
CANADA / JUDGMENT

M.A. v. E.O.

2018 BCSC 1269

COURT

Supreme Court of British Columbia

DECIDED

27 July 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 1269 M.A. v. E.O.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.A. v. E.O.,

2018 BCSC 1269

Date: 20180727

Docket: 17-3869

Registry: Victoria

Between:

M.A.

Claimant

And:

E.O.

Respondent

Corrected Judgment: The text of the judgment at para. 50 and the sub-para. numbers on pp. 48 and 49 were corrected on August 2, 2018.

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Claimant:

V. Hemminger

Appearing in Person:

E.O.

Place and Date of Trial:

Victoria, B.C.

June 25 - 27, 2018

July 6, 2018

Place and Date of Judgment:

Victoria, B.C.

July 27, 2018

Table of Contents

Paragraph Range

A. INTRODUCTION

[1] - [6]

B. GENERAL BACKGROUND

[7] - [15]

C. HISTORY OF PARENTING TIME

[16] - [93]

(a) Parenting time in 2016

[22] - [30]

(b) Parenting time in 2017

[31] - [66]

(c) Parenting time in 2018

[67] - [93]

D. ANALYSIS

[94] - [185]

(a) Relocation

[98] - [127]

(b) Parenting time

[128] - [136]

(c) Guardianship and parenting responsibilities

[137] - [160]

(d) Child support

[161] - [171]

(e) March 2016 separation agreement

[172] - [185]

E. SUMMARY

[186] - [189]

A. INTRODUCTION

- [1] This is a family trial about a 12-year common law relationship under the Family Law Act, S.B.C. 2011, c. 25, ("FLA"). The primary issues are parenting time and child support. Among other parenting issues, the claimant/mother seeks to relocate the 5.5 year old child of the parties from Victoria to Gibsons, British Columbia.
- [2] The respondent/father, in a counterclaim, seeks equal parenting time as set out in a separation agreement dated March 3, 2016. The claimant seeks to vary the agreement. The respondent also opposes the relocation of the child.
- [3] The claimant is concerned with the respondent's use of marihuana around the child, including the use of "Shatter", a highly concentrated derivative of marihuana. She is also concerned about the living conditions of the respondent and she is concerned the respondent is not providing a healthy and safe place for the child.
- [4] With respect to child support, the respondent has not provided a completed Form 8 or any other financial information. The claimant seeks income imputed to the respondent of \$40,000. She filed a Form 8 on June 5, 2018 and her income for support purposes under the Federal Child Support Guidelines, S.O.R. 97-175 (the "Guidelines") is \$23,427. There is no issue of spousal support.
- [5] There are also issues about parental responsibilities. The claimant seeks sole authority over all of the responsibilities in s. 41 of the FLA except for one.
- [6] I have anonymized the names of the parties to protect the privacy of their child.

B. GENERAL BACKGROUND

- [7] The claimant lives in the Victoria area, with family connections in Coquitlam, British Columbia. Her mother is an important part of her life and her family has recreational property in Washington State, USA. She is a master organic gardener with her own company, employing 2- 4 people. In a Form 8 filed on June 5, 2018 the claimant declared income for child support purposes of \$23,427.
- [8] The respondent is from Mexico. He has worked in construction and auto detailing. He testified that he was trained as an electronics technician and he also has training in car detailing. In 2014 he received \$350,000 in a settlement for a personal injury. His last full-time employment was in construction from April to November 2016 and he has had part-time work since then. The respondent has not filed a completed Form 8 or any financial information and he has not filed an income tax return since at least 2015. As a result his income is not known.
- [9] The parties agree they began to cohabit in May 2004 in a common-law relationship. They also agree that they separated on January 6, 2016.
- [10] The parties have a child, V, born on October 23, 2012. She lives with her mother, the claimant.
- [11] There is a separation agreement dated March 3, 2016. Among other things, it provided for "shared guardianship and parenting time" of V. The parties agree that "shared" was intended to mean equal time. The claimant says that there has never been equal parenting time because the respondent did not schedule very much time and he did not show up for scheduled time. Further, when there has been parenting time he has not returned V as arranged. The claimant seeks to vary the separation agreement. The respondent relies on the agreement and says he should have shared parenting time on an equal basis.
- [12] The March 2016 agreement also provided for no support payable from either party to the other and extraordinary expenses were to be shared equally. The claimant says she has paid for the expenses of V except for a small number of pieces of clothing provided by the respondent. The respondent says he has paid for all of the clothes of V. The agreement also said that the respondent was to pay the claimant \$100 per month for preschool expenses. This has never been paid by him.
- [13] Also included in the March 2016 agreement are sections on division of property. The claimant agreed to transfer to the respondent her share (and her mother's share) of property on Amelia Street. The respondent sold this in January 2017. Another property, Harriett Road, was in the claimant's name and she retained it under the separation agreement. She sold this property in May 2016. The claimant also paid, under the agreement, \$30,000 to the respondent to "equalize the division of assets."

- [14] During their relationship the parties used marihuana. The claimant testified that she stopped in June 2017 and does not use any drugs. She also said that she has not consumed alcohol since 2004. She says and she is concerned that the respondent continues to use marihuana and in excessive amounts. He denies this. The claimant also raises issues about the health and safety of V as a result of a previous residence of the respondent.
- [15] Further evidence about the history of the respondent's parenting time with V is below, along with some information about other issues such as finances and employment.

C. HISTORY OF PARENTING TIME

- [16] It is relevant and necessary to review in detail the parenting time the respondent has had with V since the March 2016 separation agreement. It may be recalled that the agreement provided for the parties to have "shared guardianship and parenting time of [V]." It is agreed that "shared" was intended to mean half the time with the claimant and half the time with the respondent. In addition, under the agreement, they were to "determine a parenting schedule by agreement."
- [17] The parties disagree about the parenting time that the respondent has had with V since the 2016 agreement. In very general terms, the respondent says he had more time than described by the claimant. As well, the respondent says he always gave sufficient notice, he picked up V at the agreed time, and he dropped her off at the agreed time. In contrast the claimant says, for example, that she would keep every other weekend open so the respondent could have parenting time (and she decided early on not to keep every weekend open). If the respondent was going to request parenting time the request would come late Friday afternoon. On many weekends there was no request. In addition the respondent was quite unreliable when it came to picking up V and dropping her off.
- [18] The respondent says he would ask for time but the claimant would set conditions and he disagreed with the conditions. The conditions were, for example, that V had a birthday party of a friend to go to or Girl Guides so the respondent could not have all of the time he wanted. These had been arranged before the respondent called on, as usual, the Friday afternoon or evening. In most cases the respondent simply refused any parenting time rather than accommodate V's activities that were the basis of the claimant's responses to his requests for parenting time. The last parenting time the respondent had was in April 2018 plus some FaceTime in May 2018.
- [19] Overall, I prefer the claimant's accounts of the parenting time since March 2016. She has kept a record of the times including a diary, her testimony was given fairly and her evidence was not seriously challenged in cross-examination. In contrast the respondent's evidence was generally unsatisfactory with inadequate or incomplete explanations of his living arrangements, the presence of marihuana in his residence, the safety of V while visiting him, his unreliability for exchanges with V and his financial circumstances. The history of parenting time set out below relies primarily on the account of the claimant. Overall, as will

be seen, since the 2016 separation agreement the respondent has never had shared parenting time in the sense of equal time and scheduling has been difficult and caused distress to V as well as the claimant.

- [20] The numerous text messages and other documents were summarized in an affidavit sworn by the claimant and entered as an exhibit at trial. The respondent has also tendered a large number of text messages, many of them the same ones as relied on by the claimant. As usual with this form of communication, it is difficult to understand the issue that is the subject of the rapid and disjointed chatter. As is also usual, the messages are voluminous and I have summarized most of them rather than cite them all.
- [21] With the above in mind, the history of parenting time for these parties is as follows from the 2016 separation agreement to June 2018. As above the starting point was the "shared" or equal parenting time described in the 2016 agreement. Also, again, V was born in 2012 and she was 5.5 years old at trial. I have also included some contextual matters such as some employment and financial information.
- (a) Parenting time in 2016
- [22] In 2016 (from March 2016) the respondent had what the claimant describes as the most "functional" and consistent parenting time since the parties separated. This was every other weekend during the months of April, May and June 2016. As well, the parties had something of an amicable relationship and could discuss things over the telephone. But the respondent did not start to make the \$100 per month payment for V's preschool and he has never paid.
- [23] Nonetheless, according to the claimant and corroborated by text messages, the respondent would arrange to pick up V and then not show up. This was upsetting to V and disruptive to the work schedule of the claimant. During this time V was in preschool and the claimant would have to pick her up because the respondent would not show up as previously arranged. On one occasion, in June 2016, the respondent said he would "restrain" the claimant visiting the United States. This was in response to the claimant not agreeing with the respondent's proposed parenting time because V had a previously planned activity with the claimant's family (as above, the claimant's family has recreational property in Washington State).
- [24] In April 2016 the respondent started full-time work in construction. In May 2016 the claimant sold the Harriett Road property, which she had retained under the 2016 separation agreement.
- [25] In July and August 2016 the respondent did not have any parenting time with V. According to the claimant she did not hear from the respondent very much during these months but he had some FaceTime with V. In September there were about two days of parenting time. The claimant enrolled V in preschool and daycare and she describes the respondent as being furious with her because he said he wanted to care for V. However, he was rarely available. And he contributed no money for daycare (or preschool) despite the requirement in the

March 2016 agreement to do so.

