
CANADA / JUDGMENT

C.A.U. v. E.L.K.H.

2021 BCSC 2588

COURT

Supreme Court of British Columbia

DECIDED

15 December 2021

Source: bccourts.ca - Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 2588 C.A.U. v. E.L.K.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.A.U. v. E.L.K.H.,

2021 BCSC 2588

Date: 20211215

Docket: E46875

Registry: New Westminster

Between:

C.A.U. aka C.A.H.

Claimant

And

E.L.K.H.

Respondent

Before: The Honourable Justice Lamb

Oral Reasons for Judgment

Counsel for the Claimant:

S. Ahuja

Counsel for the Respondent:

T.E. Watkins

Place and Date of Trial:

Port Coquitlam, B.C.

November 29, 30, 2021

December 1-3, 2021

Place and Date of Judgment:

New Westminster, B.C.

December 15, 2021

- [1] THE COURT: In this family law action, the main issue is parenting time. The parties have two children together, G and M. G is 13 years old, and M is eight years old.
- [2] It is clear that both children are well-loved and supported by their parents. The key issue for me to decide is what parenting arrangement is in their best interests, based on the evidence.
- [3] Both children have resided primarily with their mother, Ms. U., since the parties separated in February 2014. Mr. H, father of the children, has parenting time every other weekend, currently from Friday afternoon to Tuesday morning. Mr. H seeks an order for equal parenting time. Ms. U says that other than four one-week holiday blocks of time, Mr. H's parenting time should continue to be every second weekend, but the children should be returned to her care on Monday mornings, consistent with the schedule that was in place from mid-2016 to mid-2021.
- [4] There are also support issues that I must decide. Ongoing child support will be dictated by the parenting schedule. Ms. U seeks an order for retroactive child and spousal support. Mr. H's monthly child support payments have not increased since the interim child support order was made in 2015, despite significant increases in his income since then, and he has never paid spousal support. Ms. U does not seek an order for ongoing spousal support.
- [5] Mr. H says that retroactive awards should not be made in the somewhat unique circumstances of this case.

Overview

- [6] I will start by setting out an overview of the parties' relationship and the history of the litigation before turning to the issues I must decide.
- [7] Ms. U and Mr. H were high school sweethearts. After a brief separation, they started living together in Ms. U's mother's home in Abbotsford, British Columbia, in December 2004 when Ms. U was 18 years old and Mr. H was 19 years old.

- [8] When they first lived together, both parties pursued some post-secondary education and training, and they both worked at various jobs. Mr. H found employment in the oil fields and travelled back and forth between Alberta and British Columbia. In June 2005, he returned to British Columbia to support Ms. U following the death of her mother.
- [9] In 2006, Mr. H suggested that the couple move to Alberta, where his job prospects seemed to be better and the cost of living was less. Initially they moved to Calgary. Mr. H secured a job in Whitecourt, Alberta, in the oil industry. While living in Calgary, Ms. U worked as a nanny and trained to become an emergency medical responder. After completing the program, she worked as an EMR for a short time.
- [10] In mid-2006, the parties moved to Edson, Alberta, and bought a trailer with part of an inheritance that Ms. U had received upon her mother's passing. In Edson, the parties shared the nightshift for the front desk job at a local motel.
- [11] The parties married on April 4, 2007. Their son, G, was born April 27, 2008. After parental leave, Ms. U returned to work at the motel before securing a part-time position providing in-home care to a senior citizen. She was able to bring G to work with her.
- [12] In the meantime, in 2008, Mr. H secured his first position as an assistant metal tester, a field in which he continues to work. Mr. H travelled often for his job, leaving Ms. U responsible for G's care.
- [13] In 2012, the parties decided to return to British Columbia and found rental housing in Pitt Meadows, B.C. Mr. H secured steady employment as an assistant metal tester. They rented out the trailer that they owned in Edson until it was sold in 2013. The proceeds were used to pay off family debt.
- [14] By 2012, Ms. U was keen to have another child. Mr. H was somewhat reluctant. He would have preferred to be more financially secure before having more children. He was also having some doubts about his relationship with Ms. U. The parties agree that they often argued over the course of their relationship and that sometimes their arguments escalated into physical fights. Mr. H felt like the level of conflict was somewhat less once they moved back to British Columbia. He agreed to have another child, and he has no regrets about that decision. M was born April 24, 2013.
- [15] In June 2013, Mr. H's father was suffering from some health issues, and he moved in with the family. Ms. U provided home care to Mr. H's father while looking after their infant daughter and home schooling G in kindergarten. Mr. H supported the family financially.
- [16] The parties' relationship took a dramatic turn in September 2013. Both parties recall watching a Ted Talk together about having difficult conversations. The presenter recommended being honest and "ripping off the band-aid". Mr. H took that advice to heart and told Ms. U that he no longer loved her and that he did not want to be married. By that point, Mr. H had been unfaithful more than once, including when Ms. U was pregnant with their second child. After that conversation, the parties essentially lived like roommates until

Mr. H moved out in February 2014.

- [17] Ms. U was understandably hurt by Mr. H's words and conduct, particularly toward the end of their marriage. While Mr. H had his own grievances about the relationship, he recognizes and acknowledges that he caused Ms. U emotional pain when they were together. He recognizes that he was poorly equipped at the time to handle the stress of being the principal breadwinner for his family. Mr. H feels that the parties and the children are all better off than they would have been had the parties' toxic relationship continued.

History of litigation

- [18] Turning now to the history of the litigation.
- [19] Ms. U filed this action on July 10, 2014. In the notice of family claim, she sought an order in respect of parenting arrangements, for child support, and for spousal support. According to her notice of family claim, the children resided primarily with her, and Mr. H exercised parenting time with G every weekend from Friday evening to Sunday evening and with M for a few hours at a time because she was then still breastfeeding.
- [20] In her notice of family claim, Ms. U proposed that the children's primary residence would continue to be with her. She also said that Mr. H could continue with the existing parenting arrangement and that she was "open to scheduling further parenting time as agreed upon between the parties including holidays."
- [21] The notice of family claim also sought an order for divorce, which was granted by consent on June 7, 2016.
- [22] In March 2015, Ms. U unilaterally terminated Mr. H's parenting time when she found out that Mr. H had physically restrained G in December 2014. Ms. U reported the incident to the Ministry of Children and Family Development ("MCFD"). MCFD investigated and determined that Mr. H posed no danger to the children.
- [23] The December 2014 incident was referenced in the s. 211 report and canvassed in evidence at trial. I accept that it is more likely than not that Mr. H placed his hand on G's chest and told him sternly to stay in bed after G had resisted settling down one evening. I accept that Mr. H then apologized to G for losing his temper, and G apologized for not listening.
- [24] Over time, the details of the December 2014 incident evolved into an allegation that Mr. H placed his hand on G's throat and swore at him. I accept Mr. H's evidence that he did not place his hand on G's throat or swear at him. Unfortunately, this choking allegation has perpetuated.

