

CANADA / JUDGMENT

M.P.R. v. J.B.R.

2020 BCSC 1046

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2020 BCSC 1046 M.P.R. v. J.B.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.P.R. v. J.B.R.,

2020 BCSC 1046

Date: 20200715

Docket: E040744

Registry: New Westminster

Between:

M.P.R.

Claimant

And

J.B.R.

Respondent

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Claimant:

P. Rowlands

Counsel for the Respondent:

T. Star

Place and Dates of Hearing/Trial:

New Westminster, B.C.

July 19, 20, 30, 2018

July 22-24, 2019

September 26, 2019

October 24, 2019

January 31, 2020

February 18, 2020

Place and Date of Judgment:

New Westminster, B.C.

July 15, 2020

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Introduction

- [1] This summary trial proceeding concerned an acrimonious dispute between the parties related to the respondent's parenting role with two children of the marriage and concerns about the respondent's compliance with consent orders made in December 2014 and July 2016. Both parties claimed relief and, most importantly, the respondent seeks an improved and increased parenting relationship with his two children from whom he had been largely estranged since 2012. The claimant's applications included contempt proceedings, disclosure obligations, enforcement and parenting issues. Approximately 42 affidavits sworn between August 2012 and July 2019 were included in the application record.
- [2] The affidavits filed by the parties were replete with many instances of inadmissible evidence including hearsay, argument, speculation, opinions, and much other irrelevant information.
- [3] On December 9, 2014, Mr. Justice Ball made a final consent order and a consent protection order. I will refer to these orders collectively as the "Ball J. orders" and specify where I am referring to only one of the orders made. The court took into account affidavit material and submissions before granting orders including a divorce order. Among other terms, the court ordered the respondent to pay \$848 per month child support commencing December 20, 2014 and \$300 per month representing his share of s. 7 expenses also beginning December 20, 2014. The Court also ordered the parties to exchange tax returns and notices of assessment by July 15 of every year commencing July 15, 2015.
- [4] The Ball J. orders required the respondent to pay the claimant \$1600 by July 15, 2016 representing a retroactive contribution to the children's RESP. He was to remove his name from the RESP and the claimant was to become the sole administrator. All other claims in the case were dismissed as if tried on the merits.
- [5] Mr. Justice Ball made the consent protection order under s. 187 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], changing the terms of an earlier order. The new terms restrained the respondent from communicating with his children except when exercising parenting time under a court order or written agreement. He was restricted from attending near their home and school and various other locations in the Guilford and Fleetwood areas of Surrey.
- [6] On October 26, 2016, G.C. Weatherill J. made an order requiring the respondent to comply with the Ball J. orders (the "Weatherill J. order"). This order included a term that the respondent produce copies of his income tax returns for 2012, 2013, 2014 and 2015 and notices of reassessment for 2014 and 2015 to counsel for the claimant.

- [7] Mr. Justice Weatherill's order also included terms that earlier orders of Mr. Justice Crawford made July 16, 2014, Mr. Justice Ball made December 9, 2014, and the protection order made December 9, 2014 be enforced. The court set out nine terms of those orders that were to be enforced and included a fine of \$4,000 levied against the respondent under s. 213 of the FLA for breaches of those orders. In assessing the claimant's contempt application, I take into account that the respondent consented to all previous orders.
- [8] There was also an order by Weatherill J. at the time changing the protection order concerning attendance at the children's school.
- [9] On this application the claimant also requests fines against the respondent for all breaches of the orders that had occurred before and after October 26, 2016.

The Claimant's Claims

- [10] In November 2017 the claimant filed an application seeking contempt orders against the respondent for five breaches of the Ball J. orders and two breaches of the Weatherill J. order. In the alternative, she asked for fines under the FLA for his breaches of the orders.
- [11] She abandoned claims seeking termination of the respondent's joint guardianship order and deleting his entitlement to parenting time. Further, she also abandoned a request to vary the October 26, 2016 order dealing with parenting time.
- [12] Finally, the claimant asked for a variation of the earlier order to permit her to travel with the children without the respondent's consent or authorization. She also wanted to compel the respondent to make payments to the children's RESP programs including the provision of 12 post-dated cheques. She sought an order that the respondent pay her \$7992 plus court order interest for retroactive child support. She requested the respondent's residential address, a copy of his 2016 tax return and notice of assessment. She requested an updated passport style photograph of the respondent. She sought a further order that the respondent maintain an insurance policy of \$250,000 with her as the irrevocable beneficiary as long as the children were children of the marriage. Alternatively, she requested an order that the respondent provide "comparable security For so long as each of the children is a 'child of the marriage'".

The Respondent's Claims

- [13] In May 2018, the respondent applied for variation of certain paragraphs of the Ball J. orders and the Weatherill J. order mostly dealing with his parenting role. He changed his application in June 2019. He requested the earlier orders be varied or terminated as follows and claimed the following:
- a) paragraph 2: to provide that he would share parenting responsibilities of the children;

- b) paragraph 4: if either parent should be unable to care for the children then the other parent would assume all parenting responsibilities;
- c) paragraphs 5 and 7: he would have unsupervised parenting time with the children;
- d) in the alternative, he would have reasonable and generous parenting time supervised by his mother;
- e) paragraphs 6 and 9: requiring the claimant to give notice of any intention to relocate the children and accord him the ability to oppose any proposed relocation;
- f) paragraph 12: be set aside in its entirety;
- g) paragraph 13: to require the claimant to arrange reasonable and generous parenting contact time between the children and their paternal family members;
- h) paragraph 14: be set aside in its entirety;
- i) paragraph 17: to adjust child support annually taking into account changes in his Guideline income in accordance with the Federal Child Support Guidelines, SOR/97-175;
- j) paragraph 18: section 7 expenses to be shared equally in proportion to the parties' Guideline incomes provided that he be entitled to agree in advance before expenses are incurred;
- k) paragraphs 38 and 39: to require the claimant to return various personal items to him within seven days;
- l) the December 9, 2014 protection order be terminated;
- m) the October 26, 2016 protection order be terminated and paragraphs 1(b), (d)(i), 3, 4, 5, 6 and 8 of the October 26, 2016 order be varied or terminated;
- n) an order that the respondent and his family members be entitled to contact the children via phone, Skype or email or other electronic means;
- o) an order compelling the children to attend family counselling or reunification counselling with the respondent;
- p) an order granting him unsupervised reasonable and generous parenting time with the children and his family members;
- q) in the alternative, that he have supervised parenting time with the children until the court determines it is appropriate for his parenting time to be unsupervised;
- r) an order prohibiting the claimant from attending at any of his parenting time with the children;
- s) he wanted the final order to be set aside in its entirety and to ensure that he would have reasonable and generous contact with the children and the children with their paternal family;

- t) that he be credited for overpayment of s. 7 expenses totaling \$16,200 made since December 9, 2014; and
- u) the parties pay equally the cost of the s. 211 report prepared by Leanne Harder (as previously ordered on July 30, 2018).

Background

- [14] The parties were married September 19, 1998 and separated in January 2012. There are two children of the marriage, IR born May 14, 2001 and AR born October 2, 2003. The respondent and his children have Aboriginal heritage.
- [15] The claimant is a public health nurse with Fraser Health Authority and the respondent an employee of Canada Revenue Agency in Surrey.
- [16] The parties separated in January 2012 and were divorced July 16, 2014.
- [17] The parties' separation occurred in part due to unresolved issues with the respondent's mental health and substance use and abuse. In April 2013, the respondent pled guilty to criminal charges of indecent exposure in regard to events that occurred after the parties separated.
- [18] There have been multiple orders made concerning parenting, financial disclosure, support issues and some ancillary terms. These include:
 - a) July 24, 2012 a declaration of no reasonable prospect of reconciliation between the parties;
 - b) October 24, 2012 a restraining order under ss. 37 and 38(1)(a) of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] and other terms restricting the respondent's contact with the family;
 - c) October 24, 2012 an order granting the claimant interim sole custody and interim sole guardianship and a requirement that the respondent make disclosure of financial information;
 - d) July 16, 2014 the parties were divorced and further financial disclosure was ordered to be produced by the respondent;
 - e) July 16, 2014 by consent the respondent was restrained from any communication with the children except for exercising contact allowed under a court order and the respondent was prohibited from attending the matrimonial home or the children's school. December 9, 2014 a further order was made reiterating the July 16 order and including restrictions concerning places the respondent should not be near or enter including the Guilford Mall;
 - f) December 9, 2014 by consent the final Ball J. order dealt with guardianship, parenting responsibilities, residence, the respondent's parenting time with the children, child support, property division, and terms ancillary to the respondent's relationship with the children;

- g) October 26, 2016 Weatherill J. ordered by consent enforcement terms relating to the July 16, 2014 and December 9, 2014 orders and variation of the December 9, 2014 orders and a fine for the respondent's failure to comply with the orders made July 16, 2014 and December 9, 2014; and
- h) October 26, 2014 a variation of the December 9, 2014 order prohibiting restricting the respondent's attendance at the children's school.

Framing the Issues

- [19] Although IR is mentioned in the parties' applications and affidavits, he is no longer a child as defined by the FLA except for support purposes. For the purposes of parenting issues, a person is no longer a child when they reach 19 years old: see FLA, s. 1. The parties did not make submissions concerning the parenting relationship between the respondent and IR and no order is made in these reasons. The focus of the parenting aspects of these applications concerns issues relating to AR.
- [20] In my view, the claimant's application and respondent's cross application were inappropriately presented and supported by prolix affidavit material intermingling allegations relating to the contempt applications with those related to the parenting questions.
- [21] The claimant relied on 25 affidavits sworn between August 2012 and July 2019. The respondent relied on 17 affidavits.
- [22] The claimant began her applications for contempt under Rule 21-7 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR] and enforcement of orders under the FLA coupled with some parenting issues (including an initial challenge to the respondent's status as guardian) and various claims for financial disclosure. After ten days of hearings on this application and the respondent's application for substantial changes to the parenting orders, the claimant applied to withdraw the summary trial application she had made and invited the Court to decline to decide the respondent's application; both arguments were animated by her concern that the Court could not decide these claims in a summary trial process.
- [23] The claimant's strategy of combining such a wide range of claims as part of a contempt application compromises the Court's ability to fairly address the substantive issues. In my view, contempt matters should, ordinarily, be addressed as standalone and discrete claims between the parties in litigation. They should not be brought in the context of wide-ranging disputes concerning parenting and support issues. This point was underscored by the Court in *Bassett v. Magee*, 2015 BCCA 422 [Bassett]:
- [43] It is not uncommon to see motions for contempt in high conflict family cases deployed as a weapon in the war, almost as standard pleading. The tactic is to get the court on the applicant's side, and to weaken the opponent with an adverse finding in order to improve the chances of success at trial. This should be discouraged. Judges can dampen the

enthusiasm for contempt motions by separating them from the hurly-burly of chambers work and subjecting them to vigorous scrutiny, both procedurally and substantively. These words from Stupple at para. 5 are apposite:

Great care must always be taken not to invoke the Court's undoubted power of contempt in order to protect its process except when absolutely necessary and except when it will likely have a remedial effect.