- [26] The costs for V to be in school and generally were paid by the claimant and continue to be paid by her. The respondent presented in evidence some receipts for recent purchases of clothes for V. However, the total is about \$200, far less than the cost for half of the expenses for maintaining a 4-5 year old child over 2.5 years.
- [27] In October and November 2016 V had irregular parenting time with the respondent and considerably less than half-time. When there were overnight visits the respondent was not able to get V to daycare the next morning and he generally would not return her when he said he would. During this time the claimant was planning a vacation with V and her family to Hawaii in February 2017. The respondent objected to the claimant taking V on this trip. In the end he agreed if he could take V on a trip to Mexico (discussed below).
- [28] In November 2016 the respondent quit the full-time work in construction that he started in April 2016. He testified that he currently has work but it is not clear what this is. When pressed he described 3.5 hours work the week before trial and another short contract before that. He has not provided any documents to demonstrate any income, despite demands to do so.
- [29] In December 2016 the respondent had more parenting time than previously but still not half the time. There were a number of times when he refused to return V to the claimant and he did not take her to her scheduled daycare or preschool.
- [30] Also in December 2016, the respondent stopped making mortgage payments on the Amelia property. This was a problem for the claimant because she and her mother were guarantors of the mortgage on the property. He also did not renew the house insurance apparently because he was intending to sell the property. The claimant and her mother paid for the house insurance in order to protect their investment in the property. The house sold in January 2017 with the proceeds going to the respondent.

(b) Parenting time in 2017

- [31] In January 2017 the respondent sold the Amelia Street property. After the respondent sold his house he lived in hotels and rented vehicles. He had the proceeds from the sale of the house but he continued not to make any contribution to the preschool or daycare of V.
- [32] From February 5, 2017 to February 23, 2017 the respondent took V to Mexico. He had originally said that the trip would only be for seven days but there were some problems that extended it.
- [33] Just before the respondent and V left the parties realized that V's passport had expired. The respondent carried on with the trip because he thought he could travel with Nexus cards that he and V had. They got as far as Houston, Texas, but they were refused entry on a connecting plane to Mexico. The respondent then drove from Houston to Laredo, Texas, where his family came across the border and took him and V to Mexico. How this was done

is not explained in the evidence but it was clearly done without the required travel documents for V.

- [34] Since V did not have valid travelling documents it ended up being very difficult to get her back to Canada. The respondent advised the claimant of the situation and he said he would take care of it. However it was the claimant who had to work from Victoria with the Canadian Consulate in Mexico to obtain the necessary documents (she speaks Spanish). After considerable difficulty a visa was arranged by the claimant. However when the respondent and V attended at the airport they were detained for six hours. Ultimately they did not return to Canada until February 23, 2017.
- [35] When V returned home she was very anxious, she had diarrhea and a bad cold. She was four years old at the time. The respondent was angry with the claimant because she did not pick him up at the airport. But, as a result of being detained at the airport, the flight and time were not known to the claimant. In any event, she was understandably anxious for the safety of V and upset with the respondent for putting V in this situation.
- [36] The claimant had arranged with her family (and with the respondent) to take their trip to Hawaii after the respondent took V to Mexico. As a result of the difficulties in Mexico there were further difficulties getting a passport for V to go to Hawaii. The approval of the respondent was required for the passport but he had immediately returned to Mexico and this made it more difficult still to get a passport for V. The trip to Hawaii eventually took place.
- [37] The respondent did not have parenting time from February 23, 2017 through March 2017. This was a result of the respondent being in Mexico and the trip planned by the claimant to Hawaii. The respondent returned to Canada on March 31, 2017.
- [38] In April 2017 the respondent saw V on two weekends and two weekdays. He was staying at a friend's place. The claimant had never met the friend and she asked for the address because that was where the parenting time was taking place. The respondent refused to provide the address to the claimant. On April 24, 2017 the respondent advised the claimant there had been a worm infection break-out at his friend's place. He told the claimant that she was to physically check V for worms, which she did, and she took V to a doctor. The respondent did nothing except tell the claimant about the problem.
- [39] The claimant also describes the respondent being insulting and hostile to her and calling her a "slut" in front of V. The claimant regularly visited her family in Washington State and the respondent would not allow V to go there and he threatened to call the border patrol. The visits took place and the respondent never called the border patrol but the claimant believed there was a risk of being challenged by border authorities every time she crossed the border.

- [40] By this time the claimant had reduced her work to three days a week in order to look after V. This was necessary because the respondent was unavailable and did not show up at the preschool to pick up V as he said he would. The claimant would go to the school to pick up V because of the risk the respondent would not show up and this happened a number of times. The respondent did put V in a gymnastics class and took her there each of the scheduled eight weeks except for one.
- [41] In May 2017 the respondent saw V one weeknight per week, after giving the claimant very short notice. In June 2017 there was parenting time with the respondent once or twice a week and every second weekend. In July 2017 there were two weeknights in one week and one weeknight in another week.
- [42] At this time the respondent started a new business detailing cars. He moved his residence into his shop and it was one room above the shop. The respondent made improvements to the room and the claimant testified that, at first, it was newly renovated and clean. However, it had no bathroom or kitchen and the only windows were facing into the interior of the shop. As well the bathroom was down the hall through two locked doors and access to the room from outside the building required banging on a metal bay door. The respondent had a 20 year old son from a previous relationship and he also stayed there. At one point there were three males staying in the small, windowless room without a sink or bathroom and the respondent would have V stay there. The claimant testified that the area was frequented by sex workers.
- [43] In August 2017 the claimant and V spent most of the time at the claimant's family cottage in Washington State. On the last two weekends V was with the respondent. This was the first time he had spent regular time with V in some time.
- [44] In order for her to do her work in the fall, the claimant began to make arrangements for V to go to after-school care in September 2017. A space was reserved but when the claimant told the respondent he said V should not go to after-school care because that is for parents who do not care for their children. He said he would pick V up twice a week which he did the first week. The claimant gave up the reserved space but the respondent did not pick up V after the first week. The claimant was unable to get another space for V and the need to pick up V caused the claimant to lose more work.
- [45] In order to assist her work and personal schedule the claimant asked her mother to come to Victoria (from Coquitlam) to take V to school and pick her up. When the claimant told this to the respondent he reacted with anger. He insisted that he would take V to school and the claimant agreed. The first exchange was to take place the following Sunday morning and the respondent was to drop V at school on Monday morning. But, when the claimant arrived on Sunday morning, the respondent had forgotten about the arrangement. Ultimately he did have parenting time and took V to school on Monday morning. When the claimant picked up V from school on Monday she was wearing the same clothes she was wearing on Sunday and her underwear was soiled. About this time the claimant was having concerns about V

sleeping overnight at the respondent's shop.

- [46] About the middle of September 2017 the claimant came to pick up V from the respondent, at his shop. The respondent refused to let V go and there was a shouting match. The claimant describes the respondent as angry and aggressive. The claimant was eventually able to take V. There were then a series of texts from the respondent to the claimant criticizing her as a parent. On Friday, September 22, 2017, the respondent sent a text to the claimant saying "[V] and I need time together. I'll be ready around 5pm today and you'll have her Sunday night as usual." As reflected in this message (and others) there was to be no negotiation.
- [47] The respondent missed or did not know about a professional development day at V's school later in September 2017. He also had to ask the claimant about pre-arranged pick-up times.
- [48] On September 25, 2017 the claimant came by the respondent's shop to pick up V. The respondent was cleaning the floor of the shop and directed the claimant upstairs. She went upstairs and found V. She also took a number of photographs of the respondent's room. They are in evidence and they show clothes and other things scattered around the room and on the entrance stairway and the place was in a very messy state. As well, there is a photograph showing bags of marihuana on a table and drug paraphernalia such as a grinder and a blow torch for Shatter (a concentrated form of marihuana). The bags of marihuana had the brand of a well-known marihuana dispenser in Victoria. V was standing amongst all of this by herself watching a cartoon on a wide-screen television. The claimant left with V.
- [49] Following this incident the claimant told the respondent that V could no longer visit at the shop. His response was a series of abusive text messages.
- [50] The following text exchange sets out the disagreement over the respondent having parenting time with V in his shop (reproduced as written):

[Claimant:]

[E], please read this. It's very important.

