
CANADA / JUDGMENT

P.A.L. v. L.A.L.

2015 BCSC 2369

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P.A.L. v. L.A.L.,

2015 BCSC 2369

Date: 20151215

Docket: 07-1698

Registry: Victoria

Between:

P.A.L.

Plaintiff

And

L.A.L.

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Plaintiff:

C. Tyhurst

Counsel for the Defendant:

J.L.A. Kahan

Place and Date of Trial:

Victoria, B.C.

November 20 & 21, 2014

February 19 & 20, 2015

August 27 & 28, 2015

Place and Date of Judgment:

Victoria, B.C.

December 15, 2015

- [1] This matter concerns what parenting time is in the best interests of an 11-year-old girl and a 9-year-old boy. The plaintiff father seeks an order for parallel parenting. The defendant mother opposes such a parenting arrangement and seeks an order that any overnight parenting by the father be supervised.

Suitability for Summary Trial

- [2] When the matter came before me in Chambers on November 20, 2014 the defendant was seeking an interim order relating to the plaintiff's parenting time while the plaintiff was seeking a summary trial of essentially the same issue. Defendant's counsel had understood the plaintiff's application was for interim relief because the plaintiff's application only reference to it being a summary trial application was a reference to Rule 11-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009.
- [3] Given the long history of the dispute both parties wished to have the outstanding issues resolved and consented to the applications both proceeding as summary trial applications. The underlying factors were their desire for finality and the fact that neither party could afford to retain counsel for a trial and did not wish to conduct a trial as self-represented parties.
- [4] From my initial perusal of the materials I indicated to counsel I had concerns respecting whether the matters in issue could be resolved on a summary basis given what appeared to be conflicting affidavit material and issues of credibility. However both counsel for the reasons mentioned wished to have the Court attempt to resolve matters on a summary basis.
- [5] While a full trial would have been preferable it was not disputed that neither party could afford a full trial. It is also apparent from the 9-year history of this litigation that despite the parties in the past stating the matter would be set for trial it never has been and it appears highly unlikely it ever will be. As a result no final orders respecting the children have been made and the parties have exhausted their financial resources. Had they gone to trial immediately after separation they may have been in a position to finance the litigation. That is no longer the case.

- [6] After hearing submissions of counsel over the two days set for hearing I concluded that there were significant credibility issues and ordered cross-examination of the parties on their affidavits. Updated affidavits have been filed respecting events occurring since then.
- [7] Given the above I am satisfied that I am able to find the facts necessary to address the issues before me and that it would not be unjust to do so. With the benefit of cross-examination on affidavits I can properly decide the issues summarily. As noted to not resolve this matter summarily would not result in the trial of this matter but rather in a continuation of its long and unfortunate history of interim applications.

Background

- [8] That history has significantly and detrimentally affected two young children. The involvement of the police, the Ministry of Children and Family Development (the "Ministry") and the Courts has not resolved the issues between the parties and as a result the children have been pawns in the process. Over a period of 9 years the plaintiff has not had parenting time with his children for approximately 5 years (59 months) of those 9 years.
- [9] The plaintiff is 47 years of age and is the father of the two children of the marriage, a daughter T.L. born May 17, 2004, who is now 11 years of age and a son C.L. born May 26, 2006 and who is now 9 years of age. The defendant mother is 50 years of age.
- [10] The parties married on February 14, 2003. On October 26, 2006 they separated after the defendant made sexual abuse allegations against the plaintiff concerning their then two-year-old daughter. Both the police and the Ministry became involved. The Ministry position was that until the police investigation was concluded "no contact whatsoever" was to be allowed between the plaintiff and his children. Further assessment of possible supervised access was to await the outcome of the police investigation.
- [11] No physical signs of sexual abuse were found although the examining physician noted that based on the mother's descriptions of the child's behaviour the case was "very concerning of sexual abuse". No criminal charges were laid. The defendant refused to permit any access or contact by the plaintiff to their children from October 26, 2006 to February 27, 2008, a period of 16 months. There were also subsequent periods where access did not occur.
- [12] The plaintiff commenced this action in April 2007 and applied for access to his children. He voluntarily underwent a polygraph at Pacific Polygraph Service Ltd. in Vancouver, British Columbia on December 8, 2007 in the hope that it would allay the concerns of the defendant and the Ministry. He was asked questions relating to the allegations of abuse and denied them. The examiner concluded that "[h]is physiological responses recorded on the Charts to the above relevant questions were those anticipated from someone who was not attempting to deceive the examiner. In is my opinion, based on this examination that he was being truthful when he answered the above questions as shown."

