
CANADA / JUDGMENT

Bristow v. Bristow

2006 BCSC 609

COURT

Supreme Court of British Columbia

DECIDED

19 April 2006

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2006 BCSC 609 Bristow v. Bristow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bristow v. Bristow,

2006 BCSC 609

Date: 20060419

Docket: 00 3299

Registry: Victoria

Between:

Victoria Hartley Gibson Bristow

Plaintiff

And

Steven Beryl Bristow

Defendant

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Plaintiff:

William Murphy-Dyson

Counsel for the Defendant:

Crystal I. Buchan

Date and Place of Trial:

March 20-24, 2006

Victoria, B.C.

INTRODUCTION

- [1] The parties were married March 25, 1995 and separated about five years later, on July 11, 2000. They have two children. Their daughter Alexandra is 14 years old and their son Cameron is 11 years old. Cameron has been having serious difficulties with school.
- [2] The issues in this five-day trial related to the parenting arrangements, child support, and the plaintiff wife's claim for a restraining order.
- [3] This has been an acrimonious marriage breakdown. The trial record included 16 pre-trial orders made since the parties separated about five and one-half years ago, and there were further orders referred to in the evidence. The pre-trial orders include an order restraining each party from contacting the other, with a police enforcement clause. Mr. Bristow was imprisoned in October 2003 for failure to comply with the terms of the child support order.
- [4] There is agreement on some issues. The defendant husband does not oppose the wife's claim for divorce. Both parties agree that Ms. Bristow should have sole custody of Alexandra, that Alexandra should reside with Ms. Bristow, and that any access between Alexandra and her father will be in accordance with Alexandra's wishes. Ms. Bristow is also willing to cooperate with Alexandra attending counselling to improve her relationship with her father, so long as Alexandra chooses to participate and Mr. Bristow pays the related counselling costs.
- [5] The contentious issues are what should be the arrangements for parental decision-making, whether Mr. Bristow's access to Cameron should be supervised when he is outside the Victoria area, whether there should be other terms relating to access, whether there should be a continuing order restraining Mr. Bristow from contacting Ms. Bristow, and what amount Mr. Bristow should pay for continuing child support and for arrears of child support. The wife argued that certain terms are necessary owing to Mr. Bristow's problems controlling anger and his health problems. She also argued that income should be imputed to Mr. Bristow. Mr. Bristow is currently receiving less than \$9,000 per year.

FACTS

- [6] The plaintiff wife is 37 years old and the defendant husband is 45 years old. Alexandra was born in October 1991 and Cameron was born in June 1994. The parties separated on July 11, 2000.
- (a) Pre-marriage

- [7] There were a few significant events prior to the parties' cohabitation and marriage. The evidence included details of Mr. Bristow's education and work history, but not Ms. Bristow's. This was apparently because Ms. Bristow is not seeking an order for contribution to the children's extraordinary expenses and as a result her financial situation was not relevant.
- [8] In 1979, Mr. Bristow was convicted of a drinking and driving offence based on his conduct when he was 17 years old.
- [9] Mr. Bristow obtained a two-year liberal arts diploma in 1988. In 1989, he was convicted of impaired driving. He was sentenced to pay a fine of about \$700 and his license was suspended for one year. Around that time, Mr. Bristow worked for a couple of years for the Canadian Red Cross in the small craft safety program.
- [10] Mr. Bristow worked from about 1990 through 1995, including the years that the children were born, for the Canadian Coast Guard. He obtained a rescue specialist certificate.
- (b) 1995 to 2000: Marriage
- [11] In about 1995, the year the parties married, Mr. Bristow started working for Easy Biz Software, a company his father owned. Mr. Bristow progressed to the position of sales manager with six full-time staff reporting to him.
- [12] Mr. Bristow was convicted in 1998 of an assault committed in 1997. He was given a suspended sentence, six months' probation and a fine of about \$1,000. Ms. Bristow testified that the trial judge referred to it as a case of road rage. She testified that Mr. Bristow assaulted a teenage boy who had done something Mr. Bristow did not like while driving, and Mr. Bristow beat the boy when they later met by chance at a recreation centre. However, the evidence suggested that Ms. Bristow did not witness the crime, and was testifying about her interpretation of evidence at the criminal trial. As a result, the admissible evidence is simply that Mr. Bristow was convicted of assault and sentenced as set out earlier.
- [13] Ms. Bristow left the matrimonial home with the children on July 11, 2000. She left because Mr. Bristow had been violent and sometimes stayed out overnight. Ms. Bristow testified that during the marriage, Mr. Bristow admitted that he took Percodan and Tylenol 3 and cocaine, and that she did not approve of this drug use. Mr. Bristow denied that he used cocaine.
- (c) July 2000: Separation and Orders
- [14] This lawsuit began at about the time of separation on July 11, 2000. On July 24, 2000, this court ordered that Ms. Bristow would have interim care and control of the children. Alexandra was eight years old and Cameron was six years old. Mr. Bristow was still working for Easy Biz Software.

- [15] Ms. Bristow took the children to Vancouver and they stayed with one of her brothers, Peter Nash. Because he has the same first and last names as his father, these reasons for judgment refer to him as Mr. Nash Jr. Over a period of about four weeks, Mr. Bristow called Mr. Nash Jr.'s home about 600 times, often hanging up when the call was answered.
- [16] On August 11, 2000, this court ordered, by consent, that the spouses would not enter each other's residences and would not contact each other except to arrange access to the children. There was a provision that the police could enforce the order. This order also set out an access schedule, and provided that Mr. Bristow could not use alcohol or prohibited drugs while exercising access to the children.
- [17] On August 29, 2000, an order of this court altered the method of exchanging the children, and provided for an access schedule.
- [18] On September 22, 2000, a consent order of this court modified the prior restraining orders to provide that Mr. Bristow was not to come within 100 meters of any residence of Ms. Bristow and the children. This order provided that Mr. Bristow would have access to the children Wednesdays both at school and from 4:00 to 7:00 p.m., and alternating weekends from 5:00 p.m. Friday until 5:00 p.m. Sunday. The overnight stays with the children were to be at the home of Mr. Bristow's parents. This order also required Mr. Bristow to pay \$320 per month in child support, on the basis of a Guideline income of \$21,476.
- [19] Following separation, Mr. Bristow lived for a time with a woman, and later lived with his parents. Mr. Bristow usually exercised the access permitted by the orders. However, he often did not return the children at the time required by the order.
- [20] Mr. Bristow frequently breached the restraining order by going to Ms. Bristow's home uninvited, by trying to open the front door, and by frequent telephone calls. On one occasion, Ms. Bristow found Mr. Bristow in her back yard, speaking nervously, and strangely he had a dime in his mouth.
- [21] Mr. Bristow was charged in September 2000 with criminal harassment of Ms. Bristow.
- [22] On November 21, 2000, Mr. Bristow was held in custody. He was released on the condition that he only have access to the children on alternating weekends, and that overnight access would be at his parents' home.
- [23] In November 2000, Mr. Bristow told his children that he had been jailed for seven days, and told them unpleasant details about his jail stay. That month, a social worker told Mr. Bristow to refrain from putting the children in the middle of the marital conflict by speaking to them about his breach of court order, jail time, or his emotional well-being.
- [24] On December 22, 2000, this court changed the access arrangements to provide that the children would be picked up and dropped off by Mr. Bristow's parents or at their home. Mr. Bristow was ordered to pay \$500 in costs to Ms. Bristow. This sum remains unpaid.