[V] cannot visit your shop. It is not safe for young girls. I am not inventing this. If someone sees her there and calls the Ministry, they will take her to foster care. They will not take her to me. They will take her away. Look around. There are roaches, weed, shatter, torch, all mixed in with her clothes and toys. There are drugs and prostitutes in the street. It is dangerous. This is not my invention, imagination, or manipulation.

The only way I will agree that you pick her up is with two conditions.

1. If you promise not to take her to your shop. Take her out somewhere, maybe to the pool, mall, movies, museum.
2. We make plans right now about where I will pick her up and when. No later than 5pm. Just tell me where.

[Respondent:]

You are insane.

Is this one more of your attempts to control the situation, to have control over me. For what? Revenge?!

Look, [name of claimant]! It's pretty obvious that what you are trying to do is to have control over [V]. I don't know why or the reason.

Is it money!? Or just the fixation over control?

[Claimant:]

Just read the text please.

[Respondent:]

I guess it's time for the profesionales, I hope you have money. Are you ready to spend some money!? You are dreaming

And you are ignorant! The text you just send me full of fear, shows how ignorant you are. Obviously you haven't done your homework.

I guess the questions is. Are you ready to spend some money for somebody to tell you that you are wrong?

[Claimant:]

Where will I pick her up at 5?

[Respondent:]

I can't, I'll be working till 5pm

You are a mean and controlling freak!

You know this already

You, only you. This is your own problem, you are creating an issue where there is non!

[51] Both parties rely on this exchange. The claimant says it demonstrates the respondent being irresponsible and unreasonable. For his part the respondent says it demonstrates that the claimant was controlling and rigid. I agree with the claimant's view.

[52] The photographs the claimant took of the respondent's room support what she said in her text about drugs. In addition they demonstrate that the floor of the room was literally covered with strewn clothes and the drug paraphernalia. The stairs to the room were similarly covered with discarded clothes and bags containing, perhaps, other clothes. It was entirely appropriate and certainly not "insane" for her to raise the issue of these living conditions as a concern for V. In his evidence the respondent never accepted responsibility for this and, at one point, he said the claimant had planted the marihuana. In my view, the

only reasonable interpretation was that the respondent was exercising his parenting time in conditions that were not at a standard for the proper health and safety of V. This is discussed further below.

- [53] The respondent also testified, and made references in texts, to the claimant using drugs including marihuana and ayahuasca. She did use drugs in the past but I accept her evidence that she stopped in June 2017. Certainly there is no evidence of bags of marihuana openly displayed in her residence, as was the case with the respondent. The claimant has not consumed alcohol since 2004.
- [54] During October 2017 the respondent saw V after school for a few days and every second weekend. He had a friend staying with him that the claimant knew as responsible and clean so she relented on her decision that V could not go to the shop. But there were now three men (the respondent, his son and his friend) living in the small space.
- [55] On October 6, 2017 the respondent said he wanted to pick up V on short notice. The claimant ultimately agreed, the respondent was to pick up V and the claimant planned some work while V was away. While doing the work the claimant received a text saying that the respondent could not pick up V. She had to abandon the work and she was concerned about her business reputation for reliability.
- [56] There was an argument on October 21, 2017 when the claimant and V were enjoying time with the claimant's mother. At 3:00 PM the respondent insisted on taking V to a friend's place. The claimant refused because she did not know the friend, nor where he lived. The next day some parenting time was arranged but the respondent did not show up. Two days later the respondent picked V up at school without telling the claimant and the claimant left work early to pick up V when she could have been operating her business. The respondent said the day before Halloween that he wanted to take V out that night. The claimant and V had made other plans by that time.
- [57] In November 2017 the respondent had parenting time every second weekend, four hours each day, and two days after school for two hours.
- [58] On November 4, 2017 the claimant learned that the respondent's phone no longer worked. She received a text from an old number he had used three years previously. On November 9, 2017 the respondent texted the claimant from his old phone number but it no longer worked later in the day. The respondent asked the claimant to use his son's telephone which was a Mexican number. As well, it only received messages when there is Wi-Fi which the respondent did not have at that time.
- [59] At this point the claimant was no longer able to contact the respondent by phone, text or email. At a pre-arranged visit for 11:00 AM on November 18, 2017 the respondent did not show up until 12:30 PM and he could not be contacted beforehand. V was constantly asking where her father was and she was obviously disappointed when he did not show up. On November 30, 2017 the respondent got internet in his shop so he could text using Wi-Fi.

However, because he was not always in range the claimant could not be sure he received her messages. He also had a new phone number but he did not give it to the claimant until December 2017.

- [60] In late November 2017 the claimant realized that the respondent had been picking up V in vehicles owned by his customers from the detailing shop. She was not sure he was permitted to do that. As well, the respondent was not using a car seat or booster seat for V. Sometimes he used a booster but in the front seat of a pick-up truck which had express instructions on the sun visor not to put a child in a booster or care seat in the front seat because of the risk of serious injury if the airbags inflated.
- [61] The respondent had parenting time with V for one weekend (not overnight), one weekday the first week and two weekdays the third week in December 2017.
- [62] On December 2, 2017 the respondent had arranged to pick up V to go swimming but he called that day to say that he could not pick her up. The claimant took V to the swimming pool where the respondent met them. When the respondent and his daughter parted, V was obviously missing him and he promised to see her on the following Monday. However he called that day to cancel this time. He also cancelled time on December 6, 2017. He also told the claimant that she could not cross the American border without his permission.
- [63] On December 9, 2017 the claimant had arranged to start work at 10:00 AM after the respondent picked up V at 9:30 AM. At 1:30 AM the respondent texted the claimant to say that 11:00 AM would be a better time. The claimant called him and he was at a coffee shop. The claimant dropped V off at the coffee shop at 9:45 AM.
- [64] Over the period December 13, 2017 to December 22, 2017 the respondent insisted on picking up V on short notice and the claimant resisted this. Arguments over this took time out of the claimant's work day. In one case he insisted on picking up V the same day he called but then he realized that it was Thursday and the next day, Friday, he was scheduled to see V. The Friday parenting time took place but not the requested Thursday time. In at least one FaceTime call the claimant believed that the respondent was drunk and or high on marihuana since he was slurring his words and otherwise acting impaired.
- [65] For Christmas and New Year's 2017 the claimant and respondent had arranged for the respondent to have parenting time for New Year's. The claimant was to have V for Christmas and plans were made with the claimant's family. The claimant phoned the respondent on December 27 about his plans for New Year's. He said he had planned on renting a vehicle, driving to Mount Washington to go snow sledding and spending the night. He had apparently done this successfully the year before in 2016, but at that time he had a vehicle and some money then. However in 2017 the claimant did not have a vehicle or much money. He did not have a vehicle arranged and he did not have a hotel arranged.

[66] The claimant raised these questions with the respondent and requested some solid plans with respect to accommodation and transportation. A few days later she called the respondent because she was "feeling guilty" and she said she would drive V to the respondent's location so he could carry out his New Year's plans. However the respondent said he was not interested anymore and he'd already made other plans.

(c) Parenting time in 2018

[67] In January 2018 the respondent had parenting time with V during the days on January 3, 5, 6, 7, and FaceTimed with her on January 22 and 23. The time on January 3, 2018 was the first parenting time since December 22, 2017. The respondent arrived to pick up V but he did not have a car seat. The claimant lent him a car seat. The claimant believed that the vehicle did not belong to the respondent.

[68] The respondent had arranged time with V on January 4, 2018 but he did not show up. The claimant described V as being very disappointed. For the parenting time on January 5, 2018 the claimant took V to the respondent's for a visit starting at 2:00 PM. On arrival the respondent was apparently not ready or unaware of the visit. He phoned the claimant and asked her to wait. The claimant took V to visit a friend and then in another telephone call at 4:00 PM the respondent asked the claimant to bring V back.

[69] For the visit on January 6, 2018 the claimant arrived to pick up V. V indicated that she wanted to stay with the respondent but the respondent, from behind V and unknown to her, indicated to the claimant that V should not stay. The claimant said to V that the respondent had to go somewhere and V got angry at the claimant. In the same conversation the respondent said to the claimant that she should allow V to watch more television so that she could preserve her energy. The claimant had been trying to limit the television time. The claimant and V left crying. She later received a text from the respondent saying that she had been "insulting and aggressive." He also sent an email telling the claimant not to come to his shop.

[70] During other visits in January 2018 the respondent complained to the claimant that he was not able to take V to activities like swimming, dance or gymnastics. This was in the context of the claimant enrolling V in Girl Guides and telling the respondent that V had to be back at a certain time so she could go to Girl Guides.

[71] As of January 9, 2018 the respondent was only available by text message on his cell phone and he told the claimant to no longer come by his shop. Because the cell phone relied on Wi-Fi the respondent could not receive texts when he was away from the shop.