- [24] There are discreet issues and different burdens of proof inherent in the parties' applications. I intend to issue reasons addressing the claimant's ss. 213 and 228 FLA and contempt applications separately from the parties' applications dealing with parenting and the respondent's relationship with his children.
- [25] The claimant's application was filed November 30, 2017 and first came on for hearing on June 15, 2018. Substantial arguments did not begin until July 19, 2018. On the eighth day of submissions in October 2019, the claimant sought to abandon her position and asked the Court to decline to decide the issues on a summary trial basis because they were then unsuitable for summary determinations. For reasons which are set out below, I have concluded I am able to decide the issues on a summary trial basis notwithstanding the claimant's wish to abandon the application.

Summary Trial

- [26] Section 37 of the FLA directs that when making orders regarding parenting arrangements, the court must consider the best interests of the child only. The court must consider the views of the child where appropriate and take into account a wide range of factors affecting the child.
- [27] As noted above, after many days of hearings of the parties' applications, the claimant applied to withdraw the summary trial application because she formed the belief that a summary trial was not appropriate. I have determined that the issues can be decided on the basis of the evidence presented by the parties. Although some evidence tendered by the parties was inadmissible and other parts unhelpful, there was sufficient foundation in the evidence enabling me to find the necessary facts to address the allegations of contempt and claims for fines without the need of additional evidence. I was also able to address the more important issue concerning AR's best interest in furthering his relationship with the respondent without delay.
- [28] I will now set out the relevant legal principles. As summarized in *C.S. v. S.S.*, 2017 BCSC 797:
- [23] Rule 11-3(2)(a) allows for a summary trial in "a family law case in which a response to family claim has been filed". Pursuant to R. 11-3(15)(a), judgment may be granted on a specific issue, or generally, unless:

- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

[24] In *Nesbitt v. Neufeld*, 2011 BCCA 529, the Court of Appeal confirmed that the summary trial process is appropriate for the resolution of family law matters, assuming there is a sufficient evidentiary foundation from which to make the necessary determinations. In fact, the summary trial may be a particularly useful tool for matters in which the proceedings have been "protracted", there is "misuse of the Court's process", and proceeding in this manner will avoid "further delay": *Nesbitt*, at para. 24.

[29] Summary trial applications are not appropriate in all circumstances. Per *Lougheed v. Lougheed*, 2019 BCSC 290:

[50] A summary trial is inappropriate if credibility findings are required to resolve conflicts in the evidence in order for the trial judge to find the essential facts: *Jutt v. Doehring* (1993), 82 B.C.L.R. (2d) 223 (C.A.) at para. 13.

[30] The claimant argued strenuously after many days in submissions that neither the contempt or enforcement applications, nor the parenting issues should be decided on a summary trial basis. She focused on the principles set out in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.).

[31] In *Gichuru v. Pallai*, 2013 BCCA 60, the Court of Appeal summarized the issues regarding applications under Rule 9-7, the corresponding summary trial Rule of the Supreme Court Civil Rules, B.C. Reg. 168/2009:

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
- [32] Informed by *Gichuru*, I will take into account whether the facts necessary to address the issues raised by the parties can be decided without resolving contested factual issues. In performing this analysis, I must take into account the amounts involved, the complexity of the case, urgency, prejudice that might arise by reason of delay, the cost of taking the case forward to a conventional trial, and other matters which may be important. It is also important to consider if credibility issues are essential to the fact-finding role of the court.
- [33] I am satisfied that different rules and burdens of proof are engaged in deciding the claimant's application. Contempt is a quasi-criminal process as noted above. In this case the respondent was entitled to rely on the claimant's notice of application and supporting affidavits in support of the contempt claims before electing whether to tender evidence. On the other hand, the respondent was obliged to provide affidavit responses to claims set out in the claimant's affidavits, notwithstanding the unusual situation when other claims are advanced in a contempt motion. In this case, the claimant went well beyond her initial affidavit to support her claims and the respondent tendered response material and additional material in support of his application for variation of the parenting order.
- [34] As noted, I have been able to find the facts dealing with the contempt issues based on the affidavit evidence tendered on that application. The claimant argued that she should be entitled to adduce more evidence concerning the contempt proceeding. In my view, she is not entitled to adduce any further evidence.
- [35] In support of her contempt allegations, the claimant carried the responsibility to prove each element of her case beyond a reasonable doubt. This is not a process that invites one party to provide multiple affidavits after the respondent has made their election on what evidence to tender on the contempt issue.
- [36] With regard to the parenting issues I am satisfied that the facts necessary to decide the issue can be determined without descending into the pit of conflicting and unnecessarily pejorative affidavit evidence tendered by the claimant. AR will soon be 17 years of age and his needs and best interests are dependent on the earliest possible resolution of this dispute. It will be against his best interest if this question concerning his relationship with the respondent is pushed off to a trial that may not conclude until he is 18 years or older.

- [37] The costs incurred by the parties to the present, and the enormous cost and delay that would be incurred in an ordinary trial, are compelling factors favouring a decision on these issues at this time. If I had concluded that a full trial was necessary on the parenting issue, I would likely have made an interim order to begin the urgent process facilitating AR's reconnection with his father.
- [38] Moreover, it is extremely important to make orders that take into account AR's wishes.
- [39] For these reasons, I intend to address the respondent's request for an altered parenting arrangement.
- [40] One troubling aspect of the claimant and respondent's applications is the delay between filing the first motion in November 2017 and concluding arguments in 2020. Preparation of a s. 211 report was ordered during the trial but not completed until July of 2019.
- [41] The respondent has had little meaningful contact or parenting time with either child for two years. If this application is not decided now, it will likely take many months to secure a trial date and by the time the trial concludes and reasons are given, AR could be approaching 19 years of age.
- [42] Although the claimant expresses concern about the reconnection between AR and the respondent, my role is to consider whether there are sufficient facts that will permit me to make orders in regard to the contempt applications, the parenting issues, AR's best interests and the ancillary orders on a summary trial basis.
- [43] I recognize the claimant takes exception to the opinions in the Harder report, that analysis provides helpful insights into the parties, their dispositions and needs. I am satisfied that Ms. Harder conducted a fulsome inquiry as directed for the preparation of a s. 211 report. Although there may be shortcomings in some aspects, the claimant did not raise those shortcomings until the conclusion of argument in this case. I am satisfied that the order I intend to make would not be affected by any further or more detailed inquiry suggested by the claimant.
- [44] In this analysis I am required to consider the best interests of AR and those interests can be discerned without delving into the shortcomings in Ms. Harder's inquiry as alleged by the claimant.
- [45] As will be apparent from the following reasons, the issues concerning the respondent's breaches of orders, the allegations of contempt, and the ancillary issues raised by both parties can be analyzed on the facts as presented.
- [46] Accordingly, I have decided that based on the best interests of AR, the length and expense incurred in the process to date, the potential for prolonged delay in obtaining a trial of this matter, these applications are suitable for summary determination.

Parenting Changes

- [47] The respondent seeks a variation of the Ball J. order to allow him unsupervised, generous and reasonable parenting time with AR. He would like an order permitting his extended family (but not his brother C) to have contact time with AR. The parenting changes sought by the respondent would result in a significant change in the relationship between he and AR. The threshold question is whether there has been a change in circumstances warranting a variation of the original order and whether changes proposed by the respondent or any changes that could be made are in the best interests of AR.
- [48] There has been a serious interruption in the respondent's relationship with his children brought about in part by the claimant's fears stemming from his drug use, poor psychiatric condition and proclivities that resulted in his criminal conviction.
- [49] There is a thorough s. 211 report prepared by Leanne Harder (the Harder report) that addresses AR's needs and many of the respondent's shortcomings that might influence his suitability to assume a parenting role with AR.
- [50] The claimant relied on 25 affidavits sworn between August 2012 and July 2019. The respondent relied on 17 affidavits.
- [51] In the claimant's submissions she contends that the entire history of the proceedings must be taken into account in order to understand her position actively opposing any changes or expansion in a parenting role for the respondent. After appearances on June 15, July 19, July 20 and 30th, 2018 an order was made requiring the parties to obtain a s. 211 report. The respondent was obliged to pay the initial costs of this report; the report was delivered on July 8, 2019 and the application continued to July 22, 2019.
- [52] The claimant contends there are significant shortcomings in the section 211 report and contends the author failed to make a proper inquiry of all possible collateral sources of information. Absent the comments of those collateral sources, and the failure of the author to review the respondent's October 16, 2012 affidavit and the lack of objective evidence concerning the respondent's drug use it would be inappropriate to decide the contempt application and the parenting issues on a summary trial basis. In submissions, the claimant said she intended to obtain further evidence in support of her contempt applications.
- [53] I have had the benefit of reviewing the section 211 report and the voluminous affidavit material filed by both parties in support of their applications. I also had the opportunity to meet with and interview AR.
- [54] There were multiple troubling assertions in affidavits filed by the claimant in support of her application. Many of these assertions were not admissible evidence and ought not to have been included in the material relied on in this application.

