
CANADA / JUDGMENT

Khangura v. Rogalski

2017 BCSC 1753

COURT

Supreme Court of British Columbia

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2017 BCSC 1753 Khangura v. Rogalski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khangura v. Rogalski,

2017 BCSC 1753

Date: 20170929

Docket: E130791

Registry: Vancouver

Between:

Seema Simrit Khangura

Claimant

And

Gerald Konrad Rogalski

Respondent

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

Counsel for the Claimant:

S.M. Kinney

Counsel for the Respondent:

S.L. Specht

Place and Dates of Hearing:

Vancouver, B.C.

February 9 & 10, 2017

July 25, 2017

Place and Date of Judgment:

Vancouver, B.C.

September 29, 2017

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Introduction

- [1] The respondent, Gary Rogalski, applies to vary terms of a final consent order granted on November 21, 2013 (the "2013 Order"), regarding parenting time, joint guardianship, dispute resolution, and communication.
- [2] Mr. Rogalski and the claimant, Seema Khangura, are the parents of I, who was born on July 1, 2009. Mr. Rogalski also has an older child, Mark, who is now a young adult.
- [3] The parties met in 2005 and married in 2006. Mark spent time in their care during the marriage. The parties separated in 2012. The claimant is a family physician who worked part time when I was younger. The respondent is employed as an engineer. He also operates two small businesses.
- [4] The thrust of his application is that since the 2013 Order, the claimant has undermined his relationship with I, contrary to her best interests.

2013 Order

- [5] The 2013 Order is detailed and comprehensive. In addition to parenting orders, it includes a divorce order, child support orders, and effects a division of family assets.
- [6] The parenting orders provide that I's primary residence is with the claimant, and award the parties joint custody and joint guardianship of I. The joint guardianship and parenting time provisions are somewhat complicated.
- [7] Joint guardianship is defined at para. 3, and reflects a version of the "Master Joyce Model". The claimant is granted sole discretion to make decisions about I's religious and spiritual upbringing, her participation in school activities and extracurricular activities, her diet, her care outside of school hours, and which school she attends. The claimant is obligated to discuss significant decisions with the respondent, except those related to I's education and residence. In the event the parties disagree, until I is eight, the claimant has an unfettered right to decide on two extracurricular activities that occur during his regular parenting time. If they disagree about additional activities that also occur during his regular parenting time, they are required to attend sessions with "their divorce coaches". Absent an agreement, the claimant has the right to make the decision, subject to respondent's right to seek a review if he considers the decision contrary to I's best interest.
- [8] The respondent's regular parenting time, which is set out in para. 5, includes:
 - the second and fourth weekends of each month from 5:30 pm Friday until 4:00 pm Sunday. For those months with five weekends, the fifth weekend is shared (and specified), unless it occurs during I's longer school break, in which case the holiday parenting time schedule applies;
 - each Wednesday from 3:45 pm to 6:00 p.m., with the respondent being required to pick up and drop off I at the claimant's house or at such other place or times as agreed to by the parties in writing in advance; and

· such other times as agreed in writing between the parties.

- [9] Paragraph 5(d) specifies that at all other times, except as otherwise set out in the order, I will be with the claimant.
- [10] The holiday parenting time schedule at para. 6 provides the respondent with increasing overnights that correlate with I's age (four nights when she is four, five when she is five and so on). Although the respondent is awarded two blocks of time with I at the winter or Christmas break, he must provide written notice by January 15 in odd numbered years if he wishes to exercise any time at spring break in those odd numbered years. He is also required to ensure I participates in her extracurricular activities during that time. During the summer break, the respondent again has two blocks of time, one at the end of July and the other at the end of August, with the maximum number of nights being limited to I's age. If he is not available to care for I personally during any of his holiday parenting time, he is required to provide the claimant with 30 days' written notice.
- [11] Paragraphs 7 and 8 grant the claimant additional vacation or travel time with I:
7. In addition to her time set out in the Holiday Parenting Schedule, the Claimant may have vacation/travel time with [I.R.], including international travel, for a period or periods which in the aggregate are of up to 4 weeks each year (or for such other greater amount of time as the parties may agree) at such times as the Claimant may determine in her sole discretion except that this vacation/travel, with the exception of the Siddha Yoga Family Retreat each summer, will not take place during the Respondent's holiday time with [I.R.] unless agreed to by the Respondent in advance and except as otherwise provided in this Order. The vacation/travel time will include the yearly Siddha Yoga Family Retreat each summer. If a Siddha Yoga Family Retreat occurs and is attended by the Claimant and [I.R.] during the Respondent's holiday parenting time in any summer, such missed holiday parenting time of the Respondent will be taken at another time which is agreed to by the parties in writing.
8. The Claimant may also travel with [I.R.] to India for approximately 4 weeks during each 4 year period at such time as the Claimant may determine, in her sole discretion, including during the Respondents' holiday parenting time with [I.R.]. Such travel will not be included in the four weeks of travel time provided for in paragraph 7 of this Order.
- [12] Paragraph 10 expressly suspends the regular parenting time schedule during the Holiday Parenting Schedule and the claimant's additional vacation/travel time.
- [13] The 2013 Order also contains various restrictions on the respondent's parenting time with I. For example, para. 11 requires him to maintain a vegetarian diet for her. Paragraph 12 entitles the claimant to take I to all school and school related events. Consequently, the respondent must return her to the claimant's home at least 60 minutes before any such event that occurs during his parenting time, although he is permitted to attend school and school related events himself. Paragraph 14 prohibits the respondent from taking I camping until she is 12, without the written consent of the claimant. Nor is he permitted to leave I with any

other caregiver, including his son Mark, without the claimant's written consent.

- [14] Paragraph 13 requires the parties to attend a certain number of four-way sessions with divorce coaches each year and to request emergency sessions if they are not able to resolve issues between themselves.

Procedural History

- [15] The respondent filed his Notice of Application on May 12, 2016. In addition to seeking to vary the 2013 Order related to parenting time and joint guardianship, he sought production of a s. 211 report, the appointment of a parenting coordinator to replace the role of the divorce coaches, and an order pursuant to s. 61(2)(c) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], requiring the claimant to provide him with compensatory parenting time, as well as \$5,000 for denial of his parenting time since September 2014. The application came before Justice Leask on June 20, 2016. He ordered a s. 211 report and appointed psychologist Dr. Nicole Aubé. His order required her to consider the "relationship between each parent and the Child, and the effect of the current parenting arrangement on the best interest of the Child and her relationship with her parents" (the "211 Order"). The 211 Order also restricted the materials Dr. Aubé was to receive. The balance of the respondent's application was adjourned generally pending completion of the report.

Positions of the Parties

- [16] The variations sought by the respondent are contained in a draft order. The terms of the draft order and the claimant's position regarding those terms are as follows:

Joint Guardianship

1. Paragraph 3(b) of the (2013 Order) shall be varied such that before the Claimant makes any significant decisions with respect to [I.R.]'s health, medical care, dental care or diet as set out in paragraph 3(a) of the Order, she shall be required to:
 - a. Obtain an independent diagnosis by a Licenced MD agreed upon by the Respondent and provide a written diagnosis from that MD to the Respondent;
 - b. Follow the recommendations of that MD with respect to standard medical diagnostic procedures or dental diagnostic procedures to be performed;
 - c. Obtain a written treatment plan or options of treatment from the MD or dentist and follow same unless the parties otherwise agree in writing.

2. In the event the parties disagree on what medical, dental or dietary treatment is best for [I.R.], they shall engage a neutral third party professional, being a medical doctor or psychiatrist licenced by the College of Physicians and Surgeons of British Columbia or a dentist licenced by the College of Dental Surgeons of British Columbia, in that specific area to review the concern for [I.R.] and provide them with a written recommendation on what course of treatment is in [I.R.]'s best interests, which recommendation they shall follow.
3. In the event that the parties disagree on any matter involving [I.R.]'s psychological wellbeing, they shall jointly engage a qualified child psychologist and follow the recommendations of the child psychologist for [I.R.].

· The claimant opposes this change. She argues the existing provisions gave her sole discretion over certain issues in order to reduce conflict and prevent the need for difficult communication, as well as to maintain her role as primary parent. She submits I's current doctor is sufficient, and engaging a third party expert would be costly. She also submits that there is no need to engage a child psychologist since I is doing very well. If a future need for a psychologist should arise, the parties can discuss and follow the recommendations of I's physician.

