

CANADA / JUDGMENT

L.C.H. v. L.J.K.

2024 BCSC 1299

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1299 L.C.H. v. L.J.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.C.H. v. L.J.K.,

2024 BCSC 1299

Date: 20240719

Docket: E52520

Registry: Vernon

Between:

L.C.H.

Claimant

And

L.J.K.

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

J.C. Chandler

Respondent appearing on his own behalf:

L.J.K.

Place and Date of Trial/Hearing:

Kelowna, B.C.

February 22, 2024

Place and Date of Judgment:

Kelowna, B.C.

July 19, 2024

Table of Contents

Prior Court History. 4

Factual Overview.. 6

Parenting Coordination.. 8

Section 211 Assessment. 11

Counselling for M. 15

Parenting Schedule for M. 17

Fines. 19

Wrongful Denial of Parenting Time. 21

Child Support. 23

Parenting Exchange Location.. 25

Summary of Relief Sought. 25

Costs. 27

[1] These are my reasons for judgment in respect of three notices of application in what can undeniably be considered a high-conflict family law matter. They are, in chronology, as follows:

- a) notice of application of the claimant, L.C.H. (the "Claimant"), filed December 20, 2023 (and responded to February 12, 2024). The relief sought is summarized in Schedule "A" to these reasons for judgment;
- b) notice of application of the Claimant filed January 30, 2024 (and also responded to on February 12, 2024). The relief sought is summarized in Schedule "B" to these reasons for judgment; and

- c) amended notice of application of the Respondent, L.J.K., (the "Respondent") filed February 1, 2024 and responded to September 26, 2022. For clarity, this is not a typographic error. The Respondent's notice of application was originally filed September 14, 2022. It is not clear to me why a new notice of application was not filed given the passage of time, but in any event, the Claimant's September 26, 2022 application response constitutes the governing pleading as no amended application response was filed. The relief sought in the amended notice of application is summarized in Schedule "C" to these reasons for judgment;

(collectively, the "Applications").

- [2] As will be apparent, I have redacted portions of the schedules to remove identifying information. The crux of the relief sought is apparent even with said redaction.
- [3] The Respondent consents to the relief sought in paragraph 7 of Schedule "A" (retroactive child support) and paragraph 11 of Schedule "B" (payment of outstanding costs). Those orders are granted appropriately.
- [4] The relief sought at paragraph 12 of Schedule "A" is dismissed as the security required has been posted with the court. The timeliness of this will be addressed later as it is relevant but it would be redundant for me to order compliance with an order where I am satisfied there has, ultimately, been compliance.
- [5] For reasons that I will articulate, I have concluded that certain of the relief sought in the Applications is inappropriate for determination on affidavit material and must proceed to trial. I have thus made efforts to hive off that relief which I am satisfied I can adjudicate upon versus those issues where the relief sought involves resolving conflicts in the evidence that can only be properly done through viva voce evidence and corresponding cross-examination.
- [6] Given this conclusion, I am making an order, within my inherent discretion as the presiding chambers judge and pursuant to the basket clause prayer for relief at paragraph 5 of Schedule "B", to order that a notice of trial be filed within 60 days of the release of these reasons for judgment. The notice of trial must contemplate a trial of at least six days, but that estimate can be extended upon consultation between counsel for the Claimant and the Respondent, who is presently self-represented.
- [7] Trial dates must be canvassed with Supreme Court Scheduling for both Vernon and Kelowna registries to maximize the available options. The commute time between these registries is very manageable.

- [8] In the event a mutually agreeable trial date cannot be found within the 60 day window I have ordered, the parties are given leave to request to appear back before me for the limited purpose of fixing a trial date. I am expressly not seizing myself generally of this action or any further interlocutory applications but simply making myself available, if needed, to ensure this action is set for trial in a timely way as it is, in my view, a priority matter given the nature of the parenting issues involved.