- [25] The problems at the time of exchanging the children diminished once Mr. Bristow's parents started handling the exchanges, but some problems continued.
- (d) 2001
- [26] On January 3, 2001, an order of this court changed Mr. Bristow's access to remove the Wednesday visits, leaving access at alternating weekends from Friday at 5:00 p.m. to Sunday at 5:00 p.m. with the overnight stays to take place at Mr. Bristow's parents' home.
- [27] Mr. Bristow continued to work for Easy Biz Software until it ceased operations in February 2001. Since that time, Mr. Bristow has been involved in several government programs designed to help people start businesses, but so far he has not developed a profitable business.
- [28] Mr. Bristow's father passed away on April 30, 2001. His widow, Mr. Bristow's mother, is named Ms. Shirley Bristow, and is referred to by that name in these reasons for judgment. In late 2001, Ms. Shirley Bristow moved from the Gordon Head area of Victoria to a townhouse in central Saanich, and Mr. Bristow lived with her there.
- [29] In March 2001, Mr. Bristow entered into a recognizance to stay away from Ms. Bristow and the criminal harassment charge did not proceed.
- [30] Mr. Bristow was in a "steps to employment" program for about a year, from early 2001 until early 2002, while he attended film school. The program paid his tuition and provided him with living assistance of about \$700 every two weeks. He did not pay any child support in at least the last months of 2001, and by the end of that year he was about \$4,800 in arrears of child support.
- (e) 2002
- [31] On June 20, 2002, this court ordered that Mr. Bristow could have the children from July 14, 2002 to August 4, 2002 for the purpose of taking them to Tofino. The order required Mr. Bristow to provide a firm indication of the proposed itinerary, accommodation and supervision, and gave Ms. Bristow the right to seek a review of that proposal.
- [32] Mr. Bristow provided Ms. Bristow with an itinerary which was acceptable to her. However, Mr. Bristow did not follow the itinerary.
- [33] From about August 2002 until February 2003 Mr. Bristow was in another government program, this one for "self employment assistance". He was paid \$1,200 per month for the seven month period. He did not create a successful business. He attributes that at least in part to the fact that he did not receive all of the funding because some was garnisheed under the Family Maintenance Enforcement Act ("FME Act"), R.S.B.C. 1996, c. 127. In fact, he paid only about \$1,225 in child support in the period that he was in this self employment assistance program.

- [34] Mr. Bristow paid a total of about \$1,900 in child support in 2002. By the end of that year, the arrears were about \$6,800. At some point, probably in 2002, Mr. Bristow made an assignment into bankruptcy. He has not been discharged.
- (f) 2003
- [35] On January 30, 2003, this court ordered that Mr. Bristow was entitled to go to the children's school, subject to the direction and control of the school.
- [36] On May 13, 2003, this court ordered that Ms. Bristow would have interim custody of the children pending the trial or further order. Mr. Bristow was entitled to have reasonable access of not less than alternating weekends from the close of school Friday to the opening of school Monday, provided that it would be extended a day if either the Friday or Monday were a day when the children would not be in school.
- [37] At some point in 2003, Mr. Bristow enrolled Alexandra in dance classes. He arranged to pay for the first month or two of classes but after that the tuition was in arrears. Ms. Bristow dealt with the arrears.
- [38] The Director applied under the FME Act for an order of committal of Mr. Bristow. In reasons for judgment pronounced October 17, 2003, Provincial Court Judge Neal found that Mr. Bristow had defaulted 11 times in paying either \$1 toward arrears or the regular \$320 monthly payments. Judge Neal said that Mr. Bristow had focussed on a career outside of one that might actually generate him some income, and had attempted to find a career in film school without any reasonable prospect of gainful employment. Judge Neal held that, most troubling to the court, Mr. Bristow had employment in painting available to him but had made only infrequent use of that opportunity. Judge Neal committed Mr. Bristow for 22 days as a result of the defaults between June 14 and October 17, 2003.
- [39] On October 22, 2003, Ms. Shirley Bristow paid about \$3,400 on Mr. Bristow's behalf for child support, and obtained Mr. Bristow's release from jail. Apart from that payment, Mr. Bristow did not directly or indirectly pay any child support in 2003.
- [40] For about the months of November 2003 through January 2004, Mr. Bristow worked on a business venture known as Digital Eye. The other man involved in this project paid him \$250 per week for that period.
- (g) 2004
- [41] In January 2004, Mr. Bristow agreed with his doctor that he was one of the greatest con-men around.
- [42] On March 22, 2004, this court ordered a revised access schedule which has remained substantially unchanged to date. Mr. Bristow was entitled to access on alternate weekends, and on the alternate Mondays after a non-access weekend from after school until Tuesday morning.

- [43] It appears that the reference in the March 22, 2004 order to access every alternate weekend was understood to refer to the scheduling of weekend access set out in the order of May 13, 2003. That earlier order had provided that Mr. Bristow's access on alternating weekends commenced at the close of school on Friday and concluded at the opening of school on Monday, provided that for a long weekend, access commenced at the close of school Thursday if Friday was a holiday, or continued to the opening of school on Tuesday if Monday was a holiday.
- [44] The March 22, 2004 order also provided that Mr. Bristow would have telephone access to the children every Tuesday and Thursday at 5:45 p.m. It provided for the children to spend equal time with each parent over the Christmas break, and also provided for Mr. Bristow to have access over Easter and the summer break. It required any requests to vary access to be made by email. It permitted Mr. Bristow to come within 100 metres of Ms. Bristow's residence for the purpose of exercising access and required him to remain in his vehicle. It permitted the parent who did not have the child on his or her birthday to see the child for three hours that day.
- [45] The March 22, 2004 order also provided that on the Mondays Mr. Bristow had access to the children, he was to take them to the Victoria READ Society appointments. There were at least two occasions, on dates not disclosed in the evidence, when Mr. Bristow did not take Cameron to his READ Society appointment. At least once was because Cameron instead went to a track meet. At his examination for discovery, Mr. Bristow testified that he let Cameron make the decision, although Mr. Bristow suggested at trial that it was Mr. Bristow who made the decision.
- [46] In early 2004, Mr. Bristow started receiving B.C. benefits. He received those for about five months, and then he obtained a few months of work for a couple of painting companies. He also worked for Quality Alarm Service for about a month but only received about \$400 for expenses.
- [47] In August 2004 there was an event leading to Mr. Bristow's 2005 impaired driving conviction. He was admitted to Victoria General Hospital on August 21, 2004 and diagnosed with alcohol intoxication.
- [48] On September 23, 2004, Provincial Court Judge Kay fixed the arrears of child maintenance owing by Mr. Bristow at \$9,488.36 plus interest pursuant to the FME Act and statutory fees owing. Judge Kay also ordered Mr. Bristow to pay \$157 per month towards the arrears, and ordered that the regular child support payments were suspended and would accrue to the arrears of regular maintenance.

- [49] A few weeks later, on October 15, 2004, Mr. Bristow was hospitalized following a near drowning. Mr. Bristow was paddling in a six person outrigger canoe with four others. He was working hard, was thirsty, and felt that he was suffering heat exhaustion. Mr. Bristow testified that he thinks he fainted, and he ended up underwater. It has been suggested to Mr. Bristow that he may have suffered a seizure. Mr. Bristow was hospitalized for 10 days. He testified that following this incident, he had increased problems sleeping.
- [50] In early December 2004, Mr. Bristow tried to resume painting work, but he stopped on the basis that he had trouble breathing.
- [51] Mr. Bristow paid a total of \$513.25 in child support in 2004. By the end of the year, the arrears had climbed to about \$10,500.
- (h) 2005, including MCF and grand mal seizure
- [52] In January 2005, the B.C. Ministry of Children and Family Development ("MCF") commenced an investigation primarily in response to an allegation that Mr. Bristow had touched Alexandra inappropriately, and also with respect to concerns that he was making comments to her of a sexual nature. Alexandra was interviewed by the police and a social worker, Mr. Wale.
- [53] MCF concluded that Alexandra was not in need of protection from her father. However, MCF concluded that Alexandra was uncomfortable about two incidents when she said her father touched her for about one second, once on her clothed breast, and the other time on her clothed buttocks. MCF concluded that Alexandra was also uncomfortable about her father referring to her in derogatory terms which make a sexual reference. Mr. Bristow denies any inappropriate conduct or comments and says that Alexandra has exaggerated what occurred.
- [54] Alexandra wanted a break from access to her father and Mr. Bristow agreed.
- [55] Mr. Wale recommended to Mr. Bristow that he undertake counselling with Alexandra, but only when she was ready.
- [56] In January 2005, Mr. Bristow was hired by Westcom into a training program at \$12 per hour with benefits. He worked there until February 12, 2005.
- [57] On February 1, 2005, Mr. Bristow's co-workers told him that he had stopped responding for about a minute. Mr. Bristow concluded he suffered a minor seizure.
- [58] On February 12, 2005, Mr. Bristow suffered a grand mal seizure. Cameron was with him, and Ms. Shirley Bristow was nearby and able to assist. Mr. Bristow was hospitalized for two days as a result of the seizure. Mr. Bristow's Glasgow verbal response upon admission to hospital was "confused." He refused all his blood work at the hospital. Mr. Bristow last saw Alexandra when she visited him in hospital following the seizure.

