
CANADA / JUDGMENT

K.R. v. S.O.

2022 BCSC 1381

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1381 K.R. v. S.O.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.R. v. S.O.,

2022 BCSC 1381

Date: 20220812

Docket: E190056

Registry: Vancouver

Between:

K.R.

Claimant

And

S.O.

Respondent

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

In chambers

Counsel for the Claimant

(via videoconference):

J.K. Broadhurst

Counsel for Respondent

(via videoconference):

L. Yeom

K. Lock

Place and Date of Hearing:

Vancouver, B.C.

March 11, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 12, 2022

Table of Contents

I. Introduction.. 3

II. Background.. 3

III. Parties' Positions. 5

IV. ISSUES. 11

V. Admissibility of the Final Report and Perry Letter.. 12

A. Overview.. 12

1. The PC Agreement 12

2. The Perry Report 13

3. The Perry Letter 14

B. Admissibility Ruling. 15

VI. Parental Responsibilities. 21

VII. Parenting Coordinator.. 23

VIII. Breach of the Consent Order.. 25

IX. Section 211 Report. 28

X. Name Change. 28

XI. Respondent's Application.. 30

XII. Disposition.. 31

I. Introduction

- [1] The claimant and respondent have each filed an application seeking interim orders in their family law dispute. The applications centre on a number co-parenting issues arising from a failed parenting coordination process, but also raise their child's last name and the production of certain documents.

II. Background

- [2] The parties began to live in a marriage-like relationship in June 2015. The parties married on July 6, 2018 and separated on October 21, 2018. The notice of family claim was filed on January 9, 2019.
- [3] There is one child of the marriage, E., born in March 2015.
- [4] At a May 28, 2019, judicial case conference, the parties entered a consent order that, among other things, required them to use a parenting app to communicate and consider retaining a parenting coordinator ("JCC Order").
- [5] On December 18, 2019, the claimant filed a notice of application addressing kindergarten issues. At the January 2020 hearing, the application was resolved by a consent order determining E.'s kindergarten.
- [6] Cross-applications were filed on July 27 and August 12, 2020. On August 19, 2020, these were settled under a consent order ("Consent Order") determining E.'s elementary school.
- [7] The Consent Order included non-disparagement terms under ss. 222 and 225 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] and the following:
- f. Each party shall separately obtain the Our Family Wizard ("OFW") app and the parties shall communicate with each other only through Our Family Wizard ("OFW") app with respect to [E.], including medical and dental appointments unless otherwise through counsel or in cases of emergency, in which then the parties may communicate with each other by telephone.
- ...
- h. The parties shall communicate with each other through email only when documents or contents cannot be communicated and sent through OFW.
- i. Each party shall respond to the request or inquiry from the other party, or through their counsel within:
- [i.] 5 days if the matter is not urgent; and
- [ii.] 24 hours if the matter is urgent.

- [8] At a February 25, 2021 mediation, the parties successfully negotiated a parenting plan, including a term agreeing to retain a parenting coordinator.
- [9] On April 1, 2021, a written agreement setting out the parenting plan ("Parenting Plan") was signed. In it, the parties agreed to retain Anna Perry as their parenting coordinator for a minimum of two years and to share the cost equally.
- [10] On April 28, 2021, Ms. Perry provided the respondent with a parenting coordinator services agreement ("PC Agreement"). The respondent delayed in signing the PC Agreement.
- [11] Even without a signed PC Agreement in place, Ms. Perry dealt with the parties in May and June 2021, attempting to address some issues, including a summer plan for E. and a communication plan.
- [12] The parties had outstanding issues regarding child support, section 7 expenses and E's last name. On June 3, 2021, Ms. Perry suggested she arbitrate the issue of section 7 expenses. In June and July, the parties attempted to settle some of the outstanding issues. By July 12, 2021, it was apparent that there would not be a settlement.
- [13] On August 3, 2021, the respondent signed the PC Agreement.
- [14] On August 26, 2021, and then again in September 2021, the respondent agreed that Ms. Perry should arbitrate the outstanding issues suggested.
- [15] He did not, however, sign the provided arbitration agreement. The respondent had not signed the arbitration agreement as of the date of the hearing.
- [16] Ms. Perry acted as the parties' parenting coordinator under the PC Agreement from August 2021 until February 2022.
- [17] Between August 2021 and January 2022, Ms. Perry assisted the parties with issues and made some determinations. In respect of this period, she rendered invoices totalling \$8,047.
- [18] The respondent made a few small payments, but still had not paid his 50% share as of the hearing. This was notwithstanding attempts by Ms. Perry to obtain payment.
- [19] Ms. Perry decided to withdraw as the parties' parenting coordinator. She wrote and delivered to the parties a final report dated February 16, 2022 ("Final Report").
- [20] Among other things, the Final Report states that the respondent's conduct and communications during the process were injurious to shared parenting. The Final Report recommends the claimant have final decision-making authority for certain matters and that the parties retain a parenting coordinator with mental health training.