- [72] The claimant arranged to attend a retreat from Friday to Monday (which I presume to mean January 12 - 14), and the respondent said he would look after V. He did not follow through with that and the claimant arranged for her mother to look after V including picking her up from school. The next morning the claimant received about 50 texts from the respondent demanding that he pick up V from school and that the claimant's mother was not allowed to do so. He also said that he would call the police to the school.
- [73] On January 16, 2018 the claimant received a visit at home from the police. According to the claimant, they wanted to know "my side of the story" and they wanted to know when the respondent would hear from her and how. She explained this and it was a short conversation. The respondent testified that the police told the claimant not to call him but there is no other evidence of that. The claimant testified that they only asked how she was communicating with the respondent. It is difficult to see any reason for the police to be involved with the claimant other than as a result of an attempt by the respondent to use the police as a way to harass and perhaps intimidate her.
- [74] On January 17, 2018 counsel for the claimant gave to then counsel for the respondent notice (pursuant to s. 66 of the FLA) that the claimant wanted to relocate with V to Gibsons, from Victoria. Reasons and dates were given as was a description of the parenting time with the respondent after relocation. Some time after the letter the respondent decided to represent himself and proceed without counsel. He denies receiving the January 17, 2018 letter or its contents. I find he did have notice of the relocation. He also previously received and read the notice of civil claim on or about October 17, 2017 which also describes the proposed relocation.
- [75] In February 2018 the respondent had FaceTime with V on February 17, 22, 26, visited for the day on February 18 and then had an overnight visit on February 24, 2018. Previously scheduled FaceTime on February 1, 2018 did not happen.
- [76] About this time the respondent rented an apartment. It is agreed that, unlike the room over the respondent's shop, the apartment is appropriate for parenting time with V.
- [77] There were further discussions in February 2018, including between counsel for the parties, for parenting time but no time was scheduled. On the morning of February 5, 2018 the respondent requested FaceTime that day and the claimant suggested after school. The respondent did not call. On February 12, 2018 the claimant missed a FaceTime call with the respondent. She called him twice on each of February 13 and February 14, 2018 to set up a FaceTime but there was no answer. On February 15, 2018 the respondent sent an email requesting FaceTime with V, the claimant agreed but the respondent did not call. He did call on February 17, 2018 for a short FaceTime visit.
- [78] There was parenting time on February 25, 2018 but this could not take place because the respondent was unwilling or unable to return V to the claimant at the agreed upon drop-off spot. The respondent did not want to take a bus or taxi.

- [79] In March 2018 the respondent had parenting time overnight on March 17, 2018. During the first two weeks of March 2018 the claimant went to Hawaii with V and her family. There were a number of FaceTime calls with the respondent. The claimant describes these as "amicable and fun."
- [80] In April 2018 the respondent had parenting time with V from April 13 - 15, 2018, from Friday to Sunday. He also took her to a medical appointment on April 17 but he got the day wrong. It was scheduled for the next day.
- [81] April 17, 2018 was the last time the respondent saw V.
- [82] The respondent had wanted parenting time for April 7 - 8, 2018. However he was not available by telephone, he had no vehicle and he was not able to drop V off or pick her up. The claimant also advised him that she had a Girl Guides event late in the morning of the Saturday and the respondent said he would not accommodate that. The claimant offered Saturday from 1:30 PM to Sunday to 5:00 PM. The respondent did not respond and there was no parenting time that weekend.
- [83] On April 20, 2018, a Friday, the respondent asked the claimant about seeing V on the weekend. However V had birthday parties with friends on both the Saturday and Sunday and the claimant thought that she should be able to go to at least one of them. She proposed taking V to the party on Saturday and then V would not go to the party on Sunday and be with the respondent. The respondent refused and there was no parenting time that weekend.
- [84] On April 26, 2018 the claimant received a call from V's school for what ended up being an ear infection. The school could not telephone the respondent because of the problems with his phone. On this occasion the claimant had to interrupt her work again to deal with the situation.
- [85] On April 27, 2018 the claimant and V were on a ferry to visit the claimant's mother. The claimant testified that she was exhausted, V was ill and the claimant needed to see her mother for support and rest. The respondent FaceTimed while they were on the ferry expressing anger at the claimant for leaving with V even though this was the first attempt he had made to call her or check-in since April 20, 2018.
- [86] There were a number of missed calls on April 28 and April 29, 2018. When the claimant tried to phone back she could not get through to the respondent.
- [87] In May 2018 the respondent had two FaceTime visits with V on the long weekend of May 18, 2018. The claimant and V were visiting the claimant's family in Washington State. This was the last time the respondent had any communication with V prior to the trial in June 2018. On the same long weekend as the FaceTime calls the claimant missed 6 calls. She tried returning the calls but she was not successful.

[88] As an example of how the respondent did not seem to be aware of the routine and school schedule for V the claimant points to this exchange on May 1, 2018 (reproduced as written):

[8:54 AM, respondent to claimant]:

What's going on [name of claimant]? Where is [V], I'm still waiting to talk to her. It's been to long!!!!!!

You have not return or answer any of my call to [V]

[9:09 AM, claimant to respondent]

You called at 8:52 and 8:57 am.

School has started at 8:45 am for the last 8 months, and that will not change.

[89] The respondent called again in the evening but V was at Girl Guides.

[90] On Friday, May 4, 2018 the respondent requested parenting time for the weekend of May 5 and 6, 2018. He asked what would be a good time and said "[l]et me know when she is available." The claimant suggested a drop off on Saturday at 12:00 PM and she would pick up on Sunday at 6:00 PM. The respondent said, "[s]he needs more than 24 hours with her dad. Please return a more generous offer, like 3 and a half days with me." There was no parenting time that weekend.

[91] For the following weekend, May 12 -13, 2018, on the Friday night the respondent again contacted the claimant about parenting time. The claimant and V were away and the claimant proposed a visit on the following day, Saturday, and overnight. The respondent refused.

[92] On May 7, 2018 the claimant took V to an eye appointment with a doctor. However the doctor had cancelled it and left messages on the respondent's old phone number. The respondent was no longer available on that number because of the changes he made to his phone service.

[93] In June 2018 there have not been any visits or any FaceTime conversations. As above, the last contact between the respondent and V was on FaceTime on May 18, 2018 and the last in-person time was on April 17, 2018.

D. ANALYSIS

[94] As above, the primary issues here are parenting time and child support.

- [95] As general context, the primary consideration with respect to V is her best interests as required in s. 37 of the FLA. In determining those interests a number of factors are set out in s. 37(2) including the health and emotional well-being of V, the nature and strength of the relationships between V and significant people in her life, the history of her care, the need for stability, the ability of a person who is a guardian to exercise his or her responsibilities and other matters.
- [96] The following specific issues are for consideration:
- (a) Relocation;
 - (b) Parenting time;
 - (c) Guardianship and parental responsibilities;
 - (d) Child support; and,
 - (e) The 2016 separation agreement.
- [97] I will consider those issues in turn.
- (a) Relocation
- [98] The claimant seeks to relocate with V, from Victoria to Gibsons, British Columbia. The respondent opposes this.
- [99] Division 6 of Part 3 of the FLA applies to relocation matters where there is a plan to relocate a child and there is a written agreement (or order) respecting parenting arrangements. Here there is a plan by the claimant to relocate V and there is the March 2016 separation agreement which describes parenting arrangements. Therefore, Division 6 of the FLA applies.
- [100] Section 65(1) of the FLA defines relocation as a change in location of the residence of a child that "can reasonably be expected to have a significant impact on the child's relationship with a guardian." I find below that the respondent is a guardian of V. I also accept that the respondent has a loving relationship with V and the claimant's plan to relocate will have a significant impact on his relationship with his daughter. A related matter is that, under s. 68 of the FLA, a child may be relocated after giving notice if the guardian receiving the notice does not object. Here the respondent does object and s. 68 does not apply.
- [101] Section 66 of the FLA requires that a guardian who plans to relocate with a child must give the other guardian 60 days' notice of the date of relocation and the proposed location. The claimant complied with this notice requirement by means of a letter from her counsel to then counsel for the respondent dated January 17, 2018. Prior to this the respondent had been served with the claimant's notice of family claim on or about October 17, 2017. It also set out the claimant's plan to relocate with V. The respondent denies he received any notice but I disagree.

[102] Section 69 of the FLA sets out the tests to be applied to an application to relocate a child. Section 69(3) emphasizes that the best interests of the child must be considered. Subsections 69(3), (4) and (5) describe the tests:

Orders respecting relocation

69 (1) In this section, "relocating guardian" means a guardian who plans to relocate a child.

