
CANADA / JUDGMENT

D.M.F. v. T.J.D.

2021 BCSC 1249

COURT

Supreme Court of British Columbia

DECIDED

25 June 2021

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2021 BCSC 1249 D.M.F. v. T.J.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.M.F. v. T.J.D.,

2021 BCSC 1249

Date: 20210625

Docket: E193118

Registry: Vancouver

Between:

D.M.F.

Claimant

And

T.J.D. and S.C.M.

Respondents

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the Claimant:

K. D. Craig

Counsel for the Respondent, T.J.D.:

M. Magnusson

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 5-7, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 25, 2021

Table of Contents

Introduction and Scope. 3

Issues to be Decided. 4

Credibility and Reliability. 6

Facts. 10

Substance Use. 10

Alleged Injuries and Violence against Children. 13

Abuse and Violence against Ms. F. 19

Children's Care Cards. 20

Denial of Parenting Time Since Master Muir's Order 21

Analysis. 22

Legal Framework. 22

Family Violence. 23

Parenting Schedule. 27

M.D. and N.D.'s Sleeping Arrangements. 29

Orders Related to Substance Use. 30

Decision-making Authority. 31

Care Cards. 31

Section 211 or Views of the Child Report 31

Withholding by Mr. D. 32

Police Enforceability. 34

Telephone Calls. 35

Counselling. 35

Summary. 36

Introduction and Scope

- [1] There are three applications before the Court for decision, all centred around interim parenting arrangements for D.F.'s and T.D.'s children, N.D. and M.D. M.D. was born in September 2013, and N.D. was born in December 2015.
- [2] The first is Ms. F.'s appeal of the decision of Master Muir made October 2, 2020 with respect to various parenting issues: 2020 BCSC 1466. I heard that appeal on November 26, 2020, and issued my decision on April 9, 2021: 2021 BCSC 648. In that decision, I held that it was necessary for the parties to be cross-examined on their affidavits in order to complete the appeal, and varied Master Muir's order to provide the parties with equal parenting time until such time as that could occur.
- [3] The cross-examination was scheduled for May 5 and 6, 2021. In the immediate lead-up to that hearing, the parties filed two applications. Ms. F. filed a notice of application on April 12, 2021 (refiled on April 26, 2021) seeking a variety of orders, including the imposition of fines against Mr. D. for breaching earlier court orders. Also on April 12, 2021, Mr. D. filed a notice of application seeking to vary Master Muir's order, and various other orders. After my decision was released to the parties, Mr. D. amended his notice of application on April 22, 2022 to request that I reconsider or vary my interim order. By order of Master Cameron, dated April 16, 2021, the parties' two additional applications were scheduled to be heard together with the cross-examination on affidavits.
- [4] It is important to be clear at the outset about what matters this hearing and decision did and did not deal with. It was apparent that the various parenting issues raised in the three applications are interrelated, and needed to be dealt with together. The same could not be said of some of the orders sought by Ms. F. in her April 12 notice of application, in particular her applications for an order imposing a fine on Mr. D. for breaching the order of Master Elwood relating to filing a Form F8 late, and an order that a police officer accompany her to the family home to retrieve personal items including firearms and vehicles. The applications for those orders are adjourned generally, and Ms. F. is at liberty to pursue them separately.
- [5] In relation to the appeal of Master Muir's decision, the parties raised an issue with respect to whether, as counsel for Ms. F. put it, "everything was on the table" that had been sought before Master Muir. It was Ms. F.'s position that everything was indeed on the table. It was Mr. D.'s position that only those matters raised in Ms. F.'s appeal were in issue, and that I had no jurisdiction to decide any matters that had been before Master Muir that were not appealed. So far as the appeal is concerned, I agree with Mr. D. that my jurisdiction is limited to the five matters raised in Ms. F.'s notice of appeal. This means that, among other things, this decision does not deal with Ms. F.'s request to impute an income of \$150,000 to Mr. D.

- [6] Ms. F. named S.M. as a respondent to her notice of family claim. Mr. M. is the owner on title of the family home and, as I understand it, Ms. F. alleges that Mr. D. is the true or beneficial owner, and that the home was only put in Mr. M.'s name to obscure that fact. Mr. M. has no interest in the parenting issues, and did not appear at the hearing before me. At the hearing, I was advised that Mr. M. had applied for a summary trial, scheduled to be heard in June 2021, which was intended to address the issues related to the ownership of the family home. I understand that that summary trial has now been adjourned to September 2021.
- [7] In order to ensure that the parenting issues could be adequately addressed within the time available, and so as not to encroach upon the issues to be addressed in the pending summary trial, I ruled that this hearing would solely address the parenting and related issues raised in the parties' applications. While some evidence was introduced that touched upon the parties' finances and ownership of the family home, I have considered it only insofar as it is relevant to the parties' credibility, the determination of the children's best interests, and the appropriate parenting orders to be made.

Issues to be Decided

- [8] With that by way of broad introduction, it is helpful to list the issues the Court will deal with in this decision. There is overlap between the way the orders sought are described in the various applications. I have reframed and combined them as necessary in order to get at their substance:
- a) What should the regular parenting schedule be? Should it continue on the equal parenting time schedule I ordered, whereby M.D. and N.D. are with each parent every other week starting at 5:00 p.m.? Should it be varied as initially sought by Ms. F. for the children to be primarily resident with her? Or should it be varied as sought by Mr. D. for the children to be primarily resident with him?
 - b) Should an order be made requiring Ms. F.'s parenting time to be supervised by one of her parents?
 - c) What should the parenting schedule be during Christmas and spring breaks, at Easter and Thanksgiving, and over the summer school holidays?
 - d) What should M.D. and N.D.'s sleeping arrangements be when they are with Ms. F.?
 - e) Should Ms. F. be required to undergo a drug test to determine if she is using cocaine or other controlled substances?
 - f) Should an order be made prohibiting Ms. F. from using any controlled substances? Similarly, should an order be made prohibiting her from consuming or using alcohol during her parenting time and for 24 hours before parenting time?
 - g) Should an order be made requiring Ms. F. to attend rehabilitation or counselling to address substance use?

- h) Should an order be made requiring the parties to consult with each other about important decisions related to the children, with Mr. D. having sole decision-making authority if they cannot agree?
 - i) Should Ms. F. be ordered to provide the children's care cards to Mr. D.?
 - j) Should a s. 211 report or a views of the child report be ordered?
 - k) Did Mr. D. wilfully withhold the children contrary to Master Muir's order on the evenings of April 3 and 4 and all day on April 5, 2021? If so, ought he to be fined under s. 61(2)(g) of the Family Law Act? Should Ms. F. be granted compensatory parenting time under s. 61(2)(c) of the Family Law Act?
 - l) Should my orders with respect to parenting time be made enforceable by the police under ss. 231(4), (5) and (6) of the Family Law Act?
 - m) Should Ms. F. be granted a phone call with the children mid-week on the weeks the children are with Mr. D.?
 - n) Should the parties be required to attend counselling?
- [9] I have reviewed the evidence filed by the parties, and their cross-examinations. I have made findings of fact on the most important issues raised by the parties. I have not addressed every area in which they disagree, nor have I addressed those areas that go beyond determining the best interests of the children, and the parenting and other orders necessary for the children's benefit.

Credibility and Reliability

- [10] Fundamentally, this hearing was required so that the Court could assess the parties' credibility and resolve the serious allegations each party makes against the other. The parties make many allegations against each other in the ten affidavits Ms. F. and the seven affidavits Mr. D. have made so far in this family proceeding. The most serious of these, so far as they relate to parenting arrangements, are Mr. D.'s allegations that Ms. F. has substance use issues which affect her ability to parent the children, and that the children have suffered serious unexplained injuries while in her care, and Ms. F.'s allegations that Mr. D. has engaged in family violence against her and the children. It is essential that the Court resolve those issues in order to make interim parenting orders in the best interest of the children as required under s. 37 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. As I stated in my earlier decision:
- [49] While the variation of the Master's order will provide the parties with equal parenting time, it does nothing to resolve my ongoing concerns with respect to the serious allegations which both parties make against the other. Again, I make no findings about those allegations at this time. In my view, it is essential that both parties submit to cross-examination at the earliest available date in order to permit the court to assess their credibility, make findings of fact as

required, and determine whether the parenting arrangements and other orders made by the Master, as varied by me on appeal, are in the best interests of the children, and should remain in place pending trial.