III. Parties' Positions

- [21] The claimant submits that even with the benefit of a parenting coordinator, the respondent is non-communicative and non-responsive as co-parent and introduces conflict when he does respond.
- [22] She says he has a pattern of either failing or taking weeks to respond or provide information in relation to basic parenting matters: e.g., failing to respond to her requests for consent; failing to provide E.'s doctor with a follow-up report when E. had a fever; and failing to tell her about or explain school absences that she only learned about from E.'s report card.
- [23] With regard to difficulties encountering in arranging medical and dental appointments, the claimant provides an example regarding her attempts to arrange a therapist for E. Early on in her attempts, the claimant proposed therapist X. The respondent refused that proposal, describing X as a "money-monger". Months later, in still ongoing exchanges attempting to settle the matter, the respondent - without explanation or qualification - proposed X as E.'s therapist.
- [24] The claimant also asserts that the respondent disregards court orders and agreements he has made, providing these examples:
- a) He agreed to Ms. Perry under the April 1, 2021 Parenting Plan, but did not sign the PC Agreement retaining her until August 3, 2021;
 - b) Notwithstanding the JCC and Consent Orders, he did not begin using OFW until September 2020 and then unilaterally stopped using it in September 2021;
 - c) In the Parenting Plan, the parties agreed to enroll E. in a special math program. The respondent took the position that E. should not be enrolled, and Ms. Perry had to step in to address the issue;
 - d) The respondent failed to respond to the claimant's August 29, 2021 request for consent to enrol E. in art class;
 - e) The respondent failed to respond to the claimant's August 30, 2021 request for consent to enrol E. in swimming class and Ms. Perry had to step in; and
 - f) In January 2022, the parties agreed to amend the Parenting Plan to account for time over upcoming statutory holidays, professional development days, and spring and summer break. The claimant and Ms. Perry signed the finalized amending document in February 2022, but the respondent had not signed as of the hearing.
- [25] The claimant says the respondent has consistently failed to act in E.'s best interest. She points to his: failing to respond in a timely or consistent manner; refusing to engage in co-parenting discussions; failing to comply with court orders and agreements; his failure to pay Ms. Perry, resulting in a collapse of the coordination process.

[26] With respect to co-parenting issues, the claimant seeks the following relief under the FLA:

- a) Under s. 230, an order that the respondent pay a \$2,500 fine for breaching paras. 2(f), 2(h), and 2(i) of the Consent Order and for failing to retain a parenting coordinator for two years as provided by the Parenting Plan.
- b) Under s. 15, that:
 - i. The appointment of a replacement parenting coordinator with mental health training;
 - ii. The cost of the parenting coordinator be split equally between the parties, but subject to reapportionment by the coordinator;
 - iii. The parenting coordinator be directed to report directly to the court or to an arbitrator on the following topics:
 - (1) compliance with orders, Parenting Plan, the parenting coordinator agreement and parenting coordinator determinations;
 - (2) whether guardianship and parenting roles and responsibilities are being disregarded, delayed or blocked by the parties inability to agree.
 - iv. The respondent be required to place funds in trust to ensure his financial obligations for the costs of the parenting coordinator for a minimum of one year;
 - v. The parties retain a parenting coordinator no later than two weeks following a decision.
- c) Under s. 41, an interim order giving her decision-making authority in the following areas in the event the parties cannot reach agreement following consultation:
 - i. medical decisions including mental health assessments and treatments;
 - ii. dental and orthodontics;
 - iii. ophthalmology/optometry (glasses);
 - iv. academic including school placement, tutoring and assessments and parent/teacher conferences;
 - v. scheduling;
 - vi. extracurricular activities including summer, winter, spring break camps, weekend sports, and new interests; and
 - vii. socialization (e.g., play dates to maintain friendships).

(The listed areas of decision-making responsibility parallel those specified in the recommendation in the Final Report.)

- [27] As an alternative to the s. 41 order sought, the claimant seeks an order under s. 211 requiring a qualified psychologist be retained to prepare a report with the parties sharing the cost equally.
- [28] The respondent opposes the relief sought by the claimant except as follows:
- a) With regard to s. 15, the respondent indicates he is willing to consent to an order for a parenting coordinator on the following terms:
 - i. The parties jointly retain, Robert Colby, Ellie Bolgar or Kelly-Anne Breen as their new parenting coordinator for a term of two (2) years;
 - ii. The cost of the parenting coordinator to be shared equally between the parties; and
 - iii. Neither party be required to place funds in trust for the payment of the costs of the parenting coordinator.
- [29] The respondent's notice of application seeks an order under FLA, s. 224(1) that the parties jointly retain Susan Gamache to coach the parties with respect to co-parenting communication skills. He also seeks the production of specified financial documents and an updated Form F8 financial statement from the claimant.
- [30] The respondent says he did not sign the PC Agreement until August 3, 2021, because he did not understand the role of a parenting coordinator and was concerned about the cost involved. He says he also retained new counsel during this period and his new counsel needed time to review the PC Agreement.
- [31] He says he delayed signing the Parenting Plan due to the fact that the parties had not yet reached an agreement on the allocation of the specific weeks with respect to the upcoming school break (i.e., under the Parenting Plan term agreeing to share time over breaks).
- [32] He expresses dissatisfaction with the coordination process under Ms. Perry. He submits that Ms. Perry's involvement did not improve communications between the parties. He contends that Ms. Perry made recommendations based on the claimant's version of the facts, making the process into "a battle of truths".
- [33] The respondent denies being non-responsive. He says he needed time to look into matters on some occasions and that the claimant's examples amount to a handful of incidents over a lengthy period. He says the parties are frequently able to agree, but the claimant files court applications when he doesn't agree with her position. He says those applications often settle because she files applications without making a specific proposal for his consideration first.
- [34] He says several members of his family have had serious health issues over the last two years and he was required to apply his time and attention to family matters at times as a result. He says he nonetheless responded to, and agreed to, most health and emergency issues regarding E. With regard to appointments, at times the matter is not a disagreement as to what should be done, just reasonable misunderstandings as to who will do what.