- [55] The use of these affidavits belies a certain animus towards the respondent that should not have been reflected in the affidavits relied on by the claimant. As an example, the May 2018 affidavit of MH discussed the respondent's brother in an apparent effort to use his behaviours to reflect badly on the respondent's application. She said "I am aware that [C] has a criminal history with convictions regarding mischief, mischief to property and other offences". Unfortunately, she did not provide the source of that information and belief and the allegation should not have been in the affidavit. Later in that affidavit she said she was concerned about how the respondent's family "could possibly impede the growth/emotional well-being of the children due to his and his family's distrust and disregard for the law as well". She then goes on to provide an opinion from a behavioural science publication. The affidavit material is replete with these and many other improper and inadmissible allegations that have no place in litigation and most importantly in family law litigation.
- [56] In an affidavit filed by Heather McGregor, she deposed that she believed that the claimant was a truthful person and never known to lie. She said she was angry and annoyed that the respondent had "libeled her". An affidavit from BG providing opinions concerning the children's welfare and an endorsement that the claimant is "a person who is a good mother to her children and I know she has tried to do her best to always do what is best for her boys". Similarly, in an affidavit MG said that her sister was truthful and that she believes the respondent's statements were false. Similar problems exist in the affidavit of DL and AD.
- [57] Many of these witnesses concluded their affidavit's with the phrase "due to potential safety concerns I prefer not to disclose my residential address to the respondent " No basis for those concerns was set out in the affidavit; they had the appearance of tainting the respondent's character without any factual background.
- [58] The s. 211 report was 81 pages long and considered an extensive examination of the history of this family's difficulties, parties' background and their individual histories. Ms. Harder reported on her observations of interviews with a large number of people including AR. In the interview of AR she reported and concluded:

[AR] remembers his dad was "really fun" and he "liked him way more than mom". His dad would introduce him to video games. He said, "it would always be me, [IR], and my dad doing something. Going hiking, playing video games, making pizza together. My mom would just be there and make food while he was the fun parent".

[AR] last saw his dad on these "special visits" which he thinks were three or four years ago. He thinks it is "kind of sad" and "unfortunate" that he doesn't see his dad. [AR] would like to be able to live with his dad, like others he knows where they live with each parent for a week. [AR] doesn't know if that would be allowed and if "the court doesn't want us to see him."

His mom told him that the reasons he doesn't see his dad are because his dad "did bad stuff" which was "indecent acts in a public place."

[AR] is concerned that he won't ever have a relationship with his dad again. He wants to get back together and see him, but once every four years. [AR] would like to bike, play video games, hike and eat with his dad.

If [AR] could have any contact with his dad, he would like to be able to go to his dad's house and his mom's house. He used to want one week on and one week off. He doesn't want that anymore. He wants to be able to visit him whenever.

If [AR] had concerns about his time with his dad, he would probably talk to [IR] about it. He might talk with his mom.

After the family meeting with his mom yesterday, his mom said they had done a great job and it was an emotional day. When his mom talked about "safety", [AR] thinks she means that his dad is going to do something bad like do drugs or attack us. When asked if his mom talked about the conflict between the boys and her during the meeting, [AR] said not really.

After I completed the assessment and delivered the verbal recommendations on June 25, 2019, on June 28, 2019 at 4 PM, I received a text from [AR] which stated, "hi this is [AR] and I just wanted to say that I don't want to go to visits with my dad for a while and want to do it when I am ready".

[59] The report then turned to observations and analysis regarding AR. Ms. Harder said:

[AR]'s comments indicate that he has deeply felt the loss of his father in his life. He showed some ambivalence about the amount of time he would like to spend with his father as indicated by his initial preference for week on\week off and then later just wanting to have contact with him when he wants to.

Emotionally, he will likely have anxiety about spending time with his father as they are rebuilding their relationship. He will require support from his mother, and a counsellor to navigate these anxious feelings. [AR] is likely also experiencing some loyalty conflicts regarding his parents. He has a strong connection with his mother, as evidenced by his response to her discipline, and decisions to be respectful even when he does not agree.

As [AR] gets older, he will need support to process his complex feelings regarding his father's substance abuse and criminal charges.

[AR] presents as having a positive connection with his father's extended family. His awareness regarding the tension between his mother and his father's family is typical for children in the situation.

[60] I interviewed AR on his own. He presented as a mature, thoughtful and respectful individual who holds a clear interest in forming a relationship with his father. He does not want the pressure that might come from a forced reconnection order but would like to have a good long-term relationship into his adult life. He wants to be able to visit his father but is reluctant to have that type of encounter on his own. He said he would prefer to retain the option of visiting his father with his brother at times that work for him. Currently, he feels awkward when he feels pressure to engage or respond to his father's communications.

However, he would like to maintain some texting relationship with his father.

- [61] Mindful of AR's responses to Ms. Harder and his comments in our interview that largely reflected Ms. Harder's observations, I conclude it will be valuable and in AR's best interests to begin developing a relationship with his father. Although I understand the respondent's desire to accelerate the progress and development of his relationship with AR, I have concluded it would be inappropriate to impose a schedule of parenting time with his father that was not consented to by him. AR does not want a strict or rigid schedule that requires him to be with the respondent against his own wishes. He would prefer to begin contact with his father in the company of his brother and move towards a more extensive and lasting relationship. Children's views are important and should be taken into account in assessing their future relationship with parents. Nevertheless, the overriding issue is what would be in a child's best interests.
- [62] In, *S.M.M. v. J.P.H.*, 2016 BCCA 284, the court repeated its observations that children's views are not determinative but should be given considerable weight when they are older. A child's change in views concerning their relationship with a parent can constitute a material change in circumstances.
- [63] Madam Justice Fleming discussed the importance of this principle in *T.T. v. J.M.H.*, 2014 BCSC 451:
- [54] I agree that N.'s wishes and views are not determinative. However it is a well-established principle that the court should give considerable weight to the views of an older child, proportionate to their age and level of maturity: *O'Connell v. McIndoe* (1998), 56 B.C.L.R. (3d) 292 (C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 576 [O'Connell]. In *O'Connell* the Court of Appeal set aside the trial judge's order granting custody to the mother of a 14 year old boy against his wishes. The trial judge had found the father had turned the boy against his mother. While not disagreeing with the lower court's view of the family dynamics, the Court of Appeal held that for custody orders relating to children in their teens to be practical, they must reasonably conform to the wishes of the child. Ultimately the court made no order on custody and access (at paras. 10-15).
- [64] Although the claimant raised many concerns regarding the respondent's capacity and suitability to safely and effectively fill a parenting role for AR, I do not accept that those concerns should affect or detract from AR's interests in establishing a relationship with his father. Many of the claimant's concerns are less significant because AR is at an age where he can be protected from any risks inherent in the respondent's history and current use of drugs and alcohol.

- [65] The claimant's concerns must be considered in light of the many unwarranted and unsubstantiated pejorative statements made in many of the affidavits filed in this application. So many of the claimant's assertions and references to supporting witnesses attempted to colour the court's conclusions concerning the respondent's past, present and prospects for the future. There were factual issues that arose to the level of genuine concerns on her part but the veracity of her concerns for the future were eroded.
- [66] There may not be a direct relationship between AR's change of views concerning his reconnecting with the respondent, but it is curious that AR's text to Ms. Harder came only after she had reported her findings to the parties.
- [67] To the extent that the respondent's past and present behaviours might be considered deleterious if carried out in the presence of AR, the court must weigh the evidence in determining and balancing the best interests of the child against the respondent's past behaviours. The principal focus in the respondent's application must be forward-looking; what type of relationship between AR and his father would be in AR's best interests and how that relationship can be nurtured and promoted. This analysis must take into account some of the risks and some of the protections that could be put in place to ensure AR's safety and well-being.
- [68] The claimant questions the reliability of the respondent's evidence and reports to Ms. Harder. Her most significant concern is the respondent's reliance on, and abuse of, drugs and alcohol. She contends he has a history of denying the extent of his drug and alcohol abuse which, coupled with his unresolved mental health issues might create a risky environment for AR when in the presence of the respondent.
- [69] She points out that the respondent had supervised access with the children six times in 2015 and has not seen the children since September 28 of that year.
- [70] She contends his repeated breaches of court orders including the protection order were a concern because she did not want the children living in fear of encountering the respondent in the community. She claims to have repeatedly invited the respondent to have supervised time with the children; she said he has been hot and cold about pursuing time with the children.
- [71] The respondent has not recovered from his drug addictive patterns although he remains fully employed in a stable position in his current employment. The claimant would like to postpone the ultimate decision on the respondent's request for a court ordered program for re-establishing his parenting role with AR. Insofar as this summary trial hearing occupied ten days and testimony contained in 42 affidavits, it is unlikely that a trial of this case will complete within 1.5 years.

- [72] In that time, AR will be at or beyond his 18th or perhaps even 19th birthday. To delay resolution of this family law dispute will erode further any possibility that AR will be able to establish a relationship with his father. This would not be in AR's best interest by any measure.
- [73] The claimant argued that the applications should now be divided with the contempt proceeding referred to the trial list for a separate trial and other parenting issues decided in a different trial.
- [74] The focus on this hearing cannot be overly reliant on a retrospective analysis of the parties' shortcomings, mental health issues and suspicions. The current focus must be on AR's future relationship with the respondent and how to normalize that relationship. In 2.5 years AR will reach 19 after which he will cease being a "child" and will be beyond the authority of this order.
- [75] I conclude that there have been considerable changes in the respondent's circumstances, the children's circumstances and the claimant's role since the parties entered into the consent agreement that became Mr. Justice Ball's December 9, 2014 order.
- [76] The parties' eldest child is no longer a child; AR is maturing and will cease to be a child in 2.5 years. He has an obviously close relationship with IR and wants to begin his reconnection with his father with the assistance of his brother.
- [77] The important facts underlying this analysis include AR's expressed desire to develop a relationship with his father. That singular fact overshadows much of the discussion about the claimant's reservations and fears. One of her expressed fears was that the respondent might abscond with one or both of the children. There was little evidence to support that fear and I am satisfied that given AR's age and the respondent's relative stability and continued employment, there is no basis for this concern.
- [78] The claimant does not oppose the respondent's expanded parenting time with AR but wants assurances that AR will be safe. Her concern appears to be that the respondent's history of mental illness and his use of marijuana, methamphetamines, and alcohol could create an environment which could put AR at risk when he is with the respondent. She is also concerned about the respondent communicating about or advocating drug use in the presence of AR.
- [79] I am satisfied that those concerns can be addressed with terms governing the respondent's drug use and sobriety when spending time with AR.

