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CANADA / JUDGMENT

## Kwan v. Lai

2018 BCSC 1280

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COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1280 Kwan v. Lai

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kwan v. Lai,

2018 BCSC 1280

Date: 20180731

Docket: E113494

Registry: Vancouver

Between:

Richard King Wai Kwan

Claimant

And

Ranee Wan Man Lai

Respondent

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Claimant:

Joseph K. Broadhurst

Appearing in person:

Ranee W.M. Lai

**Place and Dates of Hearing:**

Vancouver, B.C.

July 5-6, 2018

**Place and Date of Judgment:**

Vancouver, B.C.

July 31, 2018

**Table of Contents**

INTRODUCTION and OVERVIEW.. 3

PARENTING REGIME REVIEW.. 5

Psychologists' Reports. 5

Evidence of the parties. 8

Conclusion re Parenting Regime Review. 9

CHILD SUPPORT REVIEW.. 14

Income determinations. 15

Child support determination. 20

REACH program expenses. 21

Dr. England's expenses. 21

Special or extraordinary expenses. 22

SUMMARY and CONCLUSION. 26

**INTRODUCTION and OVERVIEW**

- [1] These reasons review parenting and child support issues following the parties' participation in a therapeutic counselling program designed to address reunification and co-parenting in high-conflict cases.
- [2] A Final Order was issued by this Court on October 21, 2013 following a judicial settlement conference. On August 26, 2016, the claimant father applied to vary the custody and parenting provisions of the Final Order. He claimed that the respondent mother's campaign of alienating the couple's then 8-year-old child from his father had reached such an acute stage that immediate intervention was necessary to protect the child's long-term psychological and emotional well-being.

[3] In Reasons for Judgment issued August 31, 2016 and indexed at 2016 BCSC 1626, the Court concluded that:

- a material change in circumstances had occurred;
- alienation had been proved by compelling and admissible lay and expert evidence; and
- immediate remedial intervention was required subject to ongoing supervision by the Court.

[4] Among other things, this Court's August 31, 2016 order:

- granted sole custody of the couple's child to the father;
- varied the Final Order so as to permit access and parenting time with the mother;
- required the parties to enrol and participate in a certain "REACH" program and to comply with the directions and treatment recommendations made by the therapists in that program;
- ordered the father to pay the costs associated with the REACH program, subject to re-allocation upon review;
- directed a review hearing to be scheduled for spring 2017 to assess the efficacy of the program and any parenting regime modifications that may be required; and
- suspended child support obligations and directed that issues of retroactive and continuing child support be determined along with any re-allocation of program expenses at the review hearing.

[5] Progress in the therapeutic counselling program was positive but slow and, based on the recommendations and feedback from the counselling experts, the review hearing was postponed three times in order to accommodate continued attendance and participation with the therapists. A two-day review hearing eventually proceeded before the Court on July 5-6, 2018.

[6] Pre-hearing directions were issued by the Court on June 5, 2018 addressing the procedural and evidentiary requirements for the review hearing. Among other things the Court directed that:

- updated reports to the Court were to be submitted by the REACH program and Dr. England, the psychologist who had earlier prepared a report under s. 211 of the Family Law Act, S.B.C. 2011, c. 25;
- the authors of the reports were to make themselves available for cross-examination before the Court in the event either of the parties issued written notice that such cross-examination was required;
- the parties were to exchange Notices of Application and supporting affidavits respecting all relief sought at the review hearing, including the parenting regime and all outstanding financial issues;

- such affidavits would stand as the evidence-in-chief of the parties who would then be subject to cross-examination at the hearing at the instance of the other party; and
- written submissions were invited on the merits and the law.

[7] Ultimately, neither party required Mr. Colby (the REACH program's reporting psychologist) or Dr. England for cross-examination on their reports. The mother was briefly cross-examined at the hearing before the Court but she declined to cross-examine the father.

#### PARENTING REGIME REVIEW

### Psychologists' Reports

- [8] The REACH program appoints separate therapists for each parent and child as well as another psychologist, Mr. Colby, as a "Court Designate". The individual therapists work separately with their clients but also confer with the other therapists, within and outside of group sessions as necessary. The Court Designate acts as a coordinator retaining an overview of progress and is also the person who reports to the court. The purpose of these mechanics is to preserve the strictly therapeutic relationship between the individual therapists and their respective clients.
- [9] Mr. Colby has provided five reports to the Court dated November 28, 2016, January 30, 2017, July 24, 2017, January 8, 2018 and most recently, June 18, 2018. Each report documents some progress in terms of less conflicted communication between the parents but each also notes that further work is required to "facilitate a positive dynamic" between the parents and to "continue building skills that enable them to co-parent this young boy, while also inoculating him from the experience of the parental conflicts". The therapist for the child reports that the child has become "progressively more engaged with his father", that he is "relating positively" to him and is "animated when he comes into his father's care".
- [10] Regrettably, while the father's therapist reports his client is "continuing to demonstrate a willingness to improve his co-parenting relationship" with the mother, "the parents have improved little in their ability to work to solve problems on their own ... [and they] are driven by their own emotional needs, decreasing the possibility of them co-parenting [the child]". The therapist particularly notes that when the mother's "vulnerabilities" are triggered, this results in an "emotional vortex" that causes the child difficulty which is "well past his ability to handle".
- [11] Mr. Colby's most recent report recommends:
- continuation of the current parenting schedule of six nights with the mother and eight nights with the father over a two-week cycle on a 4.2.2.6 rotation;
  - final decision-making authority be granted to the father in situations where the parents are unable to agree as he "has less tendency to be reactive" and has "a clear understanding of the dynamics while not being drawn into issues of conflict"; and

· the parties should continue with the REACH program and, if all goes well, conclude the REACH participation in January 2019.

