
CANADA / JUDGMENT

K.A.C. v. R.J.M.

2013 BCSC 1103

COURT

Supreme Court of British Columbia

DECIDED

24 June 2013

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2013 BCSC 1103 K.A.C. v. R.J.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.A.C. v. R.J.M.,

2013 BCSC 1103

Date: 20130624

Docket: E093255

Registry: Vancouver

Between:

K.A.C.

Claimant

And

R.J.M.

Respondent

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for the Claimant:

D. MacKinnon

Counsel for the Respondent:

Appearing on his own behalf

Counsel for the Family Maintenance Enforcement Program:

W. Lee

Place and Date of Hearing:

Vancouver, B.C.

May 10, 2013

Place and Date of Judgment:

Vancouver, B.C.

June 24, 2013

I The Application

- [1] The parties, R.J.M. (the "father"), born February 15, 1971, and K.A.C. (the "mother"), born December 1, 1970, were married on December 5, 1998. They separated May 18, 2007. There are two children of the marriage, a son O., born December 20, 1999, and a daughter A., born September 10, 2002.
- [2] The applicant father is a fireman. The mother is a student who also works part time.
- [3] The parties entered into a written Divorce Agreement dated February 13, 2011 (the "agreement"), in an effort to resolve all outstanding matters between them, including division of assets, child custody, access, and child and spousal maintenance.
- [4] The father seeks several items of relief in his application:
 - 1. To amend the agreement so that he has primary responsibility for the day-to-day care of the children with the obligation to discuss with the mother any significant decisions which have to be made with respect to the children, and the right to make decisions where the parents are not able to reach an agreement.
 - 2. To include in the agreement the report of Dr. Michael Elterman, dated September 24, 2010, which sets out recommendations as to the father's access schedule.
 - 3. To enforce the access schedule contained in paras. 6-10 of the agreement, as set out below:
 - 6. The Children shall primarily reside with the Wife, with specified access to the Husband following the schedule outlined on the Husband's 4-on and 4-off work schedule. The Children shall be with the Husband from either 10:00 a.m. on his first day off if it is a weekend, or after school on his first day when it is a weekday. On the day before he goes to work the following morning, the children are to return to the Wife at 6:30 p.m. (the "Regular Schedule").

7. The "Regular Schedule" shall be reviewable at the Wife's option upon her obtaining full-time employment. The Wife and Husband shall use a parenting coordinator if they cannot resolve the issue, followed by binding arbitration if needed.
8. The Husband is required to keep the Wife informed of scheduling changes and give 1 months notice of those changes. Any changes may be denied if not communicated in this advance manner.
9. The Regular Schedule shall be suspended to the extent necessary to provide for the following:
 - a. Mother's Day during which occasion the Children shall spend time with their mother from 10:00 a.m. until 6:00 p.m.;
 - b. Father's day during which occasion the Children shall spend time with their father from 10:00 a.m. until 6:00 p.m.;
 - c. Provided that the Husband is fully available and willing to care for the Children personally, the Wife and Husband may have the Children on a week on/week off schedule during the Summer, with the Husband providing satisfactory proof from his employer in advance that he is fully available for the Children during his week each summer; otherwise the schedule remains as the "Regular" Schedule.
 - d. Christmas, which shall alternate between the parents such that the Wife will have the Children from December 24th at 11:00 a.m. through December 25th at 4:00 p.m. every even year and the Husband will have from such time with the Children every odd year. The Husband will have from December 25th at 4:00 p.m. through December 26th at 11:00 a.m. every even year and the Wife shall have such time with the Children every odd year;
 - e. At such other times as agreed in writing between both parties from time to time with notice of 2 weeks.
10. In the event that one of the parties is unavailable or unwilling to care for the Children during his or her own time, he or she shall first offer care of the Children to the other parent before they are cared for by a third party.
4. To change para. 18 of the agreement to read, "the husband and wife shall share extraordinary expenses pursuant to item s.7 of the guidelines to 50/50." The agreement now reads the "Husband/Wife shall pay to the Husband/Wife forthwith, and in any event within 7 days of the Wife incurring such costs, 70% of the cost of the Children's extraordinary expenses pursuant to s.7 of the Guidelines....." Paragraph 19 of the agreement provides, as follows:

The Wife and the Husband shall share such extraordinary expenses in proportion to their respective incomes from time to time which, pending further Order of written agreement between the parties shall have the Wife paying 30% and the Husband paying 70% of all such expenses.

