
CANADA / JUDGMENT

Castle v. Oei

2020 BCSC 1392

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Supreme Court of British Columbia

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2020 BCSC 1392 Castle v. Oei

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Castle v. Oei,

2020 BCSC 1392

Date: 20200918

Docket: E142130

Registry: Vancouver

Between:

Holly Michelle Castle

Claimant

And

Jamie Shane Oei

Respondent

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

(via teleconference)

Counsel for the Claimant:

N. Allen

Counsel for the Respondent:

K. Simington

Place and Date of Hearing:

Vancouver, B.C.

July 30 and August 11, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 18, 2020

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- [1] Mr. Jamie Oei filed an application in March 2020 to seek various relief as it relates to parenting of the parties' two children (the NOA). As a result of the suspension of court operations, the matter was not heard until July 30, 2020. In particular, Mr. Oei applies to vary the parties' parenting schedule to increase his parenting time to include one full weekend in each two week period (which would mean the parties would have equal parenting time); for the appointment of a parenting coordinator; for the suspension of child support pursuant to the parties' separation agreement pending a review of child support; and for the enforcement of a previous Court order that the parties attend regular counselling sessions.
- [2] The NOA also sought the disclosure of certain financial information, but those matters were addressed by the parties between the time the notice was filed and this application was heard.
- [3] The claimant, Ms. Holly Castle, opposes all orders sought.

Background Facts

- [4] The parties lived together from March 20, 2011 to January 23, 2014. They have two children: A., born January 15, 2012, and K., born November 25, 2013. At the time of separation, the children were 2 years old and 2 months old; they are now approximately 8 ½ and 6 ½ years old, respectively.
- [5] The claimant is presently employed by the North Vancouver School District as a Work Experience Coordinator. She is employed full-time Monday - Friday during the school year, and receives Employment Insurance benefits during July and August. The respondent is self-employed as a basketball coach. He owns his own business and has a substantial amount of flexibility about when he works.
- [6] The parties entered into a separation agreement, dated May 29, 2014, and filed with this Court on July 23, 2014. Under the separation agreement, the parties agreed that they would both be guardians of the children, the children would reside primarily with the claimant, and the respondent would have parenting time, as follows:
1. Week 1:
 - a. Monday from 10:00 a.m. until 6:00 p.m. for K., and until Tuesday at 11:00 a.m. for A.;
 - b. Wednesday from 3:45 p.m. until 4:45 p.m. for K.; and
 - c. Thursday at 4:00 p.m. until Friday at 4:00 p.m. for both children.
 2. Week 2:
 - a. The same as Week 1, except that the respondent would have parenting time with A. from Thursday at 4:00 p.m. until Saturday at 4:00 p.m., and with K. from Thursday at 4:00 p.m. until Friday at 4:00 p.m.
- [7] The agreement also provided for a right of first refusal where if one party could not care for the children overnight or for a period of eight hours or more, the other party would be provided the opportunity to care for them. The right of first refusal was not intended to apply to work-related childcare or where the children were sleeping overnight with either of their grandmothers.
- [8] That parenting schedule was interim in nature, and the parties agreed to work with their then parenting coaches to develop a more comprehensive parenting plan which would expand the respondent's regular parenting time. The agreement also provided that once the children were "school age" the parties would equally share all school vacations and holidays, according to a schedule set out in the agreement.

- [9] The agreement further established that the respondent would pay the claimant child support commencing April 1, 2014 in the amount of \$391 per month. That amount was based upon the respondent's Guideline income being agreed to be \$25,000, and the claimant's \$21,501. It was also based on the children residing primarily with the claimant, which was the case at that time.
- [10] In September 2014, the claimant returned to work after her maternity leave to a new job, and she put the children in daycare. The respondent offered to look after the children during the day while the claimant was working, but the claimant refused. The right of first refusal did not apply according to the terms of the parties' agreement.
- [11] At a judicial case conference held on November 28, 2014, the parties agreed to vary the agreement to provide for an interim parenting schedule under which the respondent had parenting time with both children for five out of 14 nights.
- [12] Both parties filed applications in early 2015, and the parties entered into a consent order on February 13, 2015 (the "Scarth Order"). The Scarth Order provided for the appointment of Ms. Stephanie Fabbro as a parenting coordinator for a year. The respondent's parenting time was to be extended to a maximum of six out of 14 nights, with the parenting coordinator being empowered to investigate, consult and seek consensus and make decisions regarding parenting time, provided that the claimant's parenting time would not be changed in a way that would affect her having Friday, Saturday and Sunday overnight in week 1 of a 14-day schedule. The parenting coordinator was similarly empowered with respect to the right of first refusal established in the separation agreement, but could only make changes with respect to its application while the children were transitioning into and out of the care of each parent. This meant that the right of first refusal continued not to apply while the children were in daycare.
- [13] The parties' parenting schedule, as establish in the Scarth Order, began in March or April of 2015, and continues essentially unchanged, with minor variations of pick up/drop off times. While the parties describe it slightly differently, that schedule is essentially as follows:
1. Week 1:
 - a. Respondent has parenting time from Monday at school pick-up or 4:00 p.m. if there is no school, until Wednesday at school drop-off; and
 - b. Claimant has parenting time from Wednesday at school pick-up until the following Monday at school pick-up time or 4:00 p.m. if there is no school.
 2. Week 2:
 - a. Respondent has parenting time from Monday at school pick-up or 4:00 p.m. if there is no school, until Wednesday at school drop-off;

