

CANADA / JUDGMENT

K.F.M. v. K.G.T.

2023 BCSC 1347

COURT

Supreme Court of British Columbia

DECIDED

14 July 2023

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2023 BCSC 1347 K.F.M. v. K.G.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.F.M. v. K.G.T.,

2023 BCSC 1347

Date: 20230714

Docket: E113249

Registry: Vancouver

Between:

K.F.M.

Claimant

And

K.G.T.

Respondent

Before: The Honourable Mr. Justice Brundrett

Oral Reasons for Judgment

The Plaintiff, appearing in person:

K.F.M.

Counsel for the Respondent:

M.G. Perry

Place and Dates of Trial:

Vancouver, B.C.

July 12-16, 19-23, 26-30, 2021

August 3-6, 16, 20, 23-24, 31, 2021

September 1-3, 2021

November 1-5, 22-26, 2021

January 5, 2022

March 8-9, 16, 2023

and May 4-5, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 14, 2023

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INTRODUCTION

- [1] These reasons for judgment address the issues in a long-running, high-conflict family case that has been the subject of numerous proceedings since the final breakdown of the parties' relationship in early 2016. The issues revolve around the parties' 12-year-old child, "K". Both parties are well-meaning parents with many positive qualities, but cooperative parenting has been difficult for the last eight years of K's life, and the relationship between K and the claimant/father, K.F.M., has been particularly problematic in recent years.
- [2] The main issues to be decided are parenting time and responsibility, and the claimant's obligations for retroactive and future child support. While the claimant seeks an equal division of parenting time and parental responsibilities on the basis of the recommendations in a s. 211 report prepared by Dr. Rebecca England (the "211 Report"), the respondent/mother, K.G.T., submits that she should have the vast majority of the parenting time and parental responsibilities.
- [3] The parenting and guardianship issues are complicated by accusations of alienation by the claimant and what the respondent says is realistic or justified estrangement because of, what she says, is emotional abuse of the child by the father. The father-son relationship has allegedly been disrupted by K's long-running aversion to the claimant, though the claimant insists that K functions well in his presence. On one occasion, K lied to authorities to avoid being in the claimant's care. The claimant was charged in May of 2020 with assault of K, and a protection order (the "Protection Order") was issued in response, an allegation that has since been disproven and which the child has now admitted is false. Since then, a "Views of the Child" report by Dr. Nicole Aubé has been prepared that details the problems in the father-child relationship (the "Views of the Child Report").
- [4] After an extended period without contact with his child, the claimant had his parenting time restored in February of 2021, albeit in limited measure. While the overall situation has improved modestly since then, the father-son relationship remains a delicate one and there have been problems with communication, continued resistance from the child, and coordinating parenting time given the high level of distrust between the parties. There is no doubt that attachment disruption has taken place in the father-son relationship, and the question of how best to repair and foster that relationship is a primary one going forward.
- [5] The respondent asks the Court to order child support based on an imputation of income to the claimant. The claimant has not had full-time work since 2006. He has paid only minimal child support in the past, and nothing since 2016.

- [6] The claimant submits that he has no ability to pay child support because he is medically unable to work. He submits that he has been kept off work by health-related issues stemming from a fall off a ladder in May of 2015 and complicated by a bike accident in 2018 that aggravated his injuries. The nature of his 2015 fall, and the extent to which his asserted symptoms of post-concussion syndrome impact his ability to work, are disputed. The claimant opposes orders to pay retroactive or prospective child support.
- [7] The respondent also seeks the appointment of counsel for the child, an application which was made prior to trial but was renewed at trial.

PROCEDURAL HISTORY

- [8] Proceedings in this matter have been protracted. I was appointed as the case management justice in July 2020, after the imposition of the Protection Order and the adjournment of the last trial date. The claimant represented himself at trial. The respondent had counsel throughout.
- [9] The trial was originally scheduled to run for 19 days in July and August of 2021. The trial has exceeded time estimates, necessitating intermittent adjournments, and eventually occupied 43 days including submissions.
- [10] The evidence included: extensive evidence from each of the parties describing events in their relationship; evidence from Dr. England (the author of the 211 Report), Dr. Aubé (the author of the Views of the Child Report), and Dr. Noah Susswein (the child's therapist); and historical evidence from collateral witnesses that is argued to impact the best interests of the child factors.
- [11] The running of the trial included a long break after the calling of evidence in the fall of 2021 and the resumption of the trial in March of 2023. On January 5, 2022, when closing submissions were set to begin on day 38 of the trial, the claimant was not ready to proceed and indicated that he wanted to apply to reopen the trial to provide further evidence.
- [12] The trial then broke for an extended period of time during which the claimant's father fell ill and passed away, which further delayed the resumption of the trial. On October 14, 2022, the claimant applied to reopen the trial and call and recall numerous additional witnesses. Given the intervening delay, the Court allowed the claimant to personally provide one further day of evidence consisting of a half day each for direct and cross-examination. The Court granted leave to the respondent to do the same. The claimant and respondent each testified on March 8 and 9, 2023.
- [13] The trial completed with final submissions on May 4 and 5, 2023.

CIRCUMSTANCES

- [14] I provide below a general background and summary of the facts in several key areas. Additional facts are provided under each of the issues. While the evidence at trial was extensive and only a summary is provided in these reasons, I remain cognizant of all the evidence and the parties' submissions provided at trial.
- [15] The parties had a relationship between April 2009 and October 2011. They met in April 2009 through an online dating website and dated throughout the summer, including taking a trip together through California. The respondent described the relationship as a whirlwind romance, and it was a positive one for both parties in its early stages.
- [16] The claimant is trained as an engineer and businessman. He worked in the pulp and paper industry for years, but has not worked on a full-time basis since 2006. He reports having had accidents in 2015 and 2018 that left him with serious concussion-related injuries. He has now been unemployed for several years.
- [17] The respondent is a teacher in a local school. K lives with her full time. She has no other children. The respondent turned 40 during the year the parties met, and she was anxious to have a child soon. For his part, the claimant had lost contact with his two children from his earlier marriage and was open to the idea of having another child.
- [18] When the parties met, the claimant was engaged in lengthy matrimonial litigation with his first spouse, with whom he has two children. His trial in that matter started in 2010 and continued for several years.
- [19] The respondent reported that this previous matrimonial litigation, and the allegation that his ex-spouse had alienated the children against him, became the claimant's major focus. In the decision from Mr. Justice Walker in reasons indexed at 2014 BCSC 1740 (the "Previous Family Reasons") that eventually arose from those proceedings, the Court found that the respondent's ex-wife had engaged in alienating behaviours and that the children were indeed alienated from him: paras. 55-78.
- [20] Returning to the claimant's relationship with the respondent, in December of 2009, they found out the respondent was pregnant. Their child, K, was born in August 2010.
- [21] In the 2009 to end-of-2015 period, the parties sometimes cohabitated while maintaining separate residences, though they differ on the nature and extent of their cohabitation. The parties' relationship was marked both by happier times and periods of conflict. The claimant reported that in May 2011 the relationship was rocky and that they broke up and reconciled several times over the next few months. In August 2011, the respondent informed the claimant that she was removing him from her benefits because they were not living together. Both parties reported that they first separated in October 2011 when K was 11 months old.

- [22] Almost immediately after separation, the claimant filed a notice of family claim on October 20, 2011. The respondent filed her response on October 31, 2011. On the whole, after October 2011, the parties' cohabitation was neither consistent nor stable for an extended period of time.
- [23] In January 2012, there was some measure of reconciliation between the parties. During this time, the claimant submits that the relationship resumed in full, while the respondent reports that they only established a relatively amicable co-parenting relationship and were no longer a couple. From 2012-2015, during three years of relative cooperation, the family proceedings between the parties were mostly held in abeyance until the relationship deteriorated again. During the 2012-2015 period, the claimant mostly exercised his parenting time with K at the respondent's residence.
- [24] The claimant fell off a ladder in May 2015 in the back patio area of the respondent's home. The claimant also suffered mental health difficulties in December 2015. This led to his parenting time being supervised for a time in early 2016.
- [25] During this time, conflict in the relationship again increased, resulting in an argument in January 2016 at the respondent's residence. By the end of February 2016, the relationship was again over.
- [26] As to the date of separation, I accept the respondent's position that the parties separated in October 2011. While they cooperated and occasionally reconciled in the 2012-2015 period, they maintained separate residences, the claimant exercised parenting time at the respondent's residence, and they did not resume a marriage-like relationship.
- [27] Since 2016, conflict between the parties over K has been ongoing. In recent years, the parties have not been able to cooperate on issues related to the child. In particular, K's participation in extracurricular sporting activities and his attendance at his peer's birthday parties was highly problematic and resulted in K not attending numerous baseball games and missing several birthday parties.
- [28] As noted, the claimant had a bike accident in July 2018, which he says aggravated his injuries from the ladder fall in 2015.
- [29] Due to various concerns since the parties' separation, the claimant's parenting time with K has been restricted. The claimant alleges that K has become unduly aligned with the respondent, that she has alienated the child against him, and that she has micromanaged his parenting time.
- [30] The respondent expresses concern over K's anxiety and depression, which she says is primarily due to the respondent's behaviour. She accuses the claimant of being emotionally unstable, "gaslighting" her, being emotionally abusive toward K, and "counter-parenting" her.

CHILD SUPPORT

Positions of the Parties

- [31] The respondent seeks an order that the claimant pay retroactive and prospective child support and Federal Child Support Guidelines, S.O.R./97-175 [Guidelines], s. 7 expenses.
- [32] The respondent asks the Court to impute an income of \$100,000 to the claimant for child support purposes on the basis that he has been intentionally underemployed since 2011. She argues that the claimant has earned minimal income since 2006. She points out that he is well-educated, worked historically in marketing and in the pulp and paper industry, and argues that he has made insufficient efforts to find employment. She notes that he receives regular funds from his parents for his living expenses. She disputes that he hit his head in his fall off a ladder in 2015 and notes that he has not provided expert medical evidence in support of his health concerns.
- [33] The respondent submits that, since she has established underemployment, the onus falls to the claimant to establish that he is unable to work due to his health needs and that he has failed to meet this burden. She submits that his obsession with parental alienation syndrome and acting as his own lawyer has prevented him from earning income.
- [34] The claimant denies he has been intentionally underemployed. He asserts that he is medically unable to work. He says he has post-concussion symptoms resulting from the ladder fall in 2015, which were aggravated by his bike accident in July 2018. He says he has no income and has had to repeatedly borrow money from his family; funds which he says are loans, not gifts.
- [35] The claimant denies that he has not disclosed documents relevant to his ability to work or his medical condition. The claimant submits that expert medical evidence is not necessary to show that his health diminishes his capacity to work. He asserts that he cannot work in noisy environments and has light sensitivity, eye issues, dizziness and balance problems, nausea, and other symptoms arising from his accidents. He argues that in his previous matrimonial litigation, the trial judge did not impute income to him and found that he has tried to find work in the past.
- [36] The claimant submits that imputation has to be grounded in the evidence, and the evidence here is insufficient. He says that he will pay child support once he gets his pension and/or disability benefits, or upon settlement of his lawsuit over his bike accident with the City of North Vancouver. While the claimant was able to participate in the trial, he says he did so sometimes with difficulty, sometimes while taking Gravol, and with the court making accommodations for him, such as reducing the brightness of the lights in the courtroom.

The Claimant's Work History

- [37] The claimant has an undergraduate degree in electrical engineering, which he received in 1986. He began working in the engineering field in the pulp and paper industry in 1987. Also in 1987, he enrolled in an MBA program in Toronto. Later, in the early 2000s, he enrolled in an executive MBA program and did courses on the weekend. While he completed about eight courses in business management, he did not finish either program.
- [38] The claimant was a professional engineer for a time. The claimant worked in New Brunswick and Quebec in 1987 and 1988, respectively. He then worked for the Miramichi pulp and paper mill from 1988-1990.
- [39] He returned to another company, Measurex, in approximately 1991, where he worked until 2002. That company was purchased in the late 1990s by Honeywell.
- [40] The claimant reportedly later told Dr. England that his salary at Honeywell was \$200,000 or more, a statement which he denied at trial. He testified that his salary reached approximately \$120,000.
- [41] The claimant was laid off from his position at Honeywell in 2002. He testified that the problems in his previous relationship were a factor in his loss of employment. The claimant received a severance package after he left. He stated that he received job offers after he left Honeywell.
- [42] The claimant reported to Dr. England that he was in court frequently with his ex-wife in the 2001 period onward.
- [43] In approximately 2005, the claimant moved to BC and worked for one year at Norpac, an engineering firm, though he could not confirm his precise job title there. He indicated that there were issues with his court commitments in his matrimonial litigation interfering with his work there.
- [44] In 2006, the claimant was terminated from his position at Norpac. He received a severance package. He has not had full-time work since 2006.
- [45] The respondent reported concerns over the claimant not working after she became pregnant in 2009. She reported to Dr. England that the claimant was working only about 10 hours a week and that after litigation with his ex-wife resumed, it quickly became his sole focus. The respondent also reported that the claimant indicated he was offered work, but that he would turn it down because he did not want his income to be higher to attract child support obligations with his first wife.

[46] The claimant worked sporadically in his self-employed consulting business until his ladder fall in 2015. By "working", the claimant testified that this included doing work on his consulting business and trying to find contracts. At one point, he was successful in obtaining a contract with Clear Vision, a company involved in the corrugated box industry, in the 2009-2012 period.

[47] Since 2010, the claimant reported earning the following income from consulting work on his tax returns:

2010

Unknown

2011

\$25,167.41

2012

Not disclosed

2013

\$899.19

2014

\$360.00

2015

Not disclosed

2016-2021

Nil.

[48] The claimant has not provided any significant evidence of his attempts to acquire remunerative employment since 2010. Nor has he provided evidence of attempts to upgrade his skills or participate in job retraining. He testified that his previous litigation interfered with his ability to work and that since 2015 he has alerted his references for job applications that court commitments interfere with his ability to work.

[49] The claimant reported to Dr. England that his parents provided him with \$2,000 a month, and he has "done everything to reduce my expenses to the minimum possible", such as not having a car. He noted to Dr. England that he may be eligible at some point for disability assistance and is also hopeful that he may be able to return to work in some kind of capacity.

- [50] The claimant testified his last attempt at work was in the summer of 2015 when he "tried to work a couple of times." However, he has not worked in any capacity since the ladder fall in 2015.

The May 2015 Ladder Fall, the December 2015 Incident, and the 2018 Bike Accident

- [51] The claimant testified that he fell off a ladder at the respondent's home on May 3, 2015 while attempting to hang support hooks for a hammock on the underside of a porch, at her request. He testified that the ladder he was standing on collapsed, and he fell to the concrete ground in the vicinity of some stairs. He could not recall the precise moment of hitting his head, but he is sure he hit his head in the ensuing fall. He was not sure if he lost consciousness. He remembered everything going black, feeling dizzy, rolling around on the nearby grass, and seeing stars. He could not initially stand up and later, when the respondent went to his aid, he went to lie down.
- [52] The claimant testified that he began experiencing symptoms that he later learned are consistent with post-concussion syndrome. These include "eye issues", recurring nausea, dizziness, headaches, issues with balance, and sensitivity to light and noise. He provided examples, between 2015 and 2016, of how his symptoms impacted his ability to participate in a few sporting and social events. Other witnesses who testified confirmed that the claimant appeared to suffer from symptoms such as difficulty concentrating, communicating at length, and staying socially engaged for extended periods of time.
- [53] There was contradictory evidence as to whether the claimant struck his head during the ladder fall. The respondent called her former landlord, G.S., to testify about the layout of the area and the ladder. Other witnesses gave evidence as to what the claimant told them or failed to tell them about his fall. However, only the claimant was present at the time of his fall. K and the respondent were inside the home.
- [54] The respondent strongly challenged the claimant's assertion that he hit his head during the fall. The claimant did not immediately report having hit his head to the respondent who came to his aid. His family physician, Dr. Marck Hudon, examined the claimant the next day and made no note of the claimant hitting his head. However, the claimant later reported having hit his head to others, including to a physician at a medical clinic on May 26, 2015. It is clear that he unexpectedly fell from several feet above the ground and was unable to break his fall. I find that the claimant may not have initially been aware that he hit his head during the fall, but that the explanation of hitting his head logically explains his symptoms after the fall. Collateral witnesses certainly observed a significant difference in the claimant's presentation and functioning after his ladder fall.
- [55] On the whole of the evidence, I accept on a balance of probabilities that the claimant fell off a ladder on this occasion and likely hit his head during the fall.

- [56] On or about Sunday, December 13, 2015, the claimant suffered a mental health episode that led to him being hospitalized overnight. This incident occurred after the claimant drank a significant amount of alcohol after attending a celebration of life in the afternoon. The reports of the incident indicated that the claimant was found by police without a shirt on, running down a street in North Vancouver banging on neighbours' doors and making references to terrorists pursuing him. The claimant reported the same to the respondent. The claimant believes the incident and his alcohol intolerance that day may have been due to his post-concussion syndrome.
- [57] After this incident, the respondent became concerned about the claimant exercising parenting time, and eventually, the claimant's parenting time was suspended during the early part of 2016.
- [58] The claimant testified, and I accept, that his symptoms from this ladder fall eventually began to improve, with his eye issues, nausea and motion sickness getting better. However, he then had an accident on a bicycle in North Vancouver on July 22, 2018, which aggravated his symptoms. The claimant was riding his bike down a hill near Lonsdale Avenue when he was diverted by a contractor toward a pile of cables. His bike impacted the cables, and he lost his balance and "went flying." The claimant said he fell off his bike, landed on his left side, and struck his side, forearm, knee, and the back of his helmeted head. He was taken by ambulance to Lions Gate Hospital where he was diagnosed with various injuries including a fractured shoulder.
- [59] The claimant testified, and I accept, that since his two falls he has had ongoing issues with symptoms such as nausea, concentration issues, blurry vision, and balance issues. I cannot give effect to a diagnosis of post-concussion syndrome as no expert evidence was tendered before me; however, Dr. Hudon testified that this diagnosis was made in November 2015, that the claimant was referred for treatment, and that the claimant continued to be symptomatic after both falls.
- [60] Some medical professionals have characterized the claimant's preoccupation with his symptoms, checking his charts, seeking reassurance and seeking information about his symptoms as health anxiety, which has the potential to exacerbate and contribute to his symptoms. However, without expert evidence, I am unable to come to a conclusion on this point.

The Claimant's Medical History and Ability to Work

- [61] The claimant gave evidence of his subjective medical symptoms. As noted, he did not call expert evidence in support of his condition. However, he did call lay evidence from friends, family members, his physiotherapist and social worker, all of whom had observed his condition and/or parenting skills at various times. That evidence provides some corroboration of the claimant's ongoing symptoms. The claimant also entered various medical documents into evidence, though they do not offer expert evidence of the claimant's

condition and in what capacity the claimant's symptoms impact his ability to work. The respondent points out that no doctor testified that the claimant cannot work.