[12] The June 23, 2018 report by Dr. England was much more informative and helpful for the Court. She reviewed the earlier reports on the file, including Mr. Colby's most recent report, and also interviewed the child's teacher and psychologist. As well, she reviewed the statements provided by each parent setting out their desired parenting regime and their rationale for same.

[13] Dr. England initially had difficulty arranging an interview with the teacher. This was because the mother had conveyed criticism of Dr. England and had left the school principal with the impression that she was not consenting to Dr. England communicating with the teacher.

[14] The teacher reports that the child is very strong in math and science as he is very fact-based and "almost too logical". However, he has considerable difficulty with language arts and does not grasp the use of non fact-based language such as metaphors or joking comments. The child continues to have significant problems with social development. He can get upset and physically aggressive if others are "even remotely in his space" or touching one of his possessions. He has problems sitting at the same table as other students and the latter do not want to work with him. He requires considerable structure, consistency and repetition.

[15] Dr. England's interview of the child's psychologist identifies even more serious concerns. The therapist describes the child as having ongoing problems with processing social cues, articulating thoughts and feelings, rigid inflexibility, and occasionally "lashing out in an aggressive manner". The therapist has not used diagnostic language when describing the child's challenges to the parents but she queries an underlying Autism Spectrum Disorder.

[16] Dr. England reported the views of the child's therapist as:

The mother needs to encourage flexibility in the child and not be so over protective. She tends to see problems as arising from other people and has a hard time understanding her role in the child's functioning. While increasing some of the child's time with his mother has been good for the child, she does not feel that [the child] would do well with equal time with the mother, given the mother's difficulties in being able to address the child's particular needs. She did not see the parents as ever being able to get to a point to work well together independently to meet the child's needs. She described the father as more attuned to the child's needs and more understanding of the extent of the negative impact of these difficulties on the child.

[17] Dr. England expresses the following opinions:

- While the child's relationship with his father has become more normal and he has shown improvement in the school environment, he is continuing to manifest troubling symptoms;
- The child likely has an Autism Spectrum Disorder and may also be lagging in terms of cognitive development related to language. These concerns require follow-up assessment and likely specialized intervention;

- Ongoing participation in the REACH program is reaching a point of diminished returns and the financial resources associated with such participation are better directed to the child's special needs;
- Based on the original psychological assessments and the emerging opinions of the therapeutic psychologists, "these two parents will never be able to cooperate as well as is required to meet the child's needs";
- The mother has a paranoid personality style, is less able to grasp the child's needs, and does not have the personal qualities best suited to help the child develop more social awareness, responsibility and flexibility;
- The child is likely a special needs child who is much less resilient than other children to tolerate separations, changes in the environment, and stress, and the parents' financial resources should be targeted towards services for the child rather than the parents' co-parenting relationship.

[18] Dr. England recommends to the Court that:

- the child undergo an autism assessment and a psycho-educational assessment, so that appropriate recommendations can be made with respect to future schooling;
- the child's transitions must be reduced, while still allowing him to spend considerable time with his mother ... for the foreseeable future, the child should be primarily parented by the father with the mother having alternate long weekends from Friday after school until Tuesday morning with the drop-off at school (5 days over 14 days, number of transitions cut in half);
- the Joyce parenting model should be adopted with the father having final decision-making authority in the event of parental disagreement on issues.

## Evidence of the parties

- [19] I have carefully read all of the affidavits submitted in support of this review hearing. There is a marked contrast in the style of the parties' evidence; the father's affidavit is thoughtful and measured and his expressions of concern appear genuine. By contrast, the mother's affidavit evidence is defensive, accusatory and in some areas contradictory.
- [20] Dr. England's description of paranoid personality traits appear to be corroborated by some of the statements made by the mother under cross-examination. She testified that she is "careful in making statements" because she knows she "will be questioned on it" and she is "afraid my intention will be misread". She says that after seven years of litigation she is tired, that "everything seems like a trap", and that she is "extremely cautious of every step I take".

