

CANADA / JUDGMENT

Callaghan v. Charbonneau

2021 BCSC 1525

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Supreme Court of British Columbia

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2021 BCSC 1525 Callaghan v. Charbonneau

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Callaghan v. Charbonneau,

2021 BCSC 1525

Date: 20210416

Docket: E47229

Registry: New Westminster

Between:

Emma Callaghan aka Emma Charbonneau

Claimant

And

Robert Joseph Charbonneau

Respondent

Before: The Honourable Madam Justice Choi

Oral Reasons for Judgment

In Chambers

(Via teleconference)

Counsel for the Claimant:

C. Meghji

J. Bode

Counsel for the Respondent:

M. Huberman

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 9-10, March 12-13, and April 12, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2021

Introduction

- [1] There are three applications before the court. Broadly, the issues are as follows:
- a) Mr. Charbonneau seeks a variation of parenting arrangements and financial disclosure from Ms. Callaghan;
 - b) Ms. Callaghan seeks orders respecting financial disclosure, appointment of a parenting coordinator, variation of parenting arrangements, an annual disclosure of corporate documents, and a declaration of some expenses as s. 7 expenses under the Federal Child Support Guidelines, SOR/97-175; and
 - c) Mr. Charbonneau seeks variations of a final order made January 11, 2017 (the "Final Order") regarding parenting arrangements.
- [2] The Final Order was a comprehensive settlement between the parties. It disposed of all matters arising from the pleadings, including property division and spousal support by consent. It did not contain a Guideline income for either party, nor did it contain an order for ongoing basic child support, though it did contain an agreement on a retroactive child support amount and clauses relating to the exchange of tax returns. Per the Final Order, child support was to be based on a setoff of a shared parenting regime.
- [3] Mr. Charbonneau was represented by counsel for that order. Ms. Callaghan was self-represented.
- [4] At the outset, I note that none of the lawyers argued that there are triable issues in this matter due to the disputes in evidence, as in *C.M.R. v. L.F.R.*, 2019 BCCA 371. As such, I will make decisions on the evidence and the two application records before me.

Background

- [5] The parties were married on August 27, 2005, and separated on September 2, 2014. They have two children: Olive, born 2005, and Anya, born September 2008 (the "Children"). Olive is autistic.
- [6] Mr. Charbonneau is a real estate agent and Ms. Callaghan is a personal trainer.
- [7] Before the Final Order, there were two prior orders. The first is a without-notice restraining order obtained by Ms. Callaghan, pronounced September 5, 2014, restraining the parties from removing the Children from British Columbia. The second is a judicial case conference order pronounced January 28, 2015, which ordered the exchange of lists of documents.
- [8] Mr. Charbonneau seeks to vary some of the parenting terms from the Final Order. I will address those first, before turning to the other issues raised in his April 2, 2019 application. I will then address to the remaining two applications in the order in which they were filed.

Mr. Charbonneau's April 2, 2019 Application

Parenting Schedule

- [9] Mr. Charbonneau seeks to vary some terms of the Final Order on the basis that there has been a material change in circumstances due to changes in his work schedule. Ms. Callaghan opposes his application, citing that he has not met the threshold to prove a material change of circumstances. She also disagrees that Mr. Charbonneau exercised the alternating Saturday parenting time until shortly before he served his notice of application.
- [10] The Final Order provides that the Children, who were ages 12 and 9 in 2017, would reside primarily with Ms. Callaghan. Mr. Charbonneau is entitled to parenting time on Mondays from 7:00 p.m. to Thursday at 7:00 p.m., and on alternating Saturdays from 9:00 a.m. to 7:00 p.m. If he is unable to exercise his Saturday parenting time due to work, the order contemplates that he will arrange and pay for childcare and ensure the Children attend their usual Saturday activities. The Saturday parenting time was to commence October 29, 2016. The parents are to share school vacations equally.
- [11] The schedule sought by Mr. Charbonneau would result in equal parenting time on a week-on/week-off rotation. He argues that the current schedule contemplates equal sharing, in any event, and the week-on/week-off schedule is merely a redistribution of the parenting time set out in the Final Order. Ms. Callaghan argues that the proposed schedule would greatly disrupt the Children and her work.
- [12] Mr. Charbonneau also seeks variations regarding how each parent may exercise school vacation time, including Christmas break, spring break, and summer vacation. In addition to the variations sought, Mr. Charbonneau seeks various additional orders, including an order that he will retain the Children's passports and an order for production of Olive's autism funding records.

