

CANADA / JUDGMENT

J.L.M. v. G.G.M.

2024 BCSC 908

COURT

Supreme Court of British Columbia

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2024 BCSC 908 J.L.M. v. G.G.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.L.M. v. G.G.M.,

2024 BCSC 908

Date: 20240529

Docket: E128404

Registry: Kelowna

Between:

J.L.M.

Claimant

And

G.G.M.

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

G. Miller

Counsel for the Respondent:

H.A. Taylor

A. Mawko

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 5 - 9; 12 - 15; 19 - 23;

July 18 - 21; September 11 - 12; October 5, and 11 - 12, 2023

Place and Date of Judgment:

Kelowna, B.C.

May 29, 2024

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Overview

- [1] These are my reasons for judgment in respect of issues relating to parenting and parenting responsibilities. There shall be a companion set of reasons to be issued shortly dealing with support as those issues turn on these orders and all parties need clarity on the ongoing parenting plan moving forward.
- [2] The Claimant, J.L.M. ("Jane") was born April 24, 1980, and is 44 years old.
- [3] The Respondent, G.G.M. ("Gord") was born March 15, 1979, and is 45 years old.
- [4] Jane was born and raised in Kelowna and resides at the family home located on "C" Road, Kelowna, British Columbia (the "Family Home").
- [5] Gord was born and raised in Kelowna and presently resides at his parent's home on "D" Road, Kelowna, British Columbia ("Gord's Residence").
- [6] I have intentionally omitted the actual addresses of the parties' residences as they are essentially immaterial to the issues at trial other than to note that while there is an issue with respect to the exchange location for parenting time, I accept they are in the same general region and within reasonable proximity for orderly exchanges of the Children and both are, I accept, suitable accommodation for the Children.
- [7] I have similarly anonymized the parties' full names and have elected to refer to them by their first names. I intend no disrespect in this regard.
- [8] The parties met when they were both high school age, dated for a short period of time and, after graduation each moved away from the Okanagan region to pursue education, travel and other life experiences.
- [9] Jane ultimately obtained a bachelor of economics degree from the University of Victoria in 2005. Following graduation, Jane worked with TD Canada Trust in Victoria and later in Vernon, British Columbia. Jane left that position to travel to New Zealand. Upon her return from New Zealand, she took up residence in Kelowna again.

- [10] After Gord graduated from high school in Kelowna, he moved to Ontario to pursue employment. Thereafter, Gord moved to Manitoba to attend University of Manitoba, taking courses in economics and math. It is not entirely clear from the evidentiary record but I do not understand Gord to have obtained any degree or diploma from this institution. If I am mistaken in that conclusion, it is not material to my core findings as it not suggested that Gord is not an intelligent individual who simply chose to focus his career path in the aeronautic field.
- [11] Specifically, commencing in February 2006, Gord attended Northern Lights College - Dawson Creek Campus for his Aircraft Maintenance Engineering certification. This was followed by a brief co-op placement.
- [12] Gord returned to Kelowna after becoming a certified Aircraft Maintenance Engineer ("AME"). He began working as an AME with Kelowna Flightcraft (later changed to "KF Aerospace") in 2007.
- [13] The parties reconnected and started dating again just prior to Gord's return to Kelowna.
- [14] They commenced cohabitation in a spousal relationship in or about July 2007, married August 31, 2009, and separated on June 21, 2020. I will return to this point in due course.
- [15] The parties have two Children:
- a) MJM, born June 2012 (thus very soon to turn 12 years of age); and
 - b) MGM, born May 2015 (9 years old as of the date of these reasons),
- (collectively, the "Children").
- [16] I heard considerable evidence about the Children at trial as they are the core of the ongoing dispute.
- [17] I had three primary takeaways from that evidence:
- a) MJM has a somewhat sensitive personality. She loves animals, enjoys arts/crafts and takes on, with pride, something of a sisterly role for younger girls with whom she is closely connected to who reside near Gord. MJM has been formally diagnosed with Attention Hyperactivity Disorder ("ADHD") and is medicated for this;
 - b) MGM, to the contrary, is a very energetic and athletic boy. He enjoys activities like skiing, dirt biking, tubing behind the boat and mountain biking. MGM is neurotypical and has no special needs; and
 - c) Despite having quite different personalities, MJM and MGM have a positive sibling relationship.
- [18] This is not an exhaustive list, clearly, but I believe it paints the relevant picture of the Children.

- [19] At this juncture, I must acknowledge that part of the reason for the delay in the release of these reasons was the request to reopen the trial as a result of significant developments relating to MJM. This ultimately resulted in a contested hearing. The parties have the benefit of my oral reasons dealing with that issue, but I expressly did not authorize their publication to protect the privacy interests of MJM. I only reference them to acknowledge for the record that I am not taking into consideration any of the evidence tendered in support of the re-opening process.
- [20] Returning to the historical chronology, Jane was hired by her parent's company ("Parent Co") in May 2007 and took on bookkeeping and property management duties. This company owns and operates several commercial properties in the Okanagan. Jane maintained this employment throughout the marriage. Jane was paid director's fees on top of her wages from, the record establishes, at least 2009 to 2019.
- [21] Skipping ahead momentarily, it is not disputed that in February 2021, Jane took a leave of absence from working for Parent Co. That leave continued through the duration of trial.
- [22] Turning to Gord, it is also not disputed that throughout the marriage, Gord generally maintained full-time employment as an AME, apart from a period of paternity leave after MJM was born and during COVID when he was forced, due to economic circumstances, to pursue other employment temporarily.
- [23] There is an additional extended family dynamic in play in this matter.
- [24] Both of Jane's parents reside in Kelowna. Jane's parents have a close relationship with Jane and the Children.
- [25] Both of Gord's parents, also reside in Kelowna. Gord's parents have a close relationship with Gord and the Children.
- [26] I will address the financial circumstances of the parties in my additional reasons but it is fair, I conclude, to describe both families as having very comfortable financial means.
- [27] The parties both have siblings but their participation in the relevant events is peripheral and none were witnesses. I am not suggesting there is estrangement as that would be contrary to the evidence. I am merely noting they are not major players in this dispute between the parties. To the contrary, the grandparents (both maternal and paternal) are quite obviously major players.
- [28] Of particular note, both sets of grandparents own condos at Big White Mountain Resort and the parents together with the Children would frequently visit the condos to ski and have family time with each set of grandparents. The Children benefited, I absolutely accept, from the involvement of their grandparents in their lives. On my observation of the testimony, I believe this might actually be one of the very few issues where the parties actually agree as it relates to the Children.

- [29] The parties' marriage reached the brink of collapse by January 2020. I am not going relay the specifics because I am again seeking to maintain the confidentiality of the family circumstances as best I can and because even if the parties do not agree on the cause of the collapse or the exact precise timeline, there was a distinct continuity in their evidence that things had reached something of a tipping point at that juncture.
- [30] To their credit, the parties agreed to pursue marriage counselling. As will be abundantly clear from these reasons, that counselling was not successful. Not simply as it relates to sustaining the marriage - that ship may have already proverbially sailed by the time they decided to throw out a life preserver - but more importantly as it relates to functional co-parenting of the Children.
- [31] In the midst of this "trial separation" Gord took employment with WestJet.
- [32] This required working in Vancouver and living in a camper for approximately five days at a time while Jane and the Children remained in the Family Home in Kelowna.
- [33] When an objective observer reviews Gord's banking records during this time it is apparent this was not a healthy arrangement for him. There are almost daily charges at what I will colloquially refer to as liquor stores. While I accept from Gord's evidence that he smokes cigarettes and that he may have purchased cigarettes in conjunction with alcohol, it defies any air of reality that Gord only purchased his cigarettes at liquor stores when cigarettes are available at virtually any corner store or convenience store in a major metropolitan area such as Richmond, British Columbia.
- [34] On Father's Day on June 21, 2020, the marital situation deteriorated beyond repair. There are a multitude of factors which contributed to this deterioration but I do accept that Gord's consumption of alcohol was a primary driving factor in the decision to separate on a final basis.
- [35] Gord experienced some significant acute distress as a result of the decision to separate and was taken by ambulance to the emergency department. Upon release, Gord made arrangements with a close friend to travel to Winnipeg, Manitoba, to have some extra social/emotional support. This trip lasted approximately five days. Gord's decision in this regard did leave Jane with sole care of the Children but I accept it was reasonable in the circumstances. Gord was not, at that immediate juncture, in a position to be caring for the Children and removing himself from the situation was to his benefit and collaterally, their benefit. Both the maternal and paternal grandparents, who I have noted have strong relationships with the Children, were also available as a resource to Jane during this challenging transitional period.
- [36] Upon Gord's return, a nesting arrangement in the Family Home was organized. It was not successful. As with separation, there were a multitude of factors but the culminating event did again involve an allegation by Jane relating to Gord's alcohol consumption.