- b. Claimant has parenting time from Wednesday at school pick-up, until Friday at school pick-up or until 4:00 p.m. if there is no school; and
 - c. Respondent has parenting time from Friday at school pick-up or 4:00 p.m. if there no school, until Sunday at 11:00 a.m.
- [14] The Scarth Order further provided that the sections of the separation agreement dealing with child support be suspended during the parenting coordinator's term, which was March 25, 2015 - May 2016. As a result, no child support was paid or payable during the parenting coordinator's term.
- [15] On April 6, 2016, nearing the end of Ms. Fabbro's term, the claimant sent a fax to BC Family Maintenance Enforcement Program ("FMEP") with the re line "Immediate Suspension of Child Support Payments from payor, Jamie Shane Oei." She wrote "I am requesting a suspension of child support payments until an amended court order can be executed." She stated "as attached, an extension of our agreement (addendum) of the Parenting Coordination contracts has been executed, and no child support is to be received at this time, or in the future until otherwise noted by court order." She further stated that the respondent "is not to make payment for March 2016, and anytime thereafter until further advised by court order." Child support payments were not made, nor, so far as the evidence before me shows, raised as an issue, until in or about October or November 2019, as I will address below.
- [16] In her June 7, 2020 affidavit, the claimant says that she advised FMEP not to enforce child support while the parties were trying to sort out the terms for the extension of the parenting coordinator's contract. She further says that she was instructed by Ms. Fabbro to suspend child support during her appointment period, and that "it was not with intent that my request to suspend child support be extended until further court order despite the document that I sent." That evidence is inconsistent with the plain language of the claimant's April 6, 2016 fax to FMEP, and I do not accept her subsequent re-characterization of what she told FMEP at that time. The claimant has also not provided any explanation of why, if she assumed, as she says in her affidavit, that child support was again suspended during Ms. Fabbro's second appointment, she took no steps to enforce child support following the termination of her appointment in August 2018.
- [17] In or about May 2016, Ms. Fabbro's one year engagement came to an end, and the parties were unable to agree upon terms for the extension of her retainer, with the result that the parties were without a parenting coordinator for the following year.
- [18] In February 2017, the respondent applied for the appointment of a parenting coordinator and other relief. While the claimant had earlier been supportive of the extension of Ms. Fabbro's term, she opposed that application. In an oral judgment rendered May 9, 2017, Justice Smith ordered the reappointment of Ms. Fabbro for a further one year term (the "Smith Order"). He observed that the parties "obviously have areas of conflict", and that it "appears to me that this is precisely the kind of situation that the Legislature was

considering when it gave the court jurisdiction to order appointment of a parenting coordinator".