[13] I now turn to the evidence of a material change in circumstances.

[14] Mr. Charbonneau's evidence of a material change in circumstances is outlined in his affidavit at paras. 24 and 25. He says the change to his work is as follows:

24. Since the final order was made, my work schedule has changed. I began to work as a realtor in or about 2008, and I have worked at Remax Sabre Realty throughout. At the time, the market was difficult due to the global financial crisis. I was starting a new career in a new area, so it took some years to develop my business. The difficulties in the relationship between the claimant and me, and the subsequent aftermath of our separation, negatively impacted my ability to develop my business, so that at the time of the 2017 Order, I had to work on most weekends to continue developing my business. For example, the aftermath of the separation entailed legal proceedings and the involvement of counsel, while also moving and caring for and supporting the Children, who were much younger, in difficult circumstances. However, since the 2017 Order, my business has developed and matured so that it is more established. I can therefore manage my schedule around the Children's schedule and needs. I have flexibility in scheduling my work hours. To date, I have been scheduling my work to the children's school hours and during their parenting time with the claimant. I will be able to continue to structure my work schedule around the parenting schedule that I propose, so that during my parenting time, I'll mostly work during school hours and in the evenings when the Children have gone to bed, and I'll work longer hours during the claimant's parenting time. If I have to work on a weekend, it will only be for a short time and only on occasion.
25. Further, since in or about August 2017, I have employed an assistant who is a licensed realtor. She handles the administrative duties at my office, which has significantly increased the flexibility of my work schedule. I am also mentoring a new realtor at the brokerage, who is available to stand in for me at open houses when needed.

[15] The parenting arrangements in the Final Order were made pursuant to the Family Law Act, S.B.C. 2011, c. 25, therefore s. 47 applies:

47 On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

[16] Mr. Charbonneau relies on *S.E.D. v. B.J.D.*, 2018 BCSC 1770 to support his argument that a change in work schedule can constitute a material change in circumstances. Paragraphs 42 to 44 state:

- [42] The parent applying for a change in the parenting schedule must meet the threshold requirement of demonstrating a material change in the circumstances of the children or the parent's ability to meet the needs of the children. The test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered by agreement.
- [43] At the time the current parenting schedule was agreed to and ordered by consent, the parties did not actually contemplate that the father's schedule would change from his then present two week rotating schedule to a four days on four days off schedule. If the change was known at the time the order was made on August 24, 2015, it would have resulted in different terms: *E.L.S. v. C.A.S.*, 2016 BCSC 675 at paras. 26-29. I do not accept the mother's argument that at the time the current parenting schedule was ordered, the parties knew that their work schedules could be changed at any time, but the parties agreed that the current schedule was in the best interests of the children, and that the father's current schedule works best for the children.
- [44] The parties may have agreed that the current schedule was in the children's best interests given each party's work schedule at the time, but the father's work schedule needs to change and the change is a material change in circumstance.
- [17] Mr. Charbonneau has the onus of proving a material change in circumstances before the court can inquire further. The court must only consider the change in circumstances since the order was issued. That change must alter the child's needs or the ability of the parents to meet those needs in a fundamental way. The change must represent a distinct departure from what the court could reasonably have anticipated in making the previous order: *Gordon v. Goertz*, [1992] 2 S.C.R. 27 at paras. 11-12.
- [18] Gordon states that the applicant must establish the following before a court can consider the merits of the application:
- 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
- [19] For the reasons that follow, I find that Mr. Charbonneau has not satisfied the threshold of a material change in circumstances. Accordingly, I am unable to review the merits of his application respecting the variations to parenting time.
- [20] I accept Ms. Callaghan's argument that a change in work schedule may constitute a material change, but the changes Mr. Charbonneau relies on do not meet the threshold. At the time of the Final Order, being January 2017, Mr. Charbonneau deposed that he had to work most weekends to develop his real estate business in part due to the 2008 global economic crisis. He also cites the parties' relationship difficulties as an impediment.

