
CANADA / JUDGMENT

K.A.C. v. J.D.E.C.

2020 BCSC 1373

COURT

Supreme Court of British Columbia

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2020 BCSC 1373 K.A.C. v. J.D.E.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.A.C. v. J.D.E.C.,

2020 BCSC 1373

Date: 20200915

Docket: E103176

Registry: Vancouver

Between:

K.A.C.

Claimant

And

J.D.E.C.

Respondent

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

The Claimant, appearing in person:

K.A.C.

Counsel for the Respondent:

B.J. Ingram

Place and Dates of Trial:

Vancouver, B.C.

July 9-11 and September 20, 2019,

June 23-26 and August 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 15, 2020

Table of Contents

I. Introduction.. 3

II. The Background Facts.. 4

A. The Marriage and its Breakdown.. 4

B. The Early History of the Litigation.. 5

C. Subsequent Events. 7

D. Revisiting the Parenting Schedule. 9

E. The Trial 11

F. The August 2, 2020 Incident and its Aftermath.. 13

III. Discussion.. 16

A. Applicable Law.. 16

B. The Parenting Issues. 17

i. Preliminary Remarks. 17

ii. The Children's Health and Emotional Well-Being. 19

iii. The Children's Views. 20

iv. The Nature and Strength of the Relationships between the Children and Significant Persons in their Lives. 20

v. The History of the Children's Care. 20

vi. The Need for Stability. 21

vii. The Parties' Parenting Abilities. 21

viii. Family Violence. 22

ix. The Need for Cooperation between the Parties. 22

x. Conclusions on the Parenting Issues. 22

C. The Financial Issues. 23

i. The Parties' Incomes. 23

ii. Child Support 27

iii. Retroactive Child Support 30

iv. Section 7 Expenses. 33

v. Property and Debt 38

V. Summary and Disposition.. 40

I. Introduction

- [1] This is a family action that has been underway for nearly a decade. The parties were married in February 2008 and resided in Squamish for the short time they were together. They separated just under two and a half years later, in July 2010. They have two children, now aged 11 and 13. They were ordered divorced during the trial, on July 11, 2019.
- [2] The claimant, K.A.C., works as a sales representative for a technology consulting firm. She also has two adult sons from previous relationships who now live on their own. She continued to reside in Squamish for several years after the parties separated but has recently moved to North Vancouver.
- [3] The respondent, J.D.E.C., operates his own contracting and carpentry business as a sole proprietor. He has been in a relationship with his new partner, D.B., since 2011 and they have been living together in North Vancouver since 2014. Also living with them part time is D.B.'s teenaged daughter from a previous marriage.
- [4] One of the more contentious issues at trial was how to divide parenting time between the parties. Following their separation in 2010, they agreed to share parenting time equally. They continued to do so, generally without incident, until February 2016, when K.A.C. had a relapse in what has turned out to be her ongoing struggle with substance abuse.
- [5] As a result of that and other such episodes that have occurred from time to time since then, the children have more recently been primarily in the care of J.D.E.C. K.A.C.'s parenting time is now as restricted as it has ever been as a result of the most recent, and in many ways the most serious of those episodes. It occurred on August 2, 2020, just over a month after the trial was supposed to have concluded and while my decision was still under reserve.

- [6] Following that episode, J.D.E.C. successfully applied to re-open the trial so that he could adduce new evidence and make further submissions on the parenting questions before me. The parties agreed that the submissions that had previously been made to me on those questions had been overtaken by what had recently occurred. The main question now is whether, and if so, under what circumstances, K.A.C. can seek to regain at least some of the ground she has lost in that regard.
- [7] The most significant of the financial issues in dispute is J.D.E.C.'s claim for child support, including retroactive child support which he calculates at \$176,608.04 as of the end of June 2020. He alleges that while the children have resided primarily with him since 2017, K.A.C. has wrongfully refused to pay any child support. He also seeks to be reimbursed for certain child-related expenses he has paid over the years.
- [8] While K.A.C. acknowledges her obligation to pay child support prospectively, she disputes J.D.E.C.'s retroactive claim on several grounds. First, she says that the situation must be assessed in light of the order of this Court made April 1, 2015, which suspended her obligation to pay child support as of that date, including the arrears that were then outstanding. Second, she argues that an award of retroactive child support would not be warranted in this case because J.D.E.C. delayed producing his financial information until the trial and then understated his income during the trial. Instead, in calculating the child support that should be paid, she seeks to have the court impute a much higher income to him to reflect the relatively comfortable lifestyle he appears to enjoy compared to hers. Finally, K.A.C. also seeks to be reimbursed for certain joint family debts that she claims to have paid off herself following the parties' separation.

II. The Background Facts

A. The Marriage and its Breakdown

- [9] The parties first met in 2005 while enrolled in a six-month residential program at an addiction treatment facility in Nanaimo. Both have struggled in the past with substance abuse.
- [10] They began dating soon after completing the program. Their relationship became marriage-like in 2006. In August of that year, they purchased their first home together in Squamish. They were married on February 16, 2008. While together, they had two children, a son, R.S.C., born in early 2007, and a daughter, C.L.C., born in late 2008.
- [11] Unfortunately, their relationship appears to have deteriorated soon after the birth of C.L.C. Their quarrels grew more frequent, intense and, according to K.A.C, occasionally violent. K.A.C. had two relapses in 2006 and another in 2008. She began using cocaine again approximately three months after C.L.C. was born.

- [12] The parties began living separate lives in the summer of 2010. By July 2010, they were alternating their parenting time and moving out of the family home temporarily while the other spent time with the children. After a particularly serious incident on October 1, 2010, the police were called and J.D.E.C. was arrested and charged with assaulting K.A.C. The charge was ultimately resolved prior to trial when J.D.E.C. agreed to submit to a peace bond.
- [13] In October 2010, J.D.E.C. moved out of the family home permanently and rented a three-bedroom house for himself and the children in Squamish. Thereafter, he stopped contributing to the family expenses, including the mortgage.

B. The Early History of the Litigation

- [14] K.A.C. commenced this action on October 4, 2010.
- [15] On October 12, 2010, this Court made an order dealing with various parenting issues. Among other things, the order:
- (a) declared the parties to be joint guardians of the children, although K.A.C. was given primary responsibility for their day-to-day care along with the right to make major decisions in the event the parties were unable to agree; and
 - (b) set the parenting schedule according to a rotating two days on/three days off cycle.
- [16] By a consent order made July 26, 2011, the parties agreed on the following additional and revised terms:
- (a) the parenting schedule was changed to a seven days on, seven days off cycle;
 - (b) the other parent was to be the preferred alternate caregiver "in lieu of a babysitter, daycare, nanny or grandparents";
 - (c) the parties were prohibited from removing the children from Squamish;
 - (d) the parties agreed that their respective incomes were \$77,699 (K.A.C.) and \$47,500 (J.D.E.C.); and
 - (e) J.D.E.C. was to transfer his interest in the parties' Dodge Caravan to K.A.C. and she was to assume the associated loan, but the parties were to "attribute liability for the loan in a final division of matrimonial property".
- [17] The parties were next before the Court on October 11, 2011. On that date, Ross J. declared that there was no prospect of reconciliation between them. K.A.C.'s income was found to be \$77,699 and J.D.E.C.'s \$47,459. Based on those incomes, K.A.C. was ordered to pay J.D.E.C. child support of \$435 per month and \$2,494 in unpaid arrears. Extraordinary expenses were to be paid in the ratio of 62/38%.

- [18] Justice Ross' order also varied, by consent, the October 12, 2010 order to remove the paragraphs giving K.A.C. primary responsibility for the children's day-to-day care and final decision-making authority. Instead, both parties were given equal authority and a parenting coordinator was appointed to assist them in working through any disagreements.