- [21] In her recent affidavit, the mother states that she and the father "have been coordinating and resolving day-to-day issues effectively by email communications". However, she later states in the same affidavit that "communications with the father are problematic due to his provocative statements, providing answers in a crafty manner, contradictory responses, unwillingness to disclose defined agreements and slippery interactions". Communications through email with the father "are often confrontational and aggressive".
- [22] In other sections of her affidavit, the mother accuses the father of "embellishment and exaggeration for the purpose of demonizing me and designed to persuade the court of my inadequacy as a parent".
- [23] Her description of the child seems to suggest that, notwithstanding other evidence to the contrary, the child is having few problems: "He is a happy child ... he does well in school. He is an active, cheerful and optimistic child, he establishes good friendships with peers ... he is adorable, intelligent, polite and disciplined ... he does well in school, establishes friendships with children in the school ... he is active and a popular child in school ... he has positive reviews from his friends and parents of his friends, who describe him as smart, humorous, nice and caring."
- [24] In his affidavit, the father acknowledges that the child has made some improvements in terms of the most concerning behaviours he was exhibiting in 2016. He has made a couple of friends. He has a better relationship with his grandparents. He is more open to leaving the house to dine at restaurants. He is now willing to bring lunches that his father prepares for him to school although he will not eat any variations of food. Despite these improvements, there still remain significant concerns including:
- the child will not sleep if the lights in his room are turned off;
  - he requires an adult to stand outside the bathroom when he showers because he wants to know that people can hear if he needs something;
  - he will only wear clothing that his mother provides during transition days and will only have a haircut when he is with his mother; and
  - he refuses to wear properly fitting shoes, preferring only to wear shoes provided by his mother.
- [25] The father states in his affidavit that he agrees with the assessments and recommendations made in Dr. England's most recent report. He says he will implement the treatment recommendations that she has made.

#### Conclusion re Parenting Regime Review

- [26] In his Notice of Application filed June 29, 2018, the father seeks the following orders respecting the parenting regime for the child:
1. the father should maintain sole custody of the child although the parties would share joint guardianship;

2. the parenting schedule recommended by Dr. England be adopted, i.e. that the mother have access to and parenting time with the child every second weekend after school on Friday to the following Tuesday morning drop off at school; and
3. the parties discontinue the REACH program.

[27] In her Notice of Application filed June 29, 2018, the mother seeks the following orders respecting parenting:

1. the regime currently in place remain until the psycho-educational assessment and Autism Spectrum Disorder assessment is conducted following which the parenting arrangements should be adjusted in accordance with discussion and agreement between the parents and the REACH therapists;
2. a View of the Child report be obtained as a component for the evaluation of the ongoing parenting regime;
3. the psycho-educational and Autism Spectrum Disorder assessments be carried out by an assessor to be discussed between and agreed by both parents;
4. the family continue to attend the REACH program for day-to-day decision-making and discussions regarding the child; and
5. phone calls between the child and the parents should be allowed to occur based on a "needs basis".

[28] In submissions and also in her affidavit filed June 29, 2018, the mother amplified some of the relief she was seeking and, in particular, made it clear that she was seeking joint custody of the child along with the father.

[29] I emphasize that these proceedings are a court-ordered review of parenting arrangements following participation by the parties in a program designed to facilitate reunification and co-parenting in high-conflict cases involving allegations of parental alienation. A material change in circumstances is not required in order to vary the parenting regime set out in this Court's order of August 31, 2016.

[30] Since the August 31, 2016 order was made, the Court of Appeal has questioned whether court-ordered participation in therapeutic programs such as REACH is an appropriate remedy whether under the Divorce Act or the Family Law Act: see *N.R.G. v. G.R.G.*, 2017 BCCA 407 [N.R.G. (CA)] and the subsequent commentary on judicial and practical constraints in alienation cases found in *L.C.T. v. R.K.*, 2018 BCSC 1016.

[31] One possible reading of *Williamson v. Williamson*, 2016 BCCA 87, is that participation in such a remediation program can indeed be ordered provided it is endorsed by properly admissible expert evidence and provided the court exercises timely supervision of progress within the program and its affect upon the children and the parents. That, of course, was the basis upon which participation in the REACH program was ordered in this case.

- [32] I agree with the opinions and recommendations found in Dr. England's June 23, 2018 report. In particular, having regard not only to the matters discussed in that report but also the father's evidence respecting ongoing behaviours of concern (evidence that I accept), I make the following findings and conclusions:
1. notwithstanding some improvements in behaviour and communication on the part of the parents and the child, it is unlikely that the parents in this case will ever be able to cooperate as required in order for an effective and workable joint custody and co-parenting relationship to exist;
  2. the child is very likely a special needs child and should undergo an Autism Spectrum Disorder and psycho-educational assessments as early as reasonably possible to identify the challenges he may be confronting and the sorts of resources that should to be targeted to best promote the child's physical, psychological and emotional well-being; and
  3. of the two parents, the father is more attuned to and is better able to address the child's challenges and special needs.
- [33] Accordingly, I dismiss the mother's application for the parenting orders referred to above and grant the father's application in that regard as follows:
1. the claimant shall continue to have sole custody of Aston Isaac Ming-Lee Kwan-Lai born November 18, 2007 (the child);
  2. the child shall continue to reside with the claimant, however, except for such further periods to which the claimant may from time to time agree, the respondent will have access to and parenting time with the child every second weekend from Friday after school until Tuesday morning at the commencement of school, with the pick-ups and drop-offs being made by the respondent at those times. During such access/parenting time, the child may stay at the respondent's place of residence and the respondent will have day-to-day care, control and supervision of the child;
  3. paragraphs 4, 5 and 6 of the August 31, 2016 order of this Court are affirmed and will continue to apply;
  4. the parties are at liberty to withdraw from and discontinue the REACH program and paragraphs 7-13 and 17 of the August 31, 2016 order are of no further force and effect.
- [34] This decision is based solely on the best interests of the child. The Divorce Act, R.S.C. 1995, c. 3 (2nd Supp.), mandates "maximum contact" with each parent but only to the extent it is consistent with those best interests. Unlike the Family Law Act, the Divorce Act does not expressly specify the factors informing the best interests analysis although amendments are currently before Parliament proposing terminology almost identical to our provincial legislation.