Parenting Time

4. Paragraph 5 of the (2013 Order) shall be varied such that commencing May 1, 2016, the Respondent shall have regular parenting time with [I.R.] as follows:
 - a. Every second weekend from 5:30 p.m. on Friday until 4:00 p.m. on Sunday, with the Respondent picking up [I.R.] at the beginning of his parenting time and the Claimant picking up [I.R.] at the end of his parenting time.
 - b. In the event of a Pro-D day, the Respondent's parenting time shall be extended such that he will pick up [I.R.] on Thursday at 5:30 p.m. (if the Pro-D day is a Friday) or retain [I.R.] until Monday at 4:00 p.m. (if the Pro-D day is a Monday).
 - c. Every Wednesday from 3:00 p.m. to 6:30 p.m. with the Respondent to pick [I.R.] up from school at the beginning of his parenting time and the Claimant to pick [I.R.] up from the Respondent's home at the end of his parenting time, unless otherwise agreed between the parties.
 - d. Such other times as may be agreed upon in writing between the parties.

(the "Regular Parenting Schedule")

· The claimant is opposed to 4(a). She submits this variation is insignificant and would result in more scheduling complexity. She consents to 4(b). In response to 4(c), the claimant agrees the respondent may pick up I at 3:00 p.m. from school or an extracurricular activity, as well as a drop off time of 6:15 p.m. but she takes the position the drop off should occur at her home.

5. Paragraph 12 of the (2013 Order) shall be varied such that the Respondent shall be at liberty to take [I.R.] to any school or school related events, including events hosted by her peer group that occur during his parenting time, with there being no requirement that [I.R.] be taken to the Claimant's residence either before or after any such event.
 - The claimant does not consent to this change. The claimants argues she is entitled to take I to school events because she is paying for I's private school education and responsible for decisions regarding education under the 2013 Order.
6. The Respondent's parenting time under the Regular Parenting Schedule shall not be interrupted without the express written agreement of the Respondent in advance and in the event such agreement is provided, the Respondent shall be provided with make-up parenting time either the week before or the week after the interruption, with the exception of the Claimant's right to take 4 weeks of holiday time with the Child during any given year.
 - Other than the current provision concerning school events, the claimant argues the amendment is unnecessary because the 2013 Order does not allow for the interruption of the respondent's regular parenting time.
7. During both the Regular Parenting Schedule and during the Holiday Parenting Schedule, [I.R.] shall not go more than 10 days without having an overnight in the care of the Respondent unless both parties agree.
 - The claimant is opposed to this change as it could prevent the India trip or cut into her vacation time with I, as permitted under the 2013 Order.
9. The Respondent's parenting time under the Regular Parenting Schedule shall not be suspended due to illness of the Child absent agreement by the Respondent, which agreement shall not be unreasonably withheld in the event that [I.R.] is suffering from an illness which includes her vomiting or having diarrhea to an extent that it interferes with her ability to attend school or activities, or upon receiving a written opinion from a neutral physician agreed upon between the parties that [I.R.] is too ill to be safely moved from the Claimant's home while she recovers.
 - This issue is not addressed in the 2013 Order. The claimant agrees that if I is suffering from a "more severe illness" when the respondent's parenting time is to be exercised, and he does not agree to suspend the visit, she must provide a written statement from a medical practitioner.
10. In the event that the Respondent's parenting time with [I.R.] is interrupted due to illness, the Respondent shall receive make-up parenting time with [I.R.] within 2 weeks of the missed parenting time occurring.
 - This is not addressed in the 2013 Order and the claimant does not consent.

11. The Claimant shall not schedule any extracurricular activities, play dates, events, appointments or other plans for [I.R.] during the Respondent's parenting time without the Respondent's express consent in writing in advance.
 - The claimant is opposed to this change. She says that the only activities scheduled during the respondent's parenting time were permitted under the 2013 Order and amounted to less than 5% of his time.
12. Paragraph 6(f) of the (2013 Order) shall be varied such that the restriction on the number of nights that [I.R.] may be in the care of the Respondent based on her age shall be eliminated.
 - The claimant does not consent to this change.
13. Paragraph 6(h) of the (2013 Order) shall be varied such that the Claimant and the Respondent shall equally share [I.R.]'s Spring Break each year, with the Claimant to have the first half of Spring Break in even numbered years and the Respondent to have the first half of Spring Break in odd numbered years and with Spring Break to start at 3:00 p.m. on the last day of classes before Spring Break and end on the night before the first day of the return to classes at 4:00 p.m.
 - The claimant agrees that spring break can be shared each year with the respondent exercising his time with I during the first week.
14. Paragraphs 6(i) and 10 of the (2013 Order) shall be varied such that in addition to the Respondent's regular parenting time, the Respondent shall have two blocks of summer holiday time totalling 14 days, one block in July and one block in August each year, with the Respondent to provide his dates to the Claimant by April 1st of each year for his summer holiday parenting time.
 - The claimant is agreeable to continuing regular parenting time during I's summer break from school, except when either parent has holiday parenting time, which she says has been done since the 2013 Order. For the respondent's regular parenting time on Wednesdays, during the summer, she proposes a 3:00 p.m. pickup from her home or, if I is enrolled in any summer activity or camp, from that location when it finishes for the day, and drop off at the claimant's home by 6:15 p.m. The drop offs and pickups for the respondent's regular parenting time on weekends during the Summer Break would remain the same. The claimant says this arrangement has been successful and has helped prevent a gap in the respondent's parenting time.
15. In the event that the parties do not agree on the summer holiday dates, the Respondent's dates shall be given preference in odd numbered years and the Claimant's dates shall be given preference in even numbered years.
 - The claimant opposes this change.
16. Paragraphs 7 & 8 of the (2013 Order) shall be varied such the Claimant shall not have the right to interrupt any of the Respondent's schedule holiday time with [I.R.] during Spring Break, Summer holidays or Christmas holidays during her 4 weeks of holiday time during

the year with the Child, absent the written consent of the Respondent and with the Respondent receiving make-up time for any missed holiday parenting time as a result, however the Claimant shall be entitled to interrupt the Respondent's Regular Parenting Schedule during these 4 weeks.

- The claimant opposes this change.

Communication

8. The Claimant shall not discuss any requested interruption to the Regular Parenting Schedule with [I.R.], unless and only if an interruption has been agreed to by the parties.

- The claimant submits their communications with I are already adequately addressed by paras. 16 and 17 of the 2013 Order, which require them to demonstrate, speak, and behave respectfully toward each other, particularly in the presence of I. She suggests that other parties talk to I about events that are scheduled to occur during the respondent's time which she cannot prevent.

17. Neither the Claimant nor the Respondent shall discuss any parenting decision with [I.R.] until after a decision was made and then, with the parties providing [I.R.] with a mutually agreed upon statement, which shall be consistent as between what both parents state to [I.R.].

20. Any form of communication between the parties regarding [I.R.], including communication through any third parties shall be factual in nature as to the specific issue to be addressed at that moment and shall not make any statements of opinion or criticism against the other parent.

- Again, the claimant argues that all of these proposed changes are already addressed by paras. 16 and 17 of the 2013 Order.

Parenting Coordinator

18. Paragraph 13 of the (2013 Order) shall be varied such the parties will not be required to attend any further four-way sessions with their divorce coaches unless expressly agreed between them.

- The claimant opposes this change.

19. The parties shall engage a Parenting Coordinator within 30 days of this Order being entered, with the parties to pay the cost equally, subject to any determination by the Parenting Coordinator that one of the parties has unnecessarily increased the costs of the Parenting Coordinator's services by taking an unreasonable position, by disregarding the instructions of the Parenting Coordinator or by attempting to abuse the Parenting Coordination process in order to frustrate resolution on an issue to be resolved for [I.R.].

21. The parties shall follow any directions of the Parenting Coordinator as it relates to their communication regarding [I.R.].

- The claimant argues the expense of a parenting coordinator is unjustified given the specificity of the parenting arrangements.

