

CANADA / JUDGMENT

Cosper v. Bauer

2021 BCSC 985

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2021 BCSC 985 Cosper v. Bauer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cosper v. Bauer,

2021 BCSC 985

Date: 20210521

Docket: E184098

Registry: Victoria

Between:

Andrew Scott McLagan Cosper

Claimant

And:

Kristin Jennifer Bauer

Respondent

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Claimant:

R. Faber

Counsel for the Respondent:

J. S. Monier-Williams

Place and Date of Hearing:

Victoria, B.C.

April 21, 2021

Place and Date of Judgment:

Victoria, B.C.

May 21, 2021

- [1] The claimant and respondent are respectively the father and mother of a nine-year-old child. They divorced in February 2020, after nine-and-a-half years of marriage. The parties entered into a comprehensive final consent order pronounced by Mr. Justice Johnston on January 20, 2020 (the "Consent Order"). The respondent now seeks variation of certain terms of the Consent Order, and the appointment of a parenting co-ordinator pursuant to Part 2 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [2] The claimant also initially was to have applied before me for variation of parenting time over the coming summer, to provide for him to have parenting time with their child corresponding with the date of his planned wedding, and for the respondent to have some form of make-up time. Fortunately, the parties were able to settle that issue, and spoke to the terms of a consent order, which I pronounced at the outset of the hearing. The resolution of that issue, however, did not occur without the intervention of counsel, and the exchange of application materials. That the parties had such difficulty resolving what ought to have been a straightforward issue speaks to the high degree of animosity between the parties, and to their apparent inability to communicate in a manner that is respectful and that provides mutual reinforcement of each other's role as a parent.
- [3] The Consent Order was preceded by a comprehensive psychological evaluation report prepared by Dr. Rebecca St. Clere England. Dr. England concluded that both parents have strong bonds with their child, and that they are more than capable of meeting the child's needs. The equal parenting time provided for in the Consent Order, with a 2-2-5-5 schedule during the school year and substantially equally shared vacation time, reflects and respects those conclusions.
- [4] However, Dr. England sounded a very clear warning as to the daughter's level of anxiety around the conflict between her parents, and the degree to which it was affected by the child and her mother having an "enmeshed" emotional relationship. Dr. England opined that there were "indications that Ms. Bauer is not fully differentiating between her needs and [the child]'s needs and that [the child] is responding to this emotional dynamic by developing maladaptive coping mechanisms". This dynamic was reflected in negative remarks made by the child to Ms. Bauer about Mr. Cosper, which contradicted Dr. England's observations as to the child having strong positive bonds with Mr. Cosper, and developing bonds with Mr. Cosper's new partner. Dr. England was of the view that the child's negative

statements "may be a way to express love and loyalty to [Ms. Bauer], while masking [the child]'s actual experience of enjoying [time with Mr. Cosper] ". She opined that the child might be at risk of becoming alienated from Mr. Cosper, notwithstanding their strong positive bond, if the dynamic around Ms. Bauer making negative statements about him was not addressed.

- [5] Dr. England expressed the hope that once joint parenting was established, with the parties being obliged to work together in their child's best interest, decision-making might improve. If there was ongoing conflict, Dr. England said that it may be advisable to appoint a parenting co-ordinator. Dr. England also made recommendations as to the parties and the child undergoing counselling, including that the parties retain a parenting counsellor who could work with the parties as separated parents on a therapeutic basis.
- [6] The orders sought by the respondent, generally, are as follows:
- a) Appointment of a parenting co-ordinator;
 - b) Variation of the Consent Order:
 - i. to deal with parenting time as of the last day of school, to address an anomaly in the Consent Order that arises out of "summer" being defined as beginning on the day school lets out at the end of June, but "Summer Schedule" being defined in terms of weeks that begin and end on Fridays, with the result that a 'stub' day is created when school lets out on a Thursday;
 - ii. to provide Ms. Bauer with additional parenting time during the Regular Schedule, to address what she submits is an inequity in the apportionment between the parties of Summer Schedule time; and
 - iii. to allow Ms. Bauer to provide the child with a cell phone, with which the child may contact either parent during the other parent's parenting time, and that neither parent shall unreasonably refuse a request by the child to contact the other parent.