C. Subsequent Events

- [19] The parties went their separate ways with few, if any, valuable assets. They each retained their own vehicles - K.A.C., the Dodge Caravan mentioned in the order of July 26, 2011 and J.D.E.C., a pickup truck that he was using for his business. On June 22, 2011, K.A.C. traded in the Caravan for a more expensive Toyota Matrix. It appears that the parties still owed \$12,004.91 on the Caravan at the time. In the result, although K.A.C. notionally received a credit for the trade-in of \$12,342.07, it was offset almost entirely by the dealership's assumption of the associated debt.
- [20] K.A.C. was apparently unable to make ends meet on her own and the mortgage eventually went into arrears. In September 2011, with a foreclosure underway, the parties sold the former family home for a price that was insufficient to satisfy the balance owing on the mortgage. Their mortgage insurer covered the shortfall of \$26,987.68 but then pursued K.A.C. alone for it.
- [21] On August 30, 2012, K.A.C., by then in considerable financial difficulty, filed a consumer proposal. Her Statement of Affairs, sworn that date, listed assets totalling \$10,911 in value. Almost all of that sum, \$10,908, was attributable to the Matrix, which was subject to a lien covering its entire value. The unsecured claims against her totalled \$68,923.13, the largest of which was the \$26,987.68 owing from the mortgage shortfall.
- [22] The proposal, as approved by the creditors and this Court, called for K.A.C. to compromise her debts in exchange for regular monthly payments of \$400 over a period of five years, for a total of \$24,000. In the end, it was successful. K.A.C. was acknowledged to have fulfilled its terms as of November 1, 2017.
- [23] By the time K.A.C. put the proposal to her creditors in 2012, J.D.E.C. had already begun his new relationship with D.B. D.B. teaches nursing at BCIT and works part-time as an emergency room nurse at a Vancouver hospital. For the first few years of their relationship, D.B. resided in a condominium that she owned in the Lower Mainland.
- [24] In early 2014, she and J.D.E.C. decided to find a house that could accommodate their combined families. D.B. entered into a contract to purchase a suitable property in North Vancouver, intending to sell the condominium and use the net proceeds to make the down payment. The condominium did not sell for the price she was expecting, however, leaving her with a shortfall of approximately \$40,000.

- [25] Without living parents of her own, D.B. approached J.D.E.C.'s mother for help. She agreed to make up the shortfall so they could complete the purchase. Although she was willing to make a gift of the money, D.B. insisted that it be treated as a loan that she would repay in due course. Despite his mother's contribution to the purchase, J.D.E.C. received no legal interest in the property.
- [26] On May 30, 2014, J.D.E.C.'s then counsel (not his counsel at trial) wrote to K.A.C.'s then counsel advising that J.D.E.C. had recently purchased a new house in North Vancouver with his new partner and that they planned to send the children to Norgate Elementary Community School ("Norgate Elementary") in North Vancouver for the coming academic year. In his testimony at trial, J.D.E.C. stated that the letter was inaccurate insofar as the house had not yet been purchased at that point, and it was D.B. alone who was making the purchase. In any event, K.A.C., who was still living in Squamish at the time, objected to the proposed change of schools. J.D.E.C. applied to this Court for an order permitting him to move the children to the new school but the application was refused by Masuhara J. following a hearing before him on July 3, 2014.
- [27] Another contentious issue that had arisen by then was K.A.C.'s failure to keep current with the \$435 monthly child support payments contemplated by the October 11, 2011 order of Ross J. In his oral ruling on the relocation application, Masuhara J. expressed concern about the accumulated arrears. He urged K.A.C. either to bring her child support payments current or seek a variation from the Court. She eventually opted for the latter course. The parties appeared before Abrioux J. (as he then was) on April 1, 2015 to address that issue. He ordered that K.A.C.'s obligation to pay child support, including the arrears accumulated to that point, was to be suspended pending the trial, to be dealt with by the trial judge.
- [28] At the time, the trial was expected to take place later that year. As it turned out, it was not to begin, let alone conclude, for several years yet.

D. Revisiting the Parenting Schedule

- [29] Since their initial separation in October 2010, the parties had generally been sharing parenting time equally. The parenting schedule had been formalised by the consent order of July 26, 2011, which contemplated a rotating seven-day cycle. The parties appear to have adhered to that schedule without major incident until February 12, 2016.
- [30] On that date, while the children were in her care, K.A.C. consumed so much cocaine that she needed emergency medical treatment. J.D.E.C.'s mother, who lived nearby, collected the children when K.A.C. was taken to hospital.

- [31] J.D.E.C. kept the children with him in the immediate aftermath of the incident. On February 18, 2016, before K.A.C.'s next seven-day turn was due to begin, J.D.E.C. obtained an order without notice from Master McDiarmid provisionally granting him exclusive custody of the children. K.A.C. was given supervised access on Sundays for two hours. Having obtained that order, J.D.E.C. unilaterally enrolled the children at Norgate Elementary.
- [32] On March 11, 2016, K.A.C.'s application to vary the order of Master McDiarmid came before Griffin J. (as she then was). Relying on the medical and other evidence adduced by K.A.C. suggesting that the relapse was an isolated incident brought on by stress that was unlikely to recur, Griffin J. reinstated the original alternating seven-day schedule. In doing so, however, she also commented that the Court would be unlikely to give K.A.C. a second chance if such an incident were to occur again.
- [33] Just over a year later, there was another incident. On May 28, 2017, K.A.C. overdosed on Trazodone, an antidepressant or anti-anxiety medication that she says she was using to help her sleep. Early that day, a Sunday, J.D.E.C. drove the children to Squamish for their scheduled parenting time with K.A.C. When they arrived at her home, he sent the children in as usual but they returned to the car almost immediately to tell him that K.A.C. was asleep on the floor inside. When J.D.E.C. entered the home himself he found K.A.C. on the floor with a pill bottle on the floor near her and another in the hall. He called for an ambulance. When it arrived, the paramedics were unable to wake her and she was taken to hospital.
- [34] J.D.E.C. believed that the overdose was an attempted suicide. K.A.C. denied this, although she acknowledged that it likely had something to do with the stress associated with the recent loss of her job and accompanying financial strain.
- [35] Once again, J.D.E.C. applied for an order granting him exclusive custody of the children. On June 14, 2017, Mayer J. ordered, on an interim basis, that the children remain with J.D.E.C. until the anticipated hearing of the main application on July 11, 2017. In the meantime, K.A.C. was to have access for two hours on Tuesdays and Thursdays and five hours on Sundays.
- [36] Following a more lengthy hearing before Bracken J. on July 11, 2017, yet another change was made to the parenting schedule. In his reserved reasons of July 14, 2017, he referred to the medical evidence adduced by K.A.C., including that of Dr. Wynn, K.A.C.'s treating psychiatrist. Dr. Wynn expressed confidence that K.A.C. would "continue to maintain her sobriety," that she would "continue to make a full recovery" and that a recurrence was unlikely. Despite that evidence, Bracken J. found that K.A.C. needed time to recover. He imposed a new 11/3 schedule that placed the children primarily with J.D.E.C. in North Vancouver for the coming school year. K.A.C. was given access on alternative weekends and one weekday evening each week, although holidays continued to be shared equally. He appears to have expected that the parties would return to a more equal parenting schedule after the conclusion of the trial.