- [19] Ms. Fabbro was to assist the parties in finalizing or altering the parenting schedule agreed upon to date, subject to the requirement set out in the Scarth Order that the respondent's parenting time be six days out of each 14. Justice Smith went on to state:
- [5] I do not think it is appropriate at this stage for the court to impose a specific parenting schedule. These children are still very young. Their needs will change. What is appropriate in a parenting schedule will change and part of the role of the parenting coordinator will be to develop a schedule that both reflects the children's need for stability, but at the same time allows for changes - both permanent and changes as the needs of the children change and occasional one-time adjustments as may be necessary in the circumstances. So I am not going to restrict the jurisdiction of the parenting coordinator, other than any schedules must respect that 6 out of 14 division and provide for more or less equal division of weekends as between the parties.
- [20] Justice Smith further ordered the parties to attend counselling with respect to their communication and parenting with a psychologist, Dr. Lisa Ferrari, every six weeks.
- [21] Finally, Justice Smith declared that, for the purposes of the holiday schedule set out in the parties' separation agreement, the children were "school age", and that that holiday schedule would commence immediately. He did so because A. was to start kindergarten that September, making it appropriate for the holiday schedule to be implemented for both.
- [22] While Justice Smith ordered that the parties would both have full weekends, in discussions with Ms. Fabbro in September 2017, the respondent asked to have Mondays and Tuesdays rather than a full weekend, which was agreed to by the claimant.
- [23] Ms. Fabbro served as the parties' parenting coordinator between September 2017 and August 2018. In May 2018, she notified the parties she would not continue after August and advised them to retain a new parenting coordinator, providing them with two suggestions for a new coordinator. The parties have not had a parenting coordinator since August 2018.
- [24] The parties have not consistently attended counselling sessions as ordered with Dr. Ferrari. There is some dispute about the reasons for that. The respondent says that the claimant often cancels the appointments, and that since the parenting coordinator's term ended, they have only had appointments approximately every six months. For her part, the claimant says that while she has cancelled appointments, she does not do so often. She also says that the parties' respective schedules have made it challenging to schedule appointments every six weeks. She says that the parties and Dr. Ferrari have made agreements to have appointments every two months instead, and that their last session was on May 26, 2020. In reply, the respondent says that they had appointments scheduled with Dr. Ferrari on October 2 and 18, 2019, December 5, 2019 and April 15, 2020, all of which the claimant cancelled and he rebooked, only for the claimant to cancel again. He says the May 26, 2020

appointment was the first one they had attended in six months.

- [25] I prefer the respondent's more detailed evidence about the scheduling and cancellation of appointments with Dr. Ferrari.
- [26] I return to the question of child support payments, which had not been made or requested since March 2015, consistent with the terms of the Scarth Order and the claimant's April 6, 2016 fax to FMEP. In October or November 2019, the claimant sent the respondent a request to review child support. The parties each blame the other for not having provided the other with the financial information necessary to conduct such a review in a timely way. Whatever the reasons, the respondent did not provide his financial statement until June 29, 2020, and the claimant did not provide hers until July 10, 2020.
- [27] In the meantime, on November 8, 2019, FMEP wrote the respondent stating that he was in default because he had not made a \$391 payment due on January 1, 2019. Prior to this, the claimant had not provided the respondent with any notice that she would be contacting FMEP to request that they start enforcing child support payments. FMEP again wrote the respondent on November 18, 2019, stating that the claimant "has requested that we start enforcing the child support again. We previously stopped enforcing child support as of Feb 15, 2015. We will start enforcing \$391.00 per month as of December 1, 2019."
- [28] FMEP wrote the respondent on February 20, 2020, advising him that he was in arrears, and a lien had been registered against his property. On February 24, 2020, FMEP again wrote the respondent providing him notice he was in default in the amount of \$1,179.67.
- [29] This NOA, by which the respondent sought to have child support pursuant to the settlement agreement, and an enforcement of child support pursuant to the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127, suspended until child support is reviewed and varied, was filed on March 12, 2020.
- [30] In submissions before me, counsel for the respondent advised that he has not made any child support payments since first being contacted by FMEP in November 2019.
- [31] It is clear on the evidence that, since their separation, the parties have had a difficult parenting relationship. They communicate only via Coparently and their infrequent sessions with Dr. Ferrari. Coparently communications filed by the parties are frequently disrespectful and accusatory. Their affidavits filed in this matter continue in a similar vein, with each accusing the other of violating their separation agreement and relevant court orders and otherwise behaving unreasonably or improperly, including disparaging the other parent to the children. Each party denies the other party's allegations. Clearly, the parties have not been able to achieve a mature parenting relationship, despite the passage of time.