- [13] On February 27, 2008 Madam Justice Gill, with the consent of the plaintiff, ordered that the plaintiff obtain a psychological evaluation in light of the allegations that had been levelled against him. She ordered that collaterals for the assessment were to include the defendant, the Victoria Child Abuse Prevention & Counselling Centre (formerly the Mary Manning Centre) and the Ministry. Obtaining the assessment was delayed due to the limited financial resources of the plaintiff. Dr. Stangeland, a registered psychologist, conducted the assessment. He produced a report dated February 19, 2010 concluding that the plaintiff was a very low risk for sexual offending.
- [14] On February 27, 2008 the plaintiff also obtained a consent order for supervised access to the children. The consent of the defendant was only obtained when the plaintiff agreed to hire and pay for a professional supervisor. He did so. Despite the supervisor being a trained social worker with experience in supervising access to children the defendant refused to accept him as a supervisor. Access ceased shortly thereafter.
- [15] In March 2009 a Judicial Case Conference was held and Master Scarth ordered that the access visits provided for in the court order commence immediately. A new supervisor was arranged and agreed to by the defendant. Once again the defendant continued to deny access despite having consented to the court orders.
- [16] On June 29, 2009 the plaintiff served on the defendant a contempt application. It was only then, just prior to the hearing of that application that the defendant consented, after a 16-month hiatus, to supervised access occurring.
- [17] After 12 access visits between June 28, 2009 and September 19, 2009 the supervisor reported favourably on the visits noting no inappropriate behaviour. He stated:
- TL is very affectionate towards her father and shows no fear towards him. She is clingy at times with him, and he responds in a nurturing way. She often is reluctant for the visit to end. TL accepts limits from PL without difficulty or defiance.
- While CL is affectionate towards his father, he is more independent. He shows no fear towards his father and is compliant with his father's direction. As with TL, CL is reluctant to have visits end.
- [18] In the fall of 2009 counsel for the plaintiff requested increased access visits and removal of the supervision requirement. Requests that were ignored by the defendant. What did occur is the defendant once again complained to a counsellor at the Victoria Child Abuse Prevention & Counselling Centre alleging sexualized behaviour of the daughter, which led to the Ministry becoming involved again. Access was once again denied.
- [19] On December 24, 2009 the Director brought an application for a protective intervention order with respect to both children seeking to prevent access between the plaintiff and his children.

- [20] A Ms. Wright at the Victoria Child Abuse Prevention & Counselling Centre produced a report dated December 22, 2009 described as a "Report to MCFD". The defendant had alleged that T.L. was now talking about the abuse alleged to have occurred when she was two (so called "recovered memory") and also that in November 2009 her behaviour changed on her return from visits with her father and involved sexualized behaviour and statements that she did not want to see her father.
- [21] Those observations of the mother however were contradicted by the report of the supervisor who confirmed that all access had been in the audio and visual range of the supervisor and that the children remained affectionate towards their father.
- [22] In February of 2010 the parents consented to an order in provincial court in the Ministry proceedings that there be an independent third party assessment of the child T.L. by a qualified professional. The parties eventually agreed on Dr. Yuille, a psychiatrist, and on March 8, 2010 he was retained.
- [23] Dr. Yuille addressed a number of issues in his report of October 25, 2010. With respect to T.L.'s allegations he said this:

Based upon my review of this case, it appears that for about four years [T.L.] has been reporting that her father touched her genital area and her behind. During most of this time her allegation has lacked any detail. She provided a bit more detail in my interview. An increase in detail after four years is not an expected memory pattern. Memory does not improve with time. The additional detail is likely at result of other influences on [T.'s] memory. A brief discussion of the nature of memory may clarify this opinion.

Generally, episodic memories decline in detail with the passage of time. The additional detail that [T.] provided in my interview does not indicate that the memory is not accurate (or that it is accurate) but only that something has influenced the memory since it was originally reported.

Although [T.] reported some additional details during my interview with her, there were not enough details to evaluate credibility. That is, there were too few details to provide a basis for an opinion on whether the memory is based upon an actual experience. This is not surprising: Episodic Memory typically appears between 24 and 36 months of age. If an event did occur sometime before October, 2006, [T.] would have been less than 29 months of age. If she had any Episodic Memory at all, it would have been very limited. Little or no detail in her memory would be expected.

