

CANADA / JUDGMENT

Irwin v. Manley

2023 BCSC 137

COURT

Supreme Court of British Columbia

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2023 BCSC 137 Irwin v. Manley,

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Irwin v. Manley,

2023 BCSC 137

Date: 20230130

Docket: E192726

Registry: Vancouver

Between:

Josh Irwin

Claimant

And

Cassandra Dawn Manley

Respondent

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Claimant:

P. Toor

Counsel for the Respondent:

A. Florescu

(on November 28-30, 2022)

The Respondent, appearing on her own behalf:

C.D. Manley

(on December 1-2 and 7-9, 2022)

Place and Dates of Trial:

Chilliwack, B.C.

November 28-30, December 1-2

and 7-9, 2022

Dates of Written Submissions Received:

December 19, 2022,

January 10 and 16, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 30, 2023

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I. Introduction

- [1] The claimant, Josh Irwin, and the respondent, Cassandra Manley, have a son, James, who is now three years old. In many ways, James is very fortunate. He has two devoted parents who want to spend as much time as they can with him. Both are able to offer him a nurturing environment, complete with a loving family and a half-sibling in each of their respective homes.
- [2] Despite these advantages, James' first few years have been laden with disappointment and frustration for his parents. They lived together as a couple for only a few months prior to James' birth and their relationship lasted less than two months afterwards. Since then, they have been finding it difficult to co-parent together. At the core of their dispute, which has already brought them to court many times in James' young life, is a fundamental lack of trust. Neither has very much regard for the other's judgment, parenting skills or motives.
- [3] They have placed the following four issues before the court for resolution:
- a) the parenting schedule, particularly whether Mr. Irwin should have roughly equal parenting time and whether he should continue to be bound by a requirement that he exercise his parenting time exclusively in Chilliwack;
 - b) the allocation of decision-making authority with respect to James' medical needs, including vaccinations;
 - c) whether James' surname should be changed from "Manley" to "Irwin-Manley"; and
 - d) whether additional income should be imputed to Ms. Manley.
- [4] After briefly setting out the factual background, I will address each of these issues in turn.

II. The Background Facts

A. The Parties, their Relationship and James' Birth

- [5] Mr. Irwin was born in 1992 in Salmon Arm, British Columbia. He works as a transportation mechanic with 12-hour shifts on Thursdays, Fridays and Saturdays. He met his current partner, Jera Gunter, in the spring of 2020. Ms. Gunter already had two sons from previous relationships, who are now aged eight and five, respectively. Approximately one year ago, they had a son of their own together. They now live together with the three boys in a three-bedroom basement suite in Langley.
- [6] Ms. Manley was born in 1991 and currently lives in Agassiz, in a home with acreage, owned by her mother, where she keeps six horses. She works part-time as a horseback-riding instructor. She has a daughter, Amelia (now six), from a previous relationship. Amelia's father is not involved in her life and provides no financial support to the family.

- [7] The parties met in the spring of 2018 at the wedding shower of a mutual friend. At the time, Mr. Irwin was living in Salmon Arm and Ms. Manley, in Chilliwack. They began dating and carried on a long-distance relationship over the following six months. During that time, Mr. Irwin would drive to Chilliwack to see Ms. Manley two or three times per month. Ms. Manley occasionally drove to see Mr. Irwin in Salmon Arm.
- [8] In December 2018, Ms. Manley became pregnant. The pregnancy was unplanned. Mr. Irwin left Salmon Arm to move in with her in January 2019. Although their relationship was still developing, they discussed the possibility of getting married eventually. James was born in April 2019.

B. The Separation and its Aftermath

- [9] The relationship did not last long after James' birth. Serious tensions had already arisen between them during the pregnancy. Ms. Manley had found Mr. Irwin distant and cold after they began cohabiting. They finally separated in May or early June 2019.
- [10] After moving out, Mr. Irwin resided temporarily with a friend in Chilliwack. He returned to Ms. Manley's home to see James two or three times per week for an hour or two each time. From the beginning, he wanted to spend more time with James, but Ms. Manley was resistant.
- [11] That resistance grew substantially in the wake of an incident that occurred the first time that Mr. Irwin was allowed to take James away from Ms. Manley's home. While Mr. Irwin was driving on the highway with James in the back seat of his truck, he began video-recording James with his cell phone. He posted the minute-long video clip on his Facebook page for the benefit of his family. After she saw the post, Ms. Manley cancelled Mr. Irwin's next visit and reported the incident to the police. She then refused to allow him any more parenting time unless it was supervised. For the next several weeks, he was permitted to exercise his parenting time only at a restaurant or community centre, with other family members present.

C. This Action

- [12] Mr. Irwin commenced this action on October 10, 2019, seeking, among other things, relief from those restrictions and to have an equally shared parenting schedule implemented within six months. The day before, he had been served with materials that Ms. Manley had filed initiating separate proceedings in the provincial court.
- [13] On October 21, 2019, Mr. Irwin obtained an order, without notice, prohibiting Ms. Manley from removing James from the Fraser Valley area. After noticing a "for sale" sign on her front lawn while driving by her home, he had come to believe, based on a conversation they had had a year earlier, that she was planning to relocate with James to the Eastern Canada. In fact, there were no such plans.