Discussion

Parenting Arrangements

- [32] The respondent seeks to increase his parenting time, and in particular to ensure that he has one full weekend out of every two with the children, in accordance with the following proposed schedule:
1. Week 1:
 - a. The respondent shall have parenting time with the children from Monday at school pick-up or 4:00 p.m. if there is no school, until Wednesday at school pick-up; and
 - b. The claimant shall have parenting time with the children from Wednesday at school pick-up until the following Monday at school pick-up or 4:00 p.m. if there is no school.
 2. Week 2:
 - a. The respondent shall have parenting time with the children from Monday at school pick-up or 4:00 p.m. if there is not school, until Wednesday at school pick-up;
 - b. The claimant shall have parenting time with the children from Wednesday at school pick-up until Friday at school pick-up or 4:00 p.m. if there is no school; and
 - c. The respondent shall have parenting time with the children from Friday at school pick-up or 4:00 p.m. if there is no school, until the following Wednesday at school pick-up.
- [33] The respondent's proposed schedule is essentially the same as the parties' current schedule except that the children would remain with him on the second Sunday of each two week period, instead of returning to the claimant at 11:00 a.m. on that Sunday until after school on Monday.
- [34] The respondent argues that there has been a material change in circumstances, largely on the basis of the passage of time, since the February 2015 Scarth Order. Assuming that there has been a material change in circumstances, the respondent submits that it would be in the children's best interests to order the proposed changes to the parenting schedule. He relies on the ongoing conflict between the parties, and argues that anything that would reduce the need for cooperation between the parties is in the children's best interests. His proposed schedule would eliminate two transitions between the parties, and create more stability for the children. As the parties already share substantially equal parenting time, the proposed change would have no effect on the parties' child support obligations, so there is no question of any kind of improper financial motivation behind his request for increased parenting time.
- [35] The claimant opposes this proposed change to the parenting schedule. The claimant submits that it is the Smith Order of May 2017 that the respondent seeks to vary, not the Scarth Order of February 2015, which is important because it determines the date from which the court must consider whether there has been a material change in circumstances. She submits that there has been no material change since the Smith Order, as Mr. Justice

Smith determined that the children were then "school aged", as they are now. It was known then that the children would be attending school, and the mere fact they are older now than they were then is insufficient to establish a material change in circumstances.

- [36] If I find that there has been a material change in circumstances, the claimant submits that it would not be in the children's best interests to increase the respondent's parenting time. That is why she has raised concerns about the respondent's parenting in her affidavit. She also submits that it would not be in the childrens' best interests for them to go from two nights in a row to five nights in a row with the respondent. She submits that if the court is inclined to make an order changing the parenting schedule to permit the respondent to have full weekends, that can be done without altering the current rule that he has six out of 14 nights.

Legal Framework

- [37] Section 47 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] provides:

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.

- [38] In *Williamson v. Williamson*, 2016 BCCA 87, the Court of Appeal adopted the test established by the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, a case decided under the Divorce Act, in determining whether there has been a material change in circumstances under s. 47:

- [31] I conclude that a material change in circumstances is required under s. 47 of the FLA.

- [32] The first step in the analysis set out in *Gordon v. Goertz* is to "determine whether there has been a material change in circumstances since the making of the prior order": Boychuck at para. 14. The Court in *Gordon* explained what is necessary to establish a material change in circumstances:

- [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued....

[12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.

[Emphasis in original.]

[33] At para. 13, the Court summarized what the applicant must establish before proceeding on 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.

[34] Absent a material change in the needs or circumstances of the child, the inquiry can go no further. It is only after this threshold is met that the judge on the new application can embark on a fresh inquiry into the best interest of the children.

[Citations omitted.]

[39] In *Dedes v. Dedes*, 2015 BCCA 194, the Court of Appeal reviewed the law, and stated:

[22] In *L.M.P. v. L.S.*, 2011 SCC 64, the Supreme Court again examined the test for variation. The Court held that "what amounts to a material change will depend on the actual circumstances of the parties at the time of the order" (para. 34).

[23] Madam Justice Smith synthesized this decision in *Powell v. Levesque*, 2014 BCCA 33, and said, at paras. 23–27:

In *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, a decision that was rendered after the decision under appeal, the Supreme Court of Canada reiterated the two-fold test for variation of a support order under the Divorce Act, R.S.C. 1985, c. 3 (2d Supp.) from *Willick v. Willick*, [1994] 3 S.C.R. 670 (for child support orders) and *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370, (for spousal support orders). The Court stated:

[31] *Willick* described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.

[32] That "change of circumstances", the majority of the Court concluded in Willick, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). G.(L.) confirmed that this threshold also applied to spousal support variations.

The Court added that whether a material change of circumstances has been demonstrated will depend on the actual circumstances of the parties at the time of the order (para. 34) and in general will require some degree of continuity, not merely a temporary set of circumstances (para. 35) [Emphasis original] .