- [80] In the claimant's submissions, she provided an exhaustive critique of the s. 211 report outlining 45 instances where she believes Ms. Harder failed to make proper inquiries, failed to properly analyze the respondent's concessions about his poor behaviours, failed to critically analyze the information received from interviewees, failed to grasp inconsistencies between the respondent's history and current mental health status and failed to report on important aspects of her role with the children.
- [81] She enumerated 12 specific issues that undermine the value and reliability of the report. However, at that stage of the claimant's submissions she did not suggest that this application was inappropriate for a summary trial determination. She stressed the importance of taking into account AR's views concerning the respondent's role in his life.
- [82] She observed that an ongoing relationship with AR's father is in his best interest.
- [83] In view of AR's expressed interest in a future relationship with his father shrouded in concerns that he does not want to be immediately obliged to spend time with his father alone, I am satisfied that changes to the respondent's parenting role with AR would be in his best interests. Those changes would necessarily be subject to AR's views and wishes. While I am concerned that the claimant's influence may erode the process to repairing and expanding the relationship between AR and his father, I conclude that, taking into account all of the admissible evidence, that a new parenting regime can be set that ensures AR's safety and a pathway to a more fulsome relationship between them in the future.
- [84] I accept the respondent's reservations that any new schedule or routine that is left to the claimant to implement or if the claimant is left with influence over AR that his chances of developing a relationship will be diminished.
- [85] In his interview with Ms. Harder, the respondent expressed some uncertainty about his own response and mental health issues that might result from failed expectations and spending time with his son. He does not appear to understand the importance and significance of his continued use of methamphetamine. There was no opinion evidence concerning the effects of those drugs on the respondent; nevertheless, they are notoriously harmful and illegal substances and clearly threaten the respondent's physical and mental health. He rejected the possibility of drug testing in advance of parenting time with his son. It is unclear to me why he would not wish to demonstrate his abstinence at least for the times he was spending time with his son. Moreover, drugs, alcohol and mental health are significant concerns for the Court. While recognizing that the respondent's psychiatrist does not have concerns about his sexual proclivities, mental health or use of crystal methamphetamines, Ms. Harder believed his substance use may impact his parenting negatively. She believes the risks could be mitigated in part by having the respondent participate in substance use counselling for 12 months. His substance abuse seems to impact his motivation levels.

- [86] The respondent outlined multiple conditions she wishes the court to impose on the respondent's parenting time and relationship with AR. She wanted professionally supervised parenting for six months following which he would be entitled to visits with AR supervised by his family members.
- [87] After 12 months, she proposed that parenting time be conditional upon the respondent undertaking drug tests and substance abuse counselling. She would like confirmation of the respondent's compliance with these terms. She would agree that AR could have unsupervised visits with the respondent's family four times per year provided that the respondent was not present during these events. She would like a term requiring joint counselling to deal with any issues relating to the respondent's parenting visits.
- [88] She proposed that paragraph 12 of the Ball J. order and paragraphs 4, 5 and 6 of the Weatherill J. order be varied and terminated. She requested multiple other conditions to the order including a variation of this Court's order that the parties share equally the cost of the s. 211 report. No basis was advanced for varying the order and each party will pay one-half of the costs of Ms. Harder's report.
- [89] I am satisfied that variation of the Ball J. order containing the parenting terms concerning AR was reviewable after March 15, 2016. Mr. Justice Weatherill directed that a review could occur after the respondent exercised 12 consecutive months of supervised parenting with the children. Accordingly, I intend this order to be a variation following the review brought to the court by the respondent.
- [90] Paragraph 5 of the Ball J. order will be substituted with this order:
- a. The terms and restrictions set out in paragraph 5 of the order should be varied.
 - b. Commencing July 1, 2020 the respondent will have unsupervised parenting time with AR weekly at AR's discretion and if he chooses this parenting time will be in the company of IR;
 - c. Recognizing that AR would like to commence parenting time with the respondent in the company of IR, AR will make his best efforts to be with the respondent in the company of IR for two hours per week at times agreed upon by AR and the respondent;
 - d. If IR is unwilling or unable to accompany AR in parenting time with the respondent, the respondent's mother [ST] must be considered by AR as a person to accompany him at those times;
 - e. The respondent will be permitted to engage in electronic communication with AR three times per week. AR will have no obligation to respond to the respondent's communications but is encouraged to respond as often as possible;

- f. The respondent must abstain from the use of alcohol, cannabis, methamphetamines or any other non-prescription drugs for 24 hours before commencing parenting time with AR and during any parenting time provided further that if the respondent appears to be under the influence of any of these substances during parenting time, the respondent will immediately separate himself from AR and end the parenting time;
 - g. During parenting time the respondent will abstain from any discussion with AR concerning his use of alcohol, cannabis, methamphetamines or other non-prescription drugs; and
 - h. the claimant will encourage AR to participate in parenting sessions with the respondent and will not disclose her concerns regarding the respondent's behaviour unless she and the respondent agree on what information should be shared.
- [91] The restoration of AR's relationship with the respondent will depend on the good faith and flexibility of each toward this effort. I will not make further orders concerning unsupervised parenting time between the respondent and AR at this stage.
- [92] If either party forms the opinion that further direction from the Court is necessary to assist in adjusting the parenting schedule to achieve the maximum value for AR, liberty to apply is granted. I will remain seized of any further applications in this regard.
- [93] Bearing in mind that this order will have no effect after October 2, 2022, this schedule should be expanded to include more prolonged visits after December 31, 2020.
- [94] I am hopeful AR will recognize that this order places a responsibility on him to begin and advance his parent/child relationship with the respondent. He has a responsibility in this effort to repair his relationship with the respondent and that his obligation to make "best efforts" means he must make adjustments and accommodations to facilitate the schedule. I am certain he recognizes that it is in his best interest to work on establishing a good relationship with the respondent. AR must not let other influences distract him from his obligation set out in this order.

The Claims Concerning the Respondent's Breach of Orders

- [95] The claimant's submissions and allegations about the respondent's breach of court orders warranting a contempt finding and the imposition of fines center on the respondent's failure to abide by the many orders made in 2014 and 2016.
- [96] She also seeks an order to enforce various terms of those court orders.
- [97] The claimant's first substantive affidavit tendered in support of her application was sworn in August 2012. In that affidavit she chronicled the history of their marriage and events surrounding their breakup. She made assertions concerning the respondent's drug and alcohol addiction, mental health issues and pending criminal charges details of which were unknown to her.

- [98] The principal affidavit relied on by the claimant on the contempt application was her affidavit sworn October 18, 2017.
- [99] The respondent conceded he had suffered from ongoing depression for many years and was abusing drugs; he was eventually convicted of a criminal offence involving indecent exposure. In October 2012 the respondent consented to the claimant's exclusive use and occupancy of the family home.
- [100] The claimant's applications to find the respondent in contempt and to obtain other ancillary orders are set out in her Notice of application as follows:

Orders Sought

1. Pursuant to Rule 21 - 7 of the Supreme Court Family Rules, [J.B.R.] shall be found in contempt of the Order of the Honourable. Mr. Justice Ball made December 9, 2014, and shall be fined, committed, or both, in relation to the following:
 - a. paragraph 19 - the parties shall exchange their income tax returns and notices of assessment, most recent pay stubs and receipts/invoices for s. 7 expenses, by July 15 of every year, commencing July 15, 2015.
 - b. Paragraph 23 - the respondent shall pay to the claimant the sum of \$50 per month as his contribution to the children's RESP's.
 - c. Paragraph 24 - the respondent shall remove his name from the children's RESP's and the claimant shall be the sole administrator.
 - d. Paragraph 37 - the respondent shall name the claimant as irrevocable beneficiary of his employment life insurance policy, while the children are each "children of the marriage" pursuant to the "Divorce Act"
2. Pursuant to rule 21-7 of the Supreme Court Rules, [J.B.R.] shall be found in contempt of the order of the Hon. Mr. Justice G. C. Weatherill made October 26, 2016, and shall be fined, committed or both, in relation to the following:
 - a. paragraph 1(f) - the respondent shall remove his name from the RESP's for the children;
 - b. paragraph 1(h) - the respondent shall name the claimant as irrevocable beneficiary of his employment life insurance policy, while the children are each "children of the marriage" pursuant to the divorce act.
3. Pursuant to rule 21 - 7 of the Supreme Court Family Rules, [J.B.R.] shall be found in contempt of the Protection Order of the Honourable. Mr. Justice Ball made December 9, 2014, and shall be fined, committed, or both.
4. Pursuant to ss. 213 and 228 of the Family Law Act, [J.B.R.] shall pay to [M.P.R.] a penalty of up to \$5000 for every failure to comply with court orders, including the following:

- a. failure to pay the \$50 per month RESP payments for the children;
 - b. failure to remove his name from the children's RESP's;
 - c. failure to maintain the \$250,000 life insurance policy that was in place at or around the time of the order of the Hon. Mr. Justice Ball, made December 9, 2014;
 - d. late provision of the passport style photograph, which was required to be produced by November 1, 2016;
 - e. no provision of the passport style of photograph which was required to be produced by November 1, 2017;
 - f. breach of the protection order made December 9, 2014 [attendance at the Guilford Cinema];
 - g. breach of the requirement to produce his tax information within 14 days of the October 26, 2016 court date; and
 - h. failure to provide his annual financial disclosure by July 15, 2017 as required.
8. [J.B.R.] will do the following, within 14 days:
- a. pay to [M.P.R.] the sum of \$600 representing RESP payments for the children from February 2017 to January 2018;
 - b. remove his name from the children's RESP policies;
 - c. provide a series of 12 postdated cheques in the amount of \$50 per month to [M.P.R.], representing RESP payments commencing February 1, 2018 and a further series of postdated checks annually thereafter and for so long as contributions are permitted to be made on behalf of each of the children;
 - d. pay to [M.P.R.] the sum of \$7992 plus court order interest representing retroactive child support payments since February 2012;
 - e. provide his complete residential address to the counsel for the claimant;
 - f. produced to counsel for the claimant, a copy of his income tax return and notice of assessment for the 2016 tax year;
 - g. provide to counsel for the claimant an up-to-date passport style photograph of himself;
9. [J.B.R.] shall maintain a life insurance policy valued at \$250,000 with [M.P.R.] named as irrevocable beneficiary, for so long as each of the children is "a child of the marriage", and shall provide a copy of the insurance policy to [M.P.R.].

Alternatively, in the event that [J.B.R.] is unable to obtain a life insurance policy in the amount of \$250,000, [J.B.R.] shall provide comparable security to [M.P.R.] for so long as each of the children is a "child of the marriage".