- [35] I have specifically considered each of the factors referred to in s. 37(2) of the Family Law Act as well as the considerations mandated by s. 37(3) and (4) of that Act. These factors reflect the common law in any event. I do not consider it necessary to address each in detail but I add the following remarks for purposes of clarity.
- [36] I am entirely satisfied that the child's health and emotional well-being would be best served by a reduction of time in the care of his mother and also a reduction in the number of transitions between the respective parent's care and residence. There is no doubt that the mother loves the child dearly but her personality is not the best fit to address the child's needs, particularly as he has more challenges than most children. I am satisfied that the father is better able to provide and promote the child's health and emotional well-being.
- [37] It is true, as the mother submits, that the child's views have not been solicited by the Court. In this case, however, the Court has had the benefit of reporting from experts, including the child's therapist and his teacher. Furthermore, while the child is bonded to his mother and might be expected to state a preference for a parenting time with his mother, the latter's influences have had negative consequences and the child's lack of maturity and emotional challenges would result in his views attracting little if any weight.
- [38] The child has developed an improved relationship with his father and the latter's family. The father has re-partnered and his new partner is playing a more significant role in the child's life. As well, the child has a good relationship with the father's extended family, particularly his cousin who is of the same age, goes to the same school, and lives in the same apartment complex.
- [39] The history of the child's care is a significant factor, mostly in a negative context. The reasons for judgment dated August 31, 2016 describe the psychological/emotional dysfunction in the child's life and his serious emotional distress. The Court concluded that the mother's assertions to the contrary reflected a disturbing wilful blindness or lack of insight, a situation that does not appear to have significantly improved.
- [40] The child has a clear need for stability in his life, given his age, stage of development, and particularly the challenges that he is confronting. The father displays much better insight into the child's special needs and is better able to provide the necessary assessment and intervention. He is better suited to exercise parental responsibilities in this case.
- [41] It is clear from the evidence that the parents are not able to effectively cooperate on issues affecting the child. It is for this reason that final decision-making authority has been granted to the father. The mother's personality has made communication between the parents challenging but the Court is nonetheless satisfied that the father will comply with the requirement that he first attempt good faith discussions with the mother on all significant parenting decision before exercising any final decision-making authority.

[42] In N.R.G. (CA) the Court of Appeal interpreted ss. 40, 41 and 45 of the Family Law Act as limiting judicial intervention in parenting decisions, not just in alienation cases but generally. It stated that trial and chambers judges ought not issue detailed directions respecting such matters as children's activities, phone calls, electronic communications, attendance at school events and the like but, rather, should leave them up to the parents to decide, failing which the court should only determine which parent will have the final decision-making authority on disputed matters. Such authority has been granted to the father in this case, as I am satisfied that the father will exercise good judgment in that regard.

## CHILD SUPPORT REVIEW

- [43] At the time of the August 31, 2016 judgment both parties were employed full time as environmental engineers. The father's income was approximately \$150,000. The mother's income was approximately \$85,000.
- [44] The August 31, 2016 order varied the custody and access/parenting orders previously made by the court. The father was granted sole custody of the child. The child was to reside with his father and the mother's access/parenting time with the child was reduced to less than 40%. As a consequence of these changes, the father was no longer required to pay child support to the mother and, indeed, the child support obligation was transferred to the latter.
- [45] The August 31, 2016 order required the father to pay all of the expenses associated with the REACH program but also provided that these expenses could be reallocated between the parties as the court considered appropriate at the review hearing contemplated to occur six months later. The order also provided that issues of retroactive and continuing child support would be determined at that same review hearing.