Prior Court History

- [9] Before turning to the factual background, it is necessary to recognize that this matter has been before the courts previously. That is probably self-apparent from my above reference to this being a high-conflict parenting matter.
- [10] As a starting point, the parties (who were then both represented by counsel), entered into a comprehensive consent order dated May 11, 2021 (the "Consent Order"). For reference, the Consent Order is appended as Schedule "D" to these reasons for judgment. Consistent with my above comments, it has been partially redacted for anonymity.
- [11] However, what is of particular note is that there have been two prior comprehensive reasons for judgment issued in this matter.
- [12] The first are the reasons of Justice Tucker indexed as 2023 BCSC 473, although not published. This decision resulted in a very clear and, in my view, unambiguous parenting schedule. Justice Tucker, of note, also recommended that a parenting coordinator be appointed at paragraph 53 of the reasons.
- [13] However, prior to the release of Justice Tucker's decision, the Claimant actually applied for and obtained an order appointing a parenting coordinator from Master (now Associate Judge) Schwartz (the "Schwartz Order") in March 2023. There are no accompanying reasons but there is an entered order dated March 1, 2023, in the application record. Of some note, the Claimant was awarded fixed costs under the Schwartz Order.
- [14] The second set of reasons which are then material are the oral reasons for judgment of Justice G.P. Weatherill rendered June 5, 2023. These oral reasons for judgment were also not published but they were subsequently transcribed and included in the application record. There are several particular quotes from Justice G.P. Weatherill's reasons which I think provide some important overall context to this file. Those relevant portions of the oral reasons for judgment read as follows:
- [6] It is evident to me that the respondent is raising the issue of his parenting time with [M.] because it directly is connected to child support. He insists on shared parenting to ensure that he has at least 40 percent parenting time. He made that quite clear during his submissions today.

...

[13] For reasons that elude me, the respondent seems bent on getting some kind of revenge or getting even for not getting what he wanted with respect to the initial separation, and is using the court system punish the claimant, rather than that what he should be doing, which is being concerned about his daughter's best interests.

...

[24] ... I am going to try and send a message to you, Mr. [K.], that court orders once made, whether you agree or disagree, will be followed. ...

[15] This final very express direction from Justice G.P. Weatherill does not appear to have fully resonated with the Respondent. Adherence with court orders has continued to be something the Respondent considers optional at his whim when the occasion suits.

[16] Having regard to the recitation of the facts in the prior reasons for judgment of Justices Tucker and G.P. Weatherill, I will focus on the present circumstances and limit my review of the historical facts to that which are strictly material to the conclusions I make herein.

[17] Finally, before turning to said factual overview, I must note there was an additional documentary disclosure order made by Master Keim (now Associate Judge Keim) on June 28, 2022. This order required disclosure from the Respondent and made another fixed cost order in favour of the Claimant. This order is relevant as it relates to the ongoing dispute over child support.

Factual Overview

[18] The parties began living in a marriage-like relationship on July 1, 2017 and separated in or about October 2020.

[19] The parties have one child together, namely M. , born in May 2018.

[20] M. was two years of age when the parties separated.

[21] I specifically articulate these facts as it is quite apparent to me from the evidentiary record that the parties entered into a relationship and very shortly thereafter the Claimant became pregnant with M. The relationship terminated while M. was still a young toddler. The resulting effect, combined with other external factors, is that the parties have seriously struggled to co-parent M.

[22] M. is currently six years of age. The Claimant has a child from a prior relationship who is a young teenager.

[23] There is documentary evidence, admissible for an interim application, confirming that M. has been seen by her family doctor and referred to a pediatrician for concerning symptoms consistent with anxiety that are diagnostically abnormal.

[24] I am being intentionally vague given certain evidence in this proceeding. I have done so to protect the confidentiality and privacy of the children involved. Specifically, I am not outlining M.'s anxiety-related behaviours as I am mindful of how judicial commentary on these issues might impact M. as she matures. Moreover, M.'s specific birthdate and the age of her half-sister are not material to any conclusion which I shall make, though M.'s birthdate must be included in the preamble of the order arising from these reasons for judgment.

Issue Overview

[25] It is clear from a review of the record that the parenting issues relating to M. are the driving force in this action. Child support is the secondary issue but it is not lost on the Court that there is a correlation between the two issues in this matter. Specifically, beyond the disagreement as to Guideline income, whether the parenting schedule qualifies as a shared parenting regime in accordance with s. 9 of the Federal Child Support Guidelines, SOR/97-175, will make a material difference in the amount of support payable. This was, as noted, also identified by Justice G.P. Weatherill in 2023.

[26] As it pertains to the parenting issues, beyond the identified connection to the issue with child support, I will summarize the key issues in a general way as follows:

- a) The Claimant asserts that the current parenting schedule is not in M.'s best interests due to conduct by the Respondent which are incompatible with successful co-parenting and which contribute to M. exhibiting concerning anxiety driven behaviours;
- b) The Respondent asserts that the Claimant is engaging in gate-keeping conduct vis-à-vis M. (The term "gate-keeping" is not expressly used in the Respondent's materials but I believe accurately describes his evidence when viewed from a broad perspective.);
- c) The Claimant asserts the Respondent has frustrated the role of a parenting coordinator appointed to assist with the exercise of parenting responsibilities which exacerbates the difficulties in co-parenting;
- d) The Claimant asserts that the Respondent is actively obstructing counselling for M; and
- e) The Claimant asserts that the Respondent has minimal respect for court orders despite the warning from Justice G.P. Weatherill and further sanction from the court is required.