- [101] During argument, the claimant abandoned two items in her notice of application seeking changes to the respondent's guardianship role regarding the children and changing his entitlement to parenting time to "contact time".
- [102] Finally, the claimant seeks costs and special costs.
- [103] The claimant alleges the respondent is in contempt of the Ball J. and Weatherill J. orders and seeks a fine or imprisonment for the respondent's breaches of orders.
- [104] The previous fine imposed by the Weatherill J. Order, provides important context to these applications. The \$4,000 fine was made under s. 213 of the FLA, the provision on enforcing orders on non-disclosure. The term stated:

Pursuant to s. 213 of the Family Law Act, the Respondent shall pay \$4,000 to the Claimant for the Respondent's failure to comply with the terms of the Order made July 16, 2014 and the Order made December 9, 2014 (as set out in paragraph 1 of this Order).

- [105] Although the fine was imposed under s. 213 it is important to note that it dealt with the respondent's breaches of a broad range of orders, going beyond breaches related to non-disclosure. Paragraph one of the order referred to: (a) the requirement to produce a copy of the income tax returns and notices of assessment or reassessment for the 2012 and 2013 taxation years; (b) the requirement that the respondent not speak with the children about identifying information; (c) the requirement to provide his address; (d) the requirement not to communicate or attempt to communicate with the claimant other than via text or email; (e) the requirement to produce a copy of his notices of assessment or reassessment for the 2012 and 2013 years; (f) the requirement that he remove his name from the children's RESP's; (g) the requirement to make a \$1,150 retroactive payment to the children's RESP's; (h) the requirement that the respondent name the claimant as beneficiary to his employment life insurance while the children are "children of the marriage"; and (i) that the respondent comply with the term of the December 9, 2013 protection order regarding attendance at Guildford Landmark Cinemas.

Contempt - Legal Principles

- [106] The principles applied to civil contempt applications are summarized in *Carey v. Laiken*, 2015 SCC 17 [Carey]. In Carey, the Court described typical contempt proceedings as a bifurcated process where liability is addressed first, and once liability is established the court engages in a separate penalty phase: see para. 18. Civil contempt occurs when a party intentionally does an act prohibited by an order of the court.
- [107] The purpose of contempt orders is "first and foremost a declaration that a party has acted in defiance of a court order": Carey at para. 30.
- [108] Generally, civil contempt is a coercive matter: for the purpose of sentencing the goal is to punish for breaching an order: Carey at paras. 30 and 31.

[109] In *Carey* the court discussed the three important elements that must be proved beyond a reasonable doubt in a contempt application:

- (a) The order breached must be stated clearly and unequivocally concerning what should and should not be done: *Carey* at para. 33. If an order is unclear or is missing essential detail about where, when, or to whom it applies, or if it incorporates overly broad language or if external circumstances obscured its meaning, the alleged contemnor may be excused;
- (b) The person must have actual knowledge of the order: *Carey* at para. 34. It may be possible to infer knowledge in some circumstances or that the contemnor has been wilfully blind;
- (c) The party alleged to be in breach must have done the act intentionally: *Carey* at para. 35. Intent to interfere with the administration of justice is an element of civil contempt and the lack of contumacy is not a defence: at para. 47.

[110] Important principles concerning contempt applications were restated by the Court of Appeal in *Jackson v. Honey*, 2009 BCCA 112:

[12] The principles governing a contempt application were summarized by Donald J.A. in *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551, 21 B.C.L.R. (4th) 340 (C.A.):

[18] The principles governing a motion of contempt are uncontroversial. I would summarize the principles relevant to this case in this way:

1. The proceedings are quasi-criminal in nature and the rules of *strictissimi juris* apply, meaning for example that the evidence supporting the motion must conform to the rules of admissibility at a trial; so no hearsay, opinion, conclusions and the like are receivable: *Glazer v. Union Contractors Ltd.* (1960), 33 W.W.R. 145 (B.C.S.C.) at 151.
2. The applicants bear the onus of proving the elements of contempt on the criminal standard, viz. beyond a reasonable doubt: *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217 (S.C.C.) at 229.
3. If the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction: *Melville v. Beauregard*, [1996] O.J. No. 1085 (Ont. Gen. Div.) at para. 13; see also *Skybound Developments Ltd. v. Hughes Properties Ltd.* (1988), 24 B.C.L.R. (2d) 1 (B.C.C.A.) at p. 8, cited in *Hama v. Werbes* (2000), 76 B.C.L.R. (3d) 271 (B.C.C.A.) at para. 8 where the need for clarity and precision in the order to be enforced was discussed.

[111] The Court in *Bassett* summarized the principles applicable to the claimant's application:

[34] In short, a court must find that a contemnor "wilfully disobeyed a court order that was clear and precise in its meaning" beyond a reasonable doubt: *Jackson* at para. 13. A court must "ensure that no one is found to have transgressed without a full consideration of all the relevant information, including any explanations for the conduct of persons accused of violating court orders": *Larkin v. Glase*, 2009 BCCA 321 at para. 9. If an order directs a party

to provide an item that is not in that party's possession, the party cannot be said to have wilfully or deliberately disobeyed an order that was "impossible" to comply with: Jackson at para. 14.

- [35] The notion of *strictissimi juris* encompasses more than the examples given in Peel. It requires close adherence to procedural requirements: a precision in pleadings, procedure and evidence appropriate to the nature of the process which engages the court in a conflict with one of the parties. The process must be carried out with great care. The order said to be breached must be clear, for it will be strictly construed.
- [112] In *Gurtins v. Panton-Goyert*, 2008 BCCA 196 [Gurtins], the court discussed the clarity required in orders which may be the subject of contempt proceedings at para. 16:
- a. No order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to refrain from doing.
 - b. It is impossible to read implied terms into an injunction.
 - c. An order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. Looking only at the order the party enjoined must be able to find out from the four walls of it exactly what he must not do.
 - d. a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.
- [113] There is a presumption of innocence and the standard of proof is beyond a reasonable doubt and an applicant cannot rely on hearsay evidence. The alleged contemnor is not obliged to give evidence but, if they wish to, must elect to do so before the hearing: see *Denman Island v. 4064 Investments*, 2000 BCSC 1645 at paras. 51 and 56.
- [114] The applicant must establish all elements of the events including the intention to commit the breach of the order and, in the case of non-payment that the payor had the means to pay.
- [115] In *Swann v. Swann*, 2009 BCCA 335 [Swann], the court said:
- [14] I am not persuaded that this argument is meritorious. On a contempt application, the applicant must demonstrate, beyond a reasonable doubt, that the respondent has committed contempt (See *North Vancouver (District) v. Sorrenti* 2004 BCCA 316, at para. 10). In this case, it was established, beyond a reasonable doubt, that the defendant knew of the order, that there had been non-payment, and that the non-payment was wilful, in the sense of being deliberate rather than accidental. The remaining element was that of whether the defendant had the means to pay.

- [15] The evidence of the defendant's means, here, was limited. It consisted only of his Form 89. The fact that the form had been sufficient, in earlier civil proceedings, to convince a court that the defendant had the means to pay is not determinative of the question of whether his subsequent capacity to pay was established beyond a reasonable doubt. There are at least two reasons for this. First, the standard of proof on a contempt application is higher than on an application for child support or spousal maintenance. Second, circumstances may have developed that would show that the court's order was beyond the capacity of the defendant to fulfil. Still, it was open for the chambers judge, in the absence of evidence to the contrary, to infer from the Form 89 and the previous orders of the court that the defendant had the capacity to pay the amounts that he was required to pay under the orders. In deciding whether to draw that inference, the chambers judge would have had to examine the Financial Statement in some detail, however, and not simply rely on the fact that maintenance orders had been made.
- [16] In this case, the defendant was allowed to make submissions. While the judge stated, in his reasons, that the submissions were not evidence, it is apparent that he considered them. In the end, the judge was, apparently, left with a reasonable doubt about the defendant's ability to pay. Unfortunately, his reasons do not explain precisely what raised that reasonable doubt.
- [17] Contempt is a serious matter, and the judge did not err in exercising his discretion to allow the defendant to address the court, notwithstanding that he had not filed affidavits in a timely manner. That said, it was important that any facts that were put forward form part of the court record - they should have been included in affidavits, or given by way of testimony. That did not occur in this case.
- [116] Thus, the applicant must prove beyond a reasonable doubt that the respondent knew about the terms of the order and that he deliberately disobeyed the terms of that order by failing to engage in conduct mandated by the order. The applicant must also show that the respondent possessed the means to comply with the order and deliberately failed to perform the duty required of him.
- [117] An alleged contemnor is entitled to the most favourable interpretation of the order and cannot be found in contempt where the order lacks detail such as the time within which the impugned action must be performed: see *Hama v. Werbes*, 2000 BCCA 367; *Gurtins*.
- [118] Last, orders that do not stipulate times within which actions must be taken cannot generally form the basis of a contempt order.

- [119] It is important to observe that contempt power is discretionary and is to be used sparingly. It is important to the integrity of the Court that when considering contempt applications this discretion should be measured and focused. In *Carey*, the Court said "it should be used cautiously and with great restraint", and if a contemnor acts in good faith in attempting to comply with an order, there is discretion to decline to make a contempt finding: see paras. 36 and 37.
- [120] Contempt requires strict compliance with the principle of proof beyond a reasonable doubt as to the mens rea and actus reus of each allegation. In *Lee v. Weidner*, 2019 BCCA 326, DeWitt-Van Oosten J.A. reiterated this essential requirement in a contempt proceeding:
- [37] In *Hokhold v. Gerbrandt*, 2016 BCCA 6, citing someone for contempt was described by the Court as a "heavy, blunt tool": at para. 31. As such, its "routine use to obtain compliance with court orders" is discouraged: *Carey v. Laiken*, 2015 SCC 17 at para. 36. Moreover, "scrupulous care" is required in contempt hearings: *Hokhold* at para. 18. Before finding in favour of contempt, the judge must be satisfied beyond a reasonable doubt of "an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice": *Carey* at para. 38 [internal references omitted].
- [121] Taking into account these principles, I will address each of the claimant's allegations.

Tax Information Exchanges

- [122] The claimant contends the respondent is in breach of the Ball J. order requiring an exchange of income tax returns and notices of assessment by July 15 of every year commencing 2015. She claims that order was reinforced by the order of Weatherill J. She said that the respondent provided all required income tax information on January 31, 2017 for 2012, 2013, 2014 and 2015 taxation years (as well as 2010 and 2011). She said his complete financial disclosure as required by the July 16, 2014 and the December 9, 2014 orders was not provided by October 26, 2016 (within 14 days) nor was the required disclosure delivered until January 31 2017.
- [123] The notice of application seeks contempt only for breaches of the Ball J. order concerning annual exchanges of tax returns, notices of assessments and recent pay stubs by July 15 beginning July 2015. It is important to observe that notices of assessment are documents prepared by CRA based on the tax information sent by a taxpayer. These documents are sent to the taxpayer.
- [124] The contempt application did not relate to copies of his 2012 and 2013 income tax returns; the order was confined to production of his 2012 and 2013 notices of assessment. He was only required to provide notices of assessment which are documents delivered to a taxpayer after the filing of an income tax return.

