

CANADA / JUDGMENT

L.C.S. v. R.W.S.

2024 BCSC 1457

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Supreme Court of British Columbia

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2024 BCSC 1457 L.C.S. v. R.W.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.C.S. v. R.W.S.,

2024 BCSC 1457

Date: 20240812

Docket: E51115

Registry: Vernon

Between:

L.C.S.

Claimant

And

R.W.S.

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

A.D. Rekdale

Counsel for the Respondent:

M.R. Corcoran

Place and Date of Trial/Hearing:

Vernon, B.C.

January 26, 2024

Place and Date of Judgment:

Vernon, B.C.

August 12, 2024

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Introduction

- [1] Two notices of application came before me on January 26, 2024, both filed by or on behalf of the respondent.
- [2] The respondent's notice of application was first filed on April 4, 2023 (the "2023 Application").
- [3] The 2023 Application, which is handwritten, has certain deficiencies in its drafting. Its relevance is primarily for the purpose of acknowledging that the underlying issues were brought before the Court in April of 2023, although not specifically pursued at that time.
- [4] There were two other applications filed by the respondent in 2023 which were not formally adjudicated upon.
- [5] The most recent application of the respondent, filed January 10, 2024, was prepared with the assistance of counsel (the "January 2024 Application").
- [6] The January 2024 application seeks, in summary terms, the following:
 - a) compliance with the final order of Justice Winteringham entered on August 13, 2018;

- b) alternatively, graduated parenting on a gradually increasing schedule, as specified in paragraph 2 of the January 2024 Application;
 - c) enrollment in the OurFamilyWizard app for communication regarding the children;
 - d) enrollment in the family reunification program at Incentive Counselling in Vernon or with another family reunification counsellor located in the Okanagan region, with costs to be shared; and
 - e) costs.
- [7] The claimant consented to the orders sought regarding the use of OurFamilyWizard. The Court appreciates this concession. In high-conflict family law matters such as this one, OurFamilyWizard provides a reliable business record of the communications between the parties. It also allows observation by approved third parties which is unavailable with conventional text messaging or Facebook messenger texts. The relief sought in paragraphs 3 and 4 of the January 2024 Application is granted, by consent.
- [8] The balance of the relief sought in the January 2024 Application is opposed.
- [9] Before turning to the underlying factual background, there are three orders which I will define:
1. the order made June 7, 2016 at the judicial case conference (the "JCC Order");
 2. the final order of Justice Winteringham made August 13, 2018 (the "Final Order"); and
 3. the consent order made December 11, 2023 (the "Consent Order").
- [10] The claimant is 43 years of age (the "Claimant").
- [11] The respondent is 44 years of age (the "Respondent").
- [12] The parties began living in a marriage-like relationship in or around 1999 and were married on February 2, 2006.
- [13] The parties separated in February 2014, and were divorced in 2018.
- [14] There are two children of the marriage, namely, T.R.S. ("T."), who is 13.5 years of age and B.R.S. ("B."), who is 12 years of age (collectively, the "Children").
- [15] For context, B. was not quite 2 years of age and T. was 3 years of age when the parties separated.
- [16] At the judicial case conference in June 2016 the parties agreed to be joint guardians of the Children, sharing parenting responsibilities and sharing parenting time on an equal basis.

- [17] I pause to note that this is not a trial, wherein I would have the benefit of cross-examination. I conclude that the short duration of the parties' marriage after having the Children has presented a significant impediment in achieving the foundation of a functional co-parenting relationship, notwithstanding the parties consenting to equal shared parenting at first instance.
- [18] Returning to the Final Order, in August 2018 the parties comprehensively addressed the issues of parenting time, child support and special and extraordinary expenses of the Children, amongst other things. This was achieved, to the credit of the parties and the fortunate availability of court resources, as a result of a judicial settlement conference.
- [19] Again, for context, T. was then 7.5 years of age and B. was 6.
- [20] As it specifically related to parenting for the Children, the parties agreed in the Final Order that:
- a) the Children would be primarily with the Claimant;
 - b) the Respondent would have parenting time for four days every second weekend from what I will generally describe as Thursday after school to Monday drop off at school. The exact times set forth in the Final Order speak for themselves;
 - c) the Respondent would have two weeks of holiday time during the school summer holidays, with such time to be divided between the parties by agreement; and
 - d) the Respondent would have one week of holiday time over the school Christmas break, with the Claimant to have parenting time with the Children for the other week of Christmas holiday time.
- [21] Under this parenting schedule it was agreed that the Respondent's parenting time was approximately 40 percent, which met the definition of shared parenting under s. 9 of the Federal Child Support Guidelines.
- [22] In June 2020, the Claimant advised the Respondent via text that B. did not want to go to his home for parenting time. At that time, B. was barely 8 years of age.
- [23] The Respondent, I accept, made various attempts to speak with B. in the following years without success. If there was the occasional not-in-person contact between B. and the Respondent which was not specifically identified for me in the large affidavit record, it does not change my conclusions set out below.
- [24] I will come back to the role of the Claimant in this scenario in due course, but regardless of the reason, basis or justification, the Respondent has not had meaningful in-person parenting time with B. since June of 2020. They have taken a walk and seen each other at T.'s football games and had other minor incidental contact. That is not actual parenting time or contact of significance. The estrangement between B. and the Respondent has thus been ongoing more than four years at present date.