[20] I expressly acknowledge that this is a high-level overview of the parenting conflict at play between the parties. I am, however, satisfied that this appropriately articulates the crux of the dispute between the parties which is prodded further by the child support issue articulated above.

Parenting Coordination

- [27] As alluded to, the conduct of the Respondent has been criticized somewhat mildly by Justice Tucker and then more candidly by Justice G.P. Weatherill. Unfortunately, that trend has continued and requires further judicial rebuke.
- [28] One of the most concerning aspects of the Respondent's conduct regarding M. relates to compliance with the court order regarding the appointment of a parenting coordinator.
- [29] The reasons for the appointment of the parenting coordinator are absolutely apparent on the evidentiary record. It was both recommended and ordered.
- [30] The Respondent did, to his credit, comply with the Schwartz Order as to the appointment of a parenting coordinator at first instance.
- [31] The problematic issue that arose is that the parenting coordinator retained by the parties, who is a lawyer, withdrew from the law firm she practised with during the course of her initial retainer and started a new law firm. While there is almost always a slight inevitable disruption to clients when firm changes occur, it is not atypical in the legal profession.
- [32] It did, however, result in the parenting coordinator terminating the parenting coordination agreement with the parties. This termination was not the fault of the parties or due to failure to pay the accounts of the parenting coordinator, A.P.S. It was simply a practical necessity having regard to the parenting coordinator's practice change, of which the parties were informed of.
- [33] The greater concern arises from the fact that the Respondent is utilizing this as a basis to unilaterally withdraw from the parenting coordination process generally. This is not acceptable.
- [34] The tone of the Respondent's communication in this regard is quite telling and accordingly I have reproduced his email of December 4, 2023 in substantially its entirety for context. The email is sent to the Claimant, A.P.H. and M.'s counsellor, A.G. It reads, subject to minor redaction and revision for anonymity, as follows:

Date: December 4, 2023 at 9:14:47 AM PST

[email addresses omitted]

Subject: Re: [M.]

Hello,

I'm not sure what is going on here, but I thought I made myself clear, and now this is now harassment.

[A.P.H.],

As per my conversations with [assistant], I am not accountable for paying for your service any further so I recommend you stop emailing me. It will only cost . . . more. I'd advise you go talk with [assistant] if this is a problem for you.

[A.G.],

I do not consent so I believe I do not need to say anymore. Do not charge my credit card further.

[L.J.K.],

I will not be paying for any more coucelling [sic] at this time with [A.G.]. I do not consent.

The plan is to find a new PC. I will be working on that, but my priority this weekend was my daughter and my parenting time.

I also mentioned I will consider coucelling [sic] for [M.] in the new year, closer to [redacted]. That's in her best interest.

This is what's happening, I have exercised the power to do so. I request all of you to relax.

Regards,

[L.J.K.]

[35] The parenting coordinator, A.P.H., was appointed in her personal capacity having regard to her qualifications in this regard. Where a parenting coordinator "hangs their shingle" does not change those qualifications.

[36] If there are legitimate cost or logistical considerations based upon the parenting coordinator's change in firm/practice, the parties are entitled to raise those issues for discussion before entering into the updated parenting coordination agreement/addendum. However, the Respondent has not articulated those.

[37] Moreover, I can confirm from the correspondence included in the application record that this is not a situation where the parenting coordinator has relocated to, for example, the Northwest Territories or the Maritimes. She remains local, just under a different shingle. Thus, I accept on the evidence before me that the Respondent is unhappy with the parenting coordination process and is utilizing this as a convenient opportunity to frustrate that process.

[38] Moreover, A.P.H. actually indicated a willingness, in writing, to withdraw as the parenting coordinator if a new parenting coordinator was appointed. That has not happened, which I consider consistent with the Respondent's level of respect for the process generally.

- [39] I thus order that within seven days of this order both parties shall execute an updated Parenting Coordination Agreement with A.P.S. (full name to again be included in said order) and provide any updated retainer which is required in accordance thereto within 14 days. Save for the amendment as to A.P.S.'s new firm, contact and billing information, the terms of the Parenting Coordination Agreement shall remain the same as agreed following the Schwartz Order.
- [40] If the Respondent fails to comply with the order I expect he can prepare to have to respond to a contempt application as the Court has been, I believe, very clear in articulating that compliance with court orders is not a matter of preference. Unless stayed or appealed, compliance with court orders is mandatory and not a mere recommendation.