- [25] After Ms. U reported the December 2014 incident to MCFD, Mr. H's parenting time was reinstated pursuant to a consent order at the judicial case conference on April 27, 2015. Once Mr. H registered for an anger management course, he was able to have parenting time every second weekend. The JCC order provided that he could return to having parenting time every weekend once he completed the course.
- [26] The evidence of both parties was unclear as to whether Mr. H actually returned to having parenting time every weekend after he completed the anger management course in July 2015.
- [27] The JCC order also provided that the parties would renegotiate Mr. H's parenting time once he completed the course, with the prospect of increasing his parenting time. That renegotiation did not happen.
- [28] At the JCC in April 2015, the parties also consented to an order for child support in the amount of \$1,016 per month backdated to August 1, 2014, based on Mr. H's income at the time. In the months that followed, Mr. H had difficulty paying child support consistently, and he had difficulty paying off the arrears that accumulated instantly by virtue of the backdated child support order.
- [29] On March 4, 2016, the court ordered that Mr. H's arrears of child support from August 2014 to January 2016 be set at \$10,500 and prescribed a payment schedule. Mr. H was unable to meet the payment schedule, but he eventually paid off the remaining arrears in 2020.
- [30] At the March 2016 application, the JCC parenting order was varied by consent to reduce Mr. H's parenting time to biweekly instead of weekly, with each visit extended by an extra night. Mr. H was given an opportunity to bring an application on June 7, 2016, to increase his parenting time.
- [31] At the June 7, 2016, hearing, instead of proceeding with Mr. H's application to increase his parenting time, the parties agreed to have a report prepared pursuant to s. 211(1) of the Family Law Act, S.B.C. 2011, c. 25 in order to assist with determining the best interests of the children. Mr. H was self-represented in the litigation at that time.
- [32] Dr. Peggy Koopman was retained to prepare the s. 211 report. She conducted a number of interviews in the fall of 2016 and completed her report on January 19, 2017. I will review that report in more detail later in these reasons, but the essence of Dr. Koopman's recommendation was that Mr. H's parenting time should be increased until parenting time was shared equally provided Mr. H fulfilled certain prerequisites.
- [33] There were no further steps in the litigation until Mr. H filed a notice of intention to proceed on June 19, 2020, and the matter was set for trial.
- [34] On May 17, 2021, Mr. H applied to increase his parenting time. Ms. U opposed his application. The court ordered that Mr. H's parenting time every second weekend would end on Tuesday morning instead of Monday morning.

- [35] At a trial management conference, the parties consented to an order for the preparation of a Views of the Child Report. Dr. Michael Elterman was retained. He conducted interviews and produced a report dated September 29, 2021. Again, I will review the report in more detail later in these reasons. In summary, both children said that they did not want to change the existing parenting time arrangements, but both were cognizant of what their parents wanted, and it was possible that G's stated preference may have been "partly shaped by things that he has been told."
- [36] In the lead-up to trial, counsel realized that no response to family claim had ever been filed. Mr. H filed a response to family claim on September 1, 2021, seeking shared parenting in accordance with the s. 211 report of Dr. Koopman.
- [37] At trial, Ms. U testified first. She called evidence from her partner, M.T. She also called evidence from M.D., a former girlfriend of Mr. H who is the mother of his child born February 2015.
- [38] For the respondent's case, Mr. H and his current partner, A.Z., gave evidence.
- [39] The s. 211 report prepared by Dr. Koopman and the Views of the Child report prepared by Dr. Elterman were filed at trial without either report author being called for cross-examination.

Issues

- [40] I will now identify the issues I must decide. As noted at the outset, the main issue at trial is parenting time for G and M. The claimant also seeks orders for child support, retroactive and ongoing, and retroactive spousal support. She is not making a claim for ongoing spousal support. The parties agree that these orders are sought pursuant to the Family Law Act.
- [41] The parties also seek an order regarding parental responsibilities pursuant to s. 41 of the Family Law Act. The parties agree that they shall each make day-to-day decisions when the children are in their respective care and that they will otherwise exercise parental responsibilities in consultation with each other. For issues where the parties cannot agree, Ms. U wants final decision-making authority, and Mr. H says they should refer issues to mediation or a parenting coordinator.
- [42] The parties agree that Ms. U will pay 32% of special or extraordinary expenses, and Mr. H will pay 68% of such expenses. They have agreed to terms regarding such expenses that I will include in the summary of orders at the conclusion of these reasons for judgment.
- [43] The parties also consented to various conduct and other orders that I will review at the conclusion of these reasons for judgment.

Credibility and reliability

- [44] Before turning to the issue of parenting time, I will make some comments on the credibility and reliability of the witnesses who gave evidence at trial.
- [45] Ms. U wants her children to reside primarily with her. She strenuously opposes any increase to Mr. H's parenting time, and in fact Ms. U proposes that the regular schedule should be rolled back from four nights to three nights bi-weekly. I find that Ms. U's strong feelings about her preferred outcome affected the reliability of her evidence. Although she acknowledged her role in the difficulties in their marriage when speaking to Dr. Koopman in the fall of 2016, her evidence at trial instead emphasized Mr. H's misconduct during their relationship, perhaps in an attempt to cast him in a negative light.
- [46] In general, Ms. U was reluctant to say anything positive about Mr. H and his parenting. She acknowledged in direct examination that she is not concerned that Mr. H poses any physical risk of harm to the children at this time. That was the most positive thing she was prepared to say about Mr. H. In cross-examination, Ms. U declined to offer any commentary on his parenting and said that she is not able to comment because she has not observed him directly.
- [47] Both children told Dr. Elterman that Ms. U asks them questions about what they do with their dad, which makes it hard to believe that she was not in a position to acknowledge that his parenting time generally proceeds without any significant issues.
- [48] In cross-examination, Ms. U conceded that Mr. H loves the children as much as she does and that their bond with their father is critical to their well-being. She would not admit, however, that Mr. H's relationship with the children would improve if they spent more time with him.
- [49] Ms. U insisted that she speaks only in positive terms about Mr. H and his household. However, I accept that it is more likely than not that M learned the term "deadbeat dad" at Ms. U's home, which I infer was likely in reference to Mr. H. Further, G reported to Dr. Elterman that his mother told him historical details of the parties' relationship that objectively reflect poorly on Mr. H.
- [50] Ms. U's strong preference for largely maintaining the status quo is understandable. However, I find I must take a cautious approach to her evidence that reflects poorly on Mr. H or positively on her own parenting when such evidence is not otherwise corroborated by a reliable source.
- [51] I am also cautious about placing any reliance on the evidence of Ms. U's husband, M.T. Mr. T acknowledged on cross-examination that he dislikes Mr. H "because of all he has put the kids through." I agree with Mr. Watkins' submission that

the evidence of Mr. [T] was startling at times in its animus toward Mr. [H]. Mr. [T] became highly emotional during his evidence and went on to embark on a lengthy diatribe against Mr. [H] listing numerous grievances and 'disgust' about his parenting.

- [52] I find that Mr. T's complaints about Mr. H's parenting were generally minor or dated or both. Mr. T's clear animus towards Mr. H undermines the reliability of his evidence. Again, Mr. T's feelings towards Mr. H may be understandable given his loyalty to Ms. U, but his evidence was less reliable as a result.
- [53] By contrast, I found that Mr. H offered his evidence in a balanced way. He readily acknowledged that Ms. U is doing a great job home schooling the children. Mr. H is glad that the children get along with Mr. T, and Mr. H describes Mr. T as a positive influence on G in particular.
- [54] In the course of his evidence, Mr. H acknowledged his role in the historical conflicts between the parties and the eventual breakdown of their marriage. He acknowledged that he made mistakes as a parent, particularly in earlier years when he did not have the tools to cope with normal parenting frustrations. Mr. H conceded that the children's previously-expressed preference for more time with him has evolved over the last year into a preference for maintaining the status quo. He did not attribute blame for that change.
- [55] I accept that Mr. H seeks an increase in parenting time because he truly believes that it is in the best interest of the children to have more time with him, so that their bond and connection can strengthen. I reject the proposition advanced by Ms. U, indirectly if not directly, that Mr. H's request for increased parenting time is motivated primarily if not exclusively by his desire to reduce the amount of child support payable.
- [56] I also heard from Mr. H's current partner, A.Z. I found her to be a credible and reliable witness. Her evidence was presented in a balanced way. She did not overstate the strength of her relationship with the children, and she acknowledged in particular that G remains somewhat reserved towards her, though she feels that they have a good rapport. Ms. Z admitted that she feels that Ms. U's conduct amounts to parental alienation. However, I accept that she has not shared her views with the children.
- [57] In particular, I accept that Mr. H and Ms. Z have managed to speak to the children in a positive way about Ms. U and Mr. T, despite the clear animus that the latter couple show toward Mr. H in particular. On the other hand, I find that Ms. U and Mr. T, whether intentionally or not, have made the children aware of their negative feelings about Mr. H. I find that this has had an effect on the children's stated views, which I will return to later in these reasons.
- [58] I also heard evidence from M.D. Ms. D was in a romantic relationship with Mr. H from December 2013 until mid-2014. Ms. D gave birth to Mr. H's son J in February 2015. Ms. D gave evidence about Mr. H's parenting of G and M from many years ago, all of which was considered by Dr. Koopman when she prepared her report in early 2017. Ms. D offered some

evidence about the differences between her parenting style and Mr. H's as it relates to J. None of that evidence is significant for the issues I must decide, though I note that Ms. D acknowledged that Mr. H is responsive to her comments and concerns about age-appropriate entertainment.

