
CANADA / JUDGMENT

E.L.S. v. C.A.S.

2012 BCSC 1224

COURT

Supreme Court of British Columbia

DECIDED

15 August 2012

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2012 BCSC 1224 E.L.S. v. C.A.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.L.S. v. C.A.S.,

2012 BCSC 1224

Date: 20120815

Docket: 10-0367

Registry: Victoria

Between:

E.L.S.

Claimant

And

C.A.S.

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Claimant:

R. Doell

Counsel for the Respondent:

B. Bate

Place and Date of Trial:

Victoria, B.C.

October 17-21, 2011

& January 23-27, 2012

Written Submissions received from
the Respondent

February 10, 2012

Written Reply Submissions received
from the Claimant

February 17, 2012

Place and Date of Judgment:

Victoria, B.C.

August 15, 2012

INTRODUCTION

- [1] In this family law proceeding, custody, parenting arrangements and retroactive and prospective child support are in issue.
- [2] The claimant, E.L.S., and the respondent, C.A.S., were married in Hawaii, in the United States of America on August 5, 2006 and separated on June 30, 2009. On October 20, 2011, the parties sought and were granted an Order nisi of divorce.
- [3] There are two children of the marriage:
T.M.S., born October 12, 2005, now six years old;
M.F.S., born December 5, 2007, now four years old.
- [4] The parties began to cohabit in 2002. T. was born about 10 months before the claimant and the respondent married.
- [5] T. attends St. Margaret's, a private girls' school. Because she is allergic to wheat and gluten she has special dietary needs.
- [6] M. is currently attending pre-school at Pacific Christian School, a private school located near the homes of both parents.
- [7] Both children are in the primary care of the claimant.

- [8] The claimant is a 40-year-old provincial civil servant. Her current Guidelines income, as declared in her Form 8 Financial Statement sworn October 4, 2011 is \$78,704.28. That amount includes both employment income and the net amount of rental income she earns from a suite located in her home. She enjoys considerable flexibility in her hours of work, and is able to work from home during much of the work week.
- [9] The respondent, aged 34, is a police constable employed by a police department in the Greater Victoria area. His annual income as stated in his Financial Statement sworn September 16, 2011 consists of annual employment income of \$96,877.08 and rental income of \$7000, for a total income of \$103,877.08. Whether additional income should be imputed to Mr. S in order to determine his Guidelines income is a matter I address later in these reasons.
- [10] As a police officer, Mr. S works shifts, which change from time to time when he is re-assigned from one division of the department to another. There are also occasions when he must work overtime on short notice. Mr. S does not enjoy as much flexibility to adjust his hours of work to accommodate the needs of the children as does the claimant.
- [11] Since January 2011, Mr. S's schedule has been as follows:
1. Week 1: Tuesday to Friday, 6:30 a.m. to 4:30 p.m. followed by four days off;
 2. Week 2: Wednesday, Thursday 2:00 p.m. to 12 midnight, Friday, Saturday, 3:00 p.m. to 1:00 a.m., followed by two days off.

Mr. S anticipates that schedule will continue until January 2013. Depending upon his work assignment at that time, his schedule may change.

POSITIONS OF THE PARTIES

- [12] The claimant seeks orders that she have the primary residence and sole custody of the children. She agrees that the parties should have joint guardianship of the children on the Master Joyce model, but maintains that the respondent's overnight access should be limited to weekends and should be defined so as to provide the two young children of the marriage with consistent and reliable parental care. The claimant submits that the parenting arrangement she proposes is in the best interests of the children because it will provide the children with a consistent parenting routine during the school week, will ensure their attendance at after school activities and that they are well rested and ready for school each weekday. The claimant does not believe that the respondent's 22 year old girlfriend has either the maturity or the ability to care for the children when Mr. S is not available. Mr. S's relationship with this young woman, and the claimant's strongly held view that the respondent's new partner should not be involved in the care of the children have generated a high level of conflict between the parties.

- [13] The claimant also seeks an order requiring the respondent to pay basic child support to her, as the custodial parent, according to the Federal Child Support Guidelines, and to pay 50% of the children's' extraordinary expenses. At the conclusion of the trial, the claimant advanced a claim for the payment of child support retroactive to July 1, 2009, when the parties separated. She submits that Mr. S failed to disclose his full income, and argues that the court should impute to him additional income for the years 2009 through 2011 from various sources, including rentals, international student home-stay fees, and banked overtime.
- [14] The respondent seeks an order that the parties have joint custody and joint guardianship of the children, with their care to be shared on a 50/50 week on/week off basis, or alternatively, on a 3/4, 4/3 basis, with additional defined access for holidays and special occasions. Mr. S proposes to pay basic child support in accordance with s. 9 of the Guidelines, based on shared parenting of the children. With respect to special or extraordinary expenses, the respondent seeks an order that agreed s. 7 expenses be divided equally between the parties.
- [15] Mr. S opposes payment of retroactive child support on the grounds that he received no notice that Ms. S was seeking an order requiring him to pay retroactive child support until late in the trial; that there has been no blameworthy conduct on his part; and that there is no basis for imputing to him additional income for the years 2009, 2010 or 2011.
- [16] The court must determine what orders for custody and parenting time are in the best interests of the children having regard to their particular condition, means, needs and other circumstances.

BACKGROUND

- [17] When the claimant and the respondent separated at the end of June 2009, Mr. S left the family home and lived temporarily with friends while the claimant and the children remained in the family home.
- [18] At the time of separation, the parties were building a new home.
- [19] When the new house was completed in November 2009, the claimant and the children moved into that property. The respondent purchased and occupied the former family home.
- [20] Mr. S and Ms. B have cohabited in the former family home since July, 2010.
- [21] From July through November 2009, while Mr. S lacked suitable overnight accommodation for the children, his parenting time was limited to daytime access only under an agreed access schedule. From time to time, the claimant permitted Mr. S overnight access to take the children camping. Since his return to the former matrimonial home, Mr. S has sought equal parenting time with the children, which the claimant has refused.
- [22] In late 2009, the parties agreed that Mr. S's access would be increased to include one overnight access visit per week, in addition to the scheduled daytime access.

[23] On May 4, 2010, the parties attended a judicial case conference before Master Bouck, who granted a consent order providing access to Mr. S on the following schedule:

Week 1: Thursday 7:45 a.m. to Friday at 6:00 p.m.

Week 2: Wednesday at 7:45 a.m. to 6:00 p.m. and Thursday at 7:45 a.m. to Friday at 6:00 p.m.

[24] The May 4, 2010 consent order also provided for the respondent to pay the claimant monthly basic child support of \$1380, commencing January 1, 2010. The respondent has complied with that order, and continues to pay monthly child support of \$1380.

[25] On August 31, 2010, following mediation, the parties agreed to increase the respondent's access to two overnights per week on a two week rotation. Master Bouck pronounced a consent order which included the following terms:

Commencing August 9, 2010, the Respondent shall have regular access to the Children including but not limited to, on a two-week rotation:

Week 1: Thursday from 8:15 a.m. to Saturday at 8:15 a.m.

Week 2: Wednesday from 8:15 a.m. to 5:30 p.m., Thursday from 8:15 a.m. to 5:30 p.m. and Friday, from 8:15 a.m. to Sunday at 4:00 p.m.

This schedule will be reviewed by the parties on or after October 4, 2010, and is subject to any further Order of the court.