## Income determinations

- [46] Both parties filed updated Form 8 financial statements for the purposes of this review hearing. The statements included each party's income tax returns for the years 2015-2017.
- [47] The father's total income, as reflected on line 150 of his income tax return, for the year 2015 was \$156,000, 2016 \$129,000, and 2017 \$143,000. He estimates his Federal Child Support Guidelines, SOR/97-175 ("Guidelines") income for the year 2018 will be \$144,000.
- [48] The mother's total income, as reflected in line 150 of her income tax returns, was \$85,000 for 2015, \$82,000 for 2016 and \$82,000 for 2017.
- [49] However, the mother's financial situation changed significantly in 2017. Her position with her former employer was eliminated due to the absence of suitable work and she was permanently laid off on July 19, 2017. She received a severance package of approximately \$51,000 representing 32 weeks' salary. A portion of that severance payment was rolled over to the mother's RRSP as permitted under the Income Tax Act. The mother's total income set

out on line 150 of her 2017 income tax return is \$82,000 comprising \$62,000 employment income and \$20,000 RRSP income. The total, \$82,000, is the same as her annual employment income for the previous year.

- [50] Following termination of her employment, the mother made some effort to obtain alternate employment. She applied online to two other engineering companies but was not short-listed for an interview. She also applied for a retail position in August 2017 but similarly received no positive response.
- [51] It turns out that shortly after receiving the reasons for judgment issued August 31, 2016, the mother, who had been self-represented in the legal proceeding, decided to apply to law school. She submitted an application to UBC's Allard School of Law in September 2016, wrote the LSAT in December 2016 and organized the submission of various references in January 2017. In her correspondence to one such reference, the mother noted that "work in the [engineering] industry is become quite slow/challenging" and that she was "apply[ing] to law school for self improvement and future career development".
- [52] On July 24, 2017 the mother received correspondence from the Allard School of Law confirming her admission into the JD program. She completed the winter session spanning September 5, 2017 to April 30, 2018 and is currently attending the 2018 summer session, which is slated to be completed at the end of August 2018.
- [53] The mother was also offered a Law Tuition Bursary from UBC in the amount of \$11,750, \$3,525 of which was paid on November 14, 2017 and \$8,225 was paid on January 1, 2018.
- [54] The mother's most recent Form 8 financial statement discloses zero employment income and \$11,750 "other income" for present child support purposes. This amount presumably reflects the bursary received/receivable from UBC.
- [55] Although her RRSP holdings were not disclosed in her most recent Form 8 financial statement, the mother advised the Court during oral submissions that she had RRSPs in the amount of \$110,000, which she was planning to withdraw as a means of support for the next two years of school. Her financial statement discloses debt of \$7,950 on account of a Canada student loan incurred September 1, 2017. Neither her affidavits sworn June 29 and July 3, 2018 nor her oral submissions to the Court addressed past or future Canada student loans.
- [56] Her Form 8 financial statement discloses the ownership of her personal residence with an unencumbered stated value of \$2.3 million. She did state during her oral submission that she was not claiming hardship as a defence to any child support claim in this matter.
- [57] For child support purposes, I find that the mother's Guidelines income in 2016 and 2017 was \$82,000. For the latter year, this amount reflects the fact that she received a severance package that effectively permitted full recovery of her annual salary from her employer. The number is actually conservative since she also received RRSP income that year, together with the proceeds of a bursary and student loan.

- [58] The more difficult question is whether income should be imputed to the mother for child support purposes for 2018 and into the future, at least for the next two years when she will presumably continue law school.
- [59] The father submits that the mother is intentionally unemployed in the sense that she made little meaningful effort to secure alternate employment following her termination in July 2017 and indeed it had been her intention to attend law school (if she was accepted) even if her employment had not been terminated. He invokes case law emphasizing that a parent cannot be excused from child support obligations by a self-induced reduction of income in furtherance of unrealistic career aspirations: *Hanson v. Hanson*, [1999] B.C.J. No 2532 (S.C.), *Holmstrom v. Holmstrom*, 2014 BCSC 545. From the latter case he emphasizes that the mother should not be allowed to "load the costs of her career adjustment on [the father] at this time when she will reap the benefits in years to come".
- [60] In reply the mother emphasizes that she did make some effort to obtain alternate employment in her field but met with no success. She says she confronts numerous "career disadvantages" because she is a "minority, female immigrant" (notwithstanding the fact that she has a doctorate in engineering). She submits that re-training in law is a reasonable step for her to take and that she ought not be penalized by imputed income in the circumstances.
- [61] As pointed out in *Bright v. Brown*, 2018 BCSC 560, certain fundamental principles of law apply to all child support matters:
1. a parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth;
  2. parents have a joint and ongoing legal obligation to support their children in a way that is commensurate to their income;
  3. child support is the right of the child, not of the parent seeking support on the child's behalf;
  4. support payments are based on earning capacity are not just on what a parent actually earns;
  5. as a result, a parent has a legal obligation to earn as much he or she is reasonably capable of earning so the children can receive an appropriate level of support;
  6. a parent does not fulfil his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly;
  7. for reasons of predictability and consistency, parliament has mandated the determination of a spouse's annual income for child support purposes to be made with reference to "total income" in the income tax return as adjusted, i.e. income not capital (or capital assets);
  8. a payor is not generally expected to sell capital assets such as a home for the purpose of generating income from which to pay support;

9. s. 19 of the Guidelines provides a non-exhaustive list of circumstances in which the court can exercise its discretion to impute income to a spouse for child support purposes; and
10. such circumstances include situations where the spouse is intentionally under-employed or unemployed or where a spouse is not reasonably utilizing property to generate income.