- [14] On November 6, 2019, the parties attended a judicial case conference and agreed to an order containing the following terms:
- a) Mr. Irwin was to have unsupervised parenting time on Mondays, Tuesdays and alternate Sundays, from 10 am to 1 pm;
 - b) Mr. Irwin was to have additional parenting time over the upcoming holidays;
 - c) the parenting schedule was to be reviewed in January 2020; and
 - d) the non-removal order made October 21, 2019 was vacated.
- [15] The review of Mr. Irwin's parenting time contemplated by that order did not occur. Instead, his requests for more time were met with growing resistance from Ms. Manley. Any progress on that front was delayed further by the onset of the pandemic in early 2020, and the attendant closure of the courts. The dynamics of the pandemic also led Ms. Manley to become even more resistant to accommodating Mr. Irwin's requests for more parenting time. From Mr. Irwin's perspective, she became ever more demanding, leaving him little choice but to accede to her various wishes in order to be able to continue to see James when he did.
- [16] Ms. Manley testified that she had become increasingly frustrated by what she saw as Mr. Irwin's failure to take adequate precautions to reduce the risk of infection from the COVID-19 virus. She was concerned, for example, that he was travelling back and forth across healthcare regional boundaries and inviting friends and family members residing elsewhere in the Province for visits in his home during his parenting time, contrary to the public health directives that were then in place.
- [17] Mr. Irwin poured fuel on the fire by concealing or refusing to provide basic information about the individuals with whom James was put in close contact. He and Ms. Gunter thought it was "creepy" when Ms. Manley sought confirmation from him about whether they were dating and the identity of the children in the household - information they continued to withhold from her even during the trial. Mr. Irwin has also refused to confirm whether he or those around him had plans to be vaccinated. He testified that he himself is still not fully vaccinated - he has had a first dose but refused to answer about his plans for a second one. Ms. Gunter testified that she is not willing to be vaccinated. Mr. Irwin also refused, until his testimony at trial, to consent to having James vaccinated, despite his having become eligible months earlier. All of this was particularly problematic because James has turned out to be unusually susceptible to respiratory ailments. In 2022, he contracted numerous upper respiratory tract infections, bronchitis and, on two separate occasions, COVID-19.
- [18] With the reopening of the courts as the pandemic-driven restrictions eased, Mr. Irwin renewed his efforts to expand his parenting time by court order. The parties agreed to a parenting schedule for the winter break in December 2020. They also agreed that Mr. Irwin would exercise his parenting time at his home in Chilliwack with no third parties present and that he would avoid all non-essential travel with James outside the Chilliwack area

during his parenting time. The terms of that agreement were later formalised in a consent order made February 10, 2021. Mr. Irwin testified that he had agreed to those restrictions believing that they would apply only to the newly-agreed upon holiday schedule for December 2020 and January 2021, but then they came to apply to his parenting time in general.

- [19] On May 26, 2021, Mr. Irwin filed an application seeking to implement a revised parenting schedule that contemplated a staged increase in his parenting time, so that by the end of August 2021 he would have James with him from Sunday at 10 am until Wednesday at 3 pm. The matter came on for hearing before Douglas J. on August 27, 2021. Ms. Manley had, at that point, yet to file a response to the application and sought to adjourn the hearing on the basis that her grandmother was gravely ill. Justice Douglas granted the adjournment but stipulated that a new hearing date was to be scheduled on a peremptory basis. In the meantime, the parties agreed, on an interim basis, to amend the November 6, 2019 order so as to increase Mr. Irwin's parenting time by two hours on each of the days that he was with James (in particular, he was now to have his parenting time on alternate Sundays and every Monday and Tuesday from 10 am to 3 pm, rather than from 10 am to 1 pm as before).
- [20] In September 2021, Mr. Irwin advised Ms. Manley that Ms. Gunter was pregnant with their child and that he was planning to move in with her at her home in Langley. On September 16, 2021, he filed a second application, this time seeking to be relieved from the restriction contained in the February 10, 2021 consent order that he spend his parenting time in Chilliwack exclusively.
- [21] In her responses filed September 10 and November 26, 2021, respectively, Ms. Manley opposed both applications, citing, among other things, Mr. Irwin's refusal to be vaccinated against COVID-19 and his failure to abide by pandemic-related health directives, as described earlier.
- [22] Mr. Irwin's applications came on for hearing before Walker J. on November 30, 2021. After concluding that a summary resolution was impossible in light of the conflicting evidence before him, he adjourned the matter to the trial list, directing the parties to a five-day trial beginning on June 6, 2022. The trial did not proceed on that date, however, because Ms. Manley was unable to attend due to an illness. A new trial date was set for September 2022, but the trial did not proceed at that time either. At the pre-trial conference before Brown J. on August 18, 2022, the trial was adjourned once more, this time to November 28, 2022, because Ms. Manley had just retained new counsel. In his order adjourning the trial on that occasion, Brown J. also revised the parenting schedule, extending Mr. Irwin's parenting time on alternate Sundays by three hours (in particular, from 10 am to 6 pm, rather than to 3 pm as before). The order also stipulated that Mr. Irwin could exercise his Sunday parenting time at his new residence in Langley, provided that only he, Ms. Gunter or their children were present.