- [35] With regard to the math program, he says he was not aware of the program details at the time of the mediation and subsequently learned that it was a four-year program involving homework and Saturday sessions. He says when he knew the details, he felt it was too much for a 6 year-old and not in E.'s best interest.
- [36] The respondent denies making negative comments to E. about the claimant.
- [37] As for OFW, he says he had technical difficulties downloading the app following the Consent Order. He had it set up by September 11, 2020, but says he then had difficulties with the notification feature.
- [38] He says that on November 10, 2021, the claimant provided an email address to use "for all communication that is not through OFW", and that on November 17, 2021, Ms. Perry proposed acting as a communication coach and vetting the parties' communications. He says the parties then agreed to communicate through Ms. Perry rather than use OFW. In support of that assertion, he points to the following passage from Ms. Perry's November 17, 2021 email to the parties:

Requiring communications to go through OFW per the court ordered agreement will be ineffective. Use or non-use of OFW is not the problem and will have no impact I know of no court order that can impact this situation for the better except to have a judge or PC vet all communications. We have tried that: your communications have been vetted. I have coached, coaxed, cajoled and threatened. I recommending [sic] books, co-parenting counselling and coaching.

- [39] The respondent attest that he and Ms. Perry agreed upon a payment plan in January 2022 and that he made regular payments under that payment plan since February 2022.
- [40] In her reply affidavit, the claimant attaches a letter from Ms. Perry ("Perry Letter"). In it, Ms. Perry denies that she and the respondent made a payment plan agreement. She also contradicts the respondent's evidence that the parties agreed to stop using OFW.

IV. ISSUES

- [41] The following issues arise for determination:
- Whether the Final Report and Perry Letter are admissible;
 - Whether certain parental responsibilities should re-allocated;
 - The appointment and terms of appointment of a replacement parenting coordinator;
 - Whether the Consent Order was breached and, if so, whether a fine is appropriate;
 - Whether a s. 211 report should be ordered;
 - Whether E.'s last name should be changed;
 - Whether the parties should retain a communications coach; and

- h) The production of financial documents.

V. Admissibility of the Final Report and Perry Letter

- [42] As noted, the Final Report and the Perry Letter are in evidence as attachments to affidavits. The respondent objects to them on a number of bases. First, he says Ms. Perry breached the confidentiality and neutrality terms of the PC Agreement by writing them. Second, he says they are inadmissible hearsay. Finally, he says the opinions and recommendations in the Final Report are inadmissible expert evidence.
- [43] The reports of parenting coordinators are not uncommonly before the court in family law cases: see, for example, *Hokhold v. Gerbrandt*, 2014 BCSC 2411 at para. 8; *K.M.H. v. P.S.W.*, 2017 BCSC 1284 at paras. 10, 17-21, 58; *G.P. v. M.J.R.P.*, 2011 BCSC 1642 at paras. 13, 15-21, 38; *D.N.L. v. C.N.S.*, 2011 BCSC 1535 at paras. 35, 38; *Sanborn v. White*, 2016 BCSC 1290 at para. 32. Generally, their admissibility appears to have been uncontentious. In some cases, the reports appear to have included recommendations, although in many decisions there is no indication one way or the other.

A. Overview

1. The PC Agreement

- [44] The following terms of the PC Agreement are relevant:

- a) The parties recognize that Ms. Perry is a member of the BC Parenting Coordinators Roster Society and meets the FLA's professional requirements (ss. 1.5 and 1.6);
- b) If Ms. Perry withdraws from her appointment, she will, where possible, give 30 days notice and written reasons (s. 1.17);
- c) The Parenting Coordinator, subject to the limitations set out in the PC Agreement, agrees to keep information collected during process private and confidential subject to listed exceptions (s. 1.18). The stated exceptions include "to the extent that one or both Parents have provided written consent to release information".
- d) The role and function of the Parenting Coordinator is as a "neutral third party", who will "remain independent and impartial", treat the Parents "fairly and equally" and "not advance the interests of one party over those of the other, or over the interests of the child" (ss. 2.1 and 2.3); and
- e) None of the discussions between the Parenting Coordinator and either parent are privileged or confidential (s. 2.4);
- f) The parents expressly acknowledge that the Parenting Coordinator is a compellable witness in legal proceedings (s. 7.5-7.8); and

- 9) The Parenting Coordinator "may make any recommendations to the Parents she believes would be in the best interests of the children" (s. 3.3).

[45] Finally, s. 3.7 of the PC Agreement reads:

The Parenting Coordinator may report to the court or an arbitrator on the status of the parenting coordination process, disputes arising in the process or the Parents' compliance with this process, as may be ordered by the court or an arbitrator, or agreement to by the Parents; and, report to the court or to an arbitration on the status of the agreement recached and determinations made during the parenting coordination process, as may be ordered by the court or an arbitrator, or agreed to by the Parents.

2. The Perry Report

- [46] The Perry Report states that is provided under s. 3.3 of the PC Agreement and guided by E.'s best interests. The report is described as being on the parenting coordination process, compliance with the process and status of agreements and determinations under the process, as well as providing recommendations "for the parents" to improve the shared parenting regime. Ms. Perry confirms that the report is given in her capacity as a "neutral". She notes that she has not observed E. or the parties interacting with E.
- [47] Ms. Perry reports only very minor improvements in the parties' relations, communications and decision-making since August 2021 and offers the view that parental decision-making by discussion and agreement is not working. She comments on the respondent's lack of focus and pattern of avoidance, last-minute decision-making, and unwillingness to acknowledge that he is contributing to the conflict. She observes that his failure to communicate often leaves scheduling under the Parental Plan in limbo. She comments that the respondent has not been "approachable, available or particularly receptive" of the parenting coordinator process.
- [48] Ms. Perry opines that E.'s age and stage of development render him ill-equipped to deal with parental conflict. She notes that she has the "impression" that E. sensitive emotionally. She describes at some length how E.'s reported behaviour or character may interact with his parents' high-conflict situation. She expresses concern that some of E.'s reported conduct may be an early warning sign of affinity or parental alienation.
- [49] She suggests the respondent consider therapy and highly recommends that he engage a parenting coach who specializes in high conflict matters.
- [50] She recommends an authoritative parenting coordinator with mental health training, such as Leanne Harder, Dr. Michael Elterman or Mark Smith, be appointed with authority to report directly to the Court.
- [51] She also recommends that it would be in E.'s best interest for the claimant to have final decision-making authority on specific parental responsibilities (the same ones sought in the claimant's application).