Section 211 Assessment

- [41] In *L.D.B. v. A.N.H.*, 2024 BCCA 61, the Court of Appeal recently and succinctly addressed the roles of assessments ordered pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [42] The material portions of the decision of the Court of Appeal in *L.D.B.*, written by Griffin J.A., begin at para. 34:
- [34] It is helpful to first set out s. 211 of the FLA. It provides:
- 211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:
- (a) the needs of a child in relation to a family law dispute;
 - (b) the views of a child in relation to a family law dispute;
 - (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.
- (2) A person appointed under subsection (1)
- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
 - (b) unless each party consents, must not have had any previous connection with the parties.
- (3) An application under this section may be made without notice to any other person.
- (4) A person who carries out an assessment under this section must
- (a) prepare a report respecting the results of the assessment,
 - (b) unless the court orders otherwise, give a copy of the report to each party, and
 - (c) give a copy of the report to the court.

- (5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.
- [35] The chambers judge understood the differences between a full s. 211 report and a more focused "views of the child" report and acknowledged that the former involves not just the views of the children in relation to the family law dispute, but their needs and the ability and willingness of a party to the dispute to satisfy these needs. She cited *A.R. v. A.V.R.*, 2016 BCSC 629 at para. 4 for the proposition that a full s. 211 report serves as the courts' "eyes and ears" with respect to investigating matters and providing advice as to the best interests of a child".
- [36] Ultimately, whether a court exercises its discretion to order a s. 211 report must be informed by the best interests of the child and what purpose the report would serve: *H.V.G. v. L.E.T.*, 2017 BCSC 1324 at paras. 41-43. In that case, the father sought a full s. 211 report in respect of teenaged children, but the court instead ordered a partial "views of the child" report only and subject to the children's agreement to meet with the psychologist.
- [37] The threshold for ordering a s. 211 report is low, and courts are encouraged to take a "broad and generous approach" as these reports are seen as "almost invariably, a valuable source of information to a court faced with the onerous task of making fundamentally important decisions about the welfare of a child". Generally, only the cost of such a report will raise a legitimate countervailing concern: *Smith v. Smith*, 2014 BCSC 61 at para. 12.
- [43] With that context, the parties here are *ad idem* that a s. 211 assessment be prepared. The dispute arises because:
- a) the Claimant seeks the s. 211 assessment be prepared by Dr. England;
 - b) the Respondent seeks the s. 211 assessment be prepared by Dr. Elterman; and
 - c) the Respondent seeks that the Claimant pay for all of the cost of s. 211 assessment.
- [44] Of note, L.D.B. is an appeal of a chambers decision rendered by the writer. I raise that only because it confirms that I concluded that Dr. Elterman had the requisite qualifications to prepare a s. 211 assessment in a very high-conflict parenting case. The error identified by the Court of Appeal was my failure to satisfy there had been a material change in circumstances since my prior order in the same case requiring a comprehensive "views of the child report".
- [45] This commentary is intended to simply underscore the point that in making my orders herein, I am not suggesting that one assessor proposed is generally more appropriate, suitable or qualified than the other. Both have the requisite credentials and experience and have been accepted accordingly as experts by this Court on multiple occasions.

- [46] The turning point in this case, in my view, is that the Respondent has not actually articulated why Dr. Elterman should be preferred over Dr. England. If this were a situation in which there was evidence that one expert could prepare the report substantially more expeditiously, that there was some significant cost differential, that there was some bona fide concern of a conflict of interest or so forth, the burden was on the Respondent to lead that evidence. The Respondent did not.
- [47] Moreover, the Respondent's conduct generally, as indicated by his involvement with the parenting coordinator and the counsellor, tends to be obstructive rather than cooperative.
- [48] I thus draw the inference that the resistance arises from the fact that the Respondent is simply opposed to Dr. England because Dr. England is the expert proposed by the Claimant. I am not prepared to exercise my discretion in what I consider to be an arbitrary manner in this context. Accordingly, I appoint Dr. England as the s. 211 assessor in this matter on the specific terms set forth below.
- [49] Further, there is no basis for the Claimant to solely bear the costs of the s. 211 assessment at first instance. The parties shall appropriately be responsible for the cost of the report on an equal (50/50) basis subject to further adjudication upon costs after trial or subject to written agreement between the parties.
- [50] Specifically, arising from by conclusion set forth at paras. 46 and 48 of these reasons, I order that:
- a) Pursuant to s. 211 of the Family Law Act:
 - i. Dr. Rebecca England be appointed to prepare a written report concerning the parenting arrangements for the parenting of [M.] born (date to be inserted in the order).
 - ii. Without limiting the generality of the foregoing, Dr. England will assess and prepare a report concerning:
 - (a) [M.]'s needs,
 - (b) [M.]'s views, and
 - (c) the ability and willingness of each party to satisfy [M.]'s needs.
 - b) The parties shall each pay 50% of the cost for the s. 211 report at first instance with the cost to be ultimately allocated between the parties by written agreement or court order.
- [51] In addition to the foregoing orders, I make the following ancillary orders regarding the s. 211 assessment:
- a) The parties shall execute any retainer and/or engagement agreement provided by Dr. England within seven business days of receipt and shall provide the necessary retainer requested within seven business days thereafter;