- [25] The Respondent did not pursue relief from the Court at the time of the initial denial. It was not brought forward, based on the materials, until the 2023 Application.
- [26] The Respondent did, however, continue to have parenting time with T. until December 2022.
- [27] The Respondent's parenting time with T. ceased in December 2022. This, I accept, resulted as a constellation of factors, but disagreement between the parties over a travel authorization appears to have been the immediate catalyst.
- [28] Specifically, the Respondent has not had in-person parenting time with T. since December 2022. As with B., I acknowledge that there may be evidence of sporadic non-in-person contact of some sort somewhere in the evidentiary record, but that does not change my conclusion there as not been parenting time or contact of significance. The estrangement between T. and the Respondent has thus been ongoing more than 1.5 years at present date.
- [29] The cessation of parenting time with T. would appear to be the catalyst for the 2023 Application, which application was brought by the Respondent as a self-represented individual--hence the deficiencies in the relief sought as already noted.
- [30] The next material step in the litigation was the Consent Order. Importantly, this order was made on an interim and without prejudice basis. The terms of the Consent Order contemplated specified telephone contact with T. and B., the sharing of cellphone expenses and certain conduct orders. The key provision, however, is paragraphs 7 and 8 of the Consent Order which provides as follows:
7. The parties shall work together through their respective counsel to negotiate the terms of obtaining and evaluative Views of the Child report (the "Report") in a reasonable amount of time. The cost of obtaining the Report shall be shared equally between the parties. The parties will give consideration to the cost of the Report when deciding on a professional to prepare the Report.
 8. The professional retained to prepare the Report will be an unbiased individual with no personal relationship with either party. Should either party object to the use of the specific professional, then the objecting will provide the names of three (3) preferred professionals, from which the other party will select their preference.
- [31] The Consent Order also contains a provision that nothing prevents either party from setting a court application at any time regardless of the status or stage of the Report.
- [32] It is abundantly obvious that the parties have different parenting styles. However, I am prepared to conclude these differences, at their core, existed at the time that they agreed upon the Final Order. At the outset after separation, however, there was shared parenting. The revised shared parenting schedule under the Final Order continued for B. for just shy of two years thereafter and for more than four years thereafter for T. The differences arising from the differing parenting styles were again recognized, I conclude, in the Consent Order.

- [33] The Consent Order did not have the desired effect, at least from the Respondent's perspective. The Respondent asserts that the Claimant is the reason why the intent of the Consent Order has been frustrated.
- [34] In this regard, I accept there have been missed or forgotten calls. The evidence, again not tested on cross-examination, indicates this has gone both ways. Priority, by both parties, needs to be given to facilitating the contact contemplated in the Consent Order.
- [35] Recognizing the above, on balance, I accept the Respondent wishes to have this contact with the Children and that the Claimant has the ability to better facilitate same. A single missed call on occasion does not mean a parent does not wish to speak with their child. Encouragement to phone again within a reasonable period of time would be in the child's best interests, particularly in a situation such as this. Where that occurs, the child is more likely, in my view, to appreciate that this was not meant to convey that the contact with the child is not a priority to that parent.
- [36] By way of an analogy, court appearances and doctor's appointments are also a priority and there is generally reasonable flexibility on the requirement of punctuality where that flexibility is appropriate. A party who is five or ten minutes late for court on occasion is generally not denied the audience of the court.

Letter from B.