- [62] The claimant did call evidence from his family physician, Dr. Hudon; his counsellor, Julie Carlson; and his physiotherapist, Pauline Martin. That evidence indicates that the claimant has been treated for various physical symptoms. As noted, Dr. Hudon made a diagnosis of post-concussion syndrome in November 2015 and referred the claimant to Dr. Trevor Hurwitz, a neuropsychiatrist. Dr. Hurwitz has since treated the claimant and referred him to an ENT specialist and ophthalmologist for issues related to his eyes. Dr. Hudon testified that in his observation the claimant remains symptomatic and that some symptoms have improved but not resolved.
- [63] Most of the claimant's symptoms are self-reported and not objectively verified. The claimant reports that many of his post-concussion related symptoms are unresolved. However, none of the claimant's witnesses provided admissible expert opinion evidence as to the claimant's capacity to work or the impact of his symptoms on his ability to work.
- [64] There are some contradictory reports of the claimant's ability to work. For instance, while he attested that he was still partially disabled at trial, Dr. England reported that the claimant told him in 2019 that he was recovered "about 90% now".
- [65] The claimant testified that he can do part-time work for shorter periods of time, but he has trouble staying out of the house for an entire day. He can perform tasks for a while, but if his symptoms are triggered, he needs to take a break and lie down. His symptoms can sometimes get worse, which leads him to being sick in bed for days at a time.
- [66] In terms of his ability to work, the claimant says he would need to use his eyes to do computer work, which has been problematic in the past. His other option would be to perform physical work, but he says his physical symptoms also render this option problematic. He says he wants to work, but is functionally incapable of doing so, a proposition that (again) is not corroborated by expert evidence. He says he has periods where he can perform tasks and is not totally disabled, but at other times, he is afflicted by multiple symptoms that impair his ability to work.

The 2015 Settlement

- [67] In the Previous Family Reasons, arising from the claimant's litigation with his ex-wife, the trial judge found as follows:
- [104] [K.F.M.] also seeks an order against Mr. Maynard [his ex-wife's lawyer] for costs of the action in respect of what [K.F.M.] alleges was Mr. Maynard's inappropriate role in the proceedings, in accordance with the decision of the Court of Appeal in *J.A.S. v. H.M.*, 2005 BCCA 5. The parties and counsel for Mr. Maynard agreed that this issue would be dealt with following the delivery of these reasons. Arrangements should also be made to appear before me to set the mechanism in place to determine that claim. I wish to add that I have specifically refrained from making any findings or expressing any comments about the

appropriateness of Mr. Maynard's conduct in view of this looming issue and the current contempt proceeding against him.

- [68] In April 2015, settlement negotiations were conducted with respect to the claim that the lawyer involved in the ex-wife's case had acted improperly in the litigation with the claimant and the resulting impact on costs for the proceeding.
- [69] There is some dispute as to the nature of the settlement. The claimant contends that the settlement was for costs and that there was no lawsuit against Mr. Maynard.
- [70] There are two orders arising out of the settlement discussions. One is an order from Leask J., dated April 25, 2015 and filed April 27, 2015, that provides that the parties shall be bound by their settlement agreement reached on April 25, 2015 (the "Settlement Agreement"). The claimant testified that, according to the terms of the Settlement Agreement, the parties are not to discuss the terms of the settlement.
- [71] The claimant says that his former lawyer, Steven Mansfield, represented him in settlement negotiations. He testified that Mr. Mansfield received all the funds in May 2015, and that by January 2016 he had not received anything.
- [72] The claimant testified that in April 2016 he hired another lawyer, Robin McQuillan, to try to recover the funds related to the settlement from Mr. Mansfield. However, Mr. McQuillan was appointed to the bench, and by July 2016 he no longer represented the claimant.
- [73] The claimant then transferred the file to another lawyer, Justin Werb. The claimant testified that Mr. Werb received from Mr. McQuillan \$95,612 in two payments in August 2016 (being \$71,612 on August 9, 2016 and another \$24,000 on August 30, 2016) and that Mr. Werb paid the claimant \$9,000 on November 4, 2016. The claimant testified that Mr. Werb may have sent him more funds--"there had been payments out to me of \$9,000, four or five of them, an 8,000 dollar payment out to me"--but did not provide specifics.
- [74] The claimant also testified that he owed his parents, J.F.M. ("Mr. M. Sr.") and K.E.M. ("Mrs. M. Sr."), \$37,345.00, which funds were paid directly to them from North Shore Law, and that after this amount was paid to them on April 27, 2018, there was a zero balance for him in Mr. Werb's trust account as of 2019. Mr. M. Sr. testified that he could not recall receiving any additional funds directly from Mr. McQuillan; however, I find that he did receive sufficient funds to pay off the pre-2016 loans he made to the claimant.
- [75] At trial, the claimant eventually produced a heavily redacted trust ledger from North Shore Law dated May 13, 2021, which indicated they have \$0 in trust for the claimant. The claimant testified that all of the funds received from the settlement have been expended on legal fees and repayment of his debts.

- [76] The claimant would not confirm the amount of the settlement. The evidence from the prior negotiations establishes the amount of the settlement was likely in the range of \$275,000 to \$295,000, and that the claimant was holding out for the higher amount. As well, the claimant previously told the respondent that he received a settlement of \$295,000, a statement which I accept.
- [77] Previously, the claimant had told the respondent he would provide her with \$50,000 from his settlement, but in February 2016 he reneged on his promise on the basis that he had a lot of creditors to pay first and the settlement was not for lost wages. This elicited an angry response from the respondent and resulted in a heated argument.
- [78] The claimant has not disclosed his tax return for 2015. This is the same year when he would have received his settlement funds.
- [79] I find that the claimant did indirectly receive at least some funds as a result of his settlement, which funds were deposited into the trust account held by Mr. McQuillan and later Mr. Werb. However, while the claimant received some modest amounts directly, for the most part the settlement funds were largely used to pay out loans to the claimant's parents and cover some of his legal expenses, and the evidence of the tracing of the settlement funds in this trial is incomplete.

Historical Child Support

- [80] The respondent formally sought child support from the claimant in her counterclaim filed on May 18, 2016, although she also raised the issue in her application response filed on February 22, 2016.
- [81] The respondent asks the Court to use its discretion to draw a negative inference against the claimant for lack of disclosure, and to impute an income of \$100,000 to the claimant.
- [82] The claimant has paid only minimal child support over the years. The claimant has made the following child support payments since 2011:
- 2012: \$90 (April), \$2,295 (July), \$510 (August), \$224 (September), \$200 (December);
 - 2013: \$200 (April), \$2,000 (July);
 - 2014: \$2,000 (November); and
 - 2015: \$400 (October), \$200 (December).
- [83] From 2016 to the present, the claimant has paid no child support.

[84] The claimant's parents have regularly loaned him money in the past for his expenses. Although the claimant was supported by his parents prior to 2016, his debts to his parents had been paid off by 2016. Since 2016, the claimant's parents have regularly loaned him money in order to maintain a modest lifestyle. The claimant advised Dr. England that his parents provide him with \$2,000 a month. A spreadsheet prepared by Mr. M. Sr. indicated that the claimant owed \$148,132 as of the date of trial.

General Child Support Framework

[85] The Family Law Act, S.B.C. 2011, c. 25 [FLA] applies in this case since the parties were not legally married. Section 147 of the FLA creates a duty for a parent or guardian to support a child:

147 (1) Each parent and guardian of a child has a duty to provide support for the child, unless the child

- (a) is a spouse, or
- (b) is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were, considered objectively, intolerable.

[86] Section 150 of the FLA requires that the amount of child support be determined in accordance with the Guidelines.

[87] The Guidelines contain a presumptive rule with respect to the amount of child support owed:

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.

[88] With respect to determining a payor's income for support purposes, the Guidelines provide:

16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[89] One of the exceptions referred to in s. 16 of the Guidelines is the ability of the court to impute income to a spouse:

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;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (h) the spouse derives a significant portion of income from other sources that are exempt from tax;

[Emphasis added.]

Principles Applicable to the Imputation of Income

[90] In *Marquez v. Zapiola*, 2013 BCCA 433, the Court of Appeal set out the basic principles applicable to the imputation of income for support purposes:

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

[Emphasis added.]

[91] In *R.T.C. v. N.M.C.*, 2021 BCSC 2273, the Court summarized the framework of analysis that must be undertaken in considering whether to impute income to a party on the basis of underemployment, and it noted the shifting evidentiary burden in such an analysis:

[133] *Drygala v. Pauli* (2002) 61 O.R. (3d) 711, 219 D.L.R. (4th) 319 (O.N.C.A.) is the leading case in regard to the imputation of income under s. 19(1)(a) and stipulates three questions that the court must answer when deciding whether to impute income to a spouse:

1. Is the spouse intentionally under-employed or unemployed?
2. If so, is the intentional under-employment or unemployment required by virtue of the spouse's reasonable educational or health needs or the needs of a child of the marriage?
3. If the answer to question #2 is negative, what income is appropriately imputed in the circumstances?

- [134] The party seeking to have income imputed to their former spouse bears the onus of showing, on a balance of probabilities, that their former spouse is intentionally under-employed: *Windle v. Windle*, 2010 BCSC 18 at para. 88. A spouse is intentionally under-employed when they choose to earn less than what they are capable of earning: *Barker v. Barker*, 2005 BCCA 177 at paras.18-19. Section 19(1)(a) does not apply where, through no fault or act of their own, the spouse is terminated from their employment or given reduced hours: *Drygala* at para. 28. In British Columbia it is not necessary for a party alleging underemployment to show that their former spouse is under-employed with the intent of avoiding support obligations: *Barker* at paras.18-19.
- [135] Once a party has adduced sufficient evidence to show that their former spouse is earning less than they are capable of earning, the onus shifts to the under-employed spouse to show that their under-employment is by virtue of their reasonable educational or health needs or the needs of a child of the marriage: *Drygala* at paras. 38-41. If the under-employed spouse cannot show that their under-employment is required by their reasonable educational or health needs or the needs of a child of the marriage, the court must exercise its discretion in deciding whether, and in what amount, to impute income to the spouse.
- [136] In exercising its discretion under question three of the *Drygala* framework, the court must consider whether the spouse's under-employment is reasonable in the circumstances having regard to the spouse's employment history, age, education, skills, health, available employment opportunities, and the standard of living enjoyed during the marriage: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37; *Drygala* at para. 45.
- [Emphasis added.]
- [92] In *Hanson v. Hanson*, 1999 CanLII 6307, [2000] B.C.W.L.D. 234 (S.C.), the Court posed the following questions to be considered at the outset of the analysis:
- [19] How does the court decide whether a person is earning to his or her capacity? The court should be provided with information about the parent's capacity to earn and the parent's present income earning situation. The two can then be compared.
- [20] There are two aspects to a parent's capacity to earn. The first is what the parent is capable of earning based age, education, experience, skills and health. The second is the job opportunities that are realistically available.
- [93] A finding of bad faith, or specific intent to evade or minimize the payment of child support, is not required for a finding of intentional underemployment or unemployment (although if that intent exists, that finding is required): *Barker v. Barker*, 2005 BCCA 177 at para. 19; see also *Koch v. Koch*, 2012 BCCA 378.

- [94] Courts have found that a payor is intentionally underemployed or unemployed on the basis that they have not made adequate efforts to seek employment (even at a lower level than they are used to or in a slightly different role) or have failed to upgrade their job skills, despite being otherwise capable of work: see e.g. *Sandy v. Sandy*, 2016 BCSC 1684; *L.S.M.K. v. J.W.K.*, 2019 BCSC 2025; *Peake v. Trotter*, 2010 BCSC 1204; *M. (B. J.) v. B. (K. F.)*, 2003 BCSC 390; *Mahannah v. Mahannah*, 2012 BCSC 403.
- [95] A person is expected to take reasonable steps to obtain employment commensurate with such factors as their age, state of health, education, skills and work history (*Van Gool v. Van Gool*, 1998 CanLII 5650 at para. 34, 59 B.C.L.R. (3d) 395 (C.A.)), which suggests that even in instances where a payor has established on the evidence that their working capacity is limited by health issues, the payor is still expected to seek out work proportionate to their new capacity, perhaps by developing new skills. If they fail to do so, it may be appropriate to impute income to them: *Van Gool* at paras. 30-31.
- [96] The presence or absence of medical evidence will impact the court's assessment of whether it would be appropriate to impute income in the face of alleged health issues. For instance, in *Nielsen v. Nielsen*, 2007 BCSC 306, *aff'd* 2007 BCCA 604 (on this point), Russell J. found the plaintiff was intentionally underemployed despite his alleged health issues:
- [11] The plaintiff has not provided an expert report to substantiate his contention of illness. He referred rather vaguely to a cerebral haemorrhage he had suffered as necessitating a reduced level of employment. While the (largely illegible and incomprehensible) doctor's notes provided by Mr. Nielsen confirm that he did suffer some brain trauma, they appear to be unable to find any brain abnormality that would explain a cerebral haemorrhage. Additionally, according to the notes, the haemorrhage took place just over one year ago, before April 5, 2006. This would be after Mr. Nielsen commenced working for Caravel, which tends to rebut his assertion that he left Canaccord for health-related reasons.
- [12] In the absence of an expert medical opinion, I cannot relate the injury to his ability to work going forward. Additionally, I infer from the nature of his current employment as a director, officer and management consultant to multiple companies, which involves significant responsibility, continuing personal liability and significant travel, that his ability to work has not been significantly compromised.
- [97] Similarly, in *M.F.W. v M.A.H.*, 2021 BCSC 1581, Justice Basran dismissed the father's argument that his health problems impacted his capacity to work due to a lack of supporting evidence:
- [39] I am not satisfied that Mr. H's alleged health problems impair his capacity to work. There is no objective medical evidence that suggests he is incapable of working full time. He described a number of health concerns that have either not been definitively diagnosed or are being treated without apparently affecting his ability to work. Mr. H has not received a diagnosis that requires a reduction in his capacity to work full time.

- [98] Conversely, in *Bourque v. Gerlach*, 2006 BCCA 157 at paras. 62-65, the Court of Appeal held that, on the basis of uncontradicted medical evidence that the appellant suffered from a variety of mental health issues that were not amenable to treatment, it would be inappropriate to impute an income to the appellant on the assumption that she could hold down employment.
- [99] The claimant also cites *M.C.D. v D.A.D.*, 2017 BCSC 1832 at paras. 62-64, where the Court found that the absence of an expert opinion on a party's capacity to work was not fatal to the party's claim that her health prevented her from pursuing gainful employment.
- [100] In *Poursadeghian v. Hashemi-Dahaj*, 2010 BCCA 453, the Court of Appeal described the analysis required to determine an appropriate level of income to impute to a party if there is limited financial information:
- [23] In the absence of complete income tax returns and other financial information of a spouse the court must look to other evidence, including circumstantial evidence, for the purpose of imputing income, *A.G. v. B.R.*, 2005 BCSC 96 at para. 57.
- [24] The judge relied on the little evidence available concerning the defendant's ability to obtain a mortgage and his shareholding in Lucky 9, to impute an income of \$75,000. She did not accept the explanation offered for the defendant's shareholding in Lucky 9 or for the basis on which he obtained a mortgage on his home.
- [25] There was some evidence to support that conclusion and the judge was permitted to draw an adverse inference against the defendant because of his inadequate disclosure. The defendant cannot be heard to dispute the level of income attributed to him, nor permitted to escape his support obligations because of his failure adequately to disclose income information.
- [101] In *Goodhew v. Summers*, 2022 BCSC 1080 at para. 145, for example, the Court was able to impute an income to the father despite limited evidence of his earning potential. To arrive at an amount, the Court considered the father's lifestyle, personal expenses run through his business, as well as loans he had to pay off and other child support obligations he held.

Analysis

Whether the 2015 Settlement is Available for Child Support Purposes

- [102] I find that the claimant benefitted financially from the 2015 settlement arising out of his matrimonial litigation with his ex-spouse, though it has not been shown he received directly or indirectly anything close to the \$295,000 that the respondent contends he received. At a minimum, the claimant paid off a \$37,000 loan from his parents, received at least a \$9,000 payment for himself, and used a portion of the other funds to cover his legal bills.

- [103] The claimant's accounting for the settlement funds is less than ideal. To be sure, the claimant was bound by his settlement agreement and the ensuing court order not to disclose the specifics of the settlement. He also alleges that his then-lawyer improperly diverted some of the settlement proceeds. However, I found the explanation of the claimant and his father to be vague and somewhat inconsistent.
- [104] Mr. McQuillan's trust ledger has not been produced, though a redacted ledger was produced from Mr. Werb's office. The claimant claimed that Mr. McQuillan paid money to his parents; whereas Mr. M. Sr. denied this. As well, the claimant failed to disclose his 2015 tax return, which would have listed his income the year the settlement funds were received. Finally, the claimant asks this Court to believe that he shrugged off the alleged improper diversion of funds by his lawyer and thereby abandoned claims to settlement funds. In light of the fact that his lawyer would have been insured with professional liability insurance and in light of the claimant's penchant for making complaints about professionals to their governing bodies, this explanation strains credulity.
- [105] However, the nature of the funds is important. In *M.K. v. R.A.S.*, 2004 BCSC 1798 at paras. 35-38, Justice Wedge held that only the past wage loss and future earning capacity components of a personal injury settlement ought to be considered income for the purposes of determining a payor's obligations under the Guidelines. From the available evidence, it appears that any settlement funds the claimant received were in the nature of costs arising from his previous matrimonial proceedings, rather than an award for loss of income or earning capacity. The evidence does not support an inference that a portion of the settlement funds were awarded for lost income. Rather, the settlement appears to have been for legal fees and disbursements in relation to lengthy litigation. As such, I do not view the settlement funds, or any portion thereof, as a substitute or replacement for income the claimant would have or could have earned.
- [106] On the whole, I would not characterize the settlement funds as income for the claimant for Guidelines purposes. It follows that I am also not inclined to impute an income to the claimant on the basis of the receipt of income or non-disclosure of the specifics of the 2015 settlement, pursuant to s. 19 of the Guidelines.

Whether to Impute Income to the Claimant and Order Retroactive Child Support

- [107] The respondent seeks retroactive child support going back to what she says is the parties' date of separation, October 2011. The respondent submits that the Court should impute an income of \$100,000 to the claimant on the basis of his intentional underemployment or unemployment. The respondent argues that the claimant has inappropriately used scarce funds, that might otherwise be allocated to child support, to pay a social worker, Julie Carlson, to provide advice about his parenting, and to fund his litigation expenses which she says are inflated by his pursuit of a parental alienation finding.

- [108] The claimant opposes the imputation of income to himself. He points to his two accidents, his medical history, and his subjective complaints of ongoing symptoms that have impaired his ability to work. The claimant submits that it should not be held against him that he has not submitted an expert report, and that the respondent could have obtained one but did not.
- [109] In assessing whether the claimant is intentionally underemployed or unemployed, some of the claimant's previous litigation-focussed statements cast suspicion on his professed inability to pay child support. For instance, the respondent testified, and I accept, that during his previous matrimonial litigation with his ex-wife, the claimant made statements to the effect that he was concerned that if his income increased too much, he would have to pay more child support. The claimant also told employers or references in the past that his matrimonial litigation may interfere with his work obligations.
- [110] As noted in the s. 211 Report, the claimant was unemployed for several years prior to his fall from the ladder in 2015. The respondent has alleged that much of the claimant's time during the relationship was taken up with his pursuit of his previous matrimonial litigation, and I accept that being involved in two sets of protracted matrimonial proceedings has consumed a significant portion of the claimant's focus for many years.
- [111] The claimant's testimony on the stand, and indeed his performance at trial, indicates he can now function reasonably well for short periods of time. He testified that he can do "part-time stuff", evidence which I accept. During his evidence at trial, the claimant often appeared alert and attentive. However, on some occasions, the claimant appeared to be bothered by light and had concentration issues or nausea. He was also able to examine and cross-examine witnesses effectively. The claimant is well educated and obviously intelligent and articulate. His history demonstrates that he can be a determined advocate for his own interests, even within his stated limits of his functioning.
- [112] While the claimant did not call expert evidence as to his medical condition, I accept that he subjectively and genuinely believes that he suffers from symptoms similar to post-concussion syndrome and that he has experienced symptoms from time to time. However, without expert evidence, and while I am prepared to accept the claimant's symptoms had an impact upon him to a significant degree, I am unable to make further findings about the extent of the claimant's injuries on his earning capacity, such as that they have totally impaired his ability to work.
- [113] The respondent first sought prospective and retroactive child support in a notice of application filed February 22, 2016, but the issue of child support was adjourned at a hearing before Funt J. on February 26, 2016. The issue was raised again on May 18, 2016 in the respondent's counterclaim, which formally sought child support from the claimant. An amended counterclaim was filed on March 4, 2019, in which the respondent sought both prospective and retroactive child support.