- [59] Mr. Bristow testified that he has not had any seizures since February 12, 2005. He testified that his short term memory was significantly poorer following the seizure, and that he had trouble remembering passwords and telephone numbers. Mr. Bristow tried to resume the Westcom training program but failed the required testing, which included math, problem solving and typing.
- [60] On April 8, 2005, Mr. Nash Jr. saw Mr. Bristow during an access period at a liquor store with what looked like a liquor purchase. Mr. Nash Jr. thought, wrongly, that Mr. Bristow was not permitted to be in possession of alcohol during access periods. In fact, the relevant order prohibited only Mr. Bristow's use of alcohol while exercising access to the children.
- [61] The next day, April 9, 2005, Mr. Bristow was in his van in Ms. Bristow's driveway when Mr. Nash Jr. arrived. Mr. Nash Jr. told Mr. Bristow that he was not allowed to be there except for pick-up and drop-off of Cameron. Mr. Nash Jr. may also have criticized Mr. Bristow for purchasing alcohol the day before. Mr. Bristow became enraged, shoved Mr. Nash Jr., and grabbed at his cap. Mr. Bristow then laughed, saying he liked Mr. Nash Jr.'s hat.
- [62] Cameron was in Mr. Bristow's van, crying, and tried to get out, but Mr. Bristow pushed him back in. Alexandra was crying, watching from a window in the home, and later came outside. At some point she went to Mr. Bristow's car and punched Mr. Bristow in the ear.
- [63] Mr. Nash Jr.'s friend, Mr. Cave, arrived in a vehicle and honked. Mr. Bristow got back in his van and then drove a short distance and got out of his van again. Mr. Bristow then shoved Mr. Nash Jr. again. Mr. Nash Jr. shoved back, and Mr. Bristow left with Cameron in the van. Mr. Nash Jr. and Mr. Bristow both called the police, but no one was charged.
- [64] I reject Mr. Bristow's conflicting evidence about this incident, including his evidence that Mr. Cave's car rammed his van three times.
- [65] In May 2005 Mr. Bristow started training through Triumph Vocational Services. They work under a government program for people with persistent multiple barriers, which is referred to as the PPMB program. Mr. Bristow has been receiving income assistance since May 2005 through this program.
- [66] Mr. Bristow testified that he claimed entitlement to this program on the basis of these barriers: vision problem; sleep disorder; lung damage; short term memory problems; no driver's license; and criminal record. However, the only documentation at trial about his PPMB application consisted of Dr. Innes' reports on British Columbia Ministry of Human Resources Medical Report forms for persons with persistent multiple barriers. Dr. Innes referred only to an undiagnosed seizure condition which commenced February 12, 2005, and an anxiety and insomnia problem of 30 years' duration.

- [67] Mr. Bristow testified that he has been advised that he has macular edema involving fluid behind his right eye. He testified that the centre of his right eye's field of vision is a blurry dot which shrinks and expands intermittently, and that this affects his near vision. He has been treated by cortisone. He testified that the problems are increasing in frequency. He testified that the problem does not affect his ability to drive, because he does not need near vision for driving.
- [68] In June 2005, Dr. Innes told Mr. Bristow that if he persisted in basically stealing someone else's medication (referring to Mr. Bristow's sister's medication) the doctor-patient relationship would be terminated.
- [69] On June 13, 2005, Dr. Innes wrote a note stating that Mr. Bristow did not have a seizure disorder and has had multiple investigations. He also wrote that Mr. Bristow was medically fit to drive a motor vehicle.
- [70] There was an unfortunate incident on Cameron's birthday on June 18, 2005. Alexandra was with her mother and Cameron was on an access visit with his father. The March 22, 2004 order permitted Ms. Bristow to see Cameron for three hours on his birthday. Ms. Bristow spoke to Mr. Bristow by telephone to arrange to pick up Cameron. Mr. Bristow wanted to take Alexandra for a visit with Ms. Shirley Bristow while Cameron went with his mother Ms. Bristow. Ms. Bristow objected. It may not have been clear to Mr. Bristow that Ms. Bristow did not intend to exchange Alexandra for Cameron.
- [71] Ms. Bristow drove with Mr. Nash Jr. and her daughter Alexandra to the home Mr. Bristow shared with his mother. Mr. Bristow, Cameron, and Ms. Shirley Bristow were standing outside the home. Cameron got into the vehicle which Mr. Nash Jr. was driving. Mr. Bristow pounded with his fist on the driver side rear window beside Alexandra, who was crying. He says he did so because he thought Alexandra would be getting out of the van to visit and he did not want the van to drive away before she did so.
- [72] While the evidence was contentious about what happened after that, I accept that Mr. Bristow used his van to chase Mr. Nash Jr.'s van for many blocks after first trying to block Mr. Nash Jr. from driving away. Ms. Bristow chose not to contact the police about this breach of the restraining order because she did not want to spoil Cameron's birthday any further.
- [73] Ms. Shirley Bristow sent Alexandra an email message later that day. Unfortunately, this message includes many hurtful comments. Ms. Shirley Bristow suggested that Alexandra caused Mr. Bristow to have seizures. Ms. Shirley Bristow wrote that Alexandra's "mother, brother and now you [Alexandra]" had ruined Mr. Bristow's life. When she referred to "brother", she meant Mr. Nash Jr., not Cameron. Ms. Shirley Bristow wrote that it was up to Alexandra if she did not want to see Ms. Shirley Bristow, but she asked Alexandra to please stop hurting Mr. Bristow.
- [74] Alexandra, who was 13 years old at the time, was very upset by her grandmother's email.

- [75] Around this time there was an angry exchange of emails among Mr. Nash Jr., Mr. Bristow, and Ms. Shirley Bristow.
- [76] Two days after the birthday incident, on June 20, 2005, Ms. Shirley Bristow sent her granddaughter Alexandra an email. She wrote "I am very sorry about what I said. I was very upset, and still am. You are not responsible for your parents [sic] behaviour. I should know better. I am sorry but I miss you so much and it has almost been six months. Forgive me. Love Granny".
- [77] Alexandra responded by email later that day. Her response includes the following:
- I forgive you but what you have just said to me have [sic] really hurt my feeling [sic] and I don't think you understand what dad have done and say to me in my live and I am still mad at [Mr. Bristow] and what he said to me the last 48 hour [sic] really hurt ... and [sic] long he is like this long [sic] I don't see him ... love you.
- [78] Ms. Shirley Bristow and Alexandra have had some further email correspondence, which has been polite and generally appropriate. Alexandra has written that she is not yet ready to see Ms. Shirley Bristow. They have not seen each other since February 2005.
- [79] Dr. Innes' second report to the PPMB program, dated July 4, 2005, refers to Mr. Bristow's primary medical condition as "seizure NYD" (which probably means "seizure not yet diagnosed") which onset February 12, 2005. This report described Mr. Bristow's secondary medical condition as anxiety state and insomnia, with an onset date of "30 years". This report gave a prognosis of three to six months, apparently for the seizure problem, and for more than two years for the anxiety state/personality disorder. The report referred to the seizures having occurred twice. It states that becoming extremely fatigued without sleep or food may induce a seizure. This report is oddly contradictory to Dr. Innes' note a few weeks earlier stating that Mr. Bristow did not have a seizure disorder. Dr. Innes did not testify at trial and the contradiction was not explained.
- [80] In July 2005, Dr. Innes refused to provide Mr. Bristow with further medication on that basis that Mr. Bristow had overused what had been prescribed. At trial, Mr. Bristow denied overusing prescription medication.
- [81] In August 2005, Dr. Innes discussed with Mr. Bristow that he had to stop playing games to try and get extra medications. Dr. Innes threatened to put Mr. Bristow on the double doctoring list so that Mr. Bristow would not be able to obtain further prescriptions. Mr. Bristow testified that he had seen other doctors in order to get a second opinion about medication, and because it was more convenient to drop into a medical clinic than to go to an appointment with Dr. Innes.