[40] The Court of Appeal went on to state:

[25] As articulated in L.M.P., 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. A function of the material change threshold is to prevent parties from re-litigating issues that were already considered and rejected; in such cases, an application to vary would amount to an appeal of the original order (see Gordon at para. 15). As was stated by L'Heureux-Dube J. in Willick at p. 734, "the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions". See also G. (L.) v. B. (G.), [1995] 3 S.C.R. 370 at paras. 49–51 and Jakob v. Jakob, 2010 BCCA 136 at para. 40. [Emphasis original.]

[41] In T.L.M. v. J.K.B., 2018 BCSC 2237, Justice G. P. Weatherill referred to para. 25 from Dedes and stated:

[42] I take this to mean that the test is: firstly, based on what was actually contemplated at the time of the Savage Order (as opposed to what the parties knew or ought to have known); and secondly, that this court should have a flexible standard in considering whether a material change has indeed occurred.

[43] While the mere passage of time and the maturity of a child is not in and of itself proof of material change, it is one of the factors the court can look at in the overall assessment of the circumstances. The needs of the child changing over time as he or she matures can be a material change (Gray v. Wiegers, 2008 SKCA 7 at para. 25; Legien v. Legien, 2012 SKQB 326 at para. 65).

[Emphasis added.]

[42] In Villeneuve v. Fielding, 2015 BCSC 1788, Madam Justice Dorgan found that the passage of time since an order had been made in respect of a very young child was sufficient to show changed circumstances, stating:

[23] I am satisfied that Mr. Villeneuve has met the onus upon him to show changed circumstances, the passage of time being the most obvious. The agreement was made when this child was two year old and he is now 11 ½ years old. On its face, nine years in a young child's life represents a significant change in his needs, interests, and personality against which backdrop his best interests must be determined .

[43] If the court finds that there has been a material change in circumstances, then the court can embark on a fresh inquiry into what is in the best interests of the child: Williamson at para. 34.

[44] If the material change threshold is reached, the court's sole consideration must be the best interests of the child, as set out in s. 37 of the FLA:

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

Has there been a material change?

- [45] I am satisfied that there has been a material change in the children's circumstances.
- [46] I find that it is the Scarth Order, and not the Smith Order, which the respondent seeks to vary. The respondent is seeking a variation of the regular parenting schedule, which was established in the Scarth Order. The Smith Order, by contrast, dealt with other issues, including the summer and holiday schedule, and did not alter the regular parenting schedule.
- [47] Justice Smith's judgment is nonetheless instructive in considering whether a material change has occurred in the children's circumstances. He emphasized the young age of the children and said that he did not consider it appropriate for the court to impose a specific parenting schedule. He recognized that what would be appropriate in a parenting schedule would change as the needs of the children changed.
- [48] When the Scarth Order was made in February 2015, the children were a little over three and one years old. The Smith Order was made a little over two years after that. The children are older now and both are now in school full-time. That was not the case even at the time of the Smith Order, whose determination that they were "school age" was based solely on A. entering kindergarten that fall, resulting in it making sense for the parties' holiday schedule to come into effect for both children.
- [49] Similar to the situation in Villeneuve, five-and-a-half years represents a significant change in the children's needs and interests against which to assess their best interests. In addition, I accept that the respondent has increased flexibility related to his business, which enables him to have greater availability on Sundays to be with the children.
- [50] Taking the flexible approach to the determination of what constitutes a material change established by Madame Justice L'Heureux-Dube in Willick as appropriate in the family law context, and reiterated by Weatherill J. in the specific context of the FLA in T.L.M., I find that the respondent has established a material change in circumstances.

What is in the children's best interests?

- [51] Having determined that the s. 47 threshold has been met, I must consider whether it is appropriate to vary the parties' current parenting schedule. In making that determination, my sole consideration must be the best interests of the children, as set out in s. 37 of the FLA.
- [52] In assessing the children's best interests, it is important to note that the parties have shared substantially equal parenting time for many years. According to the claimant's calculations, the respondent has had over 40% parenting time with the children every year since 2016. Both parents are very involved in the children's lives. While the parties have not been able to communicate or cooperate with one another effectively, there is no serious question that both of them are good parents, who are able to meet the children's needs. I find that it is in the children's best interests to spend as much time with each of their parents as possible, and for them to spend time on both week-days, and week-ends, with each of their parents, which

will enable both parents to be involved in the full range of the children's school, extra-curricular and family, included extended family, activities.