- [21] Neither of these reasons, together or on their own, constitute a material change in circumstances. Given that the crisis occurred nine years before the Final Order and that he filed his variation application less than two and a half years after the Final Order, the evidence adduced in this case is insufficient to constitute a material change without more than a bare assertion. I accept Ms. Callaghan's argument that the real estate market had recovered from the global economic crisis by January 2017, such that it was not a significant factor in Mr. Charbonneau's business. I further accept Ms. Callaghan's argument that Mr. Charbonneau filed his notice of application less than two and a half years after the Final Order. In that short time, no material change had occurred to materially alter the Children's circumstances or routines. The evidence is that in that two-and-a-half-year period, Mr. Charbonneau hired an assistant in August 2017, and at some point started mentoring a new realtor who was able to attend open houses for him. While I accept such changes may be capable of constituting a material change, Mr. Charbonneau's evidence on this point was too limited and vague. Mr. Charbonneau swore five affidavits between April 1, 2019 and January 7, 2020, not including the Form 8 financial statement, but led little evidence on the material change in circumstances.
- [22] Mr. Charbonneau bears the onus of proving a material change in circumstances. He has failed to discharge that onus.
- [23] Accordingly, para. 1 of Mr. Charbonneau's application is dismissed.

Consent Orders

- [24] Ms. Callaghan's application response indicates that she consents to paras. 2, 3, 4, 7, 8, and 9. During argument, Ms. Callaghan consented to para. 6 respecting vaccinations.
- [25] The items in the following paragraphs in Mr. Charbonneau's application are therefore ordered by consent:
- Paragraph 2: an order that the Children will have parenting time with the respondent on Father's Day from 9:00 a.m. to 8:00 p.m., and parenting time with the claimant on Mother's Day from 9:00 a.m. to 8:00 p.m., irrespective of the regular parenting schedule;
 - Paragraphs 3: an order that during each party's parenting time, that party may travel with the Children within Canada and the United States, provided that the travelling parent provides notice to the other in advance;
 - Paragraph 4: a party travelling with the Children will provide to the other, in advance of travel, the travel itinerary including any flight information, destination, and accommodation information, but neither party is required to include payment information or information unrelated to the Children;
 - Paragraph 6: an order that the respondent may have the Children vaccinated in accordance with a regular vaccination schedule in BC for the Children's ages;

- Paragraph 8: an order that the claimant will take all steps necessary to authorize any third parties to release to the respondent directly all information about Olive's services; and
- Paragraph 9: an order that each party will inform the other of any medical, dental, or other healthcare appointments for either of the Children and of the outcome of such appointments.

- [26] I note that para. 7 relates to Olive's autism funding. In her response, Ms. Callaghan consents to this relief. However, when Mr. Charbonneau repeated this relief in his July 28, 2019 application, she opposed it. Both parties strongly argued this issue. It appears that Ms. Callaghan was prepared to provide an authorization to release these records, and consented on that basis alone. Her affidavit was clear that she did not agree to do the work to obtain the records herself.
- [27] On that basis, I dismiss the relief sought at para. 7, but order that Ms. Callaghan provide an authorization and take any other action that may be required for Mr. Charbonneau to obtain the records sought, without being required to obtain the records herself. I give Mr. Charbonneau liberty to reset this application should the authorization be insufficient to obtain the records sought.

Children's Passports

- [28] There is currently no order directing which parent should retain the Children's passports. Ms. Callaghan has retained them. Mr. Charbonneau seeks an order that he should keep them, based on an incident that occurred when he was travelling.
- [29] I order that, as the parent with whom the Children primarily reside, Ms. Callaghan will continue to retain the passports. She is to provide them to Mr. Charbonneau no less than two days before a planned trip by Mr. Charbonneau out of Canada, and Mr. Charbonneau must return the passports to Ms. Callaghan within a week after the Children return to Canada.

Ms. Callaghan's July 2, 2019 Application

- [30] Paragraph 1 respecting retroactive and ongoing child support was adjourned generally and will be addressed at a later point in these reasons.

Parenting Coordinator

- [31] At para. 2, Ms. Callaghan has requested that the parties jointly choose and retain a parenting coordinator within 14 days.
- [32] Mr. Charbonneau opposes the application on two bases:
- 1) if the parenting schedule was varied, there would be fewer difficulties and disputes between the parties; and

- 2) the parenting coordinator appointment is warranted only when there is an implementation issue respecting a parenting schedule, rather than when the dispute is about parenting arrangements.