- [82] In August 2005 Mr. Bristow failed to finalize arrangements to see Cameron on August 16, 2005. Ms. Bristow sent two email messages to him seeking to finalize the arrangements. Mr. Bristow did not respond to them, but on August 17 he sent an email accusing Ms. Bristow of blocking her emails. She does not know how to do that or if that can be done.
- [83] Mr. Bristow testified that he made alternate arrangements with Cameron for August 18, 2005, and that he overheard Ms. Bristow tell Cameron that was satisfactory. I reject that evidence.
- [84] Pursuant to the court orders, Mr. Bristow should have returned Cameron to his mother on September 4, 2005, but Mr. Bristow failed to do so until September 5, 2005. This disrupted Ms. Bristow's back-to-school arrangements for Cameron.
- [85] In September 2005 Mr. Bristow stopped living with his mother and moved into a subsidized housing residence on Tillicum Road. It is on two floors, with two bedrooms upstairs and with a living and dining and kitchen area. He pays about \$265 per month for rent.
- [86] In mid-October 2005, Mr. Bristow was convicted of impaired driving based on the incident of August 2004. His license was suspended for 18 months, which will be until mid-April 2007. He was also sentenced to a three month conditional sentence and to 40 hours of community service. He has completed those aspects of his sentence.
- [87] On December 1, 2005, this court ordered that Mr. Bristow would not have any access to Alexandra unless she wished access, and that Mr. Bristow is restrained from contacting her by email. It also adjourned the pending trial, and ordered Mr. Bristow to pay Ms. Bristow's costs thrown away in preparation for trial. Those costs have not been paid, and probably have not been assessed.
- [88] Mr. Bristow went to a sleep disorder clinic in December 2005. Since about that time he has been using a respirator while sleeping. He is having trouble adjusting to this machine.
- [89] Dr. Fleming, of the Sleep Disorders Program at UBC Hospital in Vancouver, B.C., wrote a report about Mr. Bristow dated December 7, 2005. He recommended that Mr. Bristow go onto a full sleep study. He said the diagnosis was complicated and further investigation was required.
- [90] On Christmas Day 2005, Mr. Bristow took Cameron to Ms. Bristow's later than required. The court order required Cameron's return by 8:00 p.m. While the evidence was contentious about how late, I accept the evidence that Mr. Bristow did not return Cameron until after 9:00 p.m.
- [91] Mr. Bristow drove with his brother Stewart to deliver Cameron. Mr. Nash Jr. was outside awaiting Cameron. Angry words were exchanged among the three men about Cameron being late, and Mr. Nash Jr. said and indicated that Messrs. Bristow should leave. Mr. Bristow invited Mr. Nash Jr. to fight, by raising his fists and poking and grabbing at Mr. Nash Jr. aggressively and calling him a coward. Mr. Nash Jr. called Mr. Bristow a name and returned

to Ms. Bristow's home. It is not clear whether Alexandra witnessed this incident, but Cameron did not.

[92] Mr. Bristow paid the total of \$78.50 in child support in 2005. He has not made any payments for over one year.

(h) 2006 until trial

[93] Mr. Bristow arranged for Cameron to play football starting in early 2006. The program costs \$185 for the season. Mr. Bristow obtained \$150 of funding through Kidsport B.C. The \$35 balance is outstanding.

[94] Mr. Bristow sent an email to Mr. Murphy-Dyson on February 21, 2006. Mr. Bristow testified that he saw Mr. Murphy-Dyson's name on a website regarding an Oak Bay sailing regatta, and he was not sure if it was the same person as Ms. Bristow's legal counsel. The email refers to small craft safety issues regarding bathtub races, and says "I will drop by your house some time this week and chat with about [sic] safety and what you should no [sic] about staying safe. Sincerely, Steve Bristow, small caft [sic] safetey [sic] instructor." Mr. Bristow testified he meant "nothing much" by this email.

[95] Over the period February 28, 2006 through March 2, 2006, the parties corresponded by email about whether Cameron should attend a friend's birthday party during a period that Cameron was scheduled to be with his father. Mr. Bristow's communications are sometimes unresponsive. One response to the question of whether Cameron could go to the party was "provide me with numbers and addresses and pick up a present for Cameron to bring and I will consider it. Otherwise, we have plans". Overall, Mr. Bristow's communications do not display a focus on Cameron's wishes about the party, and instead display antagonism towards Ms. Bristow. Fortunately, Cameron ultimately went to the party and his mother provided a present for him to give.

[96] Mr. Bristow testified that he thought that by the time of the trial his lungs appeared to be back to normal. He also testified that he thought that his short term memory was recovering and was almost as good as it had been before the February 12, 2005 seizure. He agreed that his vision problem did not impair his ability to drive, and that his intermittent problem was seeing up close.

[97] As reported by the Family Maintenance Enforcement Program, Mr. Bristow was in arrears of maintenance payments in the amount of \$15,259.57 as of March 19, 2006.

[98] March 20, 2006 was the first day of the trial, and a day when Mr. Bristow's access period ended at the start of Cameron's school. Mr. Bristow let Cameron stay away from school because he was complaining of intestinal problems. Cameron spent the day at the home of a friend of his father's. Ms. Bristow only learned this at about 5:00 p.m. after a day of trial.

- [99] Mr. Bristow either told Ms. Bristow or left a message to the effect that Cameron was 12 years old (although in fact he was only 11) and was old enough to make the decision himself to stay at home sick. Mr. Bristow also said that he had notified the police.
- [100] At about 7:00 p.m. Ms. Bristow went to the police station with her brother. The police then went with Ms. Bristow and her brother to Mr. Bristow's home. Mr. Bristow told the police he was going to keep Cameron because he was sick, but the police threatened to arrest Mr. Bristow, and he produced Cameron. Cameron returned to his mother's home.
- [101] Cameron was upset and crying. He told Ms. Bristow that he knew about the court case, which she had not discussed with him. Cameron accused Ms. Bristow of trying to ensure he would not see his father again. Ms. Bristow told Cameron that he would be allowed to see his father.
- [102] Mr. Bristow is presently receiving disability benefits of \$608 per month. Some of his expenses, including telephone and internet, are paid by the Triumph program. He continues to work to develop his intended business venture in internet security systems, with technical assistance provided by North Studio. He expects this program to continue until about the end of August 2006. He hopes by that time to have a viable small business which will provide him with a living and money to pay child support.
- [103] Mr. Bristow works as a volunteer managing the equipment for Cameron's football team and has coached his soccer team. On access weekends, Mr. Bristow and his son engage in many physical activities together, including bicycling and exercising at the recreation centre.
- [104] Mr. Bristow owns a 1984 Toyota van which he purchased for about \$2,500. He and his mother obtained a loan from TD Canada Trust for this purchase. He is paying \$118 per month on the loan, sometimes with assistance from his mother or a friend.
- [105] Over the period of two or three months before the trial, Mr. Bristow has gone to Cameron's school four or five times at lunch and a similar number of times after school to help him with his schoolwork and speak to his teachers. Mr. Bristow helps Cameron with his homework. Mr. Bristow frequently speaks to Cameron on the telephone. Until shortly before the trial, when Ms. Bristow reduced Cameron's computer use as a punishment, Mr. Bristow and Cameron had frequent internet communication.
- [106] Ms. Bristow works full-time in a position with student services at the Pacific Academy. She earns \$33,000 gross per year. Her work finishes at 4:00 p.m. and she is generally home at about 4:20 p.m. Her parents assist her with caring for the children and also provide some financial assistance. She lives in the Gordon Head area close to the Gordon Head Recreation Centre. She lives about a 20 minute drive from Mr. Bristow.
- [107] Alexandra is in a regular program at school, although she has access to the resource room for one block. She has been getting grades including a C+ and an A.

- [108] Cameron is in Grade 6. He is presently active in soccer and football. He has a bicycle at his father's house. He has two football practices and one game each week. Cameron is struggling in school but has shown some improvement. He gets extra help in language arts and math during the times that other children attend "exploratory" classes. He is in an adapted program for some courses, and is below grade level.
- [109] Both children have been receiving tutoring at the READ Society. Their bursary will likely run out soon and they may stop receiving this assistance.

ANALYSIS

[110] The issues are:

- (a) whether the parties should be divorced;
- (b) what will be the terms of parental decision-making for the children and of Mr. Bristow's contact with Cameron;
- (c) whether there should be an order restraining Mr. Bristow from any contact with Ms. Bristow and a police enforcement clause; and
- (d) what Mr. Bristow should pay for ongoing child support and for arrears of child support.

(a) Divorce

[111] The parties have lived separate and apart for over five years. There are no bars to the divorce. The children are adequately cared for with the financial support of their mother and the financial assistance she has been able to obtain from her own father. The parties are divorced, with the divorce to take effect on the 31st day after these reasons for judgment are released subject to s. 12 of the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3.

(b) Parenting Arrangements

(i) Parental decision-making, custody and guardianship

[112] In addition to what the parties have agreed regarding Alexandra, Ms. Bristow seeks sole guardianship of Alexandra and sole custody and guardianship of Cameron. Ms. Bristow also seeks an order that all communications between the parties shall be by email, except in case of emergency, and each party shall keep printed copies of all such emails.

[113] Mr. Bristow seeks an order that the parents have joint custody of Cameron and that Cameron reside primarily with his mother. Mr. Bristow also seeks an order that the parents have joint guardianship of both children, either on the "Joyce Model", or alternatively, on the "Horn Model". Ms. Buchan argued on Mr. Bristow's behalf that, in the final alternative, Ms. Bristow should at the very least be required to advise Mr. Bristow about significant events in the lives of the children, and Mr. Bristow should be able to get information from third parties, such as teachers, counsellors, doctors and the like.