- [114] The evidence shows that the claimant paid small amounts of child support from 2012-2015. As such, the respondent's claim is properly characterized as an application for a retroactive increase in child support on the basis of imputed past income. Retroactive awards for child support generally extend no further than three years before formal notice was given to the payor parent: *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 123; *Colucci v. Colucci*, 2021 SCC 24 at para. 114(b).
- [115] In all the circumstances, I am inclined to impute past income to the respondent on the basis of the circumstances outlined in s. 19(1)(a) and (h) of the Guidelines. I find that the claimant was intentionally underemployed or unemployed in the past when he was capable of making at least a partial income. I note as well that:
- a) he received regular, untaxed monetary support from his parents;
 - b) despite his accidents, he retained some ability to perform part-time work; and
 - c) he is an intelligent man with university-level training who has earned substantial income in the distant past.
- [116] I find that the respondent has met the threshold of establishing a past material change of circumstances justifying a retroactive increase in child support: *Colucci* at para. 114(a). The claimant's failure to disclose his 2015 tax return, his failure to share a portion of his settlement with the respondent (as was promised to her), his failure to secure even part-time employment, and his prioritizing of repayment of his parents over payment of his child support obligations constitutes conduct that justifies an order for retroactive child support.
- [117] What is the appropriate date to start retroactive child support? The date of effective notice is the presumptive date to commence retroactive child support: *Colucci* at para. 39. I find that effective notice was given in February 2016 when the claimant filed an application response seeking, *inter alia*, prospective and retrospective child support. Formal notice was given in May 2016 when the respondent amended her counterclaim. That counterclaim did not mention the seeking of a retroactive award, though I find that her claim could be taken as including a retroactive component given her recent application for such.
- [118] Alternatively, if the May 2016 counterclaim is characterized as insufficient formal notice of a retroactive claim, the date of formal notice must surely be set as March 4, 2019, the date of the amended counterclaim (seeking retroactive and prospective child support), with a presumptive start date to extend back three years to March 2016 (only one month after effective notice was given): *D.B.S.* at para. 123; *Colucci* at para. 39.
- [119] The four factors introduced in *D.B.S.* help determine when an award for retroactive child support is appropriate: *Michel v. Graydon*, 2020 SCC 24 at paras. 109-126; *Colucci* at para. 114(d). In this regard, I first take into account the respondent's explanation for her delay in seeking child support, based on the representations that the claimant made to her and the expectation that he would share his settlement funds. To some extent, her explanation is

understandable. The conduct of the claimant in providing minimal support is relevant-- though his income was minimal, the parties had partially reconciled in the 2012-2015 period, he paid some child support, and I accept that he was injured in his 2015 ladder fall. The past and present circumstances of the child is the third factor, and I take his age, needs and circumstances into account, including the fact that the respondent's means have been strained. Finally, in terms of the hardship that an award might entail, I take into account the difficulty with which I expect the claimant would have to pay the award and the fact that he has not had an income in the last few years, has no significant current assets and lives off the assistance of his parents. However, I do find some elements of blameworthy conduct with respect to the claimant's child support obligations in the 2012-2015 period and thereafter. He made insufficient efforts to look for part-time work, he made statements to the respondent that he wished to keep his income artificially low out of fear of strengthening his ex-wife's claim to support, and he did not share any of his settlement funds as promised.

- [120] While it would be open to fix the date of retroactive child support further back in time, I would nevertheless in all the circumstances exercise my discretion to fix the start date for support at March 1, 2016, which approximates the date of effective notice and is close to the date of the counterclaim filed in 2016 (and alternatively, three years back from the amended counterclaim in 2019, which substantially reaches the same result).
- [121] As for the claimant's post-2015 claims of medical impairments, the claimant has not met the burden of showing that he was totally disabled from producing income due to medical or other reasons in the past. The quality of the medical evidence is wanting in that regard. I am prepared to accept that the claimant did suffer the two major falls, and that he had certain symptoms that kept him from full-time work, but I do not accept that this mature, educated, and experienced man had no ability to earn some part-time income from 2015 to 2023.
- [122] On the basis of the foregoing, I would fix a start-date for child support as of March 1, 2016 at a very modest imputed income of \$15,000 per year from this point forward. This is not a case where I am inclined to further extend the presumptive date of retroactivity on the basis of the factors outlined in D.B.S., Michel and Colucci. This start date also takes into account that the claimant may have experienced a period of recovery and impaired work capacity during the months after his ladder fall in May 2015. It appears that he was on the road to recovery in subsequent years, but then his second accident occurred.
- [123] The claimant's bike accident occurred on July 22, 2018. Again, I would allow that the claimant experienced a period of more intense recovery for the year following his bike accident, and I would not impute income in this period. I would continue the imputation of income as of August 1, 2019 at the same rate of \$15,000 per year.

[124] As of January 1, 2020, approximately the period of time when the claimant told Dr. England that his parents supplied him with \$2,000 per month for his expenses, I would impute the claimant's income at a level of \$24,000 per year.

[125] The amount owing in retroactive support is \$11,828.00; the calculations are set out in the table below.

Year/Months

Amount Owing

(rounded to the nearest whole)

March 1-December 31, 2016

\$970

(97/month x 10 months)

January 1-November 21, 2017*

\$1,038

([97/month x 10 months] + [97/30 x 21 days])

November 22-December 31, 2017

\$98

([75/month x 1 month] + [75/30 x 9 days])

January 1-July 22, 2018

\$503

([75/month x 6 months] + [75/31 x 22 days])

July 23, 2018-July 31, 2019

\$0

August 1-December 31, 2019

\$375

(75/month x 5 months)

2020+

\$2,412

(201/month x 12 months)

2021

\$2,412

(201/month x 12 months)

2022

\$2,412

(201/month x 12 months)

January 1-July 31, 2023

\$1,608

(201/month x 8 months)

Total: \$11,828.00

*Updates to the Federal Child Support Tables came into effect on November 22, 2017.

+Imputed income increased to \$24,000 per year.

[126] With respect to past s. 7 expenses, I was not provided with detailed evidence of past special or extraordinary expenses and the respondent did not press a claim in argument for past s. 7 expenses. I make no award for past s. 7 expenses.

Whether to Impute Income to the Claimant and Order Prospective Child Support

[127] Going forward, I am inclined to impute income to the claimant on the basis of the circumstances outlined in s. 19(1)(a) and (h) of the Guidelines. I find that:

- a) he has received regular, untaxed monetary support from his parents that is likely to continue;
- b) he retains an ability to perform part-time work;
- c) he is an intelligent man with university-level training who has earned substantial income in the distant past;
- d) the claimant is now five years out from his 2018 accident, has a better understanding of his symptoms and his limits, and his ability to manage his symptoms has improved over time; and
- e) his performance at trial indicates that he can work, at least part time and at a modest level.

[128] In addition, the claimant's own evidence indicates that he can do at least part-time work for some periods of time. Realistically as well, I would expect that removal of the claimant's preoccupation with the current trial that has consumed a significant portion of his energy will provide some impetus to his future vocational efforts.

[129] I find it appropriate to impute a modest level of income to the claimant going forward.

- [130] I do not think it is appropriate, however, to impute an income of \$100,000 to the claimant, historically or prospectively.
- [131] In all the circumstances, I would continue to impute a modest income to the claimant of \$24,000 going forward from August 1, 2023, raised to \$30,000 per year as of January 1, 2024, subject to a yearly income review. I find that the respondent has been and continues to be the primary parent. This results in a current child support amount of \$201.00 per month starting August 1, 2023 and \$279 per month starting January 1, 2024.
- [132] From August 1, 2023 onward, the parties will share future s. 7 expenses proportionate to their incomes, which will both be subject to yearly review.

CIRCUMSTANCES RELEVANT TO PARENTING TIME AND RESPONSIBILITY

The 211 Report and Evidence of Dr. England

- [133] Dr. England is an experienced clinical psychologist with specialized training in forensic psychology who transitioned around 2002 to conducting assessments in family law cases, including parental assessments. She was appointed in June 2018 to conduct a s. 211 assessment for the parties, originally for a trial scheduled to begin in 2019. The trial was adjourned to July 2020, and then adjourned again.
- [134] Dr. England's report was eventually completed on January 22, 2020. The 211 Report is comprehensive and was completed at significant cost to the parties. It was unfortunately not released to the parties until the end of June 2020 due to funding issues.
- [135] On the possible presence of parental alienation syndrome, Dr. England opined that K presented as strongly aligned with his mother, and on the continuum for becoming alienated from his father. At trial, when more recent events were put to her, Dr. England testified that the alienation dynamics have continued, and it appears that they have escalated.
- [136] Dr. England recommended that K be equally parented by both parents and that he rotate between them, following gradual implementation of a 2-2-5-5 plan.
- [137] As to decision making, Dr. England recommended that both parents retain parallel decision-making rights for all areas pertaining to K. In the event of disagreement, she recommended the parties speak to a parenting therapist or coordinator, or possibly resort to mediation.
- [138] The parties are at odds over Dr. England's recommendations. The claimant is in full agreement with implementation of her recommendations. His position at trial was substantially in accord with Dr. England's recommendations.
- [139] The respondent strongly disputes some of Dr. England's conclusions. She submits that Dr. England's report does not sufficiently account for concerns over K's psychological and emotional health arising from the claimant's practice of interrogating K over

litigation-related issues. She submits that Dr. England overlooked key evidence, did not speak with important collateral witnesses such as Dr. Susswein, K's therapist, and did not have the benefit of subsequent developments including the (false) allegations of abuse made in April 2020.

- [140] Dr. England testified at trial and expanded on her conclusions. She testified that K's demonstrated willingness to make false reports to his mother about being harmed by his father is an indication of the conclusions in her 211 Report--i.e., the maladaptive strategy of an alienated child with negative emotional and psychological adjustment.
- [141] Dr. England indicated that such allegations are likely to continue as they are reinforced by the child's empowerment, the attention it draws, and the maladaptive coping strategy. One factor that drives this phenomenon is social referencing, in other words, the child picking up on small cues and modifying his behaviour. The other factor driving this phenomenon is confirmation bias, the idea that one only takes in information that fits one's preconceived ideas.
- [142] Dr. England saw the respondent's self-centred thinking and hostility toward the claimant as feeding the child's alienation in an unhealthy way. She said that K engaging in self-harm is a form of emotional escalation that does not serve him well. She opined that a "Views of the Child" report could entrench the alienation and ultimately deprive K of a father. She also viewed the respondent taking K to professionals to recount a false narrative of abuse as a common problem with alienated children.
- [143] Dr. England viewed the current parenting plan as extremely restrictive and damaging in and of itself. In her view, it sends the message that the father is a mere visitor rather than a full parent, and it offers no opportunity for the claimant to engage in K's world. She was of the view that the empirical research indicated that a substantial increase in time with the father was required.
- [144] Dr. England pointed out that the way transitions have been structured is causing problems. It was her recommendation that the parent who has the child delivers the child to the other parent. She opined that it is hard to extract a child from an environment where they are already settled, and children do not like being packed up and moved. Neutral environments such as picking up or dropping off at school offer better locations for transitions. She recommended that the parents not be in the same place at the same time.
- [145] While Dr. England did not have the benefit of Dr. Susswein's file prior to writing her report, nothing she heard about Dr. Susswein's file at trial caused her to think that her formulation was inaccurate. She testified that even if Dr. Susswein outlined instances of emotional abuse by the claimant, she would discount that information because he was not in a position to determine the veracity of the information.

[146] In Dr. England's view, both of the parties are focussed on making allegations against each other and are ill-equipped to deal with conflict. In this context, K is already an alienated child who is unhealthily aligned. She anticipated that K would repeat his abuse allegations to other professionals who wouldn't necessarily appreciate the importance of ruling out alternative hypotheses unless they have adopted a forensic model. She saw the problem as bigger than simple acrimony between parents, or poor communication by the claimant. In her view, the parties are unable to function as a co-parenting unit.

[147] Dr. England favoured a more significant adjustment of parenting time rather than incremental steps. She stated that because the alienation in the current situation is entrenched, it is important to intervene as strongly as possible because many alienated children never re-establish their relationship with the rejected parent.

The Views of the Child Report and Evidence of Dr. Aubé

[148] Dr. Aubé is an experienced psychologist with a PhD in marital and family therapy. She has 40 years of experience as an expert psychologist and has prepared numerous s. 211 reports and parenting capacity assessments. The referral for the Views of the Child Report was made on November 20, 2020. She completed the report on March 8, 2021.

[149] The main goal of the Views of the Child Report was to provide information about K, but the report does not make recommendations regarding existing custody and access determinations. In order to prepare her report, Dr. Aubé interviewed K twice in early 2021, when he was 10.5 years old, and conducted psychological testing of K. She also interviewed the claimant and the respondent. Unlike Dr. England, Dr. Aubé also received information from Dr. Susswein, K's therapist.

[150] Dr. Aubé's clinical impression is as follows:

[K] is a beautiful child who is approaching the teenage years. If he was mildly hesitant when he arrived for the first session, his reticence vanished rapidly; he expressed himself well, with no signs of anxiety. It did not appear that he was editing his responses. He is a thoughtful child; his responses appeared genuine. His affect was congruent with the topics. Eye contact was generally appropriate. His demeanor was more taciturn in the second session, when he was accompanied by his dad. During the interviews, when talking about his father, his emotions fluctuated from sad to angry in the first session and more flat in the second one. His responses had an undertone of resignation while giving some hope for finding a solution in the second session. He repeated a few times, with a sentiment of grief, that he wanted to have a "normal life".

[K]'s compromised attachment with his father has inadvertently solidified a strong bond with his mother, as she has been the only parent, by whom he feels accepted. [K]'s preoccupation about his dad appeared authentic. His view was well expressed and resonated with what he felt. I did not see what [K.F.M.] perceives when he says that [K] is "a chameleon child"; meaning that he needs to adapt to each caregiver's corresponding needs for a confirmation of his alliance with each parent.

Although [K] repeated that he was fearful of his dad, the emotions that predominated were a great deal of disappointment, mixed with sadness and distrust. His fear of his dad seems to be an amalgamation of a series of times of discontentment, which inevitably holds a great deal of sadness.

Clinically, this assessment did not reveal any major signs of psychopathology. [K] described healthy relationships with his friends; he enjoys school, he eats and sleeps well and referred to a safe relationship with his mother. His apprehension and his distrust are solely connected with the relationship with his father. Although he does not meet the clinical criteria for Generalized Anxiety Disorder, it is clear that he has responded with a high level of anxiety in situations when he felt not only threatened but also not respected.

[K] feels that he has not been protected by his dad. The unsafe feeling that he reports is authentic and should not be dismissed. [K] feels that he will not be loved unless he complies with his dad's view and/or instructions. The problem is that the root of a child's attachment is disturbed when the child feels that the relationship is unsafe. In such a dynamic, often in an attempt to protect himself, early on, the child can embrace a distant and, perhaps, further along, endorse a stubborn and defensive style. It is a way for the child to safeguard himself/herself from the threat or danger he/she perceives. It is a defensive survival response.

I agree with Dr. Susswein that it is almost impossible for a parent to conceal all of his or her perceptions about the other parent. It is even less possible when a custodial dispute goes on for years and has triggered incommensurable emotional, social and financial costs. I am sure that [K] has received ambivalent messages from both parents and probably more from his mother who has been his main caregiver since his parents separated. This said, the reality is that he has formed with her a "safe" attachment.

Although the amount of time a parent can spend with his child is important, the quality of this time is even more essential. There is no doubt that the limited time [K] has spent with his dad has had an impact on their relationship. This said, a safe dad/son partnership with solid ground for attachment still can be built even when the amount of time spent together is circumscribed.

Many grandparents build strong bonds with their grandchildren with interrupted and limited access to them. The common denominators that solidify their relationship are: love, acceptance and trust.

Blaming "parental alienation" is certainly not a solution but it has become an apparent aggravating factor. I suspect that [K.F.M.]'s focus on this concept to try to explain the unhealthy dynamic of this family has created a deepening crevasse. This being said, there is no doubt that the limited parenting time between [K.F.M.] and [K], including no overnight sleeps, has been among the major parameters responsible for an impoverished father/son relationship. I suspect that his mother's distrust and his dad's response have also played a vital role.

[Emphasis added.]

[151] Dr. Aubé summarized her conclusions as follows.

I need to remind the reader that the mandate of a "View Of A Child" is rather restrictive. It does not permit me to specify recommendations to every protagonist involved in this family. This being said, it does allow me to express concerns regarding [K], who was the main focus during the course of this assessment.

Considering that [K] is just about to become a teenager, time is of the essence. The door of opportunity is progressively closing; [K] will be soon a teenager with all of the rights and determination to define the relationship he wants with his dad. Everyone needs to remember that there is no Court Order that will force a child to love a parent.

Despite the fact that I am of the opinion that in a maximum of 3 to 4 years, it will be very difficult to reverse the present dynamics, it is clear that [K] is a child that will oppose forceful pressure.

He is a bright, vibrant and perceptive child. He has a very good sense of what is happening around him. He expressed his concerns, regarding his father, with authenticity and undeniable conviction. Unfortunately, it seems that there is evidence of a long history of an unhealthy father/son connection that will need a great deal of rehabilitation and a new *modus operandi* for everyone in this family.

In order to maximize the likelihood of improvement of the father/son relationship, I recommend not placing any rigid or restrictive regiment on [K]; the risk to build resentment and increase anger is quite high. I hope that [K] will be open to seeing the positive aspects of his father, He needs to allow himself to experience and validate new challenges. He needs to understand that he may need to see his dad with a wider range. It is time for father and son to have some fun together.

Despite the restrictions of my role, I would like to point out that the therapeutic relationship [K] has developed with Dr. Susswein has been a great source of comfort and solace for [K]. It is essential that this relationship persists. Perhaps Dr. Susswein can invite [K.F.M.] to join them for a few sessions when he feels that it will be productive for [K].

[Emphasis added.]

[152] Dr. Aubé testified at trial and expanded on her conclusions.