[52] Ms. Perry also made various other recommendations to the parties, many of which were not touched upon in argument before me.

3. The Perry Letter

[53] The Perry Letter is dated March 7, 2022 and addressed to the parties' legal counsel. Ms. Perry writes that she has been asked to respond to certain portions of the respondent's application materials and that she intends to respond "factually, to the best of her knowledge".

[54] Ms. Perry denies that she and the respondent agreed on a payment plan. She outlines the payments received from the respondent to date. In response to the respondent's assertion that the parties agreed not to use OFW, Ms. Perry states that the respondent refused to use OFW and that emailing through her using Gmail accounts was a "stopgap" measure following that refusal.

B. Admissibility Ruling

[55] The Final Report is not a report to the court. It was written for and provided to the parties. The PC Agreement provides for Ms. Perry to make recommendations and requires her to provide written reasons for withdrawal. There is no merit to the assertion that Ms. Perry's conduct in writing the Final Report and providing it to the parties was a breach of confidentiality on her part.

[56] Nor did Ms. Perry, by writing the Final Report, breach her duty of impartiality under the PC Agreement. Being impartial does not disentitle a neutral party from forming or stating an opinion on the matters at issue, and the PC Agreement expressly provides for recommendations and reasons to be provided by Ms. Perry.

[57] With respect to the content of the Final Report, there is no doubt that it is critical of the respondent. But nothing the respondent points to in the Final Report provides any basis for asserting that Ms. Perry was biased or had personal interest in the outcome.

[58] The Perry Letter is a factual statement dealing with matters within Ms. Perry's personal knowledge. I can see no reason why Ms. Perry's role under the PC Agreement should prevent her from making statements of fact with respect to whether she had been paid or has agreed to a payment plan.

[59] The Perry Letter also addresses the circumstances that lead to discontinued of OFW. Unlike the payment information, Ms. Perry's statements regarding the circumstances are based on discussions and events that took place during actual coordination. However, in my view, her statements are permitted under the PC Agreement which expressly permits Ms. Perry to reveal information regarding the process provided she has the written consent of one of the parties. The Perry Letter indicates that it is written in response to questions posed by claimant's counsel. I infer from the questions reproduced in the Perry Letter, that the questions posed for answer were requested in writing.

- [60] The respondent correctly notes that Final Report and Perry Letter are hearsay. However, under Rule 10-4(13) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules], hearsay evidence is admissible on an application for an interim order: *Evans v. Mahtoy*, 2015 BCSC 2141 at para. 33.
- [61] That said, the Final Report contains some double hearsay. While prima facie presumptions apply with respect to facts stated in a report to the court (see, for example: *Wu v. Sun*, 2006 BCSC 1891, A.P. v. J.C., 2018 BCSC 1381 at para. 46), but the Final Report does not have that status.
- [62] The double hearsay evidence set out in the Final Report must be disregarded. Notably, that includes the portions of the report that deal with E.
- [63] I turn now to the opinions contained in the Perry Report. The respondent objects to these based on non-compliance with R. 13-7 of the Rules.
- [64] Rule 13-7(1) and (6) of the Rules provide:

Admissibility

- (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 13-5, must not be introduced at trial unless
 - (a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 13-6, and
 - (b) any supplementary reports required under Rule 13-5 (12) or 13-6 (5) or (6) have been prepared and served in accordance with Rule 13-6 (5) to (7).

When court may dispense with requirement of this Part

- (6) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this Part have not been complied with, if
 - (b) the non-compliance is unlikely to cause prejudice
 - (i) by reason of an inability to prepare for cross-examination, or
 - (ii) by depriving the party against whom the evidence is introduced of a reasonable opportunity to introduce evidence in response, or
 - (c) the interests of justice require it.
- [65] The claimant submits that the admissibility of expert evidence is more flexible in the family law context: see, for example, *Dosanjh v. Liang*, 2015 BCCA 18 and *Kuhberg v. Hall*, 2015 BCSC 2230. She argues that strict compliance should not be insisted upon in the circumstances.