Parenting Co-ordinator

- [7] The desirability of a parenting co-ordinator was addressed in the report of Dr. England, but was a form of relief the parties chose not to include in the final Consent Order. Instead, the Consent Order provides that decision-making for all matters of a significant nature is to be joint; and that in the event of a dispute, dispute resolution is to be effected through mediation, the cost of which is to be shared equally. Ms. Bauer concedes that as what she proposes is a different form of dispute resolution, the circumstances that she says weigh in favour of appointment of a parenting co-ordinator must meet the test for variation of the Consent Order.

- [8] A material change in circumstances is a precondition to the variation of a final order, under both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [Divorce Act], and the FLA. Ms. Bauer submits that here, the requisite material change can be found in the parties' continual conflict over parenting matters, illustrated through anecdotes each party describes in their affidavits, supplemented by documentary communications such as text messages and emails.
- [9] Ms. Bauer relies on *Friedlander v. Claman*, 2015 BCSC 2409, in which Madam Justice Gropper found that one parent's ongoing breaches of court orders demonstrated that the parenting scheme reflected in the final order at issue was not workable. There was also, however, expert evidence of a psychologist before the court that the previous joint custody regime was having a negative effect on the child. Madam Justice Gropper referred to the decision of Mr. Justice Price in *P.C.P. v. L.C.P.*, 2013 ONSC 2564, where at para. 81 he had quoted from the decision of Mr. Justice Corbett in *De Melo v. Gooding*, 2010 ONSC 2271 [De Melo]:
- [81] As Corbett J. noted in *De Melo*, the threshold requirement for a material change in circumstances is not intended to condemn the parties to a lengthy process of dispute resolution that holds no reasonable prospect of enabling them to resolve their differences:

This is not to encourage interminable court attendances, or unending participation in formal dispute resolution outside the court process. There comes a point at which the frequency and intensity of conflict may warrant a change in the overall custody and access regime, in an effort to reduce that conflict. In other words, the failure of the processes established by the parties may, itself, be a material change of circumstances, just as the apparent inability of the parties to work with a specific parenting coordinator could justify changing the coordinator in *Litman v. Sherman* [2008 ONCA 485 [Litman]].

[Emphasis added by Price J.]

Madam Justice Gropper found the non-co-operating parent in contempt, found that the particular breaches of court orders were all counter to the best interests of the child, and concluded that the contempt and the impact of the joint custody regime on the child provided sufficient grounds for a finding of material change in circumstance.

- [10] That decision was upheld on appeal, in reasons indexed at 2016 BCCA 434. In a unanimous decision, Madam Justice Smith wrote:
- [68] A material change in circumstances will depend on the actual circumstances of the parties at the time of the order asked to be varied. It will in general require some degree of continuity, not merely a temporary set of circumstances, and must be "material" in the sense that if known at the time of the earlier order it would have resulted in a different order: *L.M.P. v. L.S.*, 2011 SCC 64.

...

[70] As previously noted, the parties acknowledged that the child was experiencing distress under the joint parenting regime and that the arrangement, which the parties and the chambers judge had initially envisioned as a viable solution, was no longer working. In my view, those undisputed facts sufficiently and independently grounded the finding of a material change in circumstances on a balance of probabilities and the need to vary the joint parenting arrangement to protect the best interests of the child.

[71] The direct evidence of the mother's conduct as found by the judge, as well as the direct evidence of its visibly disturbing effect on the child, also sufficiently and independently supported the judge's finding of a material change of circumstances regardless of whether it met the criminal standard of proof.

...

[73] The judge correctly reviewed the law on what constitutes a material change of circumstances from *Gordon v. Goertz*, [1996] 2 S.C.R. 27, correctly applied the statutory factors to be considered in determining the best interests of the child as listed in s. 37(2) of the FLA, and committed no reversible error in applying the evidence she accepted to those statutory factors in determining the parenting arrangement that, in her assessment, was in the best interests of the child. In my view, it was open to the judge to vary the joint parenting regime based on the totality of the evidence, in the best interests of the child.

[Emphasis added.]