- (2) On application by a guardian, a court may make an order permitting or prohibiting the relocation of a child by the relocating guardian.
- (3) Despite section 37 (1) [best interests of child], the court, in making an order under this section, must consider, in addition to the factors set out in section 37 (2), the factors set out in subsection (4) (a) of this section.
- (4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,
 - (a) the relocating guardian must satisfy the court that
 - (i) the proposed relocation is made in good faith, and
 - (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and
 - (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise.
- (5) If an application is made under this section and the relocating guardian and another guardian have substantially equal parenting time with the child, the relocating guardian must satisfy the court
 - (a) of the factors described in subsection (4) (a), and
 - (b) that the relocation is in the best interests of the child.
- (6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following:
 - (a) the reasons for the proposed relocation;
 - (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
 - (c) whether notice was given under section 66 [notice of relocation];
 - (d) any restrictions on relocation contained in a written agreement or an order.

- (7) In determining whether to make an order under this section, the court must not consider whether a guardian would still relocate if the child's relocation were not permitted.

[Emphasis added].

[103] As can be seen there are two approaches to relocation applications.

[104] The first approach, under s. 69(4), is where the guardians/parents do not have "substantially equal parenting time." If the proposed relocation is made in good faith and the proposed relocation plan is reasonable and workable, the relocation must be considered in the best interests of the child "unless another guardian satisfies the court otherwise." The second approach, under s. 69(5), applies where there is substantially equal parenting time and, in that case, the relocating parent must prove that the relocation is in the best interests of the child.

[105] In this case, if s. 69(5) applies, the claimant would have to prove the relocation is in the best interests of V. On the other hand, under s. 69(4) the relocation can be presumed to be in the best interests of the child if the preconditions are met. But the presumption under s. 69(4) is subject to another guardian satisfying the court otherwise.

[106] In order to decide which approach applies in this case it is necessary to determine whether the parties have had "substantially equal parenting time." There are two aspects to determining this issue.

[107] First, there is the March 2016 parenting agreement which says that the parties will have "shared guardianship and parenting time" of V (s. 2.1). On its face and taken by itself, that provision would mean that there was substantially equal parenting time and s. 69(5) applies and s. 69(4) does not. However, I do not consider that to be the end of the matter.

[108] In my view, there is also a factual issue as to whether there was substantially equal parenting time. That is, the actual parenting time is to be considered, not just what the 2016 agreement said it should be.

[109] As can be seen, despite the March 2016 separation agreement, there has not been equal parenting time. Indeed, there have been periods when the respondent has had no parenting time. For example, as of the date of the trial in June 2018, he had not seen V since April 2018 and his last communication was via FaceTime on May 18, 2018. He says that the claimant has refused him time with his daughter but what has occurred is that the claimant has proposed reasonable limits on the respondent's parenting (primarily related to the activities of V) and he simply refused to accept or even discuss those limits.

[110] In another example, in April 2018 it was entirely reasonable for the claimant to tell the respondent when he called late on a Friday for parenting time that weekend that V had planned to be at two birthday parties. The claimant proposed that V go to the one on Saturday and forgo the one on Sunday to be with the respondent. That was a reasonable accommodation of the respondent's late request and one that took into account the

activities and friendships of V as well as her time with the respondent. Nonetheless the respondent refused.

- [111] Similarly, the claimant is entitled to say that 3.5 days with the respondent is too long in light of the difficulties the respondent has had getting V to school. Again, the respondent's response was to decide not to have any parenting time. V is also enrolled in Girl Guides and she will undoubtedly be involved in more activities as she grows older. The best interests of V include the opportunity to be with her friends in appropriate circumstances. And the claimant is entitled to inquire about the living situation of the respondent, including the name of people he and V stay with. It is not "insulting and aggressive" (as the respondent has described it) for the claimant to make these inquiries or for her to propose reasonable changes to the respondent's often last minute requests for parenting time. She is simply acting as the mother and guardian of V.
- [112] For these reasons I conclude that, despite the wording of the March 2016 separation agreement, there has never been substantially equal parenting time between the parties. Further, despite the efforts of the claimant to propose parenting time for the respondent and to propose reasonable changes to what the respondent wanted to do, it has been the actions or inaction of the respondent that has resulted in less than equal parenting time. Even immediately after March 2016, when the respondent had the most consistent time with V, this was alternate weekends and some FaceTime (and there were a number of times when the respondent did not show up at all).
- [113] The result is that s. 69(4) of the FLA applies and the proposed relocation is to be presumed to be in the best interests of V. The next issues, applying that provision, are: is the claimant's plan for relocation of V made in good faith and has she proposed reasonable and workable arrangements to preserve the relationship between the respondent and V?
- [114] With respect to good faith, the factors set out in s. 65(6) of the FLA are relevant: whether the decision will enhance the quality of life and emotional well-being of V and the claimant, whether notice was given and whether there are any restrictions on relocation contained in a previous agreement. Here, the claimant testified that the main reason for the relocation to Gibsons is that her mother is now living there. There is a basement suite in the mother's house for the claimant and V. The claimant's sister also lives in Gibsons and V knows the child of this sister. I accept the claimant's point that there would be considerable support for V in Gibsons. In contrast the claimant has struggled to obtain support in Victoria from the respondent on a number of occasions. However, he has either refused to be involved or he has not shown up.
- [115] It is true, as the respondent points out, that the claimant has not arranged any employment in Gibsons that would give her immediate income. However, part of the claimant's plan to relocate is that she would do landscaping work for her mother at two properties in exchange for rent. She intends to develop her landscaping business and ultimately re-build it in Gibsons.

- [116] The claimant has also explained that the current situation in Victoria has become untenable for V and for her. When the respondent does not show up for pre-arranged parenting time the claimant has to manage V's disappointment. V has to compromise plans she has made for activities such as with V's friends when the respondent announces late on a Friday that he wants parenting time that weekend. I agree with the claimant that it makes no sense, and is contrary to the best interests of V, for alternate weekends to be held open with the chance the respondent will show up for a visit.
- [117] I also accept the claimant's submission that the uncertainties and abrupt changes in the respondent's parenting time has affected her work and income. She works less hours because she has to pick up V at preschool or kindergarten since she cannot rely on the respondent to follow through on his commitment to pick up V. There have been times when the respondent picked up V from school unannounced and the claimant left work needlessly. These circumstances have meant that the claimant cannot expand her business to any great extent. She has also had to use more sub-contractors for her contracts and those sub-contracts reduce her profit.
- [118] Currently, the claimant is earning about \$23,000 per year and the rent for her and V is \$1,200 per month. This obviously cannot continue. In addition, the respondent has paid no support for V and he has never paid the \$100 per month for V's preschool expenses. As above, the attraction of Gibsons is rent-free accommodation with considerable support for the claimant and V.
- [119] I conclude that a move to Gibsons would provide the claimant (and V) the opportunity of a fresh start with minimal expenses and strong reliable support for V. There cannot be any suggestion of bad faith in the claimant's plan and I find that she has complied with s. 69(4)(a) (i) of the FLA.
- [120] I should add that there have been a number of visits between the respondent and V which have been good for V, even very good. The FaceTime visits in March 2018 when V and her mother were in Hawaii is an example. The claimant acknowledges that V loves her father, he loves her and his evidence reflects this. The problem is that the respondent's unreliability as a parent and his poor judgement in activities involving V have become an issue with regards to her best interests.
- [121] I turn next to s. 69(4)(a)(ii) of the FLA. The issue is whether the claimant has proposed reasonable and workable parenting arrangements to preserve the respondent's relationship with V. Her proposal for parenting time in the event of a relocation to Gibsons from Victoria is as follows:
- a. Three times per week via FaceTime, such calls to be initiated by the Respondent;
 - b. One weekend every 8 weeks in Victoria, the Claimant to bring the Child to Victoria, British Columbia, and such parenting time will only occur if the Respondent confirms that he is in Victoria by the Wednesday prior to the anticipated weekend of parenting time;

- c. If the Respondent fails to confirm that he is in Victoria for his planned parenting time by the Wednesday prior to the commencement of the parenting time, the Claimant will not be required to attend Victoria with the child;
- d. Every second weekend in Gibsons, British Columbia, upon 14 days' clear notice.

[122] As will be seen below, I have added some details to this plan in an attempt to make it more workable and, frankly, in an attempt to create more reliability on the part of the respondent.

[123] However, taken as proposed by the claimant, the proposal is noteworthy for the fact that it provides for more parenting time than the respondent has had while the claimant and V have been in Victoria (and since the 2016 separation agreement). For example, he has not seen V since April 2018 (with FaceTime in May 2018) largely because of his refusal to accept reasonable changes proposed by the claimant. He is simply unable to accept these changes, ones that are in the interest of V and they are not rigidly imposed by the claimant. I accept that there would be additional cost to the respondent for parenting time in Gibsons. On the other hand, the claimant would also be taking on additional cost when she brings V to Victoria.

[124] I find that the claimant's proposal for parenting time by the respondent with V in the event of a relocation by the claimant is reasonable and workable. The respondent has not satisfied me otherwise. It follows that, under s. 69(4) of the FLA, the relocation must be considered in the best interests of V and the claimant's plan for relocation is allowed on that basis.

[125] In the event I am incorrect, s. 69(5) applies instead of s. 69(4) and there must be proof that the relocation is in the best interests of V, I find that it would be in her best interests.