- [37] A critical piece of evidence before the Court is a letter from B. to the Respondent, attached as Exhibit "C" to the Respondent's affidavit #3 (the "B. Letter"). Reproduction of the B. Letter is not of particularly high quality, but I am able to accurately read its contents. B. was approximately 8 years and 2 months of age at that time.
- [38] During the course of submissions I expressed to counsel that I had significant doubt that the B. Letter was authored by B. alone and without adult assistance. In doing so, I misspoke as I indicated there were not spelling mistakes in the B. Letter. There is indeed one spelling mistake that I have subsequently identified. However, notwithstanding that spelling error, I remain of the view that B. may have physically printed the B. Letter, but did not independently draft it without adult assistance from the Claimant.
- [39] I reach this conclusion for the following reasons:
- a) The B. Letter makes appropriate use of punctuation. Given that the B. Letter is handwritten, this cannot be explained by "spell check" or "autocorrect".
 - b) The B. Letter is, with the above-noted exception, devoid of but one spelling mistake.
 - c) The B. Letter includes reference to parenting issues which I consider to be outside that of appropriate maturity of a child B.'s age, regardless of her intelligence or level of sophistication.

- d) The B. Letter, despite being handwritten, has a recognizable degree of paragraph structuring, including underlining between the paragraphs, which I conclude is inconsistent with that normally consistent with a child of B.'s age.
- [40] Were this final point my only concern with the B. Letter, I acknowledge that the paragraph structuring is not determinative. B appears to be of at least average intelligence and possibly somewhat above average intelligence for her age. B. also appears to have quite nice printing for her age at the time of the B. Letter and I accept that she may have had a better understanding of paragraph structuring than an average child of her age. However, when considered in the context of my above conclusions regarding punctuation, spelling and certain content, it appears as though B. was most likely copywriting from a prepared text authored by or co-authored with the assistance of the Claimant.
- [41] Consistent with this, B. withdrew from her relationship with the Respondent at that time and there is very little evidence of any efforts by the Claimant to take steps to address this proactively. I also recognize the above finding is balance against the reality the Respondent took modest steps to address the issue through the court until his parenting time with T. ceased.
- [42] Further balanced against this finding is my conclusion that some of the concerns raised in the B. Letter are merited. I will turn to those.
- [43] The photograph evidence tendered as part of the Claimant's affidavit materials confirms an obvious state of uncleanliness in the Respondent's residence, including a very large accumulation of beer cans (or what might be similar adult beverage cans as the labels are not all clearly identifiable). These cans are pictured situated in multiple locations throughout the Respondent's residence and porch/yard. They are not stored in recycling bags or bins. The accumulation thus cannot, and is not, explained away by simply being slow in attending to intended recycling after a social occasion or two.
- [44] I thus conclude the Respondent either consumes more beer (or again similar adult-type beverages) than he acknowledges in his affidavit. The most generous assessment of the evidence is that he does not make any reasonable timely efforts to dispose of his recycling after social events, where he and others consumed alcoholic beverages at his home, in order to maintain a clean residence for his minor children. I also recognize that there are more recent photographs tendered by the Respondent which exhibit a much tidier residence, though the Court cannot ignore the fact that these photographs were taken by the Respondent for obvious evidentiary purposes and do have a self-serving quality to them.
- [45] The above concerns also give some air of reliability to the concern that the Respondent may have driven under the influence of alcohol while the Children were in his care. Without reiterating my above comment, I recognize that there is no corroborating evidence of this from a third-party adult in the record. It is, if merited, an obvious concern regarding the best interests of the Children as it relates to in-person parenting time. However, the Claimant did not seek to proactively address this issue by bringing the matter to court for an

order precluding the consumption of alcohol during parenting time or having the court mandate the use of a sobriety monitoring device like Soberlink. The Claimant also apparently considered parenting time with T. to be appropriate until December of 2022 and the cessation of that parenting time was not related to conduct of this nature. This gives rise to a competing air of reality that is an explanation the Claimant is using to justify the denial of parenting time. I simply cannot conclude one way or another on the evidence before me.