- b) The parties shall make objectively reasonable efforts to accommodate Dr. England's schedule of availability to facilitate the preparation of the s. 211 assessment;
 - c) Any documents audio recordings or videos provided to Dr. England must be contemporaneously provided to the other party. Compliance with this term of the order may be satisfied through carbon copy on any email transmissions or by sending duplicate USB drives to Dr. England and the other party. The parties shall provide a list to the other party of any filed pleadings provided to Dr. England but shall not be required to provide a copy of said pleadings to avoid redundancy; and
 - d) Unless authorized by Dr. England, neither party shall have unilateral communication, by telephone or email, with Dr. England.
- [52] With respect to the order at subparagraph (d), there obviously will be private meetings between Dr. England and the parties and private communication for the purposes of scheduling, and so forth. That is a necessary function of the s. 211 assessment process. My order is intended to prevent either party from trying to influence the objective nature of the s. 211 assessment without the knowledge of the other.
- [53] In the event that due to the passage of time or other circumstances Dr. England is no longer in a position to accept her appointment as the s. 211 assessor in this matter, the appointment of an alternate assessor may be brought back before me through a request via Supreme Court Scheduling. The accompanying affidavit materials shall include the curriculum vitas of the alternate candidates, their retainer requirements and their availability. I will hear this request, if necessary, at 9:00 or 9:30 a.m. on the first mutually agreeable date.

Counselling for M.

- [54] Even on the record before me, it is apparent that M. has had some significant behavioural concerns since separation. Some of those may be unrelated to the separation but that is, it would appear, a very relevant contributing factor.
- [55] M. has been engaged in counselling during the material time with A.G. to address these concerns.
- [56] M. has developed a therapeutic relationship with A.G. A.G. is a qualified professional in her field who practices in what I would best describe as a multi-disciplinary clinic with other qualified professionals.
- [57] As far as I can ascertain from the materials, the Respondent has not articulated any specific legitimate concern about M. attending counselling with A.G. in particular. The concerns raised are that M. does not necessarily need counselling and counselling closer to the District of Coldstream would be something the respondent would possibly entertain.
- [58] As it relates to the issue of necessity, I am more than satisfied that it is in M.'s best interests to attend counselling. There are issues articulated in the materials that are well beyond a trifling age appropriate behavioural concern. Ongoing counselling is appropriate. How long

that must continue will be a decision that needs to be made with the benefit of professional advice and consideration of that advice, in due course. However, the time to cease counselling is not now. In reaching this conclusion, I do not accept, for the purposes of a making this interim order, the Respondent's evidence that M. does not exhibit any of the behaviours which are being addressed in counselling while in his care. Moreover, even if I am wrong in this regard, the behaviours are documented and regardless of where they are occurring, counselling to address them remains appropriate.

- [59] I recognize there is a degree of inconvenience in travelling to Kelowna for the purposes of this counselling for M. but, in my view, that inconvenience is outweighed by the level of rapport that M. has had the opportunity to build with A.G.
- [60] I thus order that A.G. (full name to be inserted in the order) shall continue to provide counselling services to M. until A.G. withdraws or terminates her serves, the parties otherwise agree or the court otherwise orders.
- [61] A.G. or a representative of the clinic where she practices must copy both the claimant and respondent with confirmation of appointment bookings and any other material correspondence relating to M. to ensure transparency. I cannot make an order as against A.G. as she is not a party so I shall make following ancillary orders:
- a) A copy of these reasons for judgment and, upon entry, the resulting court order shall be forthwith provided to A.G. to be placed on M.'s file; and
 - b) If either party receives an email from A.G. or a representative of the clinic where she practices to which the other is not copied, they shall forthwith provide a copy to the other party.
- [62] Further, I order that the parties shall be responsible for facilitating transport of M. to her counselling appointments which occur during their respective parenting time. If either parent is unable to facilitate transportation of M. for this purpose, either personally or through a suitable third party alternate, the other parent must, except in the event of emergency, provide 24 hours' notice to the other parent. That parent may, at their discretion, make other arrangements for transportation of M. to her counselling appointment with A.G. If the other parent cannot make alternate arrangements, the parent whom has parenting time with M. at the relevant time is responsible for any cancellation fee imposed.
- [63] For the reasons I articulate below, I am not making any new orders regarding Guideline income determination or child support. Accordingly, on an interim basis, the parties shall, subject to the cancellation fee caveat, each be responsible for 50% of M.'s counselling fees with A.G. This sharing can be adjusted upon final adjudication of the financial matters by this Court or through written agreement of the parties. In the meantime, I consider this order to be consistent with my above conclusions regarding M.'s best interests.