- [23] The trial finally began before me, as scheduled, on November 28, 2022, although it took longer than anticipated to complete because, among other things, Ms. Manley abruptly discharged her newly-retained counsel during the trial and required additional time to prepare her case. The parties were able, in the time available, to complete the presentation of their evidence but not their closing arguments, necessitating an exchange of written submissions in the weeks that followed.
- [24] On the last day of the trial, the parties sought interim relief to address the parenting schedule over the upcoming winter break. In addition to setting a holiday schedule, I made the following orders:
- a) Ms. Manley was to arrange for James to be vaccinated as soon as reasonably practicable;
 - b) once James had received his second dose of vaccine, Mr. Irwin was to be given overnight parenting time; and
 - c) the parties were to communicate with one another only as necessary to facilitate their exchanges with James.

III. Discussion

A. The Parenting Schedule

- [25] Mr. Irwin believes that he has been waiting far too long for a more evenly-balanced parenting schedule. Although he has, in recent months, obtained incremental increases in his parenting time, he has yet to have a single overnight visit. He attributes this state of affairs to what he sees as Ms. Manley's dilatory and unreasonable behaviour. He has been able to get the limited time he has received to date, he says, only by placating her and yielding to her demands, however unreasonable.
- [26] He now seeks to increase in his parenting time in stages, leading ultimately to a schedule giving him three nights and the better part of four days every week (namely, the four days he is not working). He proposes, in particular, to have James with him at the following times:
- a) effective immediately, from 10 am to 6 pm on every Sunday, Monday and Tuesday, until James is fully vaccinated;
 - b) for the three weeks thereafter, from 10 am on every Sunday to 6pm on Monday and every Wednesday from 10 am to 6 pm;
 - c) for the next three-week period, from 10 am on Sunday until 3 pm on Tuesday and Wednesday from 10 am to 7 pm; and
 - d) thereafter, from 10 am on Sunday to 3 pm on Wednesday.
- [27] He also seeks to be relieved from the restriction, still in effect on Mondays and Tuesdays, preventing him from exercising his parenting time outside the Chilliwack area.

- [28] Ms. Manley opposes that relief but has not proposed any alternative to the present schedule. She argues that Mr. Irwin's proposed schedule would be "unworkable" for a variety of reasons, focusing primarily on the following two:
- a) the high level of conflict and mistrust between the parties, which she attributes to Mr. Irwin's "combative and often irrational behaviour and inability to put James' best interest before his own "; and
 - b) the length of the drive between Agassiz and Langley, a distance of approximately 100 km, which can take as long as one to two hours, depending on highway conditions.
- [29] The parties recognise that the legal test to be applied in resolving this issue focuses solely on what is best for James. The factors to be considered in that regard have been codified in s. 37 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which states as follows:

Best interests of child

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.
- [30] Several of those factors are relevant in the circumstances of this case.
- [31] I agree with Mr. Irwin that James would benefit from spending more time with him and his new family in Langley. The fact that Mr. Irwin's job allows him time off for several days each week presents an opportunity for multi-day visits without the need for either party to place James in daycare during those times. James has a dedicated bedroom available for him at Mr. Irwin's home in Langley and there is a park nearby.
- [32] On the other hand, I also agree with Ms. Manley that the relentless conflict between the parties has had and, unless it is managed more effectively, is likely to continue to have, an adverse impact on James' welfare. Not surprisingly, the parties have divergent views as to the root causes of their mutual mistrust.
- [33] Mr. Irwin attributes it primarily to Ms. Manley's communication style, which he described in his closing argument as "aggressive and intimidating". He also refers in this regard to what he sees as her repeated efforts to delay the hearing of this action.
- [34] Ms. Manley refers to what she sees as Mr. Irwin's selfish and irresponsible behaviour, as exemplified by:
- a) the incident when he video-recorded James with his cell phone while driving; and
 - b) his dismissive or hostile responses to her justifiable concerns about the risk of COVID-19 and other possible sources of infection.
- [35] Mr. Irwin argues that no parent should be held to a standard of perfection, citing *M.N. v. C.G.F.*, 2019 BCSC 1406, which repeated the oft-quoted dicta of Goepel J., then of this court, in *K.D.P. v. A.R.K. aka R.K.*, 2011 BCSC 1085, as follows:
- [1] No parents are perfect. All have flaws of one kind or another. If families stay together, except in those rare circumstances in which a child is found to be in need of protection, the state and the courts allow imperfect parents to raise their children as best they can. The children, in most cases, are no worse for wear for the experience.