- [46] There are also concerns raised that the Respondent fell asleep while smoking, when the Children were in his care. I glean from the evidence that the Respondent was a smoker at the time of the Final Order. The issue, thus, is not with his smoking but rather his falling asleep while smoking. A much different issue. The denials of his are, again, untested on cross-examination. The denial of this by the Respondent is, however, rather weak. The primary assertion is that the Claimant repartnered with an individual who smokes. Leaving aside the obvious health risks of exposure to second-hand smoke, there is a qualitative difference in the risk between smoking in, for example, the yard or on the porch and the allegation of falling asleep smoking on the couch in the house. Again, I am not able to make definitive findings of fact on the basis of the conflicting evidence, but this does raise legitimate concerns given the mandate to consider only a child or children's best interests under the governing legislation.
- [47] I do not place any significant weight on the uncontroverted evidence that B. suffered an accidental burn while in the care of the Respondent. I have reviewed the photograph evidence and it confirms there was an injury, which I would not describe as trifling. I would, however, describe it as fairly minor and there was no evidence of any significant enduring consequences. There is also no evidence of this being more than an isolated incident. Simply put, I accept the Respondent potentially could have taken greater care in supervising B. at the time of her injury. However, I again have no evidence from anyone who might have been present at the time which would support a definitive finding of fact in this regard. Furthermore, children do not come encased in "bubble wrap" and a child can be injured even under the most diligent of parental supervision, especially while engaging in outdoor activities.
- [48] Accordingly, even if not perfect parenting in the moment, this from the Court's perspective would not, in and of itself, come even close to meriting the termination of parenting time between B. and the Respondent.
- [49] I similarly put no weight on the assertion that the Respondent wears dirty clothes. This is explained, I accept, entirely by the fact that the Respondent works in trades and would be in a position of having to pick up the Children (when parenting time was ongoing) in work clothes. The Respondent has to maintain his livelihood and the practical reality is that there may not have been time to shower and redress on all occasions.
- [50] There are additional issues raised in the lengthy affidavit record, but I do not consider it necessary to detail them at this juncture.

- [51] Rather, I am satisfied that the concerns over the Respondent's conduct generally, as addressed above, combined with the extensive passage of time since the Respondent has had parenting time with the Children, are the fundamental basis for my orders at this juncture.
- [52] In reaching this conclusion, I also recognize that family counselling has previously been attempted with, what I will call, very marginal success. This is a complicated situation and a specified skill set is required. What was attempted, I conclude, was not satisfactory in the circumstances.

Legal Analysis

- [53] It is trite law that the starting point is always the best needs of the children. The Court is very familiar with same. The parties are also familiar with this, based on the litigation history, but struggle with its application.
- [54] Under the amended Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), which is the governing statute under the doctrine of paramountcy, s. 16(3) sets out the factors to be considered in determining the best interests of the child, including:
- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
 - (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
 - (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
 - (d) the history of care of the child;
 - (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
 - (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
 - (g) any plans for the child's care;
 - (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
 - (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
 - (j) any family violence and its impact on, among other things,

- (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
 - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
 - (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.
- [55] These factors are similar to the factors outlined in s. 37(s) of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [56] Having regard to the length of time since the Respondent had parenting time or even meaningful contact, I am not prepared to simply order reinstatement of parenting time, even on a graduated basis, without professional assistance. I simply cannot conclude that it would be an appropriate application of the best interests' analysis.
- [57] The Children are still not of an age where they should be making adult decisions, but their views cannot be disregarded entirely. Forcing them back into a structured parenting schedule after the lengthy period of estrangement from the Respondent is, in my judicial opinion, a recipe for immediate disaster which will create greater roadblocks to any future success.
- [58] I am not, however, dismissing the relief sought at paragraph 2 of the January 2024 Application. Rather, I adjourn it generally with liberty to reapply. I am expressly not seizing myself of hearing of that portion of the January 2024 Application, if any, in due course.

Denial of Parenting Time

- [59] The statutory remedy for denial of parenting time under s. 61 of the FLA was introduced, with legislative intention, to address situations where there is an agreement or order for parenting time which is not being complied with. The remedies are set forth in s. 61(2) of the FLA. The combination of sections 61 and 62 of the FLA serve a very useful purpose where intervention of the court may be required, but the draconian remedy of contempt may not be appropriate.
- [60] Parenting time that has been in an agreement or that has been ordered must be respected. If not appealed or varied, compliance cannot be viewed as optional. Court orders are not mere recommendations: *E.F.K. v. R.J.*, 2024 BCSC 1112 at para. 72.
- [61] Before turning to the analysis, I recognize that an application under s. 61(1) of the FLA may only be made within 12 months after the person was denied parenting time or contact with a child and the onus is on the applying party to prove the denial on the evidence.
- [62] Having regard to the facts I have outlined, much of the denied parenting time falls outside of that window, especially as it pertains to B.