[126] As noted above, the factors set out in s. 65(6) inform the analysis of whether the decision is being made in good faith. The reason for the relocation is the real prospect of a secure and affordable living arrangement with readily available support for V and the claimant. That support has not been available in Victoria from the respondent despite many opportunities for it to develop since the March 2016 separation agreement. The lack of support from the respondent has caused distress to V as demonstrated by her frustration with him not showing up when she was expecting him to do so. It has also reduced the financial capacity of the claimant because she has had to give up time at work to compensate for the respondent's refusal of support or his unreliability. And he has simply refused to pay any financial obligations including the modest \$100 per month for V's preschool as set out in the 2016 separation agreement.

[127] I conclude the relocation would enhance the general quality of life of V and the claimant by increasing their emotional well-being and financial opportunities. The claimant's plan to relocate with V to Gibsons is also allowed under s. 69(5) of the FLA, effective on the date of this judgment but subject to the requirements set out below.

(b) Parenting time

- [128] Following on the above conclusion that the claimant's plan to relocate to Gibsons is allowed, there are some issues of parenting time to consider. Some of these follow under s. 70 of the FLA.
- [129] In the subject case, again, the parenting time for V began with the March 2016 separation agreement. It provided for "shared parenting time" and the parties were to determine a schedule by agreement. The parties agree that the intention was that "shared" was to be equal time with V.
- [130] As can be seen from the above history of parenting time the March 2016 agreement has not worked well. Firstly, there has not been anything close to equal parenting time. Instead the respondent has had periods with no visits and even periods without any FaceTime contact. He blames the claimant for this and I accept his point that there are times when the communications between the parties worked well. There are also some times when the claimant did not return the respondent's calls but this was because she was in the United States. I add that the claimant is not at the beck and call of the respondent and she is only required to respond to his inquiries within a reasonable time, bearing in mind her circumstances at the time. Certainly, calling late on a Friday insisting on parenting time that weekend does not oblige the claimant to immediately respond and change previously arranged plans. Nor is the respondent entitled to insist on his plan for parenting time over the previously arranged activities of V and, in some circumstances, the claimant.
- [131] Overall, unfortunately, it has to be said that the shared parenting time set out in the 2016 agreement has never been in place. And this has primarily been the result of the respondent's inability to make reliable plans for that time. In addition, the frequency of the visits has been almost entirely in the control of the respondent simply by virtue of the fact that he is not available unless he decides to be available. I deal more directly with the 2016 agreement below.
- [132] With the above history in mind and following on my decision above to allow the claimant's application to relocate with V to Gibsons, parenting time after relocation will be generally as described by the claimant in her proposal. Further particulars are discussed here and below.
- [133] In order to preserve the previous parenting arrangements and facilitate the transition to the new location for the claimant and V, the claimant will advise the respondent by email of the details of this relocation including the specific date and contact information in Gibsons as soon as they can be confirmed. This will be a reasonable time before the move itself. She will continue to advise the respondent about any changes to her address, telephone number and email address as soon as practicable. She will advise the respondent of the name, address and hours of any preschool, kindergarten, school or after school programs for V. As discussed below, the claimant has the sole authority to make decisions about these matters but she also has an obligation of informing the respondent of significant decisions.

- [134] The claimant will also provide parenting time for the respondent with V in Victoria before the actual relocation following a reasonable request by email from the respondent. Whether a request is reasonable or not depends on the notice given by the respondent and the time, place and activities he is proposing with V. It is not reasonable, as an example, for the respondent to respond to a comment by the claimant about parenting time (that she did not want V staying in the room in the respondent's shop when it was unclean and contained drugs and drug paraphernalia) that she is "insane." Nor is it reasonable for one party to have to wait a long time for a reply bearing in mind that travel outside British Columbia may create delay. As above, the claimant is entitled to propose reasonable alternate arrangements that recognize the activities of V and her own capabilities.
- [135] This parenting time before the relocation will obviously be difficult because V has not seen her father since April 2018 and she will also be moving. She is 5.5 years old, she will be confused and she may well become upset. Assisting V to adjust to this new situation will require the sensitive, ongoing and responsible support of both parents, grandparents and anyone else who can assist her. Communications will be by email (not texting) and they will be for the sole purpose of making the practical arrangements for parenting time. They are not an opportunity for the parents to blame, insult or abuse each other (as has taken place with the voluminous text messages between the parties). Telephone conversations are to be avoided except in emergencies. Exchanges of V will take place in public places such as the Bay Centre in Victoria, as in the past. A public location in Gibsons will have to be determined by the claimant.
- [136] Neither party will consume marihuana nor illegal drugs nor excessive amounts of alcohol while having parenting time with V. Nor will she be exposed to marihuana or illegal drugs. The respondent apparently has a clean and safe living arrangement now and he will maintain his residence to that standard. He will obtain a reliable and accessible telephone number that can be used in the normal course of dealings and it will not require the presence of Wi-Fi or similar technology. The respondent will advise the claimant by email of any change to his address, his telephone number or his email address as soon as practicable.
- (c) Guardianship and parenting responsibilities
- [137] Under s. 39 of the FLA guardianship is to be presumed. In the subject case, it is agreed that the respondent is a guardian of V, as is the claimant. The March 2016 separation agreement also states that the parties will have shared guardianship (s. 2.1). I find that the respondent is a joint guardian for V.
- [138] The issue for consideration is the claimant's application that she have sole authority for most parental responsibilities under s. 41 of the FLA. That is, should the respondent have fewer parental responsibilities than described in s. 41? The respondent opposes the claimant's application.

[139] Section 41 of the FLA is as follows:

Parental responsibilities

41 For the purposes of this Part, parental responsibilities with respect to a child are as follows:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
- (i) starting, defending, compromising or settling any proceeding relating to the child, and
- (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

[140] The claimant seeks sole responsibility for all the responsibilities in s. 41 except for s. 41(j), "requesting and receiving from third parties health, education or other information" respecting V.

[141] There have been some problems with the respondent exercising parental responsibilities in the past including actions against the best interest of V. There was the incident in February 2017 when the respondent did what can only be described as smuggling V across the border from the United States to Mexico. This was because her passport had expired which the respondent knew before he left Victoria. He apparently thought he could make the trip

using Nexus cards but he was not permitted to board the plane from Houston, Texas, to Mexico. He might have turned around at that point but he rented a car and drove to another town where his family from Mexico met him and took the respondent and V across the border to Mexico. This could not have been a legal crossing. Then the obvious problem of getting V back to Canada arose and the respondent told the claimant he would take care of it. He did not and the claimant had to negotiate the return of V through two countries. I accept her evidence that she was very concerned with the security of V and she had good reason to be concerned.

- [142] Another problem with the respondent's exercise of parental responsibilities is the situation with his room over his detailing shop. He moved there in June 2017. As above, it had no windows, no bathroom and no sink. At one point the respondent, his male son from another relationship and his brother were staying there with V when she visited. In his evidence the respondent stated that there was daylight available if a person stepped outside the room and looked up a stairway at some windows but that is an unsatisfactory response. He also minimized the lack of bathroom by saying it was down the hall but it was behind at least one locked door.
- [143] Apart from the situation of the room itself there are the photographs taken by the claimant in September 2017. These demonstrate something approaching squalor in the room and in the stairway up to the room. The respondent attempted to explain the situation by saying he was just moving in but he had moved in three months previously.
- [144] More significantly there were a number of packages of marihuana, including one with a label from a well-known cannabis dispensary in Victoria. There was the paraphernalia for making Shatter, a highly concentrated form of marihuana, including a propane torch. In his evidence the respondent explained this situation by denying there was any marihuana and then, when he was shown the photographs, he denied any knowledge of it. He also tried to explain it by saying he had just got up from a nap. I prefer the claimant's evidence that when she arrived he was working in the shop. The respondent also suggested in his evidence that the claimant planted the drugs in his room. That explanation is convenient but baseless.
- [145] Of considerable concern is that V was alone in the room among all the mess, the drugs and drug paraphernalia. In his evidence the respondent attempted to explain the presence of a propane gas torch as being from the shop and not for making Shatter. Given the other material in the room, especially the tools used to create Shatter, that is highly unlikely. But, assuming that was the purpose of the torch, the respondent has not explained why a 4-5 year old child was left in a room with a dangerous tool containing propane gas.