- [114] The custody and access issues in this divorce action are governed by s. 16 of the Divorce Act. Subsection 16(8) provides that 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. The Court must focus on the situation of the particular children, and there is no presumption in favour of a particular custody and access arrangement. The court must give effect to the principle that a child 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.
- [115] These reasons for judgment first address the question of parental decision-making. Mr. Bristow loves his children and wants to maintain an active role in their lives. He has a close relationship with Cameron which has focussed on physical activity. He has made some effort to assist Cameron with school.
- [116] The concerns about Mr. Bristow's participation in parental decision-making arise from Mr. Bristow's tendency to exercise bad judgment and the degree of hostility between the parents.
- [117] Mr. Bristow has frequently displayed poor judgement over at least the five and one-half years since the parties separated. Many of his poor decisions either had or had the potential to have a negative impact on his children. A list of some of the most significant examples are as follows:
- (a) he has breached court orders regarding access time, child support and document production;
 - (b) he has committed the crime of driving while impaired;
 - (c) he has lied under oath;
 - (d) he has been threatening and physically aggressive to Mr. Nash Jr., sometimes in the presence of Alexandra and Cameron;
 - (e) he pursued film school and business ventures in the period before he started working at Westcom, while his children had a pressing need for financial support and he did not have a history of success in film or his own business;
 - (f) he enrolled his children in activities without paying or arranging payment of the full costs, risking disappointment and embarrassment for the children;
 - (g) he deferred to Cameron on decisions properly made by an adult, such as whether Cameron should attend a READ Society session or go to a track meet; and
 - (h) he sent an email to Mr. Murphy-Dyson when he ought to have known it was the same Mr. Murphy-Dyson that was his wife's lawyer, and which email could be considered threatening.

- [118] Mr. Bristow's evidence also displayed a distorted perception of events. For example, he gave the following evidence, which I reject:
- (a) that the children were often dirty when he received them for access visits;
 - (b) that Ms. Bristow, her father, and Mr. Nash Jr. had telephoned his employers and told them to fire him; and
 - (c) that Ms. Bristow and Mr. Nash Jr., had sent unwanted things and people, including pizza, prostitutes, and firewood, to the home of a former boyfriend of Ms. Bristow's.
- [119] I accept the following contrary evidence:
- (a) the children take enough care in their own physical appearance and hygiene that they are not routinely dirty;
 - (b) Ms. Bristow and her father and Mr. Nash Jr. have not called Mr. Bristow's employers while he was employed, and would like Mr. Bristow to have and maintain a job so that he can contribute to his children's financial support; and
 - (c) Ms. Bristow and Mr. Nash Jr. did not send the suggested items to a former boyfriend of Ms. Bristow's.
- [120] Mr. Bristow appeared to believe his testimony about those items and similar ones despite questioning pointing out the frail basis for his belief.
- [121] There were also several instances when Mr. Bristow gave contradictory evidence. He admitted at trial that he knowingly lied in testimony before Judge Neal on October 17, 2003. There were several instances when his evidence at trial contradicted his evidence either at examination for discovery or in an affidavit.
- [122] Whatever the source of Mr. Bristow's distorted perceptions, his evidence was often unreliable or false. While I accepted some of his evidence, it was generally unreliable.
- [123] Joint guardianship of either of the children is inappropriate. It is in the children's best interests for parental decisions to be made by their mother, who has displayed appropriate decision-making, and whose evidence was not characterized by distortion. Hopefully, the fact that the parties will not have to negotiate over parental decisions will also reduce the opportunity for hostility between the parties, which is also in the children's best interests.
- [124] As a result, Ms. Bristow will have sole custody and guardianship of both children.
- [125] It is in the best interests of both children for Mr. Bristow to have access to information about significant events in their lives, even if he is not making parental decisions for them. This will enable him to assist them when he can and to have meaningful dialogue with them. As a result, Mr. Bristow is entitled to obtain information directly from third parties such as teachers, counsellors, and doctors. Ms. Bristow is required to co-operate with Mr. Bristow obtaining information from those third parties. Ms. Bristow is ordered to advise

Mr. Bristow by email from time to time of significant events in the children's lives.

(ii) Access

[126] There are three issues or areas of concern regarding access to Cameron. The first is when Mr. Bristow will have access. The second area is transportation and trips, including whether the access should be supervised when Cameron is out of Victoria, how trips will proceed, and whether Mr. Bristow can drive with the children. The third is whether Mr. Bristow will be entitled to access only if his child support payments are up to date.

a. Schedule

[127] Pursuant to the order of March 22, 2004, the situation for about the last two years has been that Mr. Bristow has access to Cameron on alternate weekends until he returns to school on the Monday (or Tuesday if a long weekend), and that access has begun when school closed on Friday (or Thursday if a long weekend). He also has access on the alternate Monday (or Tuesday if a long weekend) until school starts the next morning. For about a year prior to that, Mr. Bristow had access on alternating weekends on the same basis, but without the Monday on the following week. For about two years prior to that, Mr. Bristow had access on alternating weekends but returned Cameron on the evening before school started and did not have an extension for long weekends.

[128] Ms. Bristow seeks an access schedule which is a reduction from the present schedule in terms of specified access periods, although which may provide for more access overall by stating that Mr. Bristow may attend at Cameron's sports practises and games. While Ms. Bristow is agreeable to Mr. Bristow continuing to have access on alternate weekends, she wants an order that access ends at 7:00 p.m. on the night before Cameron returns to school, and that if Cameron is not in school on Friday, access begins at 4:00 p.m.

[129] Mr. Bristow seeks an access order which is similar to the existing schedule but longer in the summers and at Christmas. Mr. Bristow seeks an order for reasonable and generous access, including but not limited to terms similar to what has been in place for the last two years. Ms. Buchan argued for an order for access every second weekend commencing March 31, 2006 from Friday after school until Monday at school, with the weekends extended to include the Monday or Friday if such day is a day when Cameron does not have school. In the intervening weeks, Mr. Bristow seeks access from Monday after school until Tuesday at school. Mr. Bristow seeks access for half of the school breaks.

[130] Mr. Bristow seeks an order that on Christmas Day, Cameron will be with his mother from 9:00 am to 2:00 p.m. and his father from 2:00 p.m. to 9:00 p.m. Otherwise, he seeks one half of summer breaks, on giving one month's written notice by email to Ms. Bristow, so long as she responds within five days of receiving the notice. Mr. Bristow also seeks access for a minimum of three hours on Cameron's birthday, every June 18. He also seeks some access every Father's Day, access at school, reasonable telephone and email access, and access such other times as may be agreed between the parties.

[131] Factors relevant to access include the following:

- (a) Cameron is experiencing significant challenges with schoolwork. Assisting Cameron to do as well as possible in school must be a priority;
- (b) Mr. Bristow is actively involved in Cameron's life. Mr. Bristow has participated in coaching sports activities and supports Cameron in soccer and football. He has tried to help Cameron by doing things like repeatedly calling the READ Society to try to get Cameron reading assistance and obtaining funding for sports. He has spent some time helping Cameron with school work, although not as regularly and frequently as Cameron may need;
- (c) Cameron has ties of love and affection to both parents;
- (d) Cameron appears to be happy to spend time with his father; and
- (e) both parents have something to offer Cameron and are loving parents.

[132] It is appropriate for Cameron to continue to have significant contact with his father. While the evidence demonstrated that Cameron has been late at least once or twice on days that Mr. Bristow was responsible for getting him to school, the evidence did not show that there was a significant problem with Cameron's tardiness or absences over the last three years that Cameron has spent some nights before school with his father.

[133] Cameron has significant learning challenges. Both parents should do everything possible to support Cameron in school, including ensuring that Cameron attends school on time. It may be that educators will suggest that Cameron needs the stability of being at his mother's home on the nights before school to progress, but there was no evidence of such a recommendation. In the present circumstances, it is appropriate for the existing access schedule to substantially continue.

[134] One appropriate change to the access schedule is to provide that exchanges which do not take place at Cameron's school occur at the Gordon Head Recreation Centre, as suggested by Mr. Bristow. The degree of tension between the parties during exchanges of the children is so high that personal contact between them is likely to be harmful to the children. An appropriate access schedule provides for as little contact as possible between the parties. The recreation centre is a suitable public place, a few blocks from Ms. Bristow's home, at which Cameron can entertain himself while moving between his parents' homes.