5. To equally share the child tax benefit referred to in para. 6 of the agreement, or count the benefit as income when calculating child support;
6. To stipulate that extraordinary educational, or other special expenses sought by either parent do not exceed \$100 per month, unless agreed upon by the parties.
7. To limit a party's ability to incur child expenses in excess of the financial capability of that party.
8. To include the rent collected from the three suites in the former matrimonial home, owned by the mother, as income when calculating child support payments.
9. To require the mother issue to the father a receipt for his \$25,000 spousal payment given at the time of the divorce settlement.
10. To waive all arrears in regard to O.'s private school tuition and that all actions taken by Family Maintenance Enforcement Program (FMEP) be reversed.
11. To enrol the children in schools in closer proximity to the mother's home in White Rock and the father's home in Cloverdale.

II The Father's Position

- [5] The father contends that he should be the primary decision maker because the mother has disregarded, or manipulated access and other conditions stated in the agreement. He says that this has caused him and the children undue stress, together with personal financial strain. He also says that at no time did he agree that O. should attend Magnussen, a private school in Vancouver. In fact, he says that he openly opposed O. attending this school and submits that neither party can afford the annual school tuition fee of \$16,900.
- [6] The father also claims that the mother refused to allow him to purchase the former family home in White Rock. He says that at the time of negotiating the agreement she told him that she wished to remain in the White Rock home to ensure that the children were able to continue to attend their public school and maintain neighbourhood and school friendships. However, within three months of the agreement, she rented out the home and moved herself and the children into a condominium residence in the UBC area of Vancouver. The father, who now lives in Cloverdale, says that this relocation has effectively removed his access to the children.

- [7] In addition, the father says that the mother pays no regard to his views, does not respect or acknowledge his rightful access to the children, and ignores the custody arrangements outlined in the agreement.
- [8] The father attached a series of emails in support of his contention that the mother is disregarding the access provisions of the agreement and attempting to turn him into a weekend parent.
- [9] In an email dated September 3, 2011, the father wrote to the mother suggesting that he pick up the children and "continue our [schedule] as in accordance to our separation agreement". The mother replied on the same date stating, "The schedule has changed."
- [10] The father responded via email telling her that she could not change the schedule "just because you decided to move K. It's court ordered. You are simply telling me that I am a weekend parent and that will never happen. I realize the kids will be going to school in Vancouver and it was not my decision but yours so you can move across the street from your boyfriend."
- [11] On September 12, 2011, the father emailed the mother that he was completely opposed to the school changes for the children and that he was simply unable to afford the cost of the school for O., insisting that the children were getting the support they needed in the public school system, "even though a private school would be great for both kids."
- [12] On October 3, 2011 the mother sent the following email to the father:
- Oct 7th - A. has a pro d day...are you interested in picking her up at 3pm? and I will bring O. to you on the Sat at 1030am ... meet me at 1pm at my parents on Monday the 10th in Ladner
- Oct 15 - I will have the kids to you by 10:30am and you return home for school Monday morning
Oct 17th
- Oct 21st - I can drop them off at 7pm return them for Monday morning school Oct 24th
- Oct 29th - I will drop them off at 10:30am you return for Monday school Oct 31st**
- Nov 4th - O. has a pro d day...you pick up for 3pm? I drop A. off at 1030am on Sat Nov 5th you return the kids to school Monday morning Nov 7th
- Nov 11th - I can drop the kids off at 7pm you return for Monday morning school Nov 14th
- Nov 19th - I will drop the kids off at 10:30am you return for school Monday morning 21st
- Nov 26th - I will drop the kids off at 10:30am you return for school Monday morning 28th
- Dec 3rd - I will drop the kids off at 10:30am you return for school Monday morning Dec 5th

Dec 10th -I will drop the kids off at 10:30am you return for school Monday Dec 12th

Dec 17th - I will drop the kids off at 12 noon and you keep them for 4 days (21st Stat 12 noon and then I keep them for 4 days. We can share the 25th - I will bring them to you by 2pm on the 25th.