- [37] There was police involvement with the family, including extended family members, in August of 2020. However, I conclude it was a minor incident involving a dispute regarding access to the Family Home to retrieve personal belongings and although there were raised emotions, there was no family violence by any involved party and the Children were not directly engaged.
- [38] Throughout August 2020 and September 2020, there were ongoing difficulties between the parties regarding Gord's parenting time with the Children. I accept it was, at Jane's insistence, very limited.
- [39] It must also be noted at this juncture that Jane acknowledges she has had multiple episodes of depression which even pre-dated the marriage. This adds a further layer of complexity to ascertaining these parties' familial circumstances.
- [40] Just for procedural history to put future events in perspective, I note that the notice of family claim was filed by Jane on August 10, 2020. Gord filed his response to family claim on September 22, 2020, and a counterclaim on October 19, 2020.
- [41] On September 11, 2020, Gord and Jane signed an "interim interim" agreement regarding parenting and use of the Family Home. As I will address below, it was, I find, a key term of the agreement that Gord agreed to participate in the Soberlink program ("Soberlink") in conjunction with his parenting time. Soberlink is an independent privately paid for service which is sometimes utilized where alcohol consumption is a concern. I come back to this point below.
- [42] The salient terms of this agreement (the "Interim Interim Agreement") were, I summarize, as follows:
- a) Jane would have interim exclusive use and occupancy of the Family Home for a period of six months;
 - b) Each party would pay half the mortgage on the Family Home;
 - c) Jane would pay Gord \$1,500 per month to assist him in paying for alternative rental housing;
 - d) On an interim interim and without prejudice basis, Gord would have parenting time to the Children as follows:
 - i. Alternating Mondays from 2:30 pm (or 8:30 am non-school days) until 6 pm;
 - ii. Thursdays from 2:30 pm (or 8:30 am non-school days) until 6 pm; and
 - iii. Alternating weekends from Friday at 2:30 pm (or 8:30 am non-school days) until Sunday at 6 pm; and

- e) On a without prejudice basis, Gord, as noted, agreed to participate in the Soberlink with Gord agreeing to provide a sample twice per day during his parenting time with, of particular significance, Gord agreeing to provide one test result to Jane within one hour prior to his parenting time.
 - f) There was a further relatively routine conduct provision wherein both parties agreed to put the interests of the Children before their own; encourage a good relationship with the other parent; maintain polite respectful communications with each other and refrain from negative or hostile communications in front of the Children.
- [43] The Soberlink testing was, at the time of the Interim Interim Agreement intended to be time limited. Notwithstanding this, the Soberlink testing continued to and through the date of trial. It is my understanding that it has continued since the conclusion of the trial whilst my reasons for judgment were under reserve but I do not have the Soberlink records for that period of time. I will return to the Soberlink results in rendering my decision on the merits as they are very significant to my ultimate conclusion as to the best interests of the Children.
- [44] Returning to the chronology, in December 2020, issues arose between the parties. They are far from determinative of the primary issues for determination but they are very representative as to the difficulties between the parties. I will summarize them very succinctly as follows:
- a) Based upon a Soberlink report, Jane, through counsel, advised she was suspending Gord's parenting time;
 - b) Notwithstanding the terms of the Interim Interim Agreement, Jane would only permit parenting time with Gord over Christmas Break if Gord's father supervised his parenting time; and
 - c) Gord's father agreed to this arrangement but did not strictly abide by his obligations and knowingly permitted Gord to have unsupervised time with the Children.
- [45] With the benefit of having heard many days of evidence, I consider the demand for supervised parenting in addition to compliance with Soberlink to be clear gatekeeping behavior on the part of Jane. Jane had very valid reasons for being concerned about Gord's alcohol consumption but otherwise Jane had no basis to assert that Gord was a risk to the Children, had abused them or was otherwise incapable of meeting their general needs.
- [46] I do also find the conduct of Gord and his father to be unacceptable. There was an agreement for Gord's parenting time to be supervised. That agreement ought to have been honored. Failing to do so further eroded the trust between the parties. In reaching this conclusion, it must be clear on the record that failure to comply was not, I find, trivial in nature such as where Gord's father failed to have direct "eye's on" supervision for a short duration because he was having a shower or taking out the garbage. Having regard to the circumstances, which involved an extended stretch of overnight parenting time, 24/7 supervision would be an unreasonable expectation. The concern from Jane, which the court

accepts, is that Gord's father took on the supervisory role and then intentionally failed to meaningfully comply because he thought it was unnecessary. Supervised parenting time is an onerous and important responsibility and this Court will not condone the failure to abide by such a term in a meaningful way.

[47] This ultimately resulted in a further interruption in Gord's parenting time.

[48] At a February 3, 2021 hearing, Justice G.P. Weatherill made the following orders in an effort to stabilize the parenting of the Children and living situation of the parties:

1. The parties are both guardians of the Children;
2. All parental responsibilities under section 41 of the Family Law Act are shared;
3. Jane shall be the primary care parent;
4. Gord shall have unsupervised parenting time with the children:
 - a. Alternating Mondays from 2:30 to 6:00 pm;
 - b. Thursdays from 2:30 (or 8:30am on non-school days until 6 pm); and
 - c. Alternating weekends commencing from Fridays at 2:30 pm until Sunday at 6:00 pm
5. Gord to be provided with 12 make up parenting days,
6. Exchanges of the Children shall at the IGA grocery store in Glenmore;
7. Gord shall continue to be monitored through the Soberlink Program as follows:
 - a. The costs of the Soberlink program are to be borne by Jane;
 - b. Gord is to provide a Soberlink sample to Jane one hour prior to exercising his parenting time;
 - c. Jane may contact Gord once during Gord's weekend parenting time, through Our Family Wizard, to request a Soberlink sample from Gord, such sample to be provided by Gord to Jane within a reasonable time frame. Gord shall provide a satisfactory reason to Jane if he does not provide a test result;
 - d. The results to be provided by Gord shall be subject to a minimum threshold of .02% blood alcohol content ("BAC") to accommodate the possibility of a false positive reading;
 - e. Should a Soberlink sample test positive at .02% or higher, or if there is an indication that the Soberlink sample has otherwise failed, Jane is at liberty to report the finding to counsel so further steps may be taken; and
 - f. Jane is not at liberty to unilaterally terminate or cancel any parenting time unless the Soberlink sample records a blood alcohol reading of .08% BAC or higher or in the event that Gord does not provide a Soberlink test result prior to the exercise of his parenting time.