Both [T.] and her mother believe that [P.L.] touched [T.] on her genital and anal areas. Based upon [T.'s] memory alone, it will never be possible to determine if such touching did occur. [T.'s] mother, and the reports from the Mary Manning Centre, refer to [T.'s] behavioral problems (e.g., bed wetting, touching herself, vomiting, etc.) as evidence or consistent with [T.] being a victim of abuse. For more than two decades researchers and practitioners have sought to determine if particular behaviors are diagnostic of sexual abuse. This search has been prompted by the expectation that sexual abuse of children might produce some unique consequences in the

victims that could be used to diagnose abuse in the history of a complainant. It is now understood that there is no behavior pattern or psychological problem that is diagnostic of abuse. In fact, about 25% of victims of abuse are asymptomatic (they show no apparent consequences of the abuse). Of those victims that do display some behavioral and/or psychological consequences of their abuse the pattern of response is varied in both nature and degree. Commonly reported sequelae in adolescents who were victims of abuse include sexually inappropriate behaviors, sleep disturbances, depressed mood and delinquent behavior (Goldston, Tumquist & Knutson, 1989, *Journal of Abnormal Psychology* 98(3), a study of 192 girls aged 2-18 years) Severity of sequelae is also related to the relationship between the abuser and the victim (e.g., an abuser in a position of trust or authority will usually have a more negative effect than a stranger) and the use of violence or threats of violence.

It must be emphasized that these various behavioral signs are generally not diagnostic of abuse but rather they are diagnostic of stress. The stress may be a consequence of sexual abuse but it may also be due to domestic violence, or marital discord in the home, or peer harassment, or a variety of other stressors in the complainant's life. In general, victims of sexual abuse display more of these symptoms than non-abused individuals (see for example a thorough review of the literature by Kendall-Tackett, Williams & Finkelhor, 1993, *Psychological Bulletin*, volume 113, pp. 164-180), yet, no one symptom is exhibited by a majority of abuse victims.

Given that there are no behavioral signs diagnostic of sexual abuse, the behaviors reported about [T.] cannot be used to conclude that she was a victim of abuse. Although it is possible that her behavioral problems were a result of abuse, there are other viable possible sources for her behavioral problems. For example, given that her parents were in a dysfunctional relationship when [T.] was two years old and that [T.] stated that she remembers hearing her parents argue, her behavioral problems could also have been a result of the stress caused by her parent's conflict.

The fact that [P.L.] was found to be non-deceptive in a polygraph test concerning these allegations is consistent with his denial of sexual abuse.

In summary, in my opinion there is insufficient information to support any firm conclusion about the allegations of sexual abuse of [T.]. Given her age at the time of the alleged abuse and the passage of time since the alleged abuse, this situation will not change. There will never be any basis to confirm or disconfirm the alleged abuse. There is nothing to be gained from a continued focus on these allegations. However, shifting away from this focus will be difficult, particularly for [L.L.]. Given Dr. Stangeland's conclusion that [P.L.] is very low risk of sexual offending, both parents need to find a way to have these children integrated into their lives. Hopefully, counselling can help these parents and their children build future healthy relationships.

The three questions I was asked to address (page 8 above) were implicitly answered in the above assessment of the allegations of abuse. To briefly answer those questions directly:

- (1) Was [T.'s] behaviour after her disclosure of abuse consistent with the abuse having occurred or was it consistent with a child being coached about sexual abuse? As detailed above, [T.'s] behaviours were consistent with stress in her life. Sexual abuse could have been the source of that stress but other sources are equally possible. For example, she could have been stressed the arguing of her parents or she could have been stressed by the breakup of her parent's marriage. Her behavioural problems could only be related to sexual abuse if there was clear evidence that sexual abuse had occurred. There is no such evidence.
- (2) Address the issue of recovered memory and comment on the finding of Judith Wright that [T.L.] is experiencing recovered memory of alleged abuse at age two: The concept of recovered memory remains controversial in psychology. The relevant diagnosis from the diagnostic and Statistical Manual of Mental Disorders (DSM-IV - American Psychiatric Association 2000) is Dissociative Amnesia. In order to diagnose amnesia there must have been an extensive inability to recall an important event. The reports of the alleged abuse by [T.] have been continuous over the past four years. There is no foundation for a diagnosis of amnesia. Also, this type of amnesia is thought to be relatively rare and to be a result of trauma. There is no suggestion of trauma (as defined in the DSM-IV) in the present case. I should also note that the DSM-IV specifies that Dissociative Amnesia is 'especially difficult' to assess in prepubescent children. There is no foundation for raising the issue of repressed memory in the present case.
- (3) Comment on whether the paternal visits with [T.] are harmful to her. I reviewed no evidence that the visits with her father are harmful to [T.]. However, she expressed a wish not to see him. Counselling with [T.] and with her mother should occur to assure that such visits occur in an atmosphere that is beneficial to all parties.

[Emphases added.]