E. The Trial

- [37] The trial had been set to begin on February 4, 2019. Once again it was adjourned, this time to July 20, 2019, due to the late arrival of a s. 211 report prepared by Robert Finlay. That report, which I will discuss in more detail later, recommended, among other things, a gradual return to an equal parenting schedule.
- [38] As a term of his February 4, 2019 order adjourning the trial, Abrioux J. changed the parenting schedule again. By that order, K.A.C. was to pick the children up from school every second Wednesday and return them the following Monday (or Tuesday if there was no school on the Monday). He also directed Mr. Finlay to supplement his report to address the question of the children's school, which was still contentious at the time. In May 2019, however, the parties agreed that the children would remain where they were at Norgate Elementary and there was consequently no need to supplement the report.
- [39] The trial finally began on July 9, 2019, initially before Bowden J. It did not complete in the three days that had been reserved and so additional dates were scheduled in September 2019. On Wednesday, September 18, 2019, however, just days before the trial was supposed to resume, K.A.C. was hospitalised once again due to another episode of substance abuse involving cocaine. It appears that she was taken to hospital by ambulance after a neighbour witnessed an apparent suicide attempt while she was under the influence of cocaine.
- [40] According to her subsequent testimony, she was experiencing high levels of stress and anxiety, this time occasioned by the imminent resumption of the trial. She attributes the incident partly to a prescribed increase in the dosage of her anti-depression medication the week before. She subsequently reported to Dr. Wynn that she had consumed cocaine over the course of the previous evening, but she appears to have told the paramedics who brought her to the hospital that day that she had in fact been consuming cocaine every day since September 13, 2019, the previous Friday. The hospital records also suggest that she continued to consume cocaine even while at the hospital, before her remaining supply was taken from her.
- [41] Rather than notify J.D.E.C. in advance that she was unwell and would probably be unable to take the children as scheduled, she spent two days in self-isolation, fearing that her troubles would be used against her in court to justify another reduction in her parenting time. The extent of the problem was discovered before her parenting time was supposed to have started only because her friends became concerned after receiving erratic texts from her. It was only after she was taken to the hospital that she had a friend call J.D.E.C to tell him what had occurred and that he would have to collect the children from school that day instead of her.
- [42] After he did so, he kept them exclusively with him until the matter was addressed before me in chambers on October 11, 2019. The parties had set down competing applications to be heard on that day. J.D.E.C. sought an order allowing him to keep the children with him exclusively pending a full exploration of the incident. K.A.C. sought to reinstate the

parenting schedule set out in the February 4, 2019 order of Abrioux J. that was still formally in effect. I provisionally ordered the parties to revert to the 11/3 schedule set out in the July 14, 2017 order of Bracken J., pending the outcome of the trial. I also added a requirement that K.A.C. report to a mutually acceptable third party to confirm that she was in a fit state to take the children prior to exercising her scheduled parenting time.

[43] Shortly after that, the trial itself was assigned to me (Bowden J. having since retired). The parties finally had the opportunity to present the rest of their trial evidence and concluding arguments before me between June 23 and 26, 2020. With the trial completed, they agreed to an interim order restoring the alternating week-on/week-off parenting schedule for the coming summer holiday, pending the release of my decision. They continued to disagree about what the parenting schedule should be during the school year, however. K.A.C. sought to have that same (equally shared) schedule continue throughout the year. J.D.E.C. argued that he should have the children for nine of every fourteen days during the school year.

[44] I reserved judgment on that and the other issues in the trial.

F. The August 2, 2020 Incident and its Aftermath

[45] Unfortunately, the newly-reinstated, equal parenting schedule did not last very long.

[46] On the evening of August 2, 2020, the children were with K.A.C. for her scheduled parenting time. They also had two friends staying with them overnight. Just before 10 pm, J.D.E.C. received a telephone call from R.S.C., who was clearly upset. He asked J.D.E.C. to come to K.A.C.'s home immediately because K.A.C. had locked herself into a bathroom and was not responding.

[47] While driving there, J.D.E.C. had R.S.C. call 9-1-1. When he arrived at the apartment minutes later, he ushered the children into a bedroom and, once he was alone, forced his way into the bathroom. He found K.A.C. on the floor unconscious, covered with white powder, with her back against the door. While on the telephone with the emergency responder, he followed instructions to lay K.A.C. flat on the floor and check her breathing.

[48] While J.D.E.C. was waiting in the bathroom for the ambulance to arrive, he observed vials with more white powder and associated drug paraphernalia nearby. He took photographs and, once the ambulance paramedics arrived, began making a video-recording of the scene.

[49] Their efforts to resuscitate K.A.C. in the bathroom were unsuccessful. After she was taken to the hospital, J.D.E.C. gathered the four children and drove the friends home.

[50] R.S.C. later recounted to J.D.E.C. that, the night before, C.L.C. had slept over at a friend's house and K.A.C. had asked R.S.C. to sleep in the bed with her because she was hearing strange voices in the apartment. When he asked her if she was "seeing things", she responded that only LSD would cause her to see things and she is not taking that. R.S.C. also told J.D.E.C. that, a few days before, K.A.C. had asked him to use her banking card to withdraw \$500 in cash from the automatic teller machine at the supermarket across the

street and that he had to go back several times to get the cash because there was confusion over the PIN.

- [51] J.D.E.C. testified that once he was alone with the children and back home, C.L.C. began crying. She said she was not going to have a relationship with her mother again. She told J.D.E.C. that she was "upset and mad". R.S.C. expressed the view that this was typical behaviour for K.A.C. and that he was mainly angry that it had occurred while his friends were present. He conveyed his reluctance to go back to K.A.C.'s home again. More recently, his stated preference was that he not go back for an overnight stay for at least a year. Both children have expressed a desire for K.A.C. to take more effective steps to get treated before they would be willing to stay overnight with her again.
- [52] J.D.E.C. testified that over the next few days he was in contact with a social worker with the British Columbia Ministry of Children and Family Development, who informed him that a report of the incident was being prepared and that, in the meantime, it was recommended that any parenting time with K.A.C. be supervised. He has since been trying to arrange counselling for the children through North Shore Family Services, despite the children's previously expressed lack of enthusiasm for counselling in general.
- [53] K.A.C. has not seen the children in person since August 2, 2020, although she has had some limited contact with them through FaceTime. While she was in the hospital, K.A.C. appears to have attempted, through a social worker, to speak to the children directly. According to J.D.E.C., the social worker contacted him to convey K.A.C.'s wish to speak to the children but also advised him that he had the right to refuse to permit it. Believing that direct contact with K.A.C. at that time would not be in the best interests of the children, he refused to permit it. K.A.C. sent an email to J.D.E.C. on August 3, 2020 asking for his help with her recovery. He did not respond.
- [54] K.A.C. has since been making frequent efforts to resume contact with the children through text messaging and social media. According to J.D.E.C., both he and the children believe that those communications are premature and excessive. He believes, as well, that K.A.C. has been trying to manipulate the children by suggesting to them that they have an important role to play in her recovery.
- [55] In her testimony, K.A.C. acknowledged that she overdosed on cocaine while the children were in her care on August 2, 2020. Although she admits that she has a substance use disorder, she maintains that the only times she has used cocaine in the last three years were those that led to her hospitalisation. As she described it, she "did suffer brief one-night relapses" on February 16, 2016, May 25, 2017 and September 20, 2019. She denied asking R.S.C. to withdraw cash for her to pay for drugs in August 2020.