8. Both Jane and Gord shall complete the online registration for Our Family Wizard within 14 days from the date of this Order. Following registration, the parties shall communicate with one another regarding the Children exclusively through Our Family Wizard unless the communication is of an urgent matter and must be acted upon in less than 24 hours;
 9. Gord's parents are at liberty to pick up and drop off the Children;
 10. Gord shall pay child support for the Children in the amount of \$577.00 per month;
 11. Jane shall have exclusive occupancy of Family Home;
 12. Gord may attend Family Home on 48 hours' notice to obtain personal belongings with a person approved by Jane;
 13. Jane shall hereinafter pay all costs of the Family home;
 14. The parties shall attend co-parenting counselling and share the cost;
 15. Costs payable by Jane fixed in the amount of \$500.
- [49] The parties agreed to retain Dr. Michael Elterman to prepare a comprehensive s. 211 assessment (the "Section 211 Assessment"). Dr. Elterman's qualifications as an expert in this regard are not at issue in this proceeding. He has been accepted as an expert in this Court on multiple occasions. Dr. Elterman's recommendations have not always been endorsed by this Court, as is to be expected when one is tasked with the difficult role of being the "eyes and ears" of the court on challenging parenting files but his qualifications are not challenged.
- [50] The interviews and relevant psychological testing necessary for the Section 211 Assessment took place quite promptly in June and July 2022.
- [51] The Section 211 Assessment was ultimately not released until March 2023.
- [52] The recommendations made by Dr. Elterman in the Section 211 Assessment can be summarized as follows:
- a) Both parties retain their guardianship roles;
 - b) Primary parenting responsibility should be allocated to Jane;
 - c) Gord should have parenting time:
 - i. Wednesday after school to Thursday morning;
 - ii. Alternate Mondays after school to Tuesday morning; and
 - iii. Alternating weekends from Friday after school (or 8:30 am on non- school days) to Sunday at 6 pm.

- [53] This is, as noted, a high-level summary and not a comprehensive detailing of the comprehensive Section 211 Assessment. The Section 211 Assessment was entered into evidence and is available for review upon the record if required. I am electing to focus on the points of the Section 211 Assessment that I consider material to the ongoing parenting issues between the parties that continued from the time the Section 211 Assessment process commenced.
- [54] The only other salient points I will highlight from the Section 211 Assessment is that Dr. Elterman recommended that both parents would benefit from taking a parenting course; that Jane pursue counselling for her own anxiety and that Gord see a counsellor to assist him to find alternative methods to reduce his stress and emotions other than the use of alcohol.
- [55] An application was filed by Jane on August 22, 2022, and ultimately heard over two days in October 2022 before Justice Norell. In that application, Jane sought to reduce Gord's parenting time, obtain sole decision making for the Children and to increase the Soberlink testing protocols. Relief was also sought for increased basic, child support and section 7 expenses pursuant to the Federal Child Support Guidelines (SOR/97-175) [Guidelines] but I conclude those were much more peripheral issues.
- [56] In reasons for judgment issued December 21, 2022, Justice Norell dismissed Jane's claims for sole parenting responsibilities and guardianship on the basis that there had been no material change in circumstances. Justice Norell further ordered specific terms governing the communication between the parties and made an interim order adjusting the parenting schedule. Justice Norell's reasons are indexed at 2022 BCSC 2221.
- [57] Since Justice Norell's December 21, 2022 decision, Gord's parenting time with the Children was presumptively ordered to be as follows:
- a) Monday from 2:30 pm (or 8:30 am on non-school days) until 6:00 pm, on weeks one and three of the applicable rotation;
 - b) Thursday from 2:30 pm until Sunday at 6:00 pm, on weeks one and three except if it is a long weekend, the parenting time will continue until Monday at 6:00 pm; and
 - c) Thursday from 2:30 pm until Friday drop off at school, on weeks two and four except that if the relevant Friday is a school holiday, the exchange will be at 8:30 am.
- [58] Justice Norell made an interim order to vary the times in which Gord is required to provide a Soberlink breath sample, but the general obligation to comply with the Soberlink testing protocol was maintained.
- [59] Regarding child support and section 7 expenses, Gord was ordered to pay Jane monthly child support of \$738 per month and \$500 per month towards the s. 7 special and extraordinary expenses. Additional orders regarding the management of the conduct of the parties were again made.

- [60] There were also some ancillary orders made which are apparent on the record, but for the purposes of trial I conclude those were the material terms.
- [61] Finally, at commencement of the trial on June 5, 2023, I made, with the consent of the parties, an order addressing the parties' division of family property, family debt and spousal support. Notwithstanding their inability to agree on matters relating to the Children, this consensus, reached with the benefit of counsel, was welcomingly received by the Court. There was one subsequent hiccup in this regard but I have previously addressed this and the order stands as spoken to on said date.

Witnesses at Trial

- [62] Various witnesses testified in the court of this lengthy trial. Quite obviously, both parties testified and, given the close extended family relations, both sets of maternal and paternal grandparents also testified along with Dr. Elterman, whose evidence I addressed above. In addition, the Court heard evidence from:
- a) Dr. Burrows, a pediatrician engaged with the family;
 - b) Katherine Kohlen, MGM's grade 2 teacher;
 - c) D'Arcy Barker, a former co-worker of Gord;
 - d) Doug Simpson, Gord's former roommate who was also a former work colleague;
 - e) Heather Letkeman, the Children's tutor during relevant times;
 - f) Kristin Norbraten, Gord's neighbor (and the mother of the children to whom MJM is particularly attached to);
 - g) Vern Ward, Gord's counsellor; and
 - h) Doug MacKenzie, an additions counsellor who Gord engaged with shortly before the commencement of the trial.
- [63] As it relates to these eight third-party witnesses, I have no concerns as to the credibility of their evidence such that a comprehensive *Bradshaw v. Stenner*, 2010 BCSC 1398, is analysis is required. Their evidence generally harmonized where appropriate, there was no obvious indication to modify recollections or have motive to lie and their demeanour as witnesses, with one exception, did not change between direct and cross examination. The exception is that Ms. Norbraten appeared notably irritated during cross examination. She appears to consider these proceedings to be frivolous and her demeanor reflected this. Notwithstanding same, Ms. Norbraten's evidence was otherwise reliable and most importantly, I accept her evidence regarding the incident described below where MGM fainted whilst at her residence as very credible.

Evidentiary Issues and Objections

- [64] At the outset of the trial, Gord's counsel made clear that he was opposing the admissibility of the Soberlink reports which were tendered into evidence. This position was known by Jane's counsel and the Soberlink records were not included within the scope of the document agreement reached between the parties in advance of trial.
- [65] These are, I note, the Soberlink reports generated pursuant to written agreement between the parties and later court order. Access to a Soberlink representative was clearly equally available to both parties.
- [66] In my view, this constitutes a rather transparent attempt to avoid the Court relying upon the Soberlink reports which are clearly unfavourable to Gord. If admitted, they demonstrate repeated positive tests for blood alcohol content ("BAC") and multiple occasions of missed tests.
- [67] The Soberlink reports are, I conclude, admissible as a business record. The only authority I was directed to which is contrary to this conclusion is a decision from Texas: *Cox v. State*, 446 S.W. 3d, 605 (Tex. App. - Texarkana 2014). Obviously this authority is not binding on me and with respect to that Court, it does not appear that the issue was thoroughly canvassed.
- [68] In this province, the admission of business records evidence is an exception to hearsay under section 42 of the British Columbia Evidence Act, R.S.B.C. 1996, c. 124, [BC Evidence Act]. Section 42 (1) defines business records as:

Admissibility of business records

42 (1) In this section:

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

"document" includes any device by means of which information is recorded or stored;

"statement" includes any representation of fact, whether made in words or otherwise.

[69] Section 42 of the BC Evidence Act permits the admissibility of "a statement of a fact" in a business document:

- (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
- (a) the document was made or kept in the usual and ordinary course of business, and
 - (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

- (3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.
- (4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.
- (5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

[70] The requirements for the admissibility of documents under the business records exception have been, I accept, summarized previously in *McTavish v. MacGillivray*, [1997] B.C.J. No. 1719 [McTavish] at para. 10. Specifically, to be admitted under this exception to the hearsay rule, a document must be:

- a) made contemporaneously;
- b) by someone having a personal knowledge of the matters being recorded;
- c) by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business; and
- d) the matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.

[71] These requirements are, I find, satisfied.