- [153] Dr. Aubé noted that K reported that his dad was mean to him, that he felt his dad would hurt him, and that his dad was grumpy and not nice to him. K said he felt his dad did not accept him and that he did not feel respected by his dad. It came across clearly to her that K felt emotionally unsafe with his father. K reported that what the claimant was doing as a father, such as supplying him with candy and video games, was not what he wanted in a relationship with his father.
- [154] K was not totally negative toward the claimant. K did describe positive aspects of his dad, such as that he had fun with his dad sometimes.
- [155] One of K's complaints was that the claimant did not allow him to use the respondent's surname when under his care. Another concern for K was that he did not have friends at the claimant's home.
- [156] K's trust of his mother was strong and he did not have negative things to say about his mother. Dr. Aubé described that relationship as one of safety and unconditional love. K reported that he believes his dad loves him, but he does not actually feel loved, which is confusing to him. K reported that the claimant told him not to trust the respondent.
- [157] Regarding the false allegation of abuse, Dr. Aubé opined that K was remorseful about his lie and likely embarrassed. His rationale was that he was afraid, and lying was like a solution for him to try to distance his father from his life.
- [158] The respondent brought K in on February 11, 2021 for his first interview with Dr. Aubé. The claimant brought K in for the second interview on February 19, 2021. In contrast to his bubbly presentation in the first interview, Dr. Aubé found K's affect in the second interview to be nonchalant, flat, and resigned. The difference in how K talked about each parent was fundamental.
- [159] K described that he had given the claimant lots of chances and that he did not want to give him anymore. He told Dr. Aubé, "I cannot make my dad happy." Dr. Aubé described a strong feeling of helplessness in the child.
- [160] Dr. Aubé did not characterize the respondent's behaviour as alienating. Nor did she see the claimant as alienating K against his mother. She saw the claimant as wanting K to have two parallel lives, and she believes this could be potentially disturbing for a child.
- [161] K indicated to Dr. Aubé that to improve the relationship with his mother, he would need to start showering in the morning when she tells him to.
- [162] K said that to improve the relationship with his father, it would help if the claimant remained nice and calm around K and refrained from "asking him millions of questions". In an attempt to give sense to this last statement, K explained that after he saw Dr. Jake Locke (a child psychiatrist at BC Children's Hospital) and Dr. Susswein, his father asked K to tell him what he talked about with them. After K refused to disclose the contents of his discussions, K explained that his dad was angry at him and told K he could not play video

games.

[163] Ultimately, Dr. Aubé was ultimately impressed with K's resilience and surprised that K did not have more problems.

The Evidence of Dr. Susswein, Child Therapist

[164] Dr. Susswein has been a registered psychologist in British Columbia since March 2016. He has been K's counsellor since June 2018.

[165] Dr. Susswein first testified at trial in July 2021. He was questioned regarding his extensive counselling notes. Some of the more significant observations and reported statements are as follows.

[166] He explained his general approach was to avoid asking leading questions, to help K express his feelings (as such expression increases his power and freedom), to provide support, and to leave to K the topics for discussion. He explained he takes K's reporting at face value and does not make determinations on the truth or falsity of what K reports. His sessions were with K were alone, not joint sessions with K and the respondent or the claimant.

[167] Dr. Susswein's first meeting with K was on June 12, 2018. On the first visit, K spontaneously reported that he never wanted to see his dad again. K indicated that he did not trust his dad, and that he only buys candy and junk food for K. K expressed that he believed his dad did not want him to be close with his mom's family. K also expressed that he was mad at the claimant. In that meeting, K told Dr. Susswein that if he had three "magic wishes", one of them would be to never see his father again.

[168] Dr. Susswein also met with the claimant in June 2018. The claimant advised that he had filed a complaint against the respondent's therapist, Dr. Lisa Ferrari. He noted the claimant's perception was that K was being alienated against him or being trained to hate his dad. Dr. Susswein formed the view that the claimant was not supportive of the counselling process. Due to an administrative error, Dr. Susswein subsequently did not have proper contact information for the claimant and Dr. Susswein's correspondence did not reach him for a lengthy period of time.

[169] When asked by Dr. Susswein about what he hoped to do during the summer, K continued to introduce information about his dad. K told him: "dad is so mean he whispered to me don't trust your mom" and "[h]e tells me just to use [his surname] not also [mom's surname]".

[170] In the notes for the same day, K is reported to have said that "I bite towels and kick the wall when I get back from dad visits" to deal with his anger.

[171] In a meeting on September 13, 2018, K reported that he "hated" his father. K indicated that he preferred to keep his anger to himself.

[172] On September 27, 2018, K revealed that his father yelled at him for waving to his (presumably maternal) grandma's friend at the supermarket.

- [173] On October 10, 2018, Dr. Susswein reported that K told him that his father was acting nicer because his paternal grandmother was present in town. Dr. Susswein found this significant because it indicated that K was able to change his assessment of his father based on the nature and quality of their relationship.
- [174] During the October 10, 2018 session, K drew a picture that depicted the claimant shooting K and killing him. K indicated that it feels like the claimant hates him but he says he does not.
- [175] On October 24, 2018, K reported that the claimant told him that if he had a problem with him, K should tell the claimant directly rather than reporting it to Dr. Susswein. K reported that, "if I tell [my dad I have a problem with him], he will destroy me and cut my heart out of my chest", a poetic reference Dr. Susswein interpreted as showing K being in great distress. Dr. Susswein encouraged K to express himself because that would increase his power.
- [176] On January 6, 2019, K said that he feels close with his paternal grandparents but not with his father.
- [177] On January 16, 2019, Dr. Susswein noted that trust was a key issue in the relationship between K and the claimant.
- [178] On January 30, 2019, K reported that the claimant is "like a dementor--he sucks the happiness out of everything".
- [179] On February 27, 2019, in reference to anti-bullying day, K reported that the claimant forces him to say "I love you" and that the claimant is angry with K. Dr. Susswein noted that K would sometimes introduce content and retreat without fully elaborating.
- [180] On March 8, 2019, Dr. Susswein received a nine-page letter from the claimant indicating that the therapy with K should stop.
- [181] On March 13, 2019, K reported that the claimant told him that Dr. Susswein tells him everything K shares with Dr. Susswein, but K knew that his father was lying and that he lies to him a lot.
- [182] On March 27, 2019, K reported that he caught his father recording him, but the claimant denied it and then blamed him for the two of them missing the bus. On the same occasion, K reported his father making him write out his name with the claimant's surname while leaving out the respondent's surname, which caused K to say of himself, "I'm furious not just upset".
- [183] In the session on April 24, 2019, K reported being so angry during his parenting time with his father on the holiday weekend that he killed crabs at the beach.
- [184] On May 22, 2019, K reportedly told Dr. Susswein, "I'm so mad about dad that I don't want to live" and "Dad was confusing me[.] [H]e acted like he didn't know I have a baseball game." K stated that the claimant said his phone did not work, but K had seen it working before.

- [185] On June 5, 2019, K reportedly told Dr. Susswein, "did I tell you my dad hits me?" K reported that he was hit by his father because he sucked his thumb on the plane on a trip to Florida. Dr. Susswein was of the view that this was a reportable piece of information.
- [186] On July 3, 2019, K reported that he was sad and mad when his father would not stop asking him questions.
- [187] On July 14, 2019, K reported that "sometimes I wish I was dead when I am with my dad mostly I just wish I was with my mom".
- [188] On October 9, 2019, K reported being pleased that his father had complimented him on being hilarious. Dr. Susswein explained that this was clinically significant because it demonstrated that K's perception of his father could vary according to behaviour.
- [189] On November 26, 2019, K reported that his father seemed meaner after his paternal grandparents left. K stated that at one point he was not scared, but he now felt unsafe again. K reported that the claimant grabbed his wrist and left a mark on his arm, which caused Dr. Susswein to report the statement to the Ministry of Children and Family Development ("MCFD").
- [190] On December 18, 2019, the respondent told Dr. Susswein that the police and MCFD had been called. Dr. Susswein learned that K had been cutting himself, and K told him, "[I] dunno why I did it other than I was so mad".
- [191] On February 12, 2020, K reported the claimant stating, "I'm scared you might use a knife to kill me." K reported being confused by the statement.
- [192] Of note, the claimant was arrested on May 2, 2020 in relation to assault allegations against K. Also in May 2020, the Protection Order was issued and the claimant's parenting time with K was suspended. The claimant did not see the child for the next eight months.
- [193] On June 17, 2020, K reported, "If I saw him, I would run away." In July 2020, K stated that he was scared to see his father again and did not want to do certain things because it would anger the claimant. Dr. Susswein attempted to introduce K to the idea that while his dad's anger might be unpleasant, it may not be unsafe.
- [194] Dr. Susswein confirmed that he never saw any bruises on K's body.
- [195] On October 14, 2020, K reported experiencing fewer nightmares and a decrease in avoidant behaviour.
- [196] On October 28, 2020, in reference to K's misrepresentation as to what had occurred in April and May in relation to the false assault allegation, K reported saying that, to protect himself, he would do it again even though he hated having to lie.

- [197] On February 10, 2021, K had a session after resuming parenting time with the claimant. K reported seeing his dad and his friend at Tim Horton's, and his dad being nice, but K was suspicious of his dad's change in behaviour.
- [198] On February 23, 2021, K mentioned stress from his dad in passing, which Dr. Susswein took to be a sign that K was not preoccupied with the relationship with his father.
- [199] On March 31, 2021, K reported refusing to hug his dad, and not being scared of his dad, but feeling weird.
- [200] On April 28, 2021, K reported not fighting with his father, and that he just gives him hugs to get it over with.
- [201] On May 26, 2021, K reported that his dad was trying to change and act nice.
- [202] On June 8, 2021, Dr. Susswein reported having to disclose his records in response to a records request, to which K reacted positively.
- [203] Dr. Susswein's cross-examination was adjourned and resumed on November 24, 2021. Unfortunately, much of the cross-examination on that date was taken up with the alleged inadequacy of Dr. Susswein's communications with the claimant, the allegation that he was biased against the claimant, and the claimant's challenges to Dr. Susswein's professional ethics, none of which were validated.
- [204] At one point, the claimant sought to play secret recordings of his parenting time for Dr. Susswein's comment, a request which was denied by the Court. Dr. Susswein, who was not qualified as an expert, expressed concern that his listening to secret recordings of K could further damage K's relationship with the claimant.
- [205] At the end of cross-examination, on questioning from the Court as to how K was doing lately, Dr. Susswein reported that K was doing well. He had moved away from his feelings of hatred toward the claimant or being hated by him. Dr. Susswein reported that K is now able to think about other's motivations for their actions. Dr. Susswein saw progress in K.
- [206] Overall, Dr. Susswein reported that K has become more articulate, more open, and better able to express himself. He reported that K "came clean" and admitted during sessions that he had lied about the claimant assaulting him. Still, Dr. Susswein described K as being deeply distrustful of the claimant's motives and sincerity, and that K is often confused by the claimant's behaviour.
- [207] Dr. Susswein reported that K has been making progress in no longer seeing the claimant in a one-dimensional manner, no longer being preoccupied with relationship stress with his father, no longer having nightmares about the claimant killing him, and demonstrating increased tolerance and an increased capacity to make informed choices about his situation.

The Judicial Interview with the Child

- [208] I interviewed K on March 16, 2023 after the close of evidence and before final submissions. The claimant brought K to court in the early afternoon. I met them at the courthouse door and conducted an interview for about 45 minutes in the courtroom. The interview was taped but the recording is sealed, subject to further order of the court.
- [209] The interview commenced with some rapport-building topics and a discussion of the importance of telling the truth. The purpose of the interview was canvassed, and K indicated he understood. He appeared to be willing and cooperative. I asked open-ended questions in the interview. I detected some initial hesitation on his part, but as the interview continued, he became more conversive.
- [210] The information K relayed during the interview was substantially consistent with the evidence at trial. I found it very helpful to hear from K personally, and it is hoped that K will benefit from having input into decisions that impact his upbringing. I found the interview also helpful to my understanding of the context of the situation and K's views of his school, home life, extracurricular activities, and plans for the future.
- [211] When the trial resumed, the parties were told of the interview consistent with the description above; however, the precise details of what K relayed were kept confidential.

The Allegations of Abuse and the Claimant's Arrest

- [212] There have been several allegations of abusive behaviour by the claimant in the past. The claimant testified that, in each case, K's concerns were exaggerated, falsified, or unduly influenced by the respondent. A common theme in the claimant's testimony is that "K is fine when he is with me".
- [213] The respondent testified that she is less concerned about physical abuse, and more concerned about emotional or psychological abuse by the claimant of K.
- [214] Concerns arose in or about 2017 when K started to complain about the claimant interrogating him, experiencing nightmares, and the claimant not taking him to activities. These concerns continued into the fall of 2018, when K reported having problems at school and expressed fear of the claimant.
- [215] In May and June of 2019, K made repeated statements to the respondent to the effect that the claimant treated him like a slave, that he hated his life, that he had nightmares the claimant wanted to kill him, and that he wanted to die. Around this time, the claimant reports that K was having bad dreams. When he discovered this, he stopped permitting K to play video games until he secured advice from a physician in September 2019 as to how to handle the issue.

- [216] On one occasion, before his parenting time with the claimant, K said he did not want to see the claimant and wanted to commit suicide. The respondent decided to take K to the BC Children's Hospital on May 25, 2019. A pediatrician diagnosed K with passive suicidal ideation.
- [217] K reported to the staff at the hospital that the claimant had slapped his hand out of his mouth on three previous occasions when he was sucking his thumb. These incidents are denied by the claimant. A social worker encouraged the respondent to report the matter to the MCFD, which she did. She told the MCFD that her concerns were emotional and psychological abuse.
- [218] A nurse contacted the respondent and advised her of psychiatrists that were available for K, but stated that she would need parental consent. Respondent's counsel wrote to the claimant on June 5, 2019 disclosing K's recent allegations and asking him to provide consent for K to see a child psychiatrist.
- [219] The respondent made attempts to have K see two psychiatrists. The claimant was opposed to the first because he was concerned he was not qualified. The respondent secured an appointment with the second, Dr. Hamed Abdoulraman, but he was hesitant to take K on as a patient given the ongoing high-conflict litigation. The claimant maintained at trial that he never refused his consent, he was just trying to get more information and was exploring other options.
- [220] The respondent's physician, Dr. Penner, supported the respondent's attempts to get referrals for specialists for K during this period. She recommended supervision of the claimant's parenting time. The claimant came to believe Dr. Penner was improperly contributing to the alienation of K against him, which led to his making a complaint about her to the College of Physicians of BC.
- [221] On November 2, 2019, the claimant and K argued about a missing Lego figure. When searching for the missing figure in the claimant's bedroom, K reported that his father grabbed his arm and dug his fingernails into his forearm, causing a minor injury. This incident was audio-recorded by the claimant, and the audio recording does not verify that such an incident took place.
- [222] On November 9, 2019, the claimant picked K up from the respondent's home and proceeded toward a shopping plaza in North Vancouver. K reported that the claimant became angry when K suggested that he and the claimant could research how to resolve the claimant's alleged concussion issues on the claimant's home computer. The claimant denied he had a computer. K reported that the claimant grabbed his arm in order to get him to follow him at the plaza after becoming angry with him. Again, the incident was audio-recorded by the claimant, and the audio recording does not substantiate K's account.

- [223] The claimant denied the November 2 and 9, 2019 allegations but did admit to grabbing K one time in August 2019 in order to prevent him from being run over. The MCFD found no child protection concerns and closed its file.
- [224] In December 2019, K told the respondent that he purposefully cut himself with a steak knife while at the respondent's home. He reported that this was due to everything that was going on with his father, and that he was really upset.
- [225] On December 13, 2019, Cpl. Swanson of the North Vancouver RCMP interviewed K. By agreement of the parties, the statement was admitted into evidence for its truth.
- [226] During his police statement, K relayed that the claimant had previously hit his thumb out of his mouth three times; in November, he grabbed K's arm; and he also dug his nails into K's arm, which left marks. K related that he did not like going to his father's house and that he did not feel good with him. He was unable to indicate why he did not feel good about his father. The police concluded that child abuse had not occurred and that K's complaints were in the nature of parenting issues. The police closed their file soon thereafter.
- [227] On March 25, 2020, Dr. Jake Locke, a psychiatrist at BC Children's Hospital, diagnosed K with significant anxiety that included features of both generalized anxiety and complex post-traumatic stress disorder. He also stated that K was at risk for depressive disorder. Dr. Locke opined that K had feelings of confusion, estrangement and dismissal regarding his interactions with father, and that he had learned not to argue with his father because it never ended well. Dr. Locke did not base his diagnosis on any new incidents, but rather on self-reporting from K about his past relationship with his father.
- [228] The claimant had increased parenting time with K in March and April 2020. The claimant played the recording of his April 30, 2020 parenting time, which was the date when K reported (falsely) that the claimant had assaulted him. On that date, K became upset while at the park with the claimant, and threw his bike down at one point. They returned home where the claimant gave him time to calm down, then engaged him in conversation. K expressed being upset that the claimant got mad with him, but K did calm down toward the end of the two-hour visit. There is no indication of any assault, but the respondent reported, and I accept, that K was very upset when she picked him up and reported his father pushing him down on the couch and putting him in an arm or head lock.
- [229] On May 1, 2020, after attending at the North Vancouver RCMP Detachment with the respondent, K reported a physical assault by his father. The allegation was false but this was not known at the time. K was then nine years old. He reported to police that after attending at the claimant's house the day before, the claimant got mad at him for spilling some chocolate. He described that the claimant started intimidating him and making him feel scared. K reported that the claimant grabbed his shoulders, brought him over to the couch, and held him by his arms and legs. K reported that the claimant said he was going to hurt him and tried to punch him in the head.

- [230] K reported that the claimant had hurt him three times before and that he did not want to see the claimant again.
- [231] The claimant was arrested on May 1, 2020 for the alleged assault of K.
- [232] Along with concerns over the child's mental health and what the respondent says were problematic behaviours on the part of the claimant, this allegation caused Justice Mayer to issue an interim protection order on May 14, 2020, which was then confirmed on May 21, 2020.
- [233] The assault charge was dropped in October 2020 after the claimant produced a recording of his parenting time that disproved the allegation. K later admitted to Dr. Susswein and to the respondent that he fabricated the assault allegation because he did not want to see the claimant.
- [234] While K has made allegations of maltreatment over the years, the claimant's evidence is that generally K enjoys his time with the claimant, that they almost never fight or argue, and that he parents K appropriately.

The Recordings of the Claimant's Parenting Time

- [235] For many years, the claimant has surreptitiously recorded his parenting time. He claimed that he first recorded his parenting time to ask Bob Finlay, the author of the s. 211 report in his former case, for parenting advice. He later recorded parenting time when allegations of abuse arose in 2018.
- [236] The claimant has been in the habit of sending recordings of his parenting time to third parties to get their advice on his parenting and how he should handle difficult situations. I confess to not understanding why he would share recordings with some individuals, such as his clinical social worker, Ms. Carlson, whom the claimant sees for counselling related to his injury and recovery.
- [237] While the respondent sought wide disclosure of the recordings, and the claimant sought to play tapes of his parenting time at trial, the Court was cautious not to admit this evidence without filtering it for relevance, probative value, and prejudice. The Court was concerned with the systemic prejudice that may result from unfiltered disclosure and routine admission of surreptitiously obtained evidence. As well, case-specific prejudice, particularly in the form of destruction of the father-son relationship, is a concern here. Recording parenting time has the potential to turn contact with the child into a self-serving evidence gathering process, rather than an opportunity for intrinsic enjoyment of the parent-child relationship: see, for instance, *C.C. v. S.P.R.*, 2022 BCSC 1057 at paras. 40-43; *Van Ruyven v. Van Ruyven*, 2021 ONSC 5963 at para. 41.
- [238] The Court heard recordings of the claimant's parenting time on November 2 and 9,, 2019 and in April 2020, when some of the abusive conduct was alleged to have occurred.