- [63] In the general course, applications under s. 61 of the FLA should thus not consider evidence that is older than 12 months: *Shaw v. Shaw*, 2014 BCSC 984. I consider that distinguishable, however, given that (although improperly drafted) the Respondent did file the 2023 Application. I also cannot ignore the correspondence sent by B. to the Respondent in the best interests' analysis, which I will review below.
- [64] However, the inevitable conclusion is that the January 2024 Application is properly before the Court and there has been a denial of parenting time in the last 12 months.
- [65] Whilst all family cases are factually unique, this case shares some key similarities with *K.R. v. J.W.*, 2016 BCSC 225.
- [66] In that case, the sole child involved was significantly more mature in age than B. and somewhat more mature in age than T. at the material times. However, the following analysis of why simply acceding to the views of a child in denying parenting time versus actively obstructing parenting time may still be wrongful. Specifically, see paras. 22-34, where Justice Betton states:
- [22] There are relatively few decisions that have considered ss. 61 and 62 of the FLA in detail. The provisions have, however, been referred to a number of times.
- [23] The central determination needed before any remedy pursuant to those provisions is available is that there be a "wrongful denial of parenting time". Section 62(1)(a)-(e) provides a non-exhaustive list of when a denial is not wrongful. Clearly, there will be scenarios where concluding denials are wrongful is straightforward, leaving only the question of identifying the appropriate remedy. The court also has discretion not to impose any consequence or remedy even if a denial is found to be wrongful; that is to say, s. 61(2) uses permissive not obligatory language.
- [24] Consistent with the best interests of children being the singular concern, s. 62(2) also allows for compensatory parenting time to be ordered even if a denial is not wrongful.
- [25] Here, however, the claimant's actions do not conveniently fit into those subparagraphs, leaving the issue of whether there are "other circumstances the court considers to be sufficient justification for the denial" pursuant to s. 62(1)(f) for consideration. Though not exclusively so, much of the dispute in these facts is how to characterize the claimant's and the respondent's responses to S.W.'s resistance to having parenting time with the respondent. As noted, numerous individual events are addressed by the parties where there have been deviations from the parenting time afforded the respondent by the Funt Order.
- [26] In my view three questions need to be addressed to resolve the issues raised by the parties.

- [27] The first is whether s. 61 of the FLA requires an incident by incident determination or whether a more global assessment based on the overall effect of a pattern of conduct or series of actions is appropriate. If it is the latter, might a finding of wrongful denial be possible even if the individual events or actions in isolation may not be viewed as wrongful denials of parenting time. In other words, can a denial for purposes of the provisions include a broad purposive meaning or only a more specific and literal interpretation.
- [28] The second is how far the claimant is obliged to go in compelling S.W. to attend to avoid the conclusion that she has wrongfully denied parenting time.
- [29] The third is what impact on the analysis does a decision by the respondent to relent and not force the issue have. This highlights the fact that before a denial can be said to be wrongful, there must first be a denial. In other words, does such a decision by the respondent relieve the claimant of any potential finding of a wrongful denial.
- [30] I do not view these three questions to be discreet inquiries but rather elements of the process of interpretation of these provisions of the FLA.
- [31] An examination of the rationale behind these provisions is helpful. In the former Family Relations Act, R.S.B.C. 1996, c. 128, there were no provisions specifically dealing with disputes regarding parenting time. Instead, the only remedy for noncompliance with an order was contempt. However, as stated in the Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, White Paper on Family Relations Act Reform: Proposals for a new Family Law Act (July 2010) [White Paper], these quasi-criminal remedies:

are rarely used and have been criticized as being ineffective and ill-suited to this type of parenting dispute: they involve a high burden of proof, are potentially at odds with the child's best interests, are costly and are not equally available in the two courts that hear family law cases (i.e., the Provincial Court and the Supreme Court) (at 64).

- [32] In consultations, the Ministry received feedback on how the law could improve to address issues between parents in following parenting time orders. They found the feedback was mixed, which is not surprising given the complex nature of these circumstances when they arise:

Some said existing tools were inadequate and thought non-compliance with support and access orders should be addressed with equal attention. Others pointed out that support orders and access orders were very different and that the law was poorly placed to force relationships between reluctant family members or address the underlying difficulties, such as addiction problems, personality disorders or even an older child's unwillingness to spend time with a parent. Concerns were also raised about encouraging litigiousness or even litigation harassment of one parent by the other, potentially leading to toxic conflict that could spill over to the child.