[135] The access schedule will be as follows:

- a) Alternate weekends from after school on Friday, or if school is not in session on Friday, from after school on Thursday, until school begins on Monday, or if school is not in session on Monday, until school begins on Tuesday;
- b) On Mondays following a non-access weekend from after school until school begins on Tuesday, unless the Monday is a statutory holiday, in which case the access will begin on Tuesday after school and continue until Wednesday morning;

- c) During school summer vacation, regular access shall be suspended, and replaced with two non-consecutive seven day periods in each of July and August, provided that the defendant gives written notice to the plaintiff of his choice of each such period, and provided further that such periods do not conflict with the plaintiff's vacation period, written notice of which she shall give to the defendant no later than June 1 of each year;
- d) During Christmas school vacation, regular access shall be suspended and replaced with the period of 3:00 p.m. to 8:00 p.m. on Christmas Day, plus seven days chosen by the defendant which are either consecutive or are interrupted once only, and which seven days will not include Christmas Eve or Christmas Day, provided that the defendant gives written notice to the plaintiff of the seven days he has chosen at least one month before the start of the Christmas school vacation period;
- e) During spring break, regular access shall be suspended and replaced with Mr. Bristow having access the first half of the spring break in odd years and the second half in even years;
- f) Commencing in 2007 and in odd years thereafter, Mr. Bristow will have Easter weekend access from after school on Thursday to Saturday at 7:00 p.m. and in even years commencing in 2008 from 7:00 p.m. on Saturday to school commencement on Tuesday;
- g) on any Father's Day that is not on an access day, Mr. Bristow will be entitled to three hours of access to Cameron, and on any Mother's Day that is an access day, Ms. Bristow will be entitled to three hours of access to Cameron, and if Cameron's birthday is an access day, Ms. Bristow will be entitled to three hours of access to him that day, and if Cameron's birthday is not an access day, Mr. Bristow will be entitled to three hours of access to him that day; and
- h) The defendant shall be responsible for picking up Cameron at the commencement of all access periods and the plaintiff shall be responsible for picking up Cameron at the conclusion of all access periods, and all such exchanges shall be at the Gordon Head Recreation Centre unless the access period commences or concludes with school, in which case the exchange will occur at Cameron's school.

[136] There are two other terms which were agreeable to Ms. Bristow and are appropriate:

- a) The defendant shall be permitted to attend all of Cameron's football and soccer practises and games unless the football or soccer association says otherwise; and
- b) The defendant shall have unrestricted access to Cameron's school records and shall be permitted to attend at Cameron's school unless the school principal says otherwise.

[137] Cameron will be permitted to telephone Mr. Bristow at least every second day without interference from Ms. Bristow, and will be permitted to email Mr. Bristow at least every second day.

- [138] The parties are to communicate about access by email except in case of emergency, and are to retain printed copies of their email exchanges. The access schedule can be changed only with the consent of Ms. Bristow, who, as sole guardian of the children, should only make changes which are in their best interests.
- b. Supervision, out-of-town trips, and driving
- [139] Ms. Bristow asks for an order that Mr. Bristow shall not take Cameron out of Victoria unless they are at all times in the company of a responsible adult, other than Ms. Shirley Bristow who dislikes camping. Ms. Bristow also seeks an order for written advance notice of the itinerary and contact information.
- [140] Ms. Bristow argued that Mr. Bristow's medical condition is such that if he is alone with Cameron outside of Greater Victoria, there is a risk that Mr. Bristow will suffer another seizure and Cameron will not have anywhere to seek help.
- [141] The evidence does not support the conclusion that there is so much risk that Mr. Bristow will suffer another seizure in a remote location that the court should put a limitation on his conduct. While Mr. Bristow has suffered at least two seizures, one of which was a grand mal seizure, Dr. Innes' report of July 4, 2005 refers to the problem continuing for three to six months. There is always some risk that a person may suffer a serious seizure or stroke or other sudden debilitating illness. Fortunately, that seldom occurs.
- [142] It is not appropriate to put a limitation on Mr. Bristow's access to Cameron while out of Victoria. Of course, Mr. Bristow should ensure that there is another adult available if he and Cameron are in remote locations, simply because it is always prudent to have another person available in case there is any problem.
- [143] It is appropriate for both parents to know when the children are out of town. The parties are not to take either child out of the greater Victoria area, or permit anyone else to do so, unless they have first given the other parent written notice at least two weeks in advance setting out the itinerary of the trip including dates, places and contact telephone numbers. The parents are to follow the trip itinerary except in case of emergency, and are to advise the other parent forthwith of any such emergency changes.
- [144] Mr. Murphy-Dyson argued on behalf of Ms. Bristow that Mr. Bristow should be restricted from driving a motor vehicle with Cameron in the vehicle. This argument was based on Mr. Bristow's history of drinking and driving convictions, and on the risk that he would suffer another seizure.
- [145] Ms. Buchan argued that it will be adequate if the court orders that Mr. Bristow will drive with Cameron only if he has a valid B.C. driver's licence, and that he shall provide Ms. Bristow with prompt notification of any change in the status of his licence.

[146] Mr. Murphy-Dyson responded that Mr. Bristow would not likely honour an order that he provide prompt notification of any change in the status of his license, on the basis that Mr. Bristow failed to produce documents regarding his licence which he was asked to produce at his examination for discovery on September 13, 2005.

[147] The seizure risk is not sufficient to restrict Mr. Bristow from driving with the children. Mr. Bristow has been convicted three times over 26 years for offences relating to driving and alcohol. His most recent sentence included suspending his drivers' license for 18 months.

[148] Mr. Bristow's history of drinking and driving raises a concern. However, the laws regarding Mr. Bristow's right to drive a motor vehicle are sufficient to ensure his responsible use of a motor vehicle while with the children. The appropriate access term to deal with the concern about Mr. Bristow drinking is that Mr. Bristow is restrained from consuming alcohol in the presence of either Cameron or Alexandra, and from consuming alcohol during or within 12 hours before an access period.

c. Effect of child support arrears on access

[149] Ms. Bristow seeks an order that in the event Mr. Bristow defaults in payment of periodic child support, all access of Mr. Bristow to Cameron shall be suspended until the default is rectified.

[150] Mr. Murphy-Dyson argued that the only thing which will make Mr. Bristow honour his support obligations is if his access to Cameron is suspended until he pays what is owing. Mr. Murphy-Dyson argued that there is no real risk of harm to Cameron, because Mr. Bristow will find a way to pay the amount owing, and in any interim period, Mr. Bristow will be able to see Cameron at sports practises and games and at school. Mr. Murphy-Dyson argued that it was in Cameron's best interests that the support be paid, and that overall his best interests favoured the making of such an order.

[151] Mr. Murphy-Dyson referred to the decision of Ontario Provincial Court Judge Pickett in *Morton v. Green*, 1995 CarswellOnt 1358, [1997] W.D.F.L. 20. In that case, the self-employed non-custodial father had considerable control over his income level and had considerable capacity to "hide" income. He failed to pay child support, and flaunted his omission by being relatively extravagant with the children during access.

[152] The court held that it was appropriate in that case to link support and access, with appropriate safeguards. The court ordered that the mother could apply on 7 days notice to suspend access if the support order was in default. The court further ordered that if support was not in arrears for 12 months, the father could apply on 7 days notice to terminate that provision.

[153] Ms. Buchan argued that such a clause would amount to punishing Cameron for his father's failings, and should not be ordered.

[154] In this case, Cameron clearly enjoys contact with his father and is upset about the possibility that it may end. The harm to Cameron of losing contact with his father, particularly for reasons that Cameron does not control, outweighs the possible benefit to Cameron's life of an incentive in addition to the threat of jail for Mr. Bristow to make full and timely child support payments.

[155] Mr. Bristow's access to Cameron will not be linked to the status of child support payments.

(c) Restraining Order and Police Enforcement

[156] Ms. Bristow seeks a permanent restraining order. She seeks an order restraining Mr. Bristow from contacting her except in cases of emergency and then only if necessary to deal with access to the children. She seeks an order that Mr. Bristow shall not attend at or within 100 metres of her existing or subsequent residence or her place of employment. She also seeks a police enforcement clause.

[157] Ms. Buchan argued that if there is a restraining order, Mr. Bristow may be effectively unable to attend activities like Cameron's sports events owing to the risk that he will encounter Ms. Bristow. Ms. Buchan argued that this is not in Cameron's best interests, particularly if there is a police enforcement clause and the risk that the police could be involved and upset and embarrass Cameron.

[158] Ms. Buchan argued that there was no recent evidence of any real problems. She argued that the only contact between Mr. Bristow and Ms. Bristow has occurred in connection with exchanging the children. She argued that the restriction on Mr. Bristow coming within 100 metres of Ms. Bristow's home was removed in March 2004, and there have been no apparent problems in that regard in the two years since then. She argued that there has been no evidence of Mr. Bristow attending at Ms. Bristow's workplace.