[26] The consent order of August 31, 2010 also amended the May 4, 2010 order to provide that:

In the event that one Party cannot care for the Children for a period of more than 60 minutes, the right of first refusal shall go to the other Party. The grandparents shall also be included for consideration in the right of first refusal. In the event that either party has an alternate caregiver for the Children for a period of less than 60 minutes, that caregiver shall not feed the Child, T.

The requirement that one parent offer the other the care of the children whenever they are unable to care for the children for a period of one hour or more has become a significant source of conflict between the claimant and the respondent.

[27] During August 2010, Mr. S advised the claimant that he expected his shifts to change in January 2011 and that the parties would therefore need to adjust his access time to accommodate his new work schedule.

[28] The respondent says that up to this time the claimant had raised no concerns about his ability to care for the children. Rather, she maintained that the children should not be away from her for more than two consecutive nights at a time.

- [29] In January 2011, the claimant, through her solicitor, (who was not counsel at trial), proposed a reduced access schedule by which Mr. S would have the children in his care for only two overnights in each two week period. The claimant asserted that if Mr. S did not accept her proposed schedule, then he would be denied all access.
- [30] When the claimant denied the respondent's access in contravention of the consent order of August 31, 2010, he applied for relief, and sought to increase his overnight access to six nights in every two week period.
- [31] On February 14, 2011, Mr. Justice Macaulay reinstated Mr. S's overnight access. The order of Macaulay J. provided that if the respondent could change his work schedule to the schedule in place in August 2010, then access would continue as provided in the August 31, 2010 order. Otherwise, access would be as follows:

Week 1: Sunday at 8:15 a.m. to Monday at 5:30 p.m. Saturday at 8.15 a.m. to Monday of Week 2 as set out below.

Week 2: Sunday to Monday at 5:30 p.m.

- [32] In the course of declining Mr. S's request to increase overnight access, Macaulay J. found little focus in Mr. S's affidavits on how he then met the needs of the children under the terms of the existing order, or on any detailed plan for meeting their needs under the order he sought. Macaulay J. thought that any further overnight access beyond the variation he ordered would be disruptive of the children's schedules because drop offs would have to be too early in the morning due to the early start to Mr. S's day shift in the first week.
- [33] Mr. S was unable to reinstate his previous work schedule. Accordingly, the schedule ordered by Macaulay J., which provides for one overnight access in Week 1 and two overnights in Week 2 has remained in force.

DISCUSSION AND ANALYSIS

CUSTODY AND PARENTING TIME

Custody and Parenting Time: Applicable Legal Principles

- [34] Section 16(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) confers jurisdiction on the court to make orders for custody of and access to children of the marriage.
- [35] The following provisions of s. 16 of the Divorce Act are also relevant to this proceeding:
- (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.
- [36] The court must determine custody and access based only on the best interests of the children, having regard to their condition, means, needs and other circumstances specific to their particular case. There is no presumption in favour of the status quo: *Nunweiler v. Nunweiler*, 2000 BCCA 300. Nor is there any presumption in favour of joint or sole custody. In each case the only issue is the best interests of the particular child, which must be determined in the particular circumstances of that case: *Robinson v. Flyk*, (1996) 28 B.C.L.R. (3d) 21 at paras. 28-30 (C.A.).
- [37] Similarly, where parents are in conflict and have difficulty communicating with each other, the court must in each case determine whether sole or joint custody is in the best interests of the children. In *M. (S. M.) v. H. (J.P.)*, 2011 BCSC 1084, the level of acrimony was such that court concluded at para. 227 that the only way to avoid continuing conflict was to give one parent the authority to make final decisions in the best interests of the children. Conversely, as L. Smith J observed in *T. (V.E.) v. T. (C.E.)*, 2009 BCSC 444 at para. 92:
- [92] Since the decision in *Robinson v. Flyk*, the courts of British Columbia have demonstrated a willingness to award joint custody and joint guardianship even in cases where there is acrimony and a lack of cooperation between parties, if the court concludes that such an arrangement is in the best interests of the child: see *Carr v. Carr*, 2001 BCCA 415, 18 R.F.L. (5th) 254; *Z. (E.) v. N. (S.)*, 2007 BCSC 471; *T. (R.S.) v. T. (R.S.)*, 2008 BCSC 890.
- [38] With these principles in mind, I turn to the particular facts of this case.

Custody and Parenting Arrangements: Application of Principles

The roles of the claimant and the respondent in the care of their children

- [39] Ms. S is devoted to her children. She has been their primary caregiver since birth, and has provided their primary residence since the parties separated. When each of the children were born, Ms. S took a one year maternity leave to stay home and look after each child. Before the parties separated, Ms. S took the lead role in the care of the children. She looked after most of the meal preparation and the children's medical appointments, and as they have grown older, she has arranged for many of their extracurricular activities. For his part,

before the separation, Mr. S helped out with the care of each child, particularly on days when the claimant had to work at her office and his shift work permitted him to remain at home.

- [40] Prior to the separation, Mr. S. worked every second weekend. He acquired a "quod" all terrain vehicle and spent most of his alternate weekends on quod expeditions with his friends. Before the separation, Ms. S bore almost the entire burden of caring for the children on weekends.
- [41] Since November 2009, when Mr. S purchased the former matrimonial home, he has been able to provide each of the children with their own rooms in familiar surroundings during his parenting time. Mr. S's home is only about a five minute drive from Ms. S's residence. Both homes are situated near the schools the children presently attend. Each parent has the means and the ability to provide the children with a comfortable home, and does so.
- [42] Mr. S loves his children, and they love him. He participates in the children's extracurricular activities, is interested in their education, attends parent teacher meetings, and has on occasion taken them to medical appointments when they have been in his care. Throughout their lives, Mr. S has devoted time to play with his children. He takes them camping, and enjoys teaching them physical skills, such as learning to ride bicycles.
- [43] Ms. G, one of T's teachers at St. Margaret's, testified that both parents were involved in their daughter's day to day schooling. She described the claimant and the respondent as two very involved parents who both care for T. and participate as much as they can in her education. Ms. G. said that T's attire and food were consistent and that she observed no marked change in T's behaviour when either parent brought her to school.
- [44] Ms. P., a neighbour and friend of Ms. S's, agreed in cross-examination that Mr. S was a good father, and said that she had no qualms about leaving her own children in the respondent's care when the children played together.
- [45] Ms. S, who meticulously prepares organic food for both children, and constantly monitors T's diet to ensure that it is gluten-free, expressed concern that Mr. S was not always sufficiently careful in overseeing T's food to guard her against the consumption of food containing wheat or gluten. Ms. S gave evidence about two occasions in the past when Mr. S inadvertently permitted T. to eat food containing gluten, which resulted in her vomiting.
- [46] Mr. S understands that his daughter suffers from an allergy to wheat and gluten and now ensures that she receives a gluten-free diet. I am satisfied that he understands the importance of protecting T. from exposure to products that would trigger her allergy, and that he now takes care to do so.
- [47] Aside from T's food allergy, the children are both healthy. T. and M. are each bright, resilient children who are doing well at their respective schools, and benefit from the time they spend in the care of each parent.