- [125] I am satisfied that the Ball J. order was the subject matter of the fine levied against the respondent granted by Weatherill J. on October 26, 2016 and, to the extent the respondent was obliged to make further disclosure, that disclosure was set out in the new order of Mr. Justice Weatherill that varied the Ball J. order. The claimant has not asked for a contempt order regarding breaches of the disclosure required in the 2014 order of Crawford J., the Weatherill J. order from 2016 nor the production of the 2012 and 2013 notices of assessment.
- [126] In fact, Weatherill J.'s order is different than Ball J.'s order; the Ball J. order directed "the parties shall exchange their income tax returns and notices of assessment, most recent pay stub and receipts/invoices for s. 7 expenses, annually, by July 15 of every year, commencing July 15, 2015." This term contemplated the parties exchanging the documents referred to; it appears neither of them performed that task at the time.
- [127] Mr. Justice Weatherill expanded on the respondent's obligation to include production within 14 days of "a copy of his income tax returns for 2012, 2013, 2014 and 2015 taxation years and notices of assessment or reassessment for the 2014 and 2015 taxation years, and documentation to confirm his current income".
- [128] The claimant does not seek a contempt order based on the breach of Weatherill J.'s orders except in regard to the children's RESP plans and his employment life insurance.
- [129] The respondent was fined by Weatherill J. \$4,000 under s. 213 of the FLA for breaches of Ball J.'s order. In my view, any breaches committed by the respondent before October 26, 2016 were dealt with in Weatherill J.'s order and cannot be relied on to obtain a contempt order or new fine under the Ball J. order.
- [130] I find that the respondent should not face double jeopardy for any breaches between the December 2014 and July 2016 orders. I conclude that the current application is *res judicata* insofar as the contempt application is concerned with reference to any breaches of the Ball J. order by the respondent prior to October 26, 2016. He has been fined for those breaches and should not face further penalty in that regard.
- [131] The respondent's next obligation to exchange income tax returns would have been July 15, 2017. Moreover, the respondent's tax returns 2012 to 2015 were provided to the claimant on January 31, 2017. There is evidence confirming the respondent was in possession of these documents and he believed they had been sent to the claimant's counsel in November 2016; thus, he did not deliberately fail to deliver the documents to the claimant before that date. He asked his new counsel to locate these documents and it is acknowledged they were sent to the claimant by January 31, 2017.
- [132] It was a short time between October 26, 2016 and January 31, 2017. The claimant's affidavit sworn October 18, 2017 said that the respondent did not provide complete financial disclosure until January 31, 2017; there was no affidavit evidence from claimant's counsel that these documents had not come into her possession prior to January 31, 2017.

- [133] In the claimant's affidavit concerning the non-production of the 2012 to 2015 tax returns and notices of assessment, she said that she had been advised by her lawyer that these documents had not been received. In my view, this is information and belief evidence and is not sufficient to support a contempt order.
- [134] Contempt motions must be considered strictly and I am satisfied that the claimant has not proven beyond a reasonable doubt that the respondent was in possession of the required documents before January 31, 2017, nor that he was in contempt.
- [135] Further, I note the respondent contends that he provided his income tax returns and financial information to counsel and believed that the documents had been sent to the claimant in accordance with the court order. It is clear from correspondence that the Canada Revenue Agency issued notices of assessment concerning his 2010 to 2015 notices of assessment on October 21, 2016. There is no indication on when those documents were received by the respondent; he would have been required to deliver them to his counsel who would then have had the responsibility to convey them to claimant's counsel.
- [136] The burden of proof rests with the applicant to prove the *actus reus*, (breach of a clear and unequivocal order) and a *mens rea*, and that he intentionally failed to comply with the order. The claimant was required to prove a deliberate failure to comply with the order; this burden has not been met.
- [137] It may be possible to infer an intention to breach an order from all of the details set out in the affidavit material: see *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316 at para. 15. In this case there is some doubt concerning when the respondent received these documents and whether he deliberately failed to send them to claimant's counsel. I have noted that most of the documents delivered in response to this request appear to have been produced by Canada Revenue in late October; this is consistent with the respondent's claim that the documents were given to his solicitor in anticipation they would be forwarded to claimant's counsel.
- [138] The claimant was obliged to prove all elements beyond a reasonable doubt and in the circumstances of this case I am not satisfied beyond a reasonable doubt that he deliberately failed to provide the documents that would have been provided by Canada Revenue or that they were in his possession by November 9, 2016 and prior to the expiry of the production orders.
- [139] On the issue of producing financial disclosure, I am satisfied that the Ball J. order was replaced by the Weatherill J. order and that no application for contempt of this term of the Weatherill J. order has been made. Thus the application also fails on this point. Further, I am not satisfied that the evidence demonstrates the respondent intentionally or deliberately failed to deliver the documents within the time prescribed. Taking into account all of the shortcomings in the evidence of breach allegations, I dismiss the application for a contempt order.

Pay the Claimant \$50 per Month Toward the RESP Plans

- [140] Next, the claimant alleges the respondent failed to pay \$50 per month as his contribution to the children's RESP's as required by the Ball J. order. The respondent contends he has paid the \$50 per month contribution although there was some concern regarding delay and receipt of his cheques. In her affidavit the claimant said that the respondent had not provided her with postdated cheques for RESP payments since February 2017. As of October 17 the total amount owing was \$450; the order did not require postdated cheques for \$50 per month to the children's RESP; it simply required the respondent to pay that sum over to her.
- [141] In the Weatherill J. order, the court required the respondent to pay the claimant \$1150 forthwith representing his contributions to the RESP from December 2014 to October 2016. She said she had not received the \$50 payments for 2017 but had received his post dated cheques for 2018.
- [142] The claimant said that as of October 17, 2016, \$450 was owing, being the payments due from February until October. Although she said he paid \$1,600, she alleged in her affidavit "he had not paid the ongoing sum of \$50 per month from December 2014 to date".
- [143] The respondent contends that he has paid this \$50 per month contribution. The claimant's affidavit evidence is unclear and it would be unsafe to find contempt based on her allegations.
- [144] Next, the claimant confirmed the respondent had paid \$1600 required by July 15, 2015 in conformity with the Ball J. order. It is significant that the respondent was already levied a fine for non-payment of the \$50 per month from December 2014 to October 2016 and was ordered to pay \$1150 representing contribution arrears from December 2014 to October 2016. This term seems to be in conflict with the Ball J. order. He has paid the \$1,150 payable for that period.
- [145] In the respondent's March 25, 2018 affidavit he said he believed he had sent funds to his lawyer representing the payments due up until October 2016 and subsequently forwarded postdated cheques to the claimant for the ongoing payments.
- [146] Interestingly, the claimant's affidavit in support of the contempt order said the respondent had not "provided me with postdated cheques for RESP payments since February 2017, at \$50 per month". Thus she said that \$450 remained owing as of October 2017.
- [147] However, in the claimant's subsequent affidavit number 11 she acknowledged receiving \$1150 for contributions due up to October 2016 and receipt of \$50 per month for the months of February 2018 up to January 2019. The respondent appended of a copy of a cheque dated March 9, 2018 for \$600 for the outstanding RESP payments for 2017; she said she had not received that cheque. He also provided copies of \$50 cheques sent to the claimant for his contributions to the RESP for the period February 2018 to January 2019 and cheques for the balance of 2019 and 2020.

- [148] Overall, I am not satisfied that the evidence establishes beyond a reasonable doubt that the respondent wilfully failed to pay funds that were due under the Weatherill J. order. There was no specific time within which those monies were to be paid and, it is also important to note that the Ball J. order did not require the respondent to deliver posted cheques; he was obliged to pay \$50 per month and was previously fined for not making payments up to and including October 2016.
- [149] The respondent eventually provided post dated cheques for the RESP payments. It is the claimant's burden to prove each element of the alleged contempt including his breach of the order to October 18, 2017 and his intentional breach of the order. Overall I find there was insufficient evidence confirming beyond a reasonable doubt the respondent's ability to pay or evidence he wilfully defaulted on paying the claimant the funds due under the Weatherill J. order: see Swann at paras. 10 and 15.

RESP Named Party

- [150] Next, the order required the respondent to remove his name from an RESP for the children and the claimant to become the sole administrator of that asset. The evidence in support of that allegation that he failed to do so is at paragraph 18 of the claimant's affidavit #10:
18. It was a requirement of the December 9, 2014 order that the respondent remove his name from the children's RESP policies, yet he has failed to do so. Attached and collectively marked exhibit "D" to this my affidavit are copies of the children's RESP policy statements confirming that the respondent is still listed on the policies. I have contacted CST and knowledge First Financial and a been told that I cannot remove the respondent's name from the policies, and that he needs to call in and do it himself, yet he has failed to do so.
- [151] The order required the respondent to "remove his name from the children's RESP's and the claimant shall be the sole administrator." Documents relied upon by the claimant indicate the respondent and claimant were "subscribers to the plan". It is not clear from the documents that there is a distinction between a named owner and a subscriber. In any event, the information relied upon by the claimant in a letter from the institution was hearsay evidence and could not be relied on to prove contempt.
- [152] In any event, Mr. Justice Weatherill fined the respondent for breaching this obligation to change the name on the children's RESPs. The respondent provided a March 2018 confirmation of his request for a joint contributor change form; he also said he had made another request to remove his name from the plan but could not locate his correspondence.
- [153] It is clear the respondent did not have the power to "remove his name" or make the claimant "the sole administrator of their plan". Those actions were solely in the province of the plan and the respondent could only make a request that the plan remove his name which was eventually done.