- [24] As a result of Dr. Yuille's report on November 18, 2010 the Ministry withdrew their application for a protective intervention order.
- [25] The plaintiff had no access to his son from December 24, 2009 until May 20, 2010. From May 20, 2010 until October 2010 he had only sporadic supervised visits with his son. On October 7, 2010 the defendant unilaterally fired the supervisor and cancelled all of the plaintiff's visits with his son.
- [26] On February 10, 2011 I ordered that the plaintiff have unsupervised access to their son every second and fourth Saturday from 5:30 p.m. to 7:30 p.m. I further ordered that the plaintiff was to have supervised access to their daughter every Thursday from 5:30 p.m. to 7:30 p.m. at the plaintiff's mother's residence with such access to be supervised by Mr. Drew van Brunt who was to provide detailed supervision and transfer reports to counsel very two weeks.
- [27] Despite that order on April 28, 2011 the defendant terminated the plaintiff's access to their daughter and on June 12, 2011 the defendant terminated access to their son.

- [28] As of July 2011 the plaintiff had had no holidays, birthdays or special occasions with his children for five years despite repeated requests through his counsel.
- [29] On July 27, 2011 the plaintiff applied once again for access. Mr. Justice D. Wilson granted an adjournment request until I could hear the matter on the strict condition that access continue in accordance with my February 10, 2011 order. Despite that order access was frustrated by the defendant's refusal to communicate over access with the plaintiff.
- [30] On September 19, 2011 Mr. Justice Greyell ordered that the plaintiff was to have unsupervised access to both children except when access occurred overnight. He ordered that the plaintiff was to have access as follows:
- a) To his daughter on the first Saturday from 5:00 p.m. to 5:00 p.m. on Sunday;
 - b) To his son on the second Saturday from 5:00 p.m. to 5:00 p.m. on Sunday.
 - c) To both children on the third Saturday from 5:00 p.m. to 5:00 p.m. on Sunday;
 - d) Access on Thursdays in accordance with my earlier order;
 - e) Overnight access to occur at the residence of the plaintiff's parents only when such grandparents were at their residence.
- [31] Access then occurred substantially in compliance with Greyell J.'s order from September 19, 2011 until late May of 2014. At the time of Greyell J.'s order the plaintiff was for financial reasons living with his parents pending the settlement of the parties' property claims.
- [32] There is no evidence that during that period the children were not having normal parenting time with their father without any complaints or difficulty.
- [33] After resolution of the parties' property claims the plaintiff, who had been residing with his parents, moved into the former matrimonial home in Brentwood Bay, BC.
- [34] Commencing in May 2014 the plaintiff unilaterally began exercising his weekend access at the former matrimonial home. He stated in part the children had been asking to have their time with him at the former matrimonial home. This resulted in the children no longer being with the plaintiff overnight at his parent's home. This was a clear violation of the order. The children's school principal informed the defendant of this. She retained a private investigator to confirm if the children were having unsupervised overnight visits with the plaintiff. As a result of the breaching of the order by the plaintiff the defendant denied further access from July 2014 to October 2014.

- [35] In November 2014 this application was heard. After two days of hearing the matter was adjourned due to insufficient time. At the conclusion of the November hearing I ordered that the parties be cross-examined on their affidavits. I also varied the order of Greyell J. to provide to the plaintiff unsupervised access to both children on Thursdays from 5:30 p.m. to 7:30 p.m. as well a continuation of the existing access with a variation of the adult supervisors and in addition permitted Christmas access.
- [36] Unfortunately due to counsel and the Court's schedule cross-examination of the parties did not commence until February 2015 and then due to a lack of court time was not completed until August 2015.
- [37] Between February 2015 and August 2015 however the defendant once again terminated access. Her reasons for doing so related to allegations that the plaintiff had physically abused the children. I will return to those allegations later in these reasons.

Credibility of the Parties

Law on Credibility

- [38] In *Fotsch v. Begin*, 2015 BCSC 227 (aff'd 2015 BCCA 403), Mr. Justice G.C. Weatherill summarized the law on credibility assessment as follows:
- [150] In *R. v. Gagnon*, 2006 SCC 17 at para. 20, the Supreme Court of Canada held that assessing credibility is not a science. Credibility of interested witnesses is determined based on the classic criteria set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [151] More recently, in *Bradshaw v. Stenner*, 2010 BCSC 1398, Madam Justice Dillon summarized the factors to be considered when assessing credibility as follows at para. 186:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the

demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont.H.C.); Farnya v. Chorny,[1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

Plaintiff

[39] I accept the plaintiff as credible. (I note that in doing so I place no weight on the polygraph test). He admitted that he deliberately breached the order respecting supervised access and that he should not have done so. In cross-examination he was not shown to be inconsistent or unreliable. He acknowledged the children's relationship with their mother and the importance of that relationship to them. He had positive things to say about the defendant. I found him to be forthright in his evidence and where the evidence of the parties diverges I accept the evidence of the plaintiff over that of the defendant.