- [53] It is important to note that Justice Smith's May 2017 decision contemplated that the parties' parenting schedule would give each party a full weekend. The respondent requested and the claimant agreed in September 2017 to have Mondays and Tuesdays instead, but that was not envisioned to necessarily be a permanent arrangement. The minutes from the parties' September 25, 2017 meeting with Ms. Fabbro state that the parties would review the Sunday transition in week 1 in June 2018, and that the parenting schedule was "without prejudice to either party's ability to ask for full weekends as contemplated in the Order at such review." Nothing can therefore be taken from the fact that the parties agreed in September 2017 for the respondent not to have full weekends.
- [54] The evidence before me makes it clear that the parties, despite the fact they clearly both love their children, have had ongoing difficulties in communicating with one another. The children are of an age when they must be aware, to some extent, of the difficulties in their parents' relationship. Both children have been referred to counselling due to the conflict between their parents. The parenting schedule proposed by the respondent would reduce the number of transitions between the parties, and minimize any need for them to be in direct contact with one another, by eliminating the Sunday morning transition. Reducing the opportunities for conflict is in the children's best interests.
- [55] The parenting schedule proposed by the respondent would enable him to have one of every two full weekends with the children, rather than the children going to the claimant for Sunday afternoon and night. The respondent says, and I accept, that he is able to arrange his work commitments so as to not have to regularly work on the Sundays the children would be with him. This would enable the respondent to spend more time with the children over the weekend, and would also increase their opportunities to spend time with the respondent's extended family, in particular their grandmother. All of that is in their best interests.
- [56] The claimant says that the respondent normally works Sundays, and it is clear that this is an important factor in her opposition to the proposed parenting schedule. The respondent says that due to growth in his business and hiring additional employees, he no longer needs to regularly work Sundays. From his point of view, an important reason for wanting the children with him on alternating Sundays is to be able to be with them.
- [57] I accept the respondent's evidence that he will not have to regularly work Sundays when he has the children with him. He is better placed than the claimant to know what his likely work schedule is.
- [58] The claimant says that the children have expressed to her that they do not want to be in the respondent's care for five nights in a row, or for more than two or three overnights, as they would be under the respondent's proposed schedule. The respondent says the children have told him they would love to spend an extra night with him. While the views of children are a relevant factor in assessing their best interests, in this case I have no objective evidence on

which to assess the children's views. The children are young, and are likely to wish to please the parent who is speaking to them about their preferences. Further, both parties are firmly committed to their preferred schedule, so the reliability of their hearsay evidence about the children's preferences is open to question. In the circumstances, the views of the children are a neutral factor in considering their best interests.

- [59] Further, under the holiday parenting schedule the children already spend uninterrupted periods of a week or more with the respondent. It is therefore difficult to see why it would create any problems for them to regularly spend five nights with him once every two weeks.
- [60] I therefore order that the parenting schedule be varied to provide the parties with equal parenting time, with the respondent having parenting time with the children for five nights between Friday and Wednesday in week 2 of the regular parenting schedule.

Parenting Coordinator

- [61] The respondent applies to have a parenting coordinator appointed for a period of two years. The claimant opposes this order, primarily on the basis that she cannot afford her half share of the proposed parenting coordinator's retainer fee of \$10,000. While she acknowledges that parenting coordinators can be useful, she also submits that a parenting coordinator is not necessary in this case. She cites *Fleetwood v. Percival*, 2014 BCCA 502, at para. 25, in support of the proposition that the benefit of a parenting coordinator would be outweighed by the cost, and argues that the situation is similar to *K.V.B. v. O.B.B.*, 2015 BCSC 171, in both of which the court declined to appoint a parenting coordinator.
- [62] The parties likely would receive some benefit from the assistance of a parenting coordinator, as they did in the past, which is reflected in Ms. Fabbro's meeting minutes. I also consider it relevant that when Ms. Fabbro declined to renew her agreement with the parties in 2018, she recommended that they retain a new parenting coordinator.
- [63] I do not find the claimant's argument that a parenting coordinator is not needed because the parties have a separation agreement and various court orders in place that determine their parenting arrangements, and have demonstrated the ability to agree to things, persuasive. The parties' affidavit evidence, including her own, demonstrates their inability to agree on a great many things.
- [64] Further, under s. 17 of the FLA, a parenting coordinator is empowered to do many things other than make determinations about parenting schedules:
- 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 [determinations by parenting coordinators].