There was general agreement, however, that if more remedies were to be included in the new law that they should address both sides of the non-compliance issue; that is, denial and failure to exercise scheduled time with a child. Many also supported the inclusion of a section recognizing that scheduled time with a child might not go ahead in certain circumstances, such as when the child is sick, accompanied by corresponding remedies such as make-up time, to encourage ongoing contact nevertheless (White Paper at 64).

[33] In formulating a recommended policy, the Ministry focused on including flexibility in these types of remedies:

Separate remedies are proposed for access denial and failure to exercise access to recognize the different circumstances in which such problems arise. For example, make-up time or supervised exchanges that promote the child-parent relationship may be an appropriate remedy where there is access denial; however, these same remedies may be inappropriate for failure to exercise access as it may not be in a child's best interests to force contact with a reluctant parent.

Including more options to address non-compliance is intended to clarify the law and fill legislative gaps (i.e., the lack of effective remedial tools, differing tools in the two levels of court) while at the same time maintaining sufficient flexibility to address the unique facts of each case. Options which fall on the preventative side of the continuum such as counselling could reduce the costs of separation by helping to resolve underlying issues and avoid future difficulties.

Further flexibility is built into the new law through the inclusion of exceptions (i.e., when scheduled parenting time did not go ahead because a doctor's note indicated the child was too ill) and certain limited remedies for those exceptional circumstances, such as make-up time (White Paper at 65).

[34] While the words of ss. 61 and 62 of the FLA do not specifically address one parent influencing the contact of the child with another parent, the White Paper does address that this set of facts could be addressed under this statutory framework:

That said, cases where it can be established that one parent has deliberately undermined the child's relationship with the other parent can be addressed in a number of different ways under the new family law. For example:

- A broad range of remedies is available to address disputes over time with a child, including denial of parenting time. See Chapter 6: When Orders for Time with a Child are Not Respected, for further detail (at 143).

[67] It has been some eight years since *K.R. v. J.W.* was decided. It continues to be a seminal authority on this issue.

[68] Adding to the analysis, Justice Schultes says in *S.K.B. v. D.S.B.*, 2017 BCSC 2569 at paras. 32 and 33:

- [32] But the circumstances envisioned by s. 62 are all quite narrowly circumscribed and relatively serious. The section should not be seen by primary care parents as a charter empowering the exercise of their discretion to decide that parenting time is not appropriate in response to more general concerns. A parent who does not employ these provisions in good faith, applies them to circumstances outside their scope, or tries to use them as a substitute for a variation application will likely find themselves subject to some of the more coercive remedies provided in s. 61, as well as the costs of a successful application by the denied parent. In other words, parents misuse s. 62 at their peril.
- [33] A parent who believes that modifications to the parenting regime are needed in the best interests of the children, but who cannot point to particular circumstances described in s. 62, should instead make an application to seek those changes by variation.
- [69] In this regard, I consider it of particular significance in this case that, as already noted above, the Claimant did not bring on an application to vary the Final Order on her own initiative and still has not done so. Instead, she took self-help measures purportedly based upon uncorroborated allegations of poor parenting skills and, most significantly, the views of the Children, which views I have noted are potentially problematic.
- [70] I thus conclude that there has been a denial of parenting time and that the denial has been, in all of the circumstances, wrongful, as that term has been interpreted in the context of s. 62 of the FLA.
- [71] Having reached this conclusion, I recognize that s. 61(2)(b) of the FLA grants the court the jurisdiction to require one or more parties or, without the consent of the child's guardian, the child, to attend counselling, specified services or programs.
- [72] This is the appropriate remedy. This situation will not be resolved through compensatory parenting time or even a monetary remedy without addressing the underlying issues between the Respondent and the Children. To do so would be contrary to the best interests of the Children which, as I have articulated above, is the fundamental guiding principle of the FLA.
- [73] Rather, I accept that the proposal of the Respondent that the family unity be enrolled in the Family Reunification Program at Incentive Counselling in Vernon, British Columbia (the "Reunification Program"). This appears to be a reputable firm with locations in the Lower Mainland, the Okanagan and Alberta.
- [74] Pursuant to s. 224(1)(b) of the FLA, which provides me the jurisdiction to require that "one or more parties or, without the consent of the children's guardian, [a] child, to attend counselling, specified services or programs", I order that:
- a) The Claimant and the Respondent shall provide any necessary enrollment forms or documentation to Incentive Counselling for the Reunification Program within seven business days;