[33] The Family Law Act outlines the role of parenting coordinators at s. 17:

17 A parenting coordinator may assist the parties in the following manner:

- (a) by building consensus between the parties, including by
 - (i) creating guidelines respecting how an agreement or order will be implemented,
 - (ii) creating guidelines respecting communication between the parties,
 - (iii) identifying, and creating strategies for resolving, conflicts between the parties, and
 - (iv) providing information respecting resources available to the parties for the purposes of improving communication or parenting skills;
- (b) by making determinations respecting the matters prescribed for the purposes of section 18 . . .

[34] In *Fleetwood v. Percival*, 2014 BCCA 502 at paras. 43-48, the Court of Appeal described the framework for parenting coordination. At paras. 45-46, the court emphasized that the Legislature intended to establish a new option for dispute resolution outside of the traditional court processes.

[35] A parenting coordinator may assist if there is a parenting coordinator agreement or order in place: s. 15 of the Family Law Act. For the reasons that follow, I order the appointment of a parenting coordinator.

[36] Mr. Charbonneau's opposition seems to be on the basis that a parenting coordinator would not be needed if his requested parenting orders were made, as there would be fewer difficulties once the parenting schedule was varied. I disagree. Some of the difficulties in communication have occurred due to scheduling, but others are simply the result of poor communication, differences of opinion, and growing mistrust between the parties. In my view, there are a number of areas that could potentially be successfully resolved by way of parenting coordination, including the dispute around Saturday parenting time.

[37] The Final Order contemplated that Mr. Charbonneau had the option of caring for the Children alternating Saturdays from 9:00 a.m. to 7:00 p.m., commencing October 29, 2016. If Mr. Charbonneau needed to work, it was his responsibility to arrange and pay for childcare. He was also to ensure that the Children attended their regular Saturday activities.

- [38] Ms. Callaghan deposed that Mr. Charbonneau only exercised his parenting time once every three months from November 2014 to January 2019. This caused her numerous scheduling difficulties, because she did not know if he would exercise the Saturday parenting time. She deposed that he sometimes cancelled at the last moment. She stated that this behaviour only changed two or three months prior to his serving his variation application. At that point, Mr. Charbonneau began regularly exercising his Saturday parenting time.
- [39] Mr. Charbonneau did not dispute Ms. Callaghan's evidence that he only rarely exercised his option for Saturday parenting time before 2019. Instead, he deposed that Ms. Callaghan has denied him parenting time on some Saturdays. He pointed to her taking the Children away for a weekend unilaterally on a Saturday that was scheduled as his parenting time.
- [40] There are other details and disputes--which I will not address--around arranging for childcare and payment of that childcare in relation to the Saturday time. In my view, disputes arising from Saturday parenting time is an example of an issue that is well-suited to the assistance of a parenting coordinator.
- [41] I note that the parties were able to reach a resolution at the time of the Final Order and in the prior period. Since then, there has been an increasing level of conflict and animosity in the parties' communications, and in the nature of the disputes and positions taken in court, particularly by Mr. Charbonneau. He has been punctilious regarding Ms. Callaghan's evidence and arguments, but has taken a more relaxed approach to his own case.
- [42] A parenting coordinator may be more cost effective, and can respond quicker and with a wider range of dispute resolution solutions than the court system. A parenting coordinator may be able to build consensus and mediate the dispute. The parties may be able to establish new ways of communicating on the myriad disputes that will inevitably arise from time to time, without the court's intervention. A parenting coordinator may help prevent this from morphing into a high-conflict relationship.
- [43] Due to these applications, both parties have criticized the other's parenting and behaviour in affidavits. Such barbs do not assist the parties in continuing to communicate and co-parent in the future. Parenting coordination may help to turn the tide.
- [44] A parenting coordinator will be appointed for a two-year term on the terms set out in Ms. Callaghan's notice of application, which are:

An Order that the parties retain a parenting coordinator within 14 days of the date of this Order, with the following to occur:

- a. Seven days after the date of this Order the Claimant will provide the names of three parenting coordinators to the Respondent that she would be agreeable to retaining;
- b. Seven days after the names have been delivered the Respondent will choose one name;
- c. The parties will then take immediate steps to retain the parenting coordinator; and

- d. The parties will pay the parenting coordinator in accordance with the Final Order, such that the Respondent [will] pay 60% and the Claimant [will] pay 40%.

Variation in Parenting Time Arrangements

- [45] At para. 3, Ms. Callaghan seeks to vary the Final Order with respect to logistics for Mr. Charbonneau's Saturday parenting time and payment of the childcare expenses. I have already ruled that there is no material change in circumstances justifying a variation. As such, I will not consider the relief sought in paragraph 3(i) further and it is dismissed.