Issues

[17] The respondent's application raises the following issues for determination:

- a. Has there has been a material change in circumstances since the 2013 Order was made?
- b. If so, what variations to the 2013 Order are in I's best interest? Should a parenting coordinator be appointed to replace the role of divorce coaches?
- c. Has the claimant wrongfully denied the respondent's parenting time under the 2013 Order and if so, should there be compensatory parenting time and should the claimant be required to pay him \$5,000?

Material Change of Circumstances

Statutory Framework

- [18] The respondent brings his application to vary the 2013 Order pursuant to s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act], and s. 47 of the FLA.
- [19] The 2013 Order does not identify the legislation under which the parenting time orders were made.
- [20] Section 17(5) governs application to vary a final custody order granted under the Divorce Act:

Factors for custody order

- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
- [21] Establishing a material change in circumstances is a threshold requirement: *Gordon v. Goertz*, [1996] 2 S.C.R. 27.
- [22] Section 47 of the FLA provides:

Changing, suspending or terminating orders respecting parenting arrangements

47 On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

- [23] In *Williamson v. Williamson*, 2016 BCCA 87, the Court of Appeal concluded that a material change of circumstances is also required for an application pursuant to s. 47.
- [24] It is clear that s. 47 applies to the respondent's application to vary the joint guardianship terms of the 2013 Order because the terms refer to s. 49 of the FLA and the Divorce Act deals only with custody and access.
- [25] In addition to guardianship, the FLA includes provisions regarding parenting arrangements but not custody and access. Parenting arrangements are defined to include arrangements regarding the allocation of parental responsibilities or parenting time or both.
- [26] Although the test for variation of a final order is materially the same under both statutes, the question remains: which provision applies to the respondent's application to vary the terms of the 2013 Order regarding his parenting time, communication, and family dispute resolution? The meaning of a court order, including its statutory foundation, is determined by the objective indicia found in the pleadings, the wording of the order, and the circumstances in which it was made. In the absence of objective indicia, the doctrine of paramountcy will apply and the order will be "founded" in the federal legislation: *Yu v. Jordan*, 2012 BCCA 367, at para. 1.
- [27] The claimant's notice of family claim was filed on March 14, 2013, four days before the FLA came into force. She pleaded both the Divorce Act and the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"), in relation to her claim for joint custody, joint guardianship, primary residence and reasonable access to the respondent. The FRA, unlike the FLA provided for custody and access, as well as guardianship of a child. By the time the 2013 Order was granted, the FLA was in force.
- [28] The claimant takes the position the Divorce Act governs the respondent's application because the 2013 Order contains a divorce order. The Divorce Act is identified in the child support orders and I is referred to as a child of the marriage in the joint custody order, language contained in the Divorce Act but not the FLA. At the same time, however, the 2013 Order does not grant the respondent access. Instead, it provides both parties with parenting time, which is a defined term in the FLA and one that is not used in the Divorce Act. Further, only the FLA makes express provision for orders regarding conduct, communication and family dispute resolution. Given the language used and not used in the parenting orders under the 2013 Order, the integration between the joint guardianship provisions, which do refer to the FLA, and the parenting time provisions, as well as the statutory foundation for orders regarding communication and family dispute resolution, I conclude the balance of

terms of the 2013 Order which the respondent seeks to vary are properly "founded" in the FLA. Consequently, s. 47 also applies to the respondent's variation application.

Legal Principles

- [29] The Court in Gordon explained the proper approach to the requirement for a material change of circumstances:
- [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued. ...
- [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.
- [Emphasis in original.]
- [30] At para. 13, Justice McLachlin, as she then was, summarized what the applicant must establish at the threshold stage:
- [13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
- [31] *Dedes v. Dedes*, 2015 BCCA 194, clarified what it means for a change to have been "contemplated" at the time of a previous consent order. The court concluded the test for material change examines what the parties actually contemplated at the time of the initial order, rather than what was known or could have been reasonably foreseen. At para. 25, Justice Bennet noted the comments of L'Heureux-Dube J. in *Willick v. Willick*, [1994] 3 S.C.R. 670, at 734:

the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions.

Discussion

- [32] The respondent asserts there have been multiple material changes since the 2013 Order was made, the most significant being deliberate and consistent interference by the claimant with his parenting time to the detriment of I. He argues it was never contemplated that he would not be permitted parenting time for weeks at a time. The respondent provides numerous examples of the claimant's alleged interference involving denials of time from 2014 onward related to I being ill or tired, the scheduling of her vacation time with I, various interruptions in his time, and refusing to agree to extra parenting time for special events or to allow him to pick up I from school.
- [33] Although the claimant consents to some of the variations sought by the respondent, she argues he has not established a material change in circumstances. She denies that she has interfered with the respondent's parenting time as alleged or at all. She takes the position he has exercised the parenting time provided to him in the 2013 Order, other than at times when I was ill and/or he agreed she could remain with the claimant and/or return her to the claimant during his time.
- [34] Determining whether there has been a material change involves considering what the parties actually contemplated at the time the 2013 Order was made.
- [35] Several terms of the 2013 Order, including those setting out the respondent's regular and holiday parenting time, the restrictions on what he is permitted to do during that time, and the broad discretion provided to the claimant to schedule her additional vacation and holiday time and to make parenting decisions, contemplate a limited role for the respondent. At the same time, however, the 2013 Order also grants the respondent joint custody, expressly contemplates an increase in the length of his holiday parenting time with I each year, and includes within the definition of his parenting time, additional parenting time by agreement.
- [36] The conflicting evidence of the parties prevents me from determining why they agreed to the terms they did.
- [37] The respondent suggests that at the time, he was under serious economic pressure, which led him to make concessions regarding his involvement with I in order to resolve the property and financial issues. He alleges the claimant represented the parenting arrangements as a safety net that included provisions she did not expect to ever invoke. The claimant denies this. Her evidence regarding the breakdown of the marriage focuses on concerns she had about the respondent, which included drinking heavily, problems with anger, inadequately parenting his son Mark, and significantly, a lack of involvement with I. Her mother and sister make the same allegations, which the respondent firmly denies. He deposes to taking an interest in and participating in I's care all along, although he alleges the claimant insisted on performing certain tasks herself. He denies being anything more than a social drinker and describes the marriage breaking down over financial issues. The respondent also complains about the claimant's lack of emotional involvement with Mark

and disapproval of him during the marriage. I note that Mark, who is now 20 and attends BCIT, spoke with Dr. Aubé. He described his father as a great parent who was always there for him. When Dr. Aubé asked him about the claimant, he acknowledged she had cared for him but he felt as though she was never pleased by what he was accomplishing.

- [38] The claimant alleges the respondent continues to struggle with anger issues and is insensitive to I's emotional needs.
- [39] She refers to two incidents in 2014, which she suggests, led I to be apprehensive about spending time with the respondent. The first occurred in August 2014, and involved the respondent taking I to Whistler for their first vacation together. According to the claimant, I became distressed because he suddenly changed her routine regarding daily phone calls with the claimant. The second occurred in December 2014. The claimant alleges the respondent was overtly angry during an exchange at what was to be the start of his holiday parenting time. I was upset and crying. I left the exchange with the claimant instead of the respondent. His account of both incidents is quite different.
- [40] It appears as though I discussed the same incidents with Dr. Aubé. She told Dr. Aubé she had been angry with her father because he did not listen to her when she wanted to phone her mother. Dr. Aubé asked I if she remembered a very hard day or moment in her life. She identified a day when she was scared of her father. She recalled he grabbed her and would not let her say goodbye to her mother. She also reported her father has told her that her mother steals his time. Dr. Aubé asked her who gets angry and I said, "Daddy" but she did not have any other recollection of when he had been angry.
- [41] The evidence of both parties indicates they battled for some time about interruptions to the respondent's parenting time caused by I's feelings of reluctance and/or anxiety. In or about late August 2015, the respondent suggested that I be given the option of calling her mother at 6 pm. At that point she could elect to stay with the respondent or return to the claimant for the night. The problem soon resolved itself. The respondent is convinced the prospect of court action led to successful overnights again, given the claimant's influence over I.
- [42] The claimant cites *Marsden v. Bercovitz*, 2013 BCSC 1246, for the proposition that production of the s. 211 report does not, in itself, constitute a material change of circumstances. The views expressed in such a report however may be another matter.