[65] These parties would clearly benefit from further assistance in the form of guidelines about how to implement the relevant agreements and orders, guidelines about communication between them, and the identification and creation of strategies to resolve conflicts.

[66] The evidence before me is clear that since Ms. Fabbro's retainer came to an end, the parties continue to be in a state of conflict, and have been unable, or unwilling, to cooperate with one another, including in the claimant's case refusing to consider even minor adjustments to the parenting schedule that the respondent might request. The tone and content of some of their communications on Coparently is regrettable. Both children have been referred to counselling as a result of the conflict between the parties. It is in the best interests of the children to minimize or manage the conflict between the parties, and a parenting coordinator would be of assistance in doing so.

[67] The claimant's position that a parenting coordinator would not benefit the children is difficult to square with her continuing complaints about the respondent's conduct. If she truly believes the many allegations she makes about the respondent in her affidavit, then surely a parental coordinator would be of at least some assistance in helping to resolve or address the issues she describes.

[68] At the same time, I also accept that the substantial cost of a parenting coordinator would be difficult at this time for the claimant in light of the loss of her secondary auxiliary position due to the COVID-19 pandemic. The significance of this factor is highlighted by the fact that correspondence from her counsel to the respondent's counsel, dated November 8, 2019, indicates that she was prepared to retain the parenting coordinator proposed by him, but even pre-COVID needed a few months to save the necessary funds to pay her half of the retainer.

[69] In this connection, I would note that it is not clear on the claimant's evidence that her lay off from her secondary auxiliary position is permanent, as she says only that she was laid off in March 2020 as a result of the COVID-19 pandemic and that she is not likely to return to this position. She does not state why she is not likely to return or whether it is due to her choice or that of her employer.

[70] Further, despite the hopes expressed in Mr. Justice Smith's decision, it does not appear that the services of a parenting coordinator in the past have helped the parties graduate to being able to resolve issues on their own. Parenting coordinators cannot be a permanent solution.

- [71] The question of whether to order a parenting coordinator for these parties is difficult. In the end, I am persuaded that the cost of a parenting coordinator for these parties at this time would outweigh a parenting coordinator's potential benefits. Resources are finite, and the funds spent on a parenting coordinator would be better allocated to counselling, both for the parties, and for the children.

Counselling

- [72] The respondent initially sought to have the Smith Order requiring the parties to attend counselling with Dr. Ferrari every six weeks enforced, which was opposed by the claimant on the basis that it was unnecessary.
- [73] Counsel advised me that, prior to the application being heard, the parties had agreed with Dr. Ferrari going forward to see her every two months, and that they had another appointment with her on August 5, 2020. In light of the parties' agreement, and past difficulties with the parties attending appointments with Dr. Ferrari as scheduled, and given the value to the parties of continued counselling, I consider it appropriate to order the parties to attend appointments with Dr. Ferrari at least every two months, unless that schedule is specifically varied by her.

Child Support

- [74] In his notice of application, the respondent sought an order that child support pursuant to the parties' May 29, 2014 separation agreement and any enforcement of child support pursuant to the Family Maintenance Enforcement Act be suspended retroactive to March 2015, and until child support is reviewed and varied by written agreement or court order.
- [75] In her application response, the claimant opposed any suspension of enforcement. She stated that she seeks to have the respondent imputed with income in addition to the income he claims. She acknowledges that she agreed to suspend the enforcement of child support between March 2015 and May 2016. She seeks payment for child support during the periods no parenting coordinator was engaged: May 2016 to August 2017, and August 2018 to date.
- [76] The claimant has not made an application for payment of the retroactive child support she seeks. The claimant has not provided any explanation explained why, if she assumed, as she says in her affidavit, that child support was suspended during Ms. Fabbro's second appointment, she took no steps to enforce child support following the termination of her appointment in August 2018 until she asked the respondent for his financial statements in October or November of 2019.
- [77] In their oral submissions before me, both counsel went further than the relief set out in their respective notice and response.