- [239] The claimant also introduced additional recordings, some of which were transcribed. These include recordings on February 3, 2018, June 18, 2019, August 3, 2019, and December 28, 2019. The claimant played some recordings which showed appropriate parenting conduct and positive, sometimes playful interactions with K. Others had segments that were more concerning.
- [240] Some of the recordings demonstrated occasionally poor parenting skills on the claimant's part. In a June 18, 2019 recording of his parenting time, made soon after K was given a referral to BC Children's Hospital for suicidal ideation, the claimant questions K about allegations K had made to the hospital about his father slapping K's hand out of his mouth when he was sucking his thumb. During the claimant's questioning of K, K reports to the claimant that he had cried when the claimant slapped his hand out of his mouth. The claimant then proceeds to question K about details of the event, including dates, times, and where they were when it happened. The claimant has K re-enact one of the incidents. The questions go on for approximately 45 minutes to the point where K says he is "so sad" and does not wish to talk or answer questions anymore. He says "there [are] some things that you do that make me sad--like asking me questions." K tells his father to "never ask questions."
- [241] In a recording on August 3, 2019, the claimant asks K questions about whether he feels afraid of the claimant. K refers to his stomach not being full and not feeling well. The claimant continues to question K despite K repeatedly asking him to stop. At trial, the claimant testified that he was trying to figure out why K was scared of him.
- [242] The claimant stressed the importance of confronting K when he perpetuates false allegations of abuse. In his view, it is imperative that he immediately challenge K's false statements. He stated that he did not do this with his two previous children, and he believes this factored into their becoming alienated from him. Still, it is apparent that K does not react well to being confronted and that this may cause him to act out later.
- [243] The claimant introduced a recording of his parenting time on April 11, 2020, in which the claimant repeatedly questions K to the point where K expresses that he does not feel happy when the claimant interrogates him, then regresses into a baby voice and eventually asks for his blanket. The following exchange occurs between the claimant and K:
- [K.F.M.]: Okay, but we have to finish this conversation so I can make that decision, right? But, how can that be bad if I'm asking what could I do differently when you're with me? 'Cause this is all about you.
- [K]: The first thing you can do and I'm going to tell you now...
- [K.F.M.]: Okay, you tell me now.
- [K]: ...is that every time we do this it makes me feel upset and I don't feel happy.
- [K.F.M.]: Do what?

[K]: Interrogate me.

[K.F.M.]: Am I interrogating you right now? What am I interrogating....

[K]: I like to be, I like to be freeing - choose what I would like to do and ask of your approval for it. I don't just like to be answered and asked questions all of the time.

[K.F.M.]: Okay.

[K]: So, if you - really my problem is whenever you, you interrogate me or ask me a bunch of questions. That's my problem.

[K.F.M.]: That's your problem. So your problem is - but - am I interrogating you right now?

[K]: Yes.

[K.F.M.]: Am I really?

[K]: (Inaudible) yes, this is one of the bad things.

[K.F.M.]: What's that?

[K]: And this is one of the bad things.

[K.F.M.]: So this is bad.

[K]: Yes.

[K.F.M.]: But you see how this is....

[K]: Not important at all and I don't want to talk about this because I'm right here and crying a second.

[K.F.M.]: 'Cause you're not even - what?

[K]: 'Cause I might even cry in a second.

[K.F.M.]: You're going to cry from this? Okay then. We - then, then I'm worried about playing PS4. If you're going to cry from this conversation, nothing was - has been discussed in this present - this conversation except for the fact that I don't let you play PS4 enough. So, if talking about how much I let you play PS4 is an issue....

[Emphasis added.]

[244] Dr. England opined that this exchange did not rise to abusive behaviour or psychological abuse causing realistic estrangement.

- [245] The respondent played the same recording for Dr. Aubé, who described the claimant's questioning of K as an interrogation that was on the fringe of harassment. She characterized the claimant as blackmailing the child to answer questions in exchange for video game time. She said she observed the claimant not responding to the child, not reading what the child wants, and having an agenda. She found the claimant's conduct to be very troublesome. I agree with Dr. Aubé on this point.
- [246] It appears that K is aware that the claimant has used a recording device to capture their conversations. The respondent reported that K told her on two occasions in 2022 that he had seen his father's recording device. Dr. Susswein received a similar report from K as well.

Allegations of Alienation and Realistic Estrangement

- [247] The parties are sharply divided as to whether the attachment disruption between K and the claimant is due to alienation (the claimant's position) or realistic or justified estrangement (the respondent's position). As noted in *Williamson v. Williamson*, 2016 BCCA 87 at paras. 47-48, alienation is a serious allegation, and proof of such a finding requires proper expert evidence.
- [248] As noted by Dr. England in the 211 Report, previous conceptualizations of "alienation" that largely blame the favoured parent can contribute to ongoing conflict. She indicated that this is because parents who already have limited skills in dealing with conflict during their relationship now engage in conflict post-separation regarding who is to blame for the alienation. In Dr. England's opinion, the reformulation of parental alienation syndrome, as published by Joan B. Kelly and Janet R. Johnston, is a superior model that places the focus on the child, takes a family systems approach to understanding the alienated child, and has no prior assumptions regarding the behaviours of the favoured parent as a causal agent: Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39:3 Fam. Ct. Rev. 249.
- [249] In the 211 Report, Dr. England explained her findings on alienation as follows:

In the writer's opinion, [K] presents as strongly aligned with his mother, and on the continuum for becoming alienated from his father. There would appear to be several factors which are contributing to this situation.

First, in the writer's opinion the current parenting plan is damaging to the father-son relationship. While the writer was not able to ascertain what understanding [K] has about the parenting plan, one wonders what sense he makes of the fact that he sees his father for only eight hours a week and has never had an overnight (apart from holidays). The structure of the plan itself conveys the nonverbal message that [K]'s mother is much more significant as a parent, than [K]'s father.

Second, the plan is so restrictive that it almost causes as much harm as good. Particularly as [K] becomes older, his time with his father occurs at the cost of him being able to take part in other activities that are of interest to him, and important for his social development. A two hour window of time on Tuesdays and Thursdays does not allow time for [K] to do an after school activity without it also taking away from the very limited amount of parent-child contact time, and the four hour window on Saturdays also means that [K] would have to lose time with his father if he were to attend other activities. Understandably, [K] may come to view his time with his father in an increasingly negative light.

Third, the plan is so restrictive that it does not permit [K.F.M.] a chance to engage in the full range of parenting behaviours which are critical for the development of a strong parent-child bond. Research in the area indicates that simply increasing the number of hours a parent (typically a father) spends with a child does not make a significant difference. The key factor is that the parent has the ability to engage in the full range of parenting in terms of providing love, comfort, nurturance, structure, discipline, and involvement in a child's schooling, health care, and extra-curricular activities. Then a child has the sense that the parent is a significant part of their life, understands their world, and the child is then more accepting of that adult as a parental figure.

Fourth, alienation dynamics can develop within children which can increase the intensity of the problem. This is often referred to as the empowerment of the child, and in the writer's opinion [K] is beginning to present in this manner. [K.G.T.] herself commented that [K]'s statement to the writer "this is boring" was rude, and in the writer's experience, children who are alienated can present in this way. Children begin to grasp that they may wield a degree of power with certain adults, and consistent with this, a degree of rude or dismissive behaviour can emerge.

Fifth, there are aspects to [K.G.T.]'s psychological presentation that are likely contributing to the alienation dynamics. These factors are feelings of hostility, feelings of anxiety and self-centered thinking. With respect to feelings of hostility, [K.G.T.] asserts that she does not speak negatively about [K.F.M.] such that [K] would be exposed to this. However, she presents as having considerable feelings of hostility towards him. Notwithstanding the legitimacy of some of these feelings, the issue is that they are present to a significant degree. [K.G.T.] speaks about [K.F.M.] using inflammatory and pathological language. For example, she accuses him of 'gaslighting' her, and readily makes unsubstantiated negative assumptions about him. This was so pronounced that it prompted the writer to ask if she thought [K.F.M.] loved [K]. [K.G.T.] responded, "I think he loves him as much as he can love anyone" adding "he is a person who doesn't have any empathy."

[K.G.T.] presents with a history of anxiety, such that she has twice been prescribed medication. Emotional regulation and cognitive distortions are typical sequelae of anxiety. [K.G.T.] presents as vulnerable to emotional escalation arising from unsubstantiated fears. While she may make efforts to not have this impact [K], there is likely a competing motivation to make a strong presentation of concern regarding [K]'s well-being while with his father, as it dovetails with her desire to limit [K.F.M.]'s parenting time.

Finally, [K.G.T.] presents with some self-centered thinking. For example, she asserts that [K.F.M.]'s negative behaviours towards [K] are motivated by wanting to hurt her. In the writer's opinion it is more likely that [K.F.M.] is upset about the history of difficulty he has had with her over sharing parenting. In terms of conflict that may occur between [K.F.M.] and [K], it is more likely that it is linked to things that occur between them and has nothing to do with [K.G.T.]. In the writer's experience, children are attuned to their parents' emotional states, and often pick up much more than what parents may be aware of. It is also noted that [K.G.T.] describes [K] as "an extremely empathetic child." It is most likely therefore that [K] is being impacted by his mother, and this contributes to his negative reports about his father.

Sixth, there is very likely a difference in parenting styles which may be contributing to the alienation dynamics. Research indicates that parents are more likely to behave in a disciplinary manner with same sex children and are more lenient with opposite sex children. [K.G.T.] has a more gentle presentation, and she acknowledged that [K] is a little "bossy" which she is attempting to address. [K.F.M.] has a stronger presentation, and it may well be that when he attempts to address some of [K]'s behaviours, [K] experiences this more negatively. The example of grabbing [K]'s arm comes to mind, where [K.F.M.] may well have been more forceful than he realized. With a difference in parenting styles, it is not unexpected that a child may gravitate towards the more malleable and gentler parent.

Seventh, the history of care is such that [K.G.T.] has been more involved in parenting than [K.F.M.]. [K] has always known [K.G.T.]'s residence as his home, and he has never stayed overnight with his father. [K.G.T.] has been critical of [K.F.M.] reading a children's book about divorce to [K] which talks about "two homes." Therefore, when issues arise and [K] feels that he may have to align himself, it is understandable that he will align with his mother and the home she provides.

Eighth, there is a history of alienation with [K.F.M.]'s older children. The extent to which [K] understands that these half siblings have rejected his father, may contribute to his perception that he can also do this.

The above is not an exhaustive list of all the factors, but it is sufficient to account for [K] developing a maladaptive alignment with his mother, that is taking on elements of alienation.

[250] On my reading of her report, Dr. England was not suggesting that the respondent is intentionally alienating K from the claimant. Rather, her theory is that K is attuned to his parents' emotional states, and often picks up on much more than what the parents may be aware of. Dr. England noted that the respondent described K as an extremely empathetic child. Dr. England suggests that he is most likely being impacted by his mother, and this is contributing to his negative reports about his father. However, as noted above, Dr. England was more emphatic in her testimony and suggested in light of recent events that the alienation dynamic in the relationship had worsened.

- [251] Though she did not have any reports that the respondent had made negative statements about the claimant, Dr. England testified that she had the "feeling" that the respondent had quite hostile feelings toward the claimant and stated that it was her hypothesis that the respondent's negative feelings toward the claimant had a bearing on K's rejection of the claimant, along with the overly restrictive parenting plan. Dr. England was critical of the respondent having the 211 Report as of July 1, 2020 and not adapting to the new information, including the finding regarding alienation.
- [252] Dr. England stated that alienation is remarkably difficult to treat. She stated that the best antidote to alienation is fulsome time with the disfavoured parent in order to develop a real relationship with that parent.
- [253] Dr. England testified that counselling with K could be counterproductive if the therapist did not understand alienation dynamics. She expressed concern that K was only being brought in to counselling by one parent.
- [254] Dr. England recommended that K be immediately placed into an equal parenting plan coupled with reunification counselling. In her view, it is important that the respondent be engaged in such reunification work. Further, Dr. England opined that the respondent should fund such treatment. If this is unsuccessful, the next step would be a full reversal of parenting time such that the claimant would become the primary parent.
- [255] Dr. Aubé agreed that it is almost impossible for a parent to conceal all of her perceptions about the other parent, and even less so when a custodial dispute goes on for years. Dr. Aubé opined that K had formed a "safe" attachment with his mother, his main caregiver. She thought that K's compromised attachment with the claimant has "inadvertently" solidified a strong bond with his mother, as she has been the only parent by whom he feels accepted.
- [256] Accordingly, it is not clear to me that the experts found any positive conduct on the respondent's part that deliberately caused an unhealthy alignment with her. There is some basis for Dr. England's theory that K is picking up some negative attitudes toward the claimant from the respondent or people associated with the respondent. For instance, he has arrived for parenting time at the claimant's home with various beliefs, such as that the claimant lied about not having a computer or that the claimant could not have a concussion because he only fell from the second step of the ladder in 2015. These are beliefs that K may well have picked up by overhearing negative statements about the claimant from the respondent or people in her social circle. On the other hand, while K stated to Dr. England that he believes the claimant hates the respondent, K did not report that the respondent made negative statements about the claimant.
- [257] I agree with Dr. England that the claimant's restrictive parenting time, the lack of cooperation between the parties, and the lack of overnight visits may have contributed to some disruption in the father-son relationship.

- [258] Nevertheless, while I agree with Dr. England that K's situation can be placed on a continuum of conflict ranging from alignment and justified rejection of a parent at one end to unjustified alienation at the other, I would reject the claimant's submission in favour of a finding of parental alienation here for the following reasons.
1. Dr. England acknowledged that she did not have any report that the mother made negative statements about the claimant.
 2. Dr. England allowed that the claimant's lack of interpersonal warmth and empathy, his persistence in asking questions, and his lack of mindfulness of K's emotions may make the child more susceptible to gravitating toward a parent who is warmer and more nurturing.
 3. Similarly, the psychological presentation of the claimant provides a possible indication of the influence of the claimant's personality on disruption in the father-child relationship. That testing indicated that the claimant's results are consistent with someone who is self-centered, immature, infantile, demanding of attention, manipulative, insensitive to others, lacking in empathy, and lacking in insight with respect to their own and others' behaviour. The evidence at trial supported such a presentation.
 4. Dr. Susswein observed no tactical or strategic thinking by K in the sense that he did not observe that K is scared of disappointing the respondent by repairing his relationship with the claimant.
 5. The respondent has acted in a manner inconsistent with parental alienation and hostility toward the claimant. She supported the claimant's ability to take K to see his family in New Brunswick in the past. She has been patient with the claimant when he has needed to change his plans. The respondent has supported K's visits with the claimant, sometimes to K's considerable consternation. The respondent was also in the habit of buying a Father's Day card for K to give to the claimant every year. She also downplayed the likelihood of the claimant physically assaulting K. She offered parenting time to the claimant on Father's Day, though the claimant did not take it. She has ensured in the past that K was available for phone calls from the claimant on K's birthday and holidays if the claimant did not have parenting time. She has attempted to facilitate contact between K and his paternal grandparents.
 6. Similarly, although incidents of physical abuse were reported to the respondent, the respondent consistently took the position over the years that she was concerned with mental and emotional abuse and not physical abuse. She could have made more of the allegations of thumb slapping or bruises, but she did not.
 7. K has consistently indicated that his mother has a positive attitude toward his father. On the other hand, K indicated that he perceives his father feels very negatively toward his mother, telling Dr. England, "I feel like my dad hates my mum, he glares at her, he told me that he'll give me candy if I tell her to leave."

8. Dr. Aubé noted that K's concerns about his father were presented with authenticity and undeniable conviction. This presentation was also apparent in my interview with K.
 9. There are other more obvious reasons than alienation for K's favouring of the respondent over the claimant, including: the greater financial resources at the respondent's home and the fact that K has his own bedroom there; the support the respondent has shown for school-related extracurricular activities with his peer group; the fact that the claimant has engaged in persistent and redundant questioning of the child about his emotions and feelings; and the claimant's poor ability to listen to the feelings of others and appreciate when K's emotions are running high.
- [259] As noted in *D.S.W. v. D.A.W.*, 2012 BCSC 1522 at para. 64, at the core of parental alienation is the notion that the child's decision to refuse to have a relationship with the targeted parent is without justification or without convincing reason. On the other hand, estrangement occurs when the child understandably refuses contact with a parent because of that parent's behaviour, and there is a logical and rational reason for the child's rejection of the parent: *Williamson* at para. 41.
- [260] I find that the claimant has not established K's unjustified rejection of him at anything close to a degree that would impact my assessment of the best interest factors as they relate to the allocation of parenting responsibility and parenting time. Rather, there are multiple interacting factors at play in the resist-refusal response of K that have contributed to the breakdown of the father-son relationship.
- [261] Further, K appears to have adopted his own moral views about the claimant, and in several respects those views do not align with the respondent's views. Fault for that circumstance, assuming such a consideration is relevant, does not lie solely or even substantially with the respondent, and there are elements of estrangement at play in K's context. I find that occasional poor parenting, and the claimant's adversarial focus (as evidenced by his recording practices) has itself led to disruption in the father-son attachment. I also find that the claimant's focus on parental alienation risks putting the pursuit of principle over intrinsic enjoyment of the parent-son relationship, making the child feel safe, and nurturing his development.
- [262] The facts in this case do not lend themselves to a clear finding one way or the other with respect to parental alienation or unjustified estrangement. I therefore find it unhelpful in this particular case to focus on who is to blame for the breakdown in K's relationship with his father. I would focus instead on a child-centered approach and the fundamental consideration of best interest factors in s. 37 of the FLA.
- [263] I would therefore reject an approach in this case that adopts alienation as a legal conclusion that places blame on one parent for disruption in the parent-child relationship. I do recognize that there is a pattern of resistance and refusal behaviour by K toward the claimant, that the child is aligned with the respondent, and that he appears to have sometimes expressed disproportionate hostility toward the claimant without reasonable

justification. I also recognize that the parenting regime has sometimes operated unfairly for the claimant, like when he was falsely accused of assault and lost his contact with the child for several months. However, as noted, there are a multitude of factors at play, and the best focus is on K's long-term interests.

[264] I find in this case that a careful assessment of the context and the characteristics involved in the best interests of the child is called for to determine the parenting issues here, rather than a judicial finding assigning blame for the attachment disruption--a finding that is only likely to lead to further litigation and conflict.

THE BEST INTEREST FACTORS

Legal Principles Impacting Parenting Arrangements and Guardianship

[265] The FLA provides that the best interests of the child are the only considerations relevant to the making of an order respecting guardianship and parenting arrangements:

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.

[266] Under the FLA, there is no presumption that parental responsibilities should be allocated equally, that parenting time should be equally shared, or that decisions among guardians should be made separately or together: s. 40(4).

[267] Just as there are no presumptions of equal parenting time or responsibility, there are no presumptions in favour of one guardian: M.W.B. v. A.R.B., 2013 BCSC 885 at para. 179.

[268] I am mindful of s. 37(3) of the FLA; namely, that an agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

[269] I would also have regard to s. 37(4), which provides that 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. In this regard, the parties urge certain characterizations of past events upon me with a view to assigning blame, attacking the other party's character and credibility, and then assessing parenting time on the basis of fault. In some cases, the parties have invited me to reassess prior applications and rulings, in order to show how reasonably they acted or how unreasonably the other side behaved. For the most part, I do not find this approach to be helpful.

[270] I will assess each of the enumerated criteria in s. 37 of the FLA, with a view to identifying the challenges that have led to a breakdown in cooperative parenting. In the course of this more nuanced analysis, I would attempt to discern how best to overcome the challenges that have thwarted cooperative parenting in the past and to attempt to identify how to repair the badly disrupted father-son attachment so that the best interests of the child may be fostered going forward.