Section 211 Report

- [43] Dr. Aubé's report sets out a thoughtful, sensitive assessment of the parties and I that is entirely relevant to the question of whether the respondent has demonstrated a material change. She writes:

To assist the Court, it seems that this psychological assessment /Section 211 which differs somewhat from the regular custody and access evaluation, needs essentially to respond to 4 main questions.

1. How is [I.R.]'s relationship with each parent since the Order of Mr. Justice Bracken of November 2013?

As mentioned, [I.R.] is a happy child; she is blossoming emotionally, intellectually, socially and academically. She has built a safe attachment with both parents, who are both very devoted caregivers. They both have a child-oriented approach and it is clear that she is on top of their priority lists. They both have remarkable resources and have the abilities to fulfill all of her needs.

I do believe that the relationship with her dad has progressively developed over the years and this for several reasons. I suspect that Dr. Khangura has permitted [I.R.] to form a stronger attachment with her dad. On the other hand, it seems also that Mr. Rogalski has himself progressively formed a stronger bond with his daughter. It is not rare to see fathers really endorse the father role when the child is older and when the child is also learning to distance from a symbiotic relationship and is able to establish more connection. The other reason could be that [I.R.], who is older, is also more responsive to her dad's love.

What is clear is that [I.R.] is enjoying the relationship with her father. At dad's home she was as spontaneous and vibrant as she was at mother's house.

The concerns that she expressed regarding her dad, and her needs to call her mom at any time, seem to have been resolved. I suspect that this dilemma stemmed from a multi-factorial process: [I.R.]'s anxiousness to separate from mom, Dr. Khangura's ambivalence to let go of her daughter and Mr. Rogalski's fear of not having a major role in his daughter's life, which I suppose was expressed via some rigidity.

2. Since November 2013, is the implementation of the present parenting arrangement respecting [I.R.]'s best interest?

In a general sense, I must respond 'Yes'; [I.R.]'s physical, emotional and intellectual needs are well catered to by both parents. Dr. Khangura, who is the main caregiver, has been very diligent to ensure that [I.R.] receives the care and attention needed. Both parents are very nurturing and clearly dedicated to the well-being of their child.

In respect to the specificity regarding the implementation of the parenting time, my response is more mitigated. It seems that on several occasions the parenting time for dad and [I.R.] was not promoted, prioritized or authorized. Dad's scheduled time with [I.R.] was, on a few occasions cancelled and no make-up time was offered. I am of the opinion that it is a wrong message to [I.R.]; she needs to feel that her time with dad is a priority because, like mom, he is a major protagonist in her life. [I.R.] should have the perception that mom and dad have equal importance in her life, despite the length of time she spends with each parent. To maintain and consolidate attachment it is important not only to have frequent contacts but that those contacts are valued by the other parents. [I.R.] needs also to feel that the time with her dad is a priority and cannot be subsidiary.

3. Within the present parenting arrangement are there any recommendations that would be beneficial for [I.R.]?

Without any change in the actual parenting agreement I would like to make the following recommendations:

A. In the eventuality that [I.R.]'s regular parenting schedule with her father (2nd and 4th weekends) has to be modified; equal make-up time should be provided to Mr. Rogalski;

B. If [I.R.] is sick, the weekend transition from one parent's care to the other parent's care is to proceed, unless [I.R.] is too sick to travel between the parents' homes as per the determination of the child's physician.

C. The present agreement does not mention the possibility of using a Parenting Coordinator (PC) to address and try to work on topics the parents disagree on. Bearing in mind that the parties are still in litigation, they may need to consider other alternatives than divorce coaches. A Parenting Coordinator can facilitate mediation and reconciliation, and help with implementation, maintenance and monitoring of settlement/parenting plans. A parenting coordinator also helps to mediate anticipated conflict, as well as clarify and resolve different interpretations of the parenting plan and unpredictable situations that need resolution.

D. The present agreement does not mention an arrangement in respect to Easter Holidays. I recommend that Easter holidays should also be divided equally. I recommend that one parent has [I.R.] for the first 2 days and the other parent for the last 2 days. The parent who has the first days of the Easter break will have the last days on the following year.

E. In respect to the Wednesday after school request, I am unable to express recommendation considering that in the parenting agreement of November 2013, signed by Mr. Rogalski and Dr. Khangura, it is stipulated that [I.R.] needs to be picked up from and returned to her mother's home for the Wednesday visits with her dad. What Mr. Rogalski plans to do with [I.R.] during his parenting time is up to him, considering that a fundamental premise to a "parenting arrangement" is that when on his or her parenting time, a parent has full jurisdiction of what he or she wants to do with his or her child(dren) because the parent is not "a babysitter". A parent should be permitted to plan, organise or schedule activities, appointments and/or special excursions with his or her child on his or her parenting time. Unfortunately, without re-opening the present parenting arrangement, it seems that Mr. Rogalski's request to pick up [I.R.] at her school on Wednesdays and asking [I.R.]'s mom to pick her daughter up at dad's, would be contrary to the present parenting arrangement.

4. Is the current parenting arrangement, in respect to her relationship with her parents, in the best interest of [I.R.]?

It is quite evident that the current parenting arrangement does limit Mr. Rogalski's parent role. In terms of sleeping arrangements, he essentially has his daughter under his care for 4 overnights a month, which is equivalent to 14% of [I.R.]'s time. Every parent will tell you about the importance and the magic of putting children to bed. Children benefit from the special time, which bed time offers to parents, promoting closeness, comfort and solace.

It is my opinion that this stringent parenting schedule does, or will, give [I.R.] the message that the role of a father/ the first man of her life, is a peripheral role; similar to how Dr. Khangura was parented by her own father. This situation became very apparent in the spring of 2016 when [I.R.] did not have any overnight sleeps at her dad's for 6 weeks; from February 28 to April 8. During this lengthy period, Mr. Rogalski's contact with his daughter was on the Wednesday afternoons, which totaled 4.5 hours. Dr. Khangura did not offer any alternative time for [I.R.] to have contact with her dad. With this in mind, it is very hard to believe that [I.R.] can perceive the role of her dad as equivalent to her mother's role; one may wonder if on a long-term basis it can impact her relationship with men. Literature reports that children transport their perception from a parental role to their adult life within the choice of partner and their relationship with the gender that they have learned to consider marginal.

Within this present parenting arrangement, [I.R.] will not experience all the milestones of a more sustained relationship with her dad, and will thus not have the regular influence of her father. Although he is a devoted father, the present parenting arrangement does not permit him to navigate in all of the daily spheres of parenthood, meaning school homework, choice of extra curriculum activities, attending after school care, bringing her to school or picking her up from school and the regularity of putting his daughter to bed. Considering [I.R.]'s developmental needs and her attachment to her dad, it is my opinion that [I.R.] would benefit from having more time with her dad.

Long-term studies show that the more involved fathers are after separation and divorce, the better it is for the children. The best interest of the child is served when parents develop a child-centred parenting plan that allows a continuing and meaningful relationship with both parents. The main principles derived from developmental theory and research indicate that responsive and sensitive care, consistency, continuity and predictability are all important ingredients in infants' and young children's development. Even though [I.R.] is receiving adequate care from both parents, she is missing out on the continuity aspect with her dad. Researches indicate that where a good father-child relationship exists, kids grow into adolescence and young adulthood as well-adjusted as married-family children. High levels of appropriate father involvement are linked to better academic functioning in kids as well as better adjustment overall; if it is true at every age level, it is particularly important in adolescence. Literature tells us that "fathers" need to be more than a "fun" dad; they need regularly to help with homework and projects, use appropriate discipline, and be emotionally available to talk about problems.

Literature also underlines that children with functioning joint custody arrangements were better adjusted across multiple measures of general behaviour, emotional adjustment, self-esteem, family relations, and divorce-specific arrangements. Overall, the empirical literature

demonstrates numerous benefits to children, including better psychological and behavioural adjustment and academic achievement when their living arrangements enable supportive and loving fathers to be actively involved in their children's lives on a weekly and regular basis, including a combination of overnights and school-related and leisure time.

It is important to point out to all protagonists in this case, that none of the parents, family members or friends should disclose or even discuss, implicitly or explicitly, this report with [I.R.]. No information regarding any litigation or Court process should be discussed with this child.