[62] Section 19(1)(a) of the Guidelines permits a spouse to be intentionally under-employed or unemployed where it is required by his/her reasonable educational needs. The onus lays with the spouse seeking to invoke that exception, here the mother. As noted in *Baberakubona v. Kanso*, 2014 ONSC 697, it is the obligation of the payor parent to justify his or her decision to return to school and in that regard the court will consider the following matters:

- whether the spouse is aspiring to a realistic or productive career;
- whether the course of study reasonably requires the spouse to temporarily remove herself from the work force;
- how much time is required in and out of the classroom;
- whether the program can be taken part time and thereby permit part-time work as well; and
- what sort of employment opportunities exist once the course of study is completed and how might employment income differ from previous occupations or careers.

[63] The evidence before me on these various points is extremely thin. The mother seems to have made half-hearted efforts to find alternate work in her field but there is no meaningful evidence about available employment either within her area of expertise or more generally for a person with her experience and qualifications. The mother's motivation for going to law school is largely based upon her experiences in the present litigation and her desire to assist similarly situated litigants in the future. However, there is no evidence before me respecting the employment opportunities available to her or the remuneration she might generate in her new occupation.

[64] At the end of the day, however, I decline to impute income to the mother on the basis that she is unreasonably and intentionally under-employed or unemployed. She did not quit her job - she was fired. Her efforts to seek alternative employment within her field met with no success. Her desire to make changes in her life by going to law school and pursuing a different career is not unreasonable and may well bear fruit that will accrue to the significant financial benefit of the child in the future. The father enjoys substantial employment income and the child is in no way being deprived of the necessities of life.

[65] Having said all that, however, it must also be noted that the mother does have and will continue to have income available to her while she is attending law school and which is properly taken into account for the purposes of child support. This includes income from her RRSPs, the UBC bursary, Canada student loans, and perhaps part-time work whether during or between her study terms. A reasonable figure in that regard for child support

purposes in 2018 and for the balance of her graduation from full-time study of law is \$35,000 per annum.

- [66] Accordingly, I find the mother's Guidelines income for child support purposes to have been \$82,000 per annum for each of 2016 and 2017 and \$35,000 for 2018 and while she remains in the full-time study of law at UBC.

### **Child support determination**

- [67] While counsel for the father made submissions respecting the legal principles of retroactive child support awards, they do not apply to the unique circumstances of this case. The August 31, 2016 order changing custody resulted in the termination of the father's obligation to pay child support and triggered a corresponding obligation on the part of the mother. However, the Court expressly ordered that a determination of that support would be deferred until the review hearing. The purpose of making that order was to ensure that all financial obligations arising from the change in circumstances could be taken into account at the same time and with due regard to intervening circumstances and the conduct of the parties. This is not the "usual" situation of delayed application for support.
- [68] I will deal with the allocation of expenses related to the counselling program and the court-appointed expert in the next section of these reasons for judgment. For present purposes, however, I am satisfied it is fair and appropriate to require the mother to pay child support in the amount of \$784 per month (22 months) for the period September 1, 2016 to present on the basis of the Guidelines income determinations made above. This results in an award in favour of the father in the amount of \$17,248 for the period ending July 31, 2018 and also triggers a future child support obligation by the mother in the amount of \$329 per month commencing August 1, 2018 and payable on the 1st day of each month thereafter.
- [69] I also observe that, given the father's substantial income enabling a comfortable lifestyle for the child, he is at liberty to waive payment of child support by the mother from time to time. He is not however obliged to do so.

### **REACH program expenses**

- [70] The father has provided a detailed accounting of the expenses associated with the REACH program. The expenses comprise the charges of all four psychologists who provided therapeutic counselling to the parties (and the child) or who acted as the Court Designate. The total is approximately \$62,000 to April 2018, but additional charges have been incurred since including, of course, the preparation of updated reports for the purposes of the review hearing.

- [71] The father has paid the majority of the REACH expenses incurred to date. The August 31, 2016 order expressly contemplated reallocation of expenses once all issues were heard and determined at the review hearing. While it is true that the father enjoys more income than the mother, all the more so at the present time, this is not a basis for proportionate reallocation. It is largely the conduct of the mother that has caused the unhealthy dynamic in this family, although the father was also a contributor in his own way.
- [72] In my view, a fair outcome in these circumstances is that the parents should bear the expense of the REACH program equally. Based on the figures set out in the father's affidavit of June 29, 2018 this will result in an equalization payment by the mother to the father of approximately \$23,000, together with 50% of the additional expenses since incurred.
- [73] If the parties are unable to agree on the final accounting and reallocation of the REACH program expenses, the matter will be referred to the registrar for final determination.