- [59] When asked in cross-examination whether there was something positive she might say about Mr. H's parenting, she said that he loves his children and that he is a good dad. Ms. D endorsed the view that Mr. H's interest in shared parenting is financially motivated. As I have said, I do not accept that that is true.

Legal Framework: Parenting Arrangement

- [60] Section 37 of the Family Law Act makes it clear that the court must consider only the best interests of the children when making a parenting time order.
- [61] Section 37(2) provides a non-exhaustive list of the children's needs and circumstances that factor into the determination of the best interests of the children.
- [62] Section 37(3) says that an order is not in the best interests of the children unless it protects, to the greatest extent possible, the children's physical, psychological, and emotional safety, security, and well-being.
- [63] Section 40(4) specifies that no particular parenting time arrangement is presumptively in the best interests of a child.

Section 211 report

- [64] In assessing the best interests of the children, I have the benefit of a s. 211 report prepared by Dr. Koopman and a Views of the Child Report prepared by Dr. Elterman. As many courts have noted, the authors of such reports act as the eyes and ears of the court: *C.D.M. v. K.M.A.W.*, 2019 BCSC 608.
- [65] Turning first to the s. 211 report. Dr. Koopman is a clinical and forensic psychologist. She was retained pursuant to a consent order made in June 2016 to assess the needs of the children, the views of the children, and the ability and willingness of each party to satisfy the needs of the children. At the time of her report, G was eight years old, and M was three.
- [66] Dr. Koopman interviewed both of the parties and observed each of them with the children in their respective homes. Dr. Koopman also carried out limited psychological testing of each of the parties. Dr. Koopman interviewed others, including Mr. T, Mr. H's then partner, and Ms. D. Dr. Koopman had access to various documents, including a June 2015 report prepared by Patricia Langlais, a registered counsellor who saw G for four counselling sessions "to address maternal concerns regarding being choked when disciplined by his father".

- [67] Based on the counselling sessions with G, Ms. Langlais determined that he was a healthy and psychologically stable child. Ms. Langlais believed that it is fundamental that a child have a healthy relationship with both parents, and she concluded that with some education and counselling the relationship between G and his father could be developed and strengthened. Ms. Langlais recommended that Mr. H attend anger management and parenting courses to support his knowledge on how to communicate with his son and control his frustration when parenting.
- [68] Dr. Koopman was aware that Mr. H wanted equal parenting time and that Ms. U opposed that possibility because she insisted that his request was primarily motivated by a desire to reduce child support and because Mr. H did not exercise all of his parenting time when he was working out of town.
- [69] As of the time of her assessment in the fall of 2016, Dr. Koopman found that G and M appeared to be happy children who were positively bonded with a healthy attachment to both parents.
- [70] Dr. Koopman made a number of recommendations for steps Mr. H should take before equal parenting time would be instituted. First, consistent with Ms. Langlais' suggestion, Dr. Koopman recommended that Mr. H take a parenting course so that he could develop skills in order to better handle his children's emotional needs. Mr. H had already taken a parenting after separation course by the time the s. 211 report was prepared. Mr. H has now taken two parenting courses. The first course in 2020 covered children from ages five to 13, and it validated some of the things he had been doing and increased his knowledge. The second course provided concrete advice on how to co-parent when divorced. Mr. H found the second course to be useful but more difficult.
- [71] As of the fall of 2016 when the s. 211 interviews were conducted, Mr. H's living arrangement was not settled, and he planned at that time to move to a house with his mother. Dr. Koopman opined that it would be important for Mr. H to "establish a living arrangement that will allow comfort for all inhabitants including the children", ideally near Ms. U's residence and the children's school.
- [72] Presently Mr. H and Ms. Z rent a three-bedroom home very close to Ms. U's house and the school the children attended before they started home schooling in March 2020. The location was chosen deliberately to facilitate co-parenting. Even though the children currently share a bedroom with step-siblings, I am satisfied that Mr. H's current home offers a comfortable and appropriate living arrangement, which I take to be the crux of Dr. Koopman's recommendation in regard to housing.
- [73] In acknowledgment of Ms. U's concern regarding Mr. H's failure to exercise all of his parenting time, Dr. Koopman said that "it will be important for Mr. H to demonstrate that he is fully present for his access time before that time is increased."

- [74] Although Mr. H had some periods of time when he was unable to exercise his parenting time due to work obligations out of town, both parties confirm that Mr. H has consistently exercised his parenting time since mid-2019, and any changes to the schedule have been agreed upon by the parties.
- [75] Most significantly, Dr. Koopman recommended that Mr. H's parenting time should be increased to include one weekday overnight per week once he completed the parenting course and demonstrated adherence to the existing parenting schedule. Dr. Koopman recommended that Mr. H's weeknight parenting time should increase gradually until the parents have equal parenting time. She believed that her plan would permit Mr. H to be a full parent in the children's lives, while at the same giving Ms. U some assurances regarding Mr. H's sincerity and ability to fulfil that role.
- [76] Although not explicitly stated in the s. 211 report, I find that Dr. Koopman agreed with Ms. Langlais' comment that "it is fundamental that a child have a healthy relationship with both parents". This was the need of the children that Dr. Koopman sought to address through her recommendations.
- [77] As noted, Dr. Koopman's report was admitted into evidence at trial by consent without cross-examination. Neither party suggested that Dr. Koopman misapprehended the facts or that her investigation was biased or inadequate. Much of the information gathered by Dr. Koopman was covered in the testimony of the witnesses at trial. Dr. Koopman's observations and assessments of the parties strike me as reasonable based on my own observations and assessments of the parties some five years later.
- [78] Ms. U argues that the report should be given little weight on the basis that the report is too dated to be relevant. Her counsel submits that the needs of a three-year-old and an eight-year-old are far different than those of an eight-year-old and a 13-year-old. However, Mr. H submits, and I agree, that the children's need to have a healthy relationship with both parents does not expire. Further, I agree that the plan crafted by Dr. Koopman to satisfy that need is logically connected to that need and remains a reasonable way in which to meet the identified objective, provided that equal parenting remains in the best interests of the children based on current circumstances.

Section 37(2)(b): Views of the children

- [79] I will now turn to the views of the children, which is one of the factors to be considered when deciding what parenting arrangement is in the best interests of the children.