- [78] Counsel for the respondent asked the Court, rather than suspending support payments, to review the child support payable by the respondent and make an order for ongoing support, on either an interim or permanent basis. In asking the Court to review the child support payable, the respondent relies upon the financial statements filed by the parties on June 29, 2020 and July 10, 2020. The respondent's financial statement indicates a Guideline Income of \$63,611.29. He states that he anticipates significant changes to his income in 2020 due to the impact of the COVID-19 pandemic on his self-employment as a basketball coach. The claimant's financial statement indicates a Guideline Income of \$47,743.73. She too anticipates significant changes to her income due to having been laid off from her secondary employment as an auxiliary with North Vancouver Recreation and Culture as a result of the COVID-19 pandemic.
- [79] Counsel for the respondent acknowledged that the respondent is the higher income earner, and proposed that his child support payments be set at the amount of \$118 per month, starting August 1, 2020, on an interim and without prejudice basis.
- [80] Counsel for the claimant opposed any review being conducted at this time of the parties' child support obligations, saying that she first time she heard that a review should be conducted now was during counsel for the respondent's submissions on this application. She said that further financial disclosure and submissions with respect to the parties' needs would be necessary to review child support. She did make submissions in opposition to the respondent's application to suspend enforcement. She also made some submissions, albeit without the full evidentiary basis she says is necessary, on imputing additional income to the respondent. She also submitted that the respondent's child support should, depending on what view the court took with respect to various issues relating to the calculation of both parties' incomes, be somewhere in the range of \$609 to \$454 per month.
- [81] I am not prepared to conduct a review of the parties' child support obligations at this time. No such application was filed, and no notice was given by the respondent to the claimant of an intention to seek a review within this proceeding in advance of the hearing. It would be unfair to the claimant to undertake a review in such circumstances.
- [82] It is apparent that the parties want and need to conduct a full review of their child support obligations. Such a review has been under contemplation at least since November 2019, and should occur as soon as possible.
- [83] I am prepared to order at this time that enforcement of the respondent's past child support obligations be suspended pending a review of the parties' past and future child support obligations. In light of the claimant's April 6, 2016 fax, clearly asking FMEP not to enforce any child support payments by the respondent until a new court order was filed, it would be unfair to the respondent for any previous support obligations to be enforced at this time. In making this order, I am not making any determination at this time about whether the respondent does owe any retroactive child support payments, in particular for the periods when no parenting coordinator was in place. The determination of whether any retroactive

child support payments are owed will be more appropriately made in the context of the pending child support review.

- [84] In light of the fact that the respondent will be required to pay child support going forward, I consider it appropriate to make an order for the respondent to pay child support, starting August 1, 2020, on an interim and without prejudice basis. The parties did not have the full evidentiary record or provide me with the submissions necessary for me to determine what the respondent's child support obligations will be going forward. That will occur on the child support review, which I address below. I therefore order the respondent to pay child support in the amount of \$391 per month, the figure the parties agreed to in their separation agreement, and a figure somewhere between those suggested by counsel. I emphasise that this figure is interim and without prejudice, and that both parties will be at liberty to provide the court with full evidence and submissions about what child support should be set at the hearing to review child support.
- [85] While I have not referenced the specifics of it in this decision, the parties' materials are replete with references to negotiations between them in which it would appear they have come close to resolving all issues between them. The claimant has expressed concerns about the legal fees associated with this application. I urge the parties to do their best to resolve the outstanding issues related to child support on a consensual basis.
- [86] However, in order to ensure that the parties' child support obligations are finally determined in a fair and final way, I order the parties, unless they otherwise come to a final written agreement with respect to past and future child support obligations, to attend a judicial case conference within 60 days of the date of this judgment. Failing agreement, a child support review hearing is to be conducted as soon as possible thereafter. If I am available, I will hear that application.

Summary

[87] In summary, I have ordered that:

1. the parenting schedule pronounced by Master Scarth on February 13, 2015 is varied to provide the parties with equal parenting time, with the respondent having parenting time with the children for five nights between Friday and Wednesday in week 2 of the parties' regular parenting schedule;
2. the parties are to attend appointments with Dr. Lisa Ferrari at least once every two months, unless that schedule is specifically varied by her;
3. enforcement of the respondent's past child support obligations is suspended pending review of the parties' past and future child care obligations;
4. starting August 1, 2020, the respondent will pay child support on an interim and without prejudice basis in the amount of \$391 per month;

5. the parties, unless they otherwise come to a final written agreement with respect to past and future child support obligations, are to attend a judicial case conference within 60 days of the date of this judgment. Failing agreement, a child support review hearing is to be conducted as soon as possible thereafter. If I am available, I will hear that application; and
6. the respondent has been substantially successful, and absent anything of which I am not aware, should be entitled to his costs of the application. The parties have leave to appear before me if they are unable to agree on costs.

"Lyster J."

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