- [13] On November 11, 2011, the father emailed the mother again to state that he would not then or ever be a 2-day-a-week parent despite her move to the UBC area and her "constant attempts to separate me from our children." On January 12, 2012, the father emailed the mother stating, "You have essentially turned me into a weekend parent and now that you have you now want to take a good chunk of that away. I am putting the kids best interests and their wishes first when I keep them the Monday night when you take them Friday nights...I have and continue to try to resolve our problems but you constantly try to cut into my time with the children. They do want time with me."
- [14] The father also says that given their respective financial situations, the division of extraordinary expenses should be 50/50, rather than 70/30.
- [15] Further, the father submits that no expenses should be incurred by one parent without the agreement of the other. He says that this will give protection to both parents, thus preventing undue expense being passed to a parent. He mentions that both families live under tight budgets and any expenses passed on without warning or agreement to either parent is unreasonable. He also asserts that rental income from the former family home received by the mother should be included when calculating child support.

III The Mother's Position

- [16] The mother agrees with the father that the rent from the former family home, after allowing for deductions, should be included when calculating her income for the purpose of proportionate sharing of expenses under the Child Support Guidelines. I understand she does not oppose an equal sharing of the child tax benefit. However, she opposes the balance of the relief sought by the father.
- [17] In her response, the mother explains that, since the parent's separation, O. has been diagnosed with ADHD. She says that private school was recommended by school specialists and teachers in White Rock following a series of problems in the public school system. She searched out a private school and found that Magnussen was the least expensive of the options. She claims that, after the father refused to discuss the matter with her, she registered O. at Magnussen. O. attended this school from September 2011 until June 2012.
- [18] A. attended University Hill Elementary School ("University Hill") commencing September 2011. Both children are now attending University Hill. She asserts that both children have expressed a wish to continue their education at University Hill.

- [19] She also says that for O., a return to the White Rock public school he attended before his transfer to Magnussen would negatively affect the progress he has made socially and academically.
- [20] She explains as well, that she chose her current residence because it is two blocks from Magnussen and 6 blocks from University Hill. The mother also says that she did not move to the UBC area to be near a boyfriend; she only began dating a man who also lives in the UBC area in 2012. She is attending school at Langara and works part time in Burnaby.
- [21] On the issue of extraordinary expenses, the mother claims that the respondent is in arrears of extraordinary expenses in an amount exceeding \$11,000.
- [22] The mother also claims that the father is not helping her pay extra expenses due for O.'s medications, and requires her to supply him with the pills she purchases for his parenting time with O. She thinks it is really important to monitor the dosage as O. has been on new medication since October 2012.
- [23] The mother also claims that the father agreed to pay for extra field trips, only to deny funds later. She says he agreed to pay for a violin for A. and is now not helping. She claims that A. is a very talented violinist and she would love to be able to continue providing her with music lessons.

IV Decision

- [24] Dealing first with the issue of access, at the present time the children reside with their mother during the week at her condominium in the UBC area. The father resides in Cloverdale. He explained that he must live within a 10 mile radius of his place of employment in White Rock. He feels that the mother and the children should move back to the large former family home in White Rock rather than living in a two bedroom condominium where one of the children has to share a bedroom with the mother. He also does not understand why the mother and children have to remain living in the UBC area given that O. has completed his program at Magnussen.
- [25] The main complaint of the father is the fact that the current access schedule does not accord with the access schedule set out in the agreement, and that he has been turned into a "weekend parent". He notes that the access schedule in the agreement follows the recommendations by Dr. Elterman in his report. He believed that the access schedule would be honored and did not realize that Dr. Elterman's report was not incorporated in the agreement.
- [26] According to the father, the access schedule was adhered to up until September 2011, when the mother relocated the children to Vancouver. He says that the mother did not apply to vary the schedule, and that the current arrangement leaves him fighting to be a father to the children.