Document Disclosure

- [46] In paragraph 3(ii), Ms. Callaghan seeks:

- a) an order for disclosure of the tax returns for Mr. Charbonneau's corporations;
- b) the financial statements of the corporation and its subsidiaries; and
- c) a statement showing the breakdown of all salaries, wages, management fees or other payments or benefits paid to or on behalf of persons or corporations with whom the corporation (and related corporations) does not deal at arm's length.

- [47] Mr. Charbonneau consents, provided he controls the corporation and provided that the same term applies to Ms. Callaghan.

- [48] I make the order sought at paragraph 3(ii). The documents sought are required under s. 21 of the Federal Child Support Guidelines, and are standard documents to be disclosed under Rule 5-1 of the Supreme Court Family Rules and in the Form 8 financial statement. Some of these documents are already attached to Mr. Charbonneau's Form 8 financial statement, filed on July 18, 2019. This order will compel disclosure of any such documents that Mr. Charbonneau has not yet produced.

- [49] I do not consider this order to go by consent since it is conditional on a similar order against Ms. Callaghan. Whether she is ordered to produce the same documents is a different matter, and Mr. Charbonneau did not file a notice of application for such production. If Ms. Callaghan controls any corporate entities, these are standard documents producible under the Rules and by legislation, and they ought to be produced if they exist. However, I will not specifically order production.

- [50] Mr. Charbonneau sought leave to introduce further affidavits on Day 5, including to demonstrate that Ms. Callaghan had incorporated her personal training business when she indicated she was self-employed on her Form 8 financial statement of July 2, 2019. The additional affidavits were not permitted on a variety of bases. However, based on the submissions during the leave application, it does appear that Ms. Callaghan has incorporated her business.

- [51] The documents sought at paragraph 3(ii) are ordered produced within 30 days of today's

date.

Kumon

- [52] Ms. Callaghan seeks an order that Kumon is an extraordinary expense and that both children be enrolled. Mr. Charbonneau opposes the order for Olive. He submits Olive needs special attention that Kumon does not provide. He supports both children attending Sylvan, which provides one-on-one support. His application response did not address his position respecting Kumon for Anya, but I understand that he wishes both children to attend at Sylvan.
- [53] Ms. Callaghan deposed that someone in Olive's therapy team championed the idea of Kumon when Ms. Callaghan suggested it. However, Mr. Charbonneau argues there is no evidence of such a meeting and no evidence of the therapist supporting Kumon. He argues that the evidence is vague, and Ms. Callaghan should have something more cogent in the way of professional advice that is not presented to court in the form of hearsay.
- [54] I agree with Mr. Charbonneau that the evidence could and should have been more specific, including the names of any therapists that would have recommended Kumon or any other type of educational or other assistance that may help Olive's development. However, I disagree that such evidence is a requirement that would necessitate an affidavit or even a letter from the therapist on the issue of whether Kumon ought to qualify as a s. 7 expense based on the principal of proportionality.
- [55] As the parent with whom the Children primarily reside, I accept Ms. Callaghan's evidence that Kumon is beneficial for Olive. I order that Kumon is an expense pursuant to s. 7 to be shared proportionately to each party's income, which pursuant to the Final Order is 60/40.

Email Responses

- [56] Ms. Callaghan seeks an order that the parties respond to each other's non-urgent emails within 48 hours. She alleges that Mr. Charbonneau either ignores her communications or responds a long time later. Mr. Charbonneau opposes this relief on the basis that neither should be in breach of an order if they fail to respond to a communication in this period of time. He argues that such a breach would potentially result in contempt proceedings, inflaming matters further.
- [57] I will make an order that each party will make their best efforts to respond to the other's communication in a timely manner.

TouchChat

[58] Ms. Callaghan seeks an order that Mr. Charbonneau uses TouchChat when Olive is in his home. TouchChat is an application that Olive uses to communicate on her iPhone. Olive is non-verbal and Ms. Callaghan believes that TouchChat helps her communication development. Mr. Charbonneau opposes such an order. He deposed that Olive does use TouchChat while in his home, but that he also encourages her to speak and not only to rely on TouchChat.