[Emphases omitted.]

- [44] The claimant is critical of the report. She complains that Dr. Aubé does not appear to address the respondent's anger issues and his controlling behaviour. It is apparent to me, however, that Dr. Aubé simply did not share the claimant's view of the respondent. The report refers to various allegations made by the claimant, her sister, her mother and I's first grade teacher Nicole Sobieski during their interviews with Dr. Aubé. I note that in Ms. Sobieski's affidavit, she deposes to often hearing I say to others in the classroom that her father would get angry and yell at her. Dr. Aubé writes that Ms. Sobieski indicated I told other children her father had been mean because he did not allow her to contact her mother over the phone and he raised his voice. Dr. Aubé concluded the concerns that I expressed to her about her father seemed to have resolved. During an observation session, I appeared "remarkably" comfortable with the respondent. She was just as spontaneous and vibrant as she was with her mother. Dr. Aubé found I to be an assertive, happy child who is able to express herself confidently. At this point she is largely oblivious to her parents' conflict.
- [45] In discussing her clinical impressions of the parties, Dr. Aubé described the claimant's insight into the present situation as mildly limited, whereas the respondent's was appropriate. She noted that neither presented with any signs of anxiety or mood disorder and despite the claimant's suggestion to the contrary, the respondent showed no signs of depression. Interestingly, Dr. Aubé also found the parties share many, largely positive psychological characteristics. They are high achievers, meticulous, cautious decision makers, quite perceptive, detail oriented, disciplined, calm, and extremely resourceful. They are interested in accuracy, rationale and logic and favour organization and planning, and have a good sense of priorities. Dr. Aubé found that both of them tend to be controlling of themselves and others.
- [46] Dr. Aubé determined that I feels well loved by and has established a solid attachment with both parents. Although she is clearly more bonded with her mother, Dr. Aubé indicated this may simply be the result of spending most of her time with the claimant. Uncertain about the extent of the respondent's involvement with I when she was a young child, Dr. Aubé concluded that I now deeply enjoys the time they spend together, and their relationship is a safe one.

- [47] It is apparent, therefore, that Dr. Aubé was not concerned the respondent actually has a problem with anger or controlling behaviour, which I accept, based both on her findings regarding I and the parties but also based on their evidence.
- [48] The claimant is also critical of Dr. Aubé's conclusion the "stringent" parenting schedule does or will convey to I that her father's role in her life is peripheral. The claimant suggests this view is based on inaccurate information about how much time I was actually spending with the respondent, discussing and referring to her own calculation of her own time and his. Dr. Aubé makes it clear however, she was focused on the number of overnights the current arrangement provides, given the importance of bed time to promoting closeness, "comfort and solace". Dr. Aubé correctly observes that in the spring of 2016, I did not have any overnights with the respondent from February 28 to April 8, 2016, because she spent spring break with the claimant. The claimant misses this point and instead takes issue with Dr. Aubé's other observation that I spent only 4.5 hours with the respondent during that time when in fact it was 9.

Interference with the Respondent's Parenting Time

- [49] Although it is not possible to resolve all of the conflicting evidence related to the respondent's allegations of interference by the claimant, some of which he appears to have overstated, I am satisfied that on many occasions the claimant has either denied or limited the respondent's regular or intended holiday time, or denied what I regard as reasonable requests for extra time. Not infrequently, her communication with the respondent has been unnecessarily judgmental and critical. Sometimes she has also been accusatory.
- [50] An early but important example of the claimant refusing to agree to extra time involved Mark's high school graduation in June 2014. A month earlier, the respondent asked if he could take I to the ceremony, which his father also planned to attend. The claimant refused stating the event was too long and ran too late for I at the age of four, writing in part:

The ceremony starts at 7 pm, which is her bedtime, and will last 2 to 2.5 hours [I.R.] will be very tired by then (cranky, irritable, etc.) I understand you and/or Mark would like her there, but she is only 4 years old and I think this is going to be too much for her and will, quite frankly, make it an unenjoyable experience for you . She won't remember it either.

Perhaps a better idea might be to take pics and video Mark's part of the ceremony and then play it for her on the computer . [I.R.] is going to be with you and Opa the very next day as you will be picking her up at 4 pm on Saturday for Father's Day This way she can see what happened, but in a fun, relaxed way where she isn't kept up until past 10 pm and thrown completely [off] her sleep cycle and you can freely enjoy the ceremony with your father

- [51] I was actually almost five at the time. By refusing to allow her to attend, the claimant prioritized her bedtime routine over the benefit of being a part of a very special event for her only sibling, involving her father's family. It is apparent from her response the claimant did not place much value on the experience for I.
- [52] Coincidentally, the day after Mark's graduation was the day before Father's Day. I developed an ear infection and was taking antibiotics. Under the 2013 Order, I spends Father's Day and the preceding overnight with the respondent. The claimant told the respondent I would remain with her instead, to ensure she got enough sleep and the Father's Day visit would start the next morning. When the parties' communications devolved into a dispute over pick up and drop off times, the claimant suggested I's ear infection was caused by his carelessness regarding swimming at the pool.
- [53] There are several other instances where significant conflict has arisen when the claimant cancelled or interrupted the respondent's parenting time because I was ill, overtired, or had an "event", including birthday parties. The claimant deposes that I has not missed any parenting time due to illness since November 2015, now that she is aware the respondent wishes to care for I when she is ill.
- [54] On a number of occasions, the claimant has scheduled her additional vacation time during what would have been the respondent's holiday time or regular parenting time. Although the 2013 Order permits her to do so, her approach to her additional time, including the 2016 spring break discussed above, indicates that she has not viewed the respondent's parenting time, and particularly overnights, as a priority for I.
- [55] In December 2014, the respondent notified the claimant he wished to claim the holiday time he was entitled to with I during spring break 2015. It was his first opportunity to do so under the 2013 Order. She responded the same day telling the respondent she had decided to take I to India at spring break, because her grandmother, whom I had never met, was "getting on". At some point, the claimant advised the respondent her grandmother was actually ill. The respondent asked the claimant whether or not she could delay the trip given his next chance to have I at spring break was not until 2017 and if not, whether she was prepared to make up some of the lost time, both of which she refused. As it turned out, the claimant's grandmother passed away before the summer. The claimant also refused to commit to any form of communication between the respondent and I while they were in India, citing the time difference and her uncertainty about the internet connections available in her grandmother's village.
- [56] The claimant and I visited India from March 10 to April 1, 2015, two days before a four-day long weekend. The claimant allowed the respondent to have a brief daytime visit when they returned but otherwise enforced the regular parenting schedule. Consequently, his next overnight with I was not until April 11, 2015.

- [57] Prior to the India trip, I and the claimant also travelled to Mexico on January 17, 2015. The claimant notified the respondent of the trip on January 5, 2015. They returned to Vancouver on Saturday, January 25, 2015, during what would have been regular parenting time for the respondent. The claimant said she told the respondent when he signed the consent to travel form that the vacation would include the weekend they returned and his next visit with I would be on Wednesday January 28, 2015. She stated when she travels with I, she likes to have one day at the end of a trip as a "slow day". The respondent emailed, texted and called her several times asking to see I on the Sunday. The claimant took great exception to his persistence. During one exchange she wrote: "This is part of our vacation time to Mexico and it seems that you are trying to interfere with our enjoyment of that time. Your behaviour amounts to harassment and it is not acceptable. " The respondent also went to the claimant's home on Sunday morning but found no one there. The claimant indicated they were out for breakfast, although she said I was jetlagged and tired and not "up" to even a phone call with her father.
- [58] In her most recent affidavit, the claimant suggests the parties' disputes over his parenting time have lessened. She acknowledges the bond between I and the respondent has grown stronger. The evidence shows however, her stance toward the respondent has remained suspicious and critical at times. For example, in September 2016, when the respondent informed her he intended to exercise holiday time during I's 2017 spring break, his second opportunity to do so, the claimant asked him to discuss his travel plans before booking a trip because the 2013 Order requires her consent to travel outside BC. She also wrote; "I think it's important that you discuss these plans clearly with [I] prior to finalizing them and make sure that she is informed of, comfortable and happy with the plan, so that there are no further incidents where she is upset." The claimant suggests she was asking him to reciprocate. However, she simply told him the dates and destination for her previous travel. I was left with the impression the claimant views herself as entitled to vet his travel plans.
- [59] The claimant asserts she has actually given the respondent extra parenting time in the summers and on other occasions. The evidence establishes however, that his extra time has been minimal. I note the claimant's parenting time schedule for 2016 construes the respondent's attendance at school field trips, school events, and two medical appointments as extra parenting time.