[72] The Soberlink reports are unquestionably made contemporaneously. That is obvious from a review of the reports. They are taken in the ordinary course of business as the entire purpose of the Soberlink service is to monitor BAC of the participant. The reports generated from the monitoring are clear and easily understandable on their face. The only possible argument which has any merit is with respect to the requirement of personal knowledge. It, however, is an essentially automated system which can be analogized to an ATM bank machine. Bank records from bank accounts where parties have utilized ATMs are routinely accepted in family law matters and quite obviously the ATM does not have personal knowledge of the matters being recorded.

[73] I must also return to the fact that it was very clear to Gord that Jane would be relying on the Soberlink records as the foundation of her case. There was no trial by ambush on this issue whatsoever. If Gord legitimately believed there was an error in the preparation of the reports, he had the ability to call a representative of Soberlink as part of his case to address his alleged concerns as to the authenticity of the reports.

- [74] Accordingly, despite the able submissions from Gord's counsel, I accept that the Soberlink records are admissible for the truth of their contents pursuant to the BC Evidence Act subject to the below caveat.
- [75] The caveat is that Gord had the opportunity to explain in his evidence at trial the circumstances surrounding the Soberlink testing. I actually do accept there were occasions where the exact timing of the testing conflicted with Gord's work schedule or his WIFI availability. Jane was less than accommodating in some of these situations even where the somewhat delayed Soberlink report showed a 0.0% BAC. A 0.0% BAC report received something less than exactly one hour prior to scheduled parenting time ought to have been treated with greater flexibility by Jane. That would be putting the best interests of the Children at the forefront instead of punishing Gord as she had objective evidence in hand that he was not under the influence of alcohol.
- [76] What I do not accept is Gord's evidence as to the purported malfunctioning of the Soberlink device on a recurring basis such that there were multiple false positive readings. This evidence completely lacks an air of reality when put into the context of the situation. A single isolated incident of a false positive from, for example, his beard products could be possibly accepted as at least plausible. The Soberlink records, however, show multiple positive BAC reports even after what I will describe as the de minimus threshold of 0.02% BAC was implemented.
- [77] I similarly do not accept that the rule (as it is described despite being an evidentiary proposition) in *Browne v. Dunn* (1893) 6R 67 (H.L.) is engaged by virtue of the failure to confirm in the course of cross examination the exact nature of the purchases made at licensed establishments. I have already addressed this issue above in my conclusion wherein I found that some of the purchases identified could have included cigarettes and maybe some incendiary items, but that these purchases were corollary to the primary intention to purchase alcohol.
- [78] This I also consider consistent with the Court of Appeal decision in *R. v. Podolski*, 2018 BCCA 96 at paras. 187-191, which when addressing the rule in *Browne v. Dunn*, highlights the weight given to the unchallenged evidence and the weight of any contradictory evidence that is subsequently submitted on that point.
- [79] Returning to the facts, I reach this conclusion because the purchases at the establishments identified as liquor stores are set out in Gord's relevant banking and credit card records. Their admissibility as a business record was not challenged. It would have been a futile exercise to ask Gord what he bought at each of these liquor stores at the material time of the transaction over the last several years. The best evidence, which the Court already has the benefit of, is that there may have been at times something other than alcohol purchased.
- [80] A prime example of this is the charges at Big White Mountain Mart. There are frequently two consecutive charges on the same date in Gord's bank records. The liquor store and grocery store portions of Big White Mountain Mart have separate cashiers. It is thus

probably quite likely that one charge was for groceries and one charge was for the purchase of alcohol but I cannot find that as a fact based simply on the bank and credit card statements. It is plausible that Gord got eggs, sausage and cheese but returned later because he forgot the bread and butter. It is also plausible Gord purchased eggs, sausage and cheese and then purchased alcohol. Jane did not testify with personal knowledge of any of these transactions. Accordingly, only actual receipts would resolve this issue and those were not in evidence at trial.

- [81] A further example of this is charges at licensed restaurants. Do I consider it quite likely on the overall body of evidence that Gord consumed an alcoholic beverage with a meal when these charges were processed - yes -- but that was simply not proven on a balance of probabilities. Again, the specific receipts were not put to Gord to confirm or deny this proposition and so I must accept his evidence which was not successfully challenged that these were charges incurred for food or non-alcoholic beverages.
- [82] On a final procedural note before turning to the merits, I was rather perplexed by the claimant's reliance on her own affidavit evidence in the written submissions filed by her counsel. Affidavit evidence does have a place at trial where, for example, one can rely on their own Form 8 Financial Statement. It may also be appropriate where there needs to be context placed to understand what was before the court on a prior without notice application. There are other examples but the general proposition is that witnesses at trial are to testify orally (see Rule 14-6(27)).

Parenting Capability and Capacity - Findings of Fact

- [83] There were, as I acknowledged above, multiple days of evidence provided outlining the parental relationship between each parent and the Children.
- [84] I heard evidence about the activities they enjoy with each parent, their strengths, their weaknesses and their emotional connection to the relevant players in their familial and extended familial situation.
- [85] I could very easily write 50 paragraphs painting the varying pictures of what has transpired.
- [86] In my view, however, that would only add extra fuel to an already raging fire as between the parties and frankly not actually be helpful in exercising my obligation to make decisions solely in the best interests of the Children.
- [87] In that context, I conclude that the relevant factual matrix can be condensed to the following:

- a) Gord's only significant issue with parenting is his failure to fully address, at least to date of trial, his misuse and likely abuse of alcohol. His engagement of Vern Ward and subsequent engagement with Doug MacKenzie was a beneficial development. but where there is a positive Soberlink test during the course of trial, it raises very large red flags that the therapeutic efforts have not necessarily addressed the underlying issues sufficient to mitigate risk to the Children;
- b) I draw this conclusion notwithstanding the evidence of the third-party witnesses and Gord's parents who all testified that they have not witnessed Gord consume alcohol at any time while the Children have been in his care since separation. I do so, as noted above, without concluding that their evidence was not credible or reliable. I do so on the basis that I conclude that Gord's alcohol consumption may be at a level that is unnoticed by them. In the same vein, I also accept that Gord has, but for COVID-19, maintained employment as an AME which is a position involving very considerable responsibility and mental acuity inconsistent with being under the influence of alcohol whilst working. Gord's only alcohol related driving infraction is also from well prior to the birth of the Children and was known to Jane so is of extremely marginal relevance;
- c) Notwithstanding these findings, I accept Gord's habitual alcohol consumption is objectively confirmed through Soberlink testing and is not simply a delusion of Jane's imagination;
- d) There have been a few incidents of injury while in Gord's care but I heard absolutely no evidence that these were in anyway connected to Gord's use and/or alleged use of alcohol. There is the suggestion that he might have been more attentive when these issues arose but perfection is not the requisite standard of parenting and children, especially energetic, athletic boys like MGM, cannot be put in bubble wrap. The two significant injuries MGM sustained were unfortunate but they occurred in the context of engaging in sports he enjoys with Gord. The third incident in which MGM fainted appears, based upon the evidence of Ms. Norbraten to have been an unexplained event totally unconnected to anything relating Gord's parenting. Ms. Norbraten is very familiar with MGM and a mother herself. I have no doubt upon hearing her evidence that if MGM had told her he was hungry that she would have provided him with a snack pending dinner. Moreover, Gord is acknowledged to be a good cook. There is just simply nothing in the record which would explain why on this particular day Gord would forget to feed MGM or deny him food. The more important takeaway from this incident is that Gord took MGM to the emergency department at Kelowna General Hospital ("KGH") for review and Jane was very promptly notified. Jane attended at KGH with Gord and MGM. Jane did not testify that she observed any signs of intoxication by Gord and there are no clinical records which raise that as a concern. MGM has had no similar episodes in either parent's care and it appears to have been a truly isolated incident which could have similarly occurred in Jane's care;
- e) Gord's failure to diligently follow through with MGM's scheduled attendance at a literacy program in the summer of 2022 does not reflect very well on Gord. I conclude it represents an example, however, not necessarily of Gord neglecting to consider MGM's best interest but

more of an inappropriate reactive response to being "told" by Jane as to what he should be doing during his parenting time. Unfortunately, this reactive response was to MGM's detriment as it had been identified that he would benefit from this additional support and the schedule was pre-determined by virtue of the program timing. It was not a situation where an activity was intentionally scheduled by Jane for the purpose of interfering with Gord's parenting time;

