithstanding the Regular Parenting Schedule, G. will be with his mother on Mother's Day and with his father on Father's Day for a four hour period.
8. The Respondent will have G. in his care on the Respondent's birthday (January 1) each year, save and except those years when G. is out of Vancouver for the Christmas holiday with the Claimant. In the event that G. is away during the Respondent's actual birthday, that day will be made up the day after G. returns to Vancouver should the Respondent so desire.
9. The Claimant will have G. in her care on the Claimant's birthday (October 1).
10. G.'s Summer Holiday will be defined as the day G. finishes school for the summer to the day he begins school in the fall.
11. The parties will share G.'s Summer Holiday as follows:

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- (a) The Regular Parenting Schedule will continue over G.'s Summer Holiday, with the exception that each parent will have G. in their care for one two-week period during G.'s Summer Holiday (the "Two Week Holiday").
 - (b) The parties will alternate first choice of vacation time each year with the Claimant having first choice in Summer 2010.
 - (c) Each party will provide notice of their Two Week Holiday time and G.'s schedule by June 1 each year.
 - (d) In the event that the Claimant or Respondent travel with G. during their Two Week Holiday, whether within British Columbia, Canada, or outside Canada they will provide the other party the full and complete itinerary three weeks prior to the travel date.
 - (e) While G. is on the Two Week Holiday with either party, that party will ensure that G. has reasonable communication with the other parent either by telephone or some other mode of communication.
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