Claimant's Decision Making

- [60] The respondent also makes allegations related to the claimant's decision making related to I's diet. Paragraph 11 of the 2013 Order requires the respondent to provide I with vegetarian foods. In late 2013, the claimant advised the respondent she was concerned that I may have an allergy to dairy products. She said she had noticed I became very congested after consuming them and then improved when they were minimized. The claimant also told the respondent:

"Western allergy testing is inaccurate in children her age and her doctor suggested that we gradually eliminate dairy from her diet to "confirm" diagnosis at this point. My suspicion is she has both viral infection and dairy reactivity".

- [61] The claimant asked the respondent to try to eliminate dairy for I or alternatively to provide her with organic dairy products, suggesting I seemed to tolerate them better.
- [62] The affidavit of Dr. Patel, I's family doctor, says much the same thing. She deposes that given the history provided by the claimant, and I's extreme congestion in December 2013, she concluded it was most likely due to dairy ingestion. She also deposes she advised against food allergy testing for I and that children often outgrow initial food sensitivities around the age of seven when their immune systems stabilize. I note parenthetically that while Dr. Patel's opinions are not admissible for their truth, they are admissible for the fact they were made. It appears as though the claimant may not have relayed all of Dr. Patel's advice to the respondent or identified her as the source of some of the information she did provide. In any event, he indicated he was reluctant to reduce I's consumption of dairy based on the claimant's observations alone and he considered dairy product to be an important part of I's vegetarian diet. The issue led to significant, prolonged conflict between the parties. During their exchanges, the claimant quite often adopted a very didactic, accusatory stance toward the respondent.
- [63] Dr. Patel's affidavit indicates that I reported to her at several appointments that she continued to eat dairy products with her father, indicating she was being questioned about his conduct, rather than included in the appointments. The respondent's evidence is he was trying to comply, although he continued to doubt whether there was a correlation between I's dairy consumption and problems with congestion based on his own observations. It is clear however that he made an effort to learn about and feed I a vegan diet. At one point he asked the claimant for some of her mother's recipes that I particularly enjoyed. The claimant refused, made some other suggestions, and then characterized his request as an inappropriate attempt to involve himself in her family's affairs.
- [64] In or about February 2016, I was seen by a naturopath who found dairy and eggs were a problem and recommended eliminating both from her diet, which the respondent said he did. In May 2016, I was examined by a pediatric allergist named Dr. Yeung. The respondent was not notified of the appointments with the naturopath or the allergist. He alleges I disclosed the claimant would not allow her to tell him she had been to a doctor for some tests.
- [65] In contrast to Dr. Patel's affidavit, Dr. Yeung's consultation letter states that nasal congestion is not a typical presentation for a food allergy, again an opinion that is not admissible for its truth. She reports I's skin tests were negative for food allergies. Dr. Yeung also comments that "on rare occasions", there are food-associated symptoms that can only be diagnosed clinically through an elimination and reintroduction diet.

- [66] Dr. Yeung recommended a meeting with both parents to discuss synchronizing the reintroduction of dairy and eggs and an objective way to monitoring her symptoms. The claimant advised the respondent of a follow up appointment. Dr. Yeung informed Dr. Aubé the parties agreed at that appointment to a gradual reintroduction, and during her final visit, I presented with no congestion.
- [67] I note that Dr. Aubé asked I about the allergy issue. She indicated she was no longer sure she had allergies, stating that dairy products do not bother her anymore. She also indicated her mother was worried about her allergies because her father kept feeding her food that she was not supposed to eat.
- [68] I was somewhat concerned by aspects of Dr. Patel's other evidence, which seemed aimed at supporting the claimant's position in this litigation as opposed to addressing a medical issue for I. For example, she remarks that I told her in November 2015 and April 2016 that she often goes to bed late when she is with her father, which is an allegation the claimant has made in her communications with the respondent and in her evidence. I have the same concern about comments made by I's teacher Ms. Sobieski, who deposes that I was more tired on Monday mornings after weekends with her father during the 2015/2016 school year. Dr. Aubé's report indicates she reported the situation had improved by the end of that year. This is not reflected in Ms. Sobieski's affidavit. Instead, she describes relaying her concerns to Dr. Aubé and sets out that I has continued to appear very tired as recently as January 2017.

Analysis

- [69] Having considered all of the evidence and accepting the opinions of Dr. Aubé, I am satisfied there has been a material change of circumstances since the 2013 Order. In my view, I's needs and the ability of the parties to meet those needs have changed materially and in ways the parties did not contemplate. Given the terms of the order, I infer at the time it was made, the claimant was not only primarily, but almost entirely responsible for I's care. The respondent's role was very much peripheral. Since then, I's relationship with the respondent has developed and grown significantly. It is now close, secure and positive.
- [70] Assuming the correctness of the order, I also infer from the very broad discretion the 2013 Order granted to the claimant regarding decision making, the nature of the provisions regarding her vacation time and some of the unusual restrictions on what the respondent was permitted to do with I, that those arrangements were in I's best interests. This is also a circumstance that has changed materially in ways the parties did not contemplate. The evidence satisfies me the respondent is fully capable of meeting I's needs and making appropriate decisions about her care. Conversely, the decisions the claimant has made regarding parenting time, on a number of occasions, and her approach to concerns about I's diet, have been flawed by her failure to recognize the importance of the respondent's consistent, regular involvement with I and the need for meaningful consultation with him regarding her care. I accept the parties contemplated the claimant would have exercised her powers with greater insight and awareness.

- [71] Finally, it is also my view that the significant conflict the parties have engaged in related to implementing the parenting terms of the 2013 Order also constitutes a material change that was not contemplated by the parties.
- [72] Essentially, I conclude, if the current circumstances were known when the 2013 Order was made, the parenting terms and the dispute resolution terms would have been different: See *L.M.P. v. L.S.*, 2011 SCC 64, at para. 32. The question of whether the claimant's interruptions and denials of the respondent's parenting time were permitted by the 2013 Order is not determinative.

What Variations Are in I's Best Interests

- [73] Under *Gordon*, once a material change of circumstances is established, the court embarks on a fresh inquiry into what is in the child's best interests, having regard to all the relevant circumstances relating to the child's needs and the ability of the parents to satisfy them. Section 37(1) of the FLA also requires the court to consider only a child's best interests in determining orders regarding parenting time and the allocation of parental responsibilities. Section 37(2) sets out a range of factors the court must consider.
- [74] The changes the respondent has proposed regarding the parenting time schedule are quite modest. His objective is to ensure his parenting time with I is more secure, his holiday parenting time more flexible, and his involvement with I more integrated. The claimant consents to some of his proposed changes, including: equally shared spring breaks each year, pickups from school rather than her home on Wednesdays, extending the respondent's parenting time on weekends when there is a Pro-D day, a requirement that his regular parenting time not be suspended due to illness on specified terms, and continuing the regular parenting schedule during the summer when neither parent is exercising holiday parenting time.
- [75] The proposed changes she opposes include:
1. weekend parenting time for the respondent every other weekend instead of two weekends per month with any fifth weekend being split evenly;
 2. drop off arrangements for Wednesdays (she proposes 6:15 p.m. at her home instead of 6:30 p.m. at his or 7:00 p.m. at hers);
 3. the respondent being at liberty to take I to school or school related events, including events hosted by her peer group that occur during his parenting time, ending the requirement that he take I to the claimant's home before any such event;
 4. a requirement that there be no more than 10 nights between I's overnights with the respondent during both the regular and the holiday parenting schedule;
 5. a requirement for make-up time if the respondent's parenting time is interrupted due to illness, within two weeks;

6. two blocks of 14 days of holiday parenting time for the respondent in the summer, one in July and one in August, on terms related to scheduling dates; and
7. a restriction on the claimant's right to interrupt the respondent's holiday time with I during the winter break, spring break, or summer break, absent his consent and make-up time, and permitting her instead to interrupt his regular parenting schedule to exercise her four additional vacation weeks with I.