- f) Jane has been the primary caregiver to the Children throughout the marriage and post-separation. The nature of her employment through a familial company permitted her the necessary flexibility even before she took a leave of absence. This has been augmented as appropriate with third party care. Gord, however, did not have that flexibility as one cannot work from home as an AME unless your home happens to be an airport. Gord's decision to pursue alternate employment as a plumber during the COVID-19 pandemic and then taking out-of-town work which required him to reside in a camper in a parking lot speaks to his commitment to financially supporting the family unit even if he did not always necessarily have the opportunity to be the daily hands-on father;
- g) Jane has completely valid reasons to be concerned and continue to be concerned about Gord's alcohol misuse and, I conclude, likely periodic abuse of alcohol. Her reason for concern is objectively verified in the banking records which often show near daily purchases at liquor stores which as noted, I find may not all have been exclusively for alcohol but were predominately for that purpose and the repeated instances of missed Soberlink tests, failed Soberlink tests early in the mornings on his scheduled parenting days and failed Soberlink testing during the course of the trial. I again stress that these records speak for themselves and cannot be rationally explained as an isolated error;
- h) Jane's personality, combined with the above concerns about Gord's parenting capacity, has resulted in her engaging in overly controlling and gatekeeping behavior as it relates to Gord's parenting time with the Children. Unless things occur on Jane's terms, Jane will resist cooperating. This is absolutely clear on the evidence. Moreover, even where things occur on something close to Jane's terms, Jane can find reason to engage in conflict with Gord. Jane even engaged her mother to contact Gord's place of work when she was suspicious as to whether he was in attendance on a specific date. This was tied to the timing of Soberlink sample requirements in place but was not acceptable as it jeopardized Gord's employment and his corresponding ability to support the Children;
- i) There are multiple other examples of this gatekeeping behavior by Jane but the most obvious is Jane unilaterally registering the Children to North Glenmore Elementary School in English from Glenmore Elementary School in French immersion for September 2020 without consulting Gord, without putting Gord's name on the application or obtaining his written consent. No failure to comply with Soberlink testing merited this action. This was Jane acting unilaterally in what she considered to be her personal determination of the best interests of the Children. Upon hearing the evidence, I do not consider Jane's belief that a change in school would benefit the Children to be ill-advised based on the Children's

individual circumstances. What I consider ill-advised was the decision to make this significant change without consultation with Gord. Moreover, of note, Gord is the parent who graduated from the French Immersion program and thus had a particular bona fide interest in linguistic educational decisions involving the Children; and

- j) Jane and Gord's mother have had some difficulties while facilitating parenting exchanges. This conduct is "not becoming" of either of them to use legal vernacular and very likely caused some temporary discomfort for the Children. This conduct is not condoned by the Court in any way. The level of discord at the exchanges, however, is at the very low end of the spectrum in high conflict parenting files such as these. I further anticipate that the resolution of these proceedings will further reduce the possibility of conflict between Jane and Gord's mother as I do not accept Jane's evidence to establish an ongoing concern about Gord's mother's involvement in the Children's lives. The issues between Jane and Gord's mother have been brief, situationally specific and not in any way physical in nature.

- [88] For the benefit of the parties, I wish to reiterate that I recognize each party raised other issues regarding the conduct as between themselves which are potentially, at best, slightly probative in the overall factual matrix of determining the best interests of the Children. I have, for the reasons indicated, concluded that the above summary concords with my final determination and that reviewing in detail the minutia of these other disputes would not override my conclusions based on the evidence considered as a whole.

Best Interests of the Children Analysis and Parenting Time Conclusion

- [89] Section 37(1) of the Family Law Act, S.B.C. 2011, c. 25, [FLA] provides that the only consideration in making an order or agreement for the care of a child is the child's best interests.

- [90] Specifically, s. 37(1) mandates:

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.

- [91] Pursuant to s. 37(2), in order to determine the child's best interests, the court or the parties must take into account all of the child's needs and circumstances, 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.
- [92] Section 37(3) provides that 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.
- [93] Similarly, under the amended Divorce Act, s. 16(1), a court must consider only the best interests of the child of the marriage in making a parenting or contact order. In addressing all the circumstances of the child, the court must give primary consideration to the child's physical, emotional, and psychological safety, security, and well-being (s. 16(2)).
- [94] Section 16(3) sets out the relevant factors to be considered:
- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
 - (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
 - (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
 - (d) the history of care of the child;
 - (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
 - (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
 - (g) any plans for the child's care;
 - (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
 - (j) any family violence and its impact on, among other things,
 - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
 - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
 - (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.
- [95] Section 16(5) of the Divorce Act provides limits on considering 'past conduct' of parents:
- (5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.
- [96] Section 16(6) of the Divorce Act provides for maximizing contact between both parents, as long as such contact is in the best interests of the child:
- (6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.
- [97] Pursuant to the doctrine of paramountcy, and based on my above findings of fact, I shall analyse the Children's best interests under section 16(6) of the Divorce Act:
- a) The child's needs, given the child's age and stage of development, such as the child's need for stability
- [98] Gord and Jane clearly have very different parenting styles.
- [99] Regardless of this divergence in parenting styles, and subject to my above conclusions about alcohol consumption and gatekeeping behaviours, I accept the Children's health and emotional well being are adequately addressed in both households.
- [100] While all children benefit from stability and consistency, MJM in particular, I accept, benefits from more stability and consistency given her diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD") and her personality generally. When there is a change in routine, MJM becomes distressed and is subject to periods of emotional dysregulation.
- [101] My ultimate orders must very clearly take this into consideration.
- [102] I specifically recognize, in this regard, that the Soberlink testing protocol has resulted in some dysregulation for MJM and, to a lesser extent, MGM when parenting time is cancelled due to the failure to provide an acceptable BAC sample within the designated window or a

non-compliant test. As acknowledged, I also accept that there have been occasions where the failure to comply within the exact timing of the testing requirement probably ought to have been excused by Jane in the best interests of the Children when she had the benefit of a 0.00% BAC reporting in advance of scheduled parenting time.

[103] However, I am not satisfied that this occasional dysregulation outweighs the need for continued monitoring for alcohol consumption by Gord. There have, as noted, been multiple Soberlink tests which report positive BAC above the court ordered threshold 0.02%. I thus simply cannot conclude that parenting time for Gord with the Children can occur at present without continuing BAC monitoring in some fashion. I will return to this point in due course when I make my ultimate orders.

b) The nature and strength of the child's relationship with each spouse, siblings, grandparents and other important persons

[104] The Children have a strong bond with both parents and their extended family. The role of the extended family from both the maternal and paternal sides is particularly significant as described above.

c) Each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse

[105] This is the most difficult portion of the best interests' analysis in this matter.

[106] Jane has legitimate reason to have concerns about Gord's alcohol consumption. I have specifically recognized this. However, Jane's gatekeeping behavior and strident refusal to regularly negotiate a reasonable compromise on even minor matters undermines Gord's relationship with the Children.

[107] In contrast, Gord, while clearly frustrated by Jane at times, I accept recognizes her role as their mother and historical primary caregiver. Gord is not seeking primary parenting or to exclude Jane from this historical role but rather a balanced sharing of parenting in light of the present circumstances.

d) The history of care of the child

[108] As I have indicated above, I accept Jane was the primary caregiver to the Children prior to separation and has continued to be so following separation.