- [56] She explained that she is devastated by what occurred on August 2, 2020 and deeply regrets its impact on her family, particularly the children. She testified that she was not surprised when a social worker told her that the children had expressed reluctance to see her the following day.
- [57] She attributes the most recent episode to various factors, including the stress of representing herself in the trial, a high-stress job, her recent move to North Vancouver and the resulting social isolation and loneliness, exacerbated by the current pandemic, all of which, she says, left her "in denial" as to how serious her problem was and "likely pushed [her] recovery work to the backburner".
- [58] She described in detail the efforts she has been making since then to address the problem. These include the following:
- (a) she is attending weekly sessions with her psychiatrist;
 - (b) she is participating in an "Intensive Outpatient Program" consisting of group sessions lasting ten hours per week for 12 weeks, a minimum of six individual counselling sessions and continuous mandatory drug testing every Monday and Wednesday;
 - (c) she has put herself on a waitlist for a 30-day inpatient program;
 - (d) she is attending weekly one-on-one, 90 minute counselling sessions with a clinical counselor; and
 - (e) she has secured a recovery sponsor.
- [59] After receiving that evidence and the parties' submissions on August 28, 2020, I made the following interim orders pending the release of my decision:
- (a) K.A.C. was to have parenting time on alternate Saturdays from 10 am to 6 pm, supervised by a neutral third party;
 - (b) K.A.C. was not to instigate contact with the children more often than once every other day;
 - (c) J.D.E.C. was to make best efforts to obtain counselling for the children through North Shore Family Services; and
 - (d) J.D.E.C. was prohibited from showing the photographs and video-recordings he made of the incident to the children.

III. Discussion

A. Applicable Law

- [60] The pleadings seek relief under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA], the Family Law Act, S.B.C. 2011, c. 25 [FLA], and the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].

[61] With respect to the parenting issues, the parties agree that it is the DA that should be applied. It appears that the parenting orders previously made in this action have generally either invoked the DA expressly or used terminology drawn from it rather than provincial legislation.

[62] With respect to the property and debt issues, however, the parties agree that it is the FRA that applies pursuant to s. 252 of the FLA, which states as follows:

252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

(2) Unless the spouses agree otherwise,

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

B. The Parenting Issues

i. Preliminary Remarks

[63] Following the hearing on August 28, 2020, K.A.C. was given supervised parenting time every other Saturday from 10 am to 6 pm. K.A.C. had sought to have interim parenting time from Saturday at 10 am to Sunday at 6 pm on three weekends each month. In addition, she urged me not to make any final order until December 2020, at which point she hopes that her situation will have stabilised so that a more evenly balanced schedule can be restored. J.D.E.C. seeks a final order now but accepts that it may be appropriate to revisit the parenting schedule in December.

[64] In addition to the parenting schedule, the parties seek clarification of their respective parenting responsibilities. Although it has been common ground that the parties will continue to be joint guardians, J.D.E.C. also seeks an order that he have primary responsibility for arranging their extracurricular activities while K.A.C. their medical and dental care. K.A.C. seeks to have a parenting coordinator appointed, but J.D.E.C. argues that such an appointment is unnecessary.

[65] Parenting issues such as these must be resolved by determining what is in the best interests of the children. Although this matter falls to be decided under the provisions of the DA rather than the FLA, it has been held that the test is no different under the two statutes. In *G.G. v. M.A.*, 2014 BCSC 1023, Butler J. (as he then was), stated as follows at para. 78:

Section 37(2) of the [FLA], lists factors to be considered when a court is deciding what is in the best interests of a child. As noted by Humphries J. in *Hansen v. Mantie-Hansen*, 2013 BCSC 876 at para. 61, the considerations listed are those that can be gleaned from a perusal of case law under the Divorce Act and the FRA.

- [66] Similarly, in *Pozzobon v. Pozzobon*, 2013 BCSC 1226, Grauer J. (as he then was) held that although the application before him had been brought under the DA, the list of factors set out in s. 37 of the FLA, though not exhaustive, provides a helpful structure for analysing the best interests of the child under both statutes.
- [67] It is therefore appropriate to have regard to the factors set out in the FLA, s. 37, 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.

ii. The Children's Health and Emotional Well-Being

- [68] In seeking to have her parenting time restored, at least in part, K.A.C. relies heavily on the s. 211 report of Mr. Finlay, particularly the following observations that he made in connection with K.A.C.'s previous relapse and overdose episodes:

there are many parents with chronic health conditions who may from time to time have a relapse in their condition. These could be physical disabilities, mental health conditions or both. The main aspect to be evaluated is their parenting capacity during the relapse and whether supports need to be added during times of relapse or respite to assist that parent to continue to parent and maintain a relationship with the children. It is in the children's best interests not to have significant attachment disruptions in their relationship with either parent and to normalize the parenting relationship as soon as possible.

[Emphasis added.]

- [69] To that end, Mr. Finlay recommended moving from the schedule that the parties had then been following pursuant to the order of Bracken J., after a five-month transition period, to a permanent week-on/week-off schedule throughout the year.
- [70] But that was in January 2019. Since then, there have been two further episodes of substance abuse. The most recent of them, that on August 2, 2020, was particularly disturbing because it occurred while the children, and two of their friends, were in K.A.C.'s care. The children were clearly traumatised by the experience and have yet to recover from it.
- [71] While I accept that normalizing relationships as soon as possible after such an episode may be desirable in principle, it would be counterproductive to try and achieve any such normality before the children are truly ready for it. The evidence suggests they are not yet there. I am also not willing to put them at risk of having yet another experience of that kind, even if that means prolonging the current "attachment disruption" in their relationship with K.A.C.
- [72] Before any amelioration of the current situation can occur, K.A.C. will have to demonstrate more stability in her progress toward recovery than she has shown thus far. I appreciate that K.A.C. has since August 2, 2020 pursued new treatment programs that appear to be more intensive than those that she had been pursuing previously. That is encouraging and one can only hope that she will be more successful from now on. Given the uneven history recounted above, however, I find that it is necessary for the sake of the children's health and emotional well-being to err on the side of caution.
- [73] For that reason, I find that the children's health and emotional well-being will be best served by maintaining the current parenting schedule at least until December 2020.

iii. The Children's Views

[74] While there was evidence adduced at trial suggesting that the children had, before August 2, 2020, indicated a preference for equal or near equal parenting time, it is clear that they no longer feel the same way. I accept that their current views are as J.D.E.C. described them at the hearing on August 28, 2020. This is also a factor weighing in favour of maintaining the current schedule.

iv. The Nature and Strength of the Relationships between the Children and Significant Persons in their Lives

[75] Although Mr. Finlay reported that the children had strong attachments to both parents, their relationship with K.A.C. has clearly suffered as a result of the August 2, 2020 incident and its aftermath.

v. The History of the Children's Care

[76] The parties generally shared parenting time equally after their separation in 2010 until February 12, 2016. There was a brief hiatus immediately following the relapse that occurred on that date, but an equally shared parenting schedule was reinstated within less than a month, on March 11, 2016, by order of Griffin J. That reinstatement lasted just over a year, until the overdose incident on May 28, 2017. Thereafter, J.D.E.C. has had the children for significantly longer intervals than K.A.C.

[77] K.A.C. did not have equal parenting time again until after the trial concluded on June 26, 2020. That regime ended just over a month later with the incident on August 2, 2020. That history suggests that any future increase in K.A.C.'s parenting time must be considered cautiously and only after robust safeguards are put in place to protect the children from the risk of yet another recurrence.

vi. The Need for Stability

[78] The children have recently been traumatised while in K.A.C.'s care. Until the risk of a recurrence is shown to have abated, any increase in her parenting time must be considered with caution.

vii. The Parties' Parenting Abilities

[79] Although Mr. Finlay reported that, "[b]oth parents were found to be competent and to have good relationships with the children who are securely and positively attached to their parents," in K.A.C.'s case, that was said to be so, "when her mental health is stable and she is not using illicit drugs and is using her medications as directed by her psychiatrist". When that is not occurring, however, that statement no longer holds true for her.