- [2] If families separate, however, and issues of custody and access arise, in the guise of determining the best interests of the child, a parent's flaws of character and conduct are put under a microscope. In such circumstances, care must be taken not to lose sight of the strengths that a party brings to the challenge of raising a child.
- [36] With respect to the cell phone incident, he notes that Ms. Manley herself has been careless behind the wheel, citing an example where she rear-ended another vehicle while speaking with Amelia, who was seated in the back seat at the time. Although I disagree with Mr. Irwin's premise that the two incidents are truly comparable, he has, at least in his testimony at trial, expressed remorse for his behaviour on that occasion. I accept that the incident was an isolated one, is now dated and unlikely to be repeated. It is, however, unfortunate that he did not express the same degree of contrition to Ms. Manley at the time. Had he done so, her reaction might not have been as severe. As it turned out, the incident and its aftermath set the tone for many of the intemperate communications that followed.
- [37] Mr. Irwin's response to Ms. Manley's health-related concerns raises a more troubling impediment to the relief that he seeks. He argues that the pandemic era restrictions are no longer in place and vaccination is now "viewed as a personal choice." It follows, in his submission, that the parties' prior disagreements on that topic are no longer relevant and that the focus should now shift to maximizing his parenting time.
- [38] I am unable to accede to that submission. Although I appreciate that the public health restrictions have eased in recent months, and James will soon be fully vaccinated, the history of the parties' many disagreements on that issue remains relevant both because of the ongoing potential for future infection, given James susceptibility, but also for what it says about Mr. Irwin's misplaced priorities in relation to James' health, not to mention that of those around him. James should not have had to wait until Mr. Irwin's trial testimony to receive his permission to become vaccinated.
- [39] Recently, in *Steiner v. Mazzotta*, 2022 BCSC 827, a decision released on May 6, 2022, Branch J. had occasion to consider the receding threat posed by the pandemic in the context of a dispute over parenting time and decision-making, where one of the parents remained unvaccinated. After referring to a number of recent Canadian decisions on the topic, he stated as follows:
- [5] It is true that courts and governments have begun to recognize that we are entering into a new phase of the pandemic, which brings with it changes in the threat posed by the COVID-19 virus. For example, in *Davies v. Todd*, 2022 ONCJ 178, the court granted the vaccinated father sole decision-making authority with respect to the children's vaccination status, but ordered that the parenting arrangement would remain unchanged from its existing status (i.e., with the children remaining in the primary care of their unvaccinated mother without restrictions). That said, I find that is still appropriate to take judicial notice of the basic facts recently accepted in the March 4, 2022, decision in *Dyquiango Jr. v. Tipay*, 2022 ONSC 1441, wherein the court stated as follows:

[22] So what are the notorious or "accepted" facts which this Court is prepared to accept and which cannot be the subject of dispute among reasonable persons? And represent our collective lived experience. They are:

- (a) The Covid virus kills;
- (b) The virus is transmissible;
- (c) The virus can, and has, mutated;
- (d) Variants of the virus are more transmissible than others;
- (e) Asymptomatic carriers of the virus can infect other people;
- (f) Symptoms of the virus may vary according to age, health and co-morbidity factors;
- (g) The virus does not discriminate;
- (h) There is no known immunity to contracting the virus;
- (i) There is no verifiable evidence of natural immunity to contracting the virus, or any mutation, a second or more times;
- (j) Vaccines work;
- (k) Vaccines are generally safe and have a low risk of harmful effects, especially in children;
- (l) Vaccines do not prevent infection, reinfection or transmission, but they reduce the severity of symptoms and the risk of bad outcomes

[40] Like the judge in the Davies case cited by Branch J., I am of the view that Mr. Irwin's attitude to vaccination should not stand in the way of an increase in his parenting time, but it continues to be a relevant factor, bearing both on the appropriate schedule and the allocation of final decision-making authority.

[41] That being said, I am not persuaded that the high level of conflict between the parties justifies adhering to the current parenting schedule, as Ms. Manley appears to argue. The parties will face the same challenges in having to communicate respectfully and to cooperate with one another, regardless of the schedule that is implemented.

[42] Finally, although I agree with Ms. Manley that the lengthy drive between the parties' respective homes is far from ideal, it is no answer to force Mr. Irwin to continue exercising most of his parenting time in Chilliwack, where he no longer has any real connection. Contrary to her submission, Mr. Irwin's move to Langley was not a "relocation" in the sense contemplated by s. 65 of the FLA, because it cannot reasonably be expected to have a significant impact on James' relationship with her or anyone else in his life. James would be better served by a schedule that allows Mr. Irwin to bring James home with him to Langley, but with fewer transitions so as to minimise the driving. It would also be preferable if those transitions occurred outside the weekday rush hour. To his credit, Mr. Irwin has been, and

agrees to continue, doing all of the driving to accommodate the exchanges.