[271] In order to determine the most appropriate arrangements for guardianship, parenting responsibility, and parenting time, I will address the facts as I find them in light of these enumerated criteria.

The Child's Health and Emotional Well-Being

[272] K is now 12, soon to be 13, years old. He is transitioning from elementary school to high school next year. K has a history of mental health issues including anxiety, passive suicidal ideation, and self-harm. He has in the past expressed fear of his father on multiple occasions, and has expressed that he feels unsafe with him.

[273] K's complaints about the claimant in the past have included being repeatedly questioned, being prevented from using his mother's surname, perceiving that the claimant has frustrated his attempts to play organized sports and attend birthday parties, feeling his father is being mean to him, and complaints that his father threatens his physical safety. I accept that some of these complaints may not be reasonably justified, and that the claimant has a different perspective on them. However, they appear to be the source of considerable angst for K.

[274] K is older now, he has matured and developed some resilience. He is coming into an age where he will increasingly start to assert his independence. He wants to do things that are important to him such as sports, recreation, and socializing with friends.

[275] K's report cards in elementary school of late show indications of behavioural difficulties such as attention issues, interrupting, handing work in late, and not wanting to speak French. Lately, he does not do homework at the claimant's house and has not kept up with the higher pace of homework in grade 7.

[276] The 211 Report states in part as follows:

One factor is the children's health and emotional well-being. [K] presents as a somewhat immature child who has had some behavioural issues in the past. At present he is doing fairly well in the school environment, but the writer is concerned about his emotional development given that in some ways he presents in a manner that is similar to alienated children. Alienated children have far poorer outcomes across a wide range of areas, than children who have healthy relationships with both parents. [K] needs to have his relationship with his father normalized in order to correct the maladaptive emotional and behavioural issues that are present and to prevent increased alienation.

[Emphasis added.]

[277] K presents as stable and safe in his mother's care.

The Child's Views, Unless It Would Be Inappropriate to Consider Them

[278] The Views of the Child Report has been canvassed above.

[279] The 211 Report provides the following information on the views of K:

Views of the Child

With respect to [K]'s expressed views, he presented as being negatively predisposed towards his father. [K] impressed as somewhat fixated on the most recent allegations. Unprompted he made several statements referring to his father hurting him. The writer interviewed [K] with respect to these incidents, and while it may be that [K.F.M.] underestimated his strength of [his] grip, the incidents as described by [K] did not impress as reaching a threshold to be considered a concern. [K]'s stated that he was afraid of his father hurting him, saying "even a minute with him is scary."

Behaviourally, [K] presented a very different picture. [K] initiated physical closeness and affection with his father, and did not want to miss even a few moments of his father's company. Consistent with what one observes with children who are interested in forging relationships, [K] showed an example of imitation, when saying that like his father, he refers to the evening meal as 'supper.' Information from other sources of information indicates that [K] and [K.F.M.] have a typical father-son relationship.

In the writer's opinion, [K] presents as strongly aligned with his mother, and on the continuum for becoming alienated from his father. There would appear to be several factors which are contributing to this situation

[Emphasis added.]

[280] Dr. Susswein's observations were also canvassed above.

[281] K has expressed frustration that his voice is not being heard.

The Nature and Strength of the Relationships between the Child and Significant Persons in the Child's Life

[282] The 211 Report provides:

Another factor is the nature and strength of the relationships between the child and significant persons in the child's life. Most notably, this factor relates to the relationship [K] has with his father. [K.F.M.] presents as being tentative in his parenting, mindful that [K] will complain to his mother and that this may be used to further limit his already restricted parenting time. The significance of this for [K] is that he has become inappropriately empowered in his relationship with his father, thus rendering his father less effective as a parent. This is a very significant relationship issue which needs to be addressed for [K]'s psychological development. When a child becomes unhealthy aligned with one parent against the other, extended family relationships can also be impacted, such as paternal grandparents. It is important for [K]'s well-being that these relationships are preserved only if it will not negatively impact [K]'s relationship with his father. Another group of relationships that become increasingly important for children are friends. While parents may live in separate communities, it is best for a child's world not to be divided, but rather for their activities to be based in one community with the same group of friends. This supports their development of extra-familial relationships, which become increasingly important as a child grows older.

[Emphasis added.]

- [283] K is closely bonded with his mother. She is a trusted person in his life. He also has a close relationship with his maternal grandmother, J.T., who lives in North Vancouver.
- [284] The respondent's step-father, E.G., who is referred to as "Grampsy", passed away in January 2020, and he was the source of a discussion on April 21, 2020 between K and the claimant when it appears that K perceived (incorrectly, I find) that the claimant pretended not to know who Grampsie was.
- [285] Because the respondent has been the primary parent for most of K's life, K's peer group is associated with his school and the neighbourhood around the respondent's home.
- [286] K has a strong bond with the claimant; however, there are problematic aspects to the father-son relationship as outlined above, and tension in the relationship can be a source of stress and anxiety for K.
- [287] K has positive relationships with the claimant's family, including his paternal grandparents who reside in New Brunswick, though his grandfather passed away in April 2022 after testifying at trial. In fact, Dr. Susswein reported that K felt closer to his parental grandparents than the claimant. K also has a positive relationship with the claimant's younger sisters: C, who resides in New Brunswick, and T, who resides in Delaware. K's paternal grandmother has spent the winter months in Florida in the past, and K and the claimant have visited her and Aunt C in New Brunswick in the past.
- [288] K does not currently have a relationship with E and B, the claimant's children from his first marriage, as the claimant does not have regular contact with them.

The History of the Child's Care

- [289] K has grown up primarily in the care of the respondent since birth. The respondent has taken K to medical and dental appointments, paid for orthodontics, and arranged for K to attend doctors and counsellors. Since July 5, 2019, she has had sole authority over decisions related to his physical and mental health treatments.
- [290] After the separation in October 2011, an order pronounced on November 29, 2011 provided the claimant with parenting time on Tuesday and Thursday evenings from 5:30 p.m. to 7:30 p.m., and Saturdays from 8:30 a.m. to 4:30 p.m. As noted above, the parties managed to co-parent reasonably well from 2012 to 2015. The claimant often exercised parenting time at the respondent's home, often with her present. K did not have sleepovers at the claimant's residence during this time.
- [291] In December 2015, the claimant had a mental health episode and was hospitalized, as discussed above.

- [292] After this incident, relations between the parties again deteriorated. The claimant took the position that K should be cared for by him at his residence without supervision. The respondent expressed concern about the claimant's health and ability to care for K alone. The claimant began to claim that the respondent was alienating the child against him.
- [293] On February 26, 2016, Justice Funt ordered that the claimant's parenting time would be supervised, with the name of the supervisor to be provided to the respondent's counsel at least 24 hours in advance.
- [294] On March 4, 2016, Justice Ehrcke held a judicial case conference. The ensuing order provided that the claimant's parenting time with K would be supervised by an adult supervisor of the claimant's choice.
- [295] On April 20, 2016, Justice Adair removed the supervision requirement but reduced the claimant's parenting time to a total of eight hours per week. This comprised parenting time on Tuesday and Thursday evenings from 5:30 p.m. to 7:30 p.m., and Saturday mornings from 8:30 a.m. to 12:30 p.m.
- [296] On April 20, 2018, Mr. Justice Sewell made an order for K to attend counselling with Dr. Susswein. Sewell J. varied the parenting time order to confirm parenting time for the claimant on Saturdays from 8:30 a.m. to 12:30 p.m., unless the parties otherwise agree. He also ordered the completion of a s. 211 report.
- [297] While K has remained predominantly in the care of the respondent, K travelled to Moncton with the claimant in the summer of 2016.
- [298] The claimant also travelled to Florida with K to visit the claimant's parents at the end of 2018. The claimant maintains that he had K call the respondent regularly during the trip, though K reported to others that he was forbidden from calling the respondent during the trip.
- [299] On July 5, 2019, in light of serious concerns about K's mental health and his diagnosis of passive suicidal ideation, Justice Weatherill granted the respondent interim sole authority under s. 45(f) of the FLA with respect to decisions related to K's physical and mental health. The claimant's application for greater shared parenting time was dismissed.
- [300] On November 12, 2019, Justice Fleming ordered that the claimant's communications with healthcare professionals assigned to treat K at BC Children's Hospital be restricted. The allegations of abuse on November 2 and 9, 2019 were not brought up at the hearing, though the respondent maintains she did not appreciate what had happened at the time.
- [301] On March 12, 2020, Master Cameron dealt with an interim application and ordered additional parenting time for the claimant during the spring break in March, as well as at Easter, and Father's Day.

- [302] On May 5, 2020, the respondent applied for the Protection Order, under the circumstances described above. On May 14, 2020, Justice Mayer issued his interim order on a "without prejudice basis" pending a complete hearing of the respondent's application. That order prohibited contact between the claimant and the child and prohibited the claimant from attending at certain places, such as the child's residence or school.
- [303] On May 21, 2020, Justice Mayer ordered a continuation of the May 14, 2020, protection order and provided leave to the claimant to set aside the order once a case conference had taken place. Justice Mayer indicated that his protection order, in the absence of further order of the court, would expire on May 14, 2021. Justice Mayer also provided the claimant with leave to set aside the protection order "if he is successful in gathering relevant additional evidence."
- [304] Justice Abrioux dismissed the claimant's application for leave to appeal on October 14, 2020, and a further application to vary the denial of leave to appeal was dismissed on January 15, 2021.
- [305] Going back to the incident that formed part of the basis for the Protection Order, unbeknownst to the respondent, the claimant had recorded his visits with the child. Although the claimant did not disclose his possession of the recordings at the hearings before Justice Mayer, the recording was subsequently turned over to the Crown through the claimant's criminal counsel. After a review of the additional material, the Crown ultimately dropped the assault charge in the fall of 2020.
- [306] According to the respondent, K later admitted to lying about what happened, but he also stated that he was afraid of his father, thought his father was going to hurt him, and that he lied because he felt no one was listening to him.
- [307] The Protection Order remained in place until it was set aside by Brundrett J. on February 5, 2021.
- [308] Since the claimant's parenting time was reinstituted, his parenting time has been restricted. At first, the claimant's parenting time consisted of one supervised hour for the first weekend on February 6-7, 2021, and two unsupervised hours on Saturdays thereafter until May 2021. Parenting time was increased gradually to the previous arrangement of two hours on Tuesday and Thursday evenings and four hours on Saturdays. A conduct order was put in place.
- [309] The court order on February 5, 2021 directed the claimant to consult with Dr. Susswein about K's needs and views in order to become more sensitive to K's emotional well-being, though this never came about. The claimant maintained that he asked his parents for money to facilitate the consultation, but they said they did not want to pay more. He also testified that he emailed and called Dr. Susswein but did not receive a response. I am left with the impression, however, that the claimant could have done more to engage with Dr. Susswein, who has been an important source of support in K's life.

- [310] The trial of this matter began in July 2021.
- [311] On December 17, 2021, the Court ordered additional Christmas parenting time for the claimant on Tuesdays and Thursdays from 12:00 p.m. to 4:00 p.m., Saturdays from 12:00 p.m. to 4:00 p.m., and Christmas Day from 10:00 a.m. to 4:00 p.m. Thereafter, the claimant's parenting time on Tuesday and Thursday nights was expanded an extra half hour from 5:30 to 8:00 p.m., to comprise two-and-a-half hours per visit.
- [312] The Court also granted the claimant permission to travel with K to New Brunswick for Spring Break in March 2022 on certain terms. The trip was postponed and then cancelled due to Mr. M. Sr.'s declining health.
- [313] On January 7, 2022, the December 2021 order was amended so that the claimant's parenting time took place on Mondays and Wednesdays after school to 7:00 p.m. for January 2022, and on Saturday for six hours from 10:00 a.m. to 4:00 p.m. After February 2, 2022, the claimant's parenting time reverted to Tuesdays and Thursdays after school.
- [314] On July 27, 2022, the Court granted permission for the claimant to take K to New Brunswick from August 2-29, 2022. The claimant and K were to spend overnights accompanied by K's paternal grandmother, aunt, or another adult during the trip. The claimant reported generally that the trip was a positive one and that K was fine while they were together. The respondent reported that K disliked the trip and binge-watched shows to avoid interacting with his father.
- [315] On December 20, 2022, in light of reported difficulties during the trip to New Brunswick and other concerns, all of which were denied by the claimant, the Court dismissed an application by the claimant to bring K to New Brunswick for the Christmas holiday. The Court granted some additional parenting time to the claimant over the holiday, but again, no overnights.
- [316] Apart from the trips to Florida and New Brunswick, the claimant has not exercised overnight care with K in recent years.

The Child's Need for Stability, Given the Child's Age and Stage of Development

- [317] K has recently shown a period of slow progression to relative stability after a tumultuous period where he reported a great deal of difficulties with his father, leading to moderate to severe psychological stress and anxiety.
- [318] K has shown some progress in therapy with Dr. Susswein, who described K as more articulate and insightful, and largely recovered from his nightmares of his father killing him. However, K continues to present with challenges. In my assessment, he will likely need additional support going forward. Despite the claimant's past opposition to K's therapy with Dr. Susswein, and his attempt to replace him at one point, I find that it has been a source of comfort and reassurance for K.

[319] I agree with Dr. Aubé that "it is clear that [K] will oppose forceful pressure." I also agree with her statement that "the risk to build resentment and increase anger is quite high" and her recommendation against placing any rigid or restrictive regiment on K.

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

[320] With respect to the ability of each parent to satisfy the child's needs, the 211 Report provides as follows:

The Ability and Willingness of Each Parent to Satisfy the Needs of the Child

Both [K.F.M.] and [K.G.T.] bring certain strengths to meet [K]'s needs. They both impress as intelligent, articulate, loving, and committed to [K]'s well-being. Both parents present with having the ability and willingness to exercise many of the important parenting responsibilities to satisfy [K]'s needs. . .

. . .

In conclusion, both parents have clear strengths that they bring to their parenting. At the same time, both parents also have certain traits which have played a role in the difficulties between them.

[321] Dr. England conducted various psychological tests on the parties. She provided a preliminary caution as follows:

Psychological Testing

The psychological test results presented in this section are hypotheses that should not be considered in isolation from other assessment results. Some of the test results may have been tabulated using computer programmes supplied by test developers and some of these programmes may also provide interpretive statements that were considered by the writer in conjunction with information provided in test manuals and relevant research. The results from personality tests provide descriptions of persons whose response patterns are similar to those of the individual being assessed. Interpretations of such results should focus on general trends and conclusions should not be drawn from any given statement.

[322] Dr. England's psychological testing of the claimant yielded the following observations:

[K.F.M.] was administered the same tests as [the respondent] and the same caveats, as outlined above, apply.

On the MMPI, the validity scales indicate some degree of defensive responding, but this was not at a level higher than the typical custody litigant. Nevertheless, it still suggests some tendency on his part to portray himself as well-adjusted and self-reliant.

On the clinical profile there was one marked elevation (almost at the cut score to be considered 'extreme'), five moderate elevations and two low scores. Overall this profile indicates that [K.F.M.] is experiencing difficulties in a number of areas. Most notably, the highest score describes an individual who is self-centered, immature and infantile. They are demanding of attention and manipulative in interpersonal relationship. They may be uninhibited and outgoing in their social relations, although they relate with others on a superficial and immature level. They may be insensitive to others and lacking in empathy as a result of their egocentric involvement, and under stress they are likely to display physical symptoms. They tend to be naïve, suggestible, and lack insight into both their own and others' behaviour. They prefer to look for simplistic, concrete solutions to their problems that do not require critical self examination. The moderate elevations describe an individual who is cynical and pessimistic, overly focussed on physical symptoms, and yet outgoing, gregarious and at times quite energetic. The low scores describe an individual who tends to be unimaginative and concrete in their thinking, who may have difficulty with persons who perceive the world differently than they do. Finally while he may present as socially poised and gregarious, he is likely to have fairly superficial relationships without any real depth.

On the PAI, the validity scales indicate that he was attentive to item content and consistent in responding. No defensive responding was indicated, [K.F.M.] presented as less defensive than the typical custody litigant. He appeared to have "answered in a reasonably forthright manner and did not attempt to present an unrealistic or inaccurate impression that was either more negative or more positive than the clinical picture would warrant."

While there were "no marked elevations that should be considered to indicate the presence of clinical psychopathology" there was a moderate elevation which indicates that [K.F.M.] is concerned "about physical functioning and health matters in general." Results indicate that this is likely an area of some preoccupation and that "social interactions and conversations likely often focus on his health problems, and his self-image may be largely influenced by a belief that he is handicapped by his poor health."

Self-concept "appears to involve a self-evaluation that has both positive and negative aspects. His attitudes about himself may vary from states of pessimism and self-doubt to periods of relative self-confidence and self-satisfaction. Some fluctuation in self-esteem may be observed as a function of his current circumstances, although these fluctuations will not be extreme and are comparable to those experienced by most adults." During stressful time he is "prone to be somewhat self-critical, uncertain, and indecisive." Interpersonal style "seems best characterized as somewhat distant in personal relationships. He does not appear to place a high premium on close, lasting relationships and views most social interactions without much enthusiasm. Others may view him as reserved and possibly aloof and unsympathetic. However, he is likely to value his independence and be less concerned than most people about the opinions of others." He is not reporting any distress from thoughts of self-harm and describes his temper as "within the normal range, and as fairly well-controlled without apparent difficulty." Interest in and motivation for treatment is comparable to that of adults who are not being seen in a therapeutic setting. With respect to diagnostic considerations, diagnosis is deferred on Axis I with rule-outs

indicated for Somatoform Disorder not otherwise specified, and similarly diagnosis is deferred on Axis II with a rule-out indicated for Personality Disorder not otherwise specified (mixed personality disorder with schizotypal features).

[Emphasis added]

- [323] Some of the test results are consistent with the respondent's description of the claimant as a person who lacks empathy and thrives on conflict. The evidence at trial was consistent with the clinical profile described above.
- [324] Questioned at trial about the testing of the claimant, Dr. England explained that the results are what they are. She does not modify them. She opined that a somatization-related diagnosis was a possibility for the claimant but would need more investigation. She also had expressed a concern about the extent to which the claimant's physical complaints may be used to avoid certain responsibilities, but did not have a finding on that issue.
- [325] The claimant's health problems are a concern for his parenting abilities. The same endurance issues, inability to concentrate, sensitivity to light, and susceptibility to nausea would make it challenging for the claimant to exercise shared parenting on anything like a 50/50 basis. I find that the claimant's health issues interfere with his ability to fully exercise his parenting responsibilities.
- [326] Despite his health problems, the claimant presents at one level as highly intelligent and at times loving toward his child. He has positive attributes in terms of intelligence. An engineer and businessman by trade, he has much to teach his son. He is experienced at sports, talented in music and fully bilingual, a skill which could assist his son, who is in French immersion schooling. To a degree, he is open to the advice of others on his parenting; for instance, his following of recommended strategies dealing with alienated children. He also has a supportive family that could support and enrich the child's life. The claimant also appears to have harboured no animosity toward his son as a result of being arrested and charged. He remains genuinely concerned for his son's welfare.
- [327] Yet, the claimant can also be overbearing, adversarial, tenacious, and stubborn in his interpersonal relations. The evidence demonstrates to me that the claimant lacks social awareness, in particular, the ability to pick upon on emotional cues of others, facilitate the social comfort of others, and to recognize when his own behaviour is contributing to interpersonal stress--all factors that could affect his ability to appropriately exercise parental responsibilities with respect to K.
- [328] For instance, around the time that Dr. Abdoulraman, a child psychiatrist, met with K and the respondent on August 30, 2019, the claimant walked into the office without an appointment and advised him that everyone in this case was going to be subpoenaed. Dr. Abdoulraman viewed this as a (non-physical) threat. While the claimant denied this description of the meeting, I accept Dr. Abdoulraman's description and reject the claimant's description. Dr. Abdoulraman described the claimant as a bit upset, though he calmed

down over time. The claimant demanded a copy of Dr. Abdoulraman's notes after he met with the respondent and K.