[80] Mr. Finlay noted the need for improvement in the parenting on both sides. He suggested that K.A.C. could do better in sheltering the children from the consequences of her substance abuse (and his report was completed before the most recent episodes in

September 2019 and August 2020). But he was also critical of both J.D.E.C. and D.B. for swearing in front of the children and, more significantly, for showing, at times, inadequate support for K.A.C. in her parenting role, including by communicating their own negative impressions of her behaviour to the children.

[81] On balance, I find that this factor weighs in favour of maintaining the current schedule.

viii. Family Violence

[82] In her testimony, K.A.C. made allegations about a number of incidents of family violence by J.D.E.C. against her, all of which were said to have occurred prior to or around the time of the parties' separation in 2010. Much of her account was disputed by J.D.E.C. I am not persuaded that it is necessary for me to resolve the conflicting evidence I heard on this topic.

[83] Regardless of what occurred, I am satisfied that that history has no real bearing on the questions before me today. There is, in particular, no basis to believe that the children would be at risk of family violence if I were to make any of the orders that the parties are urging upon me now.

ix. The Need for Cooperation between the Parties

[84] The parties have in the past had difficulty in cooperating on parenting issues, particularly when parenting time was shared equally. It would not be in the children's interest to create a parenting regime with the potential for the parents to be at cross-purposes. Because the children will be primarily in the care of J.D.E.C. while K.A.C. focuses on her recovery, he should be given primary responsibility for decisions involving the children, although he should continue to consult with K.A.C. on important matters.

x. Conclusions on the Parenting Issues

[85] With respect to the parenting schedule, my review of the s. 37 factors leads me to favour maintaining the status quo. I accept, however, that my order in that regard should be open for review after December 1, 2020.

[86] It is common ground that the parties should continue to be joint guardians of the children. I am ordering that, in the event of any disagreement, primary decision-making authority should be with J.D.E.C., subject to a requirement that he consult with K.A.C. on important matters.

C. The Financial Issues

i. The Parties' Incomes

[87] The requirement to pay child is governed by the Federal Child Support Guidelines, SOR/97-175 [FCSG]: DA, s. 15.1. In most cases, child support is calculated based on the payor's income, as reported in line 150 of the payor's T1 General tax return, subject to certain deductions: FCSG, s. 16.

[88] In 2019, K.A.C. reported a net income of \$191,120. This is the most she has ever earned in a single year, at least since the parties' separation in 2010. She urges me to fix her income for child support purposes having regard to the historical range in her annual earnings, which have been as low as \$77,699 (in 2010). For the last three years she has earned the following amounts:

2017:

\$155,632

2018:

\$163,655

2019:

\$191,120

[89] If, as here, a payor's income is variable from year to year, resort may be had to s. 17 of the FCSG, which states as follows:

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[90] I am not persuaded that it would be unfair to use K.A.C. most recently reported income as her income for child support purposes going forward. While her income has indeed varied over the years, the trend, at least since 2015, has been consistently upward. Moreover, K.A.C. has not paid any child support since 2015, despite the fact that she has consistently earned far more than J.D.E.C., while he had the children in his care for most of the time during those years. This is not a situation in which K.A.C. may have overpaid in the past due to a fluctuating income. I appreciate that her income is unlikely to continue to rise indefinitely, but I prefer to deal with the possibility of future fluctuations, up or down, by having the parties exchange income information on an annual basis. I note that J.D.E.C.'s annual income in 2019 was also the highest that he has reported in any year since the parties' separation.

[91] I am therefore fixing K.A.C.'s current income for support purposes at \$191,120.

[92] J.D.E.C. has been a self-employed contractor and carpenter since 1997. His reported line 150 income for the last three years was as follows:

2017:

\$41,880

2018:

\$41,265

2019:

\$50,196

[93] K.A.C. seeks to have an income of \$105,000 imputed to him. She alleges that he receives undeclared income in the form of cash from his business. She also alleges that he overstates his business expenses, thereby understating his true income. Although she did not adduce any direct evidence to support those allegations, she relies on the evidence I did hear about J.D.E.C.'s lifestyle. It appears that J.D.E.C.'s reported expenses exceeded his reported income in some years, suggesting, according to K.A.C., that he must be drawing on an unreported source of income. He lives with D.B. in a home that she owns in North Vancouver. Despite the fact that D.B. holds title to the property in her own name, K.A.C. alleges that J.D.E.C. must hold a beneficial interest in it, due to his contribution of labour and the gift from his mother that helped pay for it. K.A.C. also refers to the trips that they have been able to take with the children to Africa, Hawaii, Mexico and California.

[94] The circumstances in which the court may impute income are set out in s. 19 of the FCSG, which states as follows:

Imputing income

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;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;

- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Reasonableness of expenses

- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.
- [95] I am not persuaded that J.D.E.C. has been shown to have failed to report cash income from his business or otherwise. He produced the source records used to compile his tax returns, all of which were entered into evidence. I heard testimony from his bookkeeper about how the tax returns are prepared. While his filed form F8 financial statements did show that there has sometimes been a disparity between his reported income and his lifestyle, the more likely explanation is that this is attributable to gifts or loans he has received over the years from his mother or, more recently, from D.B., who appears to contribute considerably more to the family finances. D.B. testified that her income, which also fluctuates from year to year, was approximately \$120,000 in 2018, or roughly three times what J.D.E.C. reported that year.
- [96] I am satisfied, however, that at least some of J.D.E.C.'s business expenses are overstated in the manner contemplated by s. 19(1)(g) and 19(2), although the degree of the overstatement and its impact on his reported income must be relatively modest.
- [97] For example, the evidence was that J.D.E.C. contributes to the household expenses by paying D.B. rent of \$1,300 per month plus property tax, for a total of between \$1,600-\$1,700 per month, or between \$19,200 and \$20,400 annually. Each year, he deducts a portion of the couple's household expenses from his business income on the basis that he maintains an office on 14.22% of their 1,800 square foot home. In 2016, he declared that his household expenses totalled \$26,343.24, including mortgage interest and property tax, from which he claimed a deduction of 14.22%, or \$3,746. This suggests that he has been claiming a deduction from his business income that is drawn at least partly from D.B.'s share of the household expenses.
- [98] Another area of concern is the manner in which J.D.E.C.'s bookkeeper, Ms. Barnes, calculates his business expenses in completing his tax returns. Ms. Barnes is not a licensed accountant. Her evidence was that she reviews his raw bank and credit card statements and receipts at the end of each year without significant input from him. During that review, she checks off items on the statements that appear to her to be deductible as business expenses.

She testified that she understands that he is entitled to a deduction of 50% for meals. My review of the statements, which are in evidence, revealed that there are checkmarks beside many items that appear dubious, such as numerous purchases from coffee and fast food restaurants and ice cream parlours.

[99] In light of that evidence, I have concluded that it is appropriate to impute an additional 10% to J.D.E.C.'s reported income, to account for the apparent overstatement of his business expenses, including a notional gross-up for unpaid tax. This yields a current net income for support purposes of $\$50,196 + 10\% = \$55,215.60$.

ii. Child Support

[100] Generally, child support is payable under the FCSG at the table amount pursuant to s. 3, which states as follows:

Presumptive rule

3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

[101] Because K.A.C.'s income exceeds \$150,000, s.4 of the FCSG is also potentially engaged. That provision states as follows:

Incomes over \$150,000

4 Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
- (iii) the amount, if any, determined under section 7.