[76] I conclude the changes proposed at (1), (2), (3) and (7), are in I's best interests, bearing in mind the evidence, the claimant's tendency to conflate I remaining in her care with I's best interests, and accepting Dr. Aubé's findings including these:

- the respondent is a devoted father and I is a bright, happy, assertive child, with some history of apprehension about transitioning to or remaining in his care that has resolved;
- the respondent's parenting time under the 2013 Order did not allow I to experience all of the milestones of a more sustained relationship with him;
- the 2013 Order did not permit him to navigate all of the daily spheres of parenthood, meaning bringing her to and from school, dealing with homework, being involved in choosing activities, and putting her to bed regularly;
- I has been missing out on the "continuity aspect" with her father, which is particularly important in adolescence; and
- overall, the empirical research demonstrates numerous academic, psychological, and behaviour benefits to children when their living arrangements enable supportive and loving fathers to be actively involved in their lives on a weekly and regular basis, including a combination of overnights, school related and leisure time.

[77] I am satisfied these changes will provide I with the "continuity aspect" that she has been missing up to now and allow the respondent to participate in some of the daily tasks of parenting. Importantly, I will have the benefit of experiencing her father's presence and participation in various aspects of her life including school, special events, and her friendships. In my view, para. 7 of the 2013 Order already prohibits the claimant from scheduling any of her four weeks of vacation/holiday time during the respondent's holiday time, excepting the Siddha Yoga Family Retreat each summer. If I understand the respondent's proposal correctly, I agree that in the event the timing of the retreat conflicts with the respondent's summer holiday time, his time should be made up. In other words, another week of holiday should be scheduled for him during the summer period in that circumstance.

[78] Paragraph 3(h)(ii) of the 2013 Order allows the claimant to decide upon up to two extracurricular activities for I that occur during his regular weekend parenting time until I reaches the age of eight. I is now eight so this entitlement has fallen away. The issue of decision making is further addressed below.

- [79] Paragraph 8 allows the claimant to take I to India once every four years for up to four weeks at any time during that year. With restructuring, I accept this arrangement remains in I's best interests. I have no doubt I has and will benefit enormously from the exposure to extended family and a period of immersion in Indian culture. While I accept there are various factors which make some flexibility with scheduling such a trip necessary, it should not interfere with the amount of the respondent's summer holiday time. Therefore, the claimant must notify the respondent of her plans for an India trip before the parties schedule their summer holiday time in that particular year to prevent a conflict between the India trip and the respondent's summer holiday time. A four week trip in the summer would make it difficult for the respondent to schedule two equal blocks of time in July and August, but there is also no reason why the total amount of his holiday time during the summer should be lessened. Further, the claimant must commit to a reasonable communication schedule for I and the respondent during an India trip. Although I permit the claimant to schedule an India trip for dates that interfere with the respondent's winter or spring break holiday time, if it occupies both weeks of either the winter or spring break, and recognizing that as I gets older, there will be a need to avoid long absences from school, I should spend the weekend that precedes the start of the trip and the weekend that follows the trip with the respondent, in the event those weekends do not fall within his regular parenting schedule, in order to minimize the gap between I's overnights with him, unless he agrees otherwise.
- [80] Given my decision with respect to the India trip, I reject the respondent's proposal that there can never be more than ten days between I's overnights with him. This is impractical and inconsistent with the implications of his summer holiday time proposal. I fail to see why it would be in I's best interest to spend two blocks of 14 days with him but not the claimant, particularly if they are away. The other variations I am granting adequately remedy the past problem of no overnights for long periods of time.
- [81] That leaves the respondent's proposal for summer holiday time. Presently, the respondent is permitted two blocks of summer holiday time up to eight days at the end of July and the end of August. His proposal of 14 days per block, combined with the effect of the variation, which no longer permits the claimant to schedule her vacation time, excepting the India trip, during his other holiday time, means that she will likely exercise some, if not most of those four weeks during the summer. The question is whether a jump from eight to 14 days with the respondent involves too much change for I. I am satisfied it does not and in fact is in I's best interests, as long as the parties act reasonably. I have found that I is a happy, assertive child who shares positive secure relationships with both the claimant and the respondent. She also continues to share a stronger bond with the claimant. I note she told Dr. Aubé she misses each of her parents when she is with the other. In my view, however, the benefit of a longer trip with each parent during the summer time will outweigh what I see as the potential for an initial emotional impact of being away from the claimant for a longer period. More recently, the parties agreed that during I's summer break from school, when the claimant is not formally exercising holiday time, the regular parenting schedule for the respondent can continue. It strikes me that some version of this should be observed when I

is with the respondent during his summer holiday time and he and I are not away.

- [82] I therefore order that each party is at liberty to schedule up to two blocks of 14 days of summer holiday parenting time with I, one occurring in July and one occurring in August. The parties will exchange their preferred dates by no later than April 1. The claimant's dates will include those for the retreat. In the event the parties are unable to agree, the respondent's dates, subject to the retreat, will be given preference in the odd numbered years and the claimant's in the even numbered years. In the event some or all of the parties' blocks are spent locally, they must consider the requests of the other for daytime or evening parenting time during the portion of the block spent locally and provide for a visit once per week. The balance of the summer break, that is when neither parent is exercising holiday time, will be subject to the regular parenting schedule.
- [83] I agree with the claimant that the 2013 Order adequately addresses communication issues, subject to their agreement to additional or modified terms.
- [84] For reasons discussed below, I grant the amendments sought by the respondent relating to divorce coaches and the engagement of a parenting coordinator.
- [85] The respondent also proposes variations that would change the claimant's right to make significant decisions regarding I's health, medical care, dental care and diet. His detailed proposal is set out above. The joint guardianship provisions of the 2013 Order allocate almost all of the parental responsibilities or incidents of guardianship to the claimant. The requirement to discuss or consult with the respondent regarding parenting decisions varies, depending on the subject matter. Essentially, the respondent seeks to limit the claimant's largely unfettered discretion. Clearly, the parties' dispute in relation to I's purported allergy to dairy underlies this concern. The claimant argues, as a physician who has always been responsible for I's medical decision making, her powers as a joint guardian under the 2013 Order should continue. The evidence establishes there is a tension between her qualifications as a physician and her approach to dealing with the respondent when making health decisions for I. Her diet, the suggestion of food sensitivities versus allergies is a matter over which reasonable and informed people may disagree. However, it is apparent the claimant has proceeded on the assumption she is the better parent. There is no doubt she has been in most respects an excellent one. She is however inclined to perfectionism when it comes to I's care. She has also consistently failed to recognize the respondent's strengths. He too is highly intelligent, very articulate, and attuned to the details of I's experience. The claimant should have been more collaborative. She should have actually considered his perspective, although different from her own. She should have given him the opportunity to attend at least some of the many medical appointments I had in relation to this issue.
- [86] Having said all of that, I regard the variations proposed by the respondent as impractical and cumbersome.

[87] The reality is the respondent is fully capable of participating in decision making related to I. However, conflict and disagreement about what is best for I has been and may continue to be a problem for the parties that requires addressing. In my view I's best interests require therefore the following amendment:

Paragraph 3 of the 2013 Order is varied to require the claimant to inform the respondent of any significant medical, dental or health concerns she may have regarding I, before she takes steps to investigate or address those concerns. Together, the parties will attempt to agree on an appropriate course of action. In the event they do not agree, the claimant is at liberty to schedule what she regards as an appropriate medical, dental or health appointment, so long as she informs the respondent of the same. In the event the parties disagree on the advice or recommendations arising from that appointment, the claimant again is at liberty to make a decision consistent with that advice or recommendation, along with the requirement to advise the respondent of that decision, subject to the parenting coordinator's authority to make a determination respecting the decision.

[88] To confirm, both parties will continue to have the discretion to make health related decisions for I when I is in their care, in the event of an emergency.

[89] I note the parties live some distance from one another. As I gets older, extracurricular activities, including sports, may well occupy more of her time on weekends and after school. It is necessary, in my view, for both parties to participate in determining what activities are best for I. Accordingly, para. 3 will also be amended in relation to decision making regarding I's extracurricular activities. The parties will attempt to reach agreement regarding extracurricular activities that impact on one another's parenting time with the assistance of the parenting coordinator, if necessary. In the event they cannot agree, the parenting coordinator may make a determination regarding the disputed activity or activities.