[59] Mr. Charbonneau is opposed to this order on the basis that:

- 1) there is no evidence from a professional respecting the importance of using TouchChat or opining that his approach is inappropriate; and
- 2) as a joint custodian and guardian, he should have some autonomy in how to parent Olive when she is in his care, particularly in the absence of any evidence other than Ms. Callaghan's respecting TouchChat.

[60] Each party criticizes the other for lack of professional evidence or input on the subject of TouchChat. I accept Mr. Charbonneau's argument that there should not be an order that Olive must use TouchChat while in his home. The relief sought in para. 6 is therefore dismissed.

Credit Card Interest

[61] Ms. Callaghan seeks an order that Mr. Charbonneau pay for interest on her credit card if he is late with payment of s. 7 expenses. Mr. Charbonneau opposes this relief.

[62] The Final Order stipulated that the parties pay for s. 7 expenses with a joint credit card. Ms. Callaghan must provide the statement by the 15th of each month, and by the 30th, each party is to pay his or her proportionate share, being 60 percent to Mr. Charbonneau and 40 percent to Ms. Callaghan.

[63] Ms. Callaghan deposed that she is the primary cardholder and that Mr. Charbonneau almost never pays on time, resulting in interest charges. Mr. Charbonneau said that he does pay the interest if he is late.

[64] I order that Mr. Charbonneau will pay any interest charges due to his late payment of s. 7 expenses, but only such interest as is related to his proportionate payment.

Mr. Charbonneau's July 18, 2019 Application

Document Disclosure

[65] In this application, Mr. Charbonneau sought document disclosure from Ms. Callaghan. Paragraph 1 seeks:

1. An order that the claimant produce the following financial disclosure:

- a. A list of all the gyms/other workplaces that she works at or has worked at since January 2017 and a complete copy of her contract with each of those gyms/workplaces.
 - b. A list of any other locations in which the claimant has worked in the period of January 2017 to the present, including at clients' homes.
 - c. Particulars and records evidencing what fees the claimant charges her clients, including whether she charges per hour or otherwise and the amount charged per time unit.
 - d. All records maintained by the claimant for the period of January 2017 showing the dates and times of sessions with clients, including any records from the gyms/other workplaces in which she works.
 - e. The claimant's business ledger for the period of January 2017 to the present.
 - f. All invoices and receipts issued by the claimant to clients for the period of January 2017 to the present.
 - g. The records, including receipts and any other records maintained by the claimant, evidencing the expenses she claimed for her business on her 2017 and 2018 income tax returns.
 - h. Particulars of the claimant's business expenses for "advertising", "utilities", and "office stationary and supplies".
 - i. A list of all bank accounts and credit cards that the claimant uses for her business and the statements for these accounts and credit cards for the period of January 2017 to the present.
 - j. A list, with supporting documents if any, of all cash income received by the claimant for her work in the period of January 2017 to the present.
 - k. Any documents evidencing the claimant looking into working as a personal trainer in the Port Moody area and the earnings of personal trainers in that area.
- I. Complete records pertaining to Olive's autism funding, At Home Funding, and any other funding or services that Ms. Callaghan has received or obtained for Olive from January 2017 to date, including but not limited to the amounts and services received and how the funds were used. Mr. Charbonneau has not received and has not been able to obtain these records.
- m. Particulars of what are "Customer List" and "Client Listing" which appear on the claimant's income tax returns in relation to medical expenses (pages 55[,], 112, and 165 in the tax documents attached to her Form 8).
- [66] Ms. Callaghan consents to the relief sought at paragraphs 1(a), (b), (c), (e), (i), (j), (k), and (m), conditional on these being documents in her possession, power, or control. Her affidavit of July 22, 2019 sets out a list of such documents. I accept her evidence that many of the documents sought are either not in existence or are not in her possession, power, or control. Ms. Callaghan is a personal trainer who assists clients with their gym programs. She

responded to some of the requests in the affidavit, such as the names of the gyms that she has worked at, her hourly rate, and the amounts the gyms charge her for using their facilities.