- [27] I dismiss the father's application to have primary responsibility for the day-to-day care of the children; that the access schedule in the agreement should be enforced; and that the children should be enrolled in schools in closer proximity to where the mother owns a home in White Rock and where he resides in Cloverdale. For the reasons that follow, I find that this relief is not in the best interests of the children.
- [28] In her affidavit sworn May 2, 2013, the mother explains that she relocated to Vancouver with the children commencing the fall school term in 2011, specifically because of the treatment available for O. at Magnussen. She says that O. flourished at the school and that the father participated in school activities and commented on O.'s improvement.
- [29] In late October 2012, the mother took O. to the ADHD Clinic at Children's Hospital for help with managing his medication. She invited the father and he attended the meeting at the Clinic. He confirmed to her and the doctor that Magnussen had been a wonderful change for O. and that he noticed a big difference in the way O. was managing.
- [30] The mother also explained that O. has had a long history of behavioural problems, but was in fact not diagnosed until two years after the parties separated, at the end of 2009, when O. was 8 years old. In grade 3, he was required to leave his local elementary school because of his challenges getting along with other children and consistently causing trouble. After his expulsion in 2007, O. attended a Montessori school in Langley. This school was chosen recognizing that O. needed the extra support and structure that the program offered. At this point, however, the parents were still not aware that it was a medical problem that was causing the learning and behavioural issues.
- [31] The mother deposes that the father left the family suddenly in the fall of 2007, and she was unable to pay for the tuition for O. to continue at the Montessori school. At the time, O. was 7 and A. was 4.
- [32] The mother explains that given she did not have the funds to pay the tuition at the Montessori school, and the father would not contribute, there was no other option for her but to enrol O. into public school. He went to grade 4 at White Rock Elementary. She says this proved to be extremely difficult, and was the beginning of two challenging years for O. at that school.
- [33] The mother deposes that unfortunately, because of his uncontrolled aggression and outbursts, O. also struggled socially at this school. He was left out of his peer group and labeled as a bully. She says the aggression was due to his undiagnosed ADHD. With the continual teasing from his classmates, he was not coping well. The teaching staff and the mother realized that O. needed a new start.
- [34] Following the parties separation, the mother remained in the former matrimonial home by purchasing it from the father. She explains that she received a small amount of lump sum support in accordance with the agreement, and paid market value for the home. She gave up her claim for long term spousal support to arrive at the agreement.

- [35] The mother says that after their separation, the father first moved to Bellingham, Washington, and later moved in with a friend in Surrey. According to the mother, he then started living with his girlfriend in about 2008 or 2009.
- [36] The parties were scheduled to go to trial on February 14, 2011, but between the Trial Management Conference, in November 2010, and the trial date they resolved all matters. She claims that after they settled the court action and were finalizing the paper work, the father announced that he and his girlfriend had purchased a home in Cloverdale. He moved into this home at the end of July 2011.
- [37] The mother deposes that White Rock Elementary was having difficulty giving O. the help he required, but even more than that he was labeled as a "dummy" by the other children, who taunted him which made him upset to go to school every day. Through a conversation with a psychologist who completed O.'s psycho-educational report, there was a suggestion that O. be enrolled in a school which understood learning challenges facing children with learning disabilities and ADHD.
- [38] The mother discussed options with the father for tutoring and private schools since O.'s 2010/2011 school year was difficult, socially and academically. O. had unfortunately made a deep negative impression on the children in the school that was tough for him to shake. The mother says that before the psychologist's report there had also been a meeting with O.'s teachers which the father attended. The teachers were basically demanding that O. be relocated to another school.
- [39] The mother says that she began looking at other resources for O. There were a number of schools in the Burnaby and Vancouver areas that had the types of programs O. needed, and they were all in the \$25,000 to \$35,000 range for annual tuition. Magnussen, a new school in Vancouver that focusses on providing socio-emotional support and an integrated learning plan for children who have disabilities and were not thriving in the regular school programs, was more affordable. She says that this school was highly recommended and because of its "new" status had a lower tuition fee than the others.
- [40] The mother says that Magnussen was a match for O. because it provided him with emotional and educational support. She says that he needed a tremendous amount of support to build confidence and this was not going to happen at White Rock Elementary. She also says that having a fresh start, after a few socially challenging years in White Rock, was in O.'s best interests. Further, it would be good for O. to be around other children with ADHD to see that he was not the only person with such struggles.
- [41] The mother deposes that in February 2011, she spoke to the father again about Magnussen. She also explained that O. needed to attend more and more specialist appointments and all of these appointments were in Vancouver. She considered whether O. could attend Magnussen and simply commute from White Rock. However, this seemed logistically impossible. Also, it appeared that A. could attend University Hill if she could get accommodation near Magnussen. University Hill provided a handy school bus which made

it easier to get both children to the different schools and allowed her to continue in her studies, and part-time work in order to support the children.