- [66] The application of R. 13-7 on an interim application was not addressed by the parties. RR. 13-6 and 13-7 of the Rules are specifically directed to expert evidence at trial.
- [67] The expert evidence rules under the Supreme Court Civil Rules are similarly structured. The approach taken under those rules was discussed in *College of Physicians and Surgeons of British Columbia v. Li*, 2018 BCSC 923:
- [27] While it is questionable whether R. 11-6 applies outside of trials, in my view, the common law still applies to expert reports. Some of the principles respecting expert evidence apply on a case-by-case basis outside of trials. In *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856, aff'd in 2017 BCCA 401, Mr. Justice Abrioux stated at para. 181:
- [181] While the formal requirements of Part 11 of the Supreme Court Civil Rules may only apply to expert evidence at trial, not on interlocutory applications (see *L.S. v. G.S.*, 2015 BCSC 377 at para. 17), it remains a fundamental rule of the common law that no expert opinion evidence can be received in evidence without:
- the essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research
- [Healey v. Chung, 2015 BCCA 38 at para. 20]
- [28] Here, Mr. Justice Abrioux quoted a passage from *Healey v. Chung*, 2015 BCCA 38, where the Court of Appeal discussed the essential components of R. 11-6 for expert reports tendered at trial. The Court of Appeal stated at para. 20:
- [20] While there is, perhaps, room for some latitude in determining whether a document meets the requirements of the Rules, for example as to including the address and expertise where those are capable of easy determination based upon the information in the document, the essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research, must be included to justify receipt of the report as an exception to the hearsay rule.
- [29] In my view, the essential components of R. 11-6 address the underlying common law principles that allow the court to admit expert evidence. My analysis of the impugned expert opinion evidence will, therefore, be guided by the general principles guiding the admission of expert opinion evidence.
- [30] In *Mazur v. Lucas*, 2010 BCCA 473 at para. 42, the Court of Appeal articulated the common law principles underlying R. 11-6:

- [42] New Rule 11-6 expands on what an expert was required to state under old Rule 40A, but does not alter the general principle that it is essential for the trier of fact to know the basis of an expert opinion so that the opinion can be evaluated. The Rule has a dual purpose. The second purpose is to allow the opposing party to know the basis of the expert's opinion so that they or their counsel can properly prepare for, and conduct, cross-examination of the expert, and if appropriate, secure a responsive expert opinion.
- [68] In *L.S. v. G.S.*, 2015 BCSC 377, Schultes J. took a comparable approach under these Rules on an interim application:
- [17] First of all, I agree that Rule 13-6 applies only to the use of expert evidence at trial, and that the disclosure requirements under subrule (8) are not the ones that I should be considering in this application.
- [18] I also agree that it is appropriate in certain circumstances to rely on expert evidence in interlocutory proceedings, particularly in family law, where a final order can be varied by a chambers application and there are numerous issues relating to the best interests of the children on which expert evidence could be helpful.
- [19] However, despite the absence of a specific rule governing the use of expert evidence in chambers matters, a court should still ensure that there is fair notice to the other side of the factual underpinnings of any expert opinion. What should be avoided however, is bogging down a hearing that is meant to be a more efficient and timely process than a trial in unhelpful procedural requirements.
- [69] Thus, I agree with the claimant that strict compliance with the requirements of R. 13-7 is not required here. Although I have reached that conclusion on a different basis than was argued, I note that if I were to assume R. 13-7 applied here, then I would adopt the approach taken by Greyell J. in *S.D.H. v. T.H.*, 2016 BCSC 380:
- [87] I am not inclined to admit the reports on the grounds there is more flexibility in permitting expert evidence in family matters than in civil matters. Both *Dosanjh* and *Kuhberg* were decided on very different facts than those present in this case. Rather, I find the introduction of both reports admissible under the exception contained in R. 13-7(6) of the Family Rules. Given the early production of the reports and the statement by the Father's counsel that she intended to rely on the reports and the reference to at least Dr. Ley's report in the material to be relied on in the application, the Mother cannot assert she has been prejudiced by an ability to prepare for cross-examination the author of the report. If there was information missing from the report(s), the Mother's counsel had ample opportunity to make a demand for such information well in advance of the hearing (see Family Rules R. 13-6(8)).
- [88] Accordingly, I admit both Dr. Ley's and Mr. Barker's reports into evidence on this application.

- [70] In my view, the approach adopted by Greyell J. is essentially a different door to the same room Schultes J. landed in.
- [71] The respondent acknowledged Ms. Perry's qualifications and expertise when he signed the PC Agreement. Ms. Perry expressly confirmed that she understood that her role was that of a neutral in the Final Report. I have dismissed the respondent's assertions that the contents of the Final Report belie that claim of neutrality.
- [72] The respondent has been in possession of the Final Report since Ms. Perry first delivered it to the parties, and the claimant's notice of application made it clear that she intended to rely on it. The respondent was not prejudiced by the introduction of the Final Report. I note that no objection was made to the claimant's reliance on the Final Report in the application response.
- [73] As above, Ms. Perry's opinions based on reported information are not admissible. I also consider Ms. Perry's recommendation that the respondent take therapy to be outside her scope of expertise. However, her opinions in the Final Report regarding the parties' ability to engage in the communication and decision-making necessary to co-parent effectively are admissible.
- [74] Finally, counsel for the respondent submitted that providing expert evidence was incompatible with the role of parenting coordinator. The submissions were a bare assertion. No authority was provided and no policy argument was developed.
- [75] The Court of Appeal's decision in *Friedlander v. Claman*, 2016 BCCA 434, was not raised by either party.
- [76] In *Friedlander v. Claman*, 2015 BCSC 2409, the court had granted the father's earlier application (not under FLA, s. 211) to have the parties' parenting coordinator - Dr. Elterman - provide recommendations to the court (see paras. 11 and 83). That report was considered by the court in deciding a variance application. On appeal, the mother appears to have challenged the Elterman report as a non-compliant s. 211 report on the basis that, contrary to s. 211(2)(b), Dr. Elterman had a previous connection with the parties.
- [77] The Court of Appeal, per D. Smith, J.A., commented as follows:
- [61] On appeal, the mother raised a procedural issue regarding the timeline in which the father's application for the Elterman Order was brought and determined. The application was brought on November 9, 2015, heard and determined on November 10, 2015. Dr. Elterman's report was filed with the court on November 21, 2015 and the father's applications for the Contempt and Variation Order were heard on November 25, 2015. The judge issued her reasons for judgment on December 18, 2015.