- [102] In *B.P.E. v. A.E.*, 2016 BCCA 335, Willcock J.A., writing for the Court, set out the manner in which a repartnered spouse's "household income" should be considered in arriving at an appropriate child support amount under s. 9 of the FCSG, which applies when parenting time is shared, including when s. 4 may also apply. The discussion begins with the observation that there are competing principles and objectives to be reconciled in this area. First, there is the tension between the need, on the one hand, for certainty and predictability, and on the other, for a measure of flexibility in the application of the FCSG. Second, there is a tension between, on the one hand, the principle codified in FLA that a stepparent's duty to support the children of the marriage is secondary to that of a biological parent. On the other hand, the main objective of the FCSG is to reduce discrepancies in living standards between the homes in which the children of the marriage live. As was held in the leading case on s. 9 of *Contino v. Leonelli-Contino*, 2005 SCC 63, "to the extent possible, the Court should strive for a result that avoids noticeable discrepancies in standards of living between parental households" (as cited in *B.P.E.*, at para. 49).
- [103] Willcock J.A. summarized the correct approach to follow in reconciling these competing considerations:
- [59] There are sound policy reasons for rejecting an approach to this issue that treats new partner income presumptively as "household income" to be generally factored into child support calculations under s. 9.
- [60] The first of these is the public interest in reducing the incidence and severity of the "cliff effect" - what Bastarache J. referred to (in *Contino* at para. 41) as the "drastic change in support" arising from variations in access arrangements. The majority of the Court in *Contino* was at pains to avoid the disproportionate drop in child support that may result from a minor change in custody arrangements and the triggering of the application of s. 9 of the Guidelines. Where the payor enjoys a much higher individual income than the payee and the set-off amount is relatively high, child support will drop precipitously if the new partner's income is routinely and fully taken into account when s. 9(c) is thus triggered.
- [61] Further, ascribing limited importance to the income of second spouses gives effect to the objectives stated in s. 1 of the Guidelines, in particular, ensuring that children continue to benefit from the financial means of both spouses after separation and making the calculation of child support orders more objective. While the Court in *Contino* held flexibility should take priority over certainty for the purpose of the s. 9 analysis, the pursuit of certainty and predictability of outcomes should still play an important role in our analysis because of their importance in the efficient resolution of disputes.
- [62] The set-off amount calculable under s. 9(a) accounts for two incomes: the earnings of the biological parents. Establishing the quantum of these incomes on the evidence may be difficult, but the framework is clear and the outcome predictable. Varying support to account for third and fourth incomes under s. 9(c) as a matter of course would degrade the certainty and predictability of the legislative scheme and risk returning us to the ad hoc

unpredictability of the old child support regime. It tends to increase the volatility of child support obligations. By contrast, giving weight to total household incomes for a more limited purpose - that is, to assess whether basic needs can be met and whether disparate standards of living between households can be avoided - maintains the flexibility of the s. 9 scheme while drawing predictable boundaries around the s. 9(c) enquiry.

[Emphasis added.]

- [104] Willcock J.A. also noted (at para. 56) that where one or both of the biological parents' incomes are over \$150,000 (thereby engaging s. 4), the situation may be more complicated but the same principles will apply. He cited a number of cases under s. 4, some ordering the full setoff amount and others a different amount. Those cases can be explained, he found, on the basis that "the outcome turned upon whether payment of the set-off amount would produce disparity between the households" (at para. 56).
- [105] The table amount for K.A.C. is \$2,644.22. I have concluded that requiring K.A.C. to pay child support in that amount would have the effect of exacerbating what is already a disparity in J.D.E.C.'s favour in the standards of living in the two homes.
- [106] J.D.E.C. and D.B. own a house. They travel occasionally and have access to credit. The evidence suggested that although J.D.E.C. pays D.B. monthly rent with a view to sharing household expenses, their finances are not kept separate and J.D.E.C. benefits considerably from the arrangement. On the other hand, D.B. also supports her own natural daughter, in addition to J.D.E.C. and his two children.
- [107] K.A.C. has completed paying off her consumer proposal in 2017 but since then she has had limited access to credit. She does not own a home of her own and so must rent. Indeed, she has had to rent a new home in North Vancouver to be close to the children, which is more expensive than renting in Squamish. The evidence supported her submission that the children's needs are currently being met adequately at J.D.E.C.'s home, indeed they appear to enjoy a comparable if not superior standard of living there, even though she has not paid any child support for many years. Some of the explanation for this probably lies in the fact that until November 2017, K.A.C. was under an obligation to make the monthly \$400 payments on her consumer proposal. That obligation has now ceased. Until recently, she also had support obligations for her two sons from previous relationships, but they are now adults.
- [108] In light of those considerations, I have concluded that it would be inappropriate to order K.A.C. to pay child support as calculated under s. 3 and that her child support obligation should instead be calculated based only on the first \$150,000 of her income, which yields an award of \$2,159 per month.

iii. Retroactive Child Support

- [109] In addition to basic child support payable prospectively, J.D.E.C. seeks retroactive child support extending back to 2011. K.A.C. opposes such an award on various grounds. She relies on the April 1, 2015 order of Abrioux J. suspending her obligation to pay child support and arrears pending the trial. She also asserts that J.D.E.C. did not produce the financial information needed to assess the support obligation until the commencement of the trial in July 2019, and even then was not forthcoming about his income during the trial.
- [110] The test to be applied in determining whether a retroactive award of child support should be made was conveniently set out by Silverman J. in *E.D.A. v. M.A.A.*, 2014 BCSC 1084, as follows:
- [115] The leading authority on the exercise of the court's discretion to make an order for retroactive child support is *D.B.S. v. S.R.G.*, 2006 SCC 37.
- [116] The principles stated by the Supreme Court of Canada in *D.B.S. v. S.R.G.* include the following:
- (a) Parents have an obligation to pay child support that is commensurate with their income. This obligation, like the child's corresponding right to support, exists independently of any statute or court order. A payor parent who does not increase child support payments to correspond with income will not have fulfilled his or her obligation to the children (para. 58).
 - (b) If the payor's income rises and the amount of child support paid does not, there remains an unfulfilled obligation that could later merit court enforcement (para. 60);
 - (c) A payor parent always has the obligation to pay and the dependent child always the right to receive child support in an amount that is commensurate with the payor's income (para. 68);
 - (d) While it will not always be appropriate for the court to order retroactive child support, such orders should not be seen as exceptional (paras. 95 and 97).
- [117] The factors which the court is required to consider in determining whether to exercise its discretion to award retroactive child support include the following:
- (a) whether the parent claiming child support has a reasonable excuse for why support was not sought earlier;
 - (b) the conduct of the payor parent;
 - (c) the circumstances of the children;
 - (d) any hardship that may be caused to the payor parent by the retroactive award (see *D.B.S.*, supra, at paras. 99 to 116).