- [67] Her application response opposed production of: 1(d) records showing the dates and times with clients; 1(f) invoices and receipts issued to clients; 1(g) records, including receipts, evidencing the expenses claimed for her business on her 2017 and 2018 tax returns; 1(h) particulars of her business expenses for advertising, utilities, and office stationery and supplies; 1(l) records regarding Olive's autism funding, At Home Funding, and how she has used the funds, including the amounts and services received.
- [68] I note that some of the items Ms. Callaghan consented to, such as 1(m) and 1(c), request particulars in addition to or instead of production of documents. The application was argued on the basis of document production, including Ms. Callaghan's consent to produce documents that were in her possession, power, or control.
- [69] Mr. Charbonneau's application did not reference any Rules of Court or any legal basis for these requests. However, Ms. Callaghan's response referred to Rule 5-1(14), which states:
- (14) If the party from whom particulars are demanded under subrule (13) fails to provide those particulars within 7 days after receipt of the demand, the court may, on terms it considers appropriate, make any order it considers will further the object of these Supreme Court Family Rules, including
- (a) an order that particulars be served within a specified time, or
 - (b) an order that a new Form F8 financial statement be served within a specified time.
- [70] Rule 5-1(13) states:
- (13) If a Form F8 financial statement lacks sufficient information, the other party may demand particulars.
- [71] Mr. Charbonneau agrees that there is no evidence of his having demanded particulars from Ms. Callaghan. I note the wording of the notice of application and the application response pointed to Rule 5-1(14) respecting particulars for Form 8 financial statements. However, the arguments of both parties centred on Ms. Callaghan's production of documents, not on whether she ought to provide particulars. It also appears that some of the relief sought requires Ms. Callaghan to generate documents and then produce them. However, she is only required to produce documents, not to create them.
- [72] Based on her affidavit, Ms. Callaghan only truly opposes paragraph 1(l), which is the request to provide complete records respecting Olive's autism funding and how she expends those funds; I have addressed that above. Ms. Callaghan addressed the other items Mr. Charbonneau sought in her affidavit.

[73] Although Ms. Callaghan has consented to production of documents as noted above, I accept her evidence that for some of the categories, few of the requested documents are actually in her possession, power, or control. Accordingly, an order to produce those categories would be a meaningless order, and I will not issue one.

[74] Therefore, I dismiss:

- paragraph 1(a) list of all gyms or workplaces where she has worked and contracts with the gyms;
- 1(b) list of other locations worked at, including clients' homes;
- 1(c) particulars and records evidencing the fees charged;
- 1(d) records showing the times and dates of all sessions;
- 1(e) business ledger, as Ms. Callaghan deposed she does not have a business ledger; and
- 1(k) any documents evidencing Ms. Callaghan searching for work as a personal trainer in the Port Moody area and earnings of personal trainers in that area. Ms. Callaghan consented to this relief, but deposed in her affidavit that she does not have this information.

[75] The items that I order her to produce within 60 days of today's date, by consent, are as follows:

- 1(f) invoices and receipts from January 2017 to present. While Ms. Callaghan opposed this, her affidavit deposed that she is actually in the process of obtaining these documents. I order them produced.
- 1(g) records, including receipts and other records, evidencing the expenses she claimed on her 2017 and 2018 tax returns. Ms. Callaghan opposed this, but her affidavit deposed that she will speak to her accountant. I order those records produced.
- 1(h) while framed in the notice of application as seeking particulars, I will order production of any documents relating to Ms. Callaghan's business expenses for advertising, utilities, and office stationery supplies. She opposed this relief, but her affidavit deposed that she would speak to her accountant. I order those documents produced.
- 1(i) production of bank accounts and credit card statements used for her business from January 2017 to present. Ms. Callaghan consented to this relief in her response.
- 1(j) list, with supporting documents, of all cash income. Ms. Callaghan consented to this and deposed that she was in the process of obtaining the e-transfer information.
- 1(m) particulars on the "Customer List" and "Client Listing", which appear on her tax return in relation to medical expenses. Ms. Callaghan consented to this and deposed that she was in the process of obtaining this information. I order that she produce these documents.