[109] This, however, does not mean that Gord was not actively involved in the Children's care. Gord was the primary cook in the household, shared transportation duties with Jane when this accorded with his work schedule and was active in multiple outdoor activities with the Children. MGM especially benefitted from Gord's interest in outdoor activities; an interest not similarly shared to the same extent by Jane.

e) The child's views and preferences

- [110] The views of the child matter. Children have unique needs. Parenting plans need to be crafted based on those individual needs. I addressed this very issue quite recently in another high conflict parenting case: L.C. v. Y.S., 2023 BCSC 422.
- [111] Dr. Elterman's report makes clear that both Children have a strong bond with both parents and enjoy spending time with each of them. His recommendations, while somewhat dated due to the progress of this litigation, remain apt.
- [112] Importantly, neither child expressed a concern about their safety in the care of either parent.
- [113] Significantly, neither child expressed a clear preference for a specific parenting schedule as, I will recognize, can be the case when dealing with Children of this age; particularly MJM.
- f) The child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage
- [114] This a relevant factor in light of the decision made by Jane to unilaterally disengage with the French Immersion stream, but that is mitigated by the fact that Gord did not take steps to legally challenge at the material time.
- [115] I simply conclude that the Children may participate in French language classes as part of their regular curriculum and that Gord is the parent with the skillset to better assist in this regard given his bilingualism.
- g) Any plans for the child's care
- [116] This is a minor relevant factor. Both parties have extended family and other trusted resources to assist as needed with the care of the Children. All of these individuals, I accept, are suitable caregivers with positive relationships with the Children. Neither "side" is preferable over the other. To the contrary, the Children benefit, I accept, from the involvement of all of these individuals in their lives.
- h) The ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child
- [117] Subject to my conclusion that ongoing monitoring is necessary as it relates to Gord's alcohol consumption prior to and during his parenting time, I accept that both parents are capable of parenting the Children when exercising their parental responsibilities in relation to the Children. With that monitoring in place, there is no evidence of any harm of significance that would impair Gord's ability to parent. Jane similarly needs to address her own anxiety levels and recognize that she no longer is in a position to gatekeep Gord's parenting time as presently exists.
- i) The ability and willingness of each person in respect of whom the order would apply to communicate and cooperate

- [118] There is no doubt that both parents have dysfunctional and poor communication between each other. Jane is very focused on detail, sometimes to excess, and Gord frequently responds to this by being unresponsive entirely or vague and dismissive to Jane. Neither approach is presently serving the Children particularly well.
- [119] The parties would be well served with a parenting coordinator with the mandate to create a strict child focused communication policy that puts parameters on the length and frequency of Jane's communications and requires Gord to respond in a reasonable amount of time as opposed to simply taking the ostrich in the sand approach. I address this issue in my ultimate orders.
- j) Family violence
- [120] I accept Jane's evidence that there was one incident of family violence while she was pregnant with MJM in or about December 2011. Gord was, I find, inebriated and Jane, being pregnant and not otherwise suggested to be prone to substance misuse, was sober. Gord sought to intervene to prevent Jane from leaving the Family Home after an argument and there was a scuffle on the stairs. Jane was not physically harmed but that does not condone Gord's conduct or make it somehow acceptable. Jane had the absolute right to remove herself from the conflict with Gord and find a safe place with family or friends to deescalate matters. Regardless of who initiated the dispute, Jane's conduct was the appropriate response.
- [121] Save for this incident, however, I conclude there has not been family violence present in the household. Both parties engaged in agitated verbal exchanges, sometimes in the presence of the Children. This is clearly not in their best interests and is also not condoned. However, in my conclusion upon hearing all of the evidence, I accept these were mutual exchanges and not what I can conclude was verbal abuse by one party as against the other.
- [122] My conclusions, reached independently, are consistent with the report of Dr. Elterman who heard fairly similar, albeit not identical historical reports, and did not identify family violence as a key concern in this family.
- k) Any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child
- [123] This is not a relevant factor in this case.

Past Conduct

- [124] Past conduct and its impact on the children's best interests' analysis is referenced in both section 16(5) of the Divorce Act and in section 37(4) of the FLA:

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.[emphasis added]

- [125] Much of this lengthy trial was dedicated to Jane outlining her concerns about Gord's consumption of alcohol. I have made a finding of fact that these concerns are not unfounded and indeed supported by the Soberlink testing.
- [126] I further concluded, however, that there is no causal link between any of the incidents of injury or harm to the Children and Gord's alcohol consumption.
- [127] Gord's use of alcohol does need to be monitored on an ongoing basis to ensure the safety of the Children. Challenges with compliance with testing have resulted in disruption and dysregulation to the Children, particularly MJM, as described above. However, on balance I have concluded that while past conduct can be relied upon for an order for ongoing monitoring, it is otherwise not probative evidence in accordance with the above law.
- [128] There was also a paucity of evidence that Gord's conduct, including use of alcohol has had any significant negative impact on the Children. There have been no criminal charges other than the motor vehicle offence which occurred several years before the Children were born. There is no evidence Gord has not properly cared for the Children in general as a result of consuming alcohol nor otherwise put the Children in danger following the use of alcohol. The concern is two-fold:
- a) When the parties were together Jane acted as the governor, so to speak, with respect to Gord's alcohol consumption such that she stepped in where appropriate to take on the primary parent role even when both parties were otherwise available to share those duties outside of work obligations; and
 - b) Soberlink has effectively taken on that role after the parties ceased living together and has provided, I accept, an objective measure of Gord's substance use. It ensures the protection of the Children.
- [129] A custodial parent, however, has no right to limit access unless the court considers the limitation to be in the best interests of the child: *Young v. Young*, [1993] 4 SCR 3; 1993 CanLII 34 (SCC).
- [130] When considering the relevance of specific examples of conduct to a parent's capacity to exercise parental obligations, it is imperative to recognize that not all conduct bears directly on parenting capacity. Not every minor breach of socially acceptable conduct is relevant. As explained in *K.D.P. v. A.R.K.*, 2011 BCSC 1085 (at paras. 1 and 2):
- [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.

Restrictions on Parenting Time

- [131] With respect to the issue of supervised or restricted parenting time, I again refer to my prior decision in *L.C. v. Y.S.*, 2023 BCSC 422, wherein I dealt with a trial where the mother sought supervision of the father's parenting time for an 8-year-old boy and 13-year-old twin girls. I ultimately concluded that the father had been psychologically abusive to the mother which appropriately resulted in an interim protection order against him early in the proceedings and ongoing conduct orders by me to address such issues prospectively. Notwithstanding, I made the following comments on supervised parenting of children of the approximate age of MJM and MGM who, I concluded, do have a degree of maturity:
- [144] Before setting out my conclusion, I want to comment on the unique and exceptional circumstances which warrant an order for supervised parenting time, particularly in a situation with children of this age who are, I am satisfied, age- appropriately mature and capable of expressing their views on matters of concern. Whether a perceived concern is legitimate is situation specific and may be the product of them unreasonably reacting to the imposition of rules and household expectations is very live with the Court. However, I am satisfied that they are all comfortable with and capable of expressing their views and concerns as necessary.
- [132] In my view, the monitoring of Gord's BAC is a form of supervision but on a much different level. Provided Gord commits to the BAC monitoring, his parenting time with the Children will be unfettered. He can boat with the Children, he can swim with the Children, he can ski with the Children and so forth without any supervision, provided he complies with the periodic monitoring of his BAC levels.
- [133] Moreover, I have expressly built in a review provision into my orders that allows Gord to have this BAC monitoring reviewed in what I consider to be an appropriate amount of time wherein he can provide evidence that he continues his work with Doug MacKenzie (or some other similarly capable individual or program) and there is substantial compliance with the testing protocols.
- [134] In order to address some of the issues, I am, as set out below, also adjusting the specific testing protocols slightly to hopefully minimize conflict between the parties. To be very clear, a failure to provide a test or a non-compliant test will have situation specific consequences as set forth but does not reset the timeline for a review. The instances of non-compliance can be addressed in the evidence at the course of that review unless the parties agree, by consent, to eliminate the BAC monitoring requirement.

[135] Before turning to my orders on this issue, I raise the suggestion that the parties consider using SmartMobile as an alternative to Soberlink. SmartMobile offers an equivalent BAC monitoring service to Soberlink. I am expressly not endorsing one entity over the other and have relied, as indicated above, on the overall accuracy and reliability of the Soberlink test results. I merely recommend that this is an option to consider given the ongoing dispute between the parties regarding the functioning of the Soberlink device.