- [118] In determining the amount of any award of retroactive child support, the court must determine a date for the retroactive award and quantum. The date for the retroactive award will usually be the date on which the payor parent received effective notice of the claim: D.B.S. at para. 121.
- [119] It will usually not be appropriate to make an award retroactive to a date more than three years before formal notice of the claim for retroactive support is given: D.B.S. at para. 123.
- [120] While quantum should be considered in an amount consistent with the applicable statutory scheme, blind adherence to the Guidelines table amount is not required. Among other reasons, this is because retroactive awards may give rise to undue hardship: D.B.S. at paras. 126 to 130.
- [111] It is clear that J.D.E.C. put K.A.C. on notice early in the litigation that he was seeking child support. Nevertheless, the question of whether J.D.E.C. has a "reasonable excuse" for not applying for an order to compel K.A.C. to pay child support earlier is complicated by the effect of the April 1, 2015 order of Abrioux J.
- [112] Although the trial did not begin until more than four years later, J.D.E.C. never applied to reinstate and recalibrate the child support payable in the interim. His explanation for not doing so is that he was not made aware of how wide the discrepancy between their respective incomes had grown. In fact, he says he was misled in that regard. K.A.C. filed a financial statement on December 12, 2018 in which she swore her income to be only \$76,544. Her actual income for 2018 was later shown to be \$163,655.
- [113] In *Dyck v. Bell*, 2015 BCCA 520, the Court of Appeal set aside a retroactive award founded on the erroneous assumption that the payor had an ongoing duty, in the absence of an application, to advise the payee of an increase in income justifying a change in the child support payable. It follows that a retroactive award would not be justified in this case simply because K.A.C. failed to advise J.D.E.C. of the extent to which her income had been rising. I accept that the situation arguably changed when K.A.C. misled J.D.E.C. about her income. Had she been forthcoming about her income in December 2018, J.D.E.C. may have been moved to make bring an application at that time. On the other hand, J.D.E.C. too was not forthcoming about his income. His financial information was not produced until the eve of trial. I have also found that he understated his income at trial, although to a lesser extent. In the circumstances, I am not persuaded that J.D.E.C. has presented a reasonable excuse for not seeking child support sooner.
- [114] Turning to the question of K.A.C.'s conduct, one of the reasons that she needed to suspend her child support payments in early 2015 was that she was still making monthly payments on her consumer proposal. Those payments went towards retiring several shared debts that she was made to assume herself without contribution from J.D.E.C. The payments continued until November 2017. According to her financial statement sworn December 10, 2018, her obligation to pay child support for the younger of her two sons from other relationships continued until August 1, 2018, although she was even then still paying off

\$3,000 in maintenance arrears to another former spouse at the rate of \$250 per month. In the circumstances, it was not unreasonable for her to believe that her obligation to pay child support should continue to be suspended until a full examination of the parties' finances could take place at trial.

[115] Finally, with respect to the circumstances of the children, I have found that their standard of living has, for many years, been higher while they have been with J.D.E.C. than with K.A.C., despite the relative size of the parties' respective incomes. The children's needs appear to have been met adequately while they have been with J.D.E.C., despite the lack of child support.

[116] In light of those considerations, I have concluded that an award of retroactive child support is not warranted in this case.

iv. Section 7 Expenses

[117] J.D.E.C. seeks to have K.A.C. contribute 80% of the cost of certain child-related expenses that he incurred between 2012 and 2018, totalling \$19,181.84. The activities he paid for include martial arts, dance, swimming and after-school or daycare.

[118] The test to be applied in determining whether s. 7 expenses should be payable retroactively is the same as that for retroactive child support: *A.M. v. G.M.*, 2018 BCSC 942.

[119] Section 7 of the FCSG states as follows:

Special or extraordinary expenses

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

[120] The term "extraordinary expenses" is defined in s. 7(1.1) as follows:

(1.1) For the purposes of paragraphs (1)(d) and (f), the term extraordinary expenses means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
- (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
- (ii) the nature and number of the educational programs and extracurricular activities,
- (iii) any special needs and talents of the child or children,
- (iv) the overall cost of the programs and activities, and
- (v) any other similar factor that the court considers relevant.

[121] In *A.M. v. G.M., Morellato J.* allowed the payee to recover daycare expenses retroactively but refused to allow her to recover the cost of soccer and swimming classes because they were not seen to be "extraordinary" as that term is defined under the FCSG. She explained her conclusions in that regard as follows:

[132] The law, as it currently stands, provides that the first step with respect to extraordinary expenses is to determine whether the expenses are extraordinary or not. In *Bodine-Shah v. Shah*, 2014 BCCA 191, the Court considered the character of "extraordinary expenses" and reasoned as follows:

[66] Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities.

[133] I have considered the cases relied on by the Father as well as the Guidelines. I have concluded that the \$775 the Mother paid for W.M.'s pre-school clearly constitutes a proper section 7 expense. I am also satisfied that the Mother acted reasonably when she registered W.M. for preschool and incurred this expense, particularly in light of the parties' incomes and their prior discussions about registering W.M. for pre-school and other activities.

Further, there can be little doubt that attending pre-school was in W.M.'s best interest. The Father also effectively acknowledged this in his testimony.

- [134] The cases upon which the Father relies where the consent of the other parent is required before section 7 expenses obligations may be enforced are distinguishable given the unique facts of this case. In the instant case, the Mother made considerable efforts to care for her son and act in his best interest by organizing activities which contributed to his physical and educational well-being, particularly in the summer and fall of 2015 when the family was in distress and the Father was still actively abusing alcohol.
- [135] Nevertheless, I am not persuaded that the soccer and swimming lessons constitute extraordinary section 7 expenses in light of the reasoning of the Court in *McLaughlin v. McLaughlin* (1998), 1998 CanLII 5558 (BC CA), 57 B.C.L.R. (3d) 186 (C.A.), which was more recently cited by the Court of Appeal in *Bodine-Shah*. In *McLaughlin*, the Court considered the meaning of the phrase extraordinary expenses for "extracurricular activities" in s. 7(1)(f) of the Guidelines. In that case, the mother had claimed a proportionate contribution from the father for the children's extracurricular activities, including soccer, softball, field hockey, outdoor school, swimming and hockey. The chambers judge ordered that the father pay his proportionate share of these expenses after taking into account the respective incomes of the parties. In discussing what extracurricular activities properly fall within s. 7(1)(f), the Court of Appeal acknowledged that courts had struggled to determine what expenses could properly be classified as "extraordinary":
- [30] It is apparent from my perusal of many of the dozens of cases decided under s. 7(1)(f) across the country that judges in British Columbia and elsewhere have been struggling to find some principled basis for deciding what expenses can properly be added to the base table amounts as "extraordinary expenses" within the meaning of s. 7(1)(f). The inability of judges to ascertain what Parliament intended to be included as ordinary expenses for extracurricular activities under the tables has resulted in a variety of approaches to the interpretation of s. 7(1)(f) with an accompanying inconsistency in results.
- [136] After canvassing the various approaches that had been taken by courts on this issue, the Court of Appeal sets out the preferred approach to s. 7(1)(f) as follows:
- [64] There is no dispute in the case law as to the meaning of the word "extraordinary". All of the decisions utilize dictionary definitions, including such synonyms as "unusual", "out of the ordinary" and "exceptional". Nor is there any dispute amongst judges that the use of the word "extraordinary" in s. 7(1)(f) to describe the type of expenses which can be added on to the basic table amounts, implies that "ordinary" expenses are included within the table amounts. The problem has been the difficulty of ascertaining the nature and extent of the extracurricular activities (in the case of s. 7(1)(f)), which are "ordinary" and, thus, included in the basic table amounts. If this could be determined, one could simply define extraordinary expenses as being those which are not ordinary; that is, those which are not included in the basic table.