- [62] The mother did not ask to adjourn the father's application for the Elterman Order. While her trial counsel (who was not counsel on appeal) did raise the issue of whether a parenting coordinator could or should be appointed to write what counsel submitted amounted to a s. 211 assessment, in the end no objection was made to the admissibility of Dr. Elterman's report at the hearing, no request was made to cross-examine Dr. Elterman on its contents, and no appeal was taken from that Order.
- [63] The role of a parenting coordinator is a relatively new concept that, in this jurisdiction, only formally surfaced with the implementation of the FLA. It is not without some controversy as evident from the differing views with respect to its use as discussed in *Fleetwood v. Percival*, 2014 BCCA 502, by the majority (at paras. 44 - 53) and the minority (at paras. 21 and 22, 27 - 33).
- [64] In *Fleetwood*, this Court upheld an order that dismissed an application for the appointment of a parenting coordinator under s. 14 of the FLA subject to the Family Law Act Regulation, B.C. Reg. 347/2012 (the "Regulation"). Section 6(2) of the Regulation sets out the requirements that must be met before a candidate may act as a parenting coordinator: (a) he or she must enter into a written agreement with the parties for those services; and (b) he or she must provide written confirmation to the parties that he or she meets the professional requirements to be a parenting coordinator. There is no issue that Dr. Elterman met these requirements.
- [65] On appeal, counsel for the mother provided more comprehensive submissions on whether a parenting coordinator should provide the court with what the mother submitted amounted to an s. 211 report, given the nature of his or her role to assist parents in resolving their disputes. In my view, this issue is of some import and should have been more comprehensively addressed before the chambers judge rather than in this Court, effectively as a matter of first instance. Moreover, as the Elterman Order was not appealed, it would also violate the common law rule against collateral attack .
- [66] I would not accede to this ground of appeal.
- [Emphasis added.]
- [78] The facts here are different. The Final Report was not ordered by the court. But to the extent that a similar policy objection has been raised with respect to the propriety of a parenting coordinator providing an expert report, the point has not been adequately addressed by the parties.
- [79] Here, Ms. Perry has already withdrawn from the file. In the particular circumstances of this case, and on bare objection made, I see no policy basis for excluding Ms. Perry's evidence, expert or lay.

VI. Parental Responsibilities

- [80] The claimant relies on her own evidence and the Final Report to argue that a reallocation of parental responsibilities is appropriate.
- [81] The evidence satisfies me that the respondent's conduct and communications in co-parenting have been and continue to be problematic. He appears to be waging a war of attrition by non-communication.
- [82] The respondent argues that none of the incidents relied on by the claimant are significant. I agree that many of the incidents raised would be minor frustrations and annoyance if considered in isolation. I also agree that, if the instances are considered in isolation, the respondent has offered some ostensibly reasonable explanations. However, I am persuaded that it is inappropriate to consider them in isolation. Rather, they are the constituent parts of a pattern of behaviour. That pattern colours the many incidents and the many proffered explanations.
- [83] I find the following points particularly informative.
- [84] The respondent's explanations for his failure to sign the finalized PC Agreement and Parenting Plan documents are unsustainable. These were documents setting out agreements already entered. The respondent held off signing to impose delay or create leverage, neither of which is appropriate.
- [85] Similarly, the respondent agreed, in August 2021, to have Ms. Perry arbitrate certain issues, but then failed to sign the arbitration agreement. Those issues remain outstanding.
- [86] The respondent's rejection and subsequent proposal of therapist X is very telling. The respondent rejected X in very strong terms, but later proposed her without any explanation. In my view, the reasonable inference is that he simply forgot that he had refused her. I conclude that he was not engaging in good faith, but rather successfully seeking to introduce delay or make things difficult.
- [87] While the respondent attests that he and Ms. Perry have a payment plan agreement, the email exchange he relies on in support of that does not, on its face, evidence an agreement. Further, Ms. Perry says there is no agreement. In my view, this colours the respondent's many explanations.
- [88] Looking at the circumstances as a whole, I am satisfied that the respondent has engaged in behaviour that was intended to avoid, frustrate or delay the resolution of co-parenting issues. This conduct has frustrated the parenting coordination process in particular and parental decision-making in general. It also indicates that the respondent has been unable to put E.'s best interests first in the co-parenting decision-making process.
- [89] I am persuaded that a limited reallocation of parental decision-making responsibility sought by the claimant is appropriate. As it is limited in scope, it will enable day-to-day decision-making to move forward in E.'s best interests, while the parties continue to consult within a new parenting coordination process.

- [90] However, I am not prepared to include scheduling parenting time under the Parenting Plan as one of the responsibilities. I appreciate that Ms. Perry noted it as a problematic area. Nonetheless, I consider it a matter that should continue to be determined by the parenting coordinator in the event of disagreement.
- [91] In addition to serving E.'s best interests, the order sought by the claimant should reduce the parties' reliance on a parenting coordinator and the court to make day-to-day parenting decisions, and yet enable the parties to continue to consult and engage through the parenting coordination process and hopefully improve their skills.