[159] The court will make an order restraining contact where there is a real or reasonably apprehended risk of physical harm to the applicant or a child in the applicant's custody. This is discussed in *Moralis (Pielak) v. Pielak*, [1983] B.C.J. No. 896 (QL) (S.C.). The evidence does not demonstrate that there is presently a real or reasonably apprehended risk that Mr. Bristow will physically harm either Ms. Bristow or the children.

[160] Mr. Bristow knows by now that intimidating Ms. Bristow is unacceptable. He knows that a peace bond can be issued in appropriate circumstances. He should realize that his confrontations with Ms. Bristow have probably been a partial cause of Alexandra's estrangement from him, and that in order to restore his relationship with her, he must behave himself properly with Ms. Bristow.

- [161] The evidence shows that Mr. Bristow's recent acts of pushing and shoving and threats of further contact have been directed to Mr. Nash Jr. rather than to Ms. Bristow herself. These events, while childish and inflammatory, do not show a recent pattern of actual or attempted inappropriate contact with Ms. Bristow. The change of location for most exchanges to the recreation centre should eliminate or substantially reduce the need for personal contact between the parties.
- [162] While it is possible that it was only the restraining order and the involvement of Ms. Bristow's family members which has kept Mr. Bristow from further contact with Ms. Bristow, it is most likely that Mr. Bristow is now capable of acting appropriately, even if he did not do so in the first few years after the parties separated.
- [163] Mr. Bristow is entitled to the opportunity to demonstrate that he will behave properly. As a result, the order will not include a restraining order. However, Ms. Bristow has liberty to apply on an urgent basis for a restraining order on the basis of any further evidence. Counsel should inquire about my availability for such a hearing, but because I may not be available as soon as necessary, I am not seized of the issue.
- [164] If Mr. Bristow breaches the access terms of this order, Ms. Bristow will be able to bring contempt proceedings or pursue a charge against Mr. Bristow under s. 128(3) of the Family Relations Act, R.S.B.C. 1996, c. 128. The court does not have jurisdiction to include a police assistance clause in an access order: *McMaster v. McMaster*, [1993] B.C.J. No. 1563 (QL) (S.C.).
- (d) Child support
- (i) Ongoing
- [165] Ms. Bristow seeks an order that Mr. Bristow pay child support of \$100 per month for the period commencing April 1, 2006. Mr. Bristow's position is that he should pay child support at the amount of \$15 per month for two children, based on his actual income of \$608 per month, which is \$7,276 per year.
- [166] Mr. Bristow's income is \$608 per month. In addition, he is provided with telephone and internet services which he estimates are worth \$75 per month. The sum of \$683 per month is \$8,196 per year. The Guideline child support payable on that income for two children \$42 per month.
- [167] Ms. Bristow argued that the court should impute income of \$10,100 to Mr. Bristow, resulting in child support of \$100 per month under the Federal Child Support Guidelines, SOR/97-175 as amended. Mr. Murphy-Dyson argued that Mr. Bristow has the capacity to obtain employment income, such as by house painting or by taking a job at minimum wage.
- [168] The Guidelines provide at section 19 that the court may impute income to a spouse as it considers appropriate in the circumstances. Among the circumstances for the court to consider is whether a spouse is intentionally under-employed.

- [169] Mr. Bristow's recent work history is poor. Although he held a responsible position with his father's software business, that business ended badly about five years ago. Prospective employers may conclude that Mr. Bristow's skills are out of date, or that he held that position because of his family connection rather than merit. Apart from his job with his father's business, it has been over ten years since Mr. Bristow has held a job for more than a few months.
- [170] It is possible that Mr. Bristow will manage to create a viable business. It is more likely that he will be unable to do so, and will be forced to pursue regular employment, such as the position he held for Westcom.
- [171] Mr. Bristow suffered serious health concerns in the period starting with his near drowning in October 2004 and continuing after his grand mal seizure in February 2005. Dr. Innes reported in July 2005 that Mr. Bristow's seizure problem would likely last for three to six months. While this report seems to contradict Dr. Innes' note of June 13, 2005 that Mr. Bristow does not have a seizure disorder, it is reasonable to assume that Mr. Bristow believed in July 2005 that he had a continuing health problem on the basis of what Dr. Innes was advising him. If this problem had lasted the predicted six months following Dr. Innes' July report, it would have ended in January 2006.
- [172] Given the uncertainty in Mr. Bristow's health, it was not unreasonable for him to pursue the PPMB program. However, his health has now stabilized. Although he has continuing sleep problems and intermittent vision problems in one eye, he is fit to work. If Mr. Bristow does not establish a viable business by the end of his present program, he should pursue regular work. None of his health complaints should bar him from achieving employment in a reasonable time, earning minimum wage at least.
- [173] As a result, it is not appropriate to impute income to Mr. Bristow on the basis of underemployment until the conclusion of the PPMB program and after a brief period to find work if his business is not viable. The program is scheduled to end around the end of August. Two months should be sufficient time for Mr. Bristow to find employment at minimum wage.
- [174] For the period from April 1, 2006 until October 31, 2006, Mr. Bristow's income will be based on what he is actually earning.
- [175] Mr. Bristow has a debt for his motor vehicle which he has been paying at the rate of \$118 per month. His licence is presently suspended and will remain suspended for about another year. It is troubling that Mr. Bristow has chosen not to comply with the court orders by selling the vehicle to pay child support. Motor vehicles are expensive to maintain and run. It may be that Mr. Bristow thinks that the vehicle is sufficiently valuable that he should retain it in the hope that his finances will improve and he can use it economically for business purposes.

- [176] Mr. Bristow has displayed some ingenuity and tenacity in obtaining accommodation at reduced rates and access to government programs. In all the circumstances, his ownership of the vehicle should not result in imputing further income to him.
- [177] Mr. Bristow's earnings from the PPMB program should be grossed up to include the value of the telephone and internet services which he is receiving. For the period until August 2006, unless he actually earns more, Mr. Bristow's income is determined to be \$8,196 per year. Commencing April 1, 2006, Mr. Bristow must pay child support for his two children of \$42 per month, subject to revision as set out below.
- [178] For the period from November 1, 2006 on, Mr. Bristow's income will be imputed to be a minimum of \$10,100 per year. For that period, he must pay child support for his two children of \$100 per month, subject to revision as set out below.
- [179] Mr. Bristow is to provide a copy of his filed annual income tax returns to Ms. Bristow no later than May 31 of each year. Child support payments are to be adjusted following that to reflect his actual income.
- [180] If Mr. Bristow's actual income for 2006 would result in payment under the Guidelines of more child support than he has been ordered to pay, Mr. Bristow must pay Ms. Bristow the difference by July 30, 2007.
- [181] For subsequent years, Mr. Bristow must pay Ms. Bristow monthly child support in the amount which is the greater of \$100 per month and the amount that he would be required to pay on the basis of his actual income for the prior calendar year. For subsequent years, he must also pay Ms. Bristow by July 30 the difference between what he actually paid in a calendar year and what he should have paid by application of the Guidelines to his actual income. If he paid more than he should have paid by application of the Guidelines, Ms. Bristow must pay him by July 30 the lesser of the difference between what he paid and \$100 per month, and the difference between what he paid and what he would have paid on applying the Guidelines to his actual income.
- [182] This will have the effect that commencing November 1, 2006, Mr. Bristow will pay the greater of \$100 per month and the amount payable on his actual income under the Guidelines.

(ii) Arrears

- [183] Ms. Bristow seeks a declaration that the arrears of child support are \$15,259.57, and that the full amount of the arrears remains payable. Mr. Murphy-Dyson argued that the arrears could be collected if Mr. Bristow either succeeds in business or inherits assets.