### **Dr. England's expenses**

- [74] The father has also provided an accounting of the costs associated with Dr. England's involvement in the case. She was appointed to assist the Court pursuant to s. 211 of the Family Law Act. Her assessment and reporting to the Court has been very helpful. While the mother has accused Dr. England of bias in favour of the father, I reject any such assertion and find that her conduct has been scrupulously professional, balanced, fair and impartial throughout.
- [75] The general rule is that where the court requires the assistance of a s. 211 professional and there is no conduct in the litigation worthy of rebuke, the parties will usually share the costs of that professional's assistance on an equal basis.
- [76] Counsel for the father argues that the mother should be required to pay 75% of Dr. England's expenses. He submits the mother has been obstructive by attempting to delay reports, accusing Dr. England of bias, and making unfounded objections to the admissibility of Dr. England's opinion evidence. While these things did occur, they are at least in part a product of the mother's complicated personality and, in my view, do not amount to litigation conduct warranting rebuke by way of unequal sharing of costs.
- [77] The costs of Dr. England's involvement in this matter are in the range of \$35,000 to \$40,000, again paid mostly by the father. These costs, once finalized, will be shared equally between the parties. If the parties are unable to agree on the accounting and the amount of the necessary equalization payment by the mother, then, as with the REACH program expenses, the matter will be referred to the registrar for determination.

## Special or extraordinary expenses

- [78] Section 7 of the Guidelines permits the court to include in any child support order provision for payment of "special or extraordinary expenses". Section 7(1) lists such expenses. The guiding principle set out in s. 7(2) of the Guidelines is that these expenses are to be shared by the parents in proportion to their respective incomes.
- [79] In determining whether to make any award for special or extraordinary expenses as part of a child support order, the court must take into account:
1. the necessity of the expense in relation to the child's best interests; and
  2. the reasonableness of the expense in relation to the means of the parents, the child, and the family's spending pattern before separation.
- [80] Section 7(1) expenses include certain childcare expenses, medical and dental insurance premiums, health-related medical treatment expenses exceeding insurance reimbursement, and "extraordinary expenses" for education or extra-curricular activities.
- [81] Section 7(1.1) defines the term "extraordinary expenses" insofar as education and extra-curricular activities are concerned. Such expenses only qualify as "extraordinary" if they exceed what the requesting parent can reasonably cover, having regard to that parent's income and the table amount ordered for child support. As well, the court may undertake a proportionality inquiry, looking at the nature and number of programs/activities, any special needs or talents of the child, the overall cost of the programs/activities, and the like.
- [82] An interim order made by consent on December 10, 2012 required the father to pay 65% of expenses incurred for the child's participation in piano lessons, kung fu lessons, Chinese lessons, and any other activities for the child "agreed to by the parties". The child's counselling costs were also to be shared in the same proportion.
- [83] The Final Order made October 21, 2013 contained consent provisions respecting s. 7 expenses as follows:
- the father would pay 66% and the mother would pay 34% of expenses related to piano lessons, child counselling, and various camps for the child during holidays;
  - any other proposed s. 7 expenses must be discussed and agreed upon in advance, in which event they would be shared equally, failing which the expense would be borne by the party incurring it; and
  - the parties would exchange tax returns and notices of assessment by June 1 of each year, following which child support would be adjusted accordingly, as well as proportional sharing of s. 7 expenses.

- [84] By order made June 19, 2015, the Court permitted the father to take the child for psycho-educational testing without the approval of the mother and the costs of that testing were to be paid 66% by the father and 34% by the mother.
- [85] The August 31, 2016 order suspended payments between the parties in respect of s. 7 expenses and deferred to the anticipated review hearing any determination respecting expenses that might otherwise have qualified for sharing pursuant to s. 7 of the Guidelines.
- [86] In their respective Notices of Application filed in support of the review hearing, each party seeks an order for proportionate sharing of past and future s. 7 expenses.
- [87] The father's claim for s. 7 expenses incurred in the period September 2016 to present is \$780 for two summer camps. In his affidavit he says these camps were "necessary in light of his being out of school" and were something the child wanted to attend.
- [88] In her affidavit of June 29, 2018, the mother sets out some \$9,162 of s. 7 expenses incurred between September 2016 to June 2018 on account of extra-curricular activities and medical/dental insurance premiums, including:
- piano tuition: \$2,189
  - taekwondo: \$3,341
  - various camps: \$1,895
  - dance lessons: \$567
  - Chinese classes: \$455
  - medical premiums: \$1,737
- [89] Counsel for the father argues in his submissions that the mother "has referenced a number of expenses that are not properly s. 7 expenses". He conceded that expenses for "summer camps are appropriate" but points out the receipts for camps attached to the mother's affidavit only totalled \$618.
- [90] One assumes by counsel's reliance upon *Clarke v. Clarke*, 2014 BCSC 824, that objection is taken to the inclusion of "ordinary" recreational sporting and similar extra-curricular activities, i.e. piano, taekwondo, dance and Chinese classes. I note, however, that along with camps during holidays, piano lessons were expressly agreed to as s. 7 expenses in the Final Order. However, taekwondo, dance, and Chinese classes would not normally constitute "special or extraordinary expenses" under s. 7 of the Guidelines absent express agreement beforehand of the sort contemplated by paragraph 12 of the Final Order.
- [91] It is not clear on the evidence whether the necessary discussion and consent took place.