[136] Specifically, I order that:

- a) For a period of 12 months following the receipt of these reasons for judgment, Gord must enroll in Soberlink, Smartmobile or such other BAC monitoring program as may be agreed in writing between the parties;
- b) During this 12 month period, Gord must provide a sample within 1 to 3 hours of the commencement of his parenting time and a sample between 5:00 and 8:00 pm on all nights in which he has overnight parenting time;
- c) The samples must show a BAC of 0.02% or less or the parenting time may be cancelled at Jane's discretion;
- d) In the event that Gord fails to provide a BAC sample in accordance with this Order, Gord's parenting time may be cancelled at Jane's discretion;
- e) Gord is responsible for the cost of the BAC monitoring device; and
- f) Upon the expiry of the 12 months, there shall be a review of the ongoing requirement for BAC monitoring. This review shall be conducted by the parenting coordinator which, I conclude below, shall be appointed. Subject to the determination of the parenting coordinator, the BAC monitoring shall remain in place pending the conclusion of the review unless otherwise agreed in writing by the parties.

Conclusion on Guardianship and Parenting Time

[137] Both parties are presumptive guardians of the Children under s. 39 of the FLA.

[138] Subject again to my below appointment of a parenting coordinator, the parties shall equally share parenting responsibilities in accordance with s. 41 of the FLA. These parenting responsibilities can be enumerated in the final order arising from these reasons for the benefit of third parties but I consider it unnecessary to recite the legislation verbatim.

[139] In terms of the parenting schedule, and having regard to my above findings of fact, I generally accept Dr. Elterman's proposed schedule for the Children as follows:

- a) Jane shall remain the primary resident parent;
- b) Gord shall have parenting time:

- i. Wednesday after school (or 3:30 pm on non-school days) to Thursday morning (8:30 am on non-school days);
 - ii. Alternate Mondays after school (or 3:30 on non school days) to Tuesday morning (or 8:30 am on non school days); and
 - iii. Alternating weekends from Friday after school (or 8:30 am on non- school days) to Sunday at 6 pm,
- (the "Regular Parenting Schedule").

[140] However, I do not consider it in the best interests of the Children to transition into the Regular Parenting Schedule so late in the school year. That is an unnecessary disruption to their routine.

[141] Accordingly, the implementation of the Regular Parenting Schedule shall commence on Monday, July 1, 2024. Until July 1, 2024, the current court ordered parenting arrangement shall continue to govern.

[142] In light of the increase in Gord's parenting time generally through the Regular Parenting Schedule, I do not consider it appropriate to also make provision for additional summer vacation parenting time for Gord in 2024.

[143] However, commencing in the summer of 2025, each of Gord and Jane shall be entitled to one full week of uninterrupted parenting time in the months of July or August. Gord shall have first right of selection in 2025 and in all odd years thereafter. Jane shall have the first right of selection in 2026 and in all even years thereafter. The selecting party must provide written notice by April 1 of said year and the responding party must provide written notice of their week by April 15 of said year so the parties can plan their summers accordingly. The exchange time shall be 6:00 pm on the relevant date.

[144] The parties shall equally share the Christmas holiday break which shall commence after school on the Friday in December in which school concludes and terminate on the Monday or, if applicable, Tuesday in which school recommences. Gord shall have the first week of the Christmas holiday break in even years and Jane shall have the first week of Christmas holiday break in odd years. The exchange time shall be 6:00 pm on the relevant date.

[145] The parties shall equally share the spring break school vacation which shall commence after school on Friday in March in which school concludes and terminate on the Monday in March or, if applicable, April in which school recommences. Gord shall have the first week of spring break in odd years and Jane shall have the first week of spring break in even years. The exchange time shall be 6:00 pm on the relevant date.

[146] Notwithstanding the Regular Parenting Schedule, Jane shall always have parenting time with the Children on Mother's Day each year from 8:30 am to 7:00 pm.

- [147] Notwithstanding the Regular Parenting Schedule, Gord shall always have parenting time with the Children on Father's Day each year from 8:30 am to 7:00 pm.
- [148] All of the above holiday parenting schedule remains open to amendment by the parties by written agreement. It is entirely foreseeable that the parties may want to switch their weeks at Christmas or Spring Break due to family events and so forth. I do not wish to discourage that. However, to date the parties have not shown themselves to be able to co-parent with any flexibility and so a rigid parenting plan is required at this juncture.

Parenting Responsibilities and Appointing a Parenting Coordinator in High Conflict Cases

- [149] Pursuant to ss.41 and 42 of the FLA, parental responsibilities and obligations include decisions regarding the day-to-day care, control and supervision, religion and upbringing, and legal and medical issues relating to the child. It is not necessary here to repeat the language verbatim. The legislation speaks for itself.
- [150] Both parties in this case are prima facie guardians under s. 39 of the FLA and presumptively share these parenting responsibilities and obligations.
- [151] The issue is that due to the level of conflict, obvious distrust and disordered communication pattern between the parties, the functional sharing of the parenting responsibilities appears destined to fail without professional assistance. At least for the present time.
- [152] This brings forward the role of parenting coordinators in family law dispute resolution. Parenting coordination is a very effective child-centred dispute resolution process in which a qualified and impartial professional assists with implementation of a parenting plan and resolution of parenting conflicts. This can include identifying disputed issues, reducing misunderstandings, clarifying priorities, exploring possibilities for problem-solving, developing methods of appropriate communication and collaboration in parenting, interpreting and refining the parenting plan, and aiding parties in complying with the agreement or court order regarding parenting.
- [153] The parenting coordinator further has the benefit of becoming aware of specific family dynamics which can help proactively manage or mitigate further disputes.
- [154] The primary impediment to engaging a parenting coordinator is the cost.
- [155] In this case, I am satisfied that the resources are available to fund this very necessary service for the parties and, most importantly, the Children.
- [156] In this regard, to state Jane and Gord's communication with one another is problematic, is most certainly an understatement. Efforts to work on more effective communication were thwarted when Jane decided to withdraw from court ordered co-parenting counselling with Ms. Maniago. In my view, MJM and MGM would be well served with a parallel parenting program which limits their parents' interactions with each other to every degree possible

combined with the appointment of a parenting coordinator to assist when negotiations break-down over parenting responsibilities such that neither parent has the proverbial veto over the other.

- [157] In the quite recent decision of this court in *J.F.C. v. A.O.C.*, 2022 BCSC 294, the parties had separated some eight years prior. They had children who were now aged 11 and 12. The mother had been the primary caregiver during the relationship when the children were young. However, by 2017, when the children were early school age, the parties had entered a 4-3 parenting schedule to share parenting. Both parties had now agreed to move to a week-on week-off schedule but were unable to agree how to implement that schedule. It was the father who sought the appointment of a parenting coordinator, while the mother sought to be the tie-breaker vote as between them in the event of a dispute.
- [158] In ordering a parenting coordinator be appointed, Justice Jackson said as follows:
- [43] The current situation has led to stagnation in the children's activities. The parties do not agree on what activities the children should be involved in, and so by default, the children do none. I find the best interests of the children require the parties to engage a third party to assist in navigating areas of conflict in their decision making about the children and in facilitating their effective and productive communication.
- [159] In *J.A.M.P. v. F.M.G.*, 2021 BCSC 425 at para. 19, the Court held that:
- [19] In my view the problems faced by the parties on this application could more effectively and properly be dealt with by a parenting coordinator. The court has a role in determining the unresolvable differences concerning parenting schedules and practical solutions, but using applications to court to solve these differences is not optimum for B or the parties; scheduling problems to resolve unforeseen circumstances, urgent situations, and the needs of the parties would much better be resolved by a parenting coordinator with ongoing responsibilities to monitor this family's circumstances and the most effective strategies to advance the child's best interest.
- [160] A parenting coordinator may also be appropriate when the nature and tone of the communication between the parties is problematic. See by way of one of many examples *H.K. v. W.K.*, 2017 BCSC 1817 at para. 32:
- [32] The parties' palpable bitterness about the breakdown of their relationship, their distrust of each other, and their failure to take responsibility for their respective roles in their current conflict has resulted in animosity and behaviours which have affected their children. Both Cary Kruger, B.K.'s occupational therapist, and Dr. Maya Lippen, his psychologist, testified that B.K. was stressed about the marital discord, and C.K. told Ms. Forster that she wished her parents could be "nicer" to each other and "act like friends".