Parenting Coordinator

[90] Based on I's age, para. 13 of the 2013 Order requires the parties to attend sessions with divorce coaches at least once every six months and they are permitted to request emergency sessions if an important issue arises.

[91] The respondent asks that a parenting coordinator be appointed instead. The claimant opposes this, in part, on the basis of cost. There is no evidence regarding the cost, however. She also argues that because parenting coordinators are used primarily for their adjudicative function and they already have a detailed order, a parenting coordinator is unnecessary.

[92] Parenting coordination is a form of family dispute resolution that involves not just adjudication but also settlement negotiation and mediation. It is intended to assist parents in resolving disagreements that arise about putting into effect agreements or orders regarding parenting arrangements: *M.H. v. C.S.*, 2013 BCSC 2232, at para. 36. Section 17 of the FLA defines the role of a parenting coordinator as follows:

Assistance from parenting coordinators

17 A parenting coordinator may assist the parties in the following manner:

- (a) by building consensus between the parties, including by
 - (i) creating guidelines respecting how an agreement or order will be implemented,
 - (ii) creating guidelines respecting communications between the parties,
 - (iii) identifying, and creating strategies for resolving conflicts between the parties, and
 - (iv) providing information respecting resources available to the parties for the purposes of improving communication or parenting skills;
- (b) by making determinations respecting the matters prescribed for the purposes of section 18.

[93] Section 18 sets out the authority of parenting coordinators to make determinations:

Determinations by parenting coordinators

18 (1) A parenting coordinator

- (a) may make determinations respecting prescribed matters only, subject to any limits or conditions set out in the regulations.
 - (b) must not make a determination respecting any matter excluded by the parenting coordinator agreement or order, even if the matter is a prescribed matter, and
- (2) In making a determination respecting parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only, as set out in section 37 [best interests of child].

[94] Section 6(4) of the Regulation to the FLA particularizes and limits the scope of a parenting coordinator's authority to make determinations about parenting arrangements and excludes for example, changes in guardianship and the allocation of parental responsibilities, as well as substantial changes in parenting time.

[95] One of the purposes of the FLA is to encourage parents to resolve their family law disputes by agreement and through an appropriate dispute resolution process before making an application to court.

[96] In my view, parenting coordination is an entirely appropriate family dispute resolution process for these parties. Although there is some indication their ability to reach a consensus has improved somewhat since the respondent's application was filed, it is clear they continue to mistrust one another and their respective views about what is best for I. The variation order will continue to provide the claimant with significant, although less, discretion. Given the parties' history, it is not reasonable to expect divorce coaches to provide an adequate mechanism for resolving future disputes regarding the implementation of the new parenting regime. Avoiding further court applications and the polarizing effect of litigation is clearly in I's best interests.

[97] Accordingly, I grant the respondent's application and order the appointment of a parenting coordinator on the following terms:

Pursuant to s. 15 of the Family Law Act, the parties will retain [name of parenting coordinator] as Parenting Coordinator for a term of not less than 24 months, unless otherwise agreed to by the parties, on terms provided for in this order and in the most current form of precedent for a parenting coordination agreement endorsed by the British Columbia Parenting Coordinators Roster Society (Standard PC Agreement), provided that where the terms of this order conflict with the Standard PC Agreement, this order will prevail.

The parties will agree upon the Parenting Coordinator within 30 days of the date of this order, with liberty to apply failing agreement.

The Parenting Coordinator may assist the parties by:

- (a) mediating disputes about parenting issues;
- (b) building consensus between the parties, by, including but not limited to:
 - (i) developing and instituting guidelines for communication between the parties;
 - (ii) identifying, creating and implementing strategies for resolving conflicts between the parties;
 - (iii) providing information respecting resources available to the parties for the improvement of their communication or parenting skills; and
- (c) in the event the parties cannot agree on any matter respecting the parenting arrangements provided for in this order, making determinations on such matters pursuant to s. 18 of the FLA and subject to s. 6(4) of the Regulation to the FLA and s. 19 of the FLA.

The parties will be equally responsible for the cost of the Parenting Coordinator, subject to the Parenting Coordinator's authority to reapportion the cost between the parties as provided for in the Standard PC Agreement.

[98] In the event the parties wish to clarify the scope of the parenting coordinator's role and authority, they are at liberty to appear before me for directions.

Compliance with Parenting Time

[99] The respondent alleges the claimant has deprived him of approximately 500 hours of parenting time and asks for an order requiring her to provide him with no less than 20 additional parenting time days as compensatory parenting time and payment of \$5,000 pursuant to ss. 61(2)(c) and (g) of the FLA.

[100] The complainant opposes this part of the respondent's application. The relevant portions of s. 61 of the FLA are as follows:

Denial of parenting time or contact

61 (1) An application under this section may be made only

- (a) by a person entitled under an agreement or order to parenting time or contact with a child, and
 - (b) within 12 months after the person was denied parenting time or contact with a child.
- (2) If satisfied that an applicant has been wrongfully denied parenting time or contact with a child by a child's guardian, the court on application may make an order to do one or more of the following:
- (c) specify a period of time during which the applicant may exercise compensatory parenting time or contact with the child;
 - (g) require the guardian to pay
 - (i) an amount not exceeding \$5,000 to or for the benefit of the applicant or a child whose interests were affected by the denial, or
 - (ii) a fine not exceeding \$5,000.

[101] Section 62(1) specifies a denial of parenting time is not wrongful in a number of circumstances which include:

- (c) the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement by a medical practitioner or nurse practitioner, indicating it was not appropriate that the parenting time or contact with the child be exercised;
- (f) other circumstances the court considers to be sufficient justification for the denial.

[102] Pursuant to s. 62(2), the court may order compensatory parenting time even if the denial was not wrongful.

[103] The respondent made few, if any, submissions in support of this part of his application at the chambers hearing. His notice of application set out no legal basis for the orders he seeks, apart from identifying the section number.

[104] The claimant asserts the last time she refused to permit the respondent to exercise his parenting time was on December 23, 2014. Given that s. 61(1) requires an application to be made within 12 months of parenting time being denied, his application is out of time. However, I note that she has at least implicitly acknowledged that I missed some parenting time due to illness in circumstances inconsistent with s. 62(1)(c) and I's resistance to the respondent up until November 2015.

[105] It seems there are relatively few cases that have considered ss. 61 and 62 in any detail apart from *K.R. v. J.W.*, 2016 BCSC 225, where Justice Betton concluded the provisions are intended to provide a mechanism less rigid and difficult to apply than contempt proceedings. He also remarked that this interpretation is consistent with the objective of the legislation, which makes the best interests of children the only consideration: see para. 56. At para. 57, his analysis continued:

Parenting time that has been included in an agreement or that has been ordered must be respected. If not appealed or varied, compliance cannot be viewed as optional. The time constraint in s. 61(1)(b) ensures some contemporaneity between the alleged denial and the remedy, thus serving as well to focus on the best interests of the children. Section 62 ensures reasonable denials are permitted, again consistent with the best interests of the children being the only consideration.

At para. 58, he concluded the provisions' purpose is to give the court a "broad discretion that can be adapted to each unique situation".

[106] In the absence of proper submissions from the respondent, I am not prepared to embark on a calculation of how much parenting time the respondent may have been deprived of in the twelve months before his application. I accept there has likely been some. At the same time, I do not agree with his assertion the claimant has acted to deliberately interfere with or undermine his relationship with I. I do not doubt she was motivated by genuinely held views about I's needs and the parties' capacity to meet those needs.

[107] Although I do not wish to condone anything less than full compliance with the terms of any court order, it is my view that awarding the respondent compensatory time is not in I's best interests. There is no dispute I's primary residence should remain with the claimant. Her needs are best served by the parties establishing a much more positive co-parenting relationship and complying with the parenting time schedule in the variation order, not by disrupting it. For the same reasons, I do not regard a financial penalty as warranted. The respondent's application for compensatory parenting time and financial payment from the claimant is therefore dismissed.

"Fleming J."

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