- [80] Courts have recognized that a child's view should be given due weight in accordance with the age and maturity of that particular child: *L.R.A.C. v. S.M.L-C.*, 2013 BCSC 1622. The Ontario Court of Appeal decision in *Decaen v. Decaen*, [2013] O.J. No. 1549 identified various factors that may affect the significance of a child's stated wishes, including the length of time the preference has been expressed for and the influence of the parent on the expressed wish or preference.
- [81] In this case, both children have recently expressed a preference for maintaining the current parenting arrangement. However, based on the report of Dr. Elterman and other evidence at trial, I am concerned that, intentionally or not, Ms. U has influenced the views of the children by what she has told them, particularly over the last year since Mr. H delivered notice that he intended to revive his request for equal parenting time. As a result, I place less weight on the children's stated preferences than I might otherwise have done based on their ages and reported maturity levels.
- [82] I have the benefit of a Views of the Child Report prepared September 29, 2021, by Dr. Michael Elterman, clinical and forensic psychologist. Dr. Elterman was not retained to assess the children's needs, nor to report on the parents' abilities to meet those needs. His only task was to report on the children's views and to comment on whether or not there is any reason that their stated views should not be accepted at face value. Dr. Elterman's report was filed by consent, and neither party required Dr. Elterman to attend for cross-examination on his report.
- [83] Dr. Elterman reviewed various documents, including Dr. Koopman's report. He interviewed each of the parties for background. To control for reliability of their views over time and across parents, Dr. Koopman interviewed each child separately when brought by each parent.
- [84] When Dr. Elterman asked Mr. H to identify his biggest concern for G's emotional health, Mr. H said that G gets withdrawn and seems angry at him based on grudges that Ms. U has against him. When asked the same question, Ms. U said that G wants more control, but he is at a stage where he cannot have more control. Ms. U reported that G gets into conflicts with Mr. H and that G complains that he does not have much control over his life at his father's place. Ms. U also noted that G complains that Mr. H calls him names like "zombie" and "psycho". I accept Mr. H's evidence regarding these allegations of name calling and find that the circumstances are not particularly significant to my assessment.
- [85] G told Dr. Elterman that he is happy with the existing parenting arrangements. When asked what is making him most unhappy now, G responded the "court thing happening" and his father's request for equal parenting time. G reported that Ms. U told him that she would be sad if parenting time was equal, but she would do it. G told Dr. Elterman that he felt more attached to Mr. H when he was younger because he did not know that much about him. When Dr. Elterman probed for what he had been told about Mr. H, G reported that Ms. U told him that there were a lot of arguments in front of him when his parents were together.

Ms. U also told G that Mr. H gave her a concussion when "she hit the ground from him". G denied that hearing these things affected his perception of his father. As I have noted, despite his denial, I find it is likely that G's views have been affected by what he has been told.

- [86] With respect to the alleged concussion incident, I pause to note that Mr. H acknowledged that he forcefully manoeuvred Ms. U to the floor in the course of one of their many physical confrontations, but he denies that she struck her head and he does not recall any suggestion that she suffered a concussion. Mr. H testified that Ms. U had initiated the physical contact on that occasion, though he did not seek to excuse or diminish the gravity of what he did. Mr. H regrets his conduct that day, especially because G, then three years old, heard the conflict from outside the room. In her evidence, Ms. U said the concussion happened in 2007, though she also said it was the year G was born, which would be 2008. It is not clear whether Mr. H and Ms. U were referring to the same physical altercation or whether one of them is mistaken as to when the incident occurred.
- [87] In any event, even if Mr. H was solely to blame for flipping Ms. U onto the floor on one or more occasions, which I do not need to decide, I cannot conceive of any good reason for Ms. U to share this historical misconduct with G when he had no independent memory of it otherwise.
- [88] Returning to the interview with Dr. Elterman, G referred to the December 2014 incident and the time that Mr. H "lied" about eating G's Halloween candy. This latter incident was canvassed at trial. I accept Mr. H's evidence that he did not in fact eat G's Halloween candy and that the incident was not a big deal when he and G discussed it at the time. I find that the gravity of the Halloween candy incident has been unreasonably amplified through repetition within Ms. U's household. Similarly, based on Ms. Langlais' 2015 report, G was likely not adversely affected by the December 2014 incident. It is in his best interests that he not be encouraged to dwell on it any longer.
- [89] Finally, G told Dr. Elterman his concern that a consequence of shared parenting might be that Mr. H would work less and in turn could only afford a smaller house. G said that he had discussed this concern with his mother, and she agreed that this likely would happen. Ms. U testified at trial that she reassured G that he need not worry about financial matters. I find that it is more likely that G accurately reported the conversation to Dr. Elterman and that Ms. U reinforced G's concerns about the anticipated negative financial fallout of shared parenting.
- [90] Dr. Elterman's interview with M confirmed that she is a generally happy child. She identified "[w]hat is making her most unhappy is when she wants to be with her dad equally". M reported that "mom wants things to stay the way they are now because she has not agreed with dad that they can stay longer." M told Dr. Elterman that she misses one parent when she is with the other. She also said that she does not want to make her mom sad. M would be surprised to learn that her mother wanted her to spend time with her father. On balance, M

said that she wanted to leave things the way they are now.

[91] Dr. Elterman concluded his report as follows:

In summary, the children have said that they would like to leave the arrangement the way that it is, however, based on comments that they both made, they are aware of what each parent wants and in the case of [G], it is possible that his views have been partly shaped by things that he has been told.

[92] I accept, based on Dr. Elterman's opinion and other evidence at trial, that the children's perspective on their father and the possibility of shared parenting has been influenced by what they have been told. I note that Mr. T confirmed that it is likely the children are aware of his strong dislike of Mr. H. When Ms. U received notice in mid-2020 that Mr. H intended to pursue equal access, she broke down in tears and sobbed. When G found her in that state, she told him that his dad would like more time, that she would have to go through this process again, and that she was overwhelmed. I find it very likely that G, described as an emotionally sensitive child, was moved by this strong display of emotion. I accept Mr. H's evidence that both children regularly asked for more time with him before he filed his notice of intention to proceed and that their attitude has evolved more recently to a preference for the status quo.

[93] In short, I am reluctant to place significant weight on the children's stated preference. In any event, the views of the child are but one factor in assessing what is in their best interests. Although they have a voice, they are not responsible for choosing what is in their own best interest. It is the court that must decide what is in their best interest after weighing all of the relevant factors.

[94] In making my decision, I have also considered the other factors identified by s. 37 of the Family Law Act that are relevant in the circumstances of this case. I will review them in turn.

Section 37(2)(a): the children's health and emotional well-being.

[95] In terms of the health of the children, there was no evidence that either child has any significant health concerns. Both parents have demonstrated that they are able to meet the children's health needs and respond to any issues that may arise.

[96] As for their emotional well-being, Ms. U argues that she is better able to protect the children's emotional well-being. She relies on the children's comments to Dr. Elterman and some of the incidents documented in Dr. Koopman's report. As I have already noted, the significance of the complaints about Halloween candy and the December 2014 incident have been exaggerated in the retelling. In my view, the perpetuation and reinforcement by Ms. U and Mr. T of these relatively minor and dated grievances is not beneficial to the children's emotional well-being.

- [97] Ms. U argues that it would be better for the children to reside primarily with her because they will be left in the care of Mr. H's partner when he is at work. Ms. U identifies "logistics" as the reason why it does not make sense to have shared parenting and why she opposes it. I will review Mr. H's current living arrangements and lifestyle in order to assess this argument.
- [98] Mr. H lives in a rented three-bedroom home with A.Z. Ms. Z has a four-year-old daughter from a previous relationship who spends equal time with Ms. Z's former spouse. Mr. H and Ms. Z have recently had a child together, born in July 2021.
- [99] Mr. H currently works nights, leaving home at 3:45 p.m. and returning at 4:10 a.m. Mr. H works Monday to Thursdays, though he changed his work schedule to have every second Monday off when his parenting time was increased in May 2021. Mr. H testified that his employer remains willing to be flexible with his work schedule to accommodate his parenting schedule, and I am satisfied that Mr. H will take reasonable steps to be present with his children when he has parenting time.
- [100] To be clear, I am not predicating any parenting time arrangement on an expectation that Mr. H will change his work schedule so that he is physically present with the children whenever he has parenting time. I accept Mr. H's submission that there is value to having G and M integrate into both households and for them to observe how Mr. H works to support his family.
- [101] In short, I am not convinced that logistics preclude equal parenting time.