VII. Parenting Coordinator

- [92] The remedial orders I am making under here are aimed at setting a renewed parenting coordination process up for success, while the reallocation above ensures the parties' challenges do not stand in the way of E.'s best interests or weigh down the coordination process.
- [93] It is important that the parties recommence working with a parenting coordinator as soon as possible. It is also important to ensure the functioning of the coordination process is not frustrated this time around and is available to the parties without interruption. To these various ends, a number of terms and conditions will be imposed under FLA, ss. 15, 218, 222, 227 and 228.
- [94] The parties are ordered to complete a minimum period of 24 months with a new parenting coordinator. The PC Agreement will continue to bind the parties subject to mutually agreed upon amendments approved or requested by the retained parenting coordinator.
- [95] In argument, the respondent appeared to agree that the claimant's proposed parenting coordinator, Mark Smith, who is a registered social worker, has a skill set that may be of assistance. In any event, I am satisfied that it is the case. Provided Mr. Smith is willing and able to act as their parenting coordinator, the parties are directed to retain Mr. Smith.
- [96] Should Mr. Smith be unwilling or unable to act, the parties will have two weeks to mutually agree on a parenting coordinator with mental health training. If the parties are unable to agree, an application may be made to the court with each party entitled to propose two persons qualified and willing to act as parenting coordinator for appointment.
- [97] The respondent will also be required to:
- a) forthwith deposit \$7,500 in trust with the retained parenting coordinator to be applied against his 50% share of invoiced fees; and
 - b) maintain a minimum deposit of \$2,500 in trust with the parenting coordinator to be applied against his fees on an ongoing basis.

- [98] I decline to empower the parenting coordinator to assess fees on a basis other than 50/50. The basis for that request is the claimant's assertion that the respondent has unnecessarily caused matters to be referred to the parenting coordinator. The reallocation under s. 41 is intended to reduce the number of determinations the parenting coordinator will be called upon to make.
- [99] I decline to pre-authorize the new parenting coordinator to report to the court. An application may be brought to that end.

VIII. Breach of the Consent Order

- [100] The claimant asks the court to fine the respondent for failure to comply with the terms of the Consent Order.
- [101] The respondent's explanations for failing to use OFW ring hollow. I find that he made no sincere effort to download the app in a timely fashion nor to use it once it was downloaded. The respondent's claim that having to check the app for notifications causing him anxiety is untenable. There is no evidence these were excessive and co-parenting obviously requires engagement.
- [102] With regard to the use of email instead of OFW, on its face, once again, the passage of Ms. Perry's email the respondent relies on as evidence of an agreement does not support his position. The claimant and Ms. Perry both deny there was an agreement. I am satisfied that the respondent knowingly failed to comply with the Consent Order terms regarding terms regarding response times and the use of OFW.
- [103] The relevant Consent Order terms were made under ss. 222 and 225 of the FLA. The claimant's application for a fine relies on under s. 230 of the FLA. The respondent opposes a fine and asserts that s. 230 does not apply.
- [104] Part 10 of the FLA includes the following provisions:

Division 5 -- Orders Respecting Conduct

Purposes for which orders respecting conduct may be made

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending final determination of a family law dispute.

Orders restricting communications

225 Unless it would be more appropriate to make an order under Part 9 [Protection from Family Violence], a court may make an order setting restrictions or conditions respecting communications between parties, including respecting when or how communications may be made.

Other orders respecting conduct

227 A court may make an order requiring a party to do one or more of the following:

- (a) give security in any form the court directs;
- (b) report to the court, or to a person named by the court, at the time and in the manner specified by the court;
- (c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222 [purposes for which orders respecting conduct may be made].

Enforcing orders respecting conduct

228 (1) If a party fails to comply with an order made under this Division, the court may do one or more of the following:

- (a) make a further order under this Division;
- (b) draw an inference that is adverse to the party, and make an order based on the inference;
- (c) make an order requiring the party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the non-compliance, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the non-compliance, or
 - (iii) a fine not exceeding \$5000;
- (d) make any other order the court considers necessary to secure compliance.

Division 6 -- Enforcement Generally

Enforcing orders generally

230 (1) Subject to section 188 [enforcing orders respecting protection], an order under this section may be made only if no other provision of this Act applies for the purposes of enforcing an order made under this Act.

- (2) For the purposes of enforcing an order made under this Act, the court on application by a party may make an order to do one or more of the following:

- (a) require a party to give security in any form the court directs;
- (b) require a party to pay
- (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, including fees and expenses related to family dispute resolution,
- (ii) an amount not exceeding \$5000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party's actions, or
- (iii) a fine not exceeding \$5000.

[Emphasis added]

[105] Section 230 is not available where another enforcement provision applies: A.J.F. v. N.L.S., 2020 BCSC 26 at para. 84. The relevant terms were imposed under Division 5. Section 228 is the proper provision for enforcing the Consent Order.

[106] That said, s. 228(1)(c) and s. 230(2)(b) are materially identical provisions. The respondent has not been prejudiced by the claimant's misreliance. The question remains whether a fine is appropriate in the circumstances.

[107] The proper approach to s. 228 is as outlined in A.J.F. :

[85] The measures set out in ss. 228 and 230 should be resorted to when, and only to the extent, necessary and appropriate to enforce and secure compliance with orders made under the FLA. Orders under ss. 228 and 230 may be necessary to impart on one or both parties that they are bound by the FLA and must comply with court orders.

[86] Although compliance with the FLA and related court orders is critical, the FLA mandates a more holistic approach to resolving family disputes that minimizes delay, formality and conflict between the parties: s. 199(1). The remedies available under ss. 228 and 230 empower the court to provide progressively more serious responses as a particular case may dictate. More importantly, a court's objective should be to fashion a remedy that ensures compliance while addressing the specific situation before the court.

[87] Given the nature of the current conflict between the parties and its relation to the children, the Court must encourage the parties to focus on the best interest of the children.

[Citations omitted.]

[108] While the respondent has not complied with the Consent Order, this is the first such finding against him: Ho v. Chu, 2020 BCSC 927 at paras. 47-48. Further, remedies above are already, in part, responsive to his non-compliant conduct.

[109] I conclude that a fine is not warranted.