- [43] On balance, I have concluded that James' interests are best served by a further series of incremental increases in Mr. Irwin's parenting time, but not at the pace that he has proposed. The goal, at least for the present, should be for James to spend two nights and the better part of three days per week with Mr. Irwin. If James adjusts well to that transition, a more equal schedule can be considered when James enters kindergarten.
- [44] Accordingly, I am ordering the parties to adhere to a revised schedule, whereby Mr. Irwin will have parenting time with James as follows:
- a) effective immediately, from 10 am to 6 pm on every Sunday, and from 10 am to 3 pm on Mondays and Tuesdays, until James is fully vaccinated;
 - b) for the three weeks thereafter, the same schedule will be followed, except that Mr. Irwin will have James with him overnight on alternate Sundays (from 10 am on Sunday until 3 pm on Monday);
 - c) for the next three-week period, the same schedule will be followed, except that the overnights will occur every Sunday/Monday; and
 - d) thereafter, and until further order of the court, Mr. Irwin will have James with him from Sunday at 10 am until Tuesday at 3 pm every week.
- [45] The parties are to cooperate in sharing the holidays and special days equitably. If they have difficulty settling the terms of the order in that regard, they have leave to appear before me again for that purpose.
- [46] Finally, I am removing any geographical restriction on where Mr. Irwin exercises his parenting time.

B. Parenting Authority

- [47] Mr. Irwin seeks an order allocating the parenting responsibilities listed under s. 41 of the FLA to both parties equally. That provision states as follows:

Parental responsibilities

41 For the purposes of this Part, parental responsibilities with respect to a child are as follows:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;

- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;
- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
- (i) starting, defending, compromising or settling any proceeding relating to the child, and
- (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

[48] As Mr. Irwin notes, the legislation generally assumes that both parents, as guardians, are entitled to exercise all of those enumerated powers jointly (see FLA s. 40(2)). He submits that there is no reason to depart from that assumption in this case. On the contrary, he says that if Ms. Manley were to be permitted to exercise any of those powers herself, to the exclusion of Mr. Irwin, the effect would be to isolate James from Mr. Irwin even more. By limiting Mr. Irwin's parenting time as she has, he alleges, her conduct "has served to alienate [Mr. Irwin] from James and limited the role he has been able to play in James' life and the amount of parenting time he has been able to exercise." He relies on the following examples of such conduct on her part:

- a) failing to involve Mr. Irwin in the birth registration process;
- b) requiring that his parenting time be supervised after the cell phone recording while driving incident; and
- c) blaming Mr. Irwin for becoming sick and then using her illness to delay the litigation.

[49] In support of that submission, Mr. Irwin cites C.A.J. v. N.J., 2014 BCSC 279. That case involved competing allegations of family violence by both parents, and culminated with a finding of alienation by the mother, on the basis that she had repeatedly disparaged the father in the presence of the children and others. Moreover, the mother was found to have an "unstable personality with a propensity for rage and physical violence" (at para. 120). Nothing in the evidence before me rises anywhere near that level. Indeed, "alienation" does

not appear to be a factor in this case at all - on the contrary, James appears to have a strong relationship with Mr. Irwin, Ms. Gunter and her children. The concern that both parties have expressed about being disparaged in the other's home can be addressed through conduct orders.

- [50] That being said, the responsibility that Ms. Manley seeks is limited. She asks to have sole decision-making authority for all of James' medical and healthcare needs, including vaccinations and immunizations, relying on the history of the parties' disagreements on that topic, discussed above. I agree with her that it is in James' best interest, in light of that history, for Ms. Manley to have final decision-making authority, after consultation with Mr. Irwin, in relation to James' future vaccinations and immunizations. With respect to all other matters, including James' other medical and healthcare needs, the authority should continue to be shared.
- [51] Finally, given that the parties will be sharing responsibility on almost all matters, Mr. Irwin seeks an order that any future disagreements between them be resolved through arbitration rather than by way of an application to court, which has been their only recourse until now. Ms. Manley responds that she has no interest in returning to court on an ongoing basis. She notes that she has previously suggested mediation or the appointment of a parenting coordinator, but that Mr. Irwin has never responded favourably to those suggestions.
- [52] In light of the parties' stated positions, I agree that James' interests would best be served by engaging the assistance of a neutral third party to help manage future disagreements between them as much as possible. Both parties share a measure of responsibility for the amount of conflict they have experienced. Both could benefit from the assistance of a third party in improving their communications with one another. To that end, I am ordering, pursuant to s. 15 of the FLA, that, within 30 days of the release of this decision, the parties engage, for a period of at least one year, a parenting coordinator who is a member in good standing of the roster of the British Columbia Parenting Coordinators Roster Society.
- [53] The parenting coordinator will assist the parties by:
- a) helping to build consensus, including by:
 - i. developing and instituting guidelines for the implementation of my final order;
 - ii. developing and instituting guidelines for communications between the parties;
 - iii. identifying, creating and implementing strategies for resolving conflicts between the parties;
 - iv. providing information about resources that the parties can access to improve their communications and parenting skills; and
 - b) to the extent the parties are unable to agree on particular matters, making decisions on those matters, subject to s. 19 of the FLA.

- [54] The cost of the parenting coordinator is to be borne by the parties in proportion to their incomes, unless the parenting coordinator suggests a different apportionment.