- [76] The relief sought respecting the autism funding is dismissed in paragraph 1(l) except to the extent already noted.
- [77] As detailed above, at para. 1 of his July 18, 2019 notice of application, Mr. Charbonneau sought orders that Ms. Callaghan produce documents. At para. 2 of his notice of application, Mr. Charbonneau sought:
2. An Order that paragraph 1 of the notice of application of the claimant, filed July 2, 2019, not be heard until after the claimant has provided the financial disclosure set out in paragraph 1.
- [78] Paragraph 1 of Ms. Callaghan's July 2, 2019 notice of application sought:
1. An Order that the Respondent pay retroactive and ongoing child support dating back to July of 2018, in an amount to be determined once the Respondent provided full and frank financial disclosure;
- [79] I adjourned the orders for retroactive and ongoing child support to a separate hearing, and will outline the circumstances in which that occurred below. However, Mr. Charbonneau's adjournment request of the child support application is relevant to the issue of a costs award for the three applications before me. I will address his request in that context.
- [80] The Final Order did not stipulate a Guideline income for either party, nor did it order any child support. It ordered that Mr. Charbonneau pay 60 percent of the s. 7 expenses and ordered him to pay retroactive child support, settled by the parties to be \$4,554. Ms. Callaghan also received \$180,000 in full settlement of her claim of spousal support and division of property.
- [81] Given these terms in the Final Order, I infer--only for the purposes of addressing Mr. Charbonneau's adjournment application and costs--that Mr. Charbonneau was the primary breadwinner during the relationship. During the marriage, Mr. Charbonneau was self-employed, such that all income from his real estate business flowed directly to him in a personal capacity.
- [82] After the separation, Mr. Charbonneau incorporated his business without informing Ms. Callaghan. At some point, he began paying himself a salary of \$30,000 out of the corporation.
- [83] It is undisputed that Mr. Charbonneau stopped paying child support in July 2018. Ms. Callaghan's argument indicates that Mr. Charbonneau stopped paying child support on the basis that his income of \$30,000 resulted in no support being payable.
- [84] Ms. Callaghan's argument indicates that Mr. Charbonneau paid \$934 per month in support commencing July 2019, around the time that Ms. Callaghan filed her notice of application. Mr. Charbonneau deposed that he incorporated in December 2015, and started operating his business through that corporation in 2016. The Final Order, which was pronounced on January 11, 2017, stipulated that the parties exchange only their personal tax returns on an

annual basis. There is no mention of corporate tax returns or other corporate documentation in the Final Order, even though, on Mr. Charbonneau's own evidence, he had incorporated prior to the Final Order being entered. Whether he was operating his business through the company at the time he filed his materials for the desk order is not in evidence.

- [85] The fact that the Final Order only stipulates the disclosure of personal tax returns obfuscates Mr. Charbonneau's true income for the purposes of determining his ongoing child support obligations. I note the Final Order was entered by consent, and that while Mr. Charbonneau was represented by counsel at that time, Ms. Callaghan was self-represented. The timeline of Mr. Charbonneau's incorporation and his transition to operating his business through the corporate entity, coupled with the fact that he did not tell Ms. Callaghan of this change, reflects poorly on Mr. Charbonneau and his intention to provide full and frank income disclosure.
- [86] Finally, I note Mr. Charbonneau's application for financial disclosure came after Ms. Callaghan's application regarding child support.
- [87] Given the above context, Mr. Charbonneau's request to stay Ms. Callaghan's application for retroactive and ongoing child support is wholly unreasonable.
- [88] On Day 4 of the hearing, Ms. Callaghan's counsel asked the court to impute income to Mr. Charbonneau. During this argument, Mr. Charbonneau's counsel objected on the basis of procedural fairness because the oral arguments went beyond what was set out in Ms. Callaghan's application. I granted leave for Ms. Callaghan to amend her notice of application to capture the oral arguments, and for both parties to file additional affidavits respecting those arguments.

Separate Hearing for Child Support

- [89] However, Ms. Callaghan's new notice of application and both parties' new affidavits encompassed a larger scope than I had expected when I gave liberty to file additional materials. The affidavits bolstered other evidence and arguments on the original three applications, which had already taken up four days of hearing. Therefore, I adjourned all relief respecting imputation of income and support on both sides, including Ms. Callaghan's para. 1, to a separate hearing. I am not seized of that hearing.
- [90] Given all the foregoing, with respect to Mr. Charbonneau's July 18, 2019 application, I would:
- a) dismiss paragraph 2; and
 - b) adjourn paragraph 3, asking for imputation of income to Ms. Callaghan, to the other hearing.

[91] Paragraph 4 seeks to adjourn the entirety of Ms. Callaghan's July 2, 2019 application, and to hear only Mr. Charbonneau's April 2, 2019 application if there was insufficient time to hear both applications. This is now moot, given that additional days were added and Ms. Callaghan's application has been argued.

Costs

[92] Ms. Callaghan was the substantially successful party. She is entitled to costs for all three applications at the level of ordinary difficulty, payable forthwith.

"Choi J."

Appendix

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