Parenting Schedule for M.

[64] Importantly, there is an existing interim parenting plan in place for M. This issue is thus not coming before the Court at first instance.

[65] With that acknowledgement, I fully appreciate that it is statutorily legislated that the only consideration by this Court in making any parenting order is that it must be in the best interests of the child. The consideration of what those best interests are may vary due to changes in circumstances. That is a very broad brush review of the law as it is a much more nuanced analysis based on the factors set out below and the overall factual matrix of each individual family unit and each individual child. However, there is one fundamental common denominator--the best interests of the child.

[66] In this regard, those factors are as outlined in s. 37 of the FLA as follows:

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [67] The evidentiary record does set forth some bona fide concerns regarding M.'s current circumstances which are not assisted, in my view, by the Respondent's documented level of regard for court orders.
- [68] However, I ultimately have concluded that an interim variation of the interim parenting arrangement is not appropriate on the basis that it is premature at this juncture. I have, as set forth above, determined that a s. 211 assessment should proceed as soon as reasonably possible and made orders to, I hope, reduce the prospect of conflict between the parties in the course thereof.
- [69] I have further made orders regarding counselling for M. with A.G. and for the timely scheduling of a trial. In my view, having regard to all the relevant factors, are the orders that collectively, on an interim basis, are in M.'s best interests.
- [70] Moreover, I consider that the s. 211 assessment will, in the overall circumstances of this case, be of greater assistance to this Court if it is conducted under the current interim parenting schedule. This is certainly not always the appropriate solution in high-conflict family files, as maintaining the status quo is not always the best route. However, I am exercising my discretion accordingly based upon the overall evidentiary record before me to adjourn the application to vary the parenting schedule on a further interim basis.

Fines

- [71] As articulated in Schedules "A" and "B", the Claimant seeks the imposition of various fines as against the Respondent pursuant to s. 228 and s. 230 of the FLA.
- [72] The relief sought by the Claimant is overreaching.
- [73] Specifically, I am satisfied that relief under s. 228 of the FLA is generally not available to the Claimant as none of the court orders made to date were specifically made under Division 10 of the FLA other than the order of Justice G.P. Weatherill which required the posting of \$2,000 as security for "future conduct" (paragraph 24 of the oral reasons for judgment).
- [74] The Respondent's compliance with that order was, on the evidence, dilatory but I am not prepared to order further sanction in this regard as this point is addressed in my costs award.

- [75] However, relief pursuant to s. 230 of the FLA is also available where "no other provision of this Act applies for the purposes of enforcing an order under this Act". That, I conclude, is the situation before me.
- [76] The Respondent, as I have articulated above, appears to regard court orders as mere recommendations. He was warned of the danger of this view very expressly by Justice G.P. Weatherill. Notwithstanding that, and the ultimate posting of security pursuant to Justice G.P. Weatherill's order, the Respondent's conduct has continued. The most significant breach is the blatant non-compliance with the order appointing the parenting coordinator. The second is the documented failure to comply with paragraph 27 of Schedule "A" which contemplated specified FaceTime calls.
- [77] The above is not a comprehensive analysis given, as with much of the evidentiary record, there are conflicts. Those can be addressed at trial. However, I am satisfied that the above two breaches are more than adequately proven on the evidentiary record and that a sanction in accordance with s. 230 is necessary and appropriate to deter and denounce this conduct.
- [78] Accordingly, pursuant to s. 230 of the FLA, I order that the \$2,000 in funds paid into Court pursuant to the order of Justice G.P. Weatherill made June 5, 2023 shall be paid out to the Claimant.
- [79] I further order that pursuant to s. 228 of the FLA, the Respondent shall post replacement security of \$2,000 within 14 days of these reasons for judgment to secure further compliance with court orders as intended by Justice G.P. Weatherill.

Wrongful Denial of Parenting Time

- [80] Denial of parenting time is unfortunately not uncommon in high-conflict files.
- [81] Accordingly, the FLA specifically includes provisions regarding denial of parent time. The key provision is s. 61 which provides 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:
- (a) require the parties to participate in family dispute resolution;

- (b) require one or more parties or, without the consent of the child's guardian, the child, to attend counselling, specified services or programs;
- (c) specify a period of time during which the applicant may exercise compensatory parenting time or contact with the child;
- (d) require the guardian to reimburse the applicant for expenses reasonably and necessarily incurred by the applicant as a result of the denial, including travel expenses, lost wages and child care expenses;
- (e) require that the transfer of the child from one party to another be supervised by another person named in the order;
- (f) if the court is satisfied that the guardian may not comply with an order made under this section, order that guardian to
 - (i) give security in any form the court directs, or
 - (ii) report to the court, or to a person named by the court, at the time and in the manner specified by the court;
- (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.
- (3) If the court makes an order under subsection (2) (a), (b) or (e), the court may allocate among the parties, or require one party alone to pay, the fees relating to the family dispute resolution, counselling, service, program or transfer.