- [154] Based on the claimant's affidavit it is not proved beyond a reasonable doubt that the respondent had not requested a change in the name which had not been processed or recorded in the document. Again the respondent does not state that she relies on the information belief contained in the documents; she simply says that she believes he has failed to remove his name.
- [155] I have reviewed the respondent's affidavit in which he reports his effort to inform the RESP company that he wished his name to be removed from the plan. It would have been a simple enough matter to obtain an affidavit from the plan indicating that the respondent had not made a request or application to remove his name in a timely way; this is the gravamen of the alleged contempt and it is not proved beyond a reasonable doubt.
- [156] At best, it could be said the respondent failed to take steps to authorize the company to change the names on the policy. That is not the order made nor the allegation in the Notice of Application. Overall, I am satisfied the evidence has not proved beyond a reasonable doubt that the respondent breached the order.
- [157] The claimant's request for a contempt order concerning the breaches of Mr. Justice Weatherill's October 26, 2016 order suffer from the same deficiencies as the claim concerning breach of Mr. Justice Ball's order. I do not need to repeat the analysis under that heading save to say that the application for a finding of contempt is dismissed.

Life Insurance

- [158] Ms. R contends the Ball J. order required the respondent to "name the claimant as irrevocable beneficiary of his employment life insurance policy, while the children are each 'children of the marriage'" pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [159] The only evidence tendered by the claimant in her affidavit pointing to a breach of this term by the respondent was the following:

The respondent has failed to comply with the term of the order made December 9, 2014 regarding maintenance of the life insurance policy through his work [PSA] that was in place at the time. During our relationship the respondent maintained a policy in the value of \$250,000 through PS AC. It was this policy that the respondent was required to maintain pursuant to the order made December 9, 2014. On January 31, 2014, my lawyer received a letter from the respondent's lawyer, attaching a basic insurance certificate from the respondent's benefits plan indicating that I was the beneficiary. However, this was not the policy that was previously in place, and the respondent has basically tried to "pass off" this basic \$5000 policy, instead of the \$250,000 policy that was in place.

- [160] In my view, the affidavit evidence does not support the claimant's assertion that the respondent was in breach of the Ball J. order. In her affidavit #7, the claimant said that she had "not received any indication or confirmation from the respondent that he has designated me as irrevocable debt beneficiary of his employment life insurance policy".

There is no evidence concerning the details or amount of any life insurance available to the respondent through his employment at the time of the Ball J. order nor did the court require the respondent to maintain an insurance policy with a specific benefit of \$250,000. The claimant provided a policy dated 2006 and insisted this was the policy he had through employment from 2014 to the present.

[161] The respondent said that the premiums had been deducted from his salary but when he ceased working no payments were made and the plan lapsed.

[162] On January 31, 2017, the respondent's counsel sent a copy of an insurance certificate through his union indicating the claimant as beneficiary to her counsel. This policy was issued December 7, 2016.

[163] Mr. Justice Ball said that the respondent was required to name the claimant as irrevocable beneficiary of "his employment life insurance policy" while the children were children of the marriage. There is no evidence that the insurance policy did not continue in place after the Ball J. orders or that there was any other insurance policy available to the claimant through his employment when this application was filed on November 30, 2017.

[164] The respondent said that the insurance policy had lapsed through no fault of his or any action taken by him. Having contacted his employer he believed his work-related life insurance policy had lapsed but has been replaced.

[165] The claimant is obliged to prove the mens rea of this allegation namely that the respondent intentionally failed to name her on his employment life insurance policy. There is no evidence that, by December 2014 or November 2017 any employment insurance policy existed that could have named her as a beneficiary. It is apparent that the respondent had this smaller life insurance policy that named the claimant as a beneficiary from December 2016.

[166] Life insurance in respect of child support is addressed in s. 170 of the FLA providing:

Matters that may be provided for in support orders

170 In an order respecting child support or spousal support, the court may provide for one or more of the following:

- (e) that a person who has a contract of life insurance within the meaning of Part 3 of the Insurance Act
- (i) designate his or her spouse or child as a beneficiary, irrevocably or for the period designated by the court, and
- (ii) either pay all premiums on the policy, or authorize his or her spouse to pay all premiums on the policy and to compensate the spouse for doing so;

- [167] The Ball J. order did not require the respondent to pay all premiums nor did it authorize the claimant to pay premiums. The claimant is designated as beneficiary of insurance policy through the respondent's employment/union. There is no evidence that an insurance policy exists or existed, other than the one referred to by the respondent, under which the claimant could be designated as beneficiary.
- [168] It appears that whatever life insurance policy the respondent owned in December 2014, that policy lapsed, most likely when the respondent was disabled and off work.
- [169] Neither the actus reus nor the mens rea are established concerning the respondent's obligation to name the claimant as an irrevocable beneficiary of his employment life insurance. Because his former employment life insurance plan was likely discontinued when he had become disabled from work and the claimant has been named beneficiary on his new life insurance through his employment, I am unable to conclude that the respondent breached this term of the order.
- [170] I note also that the claimant had alleged a breach of the respondent's obligation concerning this insurance policy in her 2016 application which was addressed by Weatherill J. and that was one breach for which the respondent was previously fined by the court.
- [171] I am satisfied that the respondent more likely than not discharged his responsibility under the Ball J. order by obtaining life insurance through his union. I am not satisfied beyond a reasonable doubt that the respondent breached this term of the order or that contempt has been proved.

Attending at the Guildford Cinema

- [172] The claimant sought a contempt order for the respondent's breach of paragraph 1(e)(iv) of the Ball J. protection order prohibiting the respondent from attending at or near Guildford Landmark Theatres. The only evidence advanced by the claimant on this point was hearsay reports of what other persons told her. Absent the respondent's affidavit, this part of the application would be dismissed.
- [173] However, in an apparent attempt to deal with parenting issues and allegations made against him, the respondent confirmed his breach of the order by attending at the Guilford cinema on one occasion in December 2015. At that time, he purchased movie tickets for his children. He said he has not attended any of the areas prohibited by the protection order with the exception of that one of instance.
- [174] This allegation was one of the claims considered by Weatherill J. in the application in October 2016 for which the respondent was fined for breaching the protection order.
- [175] The only admissible evidence the respondent has attended at the Guilford Mall or Guildford Cinemas in breach of the order since December 2015 was from his affidavit.

[176] In my view, the respondent has been punished for that breach of the protection order by Mr. Justice Weatherill and should not be found in contempt or fined a second time for the same breach. It seems to me this would violate the principle against double jeopardy. It is also an issue that is *res judicata*.

[177] I dismiss the application that he be found in contempt for this breach.

Breach of the Weatherill J. Order

[178] The claimant argued that the respondent breached Weatherill J.'s order by failing to remove his name from the RESPs and failing to name her as irrevocable beneficiary under his employment life insurance policy.

[179] Regarding the late removal of the respondent's name from the RESPs, I reiterate the comments made above concerning the contempt of the Ball J. order and that there is a reasonable doubt concerning the alleged breaches. Similarly, I repeat the comments concerning the insurance policy issue.

[180] Overall, I am not satisfied that it would be in the interests of justice to grant contempt orders in the circumstances of this case. The respondent has performed all of the obligations required of him by the court up to November 2017. To the extent that he was dilatory in removing his name from the RESPs, nothing of substance turned on that removal. As the court noted in *Carey*, contempt orders must be reserved for the most serious circumstances; in this case, the late removal of his name, if that removal were in fact a breach, would not have justified a contempt order in the context of a family law dispute.

[181] If the claimant had proven some of the breaches alleged, contempt remedies are rarely appropriate in family law cases. In *J.D.G. v. J.J.V.*, 2013 BCSC 1274 [J.D.G.], Punnett J. articulated a useful approach:

[27] While an application to hold a party in contempt is still available, presumably in all but the most egregious cases an application under s. 213 should be made initially. This recognizes the seriousness of a contempt application with its more onerous procedural and evidentiary requirements. It also recognizes that the FLA adds to the arsenal for enforcement available to the courts rather than subtracting from the court's remedies.

[182] If I am wrong on any of these claims, I would not have exercised my discretion to make a contempt order in light of the comments in *Carey* that these orders should be used cautiously and with great restraint. Further, if the respondent had been in breach of the orders, he has since purged his contempt and no purpose would be served in a contempt finding.

Summary

[183] Taking into account the direction contained in Carey that contempt powers should be used cautiously and with great restraint I would adopt the approach taken by Punnett J. in J.D.G. where, the court endorsed the use of less drastic measures in s. 213 of the FLA to ensure compliance with court orders.

Fines Under Sections 231 and 228 of the FLA

[184] First, the respondent cannot be fined for breaches of the orders that were addressed in the October 26, 2016 order by Weatherill J. I note that breaches of these terms were included in the claims made in October 2016 for which the respondent paid a global fine of \$4000.

[185] Although the respondent's name was not removed from the children's RESPs until 2018, that step has been accomplished. In my view that breach was not a serious breach because it had no consequences for the claimant. Similarly, any delays in paying the \$50 for the monthly contributions to the children's RESPs were remedied by the respondent. It is unclear, based on the claimant's affidavit evidence the full extent of his delay in meeting those timelines.

[186] As I have indicated, the respondent is not in breach of the order to name the claimant as an irrevocable beneficiary of his employment life insurance. Moreover, the claimant did not rely on s. 170 of the FLA as a basis for an order requiring the respondent to name her as a beneficiary of his life insurance policy. It is important to observe that Section 170 (e) sets out the Court's only authority to make an order concerning life insurance and child support.

[187] Thus, the court is not authorized to make orders unless a spouse "has a contract of life insurance" at the time the order is made. There is no statutory obligation that can be imposed on a payor compelling that person to obtain insurance.

[188] Further, nothing in the FLA entitles the court to order a payor to "provide comparable security" as long as the children are children of the marriage. Section 171 could permit the court to make an order that child support be binding on the payor spouse's estate. In this case the claimant did not ask for such an order.

[189] I would not order a fine for this alleged failure.

[190] The respondent was required to provide a passport style photograph of himself in 2016 and 2017. More recently he provided a passport photograph of himself. The claimant also seeks a further order that the respondent provide an up-to-date passport style photograph of himself. On January 27, 2017 the claimant's counsel acknowledged receipt of photographs of the respondent.

[191] It is apparent that no additional photographs would have been required prior to November 1, 2017.