Section 37(2)(c): the nature and strength of the relationships between the children and significant persons in the children's lives

- [102] In terms of the nature and strength of the relationships between the children and significant persons in the children's lives, I am satisfied on all the evidence that the children have a close relationship with both parties. I accept that they have a strong connection with Mr. T who has lived with them since the summer of 2014. G is not as close with Mr. H's current partner of two years, though there is reason to be optimistic that their relationship will improve once a parenting order is made and with the passage of time.
- [103] Ms. U is critical of the fact that Mr. H has, over the years, introduced the various women he has dated to the children. In his evidence, Mr. H acknowledged that in hindsight, it was a mistake to introduce the children to Ms. D before it was clear that their relationship would be long lasting. However, Mr. H explains that he was in a relationship with his next girlfriend for three years and that both children were very fond of her. Although she moved away to Ottawa to advance her career, thus ending the relationship, Mr. H believes that it is healthy for the children to recognize that sometimes people will come in and out of their lives.

- [104] Mr. H is aware that G is somewhat more reserved when it comes to Ms. Z, though he wonders whether that might in part arise from loyalty to his mother. I note that G told Dr. Elterman that he gets along fine with Ms. Z, though he does not like to see his father with another woman.
- [105] In my view, Mr. H's history of romantic partners is not a strong factor in favour of one parenting arrangement over another.
- [106] Ms. U points to her role as home-school teacher, another logistical factor, as a reason why the children should reside primarily with her and why Mr. H's parenting time should be reduced.
- [107] I note that Mr. H seeks an order to have the children rejoin the regular school system, an issue I will review in more detail later in these reasons. No matter the format of the children's education, I anticipate that the parties will be able to overcome any logistical challenges that arise. If the children continue to be home schooled, there can be flexibility in terms of when formal learning is done. The children may not always be learning during traditional school hours or days of the week but instead at a time when Mr. H's work schedule allows him to teach them. If they return to the regular school system, then neither parent will be responsible for meeting the curriculum requirements. Whatever the ultimate schooling format, I am not satisfied that this logistical factor outweighs the other factors that I must consider when assessing the children's best interests.

Section 37(2)(d): history of the children's care

- [108] As for the history of the children's care, it is clear that Ms. U has always been the primary caregiver from the time they were infants until the present day. It is also clear that Mr. H has had regular parenting time with both children since shortly after the parties separated. Initially, Mr. H had parenting time with G every weekend and with M once she was no longer breastfeeding.
- [109] From March 2016 to May 2021, Mr. H was entitled to parenting time from Friday night to Monday morning every second weekend. Mr. H missed some of that parenting time when he was in Alberta for work from November 2016 to April 2017, and again from November 2018 to April 2019. In those months, Mr. H generally saw the children one weekend per month and the children would spend the rest of his parenting time with his mother when he was not able to return to B.C. Mr. H has consistently exercised his parenting time since April 2019 but for a short stint in Ontario for work in the summer of 2019.
- [110] I am satisfied on the evidence that Mr. H asked for additional days and time with the children when his work schedule permitted, which Ms. U generally denied. Through the years, Mr. H continued to express a desire to have equal parenting time. I accept that he has worked hard to get to a place where he feels able to advance his request for equal parenting time. I accept that he did not do so sooner largely because he did not feel like he was in a financial position to do so, particularly when there were outstanding arrears of child

support.

Section 37(2)(e): need for stability, given the children's ages and stages of development

[111] As for the children's need for stability, Ms. U suggests that the concerns about Mr. H's stability identified in Dr. Koopman's report persist. I reject that argument. Mr. H has exercised his parenting time consistently for two and a half years. He has established housing that reasonably meets the needs of the children, and he is in a stable relationship. I am satisfied that Dr. Koopman's recommendation for equal parenting time was not contingent on Mr. H's continuing his relationship with his then partner. The possibility that Mr. H and Ms. Z may move to a different home in the future does not constitute instability.

Section 37(2)(f): ability of parent to exercise their responsibilities

[112] I am satisfied, based on the evidence of the parties and their partners, that both parents are able to exercise their parental responsibilities.

Section 37(2)(g): family violence

[113] Turning to the issue of family violence. It is clear from both parties' evidence and the s. 211 report that both parties were physically aggressive with the other during their relationship. G apparently overheard one such altercation when he was three years old. There is no evidence of any physical confrontations or other family violence between the parties since their separation in 2014.

[114] I have already addressed the December 2014 incident. There was one occasion in which Mr. H spanked G once at the PNE in 2014. I accept Mr. H's account of that incident, and I find that his decision to spank G once on the bottom was reasonable discipline in the circumstances. I am also satisfied that it was a singular event and that it does not constitute family violence.

[115] As noted, Ms. U confirmed in her direct evidence that she is not worried about the safety of the children when they are in Mr. H's care. I am satisfied that family violence is not a factor in deciding the appropriate parenting arrangement in this case.

Section 37(2)(i): cooperation between the parties

[116] In terms of cooperation between the parties, they have largely been able to cooperate regarding scheduling and transitions between households. This is not a factor that affects my decision on what parenting arrangement is appropriate.

Conclusion re: Parenting Time

- [117] Weighing all the relevant factors, I find it is in the best interests of the children to have equal parenting time with both children. I agree with Dr. Koopman's recommendation that equal parenting time will address the needs of the children to have a strong bond and relationship with both parents. I accept Mr. H's submission that his parenting skills have improved since Dr. Koopman's assessment and his current life circumstances put him in a better position to exercise equal parenting time than he was five years ago.
- [118] Dr. Koopman's recommendation for equal parenting time was based on the goal of strengthening Mr. H's relationship with the children, and I accept that this goal is more critical now than it was in 2016 because of how the children's views towards Mr. H have been influenced, particularly in the last year. As I have mentioned, the logistical factors do not outweigh the key objective of ensuring a strong bond with both parents.
- [119] Given the history of their care, I agree that it is in the best interests of the children to transition gradually from the current arrangement to equal parenting. I am satisfied that the schedule proposed by Mr. H is reasonable. That is, starting immediately, Mr. H's biweekly parenting time will increase by one day such that the children will return to Ms. U's care on Wednesday mornings instead of Tuesday mornings after his biweekly parenting time.
- [120] After three months with this schedule, Mr. H's parenting time will increase again so that the children spend equal time in each household. Unless the parties agree otherwise, parenting time will happen on a week-on/week-off schedule, with the transition from one household to the other happening after school on Fridays.
- [121] The parenting schedule will be suspended to allow each parent equal time on Christmas and the children's birthdays. Ms. U will have at least four hours of parenting time on Mother's Day and Mr. H will have at least four hours of parenting time on Father's Day, if those days do not otherwise fall within their parenting time.
- [122] As mentioned, the parties may agree to change the details of the parenting arrangement provided that each parent has equal parenting time.

Parental responsibilities

- [123] Turning to parental responsibilities, the parties agree that they will share the parental responsibilities set out in s. 41 of the Family Law Act.

- [124] To their credit, the parties have largely been able to reach consensus on decisions affecting the children. Going forward, if they cannot agree, Ms. U wants to have final decision-making authority, with Mr. H having the option of applying to court to vary any decision he wants to challenge. Mr. H argues that giving Ms. U ultimate decision-making authority will make it less likely that there will be meaningful discussion on any matters upon which they do not agree. Mr. H's concern is not unreasonable.
- [125] In my view, both parties are well positioned to consider the best interests of the children and to work together to reach consensus. If there is a parenting issue upon which they cannot agree, then the parties are required to consult a parenting coordinator to obtain assistance in building consensus or to make a determination respecting any matters in accordance with s. 18 of the Family Law Act.