Communications and conflict between the parents since separation

- [48] The parties separated on June 30, 2009 when Ms. S learned that the respondent was in a sexual relationship with Ms. B, who was then a 20-year-old nursing student. The parties quarrelled bitterly at the time. Ms. S testified that at one point Mr. S told her that he wished he had his Glock service pistol at home, and if he did, he would put two bullets in her. Mr. S says that at a time of high conflict immediately following the separation he said words to her to the effect that "I would shoot you in the heart because you do not have a heart". The respondent acknowledges that what he said was entirely inappropriate. However, he denies that he intended to threaten the claimant. Ms. S did report this incident to the Police Department some 90 days after it occurred. The Department found her complaint of off duty officer misconduct to be unsubstantiated, noted that Mr. S had admitted making an inappropriate comment, and described the respondent's behaviour as a poor choice of words made under emotional circumstances.
- [49] Any statement by a police officer to the effect that he would shoot his spouse is clearly unacceptable. However, this appears to have been an isolated event which occurred at or about the time the parties separated, when both were emotionally distraught. On either party's account of the words spoken, it is apparent that at the time of separation, Mr. S. had difficulty in managing the anger he directed toward Ms. S. However, I find this incident has no bearing on the respondent's present ability to care for the children, and provides no basis for restricting his parenting time with T. and M. For her part, Ms. S. agrees that the respondent should have overnight access on the weekends and equal parenting time during vacations.
- [50] Following the separation, the claimant and the respondent saw a child psychologist, Dr. Charlotte Sutker, for assistance in managing their conflict and parenting their children. In December 2009, Dr. Sutker recommended that T. and M., who were then aged four and two, not be away from their mother for two consecutive nights because this might disturb their attachment to their mother. Dr. Sutker also stressed the importance of a routine, particularly for T., who was then scheduled to start kindergarten in the fall of 2010. During the winter and spring of 2010 while Mr. S was on Vancouver Olympics duty and then training for the Emergency Response Team, the parties, on Dr. Sutker's advice, agreed that Mr. S's overnight access would be restricted to one night per week.
- [51] After Mr. Justice Macaulay made his order of February 14, 2011, Mr. S proposed that parties attempt counselling once again. Ms. S insisted that Mr. S satisfy a number of conditions before she would agree to counselling. Those conditions included Mr. S completing the Parenting after Separation program and taking anger management counselling. The respondent took the Parenting after Separation program and also arranged for and received some counselling to assist him in his communications with the claimant. However, when Mr. S refused Ms. S's demand that she provide him a cell phone number where she could contact him, negotiations for the resumption of counselling broke down. Mr. S has insisted that the parties communicate by e-mail, rather than by telephone, as a means of minimizing

conflict.

- [52] The two major sources of conflict between the complainant and the respondent are Ms. S's strongly held view that the respondent's new partner, Ms. B, should have little or nothing to do with the care of the children, and the right of first refusal contained in the consent order pronounced by Master Bouck on August 31, 2010. By that provision, if one parent cannot care for the children for a period of more than 60 minutes during their parenting time, the other parent should be offered the care of the children. Ms. S insists that she have the children in any situation where Mr. S is unable to care for them for more than 60 minutes.
- [53] On May 25, 2010, both sources of acrimony came into play, generating a high level of conflict between the claimant and the respondent. Under the schedule then in effect, Mr. S had the care of the children on that day. He picked up T. and M. from Ms. S's residence at 8:15 a.m. and then drove T. to school. Mr. S was required to attend traffic court that morning. He dropped M. off at his residence and left her in the care of Ms. B.
- [54] Ms. S happened to see Mr. S alone in his police vehicle that morning. She sent a text message to Mr. S to inquire about M.'s whereabouts. Mr. S told her that M. was with his mother. Ms. S then called the respondent's mother who at that point was driving down to Victoria from her home in Ladysmith to look after M. When she told Ms. S that she was not yet with M., the claimant dispatched another text message to Mr. S informing him that she was driving to his home where she intended to pick up M.
- [55] At that point, Mr. S telephoned Ms. B, told her Ms. S was on her way to pick up M., instructed her to lock the doors, and said that he was on his way home. When Ms. S arrived, she approached the back door, and demanded that Ms. B let her in so that she could pick up M. By the accounts of both Ms. S and Ms. B, M. became upset and began to call for his mother. According to Ms. S, after five or six minutes, Ms. B opened the door. When she did so, the claimant picked up M. and told Ms. B in no uncertain terms that she should stay away from her children, and then left.
- [56] Ms. B testified Mr. S had asked her to watch M. until his mother arrived. Shortly after Mr. S had called her to alert her that Ms. S was on her way, Ms. B heard pounding on the back door. Ms. B testified that when she did open the door, Ms. S called her profanities, picked up M., and continued to swear at her. On the preponderance of the probabilities, I find that this event occurred as Ms. B described it, and that Ms. S lost her temper and likely swore repeatedly at Ms. B. Ms. S, who is highly protective of her children, could see and hear M. crying while she was denied entry. She regards Ms. B with disdain and was no doubt angry that Mr. S had not left M. in her care while he went to traffic court that morning.
- [57] Mr. S arrived in his police cruiser just as Ms. S was leaving with M. He followed Ms. S for at least two blocks. Ms. S called the Police Department and made a complaint that Mr. S was using his police vehicle for an improper purpose. Very shortly after she called the Department, Mr. S broke off his pursuit of her vehicle.

- [58] Ms. S's complaint was investigated by the Police Department. Mr. S, who accepted responsibility for his actions, received a reprimand in the form of advice as to future conduct.
- [59] Another example of Ms. S's strict insistence on the exercise of her right of first refusal occurred on July 15, 2011. Mr. S had the children in his care that Saturday morning. He was scheduled to take T. to ice skating and wanted to leave M. with Ms. B at his home while doing so. The night before Ms. S had sent an e-mail to the respondent in which she asserted that if M. did not accompany his father to the ice rink she would call a peace officer to retrieve M. Again, Ms. S was concerned that M. would be left in Ms. B's care for more than one hour. Mr. S left M., who was still asleep, in his home with Ms. B while he took T. to the skating rink. Shortly after he delivered T. to the rink, and she had started her lesson, Ms. S arrived and immediately accused him of breaching her right of first refusal. In the result, Mr. S left the ice rink with T. and returned to his home within 60 minutes of his departure.
- [60] Neither Ms. S's insistence that Mr. S comply with the 60 minute rule to the minute, no matter what the circumstances, nor the resulting conflict which often occurs in the presence of the children when Mr. S fails to do so, serves the best interests of the children.
- [61] On other occasions, communications between these parties have been equally fraught. For example, on May 24, 2011, the parties arranged for Mr. S to drop off the children at the home of Ms. S's mother at 4:30 p.m., so that Ms. S could take them to their ice skating class that evening. About 13 minutes after the agreed drop-off time, Ms. S sent an e-mail to Mr. S inquiring where he was. One minute later, not having heard from him, she sent a follow-up message stating that she was then calling the police. There is no evidence that she did so on that occasion.
- [62] Several days before the commencement of this trial, Ms. S sent an e-mail to Mr. S to inquire if he had arranged for his mother to care for the children on the first day of trial. Thirty-six minutes later, she informed Mr. S that if he had not confirmed within 24 hours that his mother would care for the children, she would provide an order to the police for a peace officer to attend at his residence at 8:00 a.m. on the morning of the first day of trial. Happily, arrangements were made for the respondent's mother to look after the children and a minor crisis was avoided.
- [63] At times, the complainant and the respondent are able to communicate effectively respecting the children. For example, they have agreed on their choice of school for M., on some but not all section 7 expenses, and occasionally, on adjustments or changes to their respective parenting times with the children during holidays. Their face to face communications tend to be more effective if they meet at school or other extra-curricular events when Ms. B is not present.