- [192] In view of the current ages of the children and taking into account all of the circumstances, a requirement that the respondent provide a passport style photograph should no longer be required from the respondent. Much time has passed and circumstances have changed and the requirement that he provide a photograph of himself is no longer necessary to protect the children or the claimant.
- [193] AR is at an age where identifying the respondent will not in any way advance his best interests or protect him from violence. Moreover, it is important that he begin efforts to reconnect with his father and accordingly I will vary the order of Weatherill J. by deleting the obligation for the respondent to produce a photograph of himself.
- [194] In the claimant's initial affidavit in support of the application she did not make mention of passport photos or the basis on which the court should make further orders for passport photos.
- [195] She also asked for a fine for the respondent's breach of the protection order when he attended at the Guilford Cinema. As noted above, that breach was included in the group of breaches for which the respondent was fined in 2016 and no further order can be made.
- [196] She also seeks a fine for his breach of the requirement to produce tax information within 14 days of the Weatherill J. order and failure to file financial disclosure by July 15, 2017 as required.
- [197] I am satisfied based on the availability of the information required from Canada Revenue Agency that it is more likely than not that the respondent acted promptly to obtain the documents after October 26, 2016. It is also most likely that those documents were provided to counsel and were not withheld for any deliberate purpose.
- [198] The other documents were to be delivered as part of an exchange; the parties were to each deliver to the other copies of those documents. All of the documents and disclosure required from the respondent have been delivered; it is not clear that the claimant discharged her responsibility to provide the information and disclosure set out in the order. However, at this point, the respondent's disclosure has been made and I would not be prepared to assess a fine against him.

Additional Claims

- [199] The claimant was requesting an order that the respondent pay \$600 representing his RESP payments due from February 2017 to January 2018. I am satisfied that those monies have been paid and no order is necessary.
- [200] Further, she asked for an order that the respondent's name be removed from the children's RESP policies. That has taken place. She sought 12 postdated cheques of \$50 per month representing RESP payments from February 1, 2018 and a further 12 postdated cheques for so long as the contributions are permitted to be made on behalf of the children. I am satisfied that the respondent has cooperated in delivering postdated cheques annually and

that he is to deliver postdated \$50 cheques to the claimant for all payments due from February 1, 2018 to the date of this order and to the end of this year.

- [201] The amounts payable by the respondent on a monthly basis are reduced to \$25 because IR qualifies to contribute to that plan. Once the respondent's payments have been exhausted in funding AR's RESP plan, the respondent will provide the claimant with postdated cheques for the next year up to July 31, 2021 (the maturity date of the plan).
- [202] The claimant seeks child support arrears of \$7992 plus court order interest retroactive to February 2012. I accept that the respondent's incomes from December 2014 were: in 2015 \$52,074; in 2016 \$54,593; in 2017 \$85,704; and, in 2018 \$67,883. I accept that the respondent overpaid child support by \$696 in 2015 and \$240 in 2016. I also accept that he has underpaid his child support for 2017 by \$5,264 and for 2018 by \$2472. The net arrears to the end of 2018 is \$6,804. The claimant sought court order interest from 2012 and 2013 totaling \$459.84. In my view, the only court order interest that would be payable would be on payments due from January 1, 2017 to the present. If counsel are not able to agree on this sum, then the calculation and determination of court order interest will be referred to the registrar to certify findings on that point.
- [203] The claimant seeks child support arrears from 2012 to the present. I am not prepared to make a child support order retroactive to February 2012; on December 9, 2014, Ball J. made a final order including child support in this matter and all obligations were subsumed in that order; the order concludes with the term: "All other claims in this matter shall be dismissed as if heard and tried on the merits".
- [204] Thus, I find that child support cannot to be ordered for years preceding December 2014 because the issue is res judicata. As a result, the claims for retroactive child support obligations accruing from January 2015 to the present can be reviewed and varied and I would order retroactive child support be paid; the respondent is entitled to credits for 2015 and 2016 totaling \$936 and his net arrears are \$6,804 plus court order interest.

Claims Made By the Respondent

- [205] The respondent presented a notice of application seeking variations of the Ball J. order, the protection orders and the Weatherill J. order. His first application was filed May 15, 2018; later he filed a new notice of application on June 17, 2019 which I took to replace his 2018 application.
- [206] Concerning his requests for variations of the Ball J. protection order, I make the following determinations based on the parenting decisions made above. These determinations will correspond to the orders requested in the respondent's notice of application as follows:
- Paragraph 2 - The respondent seeks variation of this term to permit him to share parenting responsibilities under s. 41 of the FLA. In light of all the circumstances including AR's age and the history of this family law dispute, I am not prepared to vary that term;

- Paragraph 4 - The respondent seeks the right to assume all parenting responsibilities for the children in the event the claimant is no longer able to care for the children in place of MH. I will only vary that term of the order to vacate the right to move the children to Ontario;
 - Paragraphs 5 and 7- The respondent's parenting time as set out in these terms of the order are vacated and replaced with the order made above;
 - Paragraphs 6 and 9 - the order permitted the claimant to relocate the children to Ontario. In view of AR's age and the order made concerning the respondent's parenting role, these terms are vacated;
 - Paragraph 12 - This term restricted the respondent from sending wrapped gifts to the children. In view of the passage of time, the age of AR and the agreement of the claimant, this term of the order is vacated;
 - Paragraph 13 - This term dealt with contact between AR and the respondent's extended family. This paragraph is vacated;
 - Paragraph 14 - This paragraph dealt with retaining an expert for a section 211 report and assignment of costs. This paragraph was previously varied by my order of July 30, 2018 and no further order is made;
 - Paragraph 17 - This paragraph deals with child support and is dealt with in reasons above;
 - Paragraphs 18 and 19 - These paragraphs deal with section 7 expenses. The claimant was responsible for not more than \$300 per month representing his share of section 7 expenses. He would like section 7 expenses to be agreed before the expenses are incurred and paid in proportion to the parties' guideline incomes. In view of the fact that IR is currently in university and AR intends to pursue postsecondary education, I am satisfied that paragraphs 18 and 19 of the order ought to be vacated. Going forward, the claimant will make decisions concerning section 7 expenses; if the respondent objects to any expense incurred by her he will be at liberty to make application for a determination on the recoverability of section 7 expenses. In any event, the parties will be required to share section 7 expenses in proportion to their line 150 incomes; and
 - Paragraphs 38 and 39 - The respondent seeks return of certain items he contends remain in the claimant's residence and have not been returned to him. He wishes an order that those items be returned and designating LP as a person who will collect the items from the respondent's residence. I make no determination about the location or possession of those items. If the claimant is in possession of those items she is obliged by order to deliver those items to Mr. P forthwith.
- [207] In the respondent's June 19, 2019 Notice of Application he also asked for changes to some of the existing orders, elimination of some terms of the orders, and new orders related to matters already discussed in these reasons. I will refer to the numbering used in the notice of application to identify those issues and provide a determination.

- Paragraph 2- The respondent asks that the protection orders made October 24, 2012, July 16, 2014, December 9, 2014 and October 26, 2016 be terminated. Sections 1(a), 1(b), 1(d), and 1(i) of the December 9, 2014 Protection Order restricted the respondent's contact with the children; attending within 200 m of the claimant's home; attending at a school; and attending or nearing a number of locations in Surrey. He was also prohibited from following the children and possessing a weapon or firearm. I am satisfied that paragraphs 1(a),(d),(e), (f.) and (g) of the protection order are no longer required to address future risks of family violence. Although I accept the respondent continues to struggle with drug issues, nothing in that aspect of his life presents a risk "that family violence is likely to occur". In short, he seeks to vacate orders restricting his communication with the children and his attendance at the Guilford Landmarks Theatre and surrounding areas. In view of the ages of the children and the opinions provided by Ms. Harder, I am satisfied that the Weatherill J. protection order prohibiting his attendance within 200m of three Secondary Schools in Surrey is no longer necessary and will be vacated;
- Paragraph 3.3- The respondent wishes to eliminate the claimant's right to obtain a passport for the children without obtaining his consent. I am not persuaded that that order should be made. The claimant is the primary caregiver to AR. He is almost 17 years old and is entitled to have his own passport and the respondent should have no role in that process;
- Paragraph 3.4 - This term dealt with the respondent's parenting time with the children and suspended that feature until a treating psychiatrist provided an opinion letter. There is now a s. 211 report filed in this proceeding and an opinion letter from the respondent's psychiatrist. I find that the previous order will be vacated and parenting is now dealt with in this order;
- Paragraph 3.5 - This term deals with a further review of the respondent's parenting time. This term is vacated;
- Paragraph 3.6- deals with preparation of the section 211 report and supervised contact with the children. This term of the order is vacated;
- Paragraph 3.7-The respondent has complied with this order. I will not change the terms of the order at this stage;
- Paragraph 3.8 - This paragraph deals with the respondent's obligation to provide passport style photograph of himself annually. For the reasons given above and in particular the age of AR, I am satisfied this paragraph is no longer necessary and the term is vacated;
- Paragraph 4-The respondent wants an order permitting his paternal family members to contact the children by phone, Skype or email or other electronic means. I am not satisfied that this order is necessary or advisable. I will direct that AR be permitted to contact his paternal family members and to grant those family members permission to contact him;

- Paragraph 5- The respondent seeks an order that the children attend family counselling/or a reunification program or counselling with the respondent and his family members. In my view, the respondent may communicate to AR his interest in some type of counselling process. It must be left to AR to indicate his willingness or interest in attending such program;
- Paragraphs 6,7 and 8- The respondent seeks to place a burden on the claimant to arrange reasonable and generous contact between his children and paternal family. In my view, the respondent has discretion to invite AR to meet with him or his family members at times that can be mutually agreed upon; the respondent reiterates his claim for unsupervised reasonable and generous parenting time with the children. These issues have been dealt with above;
- Paragraph 9 - The respondent wants to exclude the claimant from attending any of his parenting time with AR. I will make such an order. If AR informs the respondent that he wishes to have his mother present at a parenting visit, the respondent will be at liberty to cancel that visit; and
- Paragraph 10- The respondent seeks a credit for the overpayment of section 7 expenses in the sum of \$16,200 paid since the final order was made December 9, 2014. Presumably, the respondent believes he should not be obliged to pay section 7 expenses when the claimant has failed or refused to provide receipts and invoices as per the Ball J. order. I am not prepared to make that order; the facts and details concerning this claim were not included in the respondent's notice of application filed in 2018. This request was not made until July 2019. Absent sufficient evidence on this point, I will dismiss the application without prejudice to the respondent to make proper application at some future time.

Conclusion

[208] If the parties are unable to agree to the terms of this order they have liberty to appear for assistance in resolving the order without the need of attending a registrar's hearing.

[209] I make no order as to costs of this application at this time; the parties are at liberty to make application and submissions on the question of costs.

"Armstrong J."

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