- [42] The mother spoke with both children about the possible move to Vancouver and what it would mean for them. She says that both were excited with the change. She contacted the father to discuss the matter, but he shut her down when she tried to explain the benefits. She continued to search for other options in the White Rock area, without success.
- [43] The mother says that she informed the father in June 2011 that she and the children were planning to move to Vancouver so that O. could attend Magnussen. She explained that she hoped O.'s attendance at Magnussen would improve his social skills, increase his confidence and help him learn to cope with his disability. She had considered relocating to Ladner (where she had family and rents were cheaper) and Vancouver (which would mean less commute time for the children, but higher rent). When she told the father that she was planning to move to Vancouver because it was closer to Magnussen he did not object, and in fact only asked her "are you moving to Ladner?" She says that he did little to discuss or offer any other options.
- [44] The mother and the children moved to the UBC area on July 15, 2011. O. registered at Magnussen and A. at University Hill. The mother rented out her White Rock house. The mother explains that while the White Rock house is 1,200 square feet, with three bedrooms, her condominium in the UBC area is only 860 square feet. However, the condominium is close to Pacific Spirit Park, playgrounds, shops and the homes of many children from the children's school.
- [45] The mother says that Magnussen has a highly organized communication system where both parents are able to log on to the blog to access daily updates, reminder notices and extra tutorials via the computer. Magnussen offered a close community of children who all struggle with a learning disability of some type. O. was welcomed into the school and adapted really well to the consistent schedule of the school program. Socially, he made friends and had the support of wonderful teachers to talk him through trying moments with other children.
- [46] O. finished at Magnussen in June 2012. The father attended the last day of school and, according to the mother, he was happy to take credit on that day for O.'s progress as well as for supporting O. through his challenges.
- [47] The mother says that while O. attended Magnussen, A. adapted well to University Hill and has successfully made new friends and built relationships.
- [48] The mother claims that after their move to Vancouver, the children seemed happy and she constantly checks with them to get a sense on how they are feeling. They are living close to their two cousins and an aunt and uncle. She has also made sure the children are actively involved with their relations in Ladner as much as possible.

- [49] The mother says that both children benefited from the consistency of the access schedule during the school week. O.'s overall attitude since his move to Vancouver has been a strong contrast to the difficulties which he had while living in White Rock. She says that O. is now a confident young man who does not live in fear of failure like he once did; he is more confident and is proud to show off his computer skills, Lego designs and skating.
- [50] The mother deposes that after completing the first year at Magnussen, O. had experienced a complete shift in his attitude and confidence. She was unsure whether this change would follow through to the next year if he stopped going to Magnussen. O. was looking forward to attending a second year at Magnussen. However, the father said he could not help with the tuition, and after researching the available programs at University Hill for grade 7, she registered O. to attend there alongside A. and his cousin.
- [51] The mother deposes that O.'s legacy of behavioural problems at White Rock seemed to follow him and even in 2013 when he had been away from White Rock for almost two years he is still remembered as a problem child. In March 2013, O. ran into a former classmate in White Rock. The young man said "O., you were a real jerk". Later that day O. told his mother, "Mom, they won't ever forget". The mother deposes that the problem with any return to White Rock is that O. has been labeled a problem child, and, true or not, he believes that he will not have a chance to change his image in White Rock.
- [52] The mother says that when she was served with the father's application, she sat down with both children and introduced the subject of moving back to White Rock. She says that both children were extremely upset about the idea. They expressed extreme sadness about the possibility of moving schools. O. told her, "I want to go to U Hill Secondary where my friends are", and the "robotics program looks really cool - I don't like change and want to go to the new school so I can be with my friends".
- [53] The mother says that A. told her, "it doesn't make sense for me to go to U Hill for two years then switch to another school for two years"; "I see my White Rock friends and I have new friends here in Vancouver"; "I like it here."
- [54] The mother says that A. has done well at University Hill and has many friends there. She was always outgoing and adapted well, but she is really committed to staying at University Hill and, at 10 years of age, is very vocal about staying put. The mother says that there was nothing that she could bring up - good memories, good people, or closeness to the father - that could change A.'s attitude.
- [55] The mother says that O. has made many friends at University Hill and considers himself one of the more popular children at the school. The mother says that whether he is or not is unknown, but the fact that he considers himself to be so is a huge change from the old O. who hated going to school in White Rock and felt like an outcast. She says that this is a huge change as he was nearly friendless in White Rock. She mentions that O.'s closest friends at University Hill have been over for visits to their home and that he is growing into a really lovely young man. He himself recognizes that he is a new person.