- [329] Another example occurred during an interaction with Dr. E.H., whose child went to school with K. In late 2017, there was a physical altercation between the children. The issue was resolved between Dr. E.H. and the respondent. When the claimant found out about the incident, the claimant wrote to her that he wanted to get to the bottom of the incident, that K had told him a different story, and that the incident had not been resolved to everyone's satisfaction. The claimant questioned why Dr. E.H. was willing to speak to the respondent and not him. Dr. E.H. was initially happy to respond to the claimant, but after exchanging emails with him, she formed the opinion that his tone was threatening and aggressive. She thought he wished to interrogate her, and she cut off communication with him.
- [330] Still another example came from school officials. T.C., the principal and former vice-principal at K's school, outlined the correspondence the school received from the claimant, including documents related to the respondent's victim impact statement, exhibits from an affidavit of the respondent, documents from the claimant's criminal case, a communication from the claimant's lawyer about his criminal charges, and communications about his criminal and family law matters. Mr. C. stated that these communications ought not to be shared with school officials. During one of the communications, the claimant suggested that providing counselling for K would involve the school in the matrimonial litigation and lead to legal ramifications.
- [331] Ms. T.L., K's teacher in Grade 3 in the 2018/2019 school year, commented on a drawing K drew at school, stating that it appeared that K drew himself crying and his father yelling at him. K wrote that it reminded him of when he and his father did not agree on things. Ms. L. testified that after K had behavioural issues at school, including conflicts with other children, the claimant emailed and "wanted to know every single detail of it." The emails referred school staff to literature on the topic of parental alienation. The claimant also accused the school staff of being part of an "inner circle" of school district staff that were "sexually discriminating against him." I would reject such a proposition. In my view, the school officials were neutral, highly credible witnesses.
- [332] Ms. L., as well as other school officials, confirmed that on the recommendation of school officials in 2018, both of K's parents were asked to provide consent for K to see the school counsellor, but the claimant refused to provide his consent. K had previously seen a school counsellor in the 2016 school year for two or three sessions, though the claimant revoked his consent. In the 2018 school year, Ms. W. (the current vice-principal) was copied on an email to the claimant that stated the understanding was that the claimant did not want K to see the school counsellor; instead of replying "yes" or "no", the claimant queried how she came to the understanding that he did not want K to see the school counsellor. The claimant never did provide his consent and wrote on December 16, 2018 to school officials that he withdrew his consent to counselling at school. As a result, K did not end up seeing a school counsellor.

- [333] On another occasion, the respondent's former neighbour testified as to an event in August 2017. She heard K crying outside, went outside, learned that he was locked out of the respondent's home after the claimant had dropped him off, and brought him inside her home where she attempted to calm him down. She helped K call the respondent, who retrieved him. A couple days later, the claimant knocked on her door wanting to know what happened. She told him that K was upset after being dropped off when no one was there to receive him, and she outlined what happened. She repeated the story three or four times after forming the impression that the claimant did not want to hear it. At no point did the claimant thank her for looking after his son. During the claimant's cross-examination of this witness at trial, after the claimant demanded to know the name of her husband (who was not present at the time of the incident), the witness expressed that she felt unsafe and a sheriff was called to escort her away once she completed her testimony.
- [334] As another example, on December 11, 2022, the claimant wrote 14 emails to the respondent in one day, which the respondent found upsetting and an indication that the claimant needed to "seek some help." In his response, the claimant indicated he was merely responding to the respondent's emails. But such over-communication appears to be a pattern of behaviour for the claimant. In an email sent on November 22, 2022, the respondent expressed distress at the fact that the claimant initiated over 20 email conversations during the month of November; for her part, the respondent had not initiated an email since October 30, 2022. More recently, the respondent testified that on one occasion in March 2023, the claimant sent her 29 emails in one day over a 12-hour period.
- [335] The claimant's overbearing behaviour is also observed in his ad hominem attacks on professionals involved with the respondent and K. Rightly or wrongly--and I am prepared to accept that one or more of his complaints may have been properly founded--he has reported or threatened to report to governing bodies multiple treatment providers or prospective treatment providers for K and/or the respondent. Recently, in February 2023, when the respondent attempted to secure a new family doctor for K, the claimant emailed her accusing her of taking K to medical doctors for litigation purposes, and the respondent stated that she was concerned a family doctor would not be willing to take K as a patient because of the claimant's tendency to report providers for K.
- [336] Several witnesses who have had conversations with the claimant described how his belief in parental alienation appears to have strongly influenced his speech and behaviour. Perhaps this is understandable in light of the claimant's unfortunate experience from his first relationship, and the estrangement of his two older children. However, even if there is some partial basis for this belief, I find that the continued focus on parental alienation is unhealthy.

- [337] The claimant risks putting advocacy of his self-interests ahead of positive relations with others, including the respondent. He is on guard for potential conflict where there is little or none. He often overreacts. He is too quick to litigate rather than negotiate. This causes others to be wary of him. His tone and communications with the respondent have too often been argumentative and antagonistic.
- [338] I find that the claimant has an ability to function effectively as a parent, but he has engaged in poor parenting at times in the past, such as questioning K about what happens in his private sessions with treatment providers. The claimant needs to improve his communication skills as a parent, become a better listener, find ways of becoming more cooperative with the respondent, and be more attentive to K's emotional needs.
- [339] As for the respondent, the 211 Report provides as follows with respect to psychological testing:

On the MMPI the validity scales indicate a relatively sophisticated form of defensive responding in that [K.G.T.] did not obviously deny any personal issues but nevertheless portrayed herself as being exceptionally well adjusted and adequate, such that this reflects a defensive façade. Individual with this style of defensive responding typically have limited awareness of and little interest in critical self-examination. Even when [K.G.T.]'s results were compared to normative data for custody litigants, her defensive responding was still higher than approximately 75% of other litigants

On the clinical profile, [K.G.T.] had moderate elevations on two scales, and low scores on two scales. The elevations describe an individual who is likely to be difficult to get along with, particularly in an intimate relationship. A tendency to be overly sensitive to any criticism and to personalize the actions of others toward themselves is indicated, as is a tendency towards rigidity, harbouring resentment and seeing oneself as somewhat morally righteous. Argumentativeness, repressed hostility and anger, and marital problems are indicated. Women with this stylistic presentation may overly identify with a traditional female role of dependency or helplessness, in order to trigger care-taking behaviours in others, particularly men. The low scores describe an individual who is denying any internal distress which may reflect some degree of deficit in being able to tolerate negative affective states, which in turn can be linked with certain aspects of impulsivity and recklessness. In addition, the low scores describe an individual who may present as socially poised and gregarious, but who tends to have superficial relationships without any real depth

On the PAI the validity scales indicate that [K.G.T.] was attentive to item content and consistent in responding. Defensive responding in the form of positive impression management is indicated, although it was not clinically significant when compared to normative data for custody litigants. This degree of defensive responding "suggests that she tends to portray herself as being relatively free of common shortcomings to which most individuals will admit, and somewhat reluctant to recognize minor faults in herself. Given this apparent tendency to repress undesirable characteristics, the interpretive hypotheses should be reviewed with caution."

There were no significant elevations on any of the clinical scales; however, this must be considered with caution given the defensive responding. Self concept "appears to involve a generally stable self-evaluation and she does describe approaching life with a clear sense of purpose and distinct convictions. Although outwardly she likely appears to have reasonable self esteem, she inwardly may be troubled by self-doubt and misgivings about her adequacy. She may have a tendency to minimize her successes as a result, tending to view such accomplishments as either good fortune or the result of the efforts of others." Interpersonal style "seems best characterized as friendly and extraverted. She will usually present a cheerful and positive picture in the presence of others. She is able to communicate her interest in others in an open and straightforward manner. She usually prefers activities that bring her into contact with others, rather than solitary pursuits, and she is probably quick to offer help to those in need of it. She sees herself as a person with many friends and as one who is comfortable in most social situations." She is not reporting distress from thoughts of self-harm and describes her temper as "within the normal range, and as fairly well-controlled without apparent difficulty." Interest in and motivation for treatment is "below average in comparison to adults who are not being seen in a therapeutic setting." With respect to diagnostic considerations, diagnoses are deferred on both Axis I and Axis II.

[Emphasis added.]

[340] To her credit, the respondent has provided a safe, secure home for K with minimal financial assistance from the claimant and his opposition to reasonable options that could offer support for K. The claimant alleged that his concern with the respondent at the time of their break up was the respondent's temper, in that she would get so out of control that they could not talk through issues or make any plans. This was not corroborated by other witnesses and, if true, does not seem to have impacted her parenting of K. I do find, however, that the respondent harbours considerable animosity toward the claimant, as shown by her continued accusations that the claimant is gaslighting her and K. It is not clear to me that she has always been successful in hiding this resentment from K.

[341] Overall, however, the respondent impressed me as a stable, intelligent, and nurturing mother who is attentive to K's needs and allows him to feel accepted. Her parenting style does seem to be more permissive in contrast to the claimant's historically more authoritative style, though his style too has become more permissive of late. Her practice of sending regular emails to the claimant updating him on K's activities is a positive practice not reciprocated by the claimant. Similarly, her practice in facilitating the sending of Father's Day cards, attempting to involve the claimant's family in holidays, and ensuring the claimant is copied on school communications is a commendable one. Generally, I find that the respondent is responsive to K's needs and has a good ability to exercise her parenting responsibilities.

The Impact of Any Family Violence and 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

[342] Section 1 of the FLA defines family violence as follows:

"family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[Emphasis added.]

[343] In terms of assessing family violence, the FLA provides as follows:

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;

- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

[344] The MCFD investigated the alleged child protection concerns in 2018 and 2019 and concluded that there were no issues with the claimant and no reason for further MCFD involvement. As noted, the abuse allegations that arose in April 2020 were later found to have been fabricated.

[345] The respondent testified that she is not concerned with threats to K's physical safety, such as the claimant slapping K's thumb. Rather, her concern relates to mental and emotional abuse, bullying, and interrogation of the child.

[346] I assess that K is not in physical danger from the claimant. However, I do find that the claimant's repeated questioning of K, his past desire to challenge or correct K's statements, and his demonstrated inability to be attuned to K's emotional presentation have the potential to rise to the level of emotional abuse if not regulated. I say this while recognizing that the claimant appears to have adopted a more permissive parenting style of late. I would therefore exercise some caution going forward in more fully placing K in the claimant's care.

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

[347] The inter-parental relationship has been extremely poor in the past. This has manifested itself in distrust, poor communication, increased stress over changes to parenting arrangements, and difficulty in transitions.

[348] Much of the evidence at trial focussed on the manner in which the parties treat each other, which is not particularly relevant here.

[349] Cooperative parenting for the parties over important matters such as health issues has had significant challenges and been largely unsuccessful. The claimant's penchant for not replying promptly to communications or requests for consent, or engaging in argument, is a barrier to co-parenting. The respondent's hostility to the claimant may have also played a role in the past, though I view her as capable of overcoming her resentment.

[350] While the parties can communicate by email, their communications often degenerate into adversarial positions. The claimant avoids in-person contact with the respondent, and in the past, if they happened to find themselves in the same place, the claimant has left or attempted to leave with K, which has caused further distress due to K's inability to understand why the claimant has such difficulty in the respondent's presence.

[351] I assess that any arrangement that would require the parties to cooperate in decision-making is very unlikely to be successful.

Any Civil or Criminal Proceeding Relevant to the Child's Safety, Security or Well-Being

[352] There are currently no ongoing civil or criminal proceedings relevant to the child's safety, security or well-being. The previous proceedings have been canvassed above.

ANALYSIS OF GUARDIANSHIP

[353] In the present case, I find it appropriate to declare both parties to be guardians of the child pursuant to s. 39(1) of the FLA.

ANALYSIS OF PARENTING RESPONSIBILITIES

[354] Section 40(3) of the FLA permits the court to allocate parental responsibilities under s. 41 to one guardian only. Section 40(4)(a) prohibits any presumption that parental responsibilities should be allocated equally among guardians or that decisions should be made separately or together among guardians. The court must only consider the best interests of the child in making an order under s. 40(3).

[355] In terms of the allocation of parental responsibilities under s. 41 of the FLA, having regard to the best interests factors outlined above, I find it appropriate to allocate to both parties the ability to make day-to-day decisions affecting K when he is in their care (s. 41(a)).

[356] Of note, and with respect to the best interests factors, cooperative parenting is not an option here. The parties have largely been unable to communicate effectively or cooperate on decisions affecting K. The respondent has been the claimant's primary parent since his birth and has exercised proper care for him. It is appropriate that she continues to do so.

[357] The rest of the parental responsibilities outlined in subsections (b)-(l) of s. 41 of the FLA will be allocated to the respondent, except the claimant will have the right to request and receive information from teachers, psychologists, medical professionals, and caregivers.

ANALYSIS OF PARENTING TIME

[358] With respect to the parties' proposals for parenting time, I find it in the best interests of K for the respondent to maintain having the majority of parenting time, with additional parenting time allocated to the claimant.

- [359] In my view, the claimant's proposal to implement a shared or 50/50 parenting time regiment on the basis of Dr. England's recommendations is not appropriate. To be sure, Dr. England testified that the parties are too focussed on blaming each other and making allegations. She testified that the antidote for alienation is having substantially more time with the alienated parent, which is what she ultimately recommended. She also testified that the situation was dire, and a full reversal of parenting time should be considered.
- [360] I assess that K is likely to resist or refuse such a schedule, and implementing such a schedule without further gains in the father-son relationship would likely lead to stress, anxiety, and other negative effects on K. Such a proposal does not pay sufficient heed to the views of K, his circumstances, and his strong opposition to such a plan. I view the situation in the present case as nuanced and complex, and one that is unlikely to be remedied by drastic solutions, which the Court in Williamson at para. 46 reminded trial judges to be careful of.
- [361] There were previously problems in the spring of 2020 when the claimant's parenting time was significantly increased. K indicated that in the past he felt no one was listening to him, and he had no choice but to act out and make a false allegation. His views at this point are clear: he wants to keep time with his father to a minimum and does not want overnight visits.
- [362] I am alive to the risk of over-empowering the child, but I would be careful not to repeat the mistakes of the past. I assess that at this point a full split division of parenting time would unacceptably increase the risk to K's emotional health and well-being and would probably lead to him acting out in an unhealthy way.
- [363] Finally, given the claimant's stated health issues, which seemed to have been emphasized at trial but minimized in his interview with Dr. England, I assess that he is not able to physically tolerate the responsibility of 50/50 parenting time. I have accepted that many of the claimant's reported post-concussion symptoms continue. The claimant had great difficulty explaining to the Court how he could parent 50 percent of the time but was medically unable to work.
- [364] In my view, the schedule should proceed more cautiously and can be subject to revision in the future if K's confidence in the father-son relationship improves. I am mindful of Dr. Aubé's caution that the risk of K building resentment is high. I do recognize that the schedule has been too restrictive in the past and some latitude needs to be provided so that K can develop trust in the claimant. A more aggressive change to parenting arrangements could jeopardize the positive gains K has made in treatment with Dr. Susswein. I would be mindful to make smaller adjustments to continue to slowly rebuild K's confidence in the relationship over time in accordance with the developing maturity of K and in the absence of any perceived threat to K's well-being.

- [365] The claimant sought overnight visits. At one point, he impatiently stated that if the Court does not order overnight visits, there is no point in his doing any more parenting. I would hope that he would reconsider this statement. Overnights may be an option in the future, perhaps even through consent if things go well, but I would not order overnight visits at this point given what I have heard about K's strong opposition to overnight visits, the claimant's health concerns, and K's best interest. The visits to the claimant's family are a good opportunity for K to spend time with the claimant, and K appears to be more comfortable at this point having overnights when others are present. The respondent has a good sense of K's tolerances and should consider agreeing to overnights at an appropriate point in the future on a trial basis, but at this point I would not force them on K. This is also an issue that can be addressed at a future review.
- [366] I would increase the claimant's parenting time from that proposed by the respondent to after school, or 3:00 p.m., to 8:00 p.m. on Wednesdays and from 9:30 a.m. to 8:00 p.m. on Saturdays. Although this is a reduction from the current two weekdays a week, it represents an increase in the duration of visits. This would also reduce the number of exchanges and allow the claimant and K to be together longer and during some dinner meals, which is a time of potential bonding between father and child. The respondent is the primary parent and has a vehicle, while the claimant does not. In my view, it is appropriate that the respondent or her delegate do the pickups on Wednesdays from the respondent's home for the regular schedule.
- [367] I would also increase the claimant's parenting time during holidays and set out a more certain schedule for parenting time during holidays and school breaks while allowing for the possibility that K will travel with the claimant in the future to New Brunswick to see the claimant's family. In the past, K has expressed more comfort in the claimant's care when his extended family members are present.
- [368] Extra-curricular activities have been a problem in the past, with challenges arising from the claimant's reluctance to take K to sports practices, games, or birthday parties if such activities were arranged by the respondent. The claimant testified either that K didn't want to go when such an event fell on his parenting time, or that K was happy to play sports and socialize with him. The claimant says now that he will take K to such events, but I intend to build mechanisms into the parenting time schedule to facilitate K's attendance.
- [369] I would add that even if the foregoing analysis of the reasons for the disruption in the father-child relationship is in error, and the evidence of the respondent engaging in alienating behaviour was clearer, my orders for parenting time and responsibility would be the same in light of the child-centred approach I have adopted, which is one that aims to promote the child's well-being rather than vindicate the rights of the rejected parent.

OTHER ISSUES

- [370] The respondent seeks an order that the claimant will not make surreptitious audio or video recordings of K without first obtaining K's consent. I agree with the respondent that the claimant's practice of recording K is an undesirable one that is likely to damage the parent-child relationship: see, for instance, *N.J.K. v. R.W.F.*, 2011 BCSC 1666 at paras. 207-210 and *Van Ruyven* at para. 41, where the practice was criticized. The fact that K is now aware that the claimant is recording him is a factor that undermines trust in the relationship.
- [371] However, it is also true that the audio recording of the claimant's parenting time allowed the claimant to demonstrate his innocence when he was wrongfully accused of assault. K has indicated that he would be willing to lie again if he saw the need. In my view, the claimant should seriously consider ceasing this practice, though, in the circumstances, I am not inclined at this stage to order it. In general, the claimant should not record his parenting time because it erodes trust in the relationship and incentivizes evidence-gathering and self-serving parental behaviour. If trust can be rebuilt, the claimant will hopefully feel he does not have to engage in such an odious practice to protect himself from false allegations.
- [372] The respondent seeks an order for the claimant to attend counselling with a psychologist who has experience with the topic of realistic estrangement in the context of divorce. The claimant would be ordered in his sessions to abandon any suggestion that the respondent has alienated K from him, and the claimant would bear the cost. The respondent suggests that the claimant be prohibited from making further court applications until he has complied with the counselling order.
- [373] I do not find such an order appropriate here. I would expect that despite these reasons, the claimant will continue to doggedly insist on his point of view that K has been unjustly alienated from him. He would be wrong to do so. But the form of counselling the respondent proposes is unlikely to change the claimant's stubborn mind. In any event, what limited funds the claimant has available are better spent on meeting his modest child support obligations, and I would not impose the cost of such a futile effort on the respondent.
- [374] The respondent seeks an order that counsel for K be appointed from the Child and Youth Legal Centre ("CYLC") in Vancouver pursuant to s. 203(1) of the FLA.
- [375] Section 203 of the FLA provides:
- 203 (1) The court may at any time appoint a lawyer to represent the interests of a child in a proceeding under this Act if the court is satisfied that
- (a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and
 - (b) it is necessary to protect the best interests of the child.