C. The Proposed Name Change

- [55] Mr. Irwin complains that when James was born, Ms. Manley unilaterally gave him her own surname ("Manley") when she registered his birth under the Vital Statistics Act, R.S.B.C. 1996, c. 479 [VSA], despite his wish that James be given his surname as well.

- [56] He seeks an order under s. 4.1 of the VSA to change James' surname to "Irwin-Manley". That provision states in relevant part as follows:

4.1 (1) The court may, in an order declaring a child's parentage, make an order

- (a) that the registration of a child's name be changed
- (2) If an order under subsection (1) is in respect of a child's surname, the court must order the child's surname to be
 - (a) the surname of a parent, or
 - (b) a surname consisting of the parents' surnames hyphenated or combined in alphabetical order, in which case, section 4 (2) and (3) applies.
- (3) Before making an order under subsection (1), the court must
 - (a) consider the best interests of the child, including the matters set out in section 9 (1) (a), (b) and (c)

- [57] Pursuant to s. 3 of the VSA, both the mother and the father are required, within 30 days of a child's birth, to complete and submit a statement with the particulars needed for registration of the child's birth. The mother may do so alone only if "the father is incapable, deceased or unacknowledged by or unknown to the mother" (at s. 3(1)(b)).

- [58] The naming of children is governed by s. 4, which states as follows:

4 (1) The surname of a child must be registered as follows:

- (a) if only one parent completes the statement under section 3, the surname must be the one chosen by that parent;
- (b) if more than one parent completes the statement under section 3, the surname must be one chosen by them;
- (c) if more than one parent completes the statement under section 3, but the parents do not agree on the child's surname, the surname must be,
 - (i) if the parents have the same surname, the parents' surname, or

(ii) if the parents have different surnames, a surname consisting of the parents' surnames hyphenated or combined in alphabetical order;

(d) if a person who is not the child's parent completes the statement under section 3, the surname must be,

(i) if the parents have the same surname, the parents' surname,

(ii) if the parents have different surnames, a surname consisting of the parents' surnames hyphenated or combined in alphabetical order, or

(iii) if only one parent is known, that parent's surname;

(e) in accordance with an order of the court under section 4.1 (1).

(2) Despite subsection (1),

(a) a surname must not contain more than 2 surnames hyphenated or combined, and

(b) if a parent has a hyphenated or combined surname, only one of the names in that surname may be used.

(3) For the purpose of subsection (1) (c) (ii) and (d) (ii) and if subsection (2) applies, the one name to be used under subsection (2) is the name that alphabetically precedes the other.

[59] Subsections 9(1)(a)-(c) state that a child should not be given a name that:

(a) might reasonably be expected to cause

(i) mistake or confusion, or

(ii) embarrassment to the child or another person,

(b) is sought for an improper purpose, or

(c) is, on any other ground, objectionable,

[60] Mr. Irwin says that the order he seeks is appropriately granted because Ms. Manley improperly registered James' birth and named him herself, without consulting with him. He testified that on many occasions, both before and after James was born, he had expressed to her his desire for James to have the surname "Irwin-Manley", but Ms. Manley repeatedly refused. The explanation she gave him, he says, was that she did not want James to have a different last name than Amelia.

[61] Ms. Manley recounted a different version of events. According to her, they were in the same room when, using her own computer, she registered James' birth online and, at the same time, applied for James' care card and social insurance number. She recalls that, while completing the online forms, she called Mr. Irwin into the room to provide her with his place of birth in order to complete the form. She testified that the parties had discussed James' name on several previous occasions. Although she acknowledges that Mr. Irwin had originally expressed his preference that James be given his surname, she says that he

eventually relented and agreed that James would receive the surname "Manley" to conform with Amelia's and her own, with the expectation that if the parties' relationship solidified and they were married, then all three of their names could change together. Mr. Irwin's consent to that arrangement was, she says, also animated in part by the compromise reflected in the first and middle names that James was given - "James" is Mr. Irwin's middle name and "William" is the first name of Mr. Irwin's maternal grandfather (although when this latter fact was put to Mr. Irwin in cross-examination, he responded, implausibly, that he was "not sure" what his grandfather's name was).