Schooling

- [126] I will now turn to one parenting issue where the parties do not agree: schooling.
- [127] In his trial brief, Mr. H seeks an order that G be enrolled in XXXXXX Secondary School and that M be enrolled in XXXXXX Elementary School at the earliest available admission date.
- [128] The children have been home schooled continuously since March 2020 when the COVID-19 pandemic temporarily interrupted classroom learning. When in-person schooling resumed in June 2020, Mr. H agreed with Ms. U that the children should continue to be home schooled rather than return to in-person learning, and he confirmed by text that he agreed to continue home schooling in the fall of 2020. That said, Mr. H anticipated that home schooling would be time-limited.
- [129] In his testimony, Mr. H confirmed without hesitation that Ms. U has done a great job teaching the children, but he had expected that G in particular would return to the regular school stream when he started Grade 8, the start of high school, in September 2021. Mr. H feels that it is important that G have the social opportunities that are available when attending high school in person.
- [130] Ms. U ties the initial decision to home school to a concern that she developed in March 2020 about G's math skills. She testified that she and Mr. T decided to spend some time that spring break working on his math skills, and that it went so well she decided it would be best to continue home schooling the children. Ms. U said that Mr. H agreed that home schooling was a good idea in light of COVID-19. She says that G had always said that he wanted to return to home schooling, which is how he completed kindergarten. Ms. U says that she has continued to home school the children because they have said they want to continue. Ms. U says they will leave it up to the children whether they wish to continue with home schooling.
- [131] Ms. U's role as the children's primary teacher affects her views on parenting time. The main reason Ms. U identified for suggesting that the children be returned to her on Monday mornings rather than Tuesdays relates to a concern about Mr. H's consistency with the

home-school program. She pointed to a series of texts on a singular Monday that indicated that the children reached out to her with a question about M's homework and another occasion when Mr. H failed to ensure that G had completed his assignments. Mr. H acknowledged these minor missteps, but he said and I accept that he is generally managing home schooling very well.

- [132] I have somewhat limited evidence upon which to assess what is in the best interests of the children on this issue. The limited school records provided indicate that both children are performing reasonably well academically. Despite rather limited in-person interaction with his friends, G's online teacher said that he was "thriving socially and emotionally with home learning" in his final report card in June 2021.
- [133] Making decisions respecting the children's education is one of the parental responsibilities listed in s. 41 of the Family Law Act. The Court of Appeal provided guidance in *N.R.G. v. G.R.G.*, 2017 BCCA 407, and essentially discouraged trial judges from making decisions that properly fall to parents before the parents have had a chance to make their own decision.
- [134] In this case, the parties' views regarding schooling may evolve once the children settle into the new parenting arrangement. The children's views regarding schooling may evolve, especially if they understand that their preference for schooling will not favour or preclude a certain parenting arrangement. If the parties are still not able to agree on schooling, then they will be able to consult the parenting coordinator for assistance.

Financial Issues

Prospective child support

- [135] The new parenting arrangement necessitates a revised child support order, and Ms. U seeks retroactive child support and spousal support. Before considering retroactive support, I will address the prospective child support, which requires me to assess what income each parent is earning from each source of income using the most current information available: *Bell v. Bell*, 2009 BCCA 280. I will then consider whether income from each source should be adjusted under Schedule III of the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines].
- [136] For the next three months until the shared parenting arrangement goes into effect, Mr. H will pay child support in accordance with the Guidelines.
- [137] Mr. H's 2020 Guidelines net income after union dues was \$96,951, and his F8 financial statement indicates no anticipated significant change. At trial, Mr. H testified that he anticipates his 2021 income might be slightly less as a result of taking days off for additional parenting time that was ordered in May 2021. Mr. H testified that he now works 70 hours in a two-week period instead of 80 hours, though he acknowledged working some overtime hours in October 2021.

- [138] Mr. H did not file in evidence a recent payslip that might clarify his anticipated final 2021 Guidelines income. I accept that his income will likely be less as a result of working fewer hours. Based on the available evidence and after taking into account a deduction for union dues, I assess his Guidelines income to be \$94,000, which results in a child support payment of \$1,442 per month.
- [139] Once there is equal parenting time, s. 9 of the Guidelines provides for a setoff of child support payable by each party. As mentioned, Mr. H's child support obligation will be based on income of \$94,000.
- [140] As for Ms. U, her 2020 Guidelines income was \$18,340 comprised solely of rental income. Mr. H argues that I should base her child support obligations on income of \$75,000 based on imputing professional income of \$50,000 and anticipated rental income of \$25,000.
- [141] Ms. U says that it is not reasonable to impute that level of income to her when she has not had an opportunity to establish her counselling practice.
- [142] Section 19(1)(a) of the Guidelines permits the court to impute income to a spouse who is intentionally underemployed or unemployed. As explained by the Court of Appeal in *Marquez v. Zapiola*, 2013 BCCA 433:
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. . . .
- [143] The test is discretionary: *Zilic v. Zilic*, 2021 BCCA 107 at para. 19. The party seeking to have income imputed to the other spouse, in this case Mr. H, bears the burden of establishing an evidentiary basis for such a finding: *Marquez* at para. 36; *Zilic* at para. 19. In order to assess Ms. U's income, it is necessary to review some background.
- [144] When the parties were together, Ms. U completed various training programs and worked at a number of different jobs. When Mr. H moved out in February 2014, Ms. U was looking after their young children and providing home care to Mr. H's father. In 2014, Ms. U enrolled in a 52-week course to become a counsellor through Vancouver College of Counsellor Training, a program she completed in 2017.
- [145] In the meantime, Ms. U, Mr. T, and the children moved in with Ms. U's grandmother in 2016. Ms. U's grandmother purchased a hobby farm where they all lived together. Ms. U was added to the title of the property in 2017. Ms. U and her grandmother used rental income from a second dwelling on the property to pay their living expenses. Ms. U became the sole owner of the property with clear title when her grandmother passed away in April 2020. She provided care to her grandmother from 2016 onward, including through her grandmother's final illness.

- [146] Ms. U attributes the delay in completing her counselling program and the launch of her counselling practice to taking care of her grandmother, looking after her children, and the divorce action.
- [147] Since 2020, Ms. U provides counselling services through her own practice, Willow Creek Counselling. She specializes in counselling blended families and has taken extra training in anxiety and trauma. Ms. U is available to provide counselling between 4:00 p.m. and 8:00 p.m., Monday to Friday. She is not available earlier in the day because she is responsible for home schooling and for looking after her youngest child until Mr. T returns from work.
- [148] Ms. U currently has 10 regular clients, and she obtains new clients primarily through referrals, though she does maintain a website. She charges \$100 per hour for individual counselling and \$130 per hour for couples. Ms. U works from home and has minimal expenses. On her F8 financial statement, Ms. U reports that she currently earns \$15,000 per year of gross income and \$13,000 in net income from her counselling business. Ms. U has not looked for employment outside the home as she wants to be available to home school her children.
- [149] Mr. H argues that I should impute income in respect of Ms. U's counselling practice of \$50,000 per year. This is the equivalent of an average of approximately 10 hours of counselling per week. Ms. U says that it is not reasonable to impute earnings at the level proposed, given that she is still building her practice. Mr. H says that Ms. U does not work more than she does because she has no financial need to do so.
- [150] Based on her education and skills and the other factors identified in *Fong v. Fong*, 2011 BCSC 42, I am satisfied that Ms. U has a greater capacity to earn income than is reflected in her reported earnings to date. Given her hourly rate, I am satisfied that it is reasonable to attribute an earning capacity of \$50,000 per year for her counselling practice to Ms. U.
- [151] As for rental income, Ms. U reported gross rental income of \$29,400 and net rental income of \$18,340 in 2020. Ms. U continues to charge \$2,450 per month for rent in 2021. She acknowledged that many of the expenses claimed in 2018 and 2020, the years for which the figures were available, were for specific repairs that are not likely to recur annually. Mr. H argues that I should set rental income at \$25,000 for child support purposes. Ms. U testified, and I accept, that although there were some one-time repairs in 2018 and 2020, she does incur annual maintenance costs in connection with the rental unit. I was not provided with an estimate of what those annual costs might be, though Ms. U said that she anticipated that she would be able to keep most of the gross rental income going forward.
- [152] I am satisfied that reasonable expenses related to generating rental income are unlikely to be as high in 2021 as they were in 2020. Based on the most current information available, I assess Ms. U's rental income to be \$20,000 per year for child support purposes.