- [64] There is some evidence that as time has passed since the separation, direct communications between the claimant and the respondent have improved to a degree. Ms. K, a long-time friend of the claimant, testified she had overheard heated arguments between the claimant and the respondent on at least 10 occasions, but agreed in cross-examination that most of these arguments had occurred in the year following separation.
- [65] Although the claimant recognizes that Mr. S cares deeply for his children, she regards him as irresponsible at times, and as more interested in participating in "fun" activities with the children than shouldering the day to day burden of their care. She points to early lapses on the part of Mr. S in ensuring that foods for T. were gluten-free and his failing to attend an appointment for T. in January 2011 with an ear, nose and throat specialist. Ms. S asserts that respondent failed to administer a nasal spray for T. until he received a note from a specialist, but acknowledges that he then complied with the specialist's directions for her treatment. For his part, Mr. S says that he decided not to attend the appointment with Ms. S and the specialist in order to avoid conflict with her. It is common ground that once Mr. S heard from the specialist about the proper administration of T.'s medication, he ensured she received it.
- [66] Sometimes Mr. S puts his own interest in maximizing his time with his children ahead of their best interests. In May 2011, T. underwent day surgery. Both parents attended in the hospital waiting room. Mr. S was scheduled to have T. until 5:30 p.m. that day. He wanted to have T. spend the rest of the afternoon with him following her release from surgery at around 1:30 p.m. Initially, Mr. S failed to appreciate that his five year old daughter would want to go home with her mother and primary care giver to recover from her operation, and that it was more important that she do so than that he have all of the time allocated to him that day under the access schedule then in effect. Ultimately, at the urging of one of the nurses, he deferred to Ms. S's request that she care for T. for the rest of the day.
- [67] In early January 2012, after she won a travel voucher, Ms. S booked a four day trip to Disneyland with the children during the first week of Spring break. She requested that Mr. S provide her with a letter permitting her to travel with the children to California. Mr. S, who had previously booked time off during the first week of Spring break to spend with the children, initially refused his consent. Although he recognized that the trip to Disneyland would benefit the children, he was not prepared to agree to Ms. S taking T. and M. out of the country unless he was assured they would spend equal time with him over the Spring break. Again, Mr. S put his own interest in achieving equal time with the children ahead of the children's interests. At the time he withheld his permission, Mr. S did not believe that he would be able to reschedule his own time off to the second week of Spring break.

- [68] During the trial, Mr. S relented, and consented to Ms. S taking the children to Disneyland at the time she had booked. Had Ms. S discussed dates for the Disneyland trip with Mr. S before she made her travel arrangements, and had Mr. S demonstrated that he was willing to compromise his own plans where it was in the children's interest to do so, unnecessary conflict over Spring break parenting time would have been avoided.
- [69] The claimant and the respondent have two very different approaches to parenting. Ms. S is highly protective of the children, organizes their meals, activities and schedule with precision and places a high value on ensuring that the children have an established routine during the school week with regular bedtimes, meal times and adequate time for extracurricular activities, and in T.'s case, homework. Mr. S takes a somewhat more casual approach to the care of the children. On occasion, he lets the children stay up later than their regular bedtime. He serves them non-organic foods, and permits snacks of which Ms. S does not always approve. With respect to discipline, Ms. S sets expectations for her children and takes a gentle but firm and consistent approach in reinforcing those expectations. At times, Mr. S is prepared to defer to his children's whims. In cross-examination, the respondent recalled an occasion when Ms. S called at about 10 o'clock in the morning to speak with T. At the time, T. was watching a movie with Ms. B. Mr. S testified he did not call T. to the telephone because he did not want to interrupt her and did not think that it was in her best interest to do so. Mr. S explained that T. does not like to be interrupted while she is watching movies. T.'s interests would have been better served on this occasion by Mr. S facilitating the telephone contact between T. and her mother.
- [70] Mr. S submits that increasing his parenting time with the children would permit him to develop a routine with the children, allow him to develop his own parenting style, and would enable him to share more responsibility for the children's extracurricular activities beyond taking them to skating every second Saturday morning.

Degree to which children have bonded with each parent, and with other persons

- [71] Because both children have been in the primary care of their mother since birth, at ages six and four, they have a particularly close bond with their mother, who has nurtured them since infancy. Ms. S is the more sensitive of the two parents to the emotional needs of the children.
- [72] T. and M. also have a strong bond with their father and have benefitted from their time with him. However, the claimant has borne the largest share of the mundane, day-to-day care of the children, and by doing so, has developed her deep bond with them.

- [73] Ms. S's sister, M.S., lives with Ms. S, assists her in caring for the children and has developed an attachment to them which they reciprocate. Ms. S also has the assistance of her 70-year-old mother, who lives in Victoria, and helps out with child care on some days when Ms. S is unable to work from her home. The children benefit from their relationship with Ms. S's mother, who has taught them some Italian, and introduced them to their Italian heritage on the maternal side of their family.
- [74] For his part, Mr. S is able to call upon his mother, who lives in Ladysmith, for limited assistance with child care.
- [75] Ms. B is now involved in these children's lives. She has been in a relationship with their father for about three years, and has shared his home for the last two years. Ms. B is a full-time nursing student, entering her third year of the four-year nursing program at Camosun College. She intends to pursue a career in pediatric nursing. As a full-time student in a professional training program, the time she has available to assist with the care of the children is limited. She describes herself as being "pretty close" to M. and T. Ms. B has accompanied the children and Mr. S on camping trips and has assisted with T's swimming and arts and crafts activities. Ms. B impressed me as a mature young woman who is capable, when her time permits, of assisting Mr. S with the care of the children. She does not hold herself out as a surrogate mother for the children, and Mr. S has not attempted to cast her in that role. The conflict between the parties will be reduced, and the interests of the children will be advanced when Ms. S accepts that for so long as the relationship between Mr. S and Ms. B endures, Ms. B will be involved in the care of the children, but will never displace her as the children's mother.
- [76] Ms. B testified that Mr. S takes the primary responsibility for the children, although she helps with meals, has learned to prepare a gluten-free diet for T, and helps out with the care of the children outside of her class time and between terms.
- [77] Mr. S and Ms. B both said that they are committed to each other and have a strong relationship. However, both also testified that in the spring of 2011, when Mr. S was particularly affected by the stress of this litigation, they agreed that they would "slow down" their relationship, and each was free to date others. Mr. S, with the knowledge of Ms. B, had an intermittent sexual relationship with another woman, which terminated by the early fall of 2011. At that time, Mr. S and Ms. B decided that they would remain together. Counsel for Ms. S submits that Mr. S and Ms. B do not have a stable relationship, and that this is a factor for the court to consider in determining what custodial arrangements are in the children's best interests. This court is not in a position to predict the longevity of the relationship between Mr. S and Ms. B. In my view, the court must determine the best interests of the children taking into account the circumstances as they exist at the time of trial. At this stage, Mr. S and Ms. B have a continuing relationship. Ms. B is willing and able to provide some assistance to Mr. S in caring for the children.

The Children's need for stability

- [78] At ages six and four, T and M need a consistent routine, particularly during the school week. Ms. S, by virtue of her role as the children's primary caregiver since infancy is in the better position to provide that routine. Her flexible work schedule and the availability of her sister to assist with child care provide Ms. S with the ability to meet the needs of her children throughout the week.