- [92] One purpose of the review hearing was to clean up the "balance sheet" as between the parties. I am not going to take an excessively technical approach to s. 7 expenses for that purpose. The amount claimed by the mother is not substantial in the overall picture of things and I accept the amounts claimed by both parties as s. 7 expenses for final accounting purposes. They are to be shared by the parties proportionate to their incomes as set out above.
- [93] Going forward, however, I wish to make it clear that except as the parties expressly discuss and agree in writing beforehand, expenses for camps, sports or extra-curricular activities such as piano, dance, or Chinese lessons do not qualify as special or extraordinary expenses within the meaning of s. 7 of the Guidelines. The parties will be involved in the parenting of their child for at least another decade (and probably much longer) and they must learn to constructively communicate on matters such as the necessity of expenses in relation to the child's best interests and the reasonableness of the expenses in relation to their means.
- [94] I also wish to make it clear that, as discussed earlier, the child may well be a special needs child who will require not only professional assessment and counselling, but also educational programming necessary to meet his particular needs (matters the father has agreed to address). Any reasonable expenses incurred in respect of such matters will likely qualify as special or extraordinary expenses whether with or without the consent of both parents and should be shared in proportion to their respective incomes after deducting whatever recoveries may be available from insurance or other third parties such as government or other social services/educational entities.

#### SUMMARY and CONCLUSION

[95] In the result, I make the following orders:

1. the claimant shall continue to have sole custody of the child;
2. the child shall continue to reside with the claimant;
3. except for such further periods to which the claimant may from time to time agree, the respondent will have access to and parenting time with the child every second weekend from Friday after school until Tuesday morning at the commencement of school, with the pick-ups and drop-offs being made by the respondent at those times. During such access/parenting time, the child may stay at the respondent's place of residence and the respondent will have day-to-day care, control and supervision of the child;
4. paragraphs 4, 5 and 6 of the August 31, 2016 order of this Court are affirmed and will continue to apply;
5. the parties are at liberty to withdraw from and discontinue the REACH program and paragraphs 7-13 and 17 of the August 31, 2016 order are of no further force and effect;

6. the respondent's Guidelines income for child support purposes is \$82,000 per annum for each of 2016 and 2017 and \$35,000 for 2018 and while she remains in the full-time study of law at UBC;
7. the respondent will pay to the claimant child support in the amount of \$17,248 (\$784 per month x 22 months) for the period September 1, 2016 to July 31, 2018;
8. the respondent will pay to the claimant child support in the amount of \$329 per month commencing August 1, 2018 and payable on the 1st day of each month thereafter;
9. the respondent will pay to the claimant an equalization payment in respect of the REACH program costs in an amount necessary to effect equal sharing of same;
10. the costs of Dr. England's involvement in this matter will also be shared equally between the parties;
11. expenses set out in paras. [87] and [88] of these reasons for judgment will be paid by the parties proportionate to their Guidelines incomes referred to in para. [6] above;
12. if the parties are unable to agree on the final accounting and equalization of the payments referred to in paras. 7, and 9-11 above, the matter will be referred to the registrar for determination;
13. except as the parties expressly discuss and agree in writing beforehand, future expenses for camps, sports or extra-curricular activities such as piano, dance, or Chinese lessons do not qualify as special or extraordinary expenses within the meaning of s. 7 of the Guidelines;
14. going forward, s. 7 expenses will be shared by the parties proportionate to their Guidelines incomes;
15. any reasonable expenses incurred for assessments or counselling of the child and for educational programming necessary to meet his needs, will qualify as special or extraordinary expenses and must be paid by the parties in proportion to their respective incomes after deducting whatever recoveries may be available from insurance or other third parties such as government or other social services/educational entities;
16. by no later than June 1st of each year the parties will provide to each other a copy of their filed personal income tax return with all schedules and attachments together with the notice of assessment for that year and any other documentation reasonably required to disclose income for child support assessment purposes;
17. paragraphs 14 and 15 of the August 31, 2016 order of this Court are affirmed and will continue to apply; and
18. Justice Kent is no longer seized of this action.

- [96] Supreme Court Family Rule 16-1 and Appendix B govern costs in family law cases. The general rule is that costs should follow the event and are awarded to the successful party unless the court orders otherwise. This rule also applies to custody cases.
- [97] In considering whether to "order otherwise" the court may consider factors such as hardship, earning capacity, the purpose of the award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award. However, neither sympathy nor the fact that one party is in a better financial position than the other, is a proper basis for departing from the general rule.
- [98] The August 2016 application and the subsequent court attendances leading up to the recent review hearing were triggered by alienation behaviours on the part of the mother that necessitated drastic intervention (change of custody and therapeutic counselling) in the best interests of the child. The father has been entirely successful and, in accordance with the general rule, is awarded the costs of these proceedings to be assessed under Appendix B at the scale of ordinary difficulty. If, however, there are matters that should be brought to my attention that might militate in favour of a different award of costs, the parties are at liberty to apply for a hearing on the matter within the next 60 days.

"KENT J."

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