- [11] Having now had the opportunity to hear and observe both parties under cross-examination, I do not find Mr. D. to be a credible or reliable witness. Under cross-examination, he was evasive and argumentative. On one occasion, he refused to read a sentence in a document related to cannabis production on the property on which the family home is located when asked to do so by counsel for Ms. F., saying he had nothing to say on the subject. He also refused to answer questions several times.
- [12] On several occasions, Mr. D. said that he and Ms. F. had been unable to communicate with one another since Ms. F. had hired her lawyer. This is absurd, as text messages from Mr. D. to Ms. F. entered into evidence demonstrate that Mr. D. has been abusive in his communications with Ms. F. The fact that Ms. F. has retained counsel is not to blame for the difficulties the parties have communicating with one another.
- [13] I will provide a few further examples to demonstrate why I do not find Mr. D. to be a credible witness.
- [14] In his first two affidavits, made March 17 and June 8, 2020, Mr. D. swore that he is a powerline technician. He is not a powerline technician, and has never qualified as one. Under cross-examination, he said he is an apprentice powerline technician, and therefore entitled to call himself a powerline technician, but there is no evidence that he has ever been an apprentice.
- [15] Mr. D. attached to his third affidavit, which was his first Form F8 Financial Statement, filed February 19, 2021, a letter of employment from Metro Power Construction Ltd. It is dated February 5, 2021. That letter stated that Mr. D. had begun work on March 1, 2020 "to clean off and maintenance off the line trucks, general landscaping and maintenance work". The letter stated the employer had laid Mr. D. off on an unspecified date, and intended to recall him when work picked up.
- [16] In his more recent affidavits, Mr. D. has stated that he is self-employed in the business of grounds maintenance, home renovations and construction. He says he has a business, Millenium V Holdings Ltd., through which he has sometimes performed this work. He also testified that he is the caretaker for Mr. M. of the property on which the family home is located, and that he works at a local vineyard, for which he is paid cash. In his fourth affidavit, made February 19, 2021, Mr. D. stated:

Although I do not earn much income, preparing the F8 has not been easy or straightforward because I have attempted some business ventures as a shareholder in a few corporations over the past number of years that were unfortunately unsuccessful. I also fell behind on my tax filings because I was not making much income and as most of the work I have done over the past years has been personal home renovations, gardening and maintenance, I have been paid primarily in cash by the owners of the properties I have done work for.

- [17] It is impossible to square those statements with Mr. D.'s earlier sworn statements that he is a powerline technician. Nor are they consistent with the letter of employment. Overall, Mr. D.'s employment and financial situations are murky to say the least, and I find it impossible to accept that he has been forthcoming, transparent and entirely honest about any aspect of it.
- [18] Another example of the frailties of Mr. D.'s evidence is his testimony about whether he has a BC Driver's Licence. In her affidavits, Ms. F. swore that he does not have a driver's licence, and drives vehicles without a licence. Under cross-examination, Mr. D. initially said that he has a BC Driver's Licence, but said he had "zero documents" with him. He said that he got a ride to court with his current partner, S.O., who, like Ms. F. before her, has cheaper insurance than he would. Then he said he would have to call ICBC and find out where his licence stands, and that it may be expired. His evidence on this point was internally inconsistent and implausible. I find that Mr. D. does not have a valid driver's licence, and he lied under oath when he testified he did.
- [19] Mr. D. does not have his own email account or cellphone. He uses Ms. O.'s email address and her phone for texting. He used to use Ms. F.'s email address. He testified that it was easier to do that, and he had never thought to get his own, and had never needed one. In 2021, I find it difficult to credit that a person in his mid-30s of Mr. D.'s apparent means would not have an email account or phone for texting. Mr. D.'s choice not to do so raises questions about why he does not. It also means that in her electronic communications with Mr. D. about the children, Ms. F. is forced to use Ms. O.'s accounts, which may not be appropriate in all cases. The same is true for the children's school and others who need to communicate with Mr. D. about the children. I would also note that it makes it difficult to know with any given text or email whether Mr. D. or Ms. O. was the author. I have generally proceeded on the basis that Mr. D. is the author of the texts and emails entered into evidence from Ms. O.'s accounts.
- [20] In the course of my findings of fact below, I identify additional occasions on which I found Mr. D.'s evidence to be untruthful.
- [21] I also had concerns with respect to the reliability of some aspects of Ms. F.'s evidence. She was very vague and at times confused with respect to details like dates and when events occurred. She testified she was nervous and flustered when testifying, and I accept that is true.

[22] My concerns about the reliability of some aspects of Ms. F.'s evidence, however, pale in comparison to my concerns about Mr. D.'s evidence. Unlike Mr. D., I find that Ms. F. attempted to tell the truth to the best of her ability.

[23] I have carefully assessed both parties' evidence on all material points in contention. I am unable to rely on Mr. D.'s evidence. I prefer the evidence of Ms. F.

Facts

[24] In what follows, I have reviewed the evidence and made findings of fact about the issues which are most germane to my consideration of the best interests of the children and what orders should be made. While I have not referred to all of the evidence filed and testimony given, I have considered it all in making these findings.

Substance Use

[25] Mr. D. sought a number of orders related to Ms. F.'s alleged substance use: drug testing for cocaine and other controlled substances; a prohibition on the use of cocaine or other controlled substances; a prohibition on the use or possession of alcohol, during parenting times and for 24 hours before them; and an order requiring her to attend rehabilitation or counselling to address her substance use. These orders were sought on the basis that Ms. F. has engaged in problematic substance use in the past, and may be continuing to do so at present.

[26] The evidence was clear that both Ms. F. and Mr. D. have used cocaine and marijuana in the past. Mr. D. testified that before Ms. F. became pregnant, they were using cocaine together every weekend. He said that once she became pregnant, they agreed they would no longer use cocaine. Mr. D. also testified that he and Ms. F. used cocaine together once after M.D. was born, and that that was the last time he had used cocaine. He denied buying the cocaine, and said that Ms. F. and her friends had bought it.

[27] The parties both gave evidence about Ms. F.'s alleged use of cocaine, alcohol and tobacco during her pregnancy with M.D. Mr. D., in his first affidavit, made March 17, 2020, said she admitted to using cocaine during that pregnancy, and that he and others had observed her drinking alcohol and smoking tobacco during that pregnancy. He reiterated similar allegations in his second affidavit, made June 8, 2020. He added that Ms. F. and her friends would drink alcohol and consume drugs in front of the children.

[28] In her second affidavit, made May 29, 2020, Ms. F. swore that she did not consume alcohol, tobacco or cocaine during her pregnancies with either child. She confirmed this evidence on cross-examination, and stated that she resumed smoking tobacco after she stopped breastfeeding. She denied consuming illegal drugs, or drinking alcohol to excess. In her third affidavit, made June 23, 2020, Ms. F. denied ever using illegal drugs in front of the children.

- [29] In Ms. F.'s third affidavit, she acknowledged she attended a program at Surrey Memorial Hospital to make her aware of the risks of using drugs, alcohol or cigarettes while pregnant. Mr. D. attached some records which he obtained from the hospital to his fifth affidavit, made April 7, 2021. The records do not appear to be complete, and it is not always clear who the author is. They do state that Ms. F. had used alcohol and cocaine recreationally before she discovered she was pregnant, and had discontinued them since then. It appears the parties were referred for an assessment to a social worker due to concerns having been raised about their possible substance use. The social worker determined there were no outstanding safety concerns as maternal substance use appeared to have been situational and appropriately discontinued.
- [30] Ms. F. was cross-examined about these records. Her evidence was a little confused about when she learned she was pregnant. It is possible that that was because she did not want to acknowledge that she had used cocaine and alcohol in the early stages of her pregnancy before she learned she was pregnant.
- [31] In his second affidavit, Mr. D. swore that Ms. F. has had to employ "1 last call driving services to bail her out of DUI's and also pick up the Children and take them to school because she was up consuming cocaine and alcohol". Ms. F. denied these allegations on cross-examination. She said she and Mr. D. had used such driving services on date nights, but she had never used them to get the children to school. She acknowledged she had retained a lawyer to represent her to avoid a DUI, which she said was a false charge. I accept Ms. F.'s evidence on these points.
- [32] In her ninth affidavit, made April 15, 2021, Ms. F. swore that she does not drink to excess, that the only illegal drugs she has ever taken were given to her by Mr. D., and that she has not used any illegal drugs since the date of separation in September 2019. I note the parties disagree about the date of separation, but I do not need to resolve that issue in this decision. Under cross-examination, Ms. F. testified that she had experimented with marijuana when she was a teenager, before she met Mr. D., so it was not accurate to say that that the only illegal drugs she has ever taken were given to her by Mr. D. This is, however, a minor inconsistency, and one Ms. F. readily acknowledged in cross-examination.
- [33] Ms. F. attached to her ninth affidavit a letter dated April 15, 2021, signed by Cory Wint on the letterhead of Heartquest Addiction Wellness Centre. Mr. Wint certified that Ms. F. had undergone a POCT urine drug screen that day for a number of substances, including cocaine, and that the results were negative.
- [34] Mr. D. said in his fifth affidavit, made April 7, 2021, that M.D. had told him that he ate a jello shooter that Ms. F. had made for her friends and herself. According to Mr. D., M.D. did not like the taste of it and told him that his mother told him that it was jello made for adults and he was too young to eat it. Ms. F. denied that the children had ever consumed alcohol while in her care, and specifically denied this allegation, saying that she made jello shooters with the children for fun, and they did not have alcohol in them. Mr. D. also says that the children

randomly bring things up about Ms. F. drinking with friends while they are with her. Ms. F. says in response that she consumes alcohol socially when the children are present, but denies drinking excessively.

[35] Ms. F. also alleged that Mr. D. uses cocaine and crack cocaine regularly, and in 2017 or 2018 smoked crack cocaine in front of her and the children in the family home. Mr. D. denied this allegation.

[36] It is not necessary to make a finding about whether Ms. F. used substances during or, as testified to by Mr. D., on one occasion shortly after her pregnancy with M.D. Given the problems with Mr. D.'s evidence, I am not prepared to find that she used substances at that time based on his evidence. It does appear likely from the hospital records that Ms. F. had used alcohol and cocaine before discovering she was pregnant and had appropriately discontinued their use. In any event, that pregnancy was eight years ago, and Ms. F.'s alleged use of substances then has no bearing on her present use. There was no evidence presented upon which I could conclude that Ms. F. is now using cocaine or other controlled substances. Mr. D. admitted as much on cross-examination. He testified that he did not know if Ms. F. is now using cocaine, that that could be an assumption, and that he hopes she is not. In this connection, he referred to the children coming back from Ms. F.'s home with "unexplained injuries", an allegation I deal with separately below. Therefore, Mr. D. had no real explanation for why he seeks to have Ms. F. attend rehabilitation or counselling for substance use.

[37] So far as alcohol use is concerned, despite the concerns stated in his fifth affidavit that Ms. F. "may have or has started drinking to excessively again", Mr. D. testified in cross-examination that Ms. F. had been sober for the last year and a half. There is no probative evidence that Ms. F. is drinking alcohol to excess. Ms. F. acknowledges drinking socially, but denies drinking alcohol to excess. I accept her evidence on that point.

Alleged Injuries and Violence against Children

[38] Mr. D. relies upon allegations that the children have returned from Ms. F.'s care with "unexplained injuries" in support of limiting Ms. F.'s parenting time, and having her parenting time supervised by her parents. In her second affidavit, Ms. F. denied having ever harmed the children.

[39] Mr. D. said in his second affidavit that Ms. F. has hit M.D. on multiple occasions to the point of a black eye. Ms. F. denied this allegation in her second affidavit. No details or particulars of this serious allegation have been provided, and Ms. F. was not cross-examined on it. I do not accept that it occurred.

[40] Mr. D. also specifically relied on alleged head injuries suffered by N.D. In her third affidavit, made June 23, 2020, Ms. F. said that she took N.D. bowling the previous year, and she slipped and bumped her head. She explained this to Mr. D. She did not believe N.D. needed medical treatment. She also explained this incident in her ninth affidavit. Mr. D. attached to his fifth

affidavit a photo of N.D., he says dated November 27, 2019. This photo clearly shows the usual mark on N.D.'s forehead caused by picking, which I discuss in further detail below. Counsel for Mr. D. suggested that it also shows a "goose-egg", caused by the fall while bowling. It is difficult to discern precisely what the photo shows, but there likely is a bruise and perhaps a goose-egg. The same photograph was attached to Mr. D.'s first affidavit, at which time it was not specifically dated, but he swore that it was one of a number of photos taken in January, February or March 2020. It is therefore impossible to know when this photograph was actually taken, and in particular, if it was taken after the bowling incident. In any event, active children suffer all manner of bumps and bruises, and I find this was nothing more than that.

- [41] In her eighth affidavit, made April 8, 2021, Ms. F. explained that N.D. has had what the parties call a "picking problem" most of her life. She sucks her thumb and picks at her forehead and sometimes other parts of her face with her fingernails. This has been known to the parties since at least 2017. Pictures attached to both parties' affidavits show that N.D. consistently has a mark on her forehead, which varies in size and severity at different times. Ms. F. says that both parties put ointment and a band-aid on the mark, and tell N.D. not to remove the band-aid. Neither party has ever taken N.D. to a doctor for this problem.
- [42] In her eighth affidavit, Ms. F. said that on March 21, 2021, at the conclusion of a one-week parenting time with her, she noticed N.D. had been picking at her forehead, so she put a band-aid on it. A photo taken by Mr. D. after N.D.'s return on March 21, 2021 appears to show that N.D.'s forehead was red and swollen. The fabric band-aid applied by Ms. F. was different than the plastic ones she usually uses, and she suggests it is possible that N.D. had an allergic reaction to it. In my view, the marks on N.D.'s forehead are consistent with an allergic reaction.
- [43] I would note that Mr. D. testified that he has also used band-aids and headbands to try to prevent N.D. from picking at her forehead and from sucking her thumb. He has also put socks on her hands for the same reason. Ms. F. says he tapes the socks on N.D.'s hands, which she disapproves of, and which he denies.
- [44] Mr. D. also took a photograph of the back of N.D.'s neck on March 21, 2021. It shows a red mark. Ms. F. says this is a birthmark. I accept that it is a birthmark, and not an injury of any sort.
- [45] In his fifth affidavit, Mr. D. swore that on her return on March 21, 2021, he and Ms. O. also noticed that N.D. had a rash on her bum. He questioned Ms. F. about it, and she told him that maybe it was the result of the soap she was using. In her ninth affidavit, Ms. F. denied ever noticing a rash on N.D.'s bum. Mr. D. was cross-examined about this issue, and he denied that he was suggesting that N.D. had been molested by anyone. N.D. is a young child, and there are a number of reasons she could have a rash. There is no evidence this rash, if it was present, was the result of anything untoward. I do not consider it further.

- [46] Ms. F. attached to her ninth affidavit a series of text messages between the parties related to these issues. In them, Mr. D. asserted that the mark on N.D.'s forehead appeared to be some sort of burn, while Ms. F. thought it looked like a reaction to something, and explained that she had used a new kind of band-aid. Mr. D. also said she had a rash on her bum, and Ms. F. said it was fine that morning and wondered if it could be the soap.
- [47] In a later text message, dated April 1, 2021, Mr. D. told Ms. F. that, "we can't do overnights for now. Just for now. Until we can figure out proper arrangements for our children. The unexplained wounds need to be addressed". That same day, Mr. D.'s lawyer sent Ms. F.'s lawyer a letter in which she stated that Mr. D. had "significant concerns about the children's safety and security" while in Ms. F.'s care. The most significant was stated to be "repeat injuries" to N.D. while in Ms. F.'s care, referring to the mark on N.D.'s forehead after her last visit with her mother. Mr. D.'s counsel went on to refer to Ms. F. being unable to provide a safe environment, and Mr. D. worrying that she is drinking excessively or doing drugs. Through his counsel, Mr. D. refused to permit Ms. F. to have any overnight visits until she could confirm that she has taken steps to address her addiction issues and provide a full explanation of various past injuries so that Mr. D. could assess whether it was necessary to have the children see a medical professional. I have already dealt with the speculative and unsubstantiated nature of Mr. D.'s allegations of substance abuse by Ms. F.
- [48] In cross-examination, Mr. D. maintained that he believed N.D. had suffered a head injury this year. I do not accept that Mr. D. actually believes that to be true. In his cross-examination, despite the fact that he admitted N.D.'s picking problem had begun at least in 2018, when the parties were living together in the family home, Mr. D. denied any responsibility for it, seeking to shift all responsibility for it to Ms. F. This evasion of responsibility was consistent with Mr. D.'s evidence throughout. Another example was his evidence about the children being late for school in 2018--again, despite the fact both parties were living in the family home at that time, Mr. D. sought to blame Ms. F. for that rather than accepting that he also had parental responsibilities to get the children to school on time.
- [49] The last point referred to in the April 1, 2021 letter from Mr. D.'s lawyer is telling. Mr. D., despite his professed concerns about the children suffering "head injuries which could may [sic] impact not just immediate safety and security but also long-term cognitive development", has never taken the children to a doctor in relation to these concerns. He confirmed under cross-examination that he had never sought medical attention for any alleged head injury. If he had any sincere belief that the children had suffered significant injuries of the kind asserted by him and his lawyer on his behalf, he would have taken them to be assessed by a doctor.
- [50] Further, the timing of this allegation, first raised by Mr. D. in his text messages with Ms. F. on or about March 21, 2021, and followed up by his texts and his lawyer's letter of April 1, is suspicious. Ms. F. says N.D. has had her picking problem for many years, and she submitted photos that demonstrate that N.D. has had a mark on her forehead since at least the summer

of 2019. Mr. D. accepted in cross-examination that she had had this problem since 2018, but maintained he had the problem under control while N.D. was in his care. He suggested that N.D.'s wounds reopened when she was with her mother. The photographs do not substantiate the suggestion that it is only while N.D. is with Ms. F. that the mark on her forehead occurs.

- [51] Mr. D. first raised the mark on N.D.'s forehead in these proceedings as "a serious unexplained head injury" when N.D. returned from spending a week with Ms. F. in his fifth affidavit, made April 7, 2021. That affidavit was filed in support of Mr. D.'s application to vary Master Muir's order (later amended to apply for a variation of my order). I conclude that Mr. D. has blown out of all proportion a long-standing skin condition, which was likely aggravated by a reaction to a new variety of band-aid, in an attempt to deprive Ms. F. of access to the children.
- [52] I find that the children have not suffered any significant injuries, and in particular that N.D. has not suffered a head injury, while in Ms. F.'s care. N.D. clearly does have a problem with picking at a spot on her forehead. This is something that occurs while she is in both parties' care, and which they have been attempting to address with various home remedies. In my view, while this problem has not caused N.D. any significant harm, it is sufficiently long-standing that the parties should seek professional medical advice about how to treat it and support N.D. in stopping this ongoing behaviour.
- [53] I would further observe that Mr. D., in particular, appears to have been photographing the children for evidentiary purposes every time they leave his care and on their return from Ms. F.'s. This was evident from his seventh affidavit, made April 28, 2021, to which he attached photos taken before and after the children spent their first regularly scheduled week with Ms. F. pursuant to the terms of my April 9, 2021 decision. In her eighth affidavit, Ms. F. says she should not have to take unnecessary photos of the children to prove she is not abusing them because of Mr. D.'s constant lies and allegations. I agree. This must be uncomfortable for the children, and must not be an ongoing practice.
- [54] Ms. F. also alleged that Mr. D. had engaged in family violence towards the children. She did not allege that he was physically abusive to them, but did allege that he had been abusive in other ways. For example, in her second affidavit, she swore that he had locked M.D. in his bedroom using a bungee cord, and in 2017 or 2018, had removed his belt and threatened to whip M.D. with it. She confirmed this evidence under cross-examination. She says that on the occasion in which Mr. D. threatened to whip M.D. with his belt, the Ministry of Children and Family Development ("MCFD") was called and interviewed all family members. The file was closed.
- [55] I pause to note that Ms. F. also says that the MCFD was called again later the same year after M.D. told his teacher that his mother and maternal grandmother hated him. After interviews, the file was closed. Ms. F. denied saying anything of the sort in anything but a "joking manner". Ms. F. was cross-examined about this matter. While I accept that Ms. F. did

not intend to hurt M.D.'s feelings in what she said, it is clear that this was a sufficiently serious matter that the MCFD was called. Clearly, neither party nor others whom they may bring in contact with the children should say such things to the children.

- [56] Under cross-examination, Mr. D. denied ever tying a bungee cord to M.D.'s door, locking him in his room or threatening to whip M.D., although he acknowledged putting him in his room for a time out when he has needed one. When asked if the MCFD had ever come to his house, Mr. D. acknowledged it had in relation to the concerns arising out of M.D.'s report to his teacher. He agreed that the file was closed, but said he would be seeking documents from them.
- [57] When Mr. D. was asked whether the children ever fought with one another while in his care, he denied that they did, but said that he knew a 13-year-old should not be wrestling with his son. He said he had not called the police or the MCFD about that issue, but the next time he would. This was an apparent reference to a matter raised by him in his fifth affidavit, in which Mr. D. referred to "head and face bruising" suffered by M.D. while at Ms. F.'s home on July 5, 2020. A photo of M.D., apparently of that date, was attached to Mr. D.'s affidavit, as was one stated to be dated February 25, 2020. Mr. D. alleges that the February photo shows a goose egg and bruise in the middle of M.D.'s forehead, and that the July photo shows "knuckle marks" from playing a "knock out game" with an 11-year-old boy. In her ninth affidavit, Ms. F. stated in response that M.D. has play-wrestled with her partner's 11-year-old son, and nobody was injured. Ms. F. was cross-examined about the photos, but was unable to see much of anything. I am unable to discern any goose egg or bruise on the February photo. There may be, though it is difficult to say, a bruise on M.D.'s cheek in the July photo. Neither photo is concerning. Had the injuries allegedly depicted been of real concern to Mr. D., he would have raised them earlier in these proceedings.

Abuse and Violence against Ms. F.

- [58] In her first affidavit, made March 5, 2020, Ms. F. swore that she and Mr. D. communicated poorly, and that he was verbally abusive to her. She attached a text message in which he accused her of only caring about herself and her "scum fuck friends", of making "constant bad choices", of having "severely damaged our children", of "smelling of booze" to pick up the children, and using drugs, among other things.
- [59] Also in her second affidavit, Ms. F. swore that Mr. D. had been physically violent towards her. She said that he violently threw her out of the house and slapped her in the face when she left the family home, and had been violent to her many times in the past. She also said that he attacked her during an exchange of the children, pushing her four times, causing her to almost fall. She also said Mr. D. was verbally abusive to her in front of the children, including calling her a "liar" and a "stupid bitch".
- [60] Ms. F. attached to her third affidavit a photograph of her face with a black eye which she said Mr. D. gave to her when he punched her in the face on November 25, 2018. She said that he also assaulted Ms. O. on that date. Ms. F. was cross-examined about this incident. In her

affidavit, she had stated that Mr. D. attacked Ms. O. by kicking her very hard, and that she (Ms. F.) had responded by hitting him with a patio chair across the back, after which he punched her in the face. In cross-examination, it was suggested to Ms. F. that this meant she had been physically aggressive toward Mr. D., which she accepted was true. In my view, her willingness to acknowledge her conduct bolsters her credibility.

- [61] Ms. F. also alleged that Mr. D. strangled her while she was in the shower in 2019, slapped her in the face in 2016, and wrapped a rope around her neck and threatened to tie it to a car and drag her to the road in 2018. In that same affidavit, she said that Mr. D. called her a "stupid bitch" in front of the children.
- [62] Under cross-examination, Mr. D. denied ever punching Ms. F., or his current partner Ms. O., in the face. He also denied ever strangling Ms. F. or tying a rope around her neck.
- [63] Given my finding with respect to Mr. D.'s credibility, I prefer Ms. F.'s evidence with respect to Mr. D. abusing her and being physically violent towards her. In particular, I accept that the November 25, 2018 incident occurred as described by Ms. F. Mr. D. was the aggressor on this occasion, first against Ms. O. and then against Ms. F., and Ms. F.'s action in hitting him across the back with a patio chair was done in defence of Ms. O. I note that Ms. O. has sworn an affidavit in which she recounts a different version of that incident. Ms. O. has not been subject to cross-examination, and is not an independent witness. In the circumstances, I do not rely on her affidavit.

Children's Care Cards

- [64] Mr. D. seeks an order requiring Ms. F. to provide him with the children's care cards. In her second affidavit, Ms. F. swore that she gave Mr. D. copies of the children's care cards. She said that she had retained the originals and their passports because she believed Mr. D. was trying to take the children away from her. Ms. F. attached copies of the care cards and passports to her third and ninth affidavits.
- [65] As Mr. D. acknowledged, as a parent, he can order original copies of the children's care cards himself. Ms. F. has provided him with copies, which provide him with their personal health numbers.

Denial of Parenting Time Since Master Muir's Order

- [66] Under Master Muir's order, Ms. F. was entitled to parenting time with the children every second weekend, and equal time over the Christmas and spring breaks. In her sixth affidavit, made January 10, 2021, Ms. F. swore that she last saw the children on Christmas Day. On the weekend of January 1, 2021, she sought to see the children, but Mr. D. told her in a text message that it was not her weekend. He suggested she not bother coming to pick them up on January 8, 2021 because of alleged safety concerns in her home, and told her they were going back to visits at his place. Ms. F. says there was a confrontation when she arrived with her father on January 8 to pick up the children. Without going into all the

details, Ms. F. was not allowed to take the children with her. She and her father called the police, who told her they could not assist because there was no police assistance clause in the order.

- [67] The parties appeared before Justice Tammen on January 15, 2021. At that time, Tammen J. ordered that Ms. F. have compensatory parenting time with the children from January 15 to January 17, 2021. This was ordered in respect of parenting time denied by Mr. D. between January 8 and 10, 2021.
- [68] In her eighth affidavit, made April 8, 2021, Ms. F. swore that Mr. D. forced her to consent to a change in the parenting schedule over spring break to accommodate his plans. She also says he refused to allow her to have the children on Easter Monday, contrary to Master Muir's order, because he "had plans".
- [69] As recounted above, on April 1, 2021, Mr. D.'s lawyer sent a letter to Ms. F.'s lawyer in which she stated that Mr. D. would not be permitting any more overnight visits. I have already determined that the alleged bases for that position, concerning the safety of the children in Ms. F.'s care, were groundless. The children have not suffered serious injuries in Ms. F.'s care. Nor does the evidence substantiate that Ms. F. has any current issues with substance abuse.
- [70] In her ninth affidavit, Ms. F. swore that she only agreed to only see the children during the day on April 3 and 4, 2021 because Mr. D. indicated to her that this is the only way she would see them at all. She did not get to see them on Easter Monday, April 5, because, as set out in an email from Mr. D.'s counsel, he already had plans for the kids that day.
- [71] Despite the fact that Tammen J. ordered compensatory parenting time in January, and the fact that Mr. D. did not permit Ms. F. to have the children with her overnight on the Easter weekend or at any time on Easter Monday, Mr. D. denied in cross-examination that he had withheld the children. Mr. D. is obviously incorrect in this position. While he may believe he was justified in doing so, there is no question he has unilaterally withheld the children from Ms. F. This is consistent with his conduct prior to Master Muir's order, in which she found, at para. 58, that Mr. D. had "unduly limited" Ms. F.'s parenting time.

Analysis

Legal Framework

- [72] This decision is the result of three applications: Ms. F.'s appeal of Master Muir's decision; Mr. D.'s application to vary the interim order I made in respect of that appeal, which application also sought a variety of new orders; and Ms. F.'s application for new orders. The parties did not make extensive submissions on the legal framework applicable to each matter before me. Rather, they focussed on what, in their submission, was in the best interests of the children. As counsel for Mr. D. aptly put it, the best interests of the children are the prism through which all considerations related to parenting are to be considered. This is

consistent with s. 37 of the FLA, which states that the court must consider the best interests of the child only in making orders respecting parenting arrangements.

- [73] Mr. D. made some submissions with respect to s. 216(3)(a), and the test for the variation of an interim order. In my view, it is not necessary to consider the test for variation of an interim order and whether there has been a "material change in circumstances". So far as the appeal of Master Muir's order is concerned, I held at para. 39 of my earlier decision that a rehearing was appropriate. The interim order I made varying Master Muir's order with respect to the regular parenting schedule was intended to be a temporary solution until the parties could be cross-examined on their affidavits and the rehearing completed. In those unique circumstances, I do not think either party bears the burden of showing that there has been a material change of circumstances before my order, or the five orders made by Master Muir which Ms. F. has appealed, may be varied.
- [74] So far as the remainder of Mr. D.'s application and Ms. F.'s new application are concerned, I am satisfied that the orders sought are all in substance new orders, again not requiring either party to show a material change in circumstances: *B.K. v. J.B.*, 2018 BCSC 2290 at para. 120.
- [75] Further, and in any event, s. 216(3)(b) of the FLA provides the court may vary an interim order if it is satisfied that "evidence of a substantial nature that was not available at the time the interim order was made has become available". In my view, the two days of cross-examination of the parties constitutes evidence of a substantial nature that was not available at the time any previous interim orders were made.
- [76] I therefore consider all orders sought through the prism of the best interests of M.D. and N.D. While I have not specifically enumerated every subsection of s. 37 of the FLA, I have considered all of the factors set out therein. I have placed primary weight on ensuring the children's physical, psychological and emotional safety, security and well-being, as required by s. 37(3).

Family Violence

- [77] Ms. F. alleged that Mr. D. engaged in family violence, both against her and against the children. While Mr. D. did not specifically refer to family violence, as that term is used in the FLA, he certainly did allege that Ms. F. had engaged in conduct, such as hitting M.D., which would fall within its parameters.
- [78] In determining the best interests of the children, all of the children's needs and circumstances must be taken into account, including:
- (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:

- (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;

[79] Under s. 38, for the purposes of ss. 37(2)(g) and (h), the court must consider all of the following:

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

[80] It is therefore necessary for the Court to consider the family violence alleged by the parties and determine how it affects the best interests of M.D. and N.D. I will do so before turning to a consideration of the specific orders sought by the parties, as my analysis with respect to family violence will be relevant to my consideration of all of those orders.

[81] On the facts I have found, I conclude that Mr. D. has engaged in family violence against Ms. F. He physically assaulted her in November 2018, leaving her with a black eye. I find he has also pushed and slapped her on other occasions prior to August 2019, when Ms. F. left the family home.

[82] To this point, I have not dealt with the January 8, 2021 incident in any detail. In her seventh affidavit, made January 15, 2021, Ms. F. recounted an incident when she and her father arrived at the family home to pick up the children. According to Ms. F., Mr. D. came out, and Ms. O. arrived with the children in her car. Ms. F. told Mr. D. she was going to record him on her phone, and Mr. D. reached in the car window and took her phone out of her hand. Ms. F. and her father got out of the car, and demanded the phone. Mr. D. hid the phone. He told

Mr. F. to get off of his property, and approached Ms. F. and "shouldered" her. Mr. D. then threw Ms. F.'s phone into Ms. O.'s lap, as she continued to be sitting in her car. Ms. F. asked Ms. O. for her phone back, and she responded by rolling up her car window and backing out towards the road. Mr. F. told Ms. F. it was time to call the Mounties, to which she responded that she didn't have her phone. She told Mr. D. they were going to the police station. Mr. D. then gave her phone back. Mr. D. and Ms. O. then yelled at Ms. F. She says the children heard and saw all of this. Eventually, Mr. D., Ms. O. and the children went into the house. Ms. F. and her father called the police, who arrived, and spoke to them and Ms. O. Mr. D. refused to speak with the police.

- [83] Mr. D. responded to these allegations in his fourth affidavit, made February 19, 2021. He says that he went out to meet Ms. F. as he wanted to discuss his concerns about the children's bedrooms, and he inquired about her partner and family. Ms. F. would not discuss anything, and started yelling at him. The children were in the car with Ms. O. He went and got them out of the car and took them into the house. Ms. F. called the police, who came to the house and spoke to each person individually.
- [84] Neither party was cross-examined about this incident to any appreciable extent. Mr. D. did deny ever taking Ms. F.'s phone out of her hand. Mr. F. swore an affidavit about this incident, but he essentially just repeats Ms. F.'s evidence. There is an unsworn copy of an affidavit from Ms. O. dated January 18, 2021 in the application record, but despite the fact she was clearly a participant in this confrontation, she does not discuss it at all.
- [85] On the evidence before me, considered in light of my general findings about the credibility and reliability of the parties, I prefer Ms. F.'s account of this confrontation. On her version, which I accept, Mr. D. "shouldered" her and took her cell phone out of her hand. This was done in front of the children.
- [86] So far as the evidence before me shows, with the exception of the January 8, 2021 confrontation, these acts of physical violence were not done in front of the children. However, I find that Mr. D. has been verbally abusive towards Ms. F. in front of the children, including calling her a "liar" and a "stupid bitch". These comments are in keeping with the text messages he has sent her post-separation, which I hope the children are not aware of, in which he has been highly verbally abusive to her.
- [87] I consider the family violence engaged in by Mr. D. against Ms. F. to be serious. While most of the physical violence does not appear to have been witnessed by the children, the January 8, 2021 incident was, as were earlier incidents of verbal abuse.
- [88] I find that Mr. D.'s conduct against Ms. F. was part of a pattern of coercive and controlling behaving against her, which has been continued post-separation by limiting Ms. F.'s access to the children, forcing her visits to be supervised by her father at the family home prior to the court making any parenting orders, and subsequently withholding the children contrary to two court orders.

- [89] The allegations of family violence by Mr. D. against the children are less serious. I accept Ms. F.'s evidence that he has locked M.D. in his room with a bungee cord, and took off his belt and threatened to whip M.D. with it, an incident which caused the MCFD to attend at the family home. I do not have any evidence of Mr. D. being abusive to N.D. Ms. F. testified that Mr. D. is a good father to both children, and these incidents appear to have been relatively minor and to have occurred some time in the past.
- [90] I do not find that Ms. F. has engaged in any family violence, with the exception of telling M.D. she "hates him". While I accept Ms. F.'s evidence that she said that in a joking manner, it is the effect of the conduct on the child which is most important, and clearly M.D. was negatively affected by that remark. Ms. F.'s conduct in hitting Mr. D. across the back with a patio chair was done in defence of Ms. O. I do not accept that Ms. F. has engaged in any physical violence of any sort against either child, or any non-physical violence beyond the remark to M.D. just mentioned.
- [91] I cannot assess the full extent of the consequences of Mr. D.'s family violence on the children. It is one of the reasons why, as I deal with below, I think a s. 211 report is important so that the court can have the benefit of the children's perspectives, as well as that of an independent expert.

Parenting Schedule

- [92] Both parties sought orders with respect to the regular parenting schedule. Under Master Muir's original order, Ms. F. had regular parenting time every second weekend from after school on Friday to 5:00 p.m. on Sunday. If her parenting time occurred on a long weekend, she was to have the children until 5:00 p.m. on the holiday Monday. Currently, as ordered by me in my April 9, 2021 decision, the parties have equal parenting time, with M.D. and N.D. with each parent every other week starting Friday at 5:00 p.m.
- [93] In her initial notice of appeal, Ms. F. sought an order for the children to be primarily resident with her. While she did not resile entirely from that position, she also indicated in submissions that she was content with the current equal parenting regime. For his part, Mr. D. asked for my order to be varied to have the children be primarily resident with him, with Ms. F. having parenting time every other weekend, supervised by one of her parents, with no overnight stays.
- [94] I start with a consideration of the maximum contact principle, keeping in mind that it is only one aspect of the best interests of the children analysis: *K.W. v. L.H.*, 2018 BCCA 204 at para. 132. Despite my concerns with respect to Mr. D.'s credibility, the family violence I have found him to have engaged in, and the unfounded allegations he has made against Ms. F., nothing I have heard or read in this case persuades me that it is appropriate to depart from that principle.

- [95] While it was difficult for Mr. D. to find anything nice to say about Ms. F. as a mother, he did testify that he thought she really does want the best for her children. For her part, Ms. F. readily acknowledged in her evidence that Mr. D. is a good father to the children. It is imperative that both parties make their best efforts to build their ongoing co-parenting relationship on those foundations.
- [96] At the time of the hearing, Ms. F. planned to move to a new home with her new partner in July 2021. She testified the new home will be 25 minutes from the children's school.
- [97] I accept that both Ms. F. and Mr. D. love M.D. and N.D., and wish to provide them with a safe and stable environment in which to grow up. I believe both children have strong relationships with both their parents, and that maintaining the stability of those relationships is in their best interests.
- [98] I find that it is in the children's best interests to continue on the regular parenting schedule I ordered on April 9, and hereby confirm that order. The evidence before me does not support any need for Ms. F.'s parenting time to be supervised by her parents, and I deny that order.
- [99] I turn to holiday and special parenting time. Under Master Muir's order, Ms. F. was to have parenting time for one-half of the Christmas and spring break holidays, and during the summer holidays on a week on/week off basis. Each party was granted leave to take the children on a two-week summer vacation with 60 days notice to the other party. The parties were granted leave to vary parenting arrangements by consent, provided that the consent was evidenced in writing.
- [100] The above noted provisions were among those included in Ms. F.'s notice of appeal. She did not, however, indicate what schedule she wanted for holiday and special parenting time. In his application, Mr. D. asked to have the regular parenting schedule he sought continue through the summer, and also sought various orders with respect to Easter, Thanksgiving, Christmas and New Years.
- [101] Beyond what was included in their applications, the parties did not make submissions with respect to holiday and other special parenting schedules.
- [102] In my view, the holiday and special parenting times ordered by Master Muir at para. 66 of her decision were appropriate, and I hereby confirm them.
- [103] I also agree with Master Muir's order at para. 65 that the parties may vary any of the parenting times ordered by consent, provided that the consent is evidenced in writing. Given the parties' communication difficulties, I make the following orders ancillary to that. Mr. D. must obtain his own email address and provide that email address to Ms. F. within one week of the date of this decision. Any communications between the parties, including with respect to varying parenting times, are to be done by email, using Ms. F. and Mr. D.'s email addresses. Text messages may be used only where it is necessary to communicate information relating to the children on an urgent basis.

M.D. and N.D.'s Sleeping Arrangements

- [104] Master Muir ordered at para. 67 that absent emergency or other unusual circumstances, the children were to have their own rooms with proper sleeping arrangements. This was one of the orders included in Ms. F.'s notice of appeal. She did not indicate what order she sought. It was not raised in Mr. D.'s application.
- [105] While I have not recounted all of it, the parties led evidence about the children's sleeping arrangements. It was Mr. D.'s position that Ms. F. was in breach of Master Muir's order that the children have their own rooms. He relied upon that alleged breach in withholding the children from overnight visits in January 2021, which led to the altercation involving the parties, Ms. O. and Ms. F.'s father on January 8, 2021. Justice Tammen addressed those issues in his January 15, 2021 order granting Ms. F. compensatory parenting time, and I do not propose to rehash them here.
- [106] I do not know what the layout of Ms. F.'s new home will be, and I do not think it is appropriate to be overly prescriptive about the children's sleeping arrangements at this time. I will vary Master Muir's order on this issue to provide that the children must have private age-appropriate sleeping accommodation in each party's home. To be clear, if Ms. F.'s new home has a sufficient number of bedrooms, M.D. and N.D. should each have their own room. If it does not have enough bedrooms, M.D. and N.D. may share a room with each other, but must not regularly share a room with anyone else. This does not prevent sleepovers and other similar circumstances.

Orders Related to Substance Use

- [107] Mr. D. sought an order that Ms. F. be required to undergo a drug test to determine if she is using cocaine or other controlled substances. He further sought an order prohibiting Ms. F. from using any controlled substances. Finally, he sought an order prohibiting her from consuming or using alcohol during her parenting time and for 24 hours before parenting time.
- [108] On the evidence before me, I find that there is no basis for the Court to grant any of the orders sought relating to Ms. F.'s alleged substance use. I find that Mr. D. has sought such orders as part of his attempt to paint Ms. F. as an unfit mother, to control her behaviour, and to limit her access to the children.
- [109] Master Muir ordered neither party to consume any controlled substances within the meaning of s. 2 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, except as prescribed by a licensed physician, during parenting time and for 12 hours before having parenting time. That order is appropriate and sufficient to address any concerns about the use of illegal substances by either party. So far as alcohol is concerned, I accept Ms. F.'s evidence that she drinks socially and not to excess, including when she is with the children. No order is necessary to address alcohol use, as excessive alcohol use which would endanger the children has not been established.

Decision-making Authority

- [110] Mr. D. sought an order requiring the parties to consult with each other about important decisions related to the children, with Mr. D. having sole decision-making authority if they cannot agree.
- [111] I am not prepared to make such an order at this time. The parties have equal parenting time, and I do not think it has been shown that there is a need to grant one party, and in particular Mr. D., sole decision-making authority.
- [112] On an interim basis, I consider it appropriate to order that each party will have the responsibility, pursuant to s. 41(a) of the FLA, to make day-to-day decisions affecting the children while they are in their care. Each party is to advise the other party of any matters of a significant nature affecting the children. Each party will consult the other party about any important decisions that must be made and will try to reach agreement concerning these important issues. Failing agreement on such important decisions, either party may apply to court. Should these orders prove unworkable in making decisions affecting the children, either party may apply to court to vary them.

Care Cards

- [113] Ms. F. has provided Mr. D. with photocopies of the children's care cards. He can also order his own copies. There is no need to make any order with respect to the children's care cards, and I decline to do so.

Section 211 or Views of the Child Report

- [114] Mr. D. sought an order for a report to be prepared pursuant to s. 211 of the FLA to be paid for proportionately by the parties, or in the alternative a views of the child report. Ms. F. submitted that any s. 211 report needed to happen after examinations for discovery. She also submitted that Mr. D. should be required to pay for it. She raised concerns that Mr. D. was hoping a s. 211 report author would be misled by the material circumstances of the family home.
- [115] The evidentiary threshold in support of an application for a s. 211 report is relatively low: *N.N.N. v. D.E.B.*, 2016 BCSC 1778 at para. 12 [N.N.N.]. Generally speaking, only the cost of such a report will raise a legitimate countervailing concern.
- [116] I am confident that the parties, and the court should this matter proceed to trial, will find a s. 211 report of substantial assistance in resolving parenting issues in the children's best interests. I therefore order that a s. 211 report be prepared. The report is to be prepared by a qualified individual chosen jointly by counsel, and failing agreement, either party is at liberty to apply to the court to appoint the report writer. Both parties are to cooperate fully in the s. 211 report process. Section 211 reports can take some time to produce, so I am not prepared to delay ordering one until examinations for discovery have been completed.

Section 211 reports can also be quite expensive. Given that Mr. D. appears to have substantially greater financial resources than Ms. F., the cost of the report will be initially borne by Mr. D., and the ultimate responsibility for the account will be determined by the court unless otherwise agreed to by the parties. I note this is the same order that was made by Master Keighly in N.N.N.

Withholding by Mr. D.

[117] Ms. F. submitted that Mr. D. wilfully withheld the children contrary to Master Muir's order on the evenings of April 3 and 4 and all day on April 5, 2021. She asked that he be fined \$5,000 under s. 61(2)(g) of the FLA, and that she be granted compensatory parenting time under s. 61(2)(c) of the FLA.

[118] Mr. D. acknowledged that he did not allow Ms. F. to exercise parenting time with the children, but submitted that his intention was not to wrongfully withhold the children, but to protect them from potential harm and ensure their well-being while continuing to ensure they spent time with Ms. F. until he felt secure that there was no potential risk to the children.

[119] Section 62 of the FLA sets out when denial of parenting time is not wrongful. Mr. D. relies upon the following subsections:

62 (1) For the purposes of section 61 [denial of parenting time or contact], a denial of parenting time or contact with a child is not wrongful in any of the following circumstances:

- (a) the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;
- (b) the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;
- (2) If, on an application under section 61, the court finds that parenting time or contact with a child was denied, but was not wrongfully denied, the court may make an order specifying a period of time during which the applicant may exercise compensatory parenting time or contact with the child.

[120] In *K.R. v. J.W.*, 2016 BCSC 225 [K.R.], Justice Betton considered ss. 61 and 62 at some length. At paras. 56-59, he wrote:

[56] Clearly the sections are intended to provide a mechanism less rigid and difficult to apply than contempt proceedings. This is consistent with the objective of the legislation of making the best interests of the children the only consideration. To that end, the standard of proof being that I be "satisfied" that there has been a wrongful denial is a significant change from contempt proceedings.

- [57] Parenting time that has been included in an agreement or that has been ordered must be respected. If not appealed or varied, compliance cannot be viewed as optional. The time constraint in s. 61(1)(b) ensures some contemporaneity between the alleged denial and the remedy, thus serving as well to focus on the best interests of the children. Section 62 ensures reasonable denials are permitted, again consistent with the best interests of the children being the only consideration.
- [58] In my view, the objective of the provisions is to give the court a broad discretion that can be adapted to each unique situation. It would be inconsistent with the broad objectives to limit the remedies to only discrete events of an express denial.
- [59] A pattern of wrongful conduct that frustrates an agreement or order such that parenting time is not fully available is a wrongful denial. A parent need not say the word "no" to scheduled parenting time for them to communicate a denial nor must they physically prevent the parenting time from occurring for it to be a wrongful denial. The cumulative effect of less definitive words and actions may suffice.
- [121] I have already dealt with the facts surrounding the denial of parenting time to Ms. F. on the April 3 weekend at some length. I am satisfied that Mr. D.'s denial of parenting time that weekend was not reasonable. He did not have a reasonable belief that the children would suffer family violence if the children stayed overnight with Ms. F., or if she saw them on Easter Monday. Nor did he have a reasonable belief that Ms. F. was impaired or would be impaired by drugs or alcohol at the relevant times.
- [122] Importantly, I find that this denial was part of a pattern of denial by Mr. D. In her decision at para. 58, Master Muir held that Mr. D. had unduly limited Ms. F.'s parenting time with the children. She made the orders regarding parenting time that were in place between October 2, 2020 and April 9, 2021. Mr. Justice Tammen made an order under s. 61(2)(c) of the FLA for compensatory parenting after Mr. D. withheld the children, contrary to Master Muir's order, in early January 2021. Mr. D. repeated this wrongful denial on Easter Weekend.
- [123] I am satisfied that Mr. D. engaged in a wrongful denial of parenting time on the Easter Weekend. I have considered the various remedies provided in s. 61(2). As in K.R., I do not see compensatory parenting time as an appropriate remedy at this time. Unlike in January, when Tammen J. made his order for compensatory parenting time, the parties now have equal parenting time. Like Betton J. in K.R., rather than imposing a fine, I see this as an appropriate case in which to order Mr. D. to pay Ms. F. an amount for the benefit of the children under s. 61(2)(g)(i). I therefore order Mr. D. to pay \$2,500 to Ms. F. for the benefit of the children. As in K.R., it is my hope that that amount will impress upon Mr. D. the seriousness of the issue, and deter him from wrongfully withholding parenting time again.

Police Enforceability

- [124] Ms. F. sought a police enforcement order pursuant to ss. 231(4)-(6) of the FLA. Mr. D. opposed such an order, submitting that such an order should only be made in extreme circumstances, as a tool of last resort.
- [125] I agree with Mr. D. that an enforcement order should be a tool of last resort. Pursuant to s. 231(1)(b), it is to be made only if the court is satisfied that no other order under the FLA will be sufficient to secure the person's compliance. Police enforcement may be traumatizing to children, and should be avoided if possible.
- [126] As a result of his wilful withholding of the children, Mr. D. has been ordered to provide compensatory parenting time and now to pay an amount to Ms. F. for the benefit of the children. It is to be hoped that those orders will prove sufficient to secure Mr. D.'s compliance with the Court's parenting orders. If they do not, then an enforcement order may unfortunately prove appropriate as a last resort.

Telephone Calls

- [127] Ms. F. sought an order that she be granted a telephone call with the children on Wednesday evenings between 5:00 p.m. and 8:00 p.m. for up to 20 minutes during the weeks she does not have parenting time with the children. Mr. D. consented to this order in final submissions.
- [128] Given that the parties now have equal parenting time, I consider it appropriate for such an order to be mutual. I therefore order that each party is permitted to have a telephone or video call with the children on Wednesday evenings between 5:00 p.m. and 8:00 p.m. for up to approximately 20 minutes in duration. The parties may vary these arrangements by mutual consent, such consent to be evidenced in writing.

Counselling

- [129] Mr. D. sought an order requiring Ms. F. to attend a parenting after separation course. Both parties were ordered, by consent, to attend such a course by Master Cameron, so that matter has been addressed.
- [130] Mr. D. also sought an order requiring the parties to attend counselling with a counsellor with specialized experience working with family separation and co-parenting for the purpose of reducing conflict and enabling future consultation and communication. Ms. F., through her counsel, opposed such an order, essentially taking the position that it was too early to attempt counselling given Mr. D.'s untruthfulness.

- [131] In my view, these parties could benefit from the assistance of an expert third party to assist them in their communication and co-parenting. M.D. and N.D. are both young, and Ms. F. and Mr. D. are both going to be actively parenting them for many years to come. The children's best interests demand that their parents do their best to achieve a manageable co-parenting arrangement.
- [132] I appreciate why, in light of the family violence which I have found Mr. D. to have engaged in, Ms. F. is reluctant, at this time, to sit down in the same room with him and engage in counselling. It would be possible for counselling to begin separately, and move toward, if appropriate, joint sessions.
- [133] I therefore order the parties pursuant to s. 224 of the FLA to attend counselling with a counsellor who has specialized experience in working with family separation and co-parenting for the purpose of reducing the conflict and enabling future consultation and communication with respect to the children. Counsel are to agree to such a counsellor, and failing agreement, either party is at liberty to apply to the court. I specifically direct that the initial counselling sessions are to be held separately, and joint sessions are only to be held at such time, if any, as the counsellor may consider them appropriate. Mr. D. is to pay the initial cost of up to 12 counselling sessions, with the ultimate responsibility for the cost of counselling to be determined by the court unless otherwise agreed to by the parties.

Summary

- [134] To summarize, I make the following orders:

Parenting Arrangements

1. The parties will have equal parenting time with M.D. and N.D. every other week starting at 5:00 p.m. on Friday.
2. During the weeks the children are with the other party, each party may have a telephone or video call with the children on Wednesday evenings between 5:00 p.m. and 8:00 p.m. for up to approximately 20 minutes in duration.
3. Ms. F. will have parenting time for one-half of the Christmas and spring break holidays, and during the summer holidays on a week on/week off basis.
4. Each party may take M.D. and N.D. on a two-week summer vacation with 60 days' notice to the other party.
5. The parties may vary these arrangements by consent, provided that the consent is evidenced in writing.

The Children's Sleeping Arrangements

6. The parties will provide the children private age-appropriate sleeping accommodation in each party's home.

7. If each party's respective home has a sufficient number of bedrooms, M.D. and N.D. will each have their own room. If it does not have enough bedrooms, M.D. and N.D. may share a room with each other, but must not regularly share a room with anyone else. This order does not prevent sleepovers and other similar circumstances.

Decision-making Authority

8. Each party will have the responsibility to make day-to-day decisions affecting the children while they are in their care.
9. Each party will advise the other party of any matters of a significant nature affecting the children.
10. Each party will consult the other party about any important decisions that must be made and will try to reach agreement concerning these important issues. Failing agreement on such important decisions, either party may apply to court.
11. Should these orders prove unworkable in making decisions affecting the children, either party may apply to court to vary them.

Communication

12. Mr. D. will obtain his own email address and provide that email address to Ms. F. within one week of the date of this decision.
13. All communications between the parties, including with respect to varying parenting times, are to be done by email, using Ms. F. and Mr. D.'s email addresses. Text messages may be used only when it is necessary to communicate information relating to the children on an urgent basis.

Section 211 Report

14. A s. 211 report will be prepared by a qualified individual chosen jointly by counsel for each party. Failing agreement, either party is at liberty to apply to the court to appoint the report writer.
15. The parties will cooperate fully in the s. 211 report process.
16. Mr. D. will initially bear the cost of the s. 211 report. The ultimate responsibility for the report will be determined by the court unless otherwise agreed to by the parties.

Counselling

17. The parties will attend counselling with a counsellor who has specialized experience in working with family separation and co-parenting for the purpose of reducing the conflict and enabling future consultation and communication with respect to the children.

18. Counsel are to agree to such a counsellor. Failing agreement, either party is at liberty to apply to the court.
19. The initial counselling sessions will be held separately. Joint sessions, if any, will only be held at such time as the counsellor may consider them appropriate.
20. Mr. D. is to pay the initial cost of up to 12 counselling sessions. The ultimate responsibility for the cost of counselling will be determined by the court unless otherwise agreed to by the parties.

Conduct Order

21. Neither party will consume any controlled substances within the meaning of s. 2 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, except as prescribed by a licensed physician, during parenting time and for 12 hours before having parenting time.

Other Orders

22. Mr. D. will pay \$2,500 to Ms. F. for the benefit of the children.
23. All other terms of Master Muir's order will remain in place.

[135] Both parties sought costs, and in Ms. F.'s case, special costs, but time did not permit them to make submissions in support of their positions. Should they be unable to agree on costs, or should either party, having consulted with the other, require further direction with respect to any orders made herein, they may request to appear before me by telephone or MS Teams within 30 days of the date of this decision.

"Lyster J."

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Prepared on 26 October 2026 · Esheria