[11] In contrast, the *Litman* decision of the Ontario Court of Appeal referenced by Corbett J. in *De Melo* illustrates the limitations on the use of continued parental conflict as evidence of a material change in circumstances. In *Litman*, the parties had entered into a final consent order in 2004, pronounced by Nelson J., which included provisions as to custody. A number of access issues remained outstanding, and in 2005 a Dr. Morris was appointed by court order as a parenting co-ordinator. Later that year the court ordered the action proceed to trial, and at the commencement of what became a fifteen-day trial, the issues to be tried were defined to be access (including matters dealing with the parenting report and possibly issues surrounding the parenting co-ordinator), child and spousal support, and contempt. As the trial proceeded, the trial judge advised the parties that as both parties had raised issues related to custody, she viewed it as having become an issue before her. As set out at para. 15 of *Litman*, in her reasons, the trial judge highlighted the high degree of conflict in the parties' relationship, which had been present since their child's birth:

There is a very high level of animosity between the parties and virtually no trust between them throughout much of the time they have known each other ... There is no evidence that the parties have made any real effort to ameliorate their differences or that they have any intention of doing so.

- [12] The trial judge concluded that the parenting co-ordinator had been ineffectual, and that obliging the parties to co-operate with rulings of any parenting co-ordinator would only serve to aggravate their already poor relationship. Accordingly, she ruled that the use of a parenting co-ordinator would have to be discontinued, and she awarded custody to the mother.
- [13] The Court of Appeal held that the trial judge had erred in failing to ground the variation of the custody order in a finding of material change in circumstance; and, that no such finding of material change had been available on the evidence before the trial judge. The parties had always been in conflict; the breakdown in the process of using the parenting co-ordinator was not a change in circumstance, because their initial willingness to attempt to work through a parenting co-ordinator only reinforced the finding that they had been incapable of co-operating in the first place. All that the breakdown established was that the issue of who was best suited to fill the role of parenting co-ordinator might have to be revisited.
- [14] In the present case, a material change in circumstances might be established if I were able to find that the parties had a mutual expectation of diminished conflict at the time the Consent Order was pronounced. As I have noted, Dr. England did express hope that once joint parenting was established, decision-making might improve, and she said that appointment of a parenting co-ordinator might be advisable if the conflict between the parties continued. However, neither party provided evidence that their decision not to appoint a parenting co-ordinator was based on an expectation of improvement in their parenting relationship, and I cannot infer any such mutual expectation from the absence in the Consent Order of a parenting co-ordinator provision.
- [15] There is evidence that the child is anxious. However, that anxiety seems rooted in the parties' hostility towards one another, and particularly in what Dr. England described as the child's enmeshment with Ms. Bauer. There is no evidence that the child has suffered any more as a direct or indirect result of the conflicts that have occurred since the Consent Order was pronounced in January 2020.
- [16] Moreover, even if a change in circumstance were made out on the evidence, I would have to consider its materiality; to ask whether, in the words of Corbett J., the frequency and intensity of the parties' ongoing conflict warrants any change in the overall parenting regime: *De Melo* at para. 12. In my view it does not - at least, not at this point in time.
- [17] Some of the points of contention between the parties over the last year have revolved around demands that each consult the other about day-to-day matters that fall within the prerogative of the parent who is exercising their parenting time, which is not required under the Consent Order - rather, the Consent Order specifies that each parent has, and may exercise during their parenting time, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control, and supervision of the child. Further, the Consent Order only requires joint decision-making as to matters of a

significant nature. It seems doubtful that a parenting co-ordinator would have jurisdiction over a matter that the parties did not agree was significant.