- [56] The mother states that A. has been successful at University Hill and has blended in really well with the other children. She has some very close friends and she has been over to her friends' houses several times to work on homework, and they spent time swimming together over spring break.
- [57] The mother arranges play dates with A.'s old friends from White Rock on days when she has the children, and they often meet up with them during the summer months. The mother feels that it is important for her to help retain these friendships and she has done a lot of planning to make sure this happens. As well, she is in close communication with all of the teachers at University Hill and they have been an excellent source of support for both O. and A.
- [58] Regarding O., the mother says that O. wants to stay at University Hill. She says that there are other opportunities but they have to be weighed against the stability of him staying at University Hill. The teachers at the school have successfully put a request in for O. to be accepted into the learning disabilities program at Point Grey High School for grade 8. The mother claims that this is a highly sought after public school program. There was an open house on March 12, 2013, which she attended and forwarded the information that she was given to the father. However, he has failed to respond in any way.
- [59] The mother claims that after the father's initial reaction in the fall of 2011 opposing her relocation to Vancouver, he made no further mention for her and the children to return to White Rock prior to him bringing this application.
- [60] The Family Law Act, SBC 2011 c. 25 sets out the framework for establishing the best interest of the 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.
- [61] Considering this framework, I am persuaded by the mother's evidence that her decision to move from White Rock to the UBC area and her enrollment of O. at Magnussen and A. at University Hill was definitely in the best interests of the children and not a flagrant breach or disregard of the access schedule in the agreement. As she points out in her evidence, the father's application comes almost two years after her move to Vancouver, and after he expressed his pleasure with O.'s progress in managing his condition following his attendance at Magnussen.
- [62] I appreciate the father's concern about the cost of the program at Magnussen. However, I accept the mother's explanation about why she had to move O. out of White Rock and find a special program to address his condition. I am satisfied that she found the best option to be Magnussen, which dictated her move to a location close to this school. I do not accept the father's assertion that her motive was to move close to her boyfriend's residence.
- [63] Moreover, I accept the mother's evidence that it was in the best interests of both children to be schooled at University Hill following O.'s completion of his year at Magnussen. The whole of the evidence satisfies me that O. has made great personal strides since his move from White Rock to Vancouver and that a return to White Rock would be a negative outcome for him. The children appear to be settled, happy and thriving in their new home and school environment, which militates against me accepting the father's assertion that the children should relocate to schools in closer proximity to his residence.

[64] The father notes that the mother did not seek a variation of the access schedule before her move with the children to Vancouver. The mother counters with the fact that after his initial opposition to her move, the father did not mention that she should move back to the White Rock area until he brought this application. Although I agree with the father that the mother should have applied to vary the access schedule set out in the agreement, I note that agreements are governed by s. 44(4) of the Family Law Act, which provides:

44 (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

[65] I am mindful of the father's concern about becoming a weekend father, and I respect his concern about becoming estranged from the children. However, I am satisfied on the evidence that the mother has made strong efforts to include him in their lives and that her relocation to Vancouver was solely motivated by her need to find an appropriate alternative school for O. Once the move was made and the children settled into their new home, they adjusted to the circumstances and on the whole of the evidence have thrived at school and in their social settings. This background points out the fact that when there is a separation between parents, their relationships with each other and with their children are subject to a change in circumstances which may have an impact upon the existing access arrangements. Thus, an access schedule cannot necessarily be treated as etched in stone, as the father in this case insists upon. The test always remains whether the parenting arrangement is in the best interests of the child.

[66] In the result, I find that the access schedule in the agreement should be set aside and replaced with an order to reflect the actual parenting arrangement. However, given that the children's 2012/2013 academic term will soon be completed, and that the mother will likely soon be employed, the parties will have to consider an access schedule for the summer of 2013, and the 2013/2014 school year.