Conduct of the Parents

- [79] One of the ways in which Ms. S seeks to exercise her control over the care of the children occurs when Mr. S drops the children off at her residence after overnight access. Due to the difficulties that Mr. and Ms. S often experience in communicating with each other, Ms. M.S. meets Mr. S and the children. Ms. S insists that Ms. M.S. go through the contents of the children's back packs to ensure they have returned with all of the clothing they departed with. This exercise is frequently performed in the driveway, in the presence of the children. If Mr. S has not ensured that the children have returned with every item, Ms. S who often waits in the garage while the exchange takes place, will immediately take him to task. At times, this has led to shouting matches between the parents in the presence of the children.
- [80] Mr. S testified that when the children exit the car, Ms. M.S. meets them, and then goes through a list of all of their clothes in the children's presence. The children are watching while their aunt questions Mr. S about whether he has returned everything with the children. This behaviour sends a message to the children that their father is not entirely responsible or trustworthy. Because Mr. S's home is within a five minute drive of Ms. S's residence, in the event that any important item of clothing is overlooked, it is a simple matter for him to retrieve it.
- [81] Following the separation and until at least July 30, 2010, Ms. S retained access to an e-mail account in Mr. S's name which she had opened for him while they were together. Ms. S testified that she regarded the account as hers. She had no qualms about reading e-mails exchanged between Ms. B and Mr. S, or privileged e-mail correspondence between Mr. S and his solicitor. Ms. S also accessed text messages between Ms. B and Mr. S of a highly personal nature. This conduct led to Mr. S's refusal to provide Ms. S with a personal cell phone number and to insist that their communications take place by e-mail through an e-mail address on an account to which she did not have access. Ms. S's access to Mr. S's private communications with both his new partner and his solicitor created yet another impediment to effective communications between these parties.
- [82] I mention these matters to emphasize again that both parents have contributed to the conflict that has inhibited their communications, and have done so in ways that undermine the best interests of their children.

- [83] Aside from the period of approximately three weeks in early 2011 when Ms. S denied the respondent access to the children, she has generally facilitated his access to T and M, and agrees that Mr. S should have overnight parenting time with the children on weekends.

Financial Circumstances

- [84] With annual incomes of \$78,704.28 in the case of the claimant and at least \$103,877.08 in the case of the respondent, these parents are able to ensure that their children enjoy a comfortable standard of living. While the means of the children is one factor the Court must take into account in determining custody and access under s. 16(8) of the Divorce Act, that factor is neutral here, where the children's means would not be significantly affected by an award of sole custody to one parent as opposed to an order for joint custody.

Preferences of the Children

- [85] While these young children have witnessed the conflict between their parents, Mr. and Ms. S have both endeavoured to insulate the children from this litigation. Further, at ages six and four, their views have not been solicited. However, the evidence of the claimant and the respondent is consistent on the point that the children enjoy their time with each parent. Mr. S's mother gave evidence to the same effect, as did the other witnesses who had observed the children with their parents, including Ms. P and Ms. K, Mr. M., a former neighbour called by Mr. S, and Mr. W, a colleague of the respondent.

Maximum Contact Principle

- [86] Under s. 16(10) of the Divorce Act, the Court must consider the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child. Here, it is in the children's interest that their parenting time with their father be increased beyond the present three overnights every two weeks provided that can be accomplished without unduly disrupting their weekly routine and in a manner that takes into account restrictions on Mr. S's parenting time imposed by his shift work. Ms. S is able to arrange her time to accommodate her attendance throughout the week at the children's activities, which include gymnastics, skating, and swim classes for both children, as well as ballet for T. Mr. S's shift schedule does not permit him to attend many of these activities, particularly on those days he works afternoon shifts to midnight or later. As I have already stated, Ms. S agrees that Mr. S should have parenting time with the children on weekends and equal parenting time during holidays.

Conclusion on Custody and Parenting Time

- [87] Both parents are intelligent, are devoted to their children, and have the capacity to cooperate in making decisions relating to the children's care. T and M have strong bonds with each of their parents, who are both capable of making positive contributions to their children's welfare. Although their communications have often degenerated into conflict, the claimant and the respondent each acknowledge that there are occasions when they communicate effectively with each other on matters relating to the children's care.
- [88] If the Court were to make an order granting sole custody to Ms. S, the opportunity for Mr. S to have a voice in significant decisions relating to the children would be reduced. An order for joint custody and joint guardianship will ensure that both parents are engaged in all major decisions respecting the care and upbringing of T. and M. In my view, despite the difficulties both parents have experienced in communicating with each regarding the children, an order for joint custody and joint guardianship on the Joyce model is in the best interests of the children.
- [89] I find that it is also in the best interests of T and M that Mr. S's parenting time with them be increased while at the same time they continue to derive the benefits from the familiar and well organized routine that their mother provides to them during the week. That balance may be achieved by increasing Mr. S's parenting time in week one so that he will have the children from 8:15 a.m. on Sunday morning, when he will pick them up from Ms. S's residence, to Tuesday morning, when he will deliver them to their respective schools. During week two, Mr. S will continue to have the children in his care from Saturday at 8:15 a.m. to Monday at 5:30 p.m.
- [90] Mr. S has testified a minimum of two officers are on shift in the traffic division at any time, and that another officer can substitute for him while he delivers the children to their schools. Despite the 6:30 a.m. start to his day shift on Tuesday mornings of week one, he will be able to arrange to drop off the children at their schools on Tuesday mornings.

CHILD SUPPORT

Basic Child Support

Retroactive Child Support

- [91] In *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231, the Supreme Court of Canada stated the legal principles applicable to any claim for retroactive child support. The Court began its analysis by emphasizing that child support is the right of the child; that following the breakdown of the marriage, child support should, to the extent possible, provide children with the same standard of living they enjoyed when their parents were together; and that under the Guidelines, the specific amount of child support will vary as the income of the payor parent fluctuates. Where, as here, there is an existing order for child support, the support obligation of the payor parent, while presumed to the amount ordered by the Court, will not

necessarily be frozen in that amount because the dependent children always have the right to receive child support in an amount commensurate with the payor's income: D.B.S. at para. 68.

- [92] The Court has jurisdiction to make a retroactive award of child support under s. 15.1 of the Divorce Act: D.B.S. at para. 83.
- [93] In exercising its discretion whether to make a retroactive award, the court should take "a holistic view of the matter" and must decide each case on the basis of its particular facts. In each case, the payor parent's interest in certainty must be balanced against the need for fairness to the child and for flexibility: D.B.S. at paras. 96, 99.
- [94] The factors that a court should consider before making an award of retroactive child support include whether the claimant has a reasonable excuse for why support was not sought earlier, the conduct of the payor parent, the circumstances of the children, and whether a retroactive award will cause hardship to the payor parent: D.B.S. at paras. 100, 105, 110 and 115.
- [95] Where the court determines that a retroactive award is appropriate, as a general rule, the award will be retroactive to the date effective notice was given to the payor parent: D.B.S. at para. 118. After noting that under s. 25(1) (a) of the Guidelines, the recipient parent's request for financial information is limited to three years, the Court also stated, at para. 123, that it will usually be inappropriate to make a support award retroactive to a date more than three years before the payor parent receives formal notice of the claim.
- [96] Here, on the last day of trial during closing submissions, the claimant advanced a claim for retroactive child support from July 1, 2009, the date of separation, to December 31, 2011 in the amount of \$19,540. Ms. S submits that the court should impute to Mr. S additional income for 2009, 2010 and 2011. She says the respondent's annual income in each of those years should include gross rather than net rental income from his basement suite, undeclared income of \$8400 per year from international student home-stays, imputed income of \$500 per month for room and board for Ms. B, and undeclared banked over time for 2010 and 2011.
- [97] Pursuant to the consent order of Master Bouck of May 4, 2010, Mr. S has paid monthly child support \$1380, retroactive to January 1, 2010.
- [98] The claimant maintains that Mr. S was under an obligation to pay child support based upon his total income since the separation, and that she is now entitled to a lump sum award for his alleged underpayment. Ms. S says that the respondent has had notice of her claim for child support since she commenced this proceeding on January 25, 2010. She relies upon *Purdue v. Purdue*, 2009 NBQB 303, where Clendening, J. stated at para 42:

The divorce petition was filed by Mrs. Purdue May 5, 2006 so Mr. Purdue was clearly put on notice at that time of the child support obligation and the request for retroactive child support. Child support is the right of the child and protecting that right is the court's responsibility.