- [18] Much of the conflict between the parties has been simply trivial. Some examples from the affidavits are illustrative:
- a) In October 2020 Mr. Cospers emailed Ms. Bauer to say that he had scheduled an appointment the following week for the child to receive a flu shot. Ms. Bauer responded, acknowledging that it was important for the child to be vaccinated, but complaining that they needed to agree on it beforehand (overlooking the fact that his advance notice gave her ample opportunity to voice any objection), and asserting that they also needed to agree in advance where the vaccine would be administered;
 - b) In May 2020 Mr. Cospers moved to a new residence. He advised Ms. Bauer of the new address in March, and though he said he would let Ms. Bauer know the move date as soon as it was set, it appears that he neglected to do so. Ms. Bauer learned from the child that Mr. Cospers would be moving over the May long weekend, which meant that, under the Consent Order, she would have to pick the child up from his house on the Monday morning. She emailed Mr. Cospers on Friday May 22nd; instead of simply confirming that she knew he had moved, she asked Mr. Cospers to let her know the move date. He replied the next morning, asking her to pick up the child from the new address on the Monday. Ms. Cospers complains that she had to follow up with him; and
 - c) The parties have exchanged emails quarrelling over matters such as the labelling of plastic food containers, and the fate of items of clothing and accessories that the child outgrows.
- [19] Ms. Bauer cites each of these incidents as examples of situations where a parenting co-ordinator could have assisted. It is not at all clear to me how that is the case. The parties are quite capable of resolving between themselves their conflicts over these, and similar, issues. The problem does not lie in the resolution of conflict. It lies in the fact that the parties treat these everyday occurrences as "issues", and then communicate with each other in a fashion that is at worst hostile and at best condescending or passive-aggressive. They appear incapable of treating each other with mutual respect and of reinforcing each other's role as equals in their child's life.
- [20] I note that the parties have been using a "tone meter", a software application that flags problematic content in electronic communications. While this may be an effective means of eliminating overt hostility in such communications, I have no evidence that it is or can be calibrated to pick up on subtle jabs, insinuations, and other less overt forms of aggression. Parties in longstanding conflict learn how to push each other's buttons in ways that will surely test the limits of current forms of artificial intelligence.

- [21] I also agree with Mr. Cosper's submissions that appointment of a parenting co-ordinator runs the risk of the conflict resolution process becoming "weaponized"; and, that the expense of a co-ordinator may be disproportionate to the nature of the "conflicts" that have emerged.
- [22] The evidence simply does not support variation of the Consent Order to provide for a parenting co-ordinator, either in terms of its availability as a remedy under the FLA or the Divorce Act, or it being a form of relief appropriate to the parties' circumstances.
- [23] What is required, in my view, is that the parties make a real effort to identify the sources of their mutual antipathy, to understand how it is impacting their child and their ability to act effectively as parents, and to find new ways of relating to each other, through - as recommended by Dr. England - the use of a parenting counsellor. I raised the possibility of joint counselling with the parties at the hearing of this application; neither objected.
- [24] This Court has the power under s. 224(1) of the FLA to order parties to undertake counselling for any of the purposes set out in s. 222. Section 222(a) specifies that one of the purposes is "to facilitate the settlement of an issue that may become the subject of a family law dispute". Under a broad and purposive interpretation of those statutory provisions, I do not find it necessary that a specific issue be identified before counselling aimed at resolving the parties' mutual antipathy can be ordered; it is sufficient that there has been and continues to be conflict, that the conflict has led to the present application, and that there is a real and substantial possibility of future family law disputes if their issues are not addressed therapeutically. Counselling, undertaken by each party with a sincere desire to further the best interests of their child, should assist the parties generally in preventing issues from becoming the subject of a family law dispute, within the meaning of s. 222(a).
- [25] Alternatively, I would find that jurisdiction to order parents into counselling arises under the Court's *parens patriae* jurisdiction, in order to promote the wellbeing of a child whose parents are parties to a family law proceeding. Mr. Justice Groberman described the nature of that jurisdiction in *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286:
- [57] The *parens patriae* jurisdiction is an important and broad jurisdiction of superior courts. In *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, La Forest J., on behalf of a unanimous Court, undertook a thorough analysis of the history and scope of the jurisdiction. He noted that it is a jurisdiction normally used for the protection of children and persons who are mentally incompetent. He was careful, however, to observe, at 427, that the use of the jurisdiction is circumscribed:

Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuik in *Re X [In re X (a minor)]* (1974), [1975] 1 All E.R. 697 (C.A.), at pp. 706-07, and Heilbron J. in *Re D [In re D (a minor)]* (1975), [1976] 1 All E.R. 326 (Fam. D.) at p. 332, cited

earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

- [58] Two other limitations on the *parens patriae* jurisdiction are important. First, as it is a prerogative power, it must yield to statutory provisions. Thus, in *L.M. v. British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 367 at para. 33, Saunders J.A., speaking for a unanimous Court, said:
- [33] Where there is a legislative scheme, this protective jurisdiction of the court applies only when there is a gap in that legislation: *Beson v. Director of Child Welfare (NFLD)*, [1982] 2 S.C.R. 716, 142 D.L.R. (3d) 20. Use of *parens patriae* jurisdiction is, accordingly, not meant to be an avenue for statutory amendment or broad interference with existing laws, and does not create substantive rights: *Tsaoussis v. Baetz* (1998), 112 O.A.C. 78, 41 O.R. (3d) 257 (C.A.); *P.(E.) v. B.C. (Supt. of Fam. & Child Service)* (1988), 23 B.C.L.R. (2d) 329, 28 D.L.R. (4th) 469 (C.A.).
- [59] The second important limitation on the *parens patriae* jurisdiction is that it is a jurisdiction of the superior courts, and cannot be exercised by other tribunals or courts: see *Eve* at 426.
- [26] The parties' child is nine years old - on the cusp of adolescence, a period of emotional development which can challenge even parents in intact families with healthy interpersonal relationships. I view it as critical to the child's emotional wellbeing that the parties undertake the type of counselling I have described. In that respect, the application of the Court's *parens patriae* jurisdiction is appropriate. The making of such an order as a matter of *parens patriae* does not conflict with any aspect of the Consent Order; hence, the variation provisions of the FLA and the Divorce Act do not apply, and there is no inconsistency between making a counselling order under that jurisdiction, and the Consent Order that was made pursuant to statutory provisions. Furthermore, s. 192(3) of the FLA explicitly provides that nothing in that Act limits or restricts the Court's ability to exercise its *parens patriae* jurisdiction.
- [27] I therefore order the parties to jointly retain a psychologist or registered clinical counsellor (the "Counsellor") and to together undertake joint therapeutic parental counselling, on the following terms:
- a) If the parties are unable to agree on who is to be retained, the Counsellor will be chosen through Mr. Cospier providing Ms. Bauer with the names of three psychologists or registered clinical counsellors who are willing, and available within a reasonable time, to work with the parties, and Ms. Bauer promptly choosing one name from that list;
 - b) The cost of the Counselling is to be borne equally by the parties, and each will directly pay their share of any retainer and of any invoices, forthwith;

- c) The parties will attend at least six and, subject to the direction of the Counsellor, up to twelve sessions of counselling;
- d) All communications with the Counsellor, other than routine communications as to the retainer and scheduling of appointments, will remain confidential, with the exception that each party may waive the confidentiality of communications with the Counsellor as to only their own treatment, including but not limited to their completion of any therapy, exercises, or treatment prescribed, recommended, or administered by the Counsellor; and, in the event that one party chooses to waive such confidentiality, no inference will be drawn should the other party maintain their own right of confidentiality;
- e) The Counsellor shall be provided with a copy of these Reasons and the entered Order reflecting these Reasons, with the report of Dr. England, and with all affidavits of the parties filed herein; and
- f) Upon conclusion of the minimum of six and maximum of 12 sessions ordered, the Counsellor will issue a letter to the Court confirming that the sessions have been completed by the parties.

Variation of Parenting Time

Commencement of the Summer Schedule

- [28] As described above, there is an anomaly in the terms of the Consent Order respecting the timing of the end of the regular 2-2-5-5 schedule, and the beginning of the summer parenting schedule. The effect of this is that if school lets out for the summer on a Thursday, the time between 9:00 a.m. and 4:30 p.m. on the next day, Friday, is not apportioned to either party. The parties agree that this anomaly needs to be addressed.
- [29] Ms. Bauer submits that their child should have parenting time from the close of school on the Thursday until the Friday at 4:30 p.m. with whichever parent is to have parenting time during the first week of the Summer Schedule. Mr. Cospers proposes that instead, the 9:00 a.m. to 4:30 p.m. Friday period of time should be allocated to whichever parent the child is scheduled to be with for the first week of the Summer Schedule, thus moving the start of the Summer Schedule up from 4:30 p.m. Friday to 9:00 a.m. I find Mr. Cospers' proposal leads to the minimal amount of disruption of the parties' schedules, and is therefore in the best interests of the child, and I order that the Consent Order be varied accordingly.

Summer Parenting Time

- [30] Ms. Bauer contends that the object of the Summer Schedule was to provide equal parenting time, and that this goal was inadvertently frustrated through the Labour Day weekend being specifically allocated to Mr. Cospers without the parenting time for the rest of the summer being rebalanced.

[31] Mr. Cosper submits the Consent Order provisions are not mistaken, and reflect the outcome of give-and-take negotiation, with Ms. Bauer having been compensated by being given first choice of a three-week block every summer.