[153] In summary, I have assessed Ms. U's income to be \$70,000 for Guidelines purposes, which results in child support in the amount of \$1,086. As a result, the net child support payable by Mr. H to Ms. U will be \$356 per month once equal parenting is in place.

[154] As long as there are children of the marriage, the parties will exchange income tax returns by July 1 of each year.

Retroactive Child and Spousal Support

[155] Section 152(1) of the Family Law Act provides the authority to vary retroactively the interim child support order. Although there was no prior order for spousal support, Part 7, Division 4 of the Family Law Act gives me the authority to order spousal support retroactively. Section 192 of the Family Law Act gives me the authority to make both orders.

[156] D.B.S. v. S.R.G., 2006 SCC 37 [D.B.S.] sets out the factors a court should consider when determining whether to order retroactive child support. The D.B.S. factors have also been applied to the question of retroactive spousal support, though with recognition of the distinct legal foundation for these awards: Kerr v. Baranow, 2011 SCC 10.

[157] The core principles that govern child support, including retroactive child support, were identified by the Supreme Court of Canada in D.B.S. and restated at para. 10 of Michel v. Graydon, 2020 SCC 24. I have considered these principles in reaching my decision.

[158] I will now review the factors to consider when deciding whether to order retroactive child support as set out in D.B.S.

[159] The first factor is the reason for the delay in applying. Ms. U testified that she was afraid to raise the topic of adjusting child support to reflect any changes in Mr. H's income and that she did not want to "rock the boat". It is important to recall that the interim child support order was made on April 27, 2015, at the judicial case conference, and the amount payable by Mr. H was set at \$1,016 per month. As part of that consent order, the parties were supposed to renegotiate Mr. H's weekly parenting time of Friday to Sunday to Thursday to Sunday "or a combination thereof". I note that weekly parenting time of Thursday to Sunday would qualify as shared parenting and would require a change to child support in accordance with s. 9 of the Guidelines.

[160] The parties agree that they did not renegotiate parenting time as contemplated by the JCC order, and Mr. H's parenting time was rolled back from every weekend to every second weekend with the additional day added in March 2016. By that time, Mr. H had fallen into arrears in his child support payments due to an involuntary reduction in his hours of work.

- [161] At the March 2016 application, Ms. U sought a \$5,000 penalty under the Family Law Act for failure to pay child support in addition to arrears. Mr. H agreed on that application to reduce his parenting time to biweekly, with liberty to apply for additional parenting time. Arrears of child support were set at \$10,500, which were ultimately paid off through the B.C. Family Maintenance Enforcement Program in 2020.
- [162] In June 2016, Mr. H filed an application to increase his parenting time. However, the parties agreed to defer his application until a s. 211 report could be prepared, which is the Dr. Koopman report that was completed in January 2017. Neither party took any steps in the litigation until Mr. H filed his notice of intention to proceed in 2020.
- [163] As set out in D.B.S., delay in seeking child support is not presumptively justifiable. I find that there was no objectively justifiable fear that Mr. H "would react vindictively to the application to the detriment of the family": D.B.S. at para. 101. Although he stopped paying child support entirely when he learned that Ms. U and Mr. T were cohabitating in the summer of 2014, which he acknowledged at trial was an inappropriate response, Mr. H has paid regular child support since March 2016. I find on the evidence that Mr. H has diligently worked toward bettering his employment qualifications in order to improve his financial circumstances, including paying the outstanding arrears, so that he would be in a position to seek increased parenting time.
- [164] There is no evidence that Ms. U lacked the knowledge, financial, or emotional means to seek increased child support or to demand financial disclosure from Mr. H to assess whether there was a basis to seek increased child support. I note that it appears from the record that Ms. U has been represented continuously by counsel throughout this matter, whereas Mr. H represented himself on at least one application and had counsel on a limited retainer for another.
- [165] As suggested by Mr. H, I am satisfied that Ms. U did not seek increased child support at any earlier date because she reasonably apprehended that any court application by her for increased child support would be met with an application by Mr. H to implement the s. 211 report recommendations for equal parenting time. With the financial support of her grandmother, Ms. U had no financial need and I find that the children's circumstances did not suffer because child support payments did not increase commensurate with Mr. H's salary increases.
- [166] As for the payor parent's conduct, it is true that Mr. H failed to disclose increases in his income after 2015. While trial judges often find such a failure to disclose to be blameworthy, I note that the Supreme Court of Canada at para. 58 of D.B.S. specifically recognized that "the scheme in the Guidelines does not burden a payor parent with the automatic disclosure obligation every time his or her income increases". Also relevant is the fact that the consent order in this case did not impose an obligation on Mr. H for regular financial disclosure, thus he was not in breach of a court order.

- [167] The final D.B.S. factor is the financial hardship to the payor parent if a retroactive award is made. Ms. U seeks a retroactive child support award in the amount of \$34,239. The amount sought represents the difference between the child support paid between 2016 and 2021, and the child support payable based on Mr. H's actual annual Guidelines income for those years. One third of the amount claimed is attributable to 2019 when Mr. H had an exceptionally high income as compared to other years, which he used in part to pay down his child support arrears.
- [168] In terms of his financial circumstances, Mr. H shares household expenses with Ms. Z, who is currently on maternity leave and collecting parental leave benefits for their child born in July 2021. Mr. H also pays child support to Ms. D. According to his financial statement, there is a modest surplus within his household of income over expenses on a monthly basis, though he noted in his evidence that he conservatively reported some of his estimated expenses. Mr. H has managed to accumulate a very modest RRSP, though I note that he owes more on his 2017 minivan than it is currently worth. Mr. H testified, and I accept, that his previous efforts to secure a bank loan have failed. I am satisfied that an award of retroactive child support would cause a financial hardship for Mr. H.
- [169] In addition to the D.B.S. factors, the other consideration that arises is whether a retroactive child support would amount to a redistribution of capital: *Macdonald v. Macdonald*, 2005 BCCA 23. In this case, there is no evidence that Ms. U had to call on resources such as capital or debt that should not have had to be used to support the children, or that the children were deprived of any necessities: *S.E.G. v. D.C.G.*, 2003 BCSC 896. As already indicated, Ms. U had the good fortune to receive a generous inheritance, in addition to financial support and gifts, that leave her in a very secure financial position for someone of her age.
- [170] On balance, when all of these factors are weighed, I am satisfied that a retroactive child support award is not warranted in this case. To be clear, this conclusion, as in all cases, turns on the facts. The outcome might very well have been different if the children's circumstances had in fact suffered as a result of the underpayment of child support.
- [171] Turning to the issue of retroactive spousal support, applying the same D.B.S. factors and considering the rationale that underlies spousal support, I reach the same conclusion that a retroactive award is not warranted. In addition to the factors already reviewed, the delay in applying or giving notice is significant. Ms. U acknowledged that she did not consider advancing a claim for spousal support until a week before trial. Despite a number of interim applications over the course of this litigation, Ms. U did not ever apply for spousal support. As noted by Justice Cromwell in *Kerr v. Baranow*, 2011 SCC 10, concerns about notice and delay generally carry more weight in relation to claims for spousal support.