[99] As the court noted in Purdue at para.41, that petition included a claim for retroactive support. Here, there is no pleading of retroactive child support in the statement of claim.

[100] From May 2010 through January 2012, the claimant accepted monthly child support payments of \$1,380 from the respondent without objection. I find that at no time before the last day of the trial did Ms. S provide the respondent with any notice of her intention to claim retroactive child support.

[101] Ms. S received the respondent's financial statements filed July 13, 2010, May 12, 2011 and September 19, 2011. Those financial statements did not disclose any income received by Mr. S from international home-stay students. However, they did show an increase in his annual income from \$90,780 in 2010 to \$103,877 in 2011. Mr. S's financial statements also show that for 2010 he included his gross rental revenues of \$11,700 in the calculation of his annual Guidelines income, and that in 2011, he disclosed gross rental income of \$12,000, but used net rental income of \$7,000 in calculating his 2011 Guidelines income. Ms. S had sufficient information to seek advice from her solicitors, and if she so chose, to make a claim for a retroactive adjustment to child support well before the conclusion of this trial.

[102] I find that Mr. S did not receive effective notice of Ms. S's claim for retroactive child support until January 27, 2012.

[103] The claimant has provided no reasonable excuse for her delay in claiming retroactive child support. Ms. S, who is not hesitant to assert her rights, has not claimed that she feared a vindictive response from the respondent, or that she lacked the financial or emotional fortitude to claim retroactive spousal support at an earlier stage. I find that Ms. S's delay of 18 months from the time she received Mr. S's first financial statement in seeking a retroactive adjustment of child support is unreasonable. Furthermore, because Ms. S did not give notice of her claim for retroactive child support until the last day of trial, the respondent was denied the opportunity to call evidence respecting the alleged additional sources of income which Ms. S now says should be imputed to him.

[104] In D.B.S. at para. 106, the Court characterized as blameworthy conduct anything that privileges the payor parent's own interests over his children's right to an appropriate amount of support. A payor parent cannot conceal increases in his income from the recipient parent in order to avoid larger child support payments. However, as the Court explained at para. 108:

On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. ... the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. ...

[105] Here, Mr. S paid all of the child support he was required to pay pursuant to the consent order of May 4, 2010. He did not conceal his rental income or the bases upon which he calculated that income. Mr. S testified that he received advice from his accountant that the income he received from home-stay students was not taxable income and that he did not have to declare it. I accept Mr. S's testimony that he relied upon his accountant's advice and find that he did not deliberately conceal any source of income from the claimant. I find that Mr. S did not engage in any blameworthy conduct that would warrant the retroactive payment of child support for the period of July 1, 2009 through December 31, 2011, particularly in circumstances where Mr. S only received effective notice of this claim on the last day of trial.

[106] There is no evidence that the children suffered any hardship during the period for which Ms. s claims retroactive child support, or that their needs went unmet.

[107] For reasons I will briefly explain, if retroactive support were ordered, it would likely be in an amount substantially less than that claimed. Accordingly, a retroactive award would probably not result in hardship to Mr. S. I find it unnecessary to make any conclusive determination of hardship because in my view the other factors I have already discussed determine the result of this application.

[108] The bases upon which the claimant invites the court to impute additional income and the claimant's position on the amounts of such additional income to be imputed are in many instances, not persuasive. Ms. B did not begin to cohabit with Mr. S until July 2010. Nonetheless, the claimant has attributed \$500 per month to Mr. S's income for Ms. B's notional room and board from July 2009 through December 2011. The claimant has provided no authority for the imputation of income to a payor spouse for room and board for a new partner cohabiting with that spouse. Further, as counsel for the respondent submits, there is no evidence to suggest that Ms. B is occupying a portion of Mr. S's residence that could be rented to generate income. The respondent rents a basement suite to a tenant, and also has an international student living with him from time to time. In all of these circumstances, I would not impute income to Mr. S for Ms. B's room and board.

[109] With respect to international exchange students, counsel for the claimant read in questions 65 to 67 from Mr. S's examination for discovery where the respondent gave evidence that he had one student per month, on and off, since January 1, 2010 and that he received \$700 per month when an international student was placed in his home. There was no evidence at trial of the number of months that Mr. S actually had a home-stay student residing with him in 2010. The claimant proposed that additional income of \$8,400 per year be imputed

to Mr. S for home-stay students. In 2011, Mr. S did have an international student during several months of the year for which he received income of \$3,615.72.

- [110] With respect to banked overtime, the claimant submits the respondent's income for 2010 should include an additional \$4,263 as the cash value of banked overtime. The evidence at trial was that both before and after separation Mr. S never received a cash payment for banked overtime, but instead took time in lieu. The cash value of the banked overtime which Ms. S says should be attributed to Mr. S for 2010 was never received by him. While Ms. S has an arguable case that banked overtime represents income that was available to Mr. S if he chose to take it in cash, this was not a case where a payor parent changed his use of banked overtime after separation in order to reduce his Guidelines income and child support obligations.
- [111] Taking into account all of these factors, and giving the most weight to Ms. S's unreasonable delay in claiming retroactive child support, the absence of blameworthy conduct on the part of Mr. S, the circumstances of the children, and the effective date of notice to Mr. S, I exercise my discretion not to make an award of retroactive child support for any period prior to January 27, 2012.

Ongoing Child Support

- [112] In his most recent financial statement sworn September 16, 2011, Mr. S reported total annual income of \$103,877.08. In addition to that amount, which consists of employment income of \$96,877.08 and rental income of \$7,000, Mr. S also received income in 2011 from home-stay students totalling \$3,615.72. That additional income was available to Mr. S for the purpose of meeting his obligations to support his children. For the purpose of determining Mr. S's 2012 Guidelines income, I would impute to him an additional \$3,600 for home-stays and determine his Guidelines income to be \$107,477.
- [113] Again, based upon the most current financial information available at the time of trial, as set out in Ms. S's financial statement sworn October 4, 2011, I find the claimant's Guidelines income to be \$78,704.28.
- [114] Under the current Guidelines, the amount of basic child support payable for two children by a payor parent with an annual income of \$107,477 is \$1,627. Commencing February 1, 2012, and continuing on the first day of each and every month thereafter, Mr. S will pay basic child support to Ms. S in the amount of \$1,627. Mr. S has been making monthly payments of \$1,380. The amounts already paid by Mr. S since February 1, 2012 may be deducted from the amounts he owed for the period February 1, 2012 through August 31, 2012.