[82] The companion provision is s. 62 of the FLA which stipulates the circumstances where a denial of parenting time is not wrongful. I have not reproduced it because, in this factual matrix, I conclude there is no basis for it to apply.

[83] Specifically, the denial of parenting time is quite straight forward. The Respondent requested parenting time over the Christmas break in 2023 which was inconsistent with the existing parenting order. Specifically, the Respondent sought to have a "straight two weeks of holiday" parenting with M. This was not agreed to by the Claimant.

[84] Despite the lack of agreement and without taking steps to bring the matter before the courts for an order for a variation of the existing schedule to accommodate this request, the Respondent simply unilaterally imposed a schedule upon the Claimant.

- [85] There is some evidence about why this occurred. This evidence can be probed on cross-examination and an ultimate determination as to its credibility made. For the purposes of the Applications, I do not accept the evidence as being reliable. To the contrary, I conclude the Respondent's evidence is contrived to justify his decision to take unilateral action in imposing his preferred holiday parenting schedule for M.
- [86] I will acknowledge I was referred to the decisions of this Court in *K.R. v. J.W.*, 2016 BCSC 225; *S.K.B. v. D.S.B.*, 2017 BCSC 2569; and *N.C. v. N.C.*, 2017 BCSC 2311. All three of those decisions involved an insightful and considered analysis of the issue of where the denial of parenting time may or may not be wrongful in the circumstances.
- [87] Of these decisions, which I do recognize involve children of a more mature age than M., the most applicable quote is that from Justice Saunders in *N.C.* at para. 75: "The integrity of the justice system requires that court orders be obeyed, not that they be treated as negotiating points".
- [88] The Claimant did not agree to a modification of the parenting schedule. Despite what I have described as some gatekeeping-type conduct by the Claimant over the course of the dispute, I do not consider this to be unreasonable or capricious. The disputed parenting time was over the Christmas break. M. was, as noted, five years old and at an age where holidays are particularly significant to most children.
- [89] I thus order that the Claimant is entitled to compensatory parenting time with M. at a time designated by the Claimant on providing the Respondent with 14 days' written notice. I have extended the length of the notice period to allow for the assistance of the parenting coordinator if necessary. If the parenting coordinator is not yet retained or is unavailable, the 14 day written notice per this order will govern.

Child Support

- [90] There is an existing child support order in place.
- [91] As with the request to modify the parenting schedule, I am satisfied that while those arrangements possibly may not coincide with a final order after the trial I ordered be scheduled, the issues of determination of Guideline income and determination of child support based on the applicable parenting schedule for M. are similarly not suitable for determination on the present evidentiary record. These are, in my view, triable issues.
- [92] Given that I am not dismissing the issue but rather determining it requires resolution via a trial with viva voce evidence and cross-examination, should the parties not be able to reach resolution outside of court, I will provide only a brief factual underpinning for this conclusion.

- [93] Specifically, and ignoring the ongoing quite obvious correlation between the parenting schedule and quantum of child support, on the basis of the current evidentiary record there are disputes regarding the following material issues relating to the determination of Guideline income which include, without limitation:
- a) the sources of income received by the Respondent;
 - b) the treatment of RRSP income received by the Respondent;
 - c) rental income claimed by the Respondent and the corresponding claimed rental expenses, this issue being further complicated by the fact the rental property is the Respondent's residence. To use a colloquial phrase, the arrangements are rather murky;
 - d) business losses claimed by the Respondent which may be closely intertwined with the rental income issue;
 - e) imputation of income to the Claimant, a previously a stay-at-home parent who became licensed as a realtor in 2022. In this regard, I note that the Claimant's Guideline income for the purposes of the support is already imputed by consent.
- [94] In the end result, I am simply not satisfied that it is appropriate to adjudicate on the child support issue, yet again, on an interim basis in this particular case. The support arrangements may be proven to require adjustment, but the trial judge is the appropriate presider to make those orders. Specifically, I am not satisfied that there has been a material change in circumstances other than the passage of time. In reaching this conclusion, I also must state that I am satisfied that M. will continue to have an acceptable standard of living in both parties' homes under the existing interim support order pending trial.
- [95] On the same basis, I am not prepared to order that M.'s gymnastics expenses are a s. 7 special and extraordinary expense under the Guidelines at this time. However, I make that order with liberty to the Claimant to pursue this expense, both retroactive and proactively. I reach this conclusion on the basis that I am not, on the evidentiary record before me, satisfied that M.'s gymnastics meet the definition of a special and extraordinary expense under s. 7(1)(f) of the Guidelines as that term is defined under s. 7.1(1).