Defendant

[40] The credibility of the defendant is suspect. Her evidence is unreliable. This is so because she asserts no responsibility for the denial of the plaintiff's parenting time with the children over the past many years. In addition she is prone to exaggerate and to speak in absolutes. Finally, she is motivated to show the plaintiff in the worst possible light while asserting she is doing no such thing. Nowhere in any of the material filed or in her oral evidence did she say anything positive about the plaintiff or his relationship with their children.

[41] The defendant displayed a curious disconnect between her actions and who was responsible for the repeated denial of access and parenting time of the children with their father. She has repeatedly informed the Ministry and the police over the years of concerning behaviour and statements of the children. That reporting by her has inevitably resulted in the involvement of the Ministry, the police, or both, followed by a denial of access. This has occurred as assuredly as night follows day.

[42] Yet, on cross-examination when it was put to her that she denied access she repeatedly stated that it was not her doing it but rather the Ministry. In response to various questions about her actions in denying access she consistently denied what in fact she was obviously alleging against the plaintiff.

[43] She testified that she "was not alleging anything". That she was simply writing down what the children complained about; that she never stopped the plaintiff from having access, that it was "always someone else" who was stopping the access. She relied on allegations such as saying T.L.'s head was drooping inviting a clear inference that the plaintiff had drugged their daughter but denied saying that he was doing so despite then swearing that if drugged she could not prove who did it. She asserted throughout that all she was doing was describing what she saw and that she was "not trying to accuse him of anything". She denied describing

certain incidents in her affidavits in order to restrict the children's contact with their father. She stated it was the Ministry that denied access and that she had never "said no to access".

- [44] When it was put to her that the pattern or history of the matter was that she would involve the police and the Ministry and then access would cease she stated that she was "not purposely doing that". She repeatedly denied making any allegations against the plaintiff. As she put it "I am not coming right out and accusing him".
- [45] Despite such statements, in her affidavit filed in July of 2014 addressing the allegations of sexual abuse she stated "I actually witnessed a few times some of things that Mr. [L.] did to [T.L.]". It is of note that nowhere in all of the affidavits and reports over the past 9 years does the defendant state having witnessed the alleged abuse yet now she says she did. It is also a vague assertion with no description of what she now says she witnessed.
- [46] The language used by her in her affidavit material was designed to raise the spectre of sexual abuse.
- [47] She complained that the supervisors were not reporting everything that occurred while at the same time admitting she was not there and had not observed the supervised access of the children with their father. She clearly refused to accept the positive reports from the supervisors. Her criticism of the supervisors was not based on any evidence but rather mere speculation on her part.
- [48] The pattern of swearing affidavits raising the inference of sexual abuse continued into the summer of 2014 yet after the long history of relating such material in various affidavits then at trial abandoned the allegation of sexual abuse and raised allegations of physical abuse.
- [49] I do not accept her denials of responsibility. They were either deliberately false or evidence a significant and possibly self-induced belief that is clearly not true. Her abandonment of sexual abuse allegations yet at the same time "reporting" matters with only that inference is of significant concern. Over the history of this litigation such allegations have lead to the required intervention of the police and the Ministry and, because of such concerns, the denials of access by such third party and the limits imposed by the Court on the plaintiff's time with his children. The "system" does not necessarily accommodate untrue and egregious allegations, particularly on interim applications.
- [50] The defendant repeatedly referred to "writing things down" in a form of diary yet at no time throughout the interim motions or at trial did she produce any such documentation. Nor did she produce any third party evidence of sexual or physical abuse. Her explanation for failing to produce the diary was that she had given it to previous counsel implying the fault for its non-production was theirs. I reject that she did so. Counsel is obliged by the Rules of Court to list all relevant documents even if privilege is claimed. I conclude the defendant either never created such a diary or has deliberately failed to produce it.