Special or Extraordinary Expenses

[115] The claimant and the respondent have agreed that special or extraordinary expenses which they have both approved will be shared equally, rather than in proportion to their respective Guidelines incomes. For 2011, special or extraordinary expenses which the parties shared equally included pre-school fees for M. and ice skating, ballet and some gymnastics lessons for the children.

[116] At trial, Ms. S claimed \$3,656.19 for Mr. S's unpaid one-half share of special and extraordinary expenses for 2011. Mr. S paid \$146.04, leaving a disputed balance of \$3,510.15. That amount represented Mr. S's one half share of the following expenses:

Skating summer camp for T.

\$306.88

Sylvan Learning tutorials for T.

\$947.50

Gymnastics for T.

\$265.93

St. Margaret's school tuition

2011-2012

\$5,500.00

[117] Mr. S refused to contribute to amounts claimed for skating summer camp, gymnastics and Sylvan Learning, on the basis that he was not consulted before these expenses were incurred. He declined to contribute to T.'s private school fees for 2011-2012 on the ground that he, and for that matter Ms. S, can no longer afford to pay this amount for private school tuition.

[118] In *Abelson v. Mitra*, 2008 BCSC 1197, Brine J. discussed the principles applicable to the payment of special and extraordinary expenses at paras. 50 through 54:

[50] The obligation for special and extraordinary expenses is found in the Guidelines. The applicable sections are as follows:

3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
 - (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
 - (b) the amount, if any, determined under section 7.

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
 - (b) that portion of the medical and dental insurance premiums attributable to the child;
 - (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
 - (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
 - (e) expenses for post-secondary education; and
 - (f) extraordinary expenses for extracurricular activities.
- (1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means
- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
 - (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

- [51] Section 7(1.1) was added to s. 7 in May 2006. It defines and limits the term "extraordinary expenses" for the purpose of s. 7(1)(d) (educational expenses) and s. 7(1)(f) (extracurricular activities).
- [52] In *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39, 57 B.C.L.R. (3d) 186 (C.A.), a decision pre-dating the enactment of s. 7(1.1), the B.C. Court of Appeal considered the meaning of "extraordinary" found in ss. 7(1)(d) and (f) and set out a two-stage enquiry for the court to undertake when considering whether to award an amount under s. 7. In an oft-quoted passage, Prowse J.A. said the following at ¶81-82:
- [81] In the result, I conclude that, in deciding whether an expense, or the totality of expenses claimed on behalf of children under s. 7(1)(f) are extraordinary, the court should take into consideration the combined income of the parties, as well as the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the children, and the overall cost of the activities. This list is not intended to be exhaustive, as considerations may arise in other cases which may also be relevant. I note that in the only other decision of this Court dealing with s. 7(1)(f), *Cochrane v. Zarins* (1998), 36 R.F.L. (4th) 434, the Court concluded that a particular child's talents are a relevant factor in determining whether an expense for an extracurricular activity is extraordinary.
- [82] As earlier stated, once an expense or expenses are found to be extraordinary it is necessary for the court to proceed to determine whether the expenses are necessary in relation to the children's best interests and reasonable, having regard to the means of the spouses and those of the child, and to the family's spending pattern prior to separation. There appears to be a consensus in the authorities dealing with s. 7(1)(f) that those questions do not need to be addressed until the expense or expenses in question have been found to be extraordinary. That would also be true of "extraordinary" educational expenses under s. 7(1)(d). With respect to the other expenses included under s. 7(1), which fit under the rubric of "special" expenses as that word is used in the heading of the section, the expenses need not be extraordinary, but they must meet the tests of necessity and reasonableness.
- [53] As mentioned, since *McLaughlin* was decided, s. 7(1.1) has been added to the Guidelines. Under s.7(1.1)(a) the court is first required to consider whether the income of the requesting spouse, including any child support received, can reasonably cover the expense claimed, or whether it exceeds her or his ability to pay without any consideration of the factors enumerated in s. 7(1.1)(b). If the income cannot cover the expense, it is, in effect, deemed to be extraordinary and the analysis then turns to a consideration of the factors enumerated in s. 7(1) which include the best interests of the children and the necessity and reasonableness of the expense taking into account the parties' means and pre-separation spending pattern.

- [54] If, under s. 7(1.1)(a), the income can reasonably cover the expense, it may still be found to be extraordinary by considering the factors set out in subsection b(i) to (v). The list of factors is not exhaustive: s. 7(1.1)(b)(v). Again, if the expenses are considered extraordinary under s. 7(1.1), the court must then analyse the "best interests," "necessity" and "reasonableness" factors set out in s. 7(1).
- [119] Extraordinary expenses for education and extracurricular activities fall within s. 7(1)(d) and (f) of the Guidelines.
- [120] Here, Ms. S agreed at trial that she had not consulted Mr. S before incurring the Sylvan Learning costs of \$947.50, and confirmed that she was not seeking a contribution from the respondent to that item. Accordingly, Mr. S will not share that cost.
- [121] The amounts claimed for T's 2011 skating summer camp, and for the gymnastics expense are modest, and are reasonable having regard to the combined incomes of the parties. Ms. S did not consult Mr. S before incurring the expense for the summer skating camp for T, which conflicted with the respondent's summer parenting time with the children. Mr. S will not be required to share that expense. Both parents agree that T benefits from gymnastics. Although Mr. S was not consulted before this expense was incurred, the parties have generally shared equally gymnastics expenses for the children, and there is no evidence that on this occasion Ms. S's failure to seek Mr. S's approval in advance interfered with any activity he had planned for the children. Accordingly, Mr. S will pay Ms. S \$132.87 for his equal share of this expense.
- [122] With respect to St. Margaret's tuition, I find the school fees in the amount of \$5,500 exceed any amount that Ms. S could reasonably pay without contribution from the respondent. Ms. S's expenses, as recorded in her financial statement, include monthly expenses of \$2,757 for mortgage payments, \$867 for child care, and \$1000 for food. She attributes the very high food expense to the special dietary requirements for T. Her annual expenses substantially exceed her annual income.
- [123] Mr. S has sworn in his most recent financial statement that he has annual expenses of \$114,000, which also exceed his Guidelines income of \$107,477. Both parties finance some of their expenses through consumer credit or loans from their parents.
- [124] T. has attended St. Margaret's since September 2009. The claimant and the respondent agreed to place T at St Margaret's for her pre-kindergarten year, and to share equally her 2009-2010 tuition expenses.
- [125] In December, 2009 Mr. S informed the claimant that he was opposed to T's enrolment at St. Margaret's for 2010-2011, her kindergarten year. He took the position that with the increased cost of maintaining a separate household following separation, he could no longer afford the cost of T's private school tuition. However, when he learned it was too late to register her at another school, Mr. S agreed to pay, and did pay his one-half share of T's kindergarten tuition for the 2010-2011 school year.