Costs

[172] When the relief sought by each party is compared to the outcome, and in particular on the primary issue of parenting time, I am satisfied that Mr. H has had substantial success in this matter: *Fotheringham v. Fotheringham*, 2001 BCSC 1321 (leave to appeal ref'd: 2002 BCCA 454). Unless there is something that may affect the award of costs, Mr. H is entitled to his costs in accordance with Appendix B as a matter of ordinary difficulty.

Summary of orders

[173] For the benefit of the parties and their counsel, I will summarize my orders, including the orders that are by consent.

1. The parties are the guardians of the children by operation of s. 39 of the Family Law Act.
2. The parties will share parental responsibilities for the children pursuant to s. 41 of the Family Law Act.
3. Each party may obtain records related to the children from third parties, including but not limited to medical or dental, directly from the service provider.
4. Pursuant to s. 40(2), each guardian may exercise all parental responsibilities with respect to the children in consultation with the children's other guardian, unless consultation would be unreasonable or inappropriate in the circumstances.
5. Pursuant to s. 42(2), during parenting time, a guardian may exercise the parental responsibility of making day-to-day decisions affecting the children and having day-to-day control and supervision of the children.
6. Pursuant to s. 43 of the Family Law Act, each guardian will exercise their parental responsibilities in the best interests of the children. In the event of a disagreement between the parties, the parties will first attempt to resolve the matter by email communication, including consideration of the views of the children, and if they fail, the parties will consult with a parenting coordinator as set out in the following paragraphs.
7. Pursuant to s. 15 of the Family Law Act, the parties will forthwith retain a member in good standing of the roster of the British Columbia Parenting Coordinators Roster Society (the "Society") as parenting coordinator (the "parenting coordinator") for a minimum term of 24 months, on the terms provided in this order and in the most current form of generally accepted precedent for a parenting coordination agreement endorsed by the Society (the "standard PC agreement"), provided that where terms of this order conflict with the standard PC agreement, this order will prevail.
8. The parenting coordinator shall be agreed upon by the parties no later than May 1, 2022, with liberty to apply to this honourable court failing agreement.
9. The parenting coordinator may assist the parties in the following manner:

- a) by building consensus between the parties, including but not limited to, by:
 - i. developing and instituting guidelines for the implementation of the parenting terms of this order;
 - ii. developing and instituting guidelines for communications between the parties;
 - iii. identifying, creating, and implementing strategies for resolving conflicts between the parties; and
 - iv. providing information respecting resources available to the parties for the improvement of their communication or parenting skills; and
 - b) subject to the specific provisions of this order, pursuant to s. 18 of the Family Law Act, and in the event the parties cannot agree on any matter respecting their parenting responsibilities as defined in s. 41 of the Family Law Act, by making a determination on such matters, subject to s. 19 of the Family Law Act.
10. The fees, disbursements, and other charges of the parenting coordinator will be shared 68% by the respondent and 32% by the claimant, subject to the parenting coordinator's authority to reapportion the total parenting coordination costs between the parties as provided in the standard parenting coordinator agreement.
11. From now until March 15, 2022, the respondent shall have parenting time every second weekend from Friday afternoon until Wednesday morning.
12. From March 15, 2022, onward, the respondent shall have parenting time from Friday afternoon to the following Friday morning on alternate weeks.
13. The parties will share parenting time equally on Christmas and the children's birthdays. The claimant will have at least four hours of parenting time on Mother's Day, and the respondent will have at least four hours of parenting time on Father's Day.
14. The parenting time prescribed by paragraphs 11 to 13 of this order may be varied by consent, provided that the parties have equal parenting time.
- [174] Turning to the conduct orders.
15. The parties will:
- a) put the best interests of the children before their own interests;
 - b) encourage the children to have a good relationship with the other parent and speak to the children about the other parent and that parent's partner in a positive and respectful manner; and
 - c) make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication, or argument in front of the children.

16. The parties will not:
 - a) question the children about the other parent or time spent with the other parent beyond simple conversational questions;
 - b) discuss with the children any inappropriate adult, court, or legal matters; or
 - c) blame, criticize, or disparage the other parent to or in front of the children.
17. By consent, the parties will encourage their respective families to refrain from any negative comments about the other parent and his or her extended family, and from discussions in front of the children concerning family issues or litigation.
18. Neither party will change the residence of the children from Maple Ridge, British Columbia, without the written consent of the other party. In the event that either party changes their residence, the parties will review the exchange location for pickup and drop-off of the children.
19. The parties will have such other parenting time, including telephone and/or electronic communication, as agreed to between them from time to time.
20. Commencing January 1, 2022, and on the first day of each month thereafter until March 1, 2022, inclusive, the respondent shall pay child support to the claimant for the children in the amount of \$1,442 per month in accordance with the Federal Child Support Guidelines, such payment to be made by way of electronic transfer from the respondent to the claimant.
21. Commencing April 1, 2022, and on the first day of each month thereafter, the respondent shall pay child support to the claimant for the children in the amount of \$356 per month in accordance with the Federal Child Support Guidelines, such payment to be made by way of electronic transfer from the respondent to the claimant.
22. By consent, with respect to s. 7 special or extraordinary expenses:
 - a) the parties' respective proportional share are currently 32% payable by the claimant and 68% payable by the respondent;
 - b) the parties agree that the following expenses (the "special or extraordinary expenses") will be the s. 7 special or extraordinary expenses for the children:
 - i. the children's health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist, or any other person, physiotherapy, occupational therapy, speech therapy, and prescription drugs, hearing aids, glasses, and contact lenses or daycare; and
 - ii. expenses, including but not limited to expenses for extracurricular activities arising in the future that the parties agree in writing qualify as special or extraordinary expenses within the meaning of the Federal Child Support Guidelines or are court ordered;

- c) each party will reimburse each other via e-transfer for his or her share of the special or extraordinary expenses within 10 days upon receiving an invoice and proof of payment.
23. For as long as the children are eligible to receive child support, the parties will exchange:
- a) not later than June 1 of each year, commencing in the year 2022:
 - i. copies of their respective personal income tax returns for the previous year including all attachments and schedules;
 - ii. three of their most recent paystubs for the year to date; and
 - iii. any other information required to be provided pursuant to the Federal Child Support Guidelines; and
 - b) copies of any notice of assessment or reassessment provided to them by Canada Revenue Agency within seven days of receipt commencing in the year 2022.
24. For as long as the children are eligible to receive child support, the parties will review:
- a) child support;
 - b) s. 7 special or extraordinary expenses; and
 - c) his or her proportional share of the s. 7 or extraordinary expenses not later than July 1 of each year commencing in the year 2022, with the adjustment starting on July 1 of each year commencing in the year 2022.
25. Each party will maintain extended health and dental insurance that is available to him or her through their employment for their children for as long as the insurance is available to them through their employer and the children are eligible for coverage under it.
26. If a party submits a claim to the other party's insurer for the children, then they will promptly advise the other party of the claim and provide a copy of the invoice, proof of payment, and the claim. The other party will reimburse the party who has paid within 10 days upon receiving an invoice, proof of payment, and the claim.
27. Each party will discuss with the other party any proposed medical or dental treatment for the children not covered by insurance, and provide the other party with a written estimate of the cost of the treatment.
28. By consent, the claimant will continue to receive benefits related to the children including, without limitation:
- a) the Canada Child Benefit;
 - b) the Dependent Disability Benefit;
 - c) the right to claim the children on her income tax return in each year; and

- d) any other benefits available to them or the children from the Federal Government, the Government of British Columbia, or other similar source.
- 29. The claimant's claim for retroactive child support and retroactive spousal support are dismissed. The claimant's claim for prospective spousal support is dismissed.
- 30. The respondent is entitled to costs of the action in accordance with Appendix B as a matter of ordinary difficulty.

[175] Those are my reasons.

"Lamb J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/25/2021BCSC2588.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/c-a-u-v-e-l-k-h-2021>

Prepared on 28 October 2026 · Esheria