Parenting Exchange Location

- [96] The Claimant seeks an order that the parenting time exchanges and transfers take place at the identified but anonymized as K.G.S. location when M.'s school is not in session.
- [97] There is, importantly, not even an address of this establishment listed in the relief sought in Schedule "B".
- [98] Being an almost life-long resident of the Okanagan Valley, I acknowledge that I think I possibly know the location of K.G.S. being referred to. However, I am not satisfied that this is an appropriate situation to take judicial notice.

- [99] Moreover, the evidentiary basis for this relief is not presently made out on the materials as to why M. needs to be exchanged at a neutral location outside of school hours. Clearly the parties have a poor co-parenting relationship at present, but I am not satisfied that the location of the exchanges is a primary point of concern in addressing M.'s best interests.
- [100] If there are issues with transitions/exchanges that can be more clearly articulated, that is a matter that falls, I conclude, within the scope of the parenting coordinator's jurisdiction to designate a suitable alternate location with a specified address.

Summary of Relief Sought

- [101] Upon doing a final review of Schedules "A", "B" and "C" for the benefit of the parties, counsel and any future presider, I provide the following very brief summary. These must obviously be read in the context of my actual findings of fact set forth above but should, I hope, assist in the timely drafting my order.
- [102] As it pertains to Schedule "A":
- a) Paragraph 1 - granted on the terms specified at paragraphs 50 to 53 of these reasons for judgment;
 - b) Paragraph 2 - granted;
 - c) Paragraph 3 - adjourned to trial;
 - d) Paragraph 4 - adjourned to trial;
 - e) Paragraph 5 - adjourned to trial;
 - f) Paragraph 6 - adjourned to trial;
 - g) Paragraph 7 - consented to;
 - h) Paragraph 8 - adjourned to trial;
 - i) Paragraph 9 - adjourned to trial;
 - j) Paragraph 10 - granted on the terms specified at paragraphs 60 to 63 of these reasons for judgment;
 - k) Paragraph 11 - consented to;
 - l) Paragraph 12 - dismissed on the basis it was complied with but the security must be replaced within 14 days in accordance with paragraph 79 of these reasons for judgment;
 - m) Paragraph 13 - dismissed;
 - n) Paragraph 14 - the Respondent shall pay the Claimant the sum of \$2,000 for her benefit pursuant to s. 230 of the FLA as specified at paragraph 78 of these reasons for judgment;

- o) Paragraph 15 - the Claimant is entitled to costs in accordance with paragraphs 105 to 108 of these reasons for judgment.

[103] As it pertains to Schedule "B":

- a) Paragraph 1 - adjourned pending completion of the s. 211 assessment;
- b) Paragraph 2 - dismissed with liberty to address the parenting exchange location for M. with the jurisdiction of the parenting coordinator;
- c) Paragraph 3(a) - granted on the terms set forth in paragraph 89 of these reasons for judgment;
- d) Paragraphs 3(b), (c), and (d) - dismissed;
- e) Paragraph 4 - the Claimant is entitled to costs in accordance with paragraphs 105 to 108 of these reasons for judgment; and
- f) Paragraph 5 - dismissed except as pertains to the order requiring the filing of a notice of trial and corresponding direction.

[104] As it pertains to Schedule "C":

- a) Paragraph 1 - dismissed;
- b) Paragraph 2 - dismissed;
- c) Paragraph 3 - dismissed; and
- d) Paragraph 4 - dismissed except as pertains to the order requiring the filing of a notice of trial and corresponding direction.

Costs

[105] Costs are always in the discretion of the presiding justice, whether in chambers or at trial.

[106] Pursuant to R. 16-1(7) of the Rules, the general principle is that costs are awarded to the successful party:

Costs to follow event

- (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[107] The standard of "success" required to be awarded costs of an action under R. 16-1(7) is "substantial success". The Court of Appeal in *Harras v. Lhotka*, 2016 BCCA 246 describes the substantial success standard as follows:

[48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:

Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:

- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.
- [108] In this case, I conclude that the Claimant was substantially successful. Given the amount of relief sought the weighing of substantial success is more challenging than in other circumstances. In my view scale, however, tips in favour of the Claimant on the basis the Claimant succeeded on her application regarding the s. 211 assessment, the counselling for M. with A.G. and the sanctions under the FLA. I further did not dismiss the application to vary the parenting schedule, I simply concluded it was premature.
- [109] Accordingly, I conclude the Claimant is entitled to her costs of this application as ordinary costs in any event of the cause. The costs are not payable forthwith.

"Hardwick J."

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