- b) The Claimant and the Respondent shall provide their share of any retainer required by Incentive Counselling for the Reunification Program within 10 business days;
 - c) The Claimant and the Respondent shall pay their share of any further retainers or invoices rendered by Incentive Counselling within 30 days of receipt pending further Court Order;
 - d) The Claimant and the Respondent shall comply with all directions provided to them as part of the Reunification Program; and
 - e) The Claimant shall use all reasonable efforts to ensure the Children's attendance at and participation in all counselling sessions, activities, programs or other necessary directed components of the Reunification Program.
- [75] Where the court makes an order under s. 61(2)(b) of the FLA, the court may allocate among the parties, or require one party to pay, the fees relating to the family dispute resolution, counselling, service, program or transfer.
- [76] The Respondent is not a perfect parent. I have made findings in this regard. However, the Claimant has consented to multiple orders which confirms he has the capacity to be capable parent. Moreover, I have made findings that also bring into question the Claimant's parenting as it relates to compliance with court orders and suspected manipulation of the Children. I am thus satisfied it is in the Children's best interests to prioritize repairing their relationship with their father. This is a cost that needs to be born by the parties equally at first instance to ensure that both parties are invested in the process.
- [77] In conjunction with paragraphs 74(b) and (c), I thus order that the parties shall be equally responsible for the cost of the Family Reunification Program subject to further order of this Court.

Contempt

- [78] The power of the court to punish for contempt is set out in R. 21-7 of the Supreme Court Family Rules [Family Rules]. Specifically, R. 21-7(1) says:
- (1) The power of the court to punish contempt of court must be exercised by an order of committal or by imposition of a fine or both.
- [79] An application for contempt in a civil or family matter is quasi-criminal in nature. It is a blunt sword that the court must only use in very appropriate circumstances.
- [80] The onus lies on the complainant to prove beyond a reasonable doubt that the alleged contemnor acted deliberately in contravention of a court order. Proof of the relevant *actus reus* is sufficient and it is not necessary for the complainant to show that the alleged contemnor intended to breach the order. Although it is not necessary to prove that the alleged contemnor intended to bring the administration of justice into disrepute, contempt is, at its core, as between the alleged contemnor and the court. These are all trite propositions of law.

- [81] The Supreme Court of British Columbia in *Neufeld. v. Nesbitt*, 2012 BCSC 2059 summarizes the principles governing contempt applications described by the Court of Appeal of British Columbia in an earlier decision, *Larkin v. Glase*, 2009 BCCA 321.
- [82] The case of *Larkin* sets out the following principles of contempt of court:
- [7] A court order must be obeyed until and unless it is reversed. Refusal to obey court orders strikes at the heart of the rule of law, at the core of the organization of our society. If court orders can be disregarded with impunity, no one will be safe. Our free society cannot be sustained if citizens can decide individually what laws to obey and what laws to disregard. . . .
- [8] Contempt of court is an issue between a party and the court. It is not concerned with the merits of the dispute between parties to litigation . . . , a finding of contempt of court "transcends the dispute between the parties; it is one that strikes at the very heart of the administration of justice . . .".
- . . .
- [10] . . .
- [6] To knowingly breach a court order is to commit a contempt of the court. All that is necessary to establish the contempt is proof of deliberate conduct that has the effect of contravening the order; an intent to bring the Court into disrepute or to interfere with the due course of justice or with the lawful process of the Court is not an essential element of civil contempt: . . .
- . . .
- [49] . . . "[t]he primary objective of the civil law sanction for contempt is to secure compliance with the courts' orders rather than punishment".
- [50] . . . [D]eterrence and rehabilitation are factors relevant to securing compliance with court orders.
- . . .
- [52] . . . [G]enerally incarceration is reserved for the more serious contempt of court, . . .
- [53] . . .
- [31] . . . It must always be borne in mind that the sanction of imprisonment is a power that ought to be used sparingly. . . .
- [83] These propositions have been cited on many occasions, including high-conflict parenting disputes: *Hokhold v. Gerbrandt*, 2018 BCCA 183 (which contains a very thorough review of the relevant law) and *Friedlander v. Claman* 2016 BCCA 434.