- [62] In support of his version of events, Mr. Irwin refers to a text message exchange dated May 3, 2019 in which Ms. Manley inquired about Mr. Irwin's place of birth. After receiving the requested information, she responded that she had registered James' birth and applied for his social insurance number and care card. Relying on that document, Mr. Irwin urges me to find that Ms. Manley must have registered the birth on her own on May 3, 2019, while the parties were communicating by text rather than in person. However, Ms. Manley's competing version of events is more convincingly supported by James' birth certificate, issued on May 7, 2019. It states on its face that James' birth was registered on April 13, 2019, suggesting that the May 3, 2019 exchange occurred long after the forms had already been submitted, and that on May 3, 2019, she was merely seeking to confirm by text that Mr. Irwin's place of birth had been correctly stated in the application submitted earlier, as she testified.
- [63] Mr. Irwin cites *Priest v. Musa*, 2018 BCSC 2274 and *Landa-McAuliffe v. Boland*, 2012 BCSC 1354, as precedents supporting the relief he seeks. As Ms. Manley argues, however, both cases are distinguishable. In *Landa-McAuliffe*, the parties agreed that the child should receive a hyphenated surname. The dispute was solely about which of the two parents' surnames should appear first in the registration. In *Priest*, both parties wanted the child to have their own surname exclusively. The mother registered the birth unilaterally, without identifying the father in the application, after the father refused to agree to her choice of surname. The father filed a counterclaim in the ensuing action seeking, among other things, a declaration of paternity, on the basis that he had not been identified as the father on the birth certificate, as he should have been. In those circumstances, Marzari J. determined that the court had jurisdiction under s. 4.1 of the VSA to order the name change while granting the declaration of paternity.
- [64] Here, Mr. Irwin is already named as James' father on the birth certificate and he has not pleaded or otherwise advanced a claim for a declaration of paternity. I agree that in these circumstances, this court is without jurisdiction to make the order sought under s. 4.1 of the VSA. A similar situation arose in *K.S.H. v. S.F.F.*, 2022 BCSC 661. There, the mother was applying to change the 15-year old child's surname from that of the father to hers, with the father's surname becoming the child's middle name instead. The father was willing to change to the child's name to a hyphenated combination of both parties' surnames. Justice Ahmad refused to order any change, whether under the VSA, the Name Act, R.S.B.C. 1996, c.

328 or the inherent jurisdiction of the court, for the following reasons, among others:

- [45] In support of her application for the name change, Ms. H. relies on ss. 4, 4.1 and 9 of the Vital Statistics Act, R.S.B.C. 1996, c. 479. Section 4 of that Act provides for the registration of a child's surname at birth. Section 9 allows the registrar general to reject a name for registration in certain circumstances. Neither confers jurisdiction on this Court to make the order allowing a name change.
- [46] Section 4.1 does allow a court to make an order that the registration of a child's name be changed but only under an order declaring a child's parentage. No such order is sought (or relevant) on this application.
- [47] In my view, the Vital Statistics Act does not confer the jurisdiction on the Court to grant the order sought.
- [48] Section 4 of the Name Act, R.S.B.C. 1996, c. 328 provides that a person who has attained the age of majority can change their name. If a person has not attained the age of majority, a parent having guardianship of the child can apply to change the name, but only with the consent of all other guardians of the child and, if the child is at least 12 years old, with the consent of the child.
- [49] Applications under the Name Act are made to the registrar general. If the registrar general refuses to register a change of name, the applicant may appeal the refusal to the Supreme Court: Name Act, ss. 7 and 9. In this case, no application has been made to the registrar general and, as such, the registrar general has not refused to register the change of name. Accordingly, there is no jurisdiction of this Court to consider the possible change of name.
- [50] Despite that conclusion regarding the statutory authority, at paras. 138 to 145 in *P.K.D. v. A.M.A.*, 2022 BCSC 469, Justice Ball reviewed the authority and concluded that the court may order a name change under its exercise of its *parens patriae* authority. He concluded that the exercise of that authority must be in the best interests of the child and that invoking the jurisdiction is rare and restricted to cases where there is a gap in the legislation, such as in the case for adopted children, who did not have a required "parent" to change their name under the Name Act.
- [51] In this case, there is no such gap in the legislation. As set out above, the Name Act expressly allows a guardian to change a child's name if the required consents are obtained. The fact that Mr. F. does not consent to Ms. H.'s proposed name change does not create the "gap" referred to in the case authority.
- [65] For those reasons, which I adopt, this court lacks the jurisdiction to order a change of name under the VSA in these circumstances. Nor can Mr. Irwin properly invoke the *parens patriae* jurisdiction of the court. Not only did he not assert that source of jurisdiction in his pleadings or closing argument, it would only be available if I were to find that there is a gap in the applicable legislation justifying its exercise. As Ahmad J. held in *K.S.H.*, however, no such gap arises merely because the other parent will not consent to the proposed change.

On the contrary, ss. 4(5) of the Name Act allows the applicant parent to proceed with the application to change the child's name without that consent if, in the opinion of the registrar general, it is being unreasonably withheld. It follows that the proper process for Mr. Irwin to follow in seeking a change of James' surname would be to apply to the registrar general under that provision, and if, having done so, he is not satisfied with the result, to appeal to this court under s. 9(5).

[66] I am therefore refusing to make the order sought to change James' surname.

D. Ms. Manley's Income

[67] As a result of the parenting schedule that I am ordering, Ms. Manley will not be required to pay child support. Nevertheless, the amount of her income will still be relevant to the proportion in which the parties share s. 7 expenses and the cost of the parenting coordinator that I have ordered them to retain.

[68] Ms. Manley reported an income of \$8,800 in 2021. Currently, she says she earns approximately \$1,000 per month giving horseback-riding lessons part-time.

[69] Mr. Irwin asserts that she is intentionally underemployed or underreporting her income or both. He seeks, on that basis, to have her income fixed at \$50,000.

[70] The imputation of income is governed by s. 19(1)(a) of the Federal Child Support Guidelines, SOR/97-175 [Guidelines], which states as follows:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[71] The onus is on the party seeking to impute income to show on a balance of probabilities that income should be imputed on a rational and evidentiary basis and there must be evidence to support the amount to be imputed: *Fong v. Fong*, 2011 BCSC 42. Ms. Manley's Guidelines income must be assessed in the context of her duty to take reasonable steps to support her children, considering her earning capacity in light of her age, education, health, work history and work availability: *Marquez v. Zapiola*, 2013 BCCA 433.

[72] The principles to be applied when a payor parent chooses not to work in order to remain at home to care for a child were conveniently summarised by Adair J. in *Shapiro v. Simpson*, 2016 BCSC 211, as follows:

[176] The basic principles concerning imputing income to a parent, where it appears that the parent is underemployed, are well-known, and include the following:

- (a) there is a duty to seek employment where a parent is healthy and there is no reason why the parent cannot work;
- (b) when imputing income on the basis of intentional unemployment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work and other obligations;
- (c) a desire simply to stay home with a child is not sufficient to invoke the exception in s. 19(1)(a) of the Guidelines. A parent who chooses to work less than full-time must justify that choice by evidence of the needs of the children;
- (d) bad faith is not required, and a parent is intentionally under-employed if the parent chooses to earn less than he or she is capable of earning.

See, for example, the discussion in *McCaffrey v. Paleolog*, 2011 BCCA 378, at paras. 45 and following.

[73] Ms. Manley's reported income in the last five years was as follows:

2017 \$25,470

2018 \$44,128

2019 \$29,076

2020 \$22,221

2021 \$8,880

[74] Mr. Irwin argues that, in addition, she has other sources of income available to her. For example, she sold one of her horses in 2021 for \$30,000, but did not declare the income, and still has six horses left that can either be sold or used to generate income through lessons. She sold off three litters of puppies in 2019 and 2020 and developed her own home-made baby formula, which she offered for sale, but did not report any income from those sources.

[75] With respect to her potential to earn additional income, Ms. Manley has a bachelor's degree in business administration, two diplomas and three certificates from University of Fraser Valley. Her most lucrative year was 2018. In April of that year, when Amelia was still a toddler, she secured a two-year contract as a marketing manager earning \$33.65/hour. That arrangement ended when she went on maternity leave after becoming pregnant with James. The contract was not renewed in 2020. Currently, she is looking for work. She hopes to find a position, such as in education, that will allow her to work from home while James and Amelia are in her care.

[76] I am not persuaded that Ms. Manley has historically under-reported her income, as Mr. Irwin alleges. She never earned a profit selling baby formula and was unable to meet the regulatory requirement to launch a business of that kind. She has since found new homes

for the dogs that gave her the puppies and therefore has no prospect of earning further income from that source. Although she still has six horses, not all of them are suitable for lessons. The sale of the horse in 2021 is more properly characterised as a sale of a capital asset, rather than ongoing income generated from capital, which means that she was not required to include the proceeds of that sale in her income: *Dunnett v. Dunnett*, 2018 BCCA 262, varied 2018 BCCA 292.

[77] On the other hand, I am satisfied that Ms. Manley's true earning capacity more closely resembles what it was in 2018 rather than 2021. The pandemic era restrictions have eased. James can now attend daycare and will, as a result of my ruling, soon be spending several days a week with Mr. Irwin. In 2018, Ms. Manley was able to earn a full-time salary by placing Amelia in daycare, and can do so again.

[78] In light those considerations, I am imputing an income of \$40,000 to Ms. Manley.

IV. Summary and Conclusion

[79] I am making the following orders:

- a) the parties are to adhere to the parenting schedule described above, without restriction as to the location in which parenting time may be exercised, unless otherwise agreed or until further order of the court;
- b) the parenting schedule will be open to revision when James enters kindergarten;
- c) the parties are to share parenting responsibilities under s. 41 of the FLA, except that if they disagree after consultation, Ms. Manley is to have final decision-making authority with respect to immunizations and vaccinations;
- d) Mr. Irwin's application for an order under s. 4.1 of the VSA is refused; and
- e) Ms. Manley's Guidelines income is declared to be \$40,000.

[80] In addition, I am making the following orders to assist the parties in co-parenting:

- a) the parties are to retain a parenting coordinator on the terms set out above;
- b) the parties are to communicate with one another via "Our Family Wizard", and then only as necessary to discuss parenting issues and facilitate their exchanges with James, unless otherwise directed by the parenting coordinator; and
- c) the parties will not make any disparaging or derogatory comments about the other parent in James' presence and will use their best efforts to ensure that any other adults having contact with James do not do so.

[81] Given that success was divided, I am inclined to order that each party will bear their own costs. However, if there are other factors that either party wishes to bring to my attention in support of a different order as to costs, they may set down a further hearing before me for that purpose.

"Milman J."

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