- [146] Overall, the respondent's explanations for the condition of his room over his shop are not defensible and they reflect a serious lack of understanding of his responsibilities as a parent. It is true that he has since moved and he has an apartment that is safe and appropriate. That is to his credit but the history of his living arrangements cannot be ignored as part of an assessment of his ability to exercise parental responsibilities.
- [147] The respondent has demonstrated additional problems exercising his parental responsibilities. For reasons that were never explained he has a serial inability to get V to school on time and he is quite unreliable about picking her up when he is supposed to do so. The claimant attributes this to drug use. As another example she points to the May 1, 2018 email he wrote to the claimant complaining that he had not seen V (since April 2018) and it had been too long. He was "still waiting to talk to her" at 8:54 in the morning apparently not aware that school started at 8:45 AM.
- [148] The respondent testified that he had a close working relationship with V's school but he was unaware of this kind of information as well as the holidays, spring breaks and non-instructional days. He relied on an attachment to an email he received from the school but he obviously had not read it. He opposed the claimant's efforts to get after-school care for V and said he would take care of her. He did not take care of her, by then it was too late to get a space for V and claimant had to take more time off work to pick V up after school.
- [149] Additional problems with the respondent not acting responsibly include his persistent refusal to have a reliable telephone number. He insists he has a strong and active relationship with V's school but he also agrees that the school could not telephone him. An appointment for V at a doctor was cancelled but the doctor's office could not reach the respondent on the telephone.
- [150] The respondent has also driven V in vehicles owned by his customers without a car seat or with a booster seat in a dangerous location in the front seat. He testified that he had his own booster seat and he had a photograph of it. But another explanation is that it belonged to someone else. In any event, I accept the claimant's evidence that there were times when a car seat or booster seat were not used or used in an unsafe manner. Finally, the respondent has never paid the \$100 per month for preschool expenses as required under s. 3.3 of the 2016 agreement.
- [151] It has been more than two years since the parties signed the March 2016 separation agreement. That document was apparently a result of mediation and it appears that both parties were hopeful that it would govern their parental responsibilities and other matters. With respect to V, there was to be shared guardianship and parenting time. Since the agreement was signed neither the parenting time or the responsibilities associated with guardianship have been shared. Indeed, with respect to the latter, the respondent has not acted responsibly and even put V in harm's way. He has not acted in the best interests of V.

- [152] Bearing in mind that s. 40(4) of the FLA states that no particular arrangement of parental responsibilities is presumed to be in the best interests of a child, I conclude that the parental responsibilities under s. 41 should be allocated unequally as between the parties in this case.
- [153] The claimant accepts that the respondent should share in parental responsibilities that relate to requesting information about V from third parties such as health and education organizations (s. 41(j)). I agree. She will also advise the respondent by email of any significant developments in the other responsibilities under s. 41. This is for the information of the respondent only and it is not an opportunity for him to make different proposals or veto the claimant's plans. The claimant is entitled to make the decision on these matters on her own (except for s. 41(j)).
- [154] As an example of the other responsibilities under s. 41, I note s. 41(e) relates to cultural and linguistic upbringing and heritage. The respondent is of Mexican heritage and he obviously takes pride in that heritage. In his evidence he incorrectly described V as being fluent in Spanish but I accept that her linguistic and cultural upbringing is important to him. The claimant speaks Spanish and it would obviously be to the benefit of V if she improved her facility in Spanish.
- [155] In these circumstances it seems to me that both parties need to be respectful of the Mexican heritage of V. Accordingly, the primary responsibility for those matters (including the authority to make any decision) will be with the claimant but she will consult with the respondent by email for any significant Mexican cultural and Spanish linguistic matters. Similarly, it is open to the respondent during his parenting time to enroll and otherwise encourage these matters with V.
- [156] With this one exception and one qualification, I conclude that the claimant will have the sole parenting responsibilities for V under s. 41 of the FLA.
- [157] As a final matter under parenting responsibilities there is the issue of the passport for V. The claimant seeks the sole authority to obtain a passport and other travel documentation for V.
- [158] On this point the 2017 trip to Mexico is, again, instructive. The trip began with an expired passport, V was taken across the Mexican border without the proper documents and getting her back was a complicated process taking days (and largely done by the claimant). V returned home sick and the claimant was understandably anxious. After returning to Victoria the respondent immediately returned to Mexico leaving the claimant to obtain a passport for V for the trip to Hawaii without his consent. That too caused complications (primarily for the claimant) which were resolved but they were nonetheless unnecessary.

[159] As can be seen the respondent has not demonstrated he can exercise the responsibility of making international trips in a responsible way. The idea of connecting V to family in Mexico was a good one but, unfortunately the trip turned out not to be in the best interests of V.

[160] I conclude that the claimant should have the sole authority over the passport and other travel documents for V. It may be that the respondent can demonstrate that he can make responsible decisions about travelling with V but that will take time and will have to be decided in the future.

(d) Child support

[161] As legal context to child support, s. 147(1) of the FLA states that each parent and guardian has a duty to provide support for a child (except in circumstances not applicable here). The respondent in this case is a parent of V, as is the claimant. Therefore, the duty described in s. 147(1) applies to them.

[162] Child support is determined under the Guidelines (FLA, ss. 150(1) and 247(1); Family Law Act Regulation, B.C. Reg. 347/2012, s. 8; *Viek v. Graff*, 2013 BCSC 1906, at para. 33). The amount of child support is determined by the number of children (under the age of majority) and the income of the spouse against whom support is sought (Guidelines s. 3(1) (a)).

[163] Imputation of income is governed by s. 19 of the Guidelines:

Imputing income

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;

- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[Emphasis added].

[164] As factual background, the 2016 separation agreement stated that the income of the claimant was \$23,867.03 and the respondent was unemployed (s. 1.4). More recently the claimant filed a Form 8 financial statement on June 5, 2018. This describes modest income for child support purposes of \$23,427, essentially unchanged since 2016.

[165] The respondent has provided no documents (including a Form 8) explaining his financial situation. He has not filed an income tax return since at least 2015. Information and documents have been requested and demanded by the claimant from the respondent but he has refused to provide anything.

[166] In his evidence he made vague references to irregular work. For example, he said that the week before trial he worked three hours doing some electronic work on a boat. This paid \$35.00 per hour. Two weeks before that he did detailing on two cars and was paid \$150 for each car. Before that he was shutting down his car detailing business and had to work on preparing for this trial. When asked his income for the first three months of 2018 he said he received \$2,500 for previous work. Although invited to do so he has not provided any documents to support these statements or any other financial documents.

[167] The respondent is 41 years old and he testified that he has been trained as an electronics technician. The claimant is sceptical about this training. He has worked in construction previously but for short periods. He says he has some training in the technical aspects of car detailing. He testified that he does not have time for anything more because he has been working on this court case. However, the same applies to the claimant who works and looks after V. The respondent's time is clearly not taken up looking after V.

[168] He had a serious accident in 2013 or 2014 for which he received a settlement of about \$350,000. His injury was to a leg and he says he has a steel rod in that leg. He describes this as a disability but his limitations are not at all clear and there is no medical evidence about his limitations or, more generally, his inability to work. His last full time work was in construction from April 2016 to November 2016. There is no explanation in the evidence as to why he quit that work or why he cannot get other work.

[169] I conclude that this is an appropriate case for imputation of income to the respondent under s. 19(1)(f) of the Guidelines. Indeed, in light of the complete lack of any financial information from the respondent (including non-compliance with demands and orders), it is the only way to assess his income. I also conclude that the respondent is under-employed and income can be imputed under s. 19(1)(a) of the Guidelines.

[170] As to the amount of imputed income there is, again, a lack of information of the respondent's earning history. He does have, at least on his own evidence, technical training. Of significance, he has not taken steps to be employed recently that could be considered gainful or ongoing. He insists he has a job but it is unclear what that job is. He may be entitled to do this on his own but he has a legal duty to provide support for his daughter and he can no longer avoid that duty. I find that \$40,000 is a fair and even low assessment of his potential earning capacity.

[171] Child support will be calculated in the mid-range using imputed income for the respondent of \$40,000. As otherwise discussed in this judgment, the claimant will have more than 60 percent of the parenting time with V and child support will be calculated on that basis.

(e) March 2016 separation agreement

[172] In light of the above findings it is necessary to review the March 2016 separation agreement. As above the claimant seeks to vary the agreement while the respondent says it should be applied by, in particular, giving him shared parenting time.

[173] There are three alternate routes to changing the 2016 agreement.

[174] First, there is the following provision in the agreement itself:

3.5 If the shared parenting time arrangement changes in the future or if the parties incomes are not similar in the future, child support will be reviewed at that time.

[175] A second approach to varying the March 2016 agreement is s. 44 the FLA. Sub-section 44(4) provides for the setting aside or replacing, in whole or part, of an agreement. I reproduce that provision here:

Agreements respecting parenting arrangements

44 (1) Two or more of a child's guardians may make an agreement respecting one or more of the following:

- (a) the allocation of parental responsibilities;
 - (b) parenting time;
 - (c) the implementation of an agreement made under this section;
 - (d) the means for resolving disputes respecting an agreement made under this section.
- (2) An agreement respecting parenting arrangements is binding only if the agreement is made

- (a) after separation, or
- (b) when the parties are about to separate, for the purpose of being effective on separation.
- (3) A written agreement respecting parenting arrangements that is filed in the court is enforceable under this Act as if it were an order of the court.
- (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

[Emphasis added].