[67] With respect to parenting time, the mother explains that prior to her move to Vancouver, the schedule had been on a rotation of eight days, with five days with her and three days with the father as she was sharing the driving duties, with occasional changes since 2008. In the fall 2011, it changed whereby she dropped the children off at the father's new residence in Cloverdale on Fridays after school, and he dropped them off with her on Sundays, one week and Monday morning the next week, alternating.

[68] She says that the new schedule for 2011 was designed to accommodate the children and their school schedule. She tried her best to work with the father by asking for his work schedule, but he refused to supply her with his schedule.

[69] The mother says that through 2011, there were times when the father missed parenting time for his own holidays, or failed to seek additional time, even when he was not working.

- [70] During July 2012 when the children were off school, the parents went back to following the father's work schedule on a rotating schedule of eight days - five with the mother and three with the father. The mother says that he was very resistant to providing the proper work schedule which interfered in making plans for the children over the holidays. She says that A., in particular, did not wish to stay away from her Vancouver home for longer than three days.
- [71] The mother does not agree to a parenting schedule that revolves around the father's work schedule. She will be finished school shortly, and hopes to have a full time job. She will also likely have a work regime that will be a weekday work, weekend off regime. She cannot expect that her work regime be the main factor in scheduling parenting time as that would give her every weekend.
- [72] Therefore, given the history of conflict between the parents on the issue of residency and access, I believe that it is in the children's best interests that the parents engage the assistance of a parenting coordinator to counsel them in arriving at an access schedule, taking into consideration the fact that the mother and children will most likely remain resident in Vancouver, and the details of the parties' work regimes. Dr. Elterman's report details the deterioration in the relationship of the parents after they had the children, and it is clear from the evidence and submissions in this application that their relationship remains strained, particularly around the issue of residency and access. Thus, engaging the assistance of a parenting coordinator would, in my estimation, go a long way towards avoiding future conflicts over this issue.
- [73] In light of my conclusion and findings on the issue of the relocation of the children and the access schedule, I dismiss the father's application that all arrears in regard to O.'s tuition fee at Magnussen should be waived, or that all actions taken by the FMEP should be reversed.
- [74] I also dismiss the father's item seeking a receipt for his \$25,000 spousal payment at the time of the settlement between the parties. The mother's evidence on this point, which I accept, is that she did not receive spousal maintenance as a periodic payment. Rather, she gave up her claim for spousal maintenance in return for a small adjustment in the buyout price of the former family home. She claims that at no time was there an agreement that the amount would be taxable in her hands or deductible for the father, and there was no evidence from the father contradicting the mother's position.
- [75] Further, I dismiss the father's item for a 50/50 split in extraordinary expenses. The father claims that the 70/30 split is an unreasonable burden on him because, he asserts, the mother has a larger after tax income than he does. However, counsel for the mother provided the court with a DivorceMate shared parenting calculation based upon the parents' respective earnings (the father with \$84,000 and the mother with \$36,349). According to the calculations the amount of the split is 69.8% for the father, and 30.2% for the mother. Thus, the 70/30 split is consistent with the parties' current income. However, should the mother's income change upon finishing school and obtaining full-time employment, the split of

extraordinary expenses should reflect that change.

- [76] Finally, I dismiss the father's application to stipulate that extraordinary expenses sought by either parent not exceed \$100 per month, unless agreed upon by the parties, or to limit a party's ability to incur such expenses in excess of the financial ability of that party. Clearly, the basis for this item in the father's application is the cost of sending O. to private school for one year and his resistance to the mother incurring this expense. Obviously, it would be preferable for the parties to reach an accord on extraordinary expenses before they are incurred, especially when they might be substantial. Nevertheless, in the case of O.'s attendance at private school I have determined that this expense was in his best interests and that the mother undertook this expense without the father's approval to properly address O.'s health and emotional well-being.
- [77] Moreover, the father agreed in para. 18 of the agreement to share in the cost of all expenses relating to O.'s disabilities, as well as the costs of the children's medical and dental expenses, expenses for counseling, costs of ophthalmologists, glasses and orthodontics, costs of post-secondary education including RESP contributions and the cost of the children's sporting activities and equipment. In light of this provision, placing a cap on such expenses, unless agreed upon by the parties, would be highly unworkable and impractical in my view, especially given the challenge the parties have experienced around reaching a common ground in relation to O.'s educational expenses to meet his special needs.

"B.I. Cohen J."

The Honourable Mr. Justice B.I. Cohen

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