IX. Section 211 Report

- [110] The claimant sought a s. 211 report only in the alternative to her application for a reallocation of parental. The reallocation has been granted.
- [111] Nonetheless, I note that the respondent was prepared to consent to a s. 211 report on terms. The parties are encouraged to seek a s. 211 report if an agreement can be reached.

X. Name Change

- [112] The claimant seeks an order changing E.'s last name from O. to R-O or, in the alternative, to O-R. The order sought is one that can be made under s. 4.1 of the Vital Statistics Act, R.S.B.C. 1996, c. 479.
- [113] The claimant is Persian and considers it important for E.'s last name reflect to their Persian heritage and believes it will help E. relate to the Persian culture and to her side of the family.
- [114] The respondent says the claimant is the one who chose E.'s current last name. He notes that E. has a Persian middle name given in honour of a member of the claimant's family.
- [115] The respondent says changing E.'s last name is against his best interest. He notes that E. is almost 7, and has four half-siblings that have the last name O. He submits that the change would be confusing for E. and make him feel different from his half-siblings.
- [116] At para. 17 of *Landa-McAuliffe v. Boland*, 2012 BCSC 1354, Savage J. set out a number of factors for consideration in naming disputes:
- a) the welfare of the child;
 - b) the short and long term effects of a change in the child's surname;
 - c) any embarrassment the child might suffer if the surname is different from that of the custodial parent;
 - d) the potential for confusion of identity;
 - e) the effect of change of name on the child; and
 - f) the effect of frequent or random changes of name.
- [117] I conclude that it is in E's best interest to have a hyphenated last name consisting of the parties' last names. I agree that this will help E. to identify with his full heritage and with both sides of his family. I do not agree that E. will find the change confusing. He is old enough to understand the change and the reason for it. Further, the evidence establishes that E. already strongly identifies with his half-siblings and has a close relationship with them. Given that O. will continue to be part of his last name, that can be expected to continue.

[118] The Vital Statistics Act includes these provisions:

Name of child

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

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

Court order respecting child's name

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

(a) that the registration of a child's name be changed, or

...

(2) If an order under subsection (1) is in respect of a child's surname, the court must order the child's surname to be

(a) the surname of a parent, or

(b) a surname consisting of the parents' surnames hyphenated or combined in alphabetical order, in which case, section 4 (2) and (3) applies.

[119] I make an order under s. 4.1 of the Vital Statistics Act declaring that E., as the child of the parties, is to have a surname consisting of the parties' surnames hyphenated in alphabetical order (i.e., O.-R.).

[120] The registrar general shall amend E.'s name accordingly.

XI. Respondent's Application

[121] The respondent's application to engage Ms. Gamache as a communications coach for the parties is dismissed, but with liberty to re-apply. The replacement parenting coordinator be more successful in addressing these matters than Ms. Perry was.

[122] With regard to financial documents:

- a) The Form F8 financial statements filed by the parties are both outdated. Unless an updated financial was already voluntarily delivered post-hearing, the parties are to exchange updated financial statements within 14 days of these reasons.
- b) Both parties are to provide tax returns and notices of assessment for 2021 to the other as soon possible.
- c) The claimant is to provide the Onyka Advisory 2021 financial statement to the respondent as soon as possible.
- d) The claimant is to provide a copy of her bank statements for any and all accounts held in her sole name or jointly with others for the period March 1, 2020 through March 1, 2022.

XII. Disposition

[123] Under FLA, s. 41, the claimant is granted, on an interim basis, decision-making authority in the following areas of parental responsibility in the event the parties are unable to reach an agreement following consultation:

- a) medical decisions, including mental health assessments and treatments;
- b) dental and orthodontics;
- c) ophthalmology/optometry (glasses);
- d) academic including school placement, tutoring and assessments and parent/teacher conferences;
- e) extracurricular activities including summer, winter, spring break camps, weekend sports, and new interests; and
- f) socialization (e.g., play dates to maintain friendships).

[124] The respondent will have the right to apply for directions on any significant decision he considers contrary to the best interests of the child, under s. 49 of the FLA.

[125] Under FLA, ss. 15, 218, 222, 227 and 228:

- a) The parties are ordered to complete a minimum period of 24 months with a new parenting coordinator;
- b) The PC Agreement will continue to bind the parties subject to mutually agreed upon amendments approved or requested by the retained parenting coordinator;
- c) Provided he is willing and able, the parties are directed to retain Mark Smith, registered social worker, as their replacement parenting coordinator;
- d) If Mr. Smith advises he is unwilling or unable to act, the parties will have 14 days to reach mutual agreement on a parenting coordinator. If the parties are unable to agree within that time frame, either party may apply to the court. On application, each party entitled to propose two persons qualified and willing to act as parenting coordinator, and the appointment will be directed by the court;
- e) On the engagement of a new parenting coordinator, the respondent will forthwith deposit \$7,500 in trust with the coordinator to be applied against the respondent's 50% share of invoiced fees; and
- f) The respondent is required to maintain a minimum deposit of \$2,500 in trust with the parenting coordinator to be applied against his fees on an ongoing basis.

[126] The claimant's application for a fine is dismissed.

[127] The claimant's application for an order for a s. 211 report is dismissed.

[128] The respondent's application for a parenting coach is dismissed, but with liberty to reapply.

[129] E., as the child of the parties, is to have the surname O.-R. The registrar general of vital statistics shall amend E.'s name accordingly.

[130] The respondent's application for an order that the parties retain Ms. Gamache is dismissed, but with liberty to re-apply.

[131] The document production order are stated above at para. 122.

[132] The plaintiff will have her costs in these applications in any event of the cause.

"Tucker, J."

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