- (2) If the court appoints a lawyer under this section, the court may allocate among the parties, or require one party alone to pay, the lawyer's fees and disbursements.

[376] Orders under this section are not commonplace. Rather, such orders only occur where the circumstances warrant. In *Goldsmith v. Holden*, 2020 BCSC 1501 at para. 23, Baker J. held that an advocate trained in communicating with children, as they negotiate the impact of family law disputes on their lives, is able to help the children understand how any legal issues may impact their lives, receive the views of the children in this respect, and communicate those views to the court.

[377] In my view, the requirements of s. 203(1) are met in this case. I find that (a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of K, and (b) it is necessary to protect the K's best interests going forward.

[378] I anticipate that counsel for the child will assist in receiving K's views and placing K's views before the court on any future applications, including any future review of parenting time. I expect that an advocate trained in communicating with children will help K understand how legal issues in this case may impact his life. The task of balancing parenting time in this high-conflict milieu in the future will be a delicate one, and I would expect counsel for K to assist with that task. Moreover, K is in need of additional support and the appointment of counsel provides him with a mechanism to have his grievances heard and should diminish his need to act out inappropriately.

[379] The order will be based on the cost of counsel for K being borne by the CYLC in accordance with the stated policy of the CYLC.

[380] I have considered other orders, such as reunification counselling for K and the claimant. The claimant has no resources to pay for the expected high cost of such counselling. Dr. England suggested that this should be at the respondent's cost, but her resources too have been strained by this prolonged matrimonial litigation. Dr. Susswein thought that joint sessions with K and the claimant would not be effective given the claimant's lack of confidence in Dr. Susswein and K's distrust. I would expect that any reunification counselling could be dominated by the claimant's dogged pursuit of a finding of parental alienation, and that K's voice would be lost in the process. I assess that the likelihood of success would be very guarded.

[381] Rather than continue the alienation-estrangement impasse, a better option is to take K out of the crossfire. I recognize that the history of K's care has operated unfairly for the claimant in terms of his exclusion from K's life and being falsely accused of abuse. But the claimant's continued focus on alienation is not helping. The claimant should ask himself whether he wants to prove alienation, or whether he wants a relationship with his child. At the same time, the respondent needs to put conflict and resentment for the claimant aside for K's sake. It is time for the claimant and K to spend quality time together, for the parties to be mindful of K's stressors, and for trust to develop organically in the father-son

relationship within the limits of what K will tolerate.

SUMMARY OF ORDERS

[382] I make the following order with respect to guardianship:

1. The parties are declared to both be guardians of K, with the respondent being the primary guardian.

[383] With respect to parenting responsibility, I make the following orders.

2. Both parties have authority during their parenting time to make day-to-day decisions affecting K and to have day-to-day care, control and supervision of K during their parenting time under s. 41(a) of the FLA.
3. Subject to the orders below, pursuant to s. 40(3)(a) of the FLA, the respondent will have sole decision-making responsibility for K in relation to these parental responsibilities listed in s. 41 of the FLA:
 - (b) making decisions respecting where the child will reside;
 - (c) making decisions respecting with whom the child will live and associate;
 - (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
 - (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;
 - (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
 - (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
 - (h) giving, refusing or withdrawing consent for the child, if consent is required;
 - (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
 - (k) subject to any applicable provincial legislation,
 - (i) starting, defending, compromising or settling any proceeding relating to the child, and
 - (ii) identifying, advancing and protecting the child's legal and financial interests;
 - (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

4. The claimant and respondent will share the parental responsibilities for K under s. 41(j) of the FLA, which will permit both parties to contact third parties involved in K's life, including but not limited to, teachers, psychologists, medical professionals, and caregivers, for the sole purposes of requesting and receiving information.
5. The respondent will advise the claimant of significant decisions concerning K as they are made, but she is not obliged to discuss them with the claimant or seek his agreement with respect to them, and the claimant must refrain from interfering with any decision made by the respondent.
6. The parties must not threaten, harass, or intimidate third party professionals involved in K's life, including but not limited to, medical providers, teachers, counsellors, administrators, and coaches.
7. The parties will immediately advise the other of any emergency affecting K by either phone or text message.
8. The respondent can apply for and obtain a passport for K and the need for the claimant's approval and the claimant's signature on the passport application is to be dispensed with.

[384] With respect to parenting time, I make the following orders:

9. All of the parenting time orders in the paragraphs that follow are subject to the parties agreeing otherwise in writing (including by email or text) or to further order of the court.
10. K will reside primarily with the respondent who will presumptively exercise all parenting time with K except as set out below
11. The claimant will have regular parenting time as follows:
 - a) Every Wednesday the claimant will pick up K from the school where he is registered at 3:00 p.m. (including on days when school is not in session) at the commencement of his parenting time and the respondent will pick K up at the claimant's home at 8:00 p.m. at the end of his parenting time;
 - b) Every Saturday the respondent will drop off K at the claimant's home at 9:30 a.m. at the commencement of his parenting time and the claimant will drop K off at the respondent's home at 8:00 p.m. at the end of his parenting time;
 - c) If K is not in the care of the claimant on Father's Day, the claimant will have parenting time from 9:30 a.m. to 4:00 p.m. that day, with the respondent to drop off K at the claimant's home at the commencement of his parenting time, and the claimant to drop K off at the respondent's home at the end of his parenting time; and

- d) If K is not in the care of the respondent on Mother's Day, the respondent will have parenting time from 9:30 a.m. to 4:00 p.m. that day, with the claimant to drop off K at the respondent's home at the commencement of her parenting time, and the respondent to drop K off at the claimant's home at the end of her parenting time;

(the "Regular Parenting Schedule").

12. The claimant will advise the respondent by either phone or text if he will be more than 15 minutes late for pick up or drop off of K.
13. Unless otherwise agreed by the parties, if the claimant is more than 30 minutes late to pick up or receive K for his parenting time, he will have forfeited his parenting time for that day.
14. The parties will be responsible for providing basic necessities to K during their parenting time, including nutritious meals, and will accommodate his need to do homework.
15. During school holidays, the Regular Parenting Schedule will be suspended and replaced with the following schedule:

e) Spring Break:

- i. during even years, the respondent may travel with K for two weeks, and during odd years, the claimant may travel with K for two weeks;
- ii. if the claimant does not travel during his parenting time in Spring Break, the claimant will have parenting time each Tuesday, Thursday, and Saturday from 9:30 a.m. to 8:00 p.m.; and
- iii. the respondent will drop K off at the claimant's home at the beginning of his parenting time, and the claimant will drop K off at the respondent's home at the end of his parenting time.

f) Winter Break:

- i. During even years, the respondent may travel with K for the first week and the claimant may travel with K for the second week. During odd years, the respondent may travel with K for the second week and the claimant may travel with K for the first week;
- ii. if the claimant does not travel during his parenting time in Winter Break, the claimant will have parenting time each Tuesday, Thursday, and Saturday from 9:30 a.m. to 8:00 p.m.; and
- iii. subject to the parties agreeing otherwise, the respondent will drop K off at the claimant's home at the beginning of his parenting time, and the claimant will drop K off at the respondent's home at the end of his parenting time.

g) Summer Break:

- i. every year, the claimant may travel with K for two weeks during the first two weeks of July, and the respondent may travel with K for two weeks during the last two weeks of August, except that in 2023 the claimant may travel with K for two weeks in the first two weeks of August and the respondent may travel with K for the last two weeks in August;

ii. except as stated above, including in the event that the claimant decides not to travel with K during the first two weeks of July, the claimant's parenting time during Summer Break will take place each Tuesday, Thursday, and Saturday from 9:30 a.m. to 8:00 p.m.; and

iii. subject to the parties agreeing otherwise, the respondent will drop K off at the claimant's home at the beginning of his parenting time and the claimant will drop K off at the respondent's home at the end of his parenting time;

(the "Holiday Parenting Time").

h) Each party must confirm the Holiday Parenting Time schedule by email to the other party at least two months prior to the holiday in question, except that this provision does not apply in 2023.

16. There will be no first right of refusal as between the parties, and should either party be unable to exercise his or her parenting time, that party will be responsible for arranging appropriate childcare for K.

[385] As noted above, K's participation in extra-curricular activities has been a particular problem in the past, to the point where it has been a great source of friction in the father-son relationship. The parties have not cooperated on K's participation. It's possible that the displacement of the claimant's limited parenting time by the extra-curricular activity has created a problem in the past. The claimant testified that K expressed to him no interest in going to certain extra-curricular activities such as sports or birthday parties, or that K could better engage in such activities but with the claimant. In my view, K maintains a desire to participate in sports and other activities with his peer group which is situated nearer to the respondent's home. The claimant's refusal to be present at the same event as the respondent has posed an additional challenge, though in my view, the claimant really needs to have more tolerance in this regard. I do not agree with the claimant that the parents should be indefinitely siloed with regard to K's activities.

[386] The result of the lack of cooperation has been that K has been unable to participate in after-school activities with his friends, a point of resentment for K. The primary parent will need to control this issue given that the parties cannot cooperate. I would make the following orders to attempt to better regulate this aspect of parenting time:

17. K may participate in any extra-curricular activities, including sports, camps, school activities, birthday parties, social events and overnight school field trips and excursions during either party's parenting time ("extra-curricular activities"). The respondent has sole decision-making over K's enrolment and the scheduling of extracurricular activities. The claimant has a right to receive reasonable notice of K's enrolment and the scheduling of such activities.

18. The party who has parenting time will presumptively facilitate K's attendance at extra-curricular activities. If the claimant's parenting time falls upon a date upon which the respondent has arranged an extra-curricular activity, unless the claimant has confirmed his

willingness and ability to transport K to and from the function by email or text at least 72 hours in advance or has provided a general consent to do so in relation to the activity, the claimant's parenting time will automatically be cancelled and rescheduled to the next day, or another date agreeable to the parties. If an extra-curricular activity overlaps with the start or finish of the claimant's parenting time, his parenting time will be extended earlier or later sufficiently to reasonably allow the claimant to transport K to or from the activity.

[387] Respecting the parties' joint attendance at extracurricular activities, the claimant continues to be concerned about the impact on K of their being together in the same place at the same time. While the respondent has been open to joint attendance at functions, the claimant has consistently sought to avoid the respondent, which can cause problems when K is present. Dr. England recommended against the parties being in the same place at the same time, but in my assessment, this is more of a problem for the parties and the claimant in particular than it is for K, and it is something the parties should work to overcome.

[388] I am prepared to tolerate the claimant's reticence for the next two years as K enters a new school, gets accustomed to a new social environment, and hopefully has the opportunity to once again participate in extra-curricular activities. Beyond that, I fail to see the need to exclude the non-custodial parent from extra-curricular activities. I order as follows:

19. With respect to the parties' attendance at extra-curricular activities,
 - a) Until August 31, 2025, the party then exercising parenting time may attend the extra-curricular activity and the other parent will not attend without the permission of the custodial parent;
 - b) After August 31, 2025, both parties and their family members are permitted to attend all of K's functions, regardless of which party has parenting time during such activities, as long as the non-custodial parent provides written notice of their upcoming attendance to the custodial parent in advance of the activity; and
 - c) The above rules regarding joint attendance at extra-curricular activities do not apply to activities occurring during regular school hours, or extra-curricular activities at which K or his team may receive an award, or special sports activities such as playoff games or tournaments, for which both parties and their family members are permitted to attend.

[389] I would provide for an optional review of parenting time next year and therefore order as follows:

20. Either of the parties may set a hearing for a review of parenting time after May 1, 2024 without showing a material change in circumstances.

[390] With respect to travel, I would make the following orders:

21. Both parties are at liberty to travel internationally with K during the Holiday Parenting Time, provided that, at least one week prior to travel, the travelling party provides the other party with a detailed itinerary, including the emergency contact information for the travelling party, the address and contact information for any accommodation where they will be staying, and a copy of the airline tickets.
 22. The respondent will generally maintain possession of K's passport and the claimant must immediately surrender K's passport to the respondent at the end of any international travel.
 23. If travelling internationally with K, including to the United States, the parties must travel with K's original passport.
 24. Each party will purchase out of country medical insurance for K for any international travel.
 25. All airline tickets and medical insurance purchased on behalf of K must be in K's full, legal name: [K.M.-T.].
 26. Neither party requires the written consent of the other party to travel internationally with K during the travel dates permitted by this Order.
- [391] With respect to phone calls during travel, this has the potential to be disruptive to the traveling parent. I would make an order as sought by the respondent but ease the terms somewhat and make it mutual. I would therefore order as follows:
27. K will be permitted to contact the non-travelling parent during periods when he is travelling with one of the parties as follows:
 - a) The phone calls will take place every fifth day;
 - b) The parties will arrange and confirm a predetermined, set call schedule at least two days in advance of the travel;
 - c) The length of the calls will be approximately 10 minutes, but this limit should not be strictly enforced;
 - d) K will be afforded privacy during his calls, without interference by the travelling parent; and
 - e) The calls will not be recorded.
- [392] With respect to retroactive child support,
28. The claimant owes the respondent \$11,828.00 in retroactive child support.
 29. No award is made with respect to past s. 7 special or extraordinary expenses.
- [393] With respect to prospective child support,
30. The claimant's Guidelines income is set at \$24,000 as of August 1, 2023, and \$30,000 per year as of January 1, 2024, subject to a yearly income review thereafter. The claimant's income will thereafter be the greater of \$30,000 or his line 15000 income.

31. The claimant will pay the respondent \$209 per month for the support of K commencing August 1, 2023 and continuing on the first day of each and every month thereafter, until January 1, 2024, when the payment will increase to \$279 per month for the support of K, for as long as K is eligible for support under the FLA or until further court order.
32. The parties will pay s. 7 special and/or extraordinary expenses in proportion to their Guidelines income (or imputed income as the case may be) commencing August 1, 2023. The claimant's proportionate share of s. 7 expenses shall be paid promptly upon the respondent providing him with a receipt for reimbursement.
33. Commencing in 2024, both parents will exchange all information required by the Guidelines by May 15 of each year to determine their respective Guidelines incomes for child support purposes, including but not limited to the following:
 - a) a copy of their respective income tax return filed for the previous calendar year, including all attachments such as T-4 slips;
 - b) a copy of their respective notice of assessment or reassessment received from the Canada Revenue Agency for the previous calendar year's filed return; and
 - c) a copy of the most recent statement of earnings received by each parent from their employer.
- [394] I find it appropriate to put some conduct orders in place. The orders will be reciprocal and will bind both parties:
34. Under s. 225 of the FLA, unless in the case of emergency, the parties will communicate with each other:
 - a) in a respectful and courteous manner,
 - b) by email or text only, except for urgent matters or express consent of the parties provided by email or text,
 - c) without sending unreasonably lengthy messages or an excessive number of emails or texts per day, and
 - d) by limiting their communications to live parenting issues, and not past concerns.
35. The parties will:
 - a) put the best interests of K before their own interests;
 - b) encourage K to have a good relationship with the other parent and speak to K about the other parent and that parent's partner and extended family members in a positive and respectful manner;
 - c) make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of K;

- d) not question K about the other parent or time K spent with the other parent beyond simple conversational questions;
- e) not discuss with the child any inappropriate adult, court, or legal matters;
- f) maintain an awareness that K may have a low threshold for emotional discomfort with difficult conversations;
- g) refrain from persistently or aggressively questioning K;
- h) refrain from persistently questioning K about his proper legal name or advising him not to use his full legal name;
- i) not question K about his statements to treatment providers; and
- j) not blame, criticize or disparage the other parent to K.

[395] With respect to the appointment of counsel, the standard form order will be made in the form suggested by the Society for Children and Youth of BC. The only exception will be that counsel appointed for K is not to make disclosure to K of the claimant's past practice of recording his parenting time visits, at risk of damaging that relationship. I make the following order:

- 36. Pursuant to section 203(1) of the FLA, the child, K, may be represented by counsel from the Child and Youth Legal Centre located at 303-1720 Grant Street, Vancouver, BC, phone: 778-657-5544, or by a lawyer appointed by them. Counsel for the child shall provide independent legal services for the purposes of advocating the child's expressed views and interests.
- 37. Counsel for the child shall have full power to act for the child as though he were a party to these proceedings and is granted standing at any future reviews of parenting time. Without limiting the generality of the foregoing, counsel for the child is authorized to:
 - a) Receive copies of correspondence between counsel (or the parties, if unrepresented) in relation to the proceedings;
 - b) Receive copies of all professional reports and all records relating to the child;
 - c) Appear and participate in this proceeding, including the right to examine and cross-examine witnesses, call evidence and make submissions to the court, such submissions to include positions advanced on behalf of the child;
 - d) Talk to and meet with the child alone and confidentially or with others at any location without prior notice to the parents, including but not limited to the child's school;
 - e) Talk to and meet with the child alone and confidentially, with reasonable prior notice to the parents, at the residence of either parent;

- f) Communicate directly with the parents of the child for the purpose of scheduling any matters relating to the child;
 - g) Apply to be removed as the legal representative of the child if counsel for the child believes that such involvement is no longer in the child's best interest or as instructed to do so by the child; and
 - h) Take other steps as authorized by the court.
38. All third parties involved with the child and their parents, including but not limited to the child's teachers and school authorities, family and child counsellors and assessors, mediators, church representatives, visit supervisors, medical service providers, psychologists, social workers and child welfare authorities are hereby authorized to release any and all information about the child to counsel for the child without the consent of the parents and/or guardians.
39. Counsel appointed for K is not to disclose to K the claimant's practice of audio-taping his parenting time though counsel may hear and relay any of K's concerns in this regard.
40. The parents may communicate with counsel for the child via email or written correspondence. All communications between the parents and counsel for the child are not confidential and may be disclosed to the other party.
41. Counsel for the child shall be permitted to provide a summary to this Court of the information acquired in the course of performing their duties, and by doing so, counsel for the child shall not be deemed to be a witness in these proceedings.
42. The registry is directed to provide a copy of this Order and the Reasons for Judgment directly to the Child and Youth Legal Centre as soon as the Order is entered.
- [396] I am also prepared to seize myself of matters for a period of one year to maintain continuity in this matter.
43. Justice Brundrett is presumptively seized of all matters in this matter for a period of one year from the release of the oral judgment in this matter unless Scheduling determines that he is not reasonably available or a matter has sufficient urgency that it ought to be heard by another justice.
- [397] Success was divided at trial. The parties will bear their own costs.
- [398] Counsel for the respondent will prepare the order arising from these reasons. The need for the claimant's signature on the draft order is dispensed with. Prior to submitting a draft order for signature, counsel for the respondent will provide a draft to the claimant at least 72 hours in advance for his comments.

"Brundrett J."

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Prepared on 26 October 2026 · Esheria