- [184] Mr. Bristow seeks cancellation of arrears of child support to the extent required to reduce the arrears to \$9,488.36 plus interest pursuant to the FME Act and statutory fees owing from and after the order of Judge Kay of September 23, 2004. Ms. Buchan argued that Mr. Bristow suffered a significant and lasting change in his circumstances when he suffered the boating accident in October 2004 and that he has made every effort to earn money since that time, although his efforts have not been successful yet.
- [185] Arrears of child support payable under the Divorce Act will not be reduced or cancelled unless the payor demonstrates that there has been a significant and long lasting change in circumstances. The considerations for the court are discussed in *Earle v. Earle*, [1999] B.C.J. No. 383 (QL) (S.C.). Where the payor refers to a reduction in his or her financial circumstances, the payor must demonstrate these three things:
- a) The change was significant;
 - b) The change was real and not one of choice; and
 - c) Every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.
- [186] As discussed above, Mr. Bristow suffered serious health concerns in the period commencing in October 2004. He did not choose to have the health problems and they persisted to some degree. His health problems were significant. It was reasonable for him to pursue the PPMB program in all the circumstances in an effort to build a career. As a result, it is appropriate to reduce the arrears of child support which arose commencing October 1, 2004 to reflect Mr. Bristow's actual earnings.
- [187] The evidence is not clear about what Mr. Bristow actually earned in the period October 1, 2004 to April 30, 2005. Income will be imputed to him on the basis that he should have paid \$100 per month for child support. For the period from May 1, 2005 to trial, Mr. Bristow ought to have paid child support of \$42 per month as discussed above.
- [188] The arrears of child support as at March 31, 2006 are reduced to \$10,650.36 plus interest pursuant to the FME Act and statutory fees owing from and after the order of Judge Kay of September 23, 2004. This consists of \$9,488.36 as at September 23, 2004, plus \$700 for the seven month period October 1, 2004 to April 30, 2005, plus \$462 for the eleven month period May 1, 2005 to March 30, 2006.
- [189] Mr. Bristow is ordered to pay \$1 per month towards these arrears. Mr. Bristow is required to advise Ms. Bristow in writing forthwith if he learns that he has received any inheritance or if his income exceeds \$1,000 in a single month. Ms. Bristow has liberty to apply for an order varying the terms for repaying the arrears on the basis of further evidence.

COSTS

- [190] The ordinary rule is that a party who is substantially successful is entitled to costs unless the court otherwise orders. This rule applies in family law proceedings as in other litigation: see *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180, 106 D.L.R. (4th) 452 (C.A.).
- [191] In determining whether a party is substantially successful the court must compare the final results with the positions advanced at trial: *O'Brien v. O'Brien* (1993), 88 B.C.L.R. (2d) 183, 24 C.P.C. (3d) 55 (S.C.).
- [192] Ms. Bristow was successful on the issues of custody and guardianship, which occupied most of the trial time. The parties were about equally successful on the issue of the schedule for access to Cameron. Ms. Bristow was unsuccessful on the issue of a restraining order and regarding several of the terms she sought to require for access. The parties were about equally successful on the issues of ongoing and arrears of child support.
- [193] In light of Ms. Bristow's greater success on the trial issues, and Mr. Bristow's failure to provide all necessary documents in a timely way, Ms. Bristow is entitled to two-thirds of her taxable costs at Scale 3.

SUMMARY

[194] In summary, the court orders as follows:

1. The parties are divorced, effective on the 31st day after these reasons for judgment are released, subject to s. 12 of the Divorce Act;
2. Ms. Bristow will have sole custody and guardianship of Alexandra and Cameron, and both children shall reside with Ms. Bristow;
3. Ms. Bristow will co-operate to enable Mr. Bristow to obtain information about the children from third parties such as teachers, counsellors and doctors. Ms. Bristow will advise Mr. Bristow by email of significant events in the children's lives;
4. Access between Alexandra and her father will be in accordance with Alexandra's wishes;
5. Ms. Bristow will cooperate with Alexandra attending counselling to improve her relationship with her father if Alexandra wishes to participate in counselling and Mr. Bristow pays the counselling costs;
6. The access schedule will be as follows:
 - a) Alternate weekends from after school on Friday, or if school is not in session on Friday, from after school on Thursday, until school begins on Monday, or if school is not in session on Monday, until school begins on Tuesday;

- b) On Mondays following a non-access weekend from after school until school begins on Tuesday, unless the Monday is a statutory holiday, in which case the access will begin on Tuesday after school and continue until Wednesday morning;
- c) During school summer vacation, regular access shall be suspended, and replaced with two non-consecutive seven day periods in each of July and August, provided that the defendant gives written notice to the plaintiff of his choice of each such period, and provided further that such periods do not conflict with the plaintiff's vacation period, written notice of which she shall give to the defendant no later than June 1 of each year;
- d) During Christmas school vacation, regular access shall be suspended and replaced with the period of 3:00 p.m. to 8:00 p.m. on Christmas Day, plus seven days chosen by the defendant which are either consecutive or are interrupted once only, and which seven days will not include Christmas Eve or Christmas Day, provided that the defendant gives written notice to the plaintiff of the seven days he has chosen at least one month before the start of the Christmas school vacation period;
- e) During spring break, regular access shall be suspended and replaced with Mr. Bristow having access the first half of the spring break in odd years and the second half in even years;
- f) Commencing in 2007 and in odd years thereafter, Mr. Bristow will have Easter weekend access from after school on Thursday to Saturday at 7:00 p.m. and in even years commencing in 2008 from 7:00 p.m. on Saturday to school commencement on Tuesday;
- g) on any Father's Day that is not on an access day, Mr. Bristow will be entitled to three hours of access to Cameron, and on any Mother's Day that is an access day, Ms. Bristow will be entitled to three hours of access to Cameron, and if Cameron's birthday is an access day, Ms. Bristow will be entitled to three hours of access to him that day, and if Cameron's birthday is not an access day, Mr. Bristow will be entitled to three hours of access to him that day; and
- h) The defendant shall be responsible for picking up Cameron at the commencement of all access periods and the plaintiff shall be responsible for picking up Cameron at the conclusion of all access periods, and all such exchanges shall be at the Gordon Head Recreation Centre unless the access period commences or concludes with school, in which case the exchange will occur at Cameron's school;
- 7. The defendant shall be permitted to attend all of Cameron's football and soccer practises and games unless the football or soccer association says otherwise;
- 8. The defendant shall have unrestricted access to Cameron's school records and shall be permitted to attend at Cameron's school unless the school principal says otherwise;
- 9. Cameron will be permitted to telephone Mr. Bristow at least every second day without interference from Ms. Bristow, and will be permitted to email Mr. Bristow at least every second day;

10. The parties are to communicate about access by email except in case of emergency, and are to retain printed copies of their email exchanges. The access schedule can be changed only with the consent of Ms. Bristow;
11. The parties are not to take either child out of the greater Victoria area, or permit anyone else to do so, unless they have first given the other parent written notice at least two weeks in advance setting out the itinerary of the trip including dates, places and contact telephone numbers. The parents are to follow the trip itinerary except in case of emergency, and are to advise the other parent forthwith of any such emergency changes;
12. Mr. Bristow is restrained from consuming alcohol in the presence of either Cameron or Alexandra, and from consuming alcohol during or within 12 hours before an access period;
13. The arrears of child support as at March 31, 2006 are fixed at \$10,650.36 plus interest pursuant to the FME Act and statutory fees owing from and after the order of Judge Kay of September 23, 2004;
14. Mr. Bristow shall pay ongoing child support for the period April 1, 2006 to October 31, 2006 at the rate of \$42 per month, and for the period commencing November 1, 2006, at the rate of \$100 per month. These payments are subject to adjustment as set out below;
15. Mr. Bristow is to provide a copy of his filed annual income tax returns to Ms. Bristow no later than May 31 of each year. Ongoing child support payments are to be adjusted following that to reflect his actual income, as follows:
 - a) If Mr. Bristow's actual income for 2006 would result in payment under the Guidelines of more child support than he has been ordered to pay, Mr. Bristow must pay Ms. Bristow the difference by July 30, 2007;
 - b) For subsequent years, Mr. Bristow must pay Ms. Bristow monthly child support in the amount which is the greater of \$100 per month and the amount that he would be required to pay on the basis of his actual income for the prior calendar year; and
 - c) For subsequent years, Mr. Bristow must also pay Ms. Bristow by July 30 the difference between what he actually paid in a calendar year and what he should have paid by application of the Guidelines to his actual income. If he paid more than he should have paid by application of the Guidelines, Ms. Bristow must pay him by July 30 the lesser of the difference between what he paid and \$100 per month, and the difference between what he paid and what he would have paid on applying the Guidelines to his actual income;
16. Mr. Bristow is ordered to pay Ms. Bristow \$1 per month towards arrears of child support. Mr. Bristow is required to advise Ms. Bristow in writing forthwith if he learns that he has received any inheritance or if his income exceeds \$1,000 in a single month. Ms. Bristow has liberty to apply for an order varying the terms for repaying the arrears on the basis of further evidence;

17. Ms. Bristow is entitled to two-thirds of her taxable costs at Scale 3; and
18. The balance of the claims in the amended statement of claim are dismissed.

"V. Gray, J."

The Honourable Madam Justice V. Gray

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