- [84] Proof of the deliberate conduct must flow from evidence that would be admissible if tendered at trial. Hearsay evidence is not admissible in accordance with the Family Rules.
- [85] There can be no doubt that the JCC Order and the Final Order establish a clearly defined parenting regime for the Children. There is, as I have identified, no ambiguity in them.
- [86] However, in my view, a finding of contempt is not appropriate. I reach this conclusion for the following reasons:
- a) Procedurally speaking, both the April 2023 Application and the January 2024 Application fail to properly plead the relief sought in accordance with the requirements of the Family Rules. The relevant portions of both applications can thus be dismissed solely on the basis of being manifestly deficient as to the form required given the specific requirements to bring forward a contempt application;
 - b) In further non-compliance with the Family Rules, there is no proof of personal service of all materials relied upon, which is a mandatory requirement of a contempt application;
 - c) Procedural deficiencies aside, there are, as I have identified, some valid concerns raised regarding the Respondent's parenting time. Those concerns do not fall within the categories under s. 62 of the FLA which define when denial of parenting time is not wrongful. There is a distinction, however, between the relevant test to be applied and, very importantly, the applicable standard of proof;
 - d) The Respondent's effective acquiescence to the breach of relevant court orders for an extended period of time must be considered. Given that I have taken into consideration the Claimant's failure to apply to vary the parenting orders in question, it would be inappropriate in the context of a contempt application to disregard the Respondent's failure to properly pursue enforcement of said orders in a timely fashion;
 - e) Finally, I have certain additional concerns regarding the affidavit evidence given the aforementioned quasi-criminal nature of the remedy and the principle of *strictissimi juris*. I am not going to enumerate them as, in my view, the denial of the relief sought is merited on the basis articulated under subparagraphs (a) (b) and (c).
- [87] For these reasons, I dismiss the relief sought in part 1 of the April 2023 Application and the relief sought in paragraph 1 of the January 2024 Application.

Conduct Orders

- [88] As a corollary to my orders regarding the Reunification Program, I exercise my jurisdiction to make a conduct order under s. 225 of FLA as follows. Specifically, I order that neither party shall:
- a) discuss with the Children (or child) any inappropriate adult, court or legal matters;
 - b) blame, criticize or disparage the other parent to the Children (or child); and

- c) encourage the Children to have a good relationship with the other parent and speak to the Children about the other parent and that parent's partner, if applicable, in a positive and respectful manner.

Conclusion of Relief Sought

[89] In summary, I make the following orders regarding the relief sought:

- a) All relief sought in the April 2023 Application is dismissed;
- b) The relief sought at paragraph 1 of the January 2024 Application is dismissed;
- c) The relief sought at paragraph 2 of the January 2024 Application is adjourned on the terms set out herein;
- d) The relief sought at paragraphs 3 and 4 of the January 2024 Application went by consent; and
- e) The relief sought at paragraph 5 of the January 2024 Application is granted subject to all the ancillary and corollary orders set out herein which shall be specifically articulated in the form of Order arising from these reasons for judgment.

Costs

[90] Rule 16-1 and Appendix B of the Family Rules govern costs in family law cases. The general rule is that costs should follow the event; that is, they are awarded to the successful party unless the court otherwise orders (R. 16-1(7)).

[91] In the event a party is not successful on all issues, the court may still award costs on the party's substantial success (*Marquez v. Zapiola*, 2014 BCCA 35). This analysis is done while considering substantial success on the major issues of substance not the number of issues (*Rattenbury v. Rattenbury*, 2001 BCSC 593). Substantive success is an objective measure of the parties' relative success or failure on the issues: *Marquez*.

[92] In my view, there was divided success between the parties. I dismissed the 2023 Application in its entirety. I adjourned the relief with respect to a revised parenting plan and I dismissed the claim to find the Claimant in contempt. However, that has to be balanced against the fact that the crux of my order is to initiate the Reunification forthwith. That issue was very important, from the Respondent's perspective, and cannot be separated from my conclusions on the other relief sought.

[93] Accordingly, I order that the parties shall bear their own costs of both the 2023 Application and the January 2024 Application, in any event of the cause.

Preparation of the Form of Order

[94] Finally, I direct that counsel for the Respondent prepare the draft form of this Order. Unless otherwise agreed, counsel for the Claimant will have seven business days to provide any comments on that form of Order.

"Hardwick J."

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