- [51] The defendant has filed voluminous affidavits relating what she says the children have told her. She relates allegations respecting their fear of their father's driving, that they fear his anger, that he starves them by not feeding them lunch or dinner, that he threatens them, that they have to keep secrets from her, and that they do not wish to see him.
- [52] Firstly, such evidence is suspect because of the children's apparent need to report unfavourably to their mother about their father and secondly her lack of credibility undermines the reliability of what she then reports was said. In addition the minor issues raised as a concern by the mother undermine what would be more significant concerns. There is a pattern of looking for every little thing that might allow her to support criticisms of the plaintiff.
- [53] I reject that such allegations are true. There is no evidence to support any of them. Allegations that the plaintiff starves the children and the like lack the ring of truth.
- [54] The third party reports of various supervisors evidence a positive and loving relationship between the plaintiff and his children. That stands at odds to the mother's view of their relationship and her behaviour. It also challenged her credibility generally. In my opinion the defendant goes out of her way to find or elicit anything she can use to prevent the plaintiff from having time with his children. She rejects the positive evidence of supervisors and she rejects the evidence of Dr. Yuille and others where they are not supportive of her view of the plaintiff.
- [55] She deposes that her daughter has threatened to kill herself. Yet, despite her tendency to report every allegation involving the plaintiff there is no evidence that she took steps to address her daughter's threat. It is disturbing if true that the child said this and disturbing that the child was not given assistance. The failure of the mother to address the issue raises the issue of whether it was even said. It also raises doubts that the defendant's allegations against the plaintiff are based in fact rather than her persistent efforts to prevent him having time with their children.
- [56] The defendant criticizes the plaintiff for his breach of the court order respecting supervised overnight access at his parent's home when he had the children with him, unsupervised, at his own home. The plaintiff admits he did so, that it was wrong, and that he should have dealt with the issue by applying for a variation order. On the other hand the defendant denies ever breaching a court order. Her explanations that any denial of access was due to the instructions she received from the Ministry ignore completely that her reports to the police and the Ministry inevitably had that result. I reject the mother's explanation. She cannot avoid responsibility for her failure to abide by court orders by seeking to offload that responsibility on the Ministry.
- [57] I conclude the defendant has raised unsupported allegations against the plaintiff and has manipulated those tasked with the duty to investigate such allegations to protect children in order to limit and deny the plaintiff's relationship with his children.

- [58] Before turning to a consideration of the best interests of the children I will first address other relief sought by the defendant in her application filed July 23, 2014 and certain relief initially sought by the plaintiff in his application filed September 16, 2014.

The Applications

- [59] The defendant in her application filed July 23, 2014 sought to vary the interim order of Greyell J. of September 19, 2011 to require all access be supervised, no overnight access, that all access be with both children at the same time and that a views of the child report be prepared by the Justice Access Centre and for a divorce.
- [60] The plaintiff in his application filed September 16, 2014 sought updated reports from Dr. John Yuille or a report from Dr. Herve to opine on the veracity of the sexual abuse claims and to provide an opinion regarding the safety of the children's continued residence with the defendant given the nature and the persistence of claims of sexual abuse by the plaintiff of the children made by the defendant.
- [61] The plaintiff also sought orders relating to guardianship, parenting time, a psychological assessment of the defendant, counselling for the children and production of existing counselling records and the names of all counselling and medical doctors respecting the children. Finally, he sought an adjustment respecting the child support that is payable consistent with any parenting time order. The parties agreed that there was insufficient time to address child support and in any event it may be dependent on the outcome of the trial respecting parenting time. As a result it was adjourned.
- [62] The application of the plaintiff for an updated report from Dr. Yuille or a report from Dr. Herve was not pursued at trial given the defendant's late assertion that she was no longer making allegations of sexual abuse.
- [63] By consent each party is to be a guardian of the children.
- [64] The other relief sought remained outstanding and will be addressed later in these reasons.

Views of the Child Report

- [65] The request for this report was first raised by the defendant in her July 2014 application, which as noted was framed as an interim application for relief. As discussed however the hearing proceeded as a summary trial by consent. The ordering of a s. 211 Views of the Child Report would, as a practical matter, have delayed resolution of the issues once again.

- [66] In addition, given the background to this matter and my findings respecting the credibility of the mother and the children's need to seek her favour, such a report would not be in the children's best interests. Over the years these children (T.L. more than C.L.) have been extensively interviewed by various individuals including counsellors, police, Ministry social workers, Dr. Yuille and have received ongoing and frequent "counselling" at the Victoria Child Abuse Prevention & Counselling Centre.
- [67] It is clear that these children say things to their mother that they know she wishes to hear. In all probability given the mother's intransigence to date they would continue to inform her and any interviewer of similar allegations as indeed has been the case with previous interviewers.
- [68] Given the history of this matter and the need to bring finality and stability to the children by supporting their relationship with their father I am of the opinion it would not be in the children's best interests to solicit their views again. The mother no longer pursues the allegations of sexual abuse. The damage has been done by such allegations. Any possible benefit from the children's views is outweighed by the harm such inquiries would inflict on them, including further delay in reintegrating their father in their lives.

Law

- [69] The Family Law Act, S.B.C. 2011, c. 25 [FLA], mandates that the sole consideration respecting orders relating to guardianship, parenting arrangements and contact with a child is the best interests of the child.
- [70] Section 37 states:
- 37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.
- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;

- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [71] While each of the factors in section 37(2) of the FLA must be separately considered "in the end the evidence has to be considered as a whole" (M.W.B. v. A.R.B., 2013 BCSC 885 at para. 254).

Discussion

- [72] It is clear that these children have adopted a pattern of telling their mother what she wants to hear. Whether deliberately elicited from them by her or not they have that perception. As counsel for the plaintiff put it, "it makes their mother happy". Unfortunately, what the defendant wants to hear is that the plaintiff is abusive, that the children fear him, and that they do not wish to spend time with their father.
- [73] The daughter in particular has been interviewed innumerable times by various individuals. This does not appear to be a situation where a parent is actively coaching their children. For example, counsel for the plaintiff accepts that the mother does not actively cross-examine the children after their visits with their father. She does not have to. It appears to be subtler than that and arises from the mother's behaviour and pattern of referrals to the police, the Ministry and the Victoria Child Abuse Prevention & Counselling Centre.
- [74] I note that Dr. Yuille recommended that the defendant mother and T.L. have counselling. He did not recommend counselling for the plaintiff.

- [75] Despite that recommendation the mother has not sought counselling. Had the mother sought such counselling there is at least a possibility that the last several years of litigation and the continued manipulation of the children could have been avoided.
- [76] As noted earlier the allegations of sexual abuse have transitioned to allegations of physical and mental abuse. This despite her affidavit of July 2014 alleging sexual abuse and including the statement when referring to the plaintiff "I believe he will mentally abuse the Children and I fear further sexual abuse on T.L. and C.L.". She then in her affidavit sworn in October 2014 states: [The plaintiff] keeps saying I am accusing him of sexual abuse. I am not. He needs to let that go".
- [77] In an affidavit filed July 14, 2015 the defendant alleged that the plaintiff had deliberately "smashed" his head into the head of C.L. three times while the child was in the back seat of the plaintiff's car and the plaintiff was in the driver's seat. The defendant did not raise the issue with the plaintiff but instead took their son to the police to file a report. The plaintiff states that when he turned his head to the back seat his son had moved forward and their heads hit each other once. No charges were laid. The defendant also alleges an earlier incident that the children said their father had bumped their heads together. No report was made with respect to that allegation.
- [78] She also raises allegations that the father went to a neighbours for a beer and left the children alone, that his driving scares them, that he gets angry with them, that they fear him and that they do not want to see him. She continues to seize upon any possible excuse to report the plaintiff. This is despite the fact that the only evidence of physical harm to the children occurred while they were with her -- their son having broken his arm twice -- and on neither occasion was the father advised nor has any explanation been provided. Had such occurred while the child was in the plaintiff's care the defendant no doubt would have reported the incident to the authorities.
- [79] Given my findings respecting the credibility of the defendant I find her recitations of what the children tell her suspect and unreliable. While the children may say some of the things she alleges I conclude to the extent they do so is to receive their mother's favour. I am also satisfied that once told she exaggerates what they say and favours inflammatory adjectives and language that raises inferences that go beyond the facts.
- [80] I accept the plaintiff's evidence respecting such events both because of my findings respecting his credibility and because his explanations for events such as the bumping of their heads in the car makes sense. In addition there were no allegations made against the father over the past three years until the issue of the children staying overnight with their father at the Brentwood Bay home arose. It was that issue that reignited the allegations of sexual and physical abuse.
- [81] I am satisfied that the plaintiff is not physically or mentally abusing his children. There is no credible evidence to the contrary.

- [82] Counsel for the defendant submits that the allegations of the children respecting their father such as he gets angry at them, that they are afraid of his driving, that he does not feed them and that they do not want to see him fall within the definition of family violence. Given the rejection of such allegations the issue of family violence does not arise.
- [83] The mother after nine years remains hostile to the father. Despite Dr. Yuille recommending that she have counselling she has not done so. She has not in any fashion encouraged the children to have time with their father. Her conduct and behaviour has in fact encouraged the children to raise issues that she can then use to make further complaints. Neither the fact that the allegations made by her are not pursued by the police or the Ministry nor the fact that expert evidence refutes them has made one bit of difference to her.
- [84] In light of the mother's conduct the importance of the children's relationship with their father achieves greater significance. In my view the well-being of these children demands that they have a close, extensive and ongoing relationship with their father in the hope that by doing so the perverse conduct of the mother can be ameliorated and that over time they may recover from that aspect of their mother's behaviour (that of her hostility to their father). At the same time it is clear these children are close to their mother and are bonded to her.
- [85] I have no optimism that the defendant will ever actually encourage the children to have a proper relationship with their father. At best she may cease actively encouraging the children to feed her need for negative information respecting the plaintiff. In my view the defendant is in urgent need of intensive counselling.
- [86] The plaintiff although requesting in his application an order that he have primary parenting time or in the alternative an order for equal parent time at the hearing only pursued the latter. Notwithstanding that position the defendant should appreciate that if she continues to behave as she has in the past with spurious reporting to the authorities of either fabricated or inconsequential allegations the Court may be compelled to award parenting time to the father with limited and supervised access to the children by the defendant.
- [87] The children's health and emotional well-being are central to this trial. As I have described there are significant issues respecting the defendant's influence on the children in matters related to the plaintiff. The plaintiff does not submit that the defendant is unfit or that she does not adequately care for the children. He acknowledges that the children love their mother and wish to have time with her. He submits however that they also need to know and have time with him and in that respect the mother's behaviour and actions are not in the best interests of the children.
- [88] I agree. In my view the emotional well-being of the children requires that they re-establish their relationship with their father.

- [89] I have previously addressed the issue of the children's views. With respect to the nature and strength of the children's relationship with their father any weaknesses in that relationship arise from the position adopted by their mother since the parties separated. The evidence is that the children do have a relationship with their father and with additional time that relationship is likely to be strengthened. They are entitled to that.
- [90] In my view the increased contact with their father will benefit the children by providing the father's influence and guidance and in doing so will create a more stable and normal relationship for them which will counter balance the current unsatisfactory parenting arrangement. While the defendant's obsession with unfounded allegations against the plaintiff is concerning given the plaintiff's acknowledgment of the mother's importance to the children a more equal parenting arrangement is appropriate.
- [91] For the three-year period from 2011 to 2014 the plaintiff had limited parenting time with his children without incident.
- [92] At the conclusion of the trial I made an interim order pending judgment for the plaintiff to have parenting time with the children three weeks out of four from after school on Friday until Monday morning without supervision. In addition the plaintiff was granted parenting time from after school until 8:00 p.m. every second Wednesday and Thursday. The parties were directed to bring to the attention of the Court any issues arising in the interim period pending issuance of these reasons. I have received no communication that such have arisen.
- [93] The parties agree that they shall both be guardians of the children and I make that order.
- [94] Pursuant to s. 40 (2) of the FLA they shall each exercise all parental responsibilities subject to the following:
- a) The parent who is exercising parenting time with the children is obliged to advise the other parent of any matters of significance affecting the children;
 - b) The parties shall discuss any significant decisions which have to be made with respect to the children including counselling, significant decisions respecting their health (except emergency decisions), education, religious instructions and their general welfare and will be obliged to try to reach agreement with respect to such decisions;
 - c) In the event they cannot reach agreement respecting such decisions the plaintiff father shall have the right to make the decision and the defendant shall have the right to apply under s. 49 of the FLA to seek a review of any decisions so made that the defendant considers is contrary to the best interests of the children;
 - d) Each party will have the right to obtain information concerning the children directly from third parties, including teachers, counsellors, medical professionals and third-party care givers;

- [95] In addition no counsellor at the Victoria Child Abuse Prevention & Counselling Centre shall counsel the children as their current counsellor has, as evidenced by her reports and previously noted in earlier rulings, become an advocate in this proceeding. Despite the plaintiff's objections the defendant continued to have the children attend at the Centre. This continued even after the Court on an earlier interim application raised concerns respecting a purported expert report from Ms. Wright that was ruled inadmissible.
- [96] I further order that the parties shall have equal parenting time with both children as follows:
- a) Commencing on the first Friday after issuance of these reasons the children shall reside with the plaintiff from Friday after school until Friday morning of the following week and then with the defendant from that Friday after school until Friday morning of the following week.
 - b) The equal parenting time shall alternate week by week thereafter.
 - c) The transfer of the children shall occur at their school(s).
 - d) During holiday and non-instructional school days the children shall be transferred at the McDonald's parking lot where such transfers are currently occurring or at such other location as the parties may agree in writing.
- [97] Counsel did not make submissions respecting Christmas, school breaks, Easter and Thanksgiving and the children's birthdays. If they are not able to agree on the equal sharing of such periods they have liberty to make further submissions in writing.
- [98] Both parties consent to an order pursuant to s. 224 of the FLA that they attend counselling. I will therefore order that they both attend a qualified psychologist for counselling as recommended by such psychologist with the expense to be shared equally. The parties have liberty to apply if issues arise respecting such psychologist and the extent of such counselling.
- [99] Given the limited time available and the lack of current financial information as well as uncertainty respecting the issue of parenting the issue of child support was adjourned. If counsel are not able to resolve child support by agreement they have liberty to apply.
- [100] With respect to the application for a divorce order that application is adjourned pending resolution of the child maintenance.
- [101] Counsel did not address the issue of costs in any detail. Counsel for the plaintiff indicated special costs are sought. The parties are at liberty to provide written submissions on costs within 60 days on such a schedule as they agree.

"Punnett J."

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