
CANADA / JUDGMENT

E.J.M. v. J.R.M.

2019 BCSC 2466

COURT

Supreme Court of British Columbia

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2019 BCSC 2466 E.J.M. v. J.R.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.J.M. v. J.R.M.,

2019 BCSC 2466

Date: 20191101

Docket: E18340

Registry: Smithers

Between:

E.J.M.

Claimant

And

J.R.M.

Respondent

Before: The Honourable Madam Justice Ker

(appearing by teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant appearing by teleconference:

G.E. Greene

Counsel for the Respondent:

I.B. Lawson

Place and Date of Hearing:

Smithers, B.C.

October 22-24, 2019

Place and Date of Judgment:

Smithers, B.C.

November 1, 2019

- [1] These Reasons for Judgment were delivered as oral reasons. They have since been edited for distribution.

Overview

- [2] This is an oral ruling on two competing family law applications. Each party seeks interim orders for exclusive occupancy of the family home and sole custody or primary custody of their five-year-old son. I will refer to the parties as the "father" and the "mother" in these reasons. They were married on May 27, 2007. They have one child, a son, A., born in August 2014. The parties separated on August 29, 2019.
- [3] Resolution of these issues is complicated by the mother's allegations of physical, emotional, and financial abuse against the father and the father's allegation that the mother is mentally unstable, terminally ill, and facing an imminent death.
- [4] The mother's argument is based upon the allegation that the father has repeatedly engaged in family violence towards her. The mother seeks various orders that would provide her with the majority of parenting time and the final say in decisions respecting their son. She further seeks exclusive occupancy of the family home, child support, and spousal support. The mother proposes that the father have access to their son up to 40 percent of the time, depending on his availability, when not working in the United Kingdom.
- [5] The father's position is based on the premise that the allegations of family violence are false. He says, instead, that the mother's behaviour over the past four months has become increasingly erratic such that she is mentally unstable and presents a danger to their son. He, too, seeks exclusive occupancy of the family home. He also seeks sole custody of the parties' son, with supervised access for the mother three times a week after school.
- [6] The mother asserts that the father has engaged in family violence and spousal abuse for years. With nowhere to turn and the father's refusal to continue to engage in counselling, she finally left the family home on or about August 29, 2019, taking her son with her. They went to a transition house in the Bulkley Valley.

- [7] The mother acknowledges she is being treated for Stage IV breast cancer and that she has HIV. She deposes that both conditions are stable. She denies that her death is imminent and further denies mental instability. What she seeks is an ability to have some quality parenting time with their son, free from the father's psychological, emotional, physical, and financial abuse so that their son can have some positive memories of his mother.
- [8] Although I have no doubt both parents love their son, they could not be further apart on what is in his best interests.
- [9] I will say at the outset that this has been one of the most disturbing family law applications I have had to deal with. The animosity and hostility between the two parties was palpable over the three days that this application was heard. There is a profound chasm of distrust and dislike between them. Tragically, a little boy, who no doubt loves both parents and wants them to stop arguing and fighting, is caught in the middle of what I can only characterize as a self-centred battle of egos--a battle so self-absorbed that neither side seems able to truly understand the damage they are each likely inflicting on their little boy.
- [10] Numerous decisions of this court have affirmed that family violence is not limited to physical violence. Emotional and psychological abuse of one parent by another will constitute family violence where the child suffers physical or emotional harm as a result. This can include when one parent makes demeaning remarks about the other in the child's presence or when one parent harms the health or financial well-being of the other to the extent it harms the child's economic safety and security. A young child's exposure to repeated arguments and high tension between the child's parents is likely to have a negative impact on the child's emotional and psychological development. The parents in this case need to understand the potential jeopardy they are placing their little boy in by continuing to behave the way they have over the past six to eight months.
- [11] Both the mother and father need to stop their war with each other and their battle over their son and understand that they need to be able to manage this little boy's care--his emotional and psychological development--in the least confrontational manner possible. The parties need to start behaving like responsible adults and do what is best for this little boy, setting aside their own selfish wants and perceived rights. The father's parents need to understand that, as grandparents of this little boy, they too have a responsibility to avoid stoking the flames of anger, distrust, and tension so fundamentally evident during the proceeding.
- [12] I accept that the mother is ill, battling Stage IV breast cancer. How one chooses to engage in medical, alternative, and naturopathic medicine is an intensely personal matter. Exploration of alternative medicines and treatments before or instead of resort to more invasive treatments, such as chemotherapy and radiation therapy, ought not to be the subject of castigation and ridicule, which is what the father and his parents appear to have subjected the mother to in this case. At the same time, the mother has to be realistic about how far the family finances can be stretched to engage in alternative therapeutic treatments.

- [13] What was truly distressing about this application was the extent to which both parties stooped to malign and smear the other during the proceedings.
- [14] Denigrating the mother's mental health by suggesting she is unhinged, unstable, and about to die is, in my view, an exceptionally cruel and inhumane strategy in the circumstances. This litigation strategy could well be found to constitute a form of emotional abuse and therefore a form of family violence, as that term is defined in the case law.

Credibility

- [15] Both parties were cross-examined on their affidavits. In assessing the credibility and reliability of the parties, I am aided by the principles I outlined in *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at paras. 27-28, citing *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, *aff'd* 2012 BCAC 296, and *Novak Estate (Re)*, 2008 NSSC 283 at paras. 36-37.
- [16] Neither party presented as an entirely credible witness. Each was only too eager to cast aspersions and criticize the other: the father by repeatedly referring to the mother as unreasonable, unhinged, and mentally ill and proffering an opinion that she suffers from an undiagnosed borderline personality disorder and other mental infirmities; the mother by engaging in character assassination of the father and his parents and by repeatedly asserting that she has received death threats, beatings, and been confined against her will. I have no doubt that there has been a measure of psychological and emotional abuse inflicted upon the mother by the father and his parents, but not to the level the mother would have the court believe. I approach the evidence of both parties with caution.
- [17] I place little to no weight on the affidavit evidence of M.M., the father's mother. Her affidavit contains psychiatric diagnoses and opinion as to her daughter-in-law's mental state, something she is not qualified to provide. Such an approach undermines her objectivity and therefore the reliability of her evidence.
- [18] Contrary to the father's assertions that the mother is mentally unstable or unhinged, I found her to be quite lucid in her testimony. Rather than being unstable, I would describe her testimony as that of an exceedingly angry person who has had to endure a campaign of character assassination by her husband and in-laws, who continue to suggest she is mentally unstable and about to die.
- [19] With that observation, I now turn to the factual context that informs these competing applications.

Factual Context

- [20] I have already outlined the basic facts of this relationship. After the mother moved to the transition house on or about August 29, 2019, the father became alarmed as he was unable to locate the mother and their son. He retained counsel, and together they took steps to have the son returned to the family home. A notice of family claim was filed in the Smithers

Supreme Court Registry on September 4, 2019. In addition, an order for exemption from the Judicial Case Conference program and an order for short leave to bring an interim application were granted. The father's application was returnable September 6, 2019. The mother was served on September 5, 2019, at 3:55 p.m.

- [21] On September 6, 2019, the father's emergency application for an interim order with respect to custody of their son and exclusive occupancy of the family home was heard by Mr. Justice Thompson via videoconference. Both parties were represented and some affidavit material was before him.
- [22] In light of the exigencies of the situation and the mother's affidavit alleging family violence, which the father had no opportunity to respond to save for a complete denial, Thompson J. made an "interim interim" order of a nesting arrangement, with the child in the family home and the parents having alternating weeks occupying it with him.
- [23] Justice Thompson also made orders, again on an interim interim basis, in respect of:
- i. child support pursuant to the Federal Child Support Guidelines, SOR 97-175 [Guidelines];
 - ii. spousal support in the amount of \$3,000 a month; and
 - iii. the conduct of the interim application hearing--specifically, that some cross-examination of the parties occur.
- [24] On October 11, 2019, the mother filed an application returnable October 21, 2019. The matter came on for hearing before me on October 22, 2019. The father complains of late notice of this application. The mother seeks exclusive occupancy of the family home and sole custody of the parties' son. Alternatively, she seeks daily parenting time and that their son reside primarily with her.
- [25] Counsel for the father suggested the matter should be converted to a mini-trial. As the mother had no notice of this and because it would unduly prolong the application proceeding, I dismissed the request for a mini-trial and directed that the parties be cross-examined on their affidavits. In my view, a mini-trial would have been unfair to the mother, who had absolutely no notice of the proposal.
- [26] The affidavits filed on these applications contradict each other on almost every point raised. Cross-examination added little clarity. Both the father and mother were poor witnesses.
- [27] The father was evasive and argumentative. At every opportunity, he tried to paint the mother as "sick", "mental", prone to fits of rage, and likely suffering from an undiagnosed borderline personality disorder. He testified that the mother's behaviour changed in the last four months and that her actions were inexplicable and "crazy". He appeared to suggest that perhaps the chemotherapy may be contributing to her alleged mental disorder.

- [28] The mother was cross-examined about her allegations of family violence. It was intimated to her that she was making it up and that she never complained to anyone, including her husband. The mother was clear, controlled, and calm on this area of cross-examination. The mother was clear that in May 2016 when she saw Dr. Evans--the surgeon who would perform her mastectomy--he questioned her about bruising and fingerprints on her arm. Dr. Evans excused the father from the consultation room and then questioned the mother. A female assistant also questioned the mother. The mother did not make a complaint.
- [29] I should mention the father was cross-examined about this meeting, and although his answers were evasive in certain respects, his lack of memory of this event is not surprising. Given that there appeared to be physical signs of domestic violence in the form of bruising on the mother's arms, it is highly unlikely the doctor would have confronted the father. However, the father's explanation that the mother was susceptible to bruising because she was taking various drugs to treat her cancer is curious. I say that because I do accept the mother's evidence that she was not taking any form of drug treatment at this stage, the time before she had her mastectomy.
- [30] The fact that the mother did not complain for some time also does not mean that physical abuse in the form of grabbing her arms tightly, holding her, and bruising her did not occur. The cross-examination of the mother appeared to suggest that because she did not complain or file charges, the abuse did not happen. This line of attack is akin to the discredited stereotypical thinking that because a woman does not cry out or resist a sexual assault, she consented to or wanted the contact or is making it up altogether. Domestic violence and physical abuse within intimate relationships is an insidious and extremely complicated problem. It often takes years for a victim to overcome the abuse and to develop the courage to speak out against the abuser. The abuser sometimes does not recognize they are engaging in violence or physical abuse.
- [31] What I do accept from the mother's evidence is that there were occasions where the couple had heated arguments and that on at least one occasion around May 2016, the father held her firmly enough to bruise her arms. I also accept that she has complained to others, including a close family friend, a marriage counsellor, and a friend from Hazelton, BC who helped her shortly after her mastectomy. I also accept that she complained to her husband about his use of force when it was used.
- [32] What I am unable to accept from the mother's evidence are the allegations of death threats and confinement against her will. The allegations of death threats and confinement appeared to arise in her second day of cross-examination, when she was very angry and went out of her way to disparage the father and her in-laws. Her first affidavit does contain an allegation that the father threatened to "destroy" her in December 2015 after she spat on him. It also alleges that her mother-in-law was controlling when the mother resided with her mother-in-law during the first part of 2019 while undergoing cancer treatments. However, neither of these allegations rise to the level of death threats or confinement, in my view.

- [33] The mother admits to spitting on the father on one occasion during an argument in December 2015. She was holding their son at the time and was trying to get away from the father as he was grabbing her by the arms. In cross-examination, she denied spitting on their son and denied that she was trying to transmit HIV to her husband. The mother explained that she has been HIV positive since 1990. At the present time, her viral load is undetectable and so is incapable of transmitting the disease. She was less clear whether she had conveyed this information to her husband at the time.
- [34] What I take from the totality of the evidence on this issue is that when very angry, the mother has spat on her husband in the past. Frankly, such behaviour is no doubt alarming to individuals aware of her HIV diagnosis, and while it seems likely that the status of her condition is undetectable, that, in my view, is not licence for the her to spit on others with whom she is angry or detests. It is deplorable behaviour.
- [35] I turn now to the evidence around an incident in late July 2019. To put the matter in context, a recitation of some family background is necessary.
- [36] The father is employed by an airline company that has a contract with the Royal Air Force ("RAF") in the United Kingdom. He works as a manager and pilot for a specialized plane. At the present time, he is engaged in drafting a 1,000-page proposal to submit to the RAF on another contract. In order to conduct this work remotely, the father requires access to the internet, a laser printer, and his work laptop as well as a desktop computer with a monitor larger than a laptop screen in order to work on the finer details of the proposal. His office setup is in the basement of the family home. Currently, he is trying to adapt when he resides in his parents' home outside Smithers during the mother's time with their son. However, the nesting arrangement is proving difficult as there is no internet service at the father's parents' residence.
- [37] As part of his contract obligation with the RAF, the father must travel to the United Kingdom. The travel amounts to about three months over a calendar year, and the trips can be as short as two or three days and as long as two to three weeks.
- [38] In June 2019, the father, mother, and child went to the United Kingdom for the father's work. On or about July 1, 2019, the mother and child returned to Smithers. The father returned on July 29, 2019. He had to travel for approximately 25 hours to return to Smithers. I accept his evidence that it was an arduous and exhausting journey.
- [39] On July 30, 2019, the couple had an argument over the father's decision to remove their son from daycare to take him for an excursion and outing so that they could have some father-son time. I accept that was his intention and, given his long absence from his son, an entirely reasonable thing for the father to have done.

- [40] The father's decision upset and angered the mother. An argument ensued, and it played out in front of their son. The mother, in her affidavit, alleges the father "knocked her" under the chin and then grabbed her by the arms, shook her, and shouted at her that she was "not going to interfere with [his] relationship with [their] son".
- [41] The mother called the police. The father admits to saying something to "the kid", as he stated in his evidence, that the mother had called the police to send daddy to jail. The father denies being violent with the mother.
- [42] The police attended but no charges were laid.
- [43] A text message (appended to her affidavit) that the mother sent to her friend P.R. shortly after the incident simply alludes to the couple fighting and the father grabbing her and pushing her to the floor in front of their son. The mother, in her testimony, provided a more dramatic account of violence than included in her affidavit.
- [44] What I am able to discern about this event from the totality of the evidence, including the text messages to P.R. and the lack of charges is the following: the parties were engaged in a heated argument over their son's schedule and the seeming chaos created by sudden changes to his schedule; a scuffle ensued and there was an element of physicality used by the father to restrain the mother. I do not accept that the physicality was to the level the mother asserted in her viva voce evidence.
- [45] What this incident demonstrates conclusively is, as the mother testified, the parties are completely unable to communicate. They disagree on how their time with their son should be managed. What they need to do is establish a schedule that works for their son, which is flexible enough to accommodate the vagaries of the father's travel to the United Kingdom and allows for impromptu outings. However, it should not be so flexible that changes can be repeatedly made at the last minute and without consultation with the other parent. I suspect the July 30, 2019, incident could well have been avoided if the father simply consulted the mother and said he would like to take their son on an outing for the day.
- [46] Two video clips from an incident on August 6, 2019, were marked as Exhibit 1 and shown during the hearing of the application. The father shot the video on his cellphone when he and the mother were arguing. Their son was present during the argument. The videos are disturbing and heartbreaking to watch. It is shocking that the parties subjected their young son to an argument of that magnitude.
- [47] The first video shows the mother trying to get their son into her truck. The child is screaming, crying, and running away from her. The father came out of the house videoing the interaction. The video clearly starts well after an argument between the parties had commenced. The argument, as depicted on the video, only escalates, and the child becomes even more distressed. In the video, the mother suggests that if the father is able to remove their son from daycare when he sees fit, then she is entitled to have time with her son and that it was her parenting time with their son that day.

- [48] The second video depicts the mother yelling and screaming profanities at her in-laws, who had stopped by to drop off a birthday present for their grandson. The mother had asked the father not to have them over that day, but he ignored the request. August 6 is not the child's birthday, rather, August 10 is. The video depicts their son becoming more distressed. He continues to cry and scream and begs not to be taken away. To the father's credit, he tries to keep a calm voice during these two arguments and eventually acknowledges that his son needs someone to act like an adult and comfort the child. At that juncture, the father stopped recording. It is unclear how much time elapsed between the two videos. It is also unclear how the situation resolved.
- [49] In so far as the mother asserted in her evidence that her son was screaming and the father was forcibly restraining the child as he dressed him, I cannot accept that evidence. In my view, it sounds like retrospective recall informed by subsequent developments, such that it is now far worse than what actually occurred. I have no doubt the child was distressed but that it was due to the parents conducting their argument in front of him. Such conduct, as I have said, is completely unacceptable and very likely damaging to their son's emotional and psychological development and well-being. It has to stop.
- [50] What also needs to stop is the parents filming each other during their arguments in front of their son. Furthermore, the father's resort to checking the mother's text messages and computer files must stop. It is a gross invasion of her privacy and completely unacceptable.
- [51] The father has suggested that P.R. is having an affair with the mother and that he is her drug dealer. These allegations are simply bald assertions that are unsubstantiated in any way. I reject them in their totality. I accept the mother's denial of an affair and denial that P.R. is her drug dealer. The mother was clear about the state of her relationship with P.R. - he is an acquaintance and someone who appears to have offered her comfort, support, and friendship at a particularly low point in the dissolution of the marriage. The fact that he took her for a drive to Twin Falls on July 30, 2019, after the police attendance at the family home is entirely understandable. I find it to be nothing more than a compassionate act by one helping support a friend in distressing circumstances.
- [52] The difficulty that this case presents was evident in the mother's second day of cross-examination. She became increasingly argumentative and defensive. She was unable to simply answer the questions put to her without providing a lot of further detail, much of which appeared to be in an effort to ensure she painted the father in as negative a light as possible. To be fair, the father did much the same thing when he was cross-examined. The only saving feature of his evidence was that the cross-examination was much shorter than the mother's.
- [53] The conduct of both parties in providing viva voce evidence to the Court assisted only in demonstrating the following:

- i. The two parties are fundamentally incapable of communicating and making decisions about their son and what is in his best interests.
 - ii. They are so caught up in their distrust and dislike of each other that they are incapable of seeing the damage their conduct is likely inflicting upon their son's development.
 - iii. Each is only too ready to jump to conclusions about the other's motivations and intent insofar as the disintegration of this marriage is concerned.
 - iv. They are both engaged in a "race to the bottom" to try and establish who is the worst individual in this unfolding tragedy.
 - v. They appear to be more concerned about their "rights" as parents than how their atrocious behaviour is affecting their son.
- [54] Counsel for the father described this application as one of the most awful things he has had to do. He frames the issue as whether I am satisfied on the evidence adduced that the father has demonstrated that the mother is ill and incapable of exercising good judgment in the care of her son. In my view, that has not been demonstrated.
- [55] While physical illness is conceded, the weight of the evidence before me does not establish that the mother is unstable and incapable of coping. In so far as allegations of mental instability are concerned, while definitely not an expert in psychiatry or psychology, I do not detect a level of incapacity such that she is unable to care for her son or make sound decisions in respect of his care. Letters from the son's daycare provider and the mother's counsellor appended to the mother's third affidavit are compelling independent evidence that the mother is capable of exercising good judgment and making appropriate choices. The letter from the daycare provider also provides independent evidence that it is the mother who largely engages in the day-to-day parenting responsibilities, given the father's work commitments and travel obligations. To be sure, the daycare provider describes both parents as involved parents.
- [56] Counsel for the father interprets the last paragraph of the daycare provider's letter as proof that the mother is about to die. With respect, I do not interpret the last paragraph as a medical opinion or a lay prognostication that the mother is about to die. Rumours of the mother's imminent demise appear to be exaggerated. I accept her evidence that although she is being treated for breast cancer and undergoing chemotherapy, she is, at this point in time, stable. There is no evidence, apart from the father's baseless assertion, that she poses a risk to her son by being in close proximity to him.
- [57] However, what this fractured family needs to do is engage in some sort of succession planning in order to ensure as limited a negative impact on their son as possible should the mother's health status decline. If there is any possibility that the mother's health status takes a turn for the worst, everyone involved with this little boy needs to be focusing on how the significant trauma to him over the loss of his mother can be alleviated as much as possible.

- [58] The totality of the evidence adduced does not support the need for supervised access, and I reject the assertion that it is warranted. The basis for such an approach is premised on the assertion that the mother is mentally unfit, unhinged, or unstable. As I said at the outset, I do not find the mother to be mentally unstable. The evidence in no way supports such a finding.
- [59] I do find, however, that the mother is an angry person, likely in part due to the unrelenting character assassination she has had to endure over the course of the past few months in these proceedings.
- [60] In so far as emotional and financial abuse are concerned, in his second affidavit the father provided a blanket denial of all allegations of violence and abuse set out in the mother's first affidavit. Unfortunately, he was not challenged on this assertion in his cross-examination, and so it is not possible to determine the extent, if any, of emotional and financial abuse that has occurred in this case. However, what I can say is that if the allegations of shooting and burning of the family dog, cancellation of credit cards, and closing and/or depleting joint bank accounts were established, collectively they would likely amount to emotional and financial abuse in the circumstances. Moreover, involvement of their son in the dispute by telling their son that his mother was going to have the father sent to jail, belittling the mother in front of the son, and other similar conduct is improper and entirely antithetical to the best interests of the child.

Analysis

- [61] I turn next to the first question that the Family Law Act, S.B.C. 2011, c. 25 [FLA] requires courts to address before turning to the remedy that should be granted in these applications. As these applications deal with the care and time with a child, the FLA is clear that only the best interests of the child are considered:

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

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;

- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

[62] Family violence under the FLA is an overarching consideration in determining parenting arrangements: see *N.J. v. S.J.*, 2018 BCSC 2352 at para. 257. The principle codified in s. 37(3) of the FLA informs the order to be made here. Under the FLA, family violence has a broad definition that includes emotional, financial, and/or psychological control: see *M.W.B. v. A.R.B.*, 2013 BCSC 885, and *C.L.M. v. M.J.S.*, 2017 BCSC 799.

[63] Section 1 of the Family Law Act defines family violence as including:

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

[64] The court must consider family violence in the context of making any orders regarding guardianship, parenting arrangements, or contact with the child (s. 37(1) of the FLA). One factor is the impact of any family violence on the child's safety, security, or well-being, whether the violence is directed toward the child or another family member (s. 37(2)(g)).

[65] Section 38 of the FLA provides:

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

(a) 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.

[66] Numerous decisions from this court address what constitutes family violence. In *R.W. v. P.C.*, 2017 BCSC 998, Justice Gropper summarized a number of cases where the courts address the existence of family violence, writing:

[36] In *Fyfe v. Fyfe*, 2014 BCSC 1999, Chief Justice Hinkson considered family violence in the context of an application for a protection order. He noted at para. 36 that the claimant mother provided notice of her applications, and sometimes the application materials, to school principals, teachers, politicians, police officers, former hockey coaches of her sons, and individuals associated with minor hockey teams. She also sent emails to the hockey coach and others who interact regularly with the children on a daily basis. She expanded the list of recipients. The Chief Justice considered that emails to third parties constituted "family violence" in those circumstances, as they fell within psychological and emotional abuse including intimidation and harassment.

- [37] In *D.N.L. v. C.N.S.*, 2014 BCSC 1417, Mr. Justice Pearlman found that the respondent's demeaning remarks about the claimant, his repeated assertions to the child that she was being manipulated by her mother and that her mother was responsible for the conflict that divided the family as well as his threats to use physical force to compel her to accompany him constituted emotional abuse which undermined the child's emotional safety, security and well-being (see at para. 72).
- [38] In *Hokhold v. Gerbrandt*, 2014 BCSC 1875, Mr. Justice Cole determined that behaviour that caused financial hardship and stress and threats to cause financial hardship qualified as family violence.
- [39] In *M.W.B. v. A.R.B.*, 2013 BCSC 885, Mr. Justice N. Brown found that, by delaying and refusing to cooperate with reasonable requests or provide information necessary to dispose of the parties' business in a mutually beneficial way, the claimant's conduct in that litigation was a form of emotional abuse and harassment that constituted family violence.
- [40] In *L.A.R. v. E.J.R.*, 2014 BCSC 966, Mr. Justice Schultes addressed the allegations of family violence at paras. 148-150. He determined that serious acts of violence that occurred during the marriage did not appear to be repeated or threatened in the post separation period despite often volatile circumstances. The children did not appear to be to have been exposed to any of the incidents. Schultes, J. found, however, that the father's comments to the mother in the presence of the children went beyond the "all-too-familiar nastiness that spouses often inflict on each other during disintegrating relationships, and amounted to actual "emotional abuse".
- [41] In *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453, Madam Justice Warren considered circumstances where there were allegations of violence by both parties. The father alleged that during the marriage and after separation the mother acted aggressively with physical violence toward him. The mother alleged that the father was violent during arguments. She said he hit and broke things, pushed her and on one occasion threw coffee at her. There was evidence concerning violence involving the grandparents. At para. 192 the court states:
- 192 In considering the impact of this violence on A.'s [the child] well-being, it is important to note that there were no allegations of violence directed towards A. However, it is obvious that exposing A. to this kind of behavior cannot be anything but detrimental to his interests. None of the parties takes responsibility for any of this conduct -- to the contrary, they all blame each other. In these circumstances, it is my view that it is important to minimize the interaction between the plaintiff and the defendant and discourage any contact between the defendant, on the one hand, and the plaintiff's parents, on the other.
- [67] And in *C.L.M. v. M.J.S.*, Justice Donegan affirmed family violence under the FLA is not limited to physical violence and can include emotional and psychological abuse. She distilled these principles on family violence:

- [361] In *D.N.L. v. C.N.S.*, 2014 BCSC 1417, Mr. Justice Pearlman held that demeaning remarks about the other parent to the child, threats to use physical force to compel the child to accompany the parent and suggestions that the other parent was responsible for the conflict in the family, constitute emotional abuse. . . .
- [362] In *K.R. v. J.D.*, 2017 BCSC 182, Mr. Justice Jenkins held that the respondent's derogatory and demeaning comments regarding the claimant, on occasion in the child's presence, "clearly amount to family violence" in that they disturbed the child and caused the child emotional harm: para. 17.
- [363] In *M.W.B. v. A.R.B.*, 2013 BCSC 885, Mr. Justice N. Brown considered whether a lack of cooperation in selling assets and other aspects of the claimant's litigation conduct was emotional abuse and harassment that constituted family violence. . . .
- [364] In *L.A.R. v. E.J.R.*, 2014 BCSC 966, Mr. Justice Schultes held that the father's disparaging comments to the mother in the presence of the children and the father's conduct in showing the oldest child lengthy and acrimonious text messages between the parties amounted to emotional abuse constituting family violence: para. 149.
- [365] The court must also be careful not to label conduct as "family violence" where there is no evidence the child has suffered any physical or emotional harm as a result of the parents' conduct. The provisions in the FLA relating to family violence are intended to address a serious social issue and to protect children and spouses from actual harm or danger: *L.S. v. G.S.*, 2014 BCSC 187, *aff'd* 2014 BCCA 334 at para. 26.
- [68] I am mindful of Justice Donegan's comments at para. 365 of *C.L.M.* about being careful in labelling conduct as "family violence" where there is no evidence the child has suffered any physical or emotional harm as a result of the parents' conduct. However, the two instances of physicality on May 2016 and July 30, 2019, which I accept, are sufficient to cause me concern, at least in so far as the mother's safety.
- [69] Concern for the child's physical safety with his father or his mother is not, in my view, substantiated in any way. However, what is of concern is the psychological and emotional damage that may occur if he has to witness or be caught in the middle of any arguments between his parents.
- [70] What is in this child's best interest is for the parents' contact in his presence to be extremely limited, if not completely eliminated. What this little boy needs at this moment in his life is structure, stability, and a routine. Attendance at kindergarten certainly provides that. I accept the mother's evidence that there was a parenting schedule prior to August 6, 2019, imperfect as it was. However, it was constantly subject to changes by both sides, without notice or consultation, because the parties were so mired in an inability to communicate with each other and so caught up in their preoccupation of their "rights to their son." Their preoccupation with their "rights", as opposed to what their son needs and what is in his best interest, is undoubtedly not in their son's best interests. As I have repeatedly said, that needs

to change.

Exclusive Occupancy

[71] The week-on/week-off nesting arrangement also needs to be modified slightly. However, in my view, the nesting arrangement itself must remain, as it provides the parties' son with a stable residence

[72] I turn then to the competing applications for exclusive occupancy pursuant to s. 90 of the FLA, which provides:

90 (1) For the purposes of this section, "family residence" means a residence that is

- (a) owned or leased by one spouse or both, and
 - (b) the ordinary place of residence of the spouses.
- (2) The Supreme Court may make an order granting a spouse, for a specified period of time,
- (a) exclusive occupation of a family residence, or
 - (b) possession or use of specified personal property stored at the family residence, including to the exclusion of the other spouse.
- (3) An order under this section does not
- (a) authorize a spouse to materially alter the substance of the family residence or personal property,
 - (b) grant to a spouse a proprietary interest in the family residence or personal property, or
 - (c) subject to subsection (4), grant to a spouse any right that continues after the rights of the other spouse, or of both spouses, as owner or lessee are terminated.
- (4) If an order has been made under subsection (2), the Supreme Court may
- (a) order that the right of a spouse to apply for partition and sale of, or to sell or otherwise dispose of or encumber, the family residence or personal property
 - (i) be postponed, and
 - (ii) is subject to the order made under subsection (2), and
 - (b) change the order made under subsection (2).
- (5) Nothing in this section prevents the filing of an entry under the Land (Spouse Protection) Act.

- [73] As Justice Tindale noted in *Ferguson v. Ferguson*, 2014 BCSC 216 at para. 62, the test for making an interim order for exclusive occupancy of the family residence continues to be that set out in *Rinta v. Rinta* (1980), 19 B.C.L.R. 287 (B.C.S.C.): the applicant must establish that shared use is a practical impossibility and that the applicant is the preferred occupant of the premises on the balance of convenience.
- [74] In *Evans v. Mahtoy*, 2015 BCSC 2141, Justice Sharma dealt with an application for exclusive occupancy. In that case, the parties began living in a marriage-like relationship in 1997, approximately four weeks after the claimant purchased the property. The claimant left the property and ended the relationship in October 2014. The claimant was the sole registered owner of the condominium and she had paid all fees associated with it. The respondent claimed he contributed by paying for furniture, groceries, and travel. The claimant suffered from Graves' disease. The claimant had not resided in the property for over a year at the time of the application.
- [75] Justice Sharma accepted, and the parties agreed, that the first branch of the test had been established--it was a practical impossibility for the parties to live together. Justice Sharma went on to consider whether the claimant had satisfied the burden of demonstrating that the balance of convenience favoured her exclusive possession of the property. The claimant's ability to earn income had been compromised by her health, and therefore she had a greater need to live at the property than the respondent. She had also continued to pay the strata fees for the property even though she was not living there. Justice Sharma found that the claimant had met the burden and granted her exclusive occupancy of the property.
- [76] Determining the balance of convenience requires the court to consider and weigh the advantages and disadvantages of such an order as examined by both parties' situations: see *Evans* at para. 30.
- [77] The factors to consider in this assessment include the ability to earn income, mental and physical health, and other financial issues: see *Evans* at para. 41.
- [78] In the circumstances arising in the current applications, some of the factors to be considered weigh in the father's favour and some weigh in the mother's favour. For instance, the father has great difficulty in doing his contract work at his parents' home as there is no internet connection. Moreover, he pays for the mortgage and upkeep of the property. The father is, at the current time, the sole income earner for this family unit. The mother works as a landscaper for the Town of Smithers, seasonal employment that has ended for the year.
- [79] In terms of the mother's circumstances, her lack of employment and, therefore, lack of income and her health issues, including the need for stability to recover from her illness, weigh in her favour.
- [80] I have no hesitation in finding that the first branch of the test for exclusive occupancy has been met by both parties. It is indeed a practical impossibility for the parties to live together. However, in my view, that is not what the current nesting arrangement provides.

- [81] In so far as the second branch of the test is concerned, I am not satisfied that the balance of convenience weighs in favour of either party.
- [82] The father needs to have access to the basement office to be able to fully meet his contract obligations. I am satisfied that he would become unduly financially compromised if he had to rent a second place in town and pay for the mortgage and upkeep of the family home and the other family property that the parties own.
- [83] The mother is unable to pay the mortgage or the upkeep of the family home, given her current unemployed status. She currently resides in a furnished one-bedroom suite in Telkwa, BC.
- [84] In *Hughes v. Erickson*, 2014 BCSC 1952, Justice Saunders had to determine whether the court should order exclusive occupancy under s. 90 of the FLA or whether a "nesting arrangement" where the child remained in the home with the parents alternating occupancy was the more appropriate order. Justice Saunders concluded that flexible interim arrangements, including nesting arrangements, are available if in the best interests of the child. In *Hughes*, the child was four years old and Saunders J. determined that it was appropriate and in the child's best interests that the child's contact with her father be maximized through the means of a nesting arrangement. In the end, Saunders J. was not satisfied that sharing the family home between the parties in accordance with a nesting arrangement was a practical impossibility: see *Hughes* at para. 19.
- [85] I have come to a similar conclusion in this case. Certainly it is practically impossible for the parties to live together under the same roof at the same time, but the best interests of this little boy are not served by bouncing him back and forth between residences. The father has difficulty doing his work outside the family residence. Neither can afford to rent another location to enable the father to carry out his contract work. While there may have been some physical altercations and therefore family violence between the parents, the evidence does not establish that the child is at risk of physical violence by either. While there is a likely risk to his emotional and psychological development if the parents continue to argue in front of him, this problem can be avoided by having transition times during school days and no communication where there is an exchange of residence during the weekend.
- [86] I am satisfied that the week-on/week-off nesting arrangement does not work for the child because it is too long a break between seeing the non-nesting parent. I am also satisfied that it creates difficulty for the father in terms of his ability to make a living.
- [87] Rather than granting exclusive occupancy to either parent, I remain of the view that it is in the best interests of the child that he retain continued residency in the family home and that the parents share the week instead of a week-on/week-off schedule.
- [88] Accordingly, both applications for exclusive occupancy are dismissed.

[89] The first two clauses of the order of Thompson J. remain in effect, but are now on an interim basis:

1. Neither party shall remove the child [A.] born August 10, 2014 ("the Child") from the Bulkley Valley without further order or the written agreement between the parties;
2. The Child shall reside at the following property:

[Address]

(the "Family Home");

[90] The nesting arrangement of the order of Thompson J. will be varied as follows: starting Wednesday, November 6, 2019, the parties shall exchange use of the family home twice a week with the mother residing in the family home with the child from Wednesday, November 6 at 3:30 p.m. until Sunday, November 10, 2019, at 9:00 a.m., at which time the father shall take up residence in the family home until Wednesday, November 13, 2019, at 3:30 p.m.

[91] Every other Saturday commencing November 16, 2019, the father shall have use of the family home from 5:00 p.m. on the Saturday until the following Wednesday at 3:30 p.m.

[92] The weekday exchange of the residence on Wednesdays shall take place after school at 3:30 p.m., commencing on November 6, 2019.

[93] The weekend exchange of the residence will commence with Sunday, November 10, 2019, at 9:00 a.m. and alternate between Sunday at 9:00 a.m. and Saturday at 5:00 p.m., so Sunday, November 10 at 9:00 a.m., Saturday, November 16 at 5:00 p.m., Sunday, November 24 at 9:00 a.m., Saturday, November 30 at 5:00 p.m., Sunday, December 8 at 5:00 p.m.

[94] Should the father be required to travel to the United Kingdom or elsewhere for his employment, the schedule will be suspended and the mother will have exclusive use of the family home and parenting time with the child during the father's absence.

[95] The parties will need to devise an appropriate schedule for the sharing of the Christmas period such that the child spends time with both parents as closely to equal as possible in the circumstances.

[96] I have endeavoured to share the parenting time between the parents as close to a shared parenting time schedule as possible.

Child Support

[97] On the issue of child support, counsel for the father argued that the current order as settled by Master Baker is a mistake and that instead of child support, the father agreed to \$3,000 interim spousal support and that he would pay the upkeep of the property. Having reviewed Thompson J.'s reasons of September 6, 2019, and the transcript of the submissions on spousal support, I cannot accede to counsel's interpretation of the order. Justice Thompson

clearly ordered that child support be paid on an offset basis and that spousal support be paid. If the import of counsel's submissions to Thompson J. was that the \$3,000 was to be child and spousal support, I would have expected that position to be made clear in the submissions; it was not.

- [98] The figures provided for the Guidelines incomes and the father's DivorceMate calculation do not accord with the income figures in the filed financial statements. I have used the financial statements to calculate child support.
- [99] For the purposes of interim child support, the father's income is set at \$132,820. The mother's income is set at her stated income in her financial statement at \$14,400. The parties shall pay child support based on the Federal Child Support Guidelines commencing November 1, 2019, and payable each month thereafter, the said payments to incorporate the appropriate offset. By my calculations, that will be \$1,219 payable by father and \$64 payable by mother. Therefore, the father is to pay \$1,155 a month child support on an interim basis.
- [100] The father shall continue to pay the expenses associated with the upkeep of the family home.

Spousal Support

- [101] In so far as spousal support is concerned, based on the parties' incomes and the child support payable by the father to the mother, the spousal support guideline amounts from the DivorceMate calculation provides a low range of \$2,473, a mid range of \$2,889, and a high-end range of \$3,305 a month. The father pays the upkeep of the family home and has housing expenses of the mortgages on two properties, taxes, insurance, etc. that work out to approximately \$3,300 a month. The mother has medical expenses, as well as housing costs when she is not in the family home, but the father has, as I have said, other significant expenses, including the upkeep of the family home. Accordingly, in my view, something slightly below the low end of the spousal support guidelines should be the amount of spousal support that the father pays on an interim basis. I am fixing it at \$2,000 a month.

Parenting

- [102] Finally, I turn to the claims for sole custody. The parenting arrangements that I have made in this order excludes that possibility. Accordingly, each parent's application for sole custody is dismissed. The parties will continue on an interim basis to have joint custody of their son under the provisions of the Divorce Act, pursuant to the "Joyce model".
- [103] Under the FLA, on an interim basis, the parties shall share equally all of the s. 41 parental responsibilities for the child under s. 40(2) of the FLA, again pursuant to the Joyce model, as follows:
- i. In the event of the death of a guardian, the surviving guardian will be the only guardian of the child.

- ii. Each guardian will have the obligation to advise the other guardian of any matters of a significant nature affecting the child.
- iii. Each guardian will have the obligation to discuss with the other guardian any significant decisions that have to be made concerning the child, including significant decisions about the health (except emergency decisions), education, religious instruction, and general welfare.
- iv. The guardians will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions.
- v. In the event that the guardians cannot reach an agreement on a significant decision, despite their best efforts, the mother will be entitled to make those decisions and the father will have the right to apply for directions, pursuant to s. 49 of the FLA, in respect of any decision he considers contrary to the best interests of the child.
- vi. Each guardian will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party caregivers.
- vii. The guardians' discussions, outlined above in the Joyce model of guardianship shall occur by means of email or text message or through counsel.

Conduct Orders

[104] In my view, given the acrimony between the two parties and their failure to keep their son immunized from the arguments, conduct orders pursuant to ss. 225 and 227(c) of the FLA are necessary and they are as follows:

- i. The father shall not attend at the family home during the mother's time with their son without the prior written, texted, or emailed consent of the mother.
- ii. The mother shall not attend at the family home during the father's time with their son without the prior written, texted, or emailed consent of the father.
- iii. Neither party shall have direct or indirect contact with the other. An exception for indirect contact via email or text message or through counsel is permitted for the parties to exchange information about the status of the welfare of the son. The only exception to this and the above two conditions is to facilitate the weekend exchanges of the residence when one party's time with their son ends and the other party's time with their son begins.
- iv. The parties shall not denigrate each other in the presence of the child or allow anyone in the child's presence to denigrate the other.
- v. Neither party will have guests stay overnight when they occupy the family home. Any visitors they may have attending at the family home shall leave the premises by 7:00 p.m.

vi. The father is not to occupy or use the mother's bedroom when he occupies the family home during his parenting time.

vii. The mother is not to occupy or use the father's bedroom when she occupies the family home during her parenting time.

viii. Neither party is to access the other's cellular phone, text messages, or email accounts messages. Nor are they to access the other's computer files or other personal electronic data.

ix. Neither party is to remove the child from attendance at his kindergarten classes, save for periods of the child's illness when he needs to be in the family home or for the purposes of a genuine medical emergency.

x. I am also ordering, pursuant to s. 224(1)(b) of FLA, that both parties take the online Parenting After Separation course offered through the Justice Education Society.

[105] I am not ordering that the parties attend counselling, but in my view that would be a highly beneficial and worthy course of conduct so that they can make decisions and conduct themselves through the course of this family law dispute, and beyond it, in a manner that is consistent with the best interests of their son.

[106] There are indications that the parents in this case likely need assistance in terms of outside advice or counselling. As I said at the outset, I have no doubt that the parties love their son. However, I am concerned that the significant and longstanding dysfunction and animosity between them have deprived them of the capacity to view their child's best interests dispassionately.

[107] An expert report pursuant to s. 211 of the FLA would likely be a valuable source of information for the trial judge faced with the task of making crucial decisions about the welfare of this child.

[108] To be clear, I am not ordering a s. 211 report at this time, but it occurs to me that it is something that the parties ought to consider in this case.

[109] Finally, I am ordering that this matter be set down for trial as quickly as possible.

[110] That concludes my ruling in this matter.

[111] THE CLERK: Thank you, My Lady.

[112] MR. LAWSON: My Lady, it is Lawson here. I just have one request for you to consider. The term of -- going back to the schedule for sharing of the residence.

[113] THE COURT: Yes.

- [114] MR. LAWSON: I wonder if it could be provided that [the father] provide some notice when he will be out of town and back from town, something reasonable, maybe a week's notice, so she -- [the mother] could just plan when she will have to stay for a longer period in the home.
- [115] THE COURT: Right. Mr. Greene, are you able to speak to that?
- [116] MR. GREENE: Well, it seems like a reasonable request.
- [117] THE COURT: All right.
- [118] MR. GREENE: I am a bit concerned here, in that you are -- seemed to have restricted contact to through counsel. Am I misreading that?
- [119] THE COURT: No, I have not. No, I am sorry, I have said email, text message, or through counsel. I have not restricted --
- [120] MR. GREENE: All right, okay. Right, right.
- [121] THE COURT: -- to counsel. I am hoping, and I hope [the parties] can hear me, that they are able to conduct themselves in a civil manner in their text message and email exchanges, and it is my fervent hope that at some point they are able to speak to each other respectfully and in a dispassionate way, and when that time develops, they are, of course, able to vary the term of no communication, either through the assistance of counsel by consent, or by coming back before the court to vary that term. But I have not restricted communication to through counsel. They can text and email each other, that is just fine.
- [122] MR. GREENE: -- I think that -- I think that is the answer then, is that --
- [123] THE COURT: Yes.
- [124] MR. GREENE: -- they can deal with it by text.
- [125] THE COURT: Yes, and so there will be one further term that the father is to provide reasonable notice, preferably a week, as to when he will be out of the country or out of Smithers for business, so that the mother can make the necessary arrangements for occupying the residence. All right.
- [126] MR. LAWSON: Very good. Thank you, My Lady.
- [127] THE COURT: Thank you. Anything else?
- [128] MR. LAWSON: Not from [the mother], thank you.
- [129] THE COURT: Mr. Greene?
- [130] MR. GREENE: No, My Lady.
- [131] THE COURT: Thank you very much.

"Ker J."

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