[32] There is no basis in the evidence for me to find a mutual mistake in the summertime allocation of parenting time. I decline to order any variation in this respect.

Telephone Communications

[33] Dr. England addressed telephone communications between the child and the absent parent in her report. She noted it was an issue of conflict between the parties. She made some general observations as to how telephone calls - both those which are scheduled, and those which may be initiated by a child - can disrupt the child's relations with the present parent. Given Dr. England's observations as to enmeshment, the following statement from her report seems particularly germane:

Leaving the decision making to the child may contribute to a child's feeling of guilt if they are not attending to the absent parent's emotional needs by making the phone calls and if there are any alienation dynamics in the family (e.g. a child making negative reports about one parent to the other) they may be exacerbated by a child having decision making with respect to contact with the absent parent.

[34] Dr. England described the parties' child in particular as being mature, with a consolidated attachment bond with both parents, and did not present as a child who required telephone contact with an absent parent to maintain those bonds. Given the potential for negative impacts, she recommended against telephone contact unless the parents agreed otherwise.

[35] This recommendation was reflected in the Consent Order, which provided for there being no requirement for the child to have any contact with the absent parent, other than once per week during the summer; and with the further exception of a transitional period, up until April 1, 2020, when the child was to be allowed one telephone call with the absent parent during each five-day period of the Regular Schedule's cycle.

[36] Ms. Bauer says that there has been a material change in circumstances in that the child has been calling her from school in recent months during Mr. Cosper's parenting time periods. Ms. Bauer attached to her 8th affidavit, sworn April 13, 2021, the transcript of such a phone call that she received from the child on January 6, 2021. She says that the child was extremely distressed, that she is at a loss as to what she should do about such calls, and that she cannot deny the child the ability to speak with her in such circumstances. Ms. Bauer says there have been "multiple calls like this one". (Why this evidence was in a reply affidavit and not in the affidavit materials filed in support of Ms. Bauer's application on April 9, 2021 was not explained.)

- [37] Although I do not doubt Ms. Bauer's sincerity in stating she believed the child was in great distress, I must say that covert recording of communications between a parent and child in the context of family law disputes is not to be encouraged. Nevertheless I have read the transcript and have listened to the recording. The child repeatedly expressed the desire not to go back to Mr. Cospers' home at the end of the day. Ms. Bauer was fair in describing the child as extremely distressed - in the child's words, "freaking out", "really anxious", and "really scared". My view, however, is that it also shows that Ms. Bauer's parenting was completely inappropriate on that occasion. She did attempt to reassure the child, but only by saying repeatedly how much she missed and loved the child, e.g. "I love you so, so much. You know I want to spend every minute of every day with you", and "I will be thinking of you every minute", with no mention of how much Mr. Cospers also loves or wants to spend time with the child. She set up the solution to the child's distress as involving the two of them working together - "Okay, sweetheart. Okay. Well, let's try to figure this out together, okay? Remember, we are in this together." - and, "I think we need to have this planned out a bit more, hon" - polarizing the situation, with her and the child on one side, and Mr. Cospers on the other.
- [38] Ms. Bauer says in her affidavit that she is providing the transcript because she believes Dr. England did not believe her about what the child had been telling her. Unfortunately, Ms. Bauer seems not to grasp that the transcript can also be interpreted as evidence that she is perpetuating an unhealthy emotional dynamic. It is to be hoped that the joint counselling may further Ms. Bauer's self-understanding and assist both parents in finding more appropriate ways to deal with similar situations.
- [39] I am not satisfied that the evidence establishes that this amounts to a material change in circumstances. Even if the evidence were to establish a material change in circumstances with respect to this point, the evidence does not establish that variation of the telephone communications provisions of the Consent Order is in the child's best interests.

Conclusion

- [40] The parties will undergo a course of joint parental counselling as set out above. The Consent Order will be varied in respect of commencement of the Summer Schedule, also as set out above.
- [41] The balance of Ms. Bauer's application is dismissed.
- [42] Mr. Cospers was substantially successful. Although this hearing did result in a further order to the mutual benefit of both parties - the counselling order - such had previously been recommended by Dr. England; it was not a new issue, and it should not have taken a court application to institute.
- [43] Mr. Cospers will have his costs of the application, under Scale B, payable forthwith.

"A. Saunders, J."

The Honourable Mr. Justice A. Saunders

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