- [161] As I have attempted to articulate, while both parties clearly love the Children, they have their faults. Jane over communicates and Gord often responds with silence. Jane has bona fide concerns about Gord's alcohol consumption and Gord minimizes those concerns. Jane has mental health issues which have resulted in her taking an extended leave of absence from her otherwise gainful employment and rely on the generosity of family. The result of this has been a long, arduous and, I strongly expect, expensive trial.
- [162] These parties need out of the court system sooner rather than later so that the Children who have not yet reached their teen years can enjoy their time with each parent, their extended family relationships, their activities and their peer relationships without the constant "black cloud" of parental conflict.
- [163] I am further satisfied, on the evidence, that due to their communication difficulties and different approaches to parenting, the parties are presently unable to work together towards a common goal that is in their Children's best interests. While the tone of the parties' communications has been tempered by the use of the Our Family Wizard communication tool, their communication continues to be problematic and someone needs to intervene. The Court is not that person.
- [164] As a result, I have concluded that a parenting coordinator should be appointed to assist the parties in moving forward on decisions respecting the Children. I will return to the appointment process shortly.
- [165] Pending the appointment of the parenting coordinator, the status quo shall remain with respect to the pick up and drop offs of the Children. With the revised parenting schedule, this is at most a minor inconvenience to Gord and if he wishes to pursue it through the parenting coordinator in due course, he can do so as it is an issue within a parenting coordinator's jurisdiction. Pending any subsequent determination by the parenting coordinator, both parties' parents shall be permitted to pick up the Children along with any other delegate(s) upon whom the parties mutually agree upon.
- [166] The same is true of the dispensation of MJM's medications. I frankly do not understand this power struggle between the parties and sought to impose some compromise on an interim basis. It does not reflect well on either of them and is to MJM's detriment. It will be within the jurisdiction of the parenting coordinator to fashion a different regime in the event the parties cannot somehow figure it out themselves as MJM's parents.
- [167] Regarding the appointment of the parenting coordinator, there is no present consensus - as is the case with most everything on this file.
- [168] As such, I do not have satisfactory affidavit evidence as to the availability of any proposed parenting coordinator and their estimated fees having regard to the residency of the parties and the Children. I take judicial notice that the fees charged by parenting coordinators do vary quite considerably and so this is a relevant consideration.

- [169] Accordingly, the parties shall have fourteen days to file a supplementary affidavit identifying their proposed parenting coordinators(s), the curriculum vitae for said coordinator(s), together with confirmation of their hourly rate and retainer requirement.
- [170] Upon filing of the supplementary affidavits, the matter shall be brought back before me for a thirty-minute hearing to occur at 9:15 am at the earliest date to be mutually agreed through Supreme Court Scheduling. Leave is given for counsel and the parties, if they wish to attend, to appear by MS Teams, if necessary.
- [171] Alternatively, if the parties can agree on a parenting coordinator, the terms of the appointment shall be on those set forth in the current form of agreement endorsed by the BC Parenting Coordinators Roster Society.
- [172] The term of the appointment of the parenting coordinator shall be for a term of 24 months. The appointment may be renewed upon mutual agreement of the parties or further court order.
- [173] The parties shall be equally responsible for the cost of the parenting coordinator, subject to the right of the parenting coordinator to allocate costs differently in accordance with the terms of the parenting coordination agreement.

Conclusion Re Other Orders

- [174] I further make the following conduct orders ancillary orders, some of which are effectively going by consent, the balance of which I consider to be in the best interests of the Children and an appropriate companion to my appointment of a parenting coordinator.
- [175] The Parties:
- a) Will put the best interests of the Children before their own interests;
 - b) Will encourage the Children to have a good relationship with the other parent and the parent's partner, and speak to the Children about the other parent in a positive and respectful manner;
 - c) Will make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of the Children;
 - d) Will not question the Children about the other parent or time spent with the other parent beyond simple conversational questions;
 - e) Will not discuss with the Children any inappropriate adult, court or legal matters; and
 - f) Will not blame, criticize or disparage the other parent to the Children.

- [176] The parties will encourage their respective families to refrain from any negative comments about the other parent, and his or her extended family and/or significant other, in front of the Children concerning family issues or litigation or the parenting coordination process.
- [177] Neither parent will speak in a disparaging or negative manner about the other parent, or allow or encourage others to do so, in the presence of the Children. Neither parent will draw the Children into inter-parent disputes or commentary, recognizing that doing so places significant stress on the Children that can cause loyalty conflicts which damage parent-child relationships.
- [178] Neither parent will discuss with the Children, or with any party in the presence of the Children, past or present legal proceedings or issues between the parties related to present or past legal proceedings, including:
- a) Financial issues of any kind relating to the parties or the Children; or
 - b) Conflicts between the parents relating to parenting or scheduling issues.
- [179] Each parent may respond briefly, in a reasonable manner, to questions concerning such matters initiated by a child.
- [180] The parties shall only communicate with each other regarding parenting time and child related matters. Non-emergency communication between the parents about the Children (eg. schedule changes, illness, homework, etc.) will be conducted via the online co-parenting portal "Our Family Wizard", or such other online co-parenting platform as the parties may agree. The parents will not email or text each other except in the case of an emergency or unavoidable urgency as addressed below.
- [181] All communications will be brief, informative, friendly and respectfully firm, non-critical, related solely to the Children and without reference to either of the parties or their activities. Absent an emergency, the parties will not communicate with each other more than once per day.
- [182] Inter-parent communications will not be shown to the Children. Each parent will respond promptly by return to the communication of the other. In this context, "promptly" means within 48 hours, subject to emergency communication.
- [183] The parties will share all documents pertaining to the Children by scanning the document and then sending it promptly to the other parent via "Our Family Wizard" or such other communication portal they mutually agree upon. The parents will not rely on the Children to transport documents or information between them.
- [184] The parents will use the calendar on "Our Family Wizard" or such other communication portal they mutually agree upon to keep track of the Children's appointments and activities, with the calendar being promptly updated upon making an appointment.

[185] In the event of an emergency, the parents will communicate by telephone or text. Any communication via telephone in an emergency, will be factual and communicate essential information to allow both parents to assess and respond to the emergency as appropriate.

[186] The parents will not discuss with the Children:

- a) Any proposed change to the parenting schedule;
- b) Any proposed absence from school for an event or holiday; or
- c) Any proposed activity that would occur on the other parent's parenting time before agreement is reached between the parents as to such change.

[187] While in the care of one parent, the Children shall have reasonable access to communicate with the other parent by telephone, text or video messaging. Each parent shall respect the other's right to put limits on that contact as may be appropriate in the circumstances but consent shall not be unreasonably withheld.

[188] Any supplementary terms regarding the form of communication between the parties directly and the parties and the Children shall be within the jurisdiction of the parenting coordinator.

Costs

[189] I will deal with the issue of costs in the accompanying reasons regarding the support issues as substantial success needs, in accordance with the law, to be considered globally.

Form of Order

[190] There are various components to the final order which I have made herein in these reasons for judgment. There has also been a change of counsel by Jane following the trial. I can thus foresee the possibility, despite my efforts to be as clear as possible, that there may not necessarily be consensus as to how the terms of the final order are to be documented.

[191] In the normal course, such issues would be dealt with through the usual process of applying to settle the terms of the order before the registrar pursuant to the Rules.

[192] However, in this case, I will grant leave to the parties, if necessary, to submit their preferred form of final order through Supreme Court Scheduling at the same time that written submissions on the parenting coordinator appointment are due to be filed.

"Hardwick J."

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