[176] Thirdly, there is s. 47 of the FLA:

Changing, suspending or terminating orders respecting parenting arrangements

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

[177] In my view the 2016 agreement can be varied under any of these three approaches.

[178] Under s. 3.5 of the agreement itself the parenting arrangements have changed significantly because there has been nothing like shared time between the parties. That is sufficient to review and presumably change child support. The logic of this, and the above discussion, and I make the specific finding here, is that the respondent's counterclaim for shared parenting must be denied. Since the 2016 agreement he has had far less than that. It is not at all clear how he could increase his parenting time and he has not acted responsibly on some serious matters involving the health and security of V.

[179] As well, the 2016 agreement apparently contemplated "similar" incomes in the future. But it is not clear whether the comparator is the incomes described in the agreement or whether it contemplated they would each earn similar incomes in the future. If the former, the parties' current incomes are very similar to the ones described in the agreement (bearing in mind there has been no financial disclosure from the respondent). If the latter, their incomes are not similar with the claimant earning a modest income but apparently more than the respondent.

[180] With respect to s. 44(4) of the FLA, I have found that the respondent is not capable of exercising shared parenting time as described under the 2016 agreement (the claimant agrees that the objective of "shared" time under the agreement was equal time). Shared parenting time is not working and, in any event, there has never been shared time in the sense of equal time. And the parenting time that has occurred has raised serious issues as to the best interests of V.

- [181] Finally, I also conclude that, for the purposes of s. 47 of the FLA, there has been a change in circumstances of V and "another person" (i.e. the parties). The parties separated in early 2016 and the separation agreement was signed in March 2016. Since that time it is not an exaggeration to say the relationship between the parties established by the separation agreement has broken down. There has not been "shared" parenting time or guardianship and, indeed, there has been substantially less parenting time for the respondent than contemplated by the agreement. In addition the respondent has not complied with the agreement by, for example, not paying any of the \$100 per month he is required to pay for V's preschool.
- [182] I note that there is a dispute resolution section in the 2016 separation agreement (s. 4). It is of some detail and it requires notice, negotiations and mediation. In the event disputes are not settled by this process either party can apply to court. At the time of the agreement both parties were represented by counsel.
- [183] The evidence is not detailed on how this process applied prior to the claimant's claim that is the subject of this judgment. What seems to have happened is that the respondent decided to proceed without legal counsel and the process under s. 4 of the agreement broke down or could not even be initiated. As a practical matter that seems to have made the process unworkable. In any event, no one is now raising a jurisdictional argument.
- [184] Overall, I conclude that there is authority to vary the March 2016 separation agreement and that there are reasons for doing so. Specifically, events since March 2016 and the findings here support replacing the parts of the agreement related to parenting and child support. Other sections such as the ones on property (ss. 6 and 7) may well now have been completed or overtaken by other events but there is insufficient evidence to make that finding.
- [185] Therefore, the March 2016 separation agreement is varied effective the date of this judgment as follows:
- (a) Section 2 (Parenting) and s. 3 (Child Support) are replaced by the orders in this judgment.
 - (b) Section 4 (Dispute Resolution), s. 5 (Spousal Support Release), s. 6 (Property), s. 7 (Real Property), s. 8 (Debts), s. 9 (Pensions) s. 10 (Releases) and s. 11 (General Terms) remain in force.
 - (c) Any future issues related to parenting and child support will be decided by this court and not the dispute resolution provision of the agreement. Disputes over other issues will be decided under the dispute resolution process.

E. SUMMARY

- [186] The claimant's claim is allowed as follows:

- (a) The claimant's application to relocate from Victoria to Gibsons with the child V is allowed, effective the date of this judgment. The conditions described above apply including parenting time with the respondent before the relocation following a reasonable request from him by email.
- (b) The respondent may have one afternoon (from 12 noon to 4:00PM) of parenting time before relocation following a reasonable request by email from him, as discussed above. The claimant will choose the drop-off and pick-up locations. An unreasonable proposal from the respondent or no proposal at all within 5 calendar days of the date of this judgment may result in no parenting time before the relocation takes place. Any parenting time with the respondent before relocation will be completed within 10 calendar days of the date of this judgment. Apart from providing time for the respondent to spend with V the purpose of this visit is for the respondent to help V to adjust to the new parenting time arrangement. It will require the sensitive, ongoing and responsible support of both parents, grandparents and anyone else who can assist her.
- (c) Parenting time for the respondent after the relocation will be as follows:
 - (i) Three times per week via FaceTime. The respondent will advise the claimant by email (not text message or telephone) one clear day before the time he wants to use FaceTime. The claimant will make reasonable accommodations to facilitate these visits. She is entitled to propose alternate arrangements if the respondent's suggested time is inconvenient, in light of her schedule but most particularly in light of the activities of V.
 - (ii) One weekend every 8 weeks the claimant will bring V to Victoria at her expense. The claimant will propose a specific time and place 6 weeks before any visit. The respondent will reply promptly to the claimant's proposal and confirm he will be available on the proposed dates or other dates. Delay in replying may result in no parenting time and claimant is not required to hold certain times open without confirmation by the respondent that he will be available. Each party will give reasonable accommodation to the other's schedules and travelling arrangements. The claimant will choose the drop-off and pick-up locations. The expectation is that there will be no cancellations or no-shows by the respondent but, if there are, there will be no alternate times unless the claimant agrees.
 - (iii) Every second weekend the respondent may come to Gibsons at his expense. The respondent will propose by email a specific time and place 14 calendar days in advance. If there is not 14 days' notice the claimant is not required to hold the weekend open. The claimant will reply promptly to the respondent's proposals. Each party will give reasonable accommodation to the other's schedules and travelling arrangements. The claimant will choose the drop-off and pick-up locations in Gibsons. The expectation is that there will be no cancellations or no-shows by the respondent but, if there are, there will be no alternate times unless the claimant agrees.
 - (iv) All communications about parenting time will be by email (not texts or telephone). The emails will only discuss the practical matters of parenting time and they are not an opportunity for one party to blame or abuse the other party. Last minute changes to plans are to be avoided

except in extraordinary circumstances and then to be communicated by email as soon as possible. The expectation is that there will be no last minute changes. Communications will not be by telephone except in emergencies in which case the other parent will be advised as soon as possible.

- (v) The respondent will have a reliable and working telephone that does not require Wi-Fi or similar technology.
- (d) Neither party will consume marihuana or illegal drugs nor excessive amounts of alcohol while having parenting time with V. Nor will she be exposed to marihuana or illegal drugs. The respondent apparently has a clean and safe living arrangement now and he will maintain his residence to that standard.
- (e) The parties will advise each other by email of any change to their addresses, their telephone numbers or their email addresses as soon as practicable.
- (f) Child support will be set in the mid-range based on imputed income of the respondent of \$40,000 and the child V being with the claimant more than 60% of the time.
- (g) Section 7 expenses based on receipts will be paid proportionate to income using \$40,000 for the respondent and \$23,000 for the claimant.
- (h) Both parties are guardians of V. The claimant has sole authority over the parental responsibilities set out in s. 41 of the FLA, except s. 41(j). She will consult the respondent about any significant issues with respect to other responsibilities, in particular cultural and linguistic issues. The respondent does not have any veto over the exercise of these responsibilities.
- (i) The claimant will have the sole authority to obtain a passport and other travel documents for V and to keep that passport in a secure location. She may travel internationally with V without the permission of the respondent. For short trips to her family in Washington State she will advise the respondent of the trip, including the dates, 24 hours before leaving. For other international trips the claimant will provide 21 days' notice, including the dates, locations and local contact information. The respondent, as a guardian for V, is entitled to this information but he does not have the right to veto these trips, make unreasonable demands or delay the claimant's travel plans. FaceTime visits can take place between V and the respondent while the claimant and V are away.
- (j) Pursuant to s. 44 and s. 47 of the FLA, as well as the March 2016 separation agreement, that agreement is varied as follows:
 - (i) Section 2 (Parenting) and s. 3 (Child Support) are replaced by the orders in this judgment.
 - (ii) Section 4 (Dispute Resolution), s. 5 (Spousal Support Release), s. 6 (Property), s. 7 (Real Property), s. 8 (Debts), s. 9 (Pensions) s. 10 (Releases) and s. 11 (General Terms) remain in force.

(iii) Any future issues related to parenting and child support will be decided by this court and not the dispute resolution provision of the agreement. Disputes over other issues will be decided under the dispute resolution process.

[187] The respondent's counterclaim is denied.

[188] If there are difficulties approving the final order that prevent its approval within 7 calendar days of the date of this judgment either party may apply for a telephone hearing for that purpose.

[189] The claimant has been substantially successful and she is entitled to her ordinary costs against the respondent.

"J. J. Steeves, J."

The Honourable Mr. Justice Steeves

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/12/2018BCSC1269cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/m-a-v-e-o-2018>

Prepared on 25 October 2026 · Esheria