- [126] For the 2011-2012 school year, Ms. S obtained a bursary for T, which reduced her tuition costs for grade one from \$11,000 to \$5,500.
- [127] Despite the objection of Mr. S to T's continued attendance at St. Margaret's, Ms. S made a unilateral decision that T would attend for grade one, commencing in September 2011.
- [128] Mr. S believes both children should have equal educational opportunities, and that the parties cannot afford to send both children to a private school charging fees approaching \$12,000 per year. He believes both children would benefit from attending Pacific Christian School, where M is presently enrolled, and where tuition would be \$650 per month for both children.
- [129] T undoubtedly benefitted from her attendance at St. Margaret's, where she completed grade one in familiar surroundings and among friends, and with dedicated teachers. However, there is no evidence that she has educational requirements that make her attendance at St. Margaret's necessary, or that her dietary needs could not be monitored at another school. Pacific Christian School and the local public elementary school are both located within a short distance of the homes of each parent. There is no evidence that the education T would receive from either school would place her at a disadvantage. The claimant has not shown that this expense was necessary.
- [130] In my view, having regard to the expenses that each parent already bears, sharing the unsubsidized cost of T's grade one tuition would impose an unreasonable financial burden on each party. However, the bursary has reduced T's tuition for 2011-2012 by half, to \$5,500. At or about the same time that Mr. S first raised his objection to the cost of T's private school tuition, he spent \$5,000 to purchase a time-share in Mexico. He has also found the resources to travel to Las Vegas since the separation.
- [131] In all of the circumstances, and taking into account the parties' pre-separation agreement that T attend St. Margaret's, and the bursary obtained by Ms. S for 2011-2012, I find that it is reasonable for the respondent to bear an equal share of that expense in the amount of \$2,750, for the 2011- 2012 school year.

Right of First Refusal

- [132] The one hour right of first refusal is a source of conflict between the parents, and by unduly disrupting Mr. S's parenting time with the children, does not serve their best interests. However, if either parent is unable to care for the children for more than three hours, and if the grandparents, Ms. M.S. on Ms S.'s side, or Ms. B on Mr. S.'s side are not available to care for them, in my view it would be in the children's best interests that the other parent have a right of first refusal to care for them. In order to make this arrangement work, both parents will need to cooperate, communicate with each other in advance about alternate care arrangements during their parenting time, and show some flexibility.

ORDERS

[133] I make the following orders:

1. The claimant and the respondent shall have joint custody and joint guardianship of the children.
2. The claimant and the respondent shall be joint guardians of the estates of the children.
3. In the event of the death of either parent, the remaining parent will be the sole guardian of the children.
4. Each parent is responsible for the day to day care of the children when the children are in their custody, and is obliged to advise the other parent of any matters of a significant nature affecting the children.
5. Each parent is obliged to discuss with the other parent any significant decisions to be made concerning the children, including the children's health, except in emergency situations, their education and their general welfare, and each parent is obligated to try to reach agreement with respect to those significant decisions.
6. In the event that the parents cannot reach an agreement with respect to any significant decision concerning the children, either parent shall have the right, under s. 32 of the Family Relations Act, to apply to the court for a determination of the issue.
7. Each parent shall have the right to obtain information concerning the children directly from third parties, including teachers, counsellors, medical professionals, third party caregivers, and those involved in organized activities in which the children are enrolled.
8. The parties shall provide each other with contact information for all third parties involved in the activities or care of the children.
9. Commencing immediately, the respondent shall have regular parenting time with the children, including, but not limited to, on a two week rotation:

Week 1: Sunday from 8:15 a.m. to Tuesday morning, when the respondent will deliver T. and M. to their respective schools; Saturday from 8:15 a.m. to Monday of week 2 as set out below.

10. Week 2: Sunday to Monday at 5:30 p.m.

Aside from the Tuesday morning drop-offs at the children's schools during the school year, all pick-ups and drop-offs will be at the claimant's residence.

11. School and other holiday periods and special occasions will be divided as follows:

- (a) One-half of the Spring break with the claimant having first choice as to her preferred week in odd years commencing 2013 and the respondent having first choice of his preferred week in even years commencing 2014 and alternating each year thereafter. The party with first choice for any given year shall provide the other party with their schedule by no later than January 31 of that year.
 - (b) Each party to have two non-consecutive, uninterrupted two-week blocks during the summer vacation period with the respondent to have first choice of his two-week blocks in 2013 and the claimant to have first choice of her two-week blocks in 2014 and alternating thereafter. The party having first choice in any given year shall inform the other party by no later than May 1 of that year.
 - (c) One-half of the Christmas vacation period with the respondent to choose which half he will have in 2012 and the claimant to choose which half she will have in 2013 and alternating thereafter with 12 noon on Christmas day to be the halfway point. The party having first choice in any given year shall provide the other party with their choice by no later than September 30 of each year.
 - (d) The claimant to have the children in her care on Mother's Day, and her birthday each year from 9:00 a.m. to 7:00 p.m. should these days fall during a period when she does not have care of the children.
 - (e) The respondent to have the children in his care on Father's Day and his birthday each year from 9:00 a.m. to 7:00 p.m. should these days fall during a period when he does not have care of the children.
12. Neither party shall attend the children's activities which occur when the other party has care of the children for a period of six months following this order, save and except for special events such as Christmas concerts, ballet recitals or sports tournaments. Either party may apply for an extension of this six month period. In the event that no application to extend is brought, this provision shall expire six months from the date of this order.
13. In the event that one parent is not able to care for the children for more than three hours and the grandparents, or Ms. M.S. in Ms. S's case, or Ms. B in Mr. S's case, is not available to care for the children, the other parent will have the right of first refusal to care for them. In the event that either party has an alternate caregiver for a period of less than three hours, that caregiver will only feed the child T. as directed by her parents.
14. The respondent payor shall pay to the claimant recipient the sum of \$1,627 per month for the support of the children, T.M.S., born October 12, 2005 and M.F.S., born December 5, 2007, payable on the first day of each and every month commencing February 1, 2012 and continuing for so long as the children are children of the marriage as defined in the Divorce Act.

15. Commencing in 2013 and for so long as either of the children are eligible to receive maintenance, the parties shall exchange:
 - (a) copies of their respective income tax returns, including all attachments not later than June 1st each year;
 - (b) forthwith upon receipt of same, copies of any Notice of Assessment provided by Canada Revenue Agency in each year; and
 - (c) any adjustments in child support will be effective as at June 1st of each year.
16. The respondent will pay to the claimant the sum of \$2,882.87 for 2011 extraordinary expenses for the children, consisting of his equal shares of gymnastic expenses for T. and T.'s private school tuition for the 2011-2012 school year.
17. The claimant and the respondent will share equally the costs of special or extraordinary expenses for the children. For the purposes of this order, special or extraordinary expenses under s. 7 of the Guidelines are limited to:
 - (a) health-related expenses that exceed insurance reimbursement by \$100 annually, including orthodontic treatment, prescription drugs, and optical needs;
 - (b) extraordinary expenses for primary or secondary school education and other educational programs that meet the children's particular needs as agreed on by the parties in advance of the expense;
 - (c) reasonable expenses for post-secondary education, when the time comes; and
 - (d) expenses for such extracurricular activities as the parties may agree on from time to time or as determined by further order of the Court, which expenses will be shared by the parties equally.

The claimant and the respondent will perform an accounting once per month to ensure that each of them has paid the appropriate share of the special expenses for the previous month and the party who has paid less than required will pay the amount of the deficiency to the other within 14 days of the accounting. Neither party will incur any expense for the children for which reimbursement is sought without the prior agreement of the other parent.

18. Each parent will facilitate the children communicating with the other parent during their periods of custody, but such communication should not interfere with the planned activities for the children.
19. Each parent shall facilitate the children communicating with the other parent by telephone during spring break, summer and Christmas vacation during periods of absence of two or more days except where it is not reasonably possible to do so.
20. Each parent shall encourage the children to respect the other parent and shall refrain from making disparaging comments about the other parent in the presence of the children.

COSTS

[134] In light of their divided success, each party will bear their own costs.

"PEARLMAN J."

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