- [81] In the result, I conclude that, in deciding whether an expense, or the totality of expenses claimed on behalf of children under s. 7(1)(f) are extraordinary, the court should take into consideration the combined income of the parties, as well as the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the children, and the overall cost of the activities. This list is not intended to be exhaustive, as considerations may arise in other cases which may also be relevant. I note that in the only other decision of this Court dealing with s. 7(1)(f), *Cochrane v. Zarins* (1998), 1998 CanLII 4270 (BC CA), 36 R.F.L. (4th) 434 (B.C. C.A.), the Court concluded that a particular child's talents are a relevant factor in determining whether an expense for an extracurricular activity is extraordinary.
- [82] As earlier stated, once an expense or expenses are found to be extraordinary it is necessary for the court to proceed to determine whether the expenses are necessary in relation to the children's best interests and reasonable, having regard to the means of the spouses and those of the child, and to the family's spending pattern prior to separation. There appears to be a consensus in the authorities dealing with s. 7(1)(f) that those questions do not need to be addressed until the expense or expenses in question have been found to be extraordinary. That would also be true of "extraordinary" educational expenses under s. 7(1)(d). With respect to the other expenses included under s. 7(1), which fit under the rubric of "special" expenses as that word is used in the heading of the section, the expenses need not be extraordinary, but they must meet the tests of necessity and reasonableness.
- [137] The Court of Appeal in *McLaughlin* applied this analytical approach and determined that common, extra-curricular activities are not "extraordinary expenses" under section 7(1)(f):
- [102] none of these expenses, individually, can be viewed as extraordinary expenses. The activities are common extracurricular activities for children of these ages and there are not, as there are in some cases, additional fees for such things as camps, trips, or expensive equipment. Nor is the total monthly amount associated with these expenses high, either in absolute terms, or in relation to the joint incomes of the parties (\$120,000). In my view, Mr. McLaughlin's proportionate share of these expenses (\$70 per month) must be treated as being included within the amount of maintenance he is paying under the basic table.
- [138] In this light, I am of the view that W.M.'s soccer and swimming lessons cannot be classified as extraordinary expenses.
- [122] I am not persuaded that K.A.C. should be required to reimburse J.D.E.C. for any of the expenses claimed.
- [123] First, I have already concluded that an award of retroactive child support is not warranted in this case.

- [124] Second, most of the expenses claimed appear to be "activities [that] are common extracurricular activities for children of these ages" and therefore do not qualify as "extraordinary" under the test set out above. Other than the daycare or after-school care expenses, they appear to fit within the kind of day-to-day costs covered by the general child support award I have made.
- [125] Finally, I am not satisfied that this is one of those cases like *A.M. v. G.M.* in which an expense should be reimbursed despite the fact that the payor never agreed to enrol the child in the activity in question. In this case, while there appears to have been some discussion between the parties about some of these activities, J.D.E.C. unilaterally enrolled the children without obtaining K.A.C.'s agreement. K.A.C. was apparently concerned about the potential for interference with her parenting time, particularly in light of the need she had at the time to commute from Squamish to attend. There was evidence that K.A.C. has paid for the children's orthodontic treatment without any contribution from J.D.E.C. When J.D.E.C. was asked about that in cross-examination, his explanation was that he was unwilling to contribute to that expense because K.A.C. arranged for the treatment unilaterally without consulting him. He added that K.A.C. was neither contributing to the extracurricular activities that he had arranged for the children nor paying child support. While that may be true, that evidence does not, in my view, justify requiring K.A.C. to reimburse J.D.E.C. for these expenses today.
- [126] Prospectively, s. 7 expenses will be as agreed between the parties in advance or, failing agreement, as determined by the court.
- v. Property and Debt
- [127] The October 11, 2011 order of Ross J. included a declaration under s. 57 of the FRA that there was no reasonable prospect of reconciliation between the parties. That triggered the application of s. 56, which operated to confer on them an undivided half interest in the family asset as tenants in common.
- [128] As I noted earlier, the parties had few assets as of that date. They each retained a vehicle (K.A.C., the Caravan and J.D.E.C., a pickup truck) but these appear to have been fully financed and therefore without value. J.D.E.C. had given K.A.C. an engagement ring that he seeks to have returned, but the parties agreed in closing argument that the ring should go to C.L.C.
- [129] What they did have in greater abundance was debt.
- [130] Justice Dardi summarized the treatment of joint family debts under the FRA in *A.K.E. v. F.F.*, 2010 BCSC 1027, at paras. 92-3, as follows:

[92] It emerges from the authorities that the term "family debts" has no statutory significance, but rather is a term that has evolved to designate a liability of either or both of the spouses incurred for a family purpose. The Court must consider debts as well as assets to ensure the fairness of property division on marriage breakdown: *Stein v. Stein*, 2008 SCC 35 at para. 10. In *Beese v. Beese*, 2008 BCCA 396, Prowse J.A. summarized the governing principles:

[46] The significance of family debt on the issue of reapportionment has been discussed in many authorities, including the recent decision of the Supreme Court of Canada in *Stein v. Stein*, 2008 SCC 35. In brief, although there is no specific mention of family debts in the FRA, it is accepted that such debt should be taken into account as one of the "liabilities" of a spouse under s. 65(1)(f). (See *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241 (C.A.)) While the *Stein* decision presents some conceptual challenges in relation to the finality of an order for reapportionment, the following passage at para. 10 of the decision accurately reflects the law which has developed in relation to the treatment of family debt under the FRA:

the term "family debt" has evolved in the jurisprudence out of a recognition that spouses jointly contribute to not only the accumulation of assets, but also debt. Although the phrase has no statutory significance, it has been used with increasing regularity by trial courts, (particularly in British Columbia) to describe "a liability of either or both of the spouses which has been incurred during the marriage or for a family purpose" (*Mallen*, at para. 26.) The very existence of the term "family debt" underlines the reality that in order to ensure fairness, both debts and assets must be considered after the breakdown of the marriage.

[93] In *G.P. v. M.J.R.P.*, 2009 BCSC 659, the Court's comments are instructive:

[110] Family debt is taken into account in determining a fair division of assets, but free-standing debts are not normally divided under the Family Relations Act: see *Young v. Young*, [1993] 4 S.C.R. 3, affirming the conclusion of Southin J.A. in the B.C. Court of Appeal that:

[t]he court cannot make a spouse jointly liable to a creditor for a debt of the other spouse, no matter for what purpose it was incurred, or, in the absence of some contractual foundation, make one spouse liable to indemnify the other, either in whole or in part, for a liability of the latter. [pp. 133-34]

The Court must consider whether the debts were in existence at the time of the triggering event. The party alleging joint responsibility for a particular debt has the onus of proving the debt was incurred for a family purpose: *Popp v. Popp* (1985), 65 B.C.L.R. 85 (C.A.).

[131] K.A.C. seeks to be reimbursed for one half of three sets of debts:

- (a) certain pre-proposal debts she claims to have paid ($\$34,203.60/2 = \$17,101.80$);
- (b) half of the loan on the Caravan ($\$12,004.91/2 = \$6,002.46$); and
- (c) half of the payments made in the proposal ($\$24,000/2 = \$12,000$).

[132] I am not prepared to make any such award. Under the FRA, family debts may be accounted for in the division of property. Because there is effectively no property to divide here, I have instead factored in J.D.E.C.'s failure to contribute to the family debts, and K.A.C.'s subsequent need to file and carry out a consumer proposal to which it contributed, in refusing J.D.E.C.'s claim for retroactive child support.

V. Summary and Disposition

[133] The following summarises the orders I am making, which will supersede and replace all previous orders made in this action:

- (a) J.D.E.C. will have primary custody of the children;
- (b) J.D.E.C. will consult with K.A.C. on important decisions involving the children but in the event of any disagreement between them, J.D.E.C. will have primary decision-making authority;
- (c) K.A.C. will have access to the children between 10 am and 6 pm on alternate Saturdays under supervision of a neutral third party;
- (d) paragraphs (a), (b) and (c) will be subject to review after December 1, 2020;
- (e) K.A.C. will pay J.D.E.C. child support of \$2,159 on the first day of each month beginning October 1, 2020;
- (f) the parties will share s. 7 expenses, as agreed in advance or determined by the Court, in the ratio of their respective incomes as I have found them to be;
- (g) the parties will exchange current income information by May 30 of every year;
- (h) as agreed by the parties during closing argument, the parties' engagement ring is to be delivered to J.D.E.C. to be held by him in trust for C.L.C. until she reaches adulthood.

[134] All other claims in the action are dismissed.

[135] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of this judgment.

"Milman J."

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