
CANADA / JUDGMENT

Phoenix v. Phoenix

2020 BCSC 1732

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1732 Phoenix v. Phoenix

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Phoenix v. Phoenix,

2020 BCSC 1732

Date: 20201116

Docket: E125680

Registry: Kelowna

Between:

Shelly Nadine Phoenix

Claimant

And

Jeremy Richmond Phoenix

Respondent

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

The Claimant appearing in person on her own behalf:

S.N. Phoenix

The Respondent appearing on

his own behalf via teleconference:

J.R. Phoenix

Place and Date of Trial/Hearing:

Kelowna, B.C.

September 15, 16, 23, 2020

November 3, 2020

Place and Date of Judgment:

Kelowna, B.C.

November 16, 2020

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Introduction

- [1] Mr. Jeremy Phoenix and Ms. Shelley Phoenix are the parents of a daughter, S., who was born on October 27, 2013. By way of notice of application ("NOA") filed August 10, 2020, Mr. Phoenix applied for 15 orders intended, among other things, to vary the existing custody, parenting and child support arrangements for S.
- [2] At present, the custody and support obligations for S. are determined by an order made by Mr. Justice Marchand on September 5, 2018 (the "Marchand Order"), as varied by a consent order made by Mr. Justice Crossin on June 17, 2019 (the "Crossin Order"). Pursuant to those orders, Ms. Phoenix has interim sole custody of S. S. resides with Ms. Phoenix in Kelowna, B.C. Mr. Phoenix lives in Regina Beach, Saskatchewan. His current parenting time with S. is set out in paragraph 10 of the Marchand Order as varied by paragraph 3 of the Crossin Order as follows:
- (a) Six consecutive weeks during S.'s summer holiday;
 - (b) the first half of S.'s Christmas holidays including Christmas Day in even years, and the second half of S.'s Christmas holidays excluding Christmas Day in odd years;
 - (c) all of S.'s Spring break;
 - (d) liberal and generous time with S. including over nights in Kelowna;
 - (e) liberal and generous electronic communications via telephone, Skype, and/or Facetime at reasonable times to be agreed upon by the parties; and
 - (f) at any other time the parties agree; and Mr. Phoenix's parenting time shall at all times be supervised by his mother Nancy Koocher or another person agreed to by the parties in writing.
- [3] Mr. Phoenix seeks to vary the Marchand Order, as varied by the Crossin Order, to provide for joint custody of S. He seeks to have S. spend alternate years in the custody of each parent. This would mean that after the conclusion of the present school year, S. would live with Mr. Phoenix in Saskatchewan for a year, and the next year with Ms. Phoenix in Kelowna, and so on alternating each year. The non-custodial parent each year would have parenting time with S. at Christmas, spring break, and other times the parties agree to.
- [4] Mr. Phoenix also seeks to vary a number of other parts of the Marchand and/or Crossin Orders, and for the Court to make a number of new orders. I will refer to those later in these reasons.
- [5] For reasons I will provide later in this judgment, I have decided, with one exception, not to vary or add to the existing orders at this time. The current interim orders will, with the exception I describe below, remain in place until trial. Final orders are necessary to resolve the triable issues between the parties, and to that end I have ordered that this matter be transferred to the trial list. The matters in issue between the parties cannot be resolved on

the basis of competing affidavits. I have seized myself of this family law case in order to ensure that it can be concluded in as fair and efficient a manner as possible.

Affidavit Issues

- [6] Before considering the substance of the application, it is necessary to address the deficiencies in Mr. Phoenix's affidavit evidence, which made this application complicated to deal with. I will describe those issues in some detail, in the hope that it will assist these parties, and perhaps other self-represented family law litigants, to understand and comply with the court's requirements in affidavits and application records.
- [7] Mr. Phoenix filed his NOA with the court on August 10, 2020. It was supported by his fifth affidavit, apparently sworn before a notary public in Saskatchewan on May 11, 2020. Subsequently he purported to swear his sixth affidavit before the same notary public on September 11, 2020, and filed copies of that affidavit with the court on September 14, 2020.
- [8] Mr. Phoenix filed an application record that included copies of his NOA and fifth affidavit, as well as of a number of earlier affidavits sworn by both parties in the course of their family law proceedings. That included Ms. Phoenix's second affidavit, sworn June 11, 2018, and her third affidavit, sworn July 23, 2018. In the course of the hearing, it became apparent that Mr. Phoenix had not attached any of the exhibits to Ms. Phoenix's second affidavit, nor some of the exhibits to Ms. Phoenix's third affidavit, to the copies of those affidavits included in the application record.
- [9] The copies of Mr. Phoenix's fifth affidavit in the application record and his separately filed sixth affidavit had numerous documents attached to them as "exhibits".
- [10] In reviewing the court file to locate the original copies of Ms. Phoenix's second and third affidavits in order to review the exhibits that had not been attached to those affidavits in the application record, I saw the original filed copies of Mr. Phoenix's fifth and sixth affidavits. There were no exhibits attached to either of those affidavits. On further review of the copies of those affidavits contained in the application record, I noted that the documents attached to those affidavits as "exhibits" had not been identified or authenticated as such by the person before whom the affidavits were made.
- [11] The Supreme Court Family Rules ("SCFR"), R. 10-4(8) requires:

Exhibit to be marked

- (8) The person before whom an affidavit is sworn or affirmed must identify each exhibit referred to in the affidavit by signing a certificate placed on the exhibit in the following form:

This is Exhibit referred to in the affidavit of sworn (or affirmed) before me on[dd/mm/yyyy].....

- [12] The documents attached to the copies of Mr. Phoenix's fifth and sixth affidavits did not have that certificate upon them, indicating they had not been part of the affidavits when they were made by Mr. Phoenix.
- [13] In order to address this problem, I issued a memorandum to the parties in which I directed Mr. Phoenix to reswear his fifth and sixth affidavits with the exhibits properly attached and identified as required by the SCFR. No changes, alterations or additions were to be made to the affidavits, other than to ensure that the exhibits were properly attached and identified. He was to file those affidavits with the exhibits attached at the Kelowna Registry, and serve Ms. Phoenix with copies of them, no later than September 23, 2020.
- [14] Mr. Phoenix needed more time to comply with my direction, and I varied my direction to allow him to do so. He made new copies of his fifth and sixth affidavits on September 24, 2020, and filed them on September 30, 2020.
- [15] Ms. Phoenix requested an opportunity to appear before me to speak to her concerns about the refiled affidavits. I heard from the parties for that purpose on November 3, 2020. In advance of hearing from the parties, I reviewed the refiled affidavits, and compared them with the original copies filed with the court.
- [16] There are a number of problems with Mr. Phoenix's refiled affidavits. First, Mr. Phoenix did not sign either of them. On further review, I noted that he also had not signed the original copies of those affidavits. The notary did, but Mr. Phoenix did not, as is required under both the Saskatchewan and British Columbia rules.
- [17] This is a significant problem, as it means that Mr. Phoenix did not, in fact, swear either the original or "resworn" copies of his fifth or sixth affidavits. As a result, I do not have sworn evidence before me from Mr. Phoenix in support of his application.
- [18] Second, contrary to my direction, Mr. Phoenix has made a number of changes, alterations and additions to the "resworn" affidavits. In particular, in respect of his fifth affidavit, Mr. Phoenix has:
- added highlighting to paragraphs 198 and 199;
 - Exhibit A (which is a copy of an affidavit sworn by Ms. Nancy Koocher on May 9, 2020) is out of order, with the certification found in the middle of the exhibit;
 - added highlighting throughout Exhibits A, C, D, E, F, G, H, K, O, P, R, U, V, W, A2, A4, A7, A9, A18 and A19;
 - added highlighting and handwritten commentary to Exhibits J, L, N, X, A1, A5 and A24;
 - added a page of a screenshot of text messages as part of Exhibit E;
 - added seven pages to Exhibit M, including handwritten notes, emails and a letter from a lawyer; and

- removed a page of a screenshot of text messages from Exhibit A8.

[19] In respect of his sixth affidavit, Mr. Phoenix has:

- added handwritten commentary on the first page of every exhibit;
- added highlighting and handwritten notes to the last page of Exhibit A;
- removed a picture of a receipt from Exhibit E;
- added an additional cover page with handwritten notes to Exhibit K; and
- added highlighting throughout Exhibit K.

[20] I would note that the highlighting and handwritten comments referred to above were in addition to extensive highlighting and handwritten comments that already appeared on the original versions of Mr. Phoenix's fifth and sixth affidavits.

[21] To be clear, affidavits filed with the court must comply with SCFR, R. 10-4. That includes the person who is swearing the affidavit signing the affidavit in accordance with R. 10-4(4), and the person before whom the affidavit is sworn identifying and certifying each exhibit in accordance with R. 10-4(8).

[22] Under R. 10-6(6), an applicant must serve on the other party:

Service of application materials

- (a) a copy of the filed notice of application;
- (b) a copy of the filed version of each of the affidavits and documents, referred to in the notice of application under subrule (3) (d), that has not already been served on that person;

...

[23] Under R. 10-6(14), an applicant must file an application record with the registry where the hearing is to take place, which must comply with the following requirements:

Application record

- (a) the application record must be in a ring binder or in some other form of secure binding;
- (b) the application record must contain, in consecutively numbered pages, or separated by tabs, the following documents in the following order:
 - (i) a title page bearing the style of proceeding and the names of the lawyers, if any, for the applicant and the application respondents;
 - (ii) an index;
 - (iii) a copy of the filed notice of application;
 - (iv) a copy of each filed application response;

- (v) a copy of every filed affidavit and pleading, and of every other document other than a written argument, that is to be relied on at the hearing;
- (vi) if the application is brought under Rule 11-3, a copy of each filed pleading;
- (vii) a copy of each filed order that the applicant seeks to vary or rescind or that is otherwise relevant to the relief sought;

...

[24] There are circumstances when it is acceptable not to file an exhibit. The exceptions to the requirement that exhibits be filed, and how exhibits are to be dealt with in that event, are set out in Rules 10-4(9) and (10):

Copies of documentary exhibits

- (9) An exhibit referred to in an affidavit need not be filed, but must be made available for the use of the court and for the prior inspection of a party and, in the case of a documentary exhibit not exceeding 10 pages, a true reproduction must be attached to the affidavit and to all copies of the affidavit that are served.

Numbering exhibit pages

- (10) Each page of the documentary exhibits referred to in an affidavit, other than an affidavit of service, must be numbered sequentially, beginning with the first page of the first exhibit and ending with the last page of the last exhibit,
 - (a) on the original exhibits and on all copies that are served, and
 - (b) even though one or more of those exhibits is not attached to the affidavit.
- [25] The exhibits that were not attached to Mr. Phoenix's original affidavits were not, with a few exceptions, more than 10 pages in length, so under R. 10-4(9) they needed to be attached to the filed affidavits and to all copies of those affidavits that were served and included in the application record.
- [26] The copies of the affidavits Mr. Phoenix filed, served and included in his application record needed to be identical. It is improper for a party to highlight and make editorial comments on such documents, particularly if that highlighting and those comments are not made on all copies. I have no way of knowing if the copies he served on Ms. Phoenix were identical to those in the court file or application record. Certainly, the original filed affidavits and the copies contained in the application record were not.
- [27] During submissions before me on November 3, 2020, I asked Mr. Phoenix if he had signed the original or "resworn" copies of his fifth and sixth affidavits. In response, he said that he did not recall signing any of his affidavits, and did not know that he needed to. He was not sure, but thought that the handwritten comments and highlighting added to the refiled copies were there because he photocopied his own previous copy, on which he had made

notes. He had no explanation for the missing and additional pages, but speculated that might have occurred during the photocopying process. He also mentioned that he had multiple versions of his affidavits saved on his computer, and he could have printed out a different version. He denied any attempt to mislead the Court.

- [28] Mr. Phoenix needed to comply with my September 17, 2020 directions with respect to filing "resworn" copies. He did not. In noncompliance with my order, he made changes, alterations and additions to his affidavits. While the notary public provided the necessary certification on each exhibit, Mr. Phoenix did not sign the body of the affidavits, which means that he did not swear the affidavits at all.
- [29] I accept that Mr. Phoenix did not intend to mislead the Court and that he is not familiar with the court's requirements. Many of the problems with his affidavits appear to have arisen from errors made by the notary public who took his affidavits, including failing to require Mr. Phoenix to sign any of the affidavits, and failing to identify and certify the exhibits to the original affidavits.
- [30] Compliance with these and other rules regarding affidavits is not a mere technicality. It is vital to the fair and efficient resolution of family and other disputes. It is not fair to the other party for them or the Court to be left guessing whether they have an accurate and complete copy of an affidavit. As this application demonstrates, it is not an efficient use of court resources for the judge to wade through the court file and compare it with the application record to determine if they are referring to the proper materials. If parties return to court for future applications, it is essential that the court file contains the proper documents, in case they need to be referred to again.
- [31] The object of the SCFR is, as set out in R. 1-3(1), to "help parties resolve the legal issues in a family law case fairly" and to "secure the just, speedy and inexpensive determination of every family law case on its merits." Rule 10-4(14) provides that the "[w]ith leave of the court, an affidavit may be used in evidence despite an irregularity in its form."
- [32] In the interests of furthering that object, in a manner proportionate to the issues in dispute, I will exercise my discretion under R. 10-4(14) to allow the refiled affidavits to be used in evidence on this application, despite the fact that they are deficient in a number of respects and not in compliance with my directions. However, the fact that Mr. Phoenix's affidavits were not properly sworn has affected the weight I can give to his evidence, and I have also taken that into account in making my directions for the next steps in this case.
- [33] Mr. Phoenix must understand that it is essential that he comply with the relevant rules in any future applications, or he will risk the Court rejecting his materials and refusing to deal with his application.

Background

- [34] It is important to summarize the history of the parties' relationship, and the family law litigation they have been involved in since their separation. In light of my conclusion that this application should be moved to the trial list, I will not set out the many competing allegations made by each party about the other's conduct, as findings about that conduct, to the extent they are relevant to the issues the Court must ultimately decide, can only be made after hearing sworn live evidence from the parties.
- [35] The parties began living together in a marriage-like relationship in April 2010 and were married on July 2, 2011. S. was born on October 27, 2013. They separated on September 1, 2016, and are not yet divorced.
- [36] The parties met and began living together in Kelowna, and moved together to Fort St. John in May 2010. They moved to Saskatchewan (where both of them have extended family) in May 2012, and returned to Kelowna in October 2015. It was while they were living in Kelowna that they separated.
- [37] Sometime after their separation, Mr. Phoenix returned to Saskatchewan, where he continues to live. After their separation, Ms. Phoenix moved to Ladysmith for a time, and returned to Kelowna in 2019, where she continues to reside with S.
- [38] Sometime in the fall of 2016, the parties entered into an undated agreement, which on its face would appear to have been intended to address the issues arising out of their separation. It included provisions related to parenting arrangements for S., and the division of their assets in Saskatchewan and elsewhere. Ms. Phoenix says that she signed it under duress and coercion, which Mr. Phoenix denies. It was never filed in court.
- [39] Ms. Phoenix filed a notice of family claim in the Kelowna Registry on November 20, 2017. On November 21, 2017, Ms. Phoenix filed a financial statement.
- [40] On December 29, 2017, Mr. Phoenix filed his response, a counterclaim and a financial statement.
- [41] On the face of the documents filed to that point, the parties were in agreement that they wanted a divorce, but there were outstanding issues about parenting arrangements for S., child support and the division of property.
- [42] On January 3, 2018, a judicial case conference ("JCC") was held. As a result of orders made at that JCC, the parties shared interim joint custody and parenting responsibility of S., whereby S. would reside with each of them, alternating every two months until September 2018, when S. would be entering school. The parties were to set a trial date to be heard before August 17, 2018.
- [43] On February 23, 2018, the parties entered into a second separation agreement. It indicated that the parties would abide by the order of Master Wilson (as he then was) made at the January 3, 2018 JCC. It further provided that because the parties' incomes were relatively

equal, no child support would be paid by either of them. It provided that in the event the parenting schedule changed such that they would no longer exercise shared parenting, the parties would exchange income information and child support would be adjusted in accordance with the Federal Child Support Guidelines. No spousal support was to be payable. In respect of property, the parties acknowledged that debt on their real properties surpassed their value. In exchange for Mr. Phoenix assuming all debts, Ms. Phoenix relinquished any interest in those properties, which consisted of a lot in Costa Rica, a lot in the Bahamas, and the family home in Saskatchewan.

- [44] Ms. Phoenix says that she was threatened and coerced into signing this agreement, and that she did so under duress. Mr. Phoenix says it is valid and that Ms. Phoenix attempted to extort him in relation to it. I make no findings about any of those allegations, which are matters the Court will have to hear evidence about in order to make findings about the validity of the agreement. Mr. Phoenix says that his lawyer filed this agreement in court in Saskatchewan, but I have no evidence to substantiate that. Certainly, the February 23, 2018 separation agreement has never been filed in court in British Columbia.
- [45] In the spring of 2018, S. was with Mr. Phoenix in Saskatchewan for the agreed upon two-month period. Mr. Phoenix sent Ms. Phoenix communications that indicated he would not be returning S. to her care on the date agreed to. Mr. Phoenix's stated refusal to return S. to Ms. Phoenix's care resulted in her making an application to court on June 11, 2018. In her application, she sought enforcement of the January 3, 2018 JCC order regarding the parties' parenting and custody schedule; that Mr. Phoenix return S. to her by July 14, 2018, which would be the end of her usual two-month period with Mr. Phoenix; that if S. was not returned within 48 hours, the order to return S. be enforced by the police; that S.'s place of residence be Kelowna; and that S. not be moved from Kelowna without further order or both parties' written consent.
- [46] On July 4, 2018, Master McDiarmid made an order requiring Mr. Phoenix to return S. to Ms. Phoenix's care. That order was to be enforced by the police if he did not return her by midnight on July 23, 2018. Master McDiarmid also made orders with respect to the conduct of a summary trial to be held on September 4, 2018.
- [47] S. was returned to Ms. Phoenix's care on July 23, 2018.
- [48] The parties appeared before Marchand J. on September 4, 2018 for the summary trial referred to in the July 4, 2018 order.
- [49] In the September 5, 2018 Marchand Order, Marchand J. ordered that the parties would have joint custody of S. He also ordered that each party was entitled to make day to day decisions regarding S. while in their care, and that each had the obligation to advise the other of any significant matters. They were ordered to discuss significant decisions and to reach agreement on such decisions. In the event they were unable to reach an agreement despite their best efforts, Ms. Phoenix was entitled to make the decision, with Mr. Phoenix having the right to apply to court. Ms. Phoenix's application to relocate S. to Ladysmith, where she

intended to move for a new job, was granted. S. was to live primarily with Ms. Phoenix, with parenting time with Mr. Phoenix on holidays as set out in the introduction to these reasons. The parties were ordered to share equally travel costs associated with Mr. Phoenix spending time with S. during those holiday times. The parties were ordered to communicate only in writing and were ordered to put S.'s interests above their own, including making a real effort to maintain polite, respectful communications with each other, and refraining from negative or hostile criticism, communication or argument, especially in front of S. Mr. Phoenix was to complete the Parenting After Separation program.

- [50] Ms. Phoenix was required to and did draft the Marchand Order; Mr. Phoenix refused to sign it.
- [51] Following the Marchand Order, Ms. Phoenix moved with S. to Ladysmith.
- [52] On January 31, 2019, Ms. Phoenix applied for and received a protection order under the Family Law Act, S.B.C. 2011, c. 25, s. 183 [FLA], prohibiting Mr. Phoenix from attending at her then places of residence and employment in Ladysmith. Mr. Phoenix was further ordered not to have contact or communicate with Ms. Phoenix except in writing and solely for the purposes of arranging parenting time and discussing issues related to the ongoing family claim. He was ordered not to possess any weapons except for ceremonial weapons already in his possession. Master Dick further ordered Mr. Phoenix not to remove S. from Vancouver Island without Ms. Phoenix's written consent.
- [53] On May 13, 2019, Ms. Phoenix applied to terminate the Marchand Order. She sought orders under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA], that she have sole custody of S., or in the alternative interim sole custody. She also sought orders to have Mr. Phoenix's parenting time with S. suspended until further agreement or order of the court; for Mr. Phoenix to file a financial statement; for Mr. Phoenix to pay interim child support in the amount of \$550 per month; for Mr. Phoenix to pay 70% of special or extraordinary expenses and provide health care and dental care coverage for S.; and for Mr. Phoenix to pay a fine of \$1,000 for contempt of court.
- [54] On June 17, 2019, by consent, Crossin J. varied the Marchand Order to provide that Ms. Phoenix would have interim sole custody of S. The parties were ordered to discuss significant decisions with each other. Mr. Phoenix was to continue to have the parenting time set out in the Marchand Order, with the proviso that his mother, Ms. Koocher, or another person agreed to by the parties, supervise all parenting time. The provision on travel costs was varied to provide further detail on the parties' obligations. The parties were ordered to primarily communicate in writing by email and only regarding parenting and issues related to the family claim, and by telephone only when necessary. Mr. Phoenix was to attend counselling a minimum of once a month for a year, and to provide proof of his attendance. On an interim and without prejudice basis, child support payable to Ms. Phoenix was set at \$550 per month commencing July 1, 2019. Special or extraordinary expenses were to be shared 70/30.

Discussion

Were the Marchand and Crossin Orders made under the DA or the FLA? Are they interim or final?

- [55] Before embarking on an analysis of the orders sought by Mr. Phoenix, it is necessary to determine whether the existing orders were made under the DA or the FLA, and whether they are final or interim orders. Those are important questions, because depending on the answers to those questions, different tests may apply to an application to vary the orders.
- [56] Both parties are currently self-represented, and have been at various times during the course of this litigation, so it is understandable that the previous applications and orders are not all completely clear on these points.
- [57] In *Khangura v. Rogalski*, 2017 BCSC 1753 at para. 26, Madam Justice Fleming discussed the significance of determining what statute a previous order was made under:
- [26] Although the test for variation of a final order is materially the same under both statutes, the question remains: which provision applies to the respondent's application to vary the terms of the 2013 Order regarding his parenting time, communication, and family dispute resolution? The meaning of a court order, including its statutory foundation, is determined by the objective indicia found in the pleadings, the wording of the order, and the circumstances in which it was made. In the absence of objective indicia, the doctrine of paramountcy will apply and the order will be "founded" in the federal legislation: *Yu v. Jordan*, 2012 BCCA 367, at para. 1
- [58] The Marchand Order was made after a summary trial, in response to the June 11, 2018 notice of application filed by Ms. Phoenix. Ms. Phoenix, who was self-represented at the time, did not refer to either the DA or the FLA in her application. The September 5, 2018 Marchand Order also does not refer to either the DA or the FLA. Nor does it specify whether the orders made are final or interim.
- [59] In his fifth affidavit, Mr. Phoenix says that Marchand J. made a final order, and that he was surprised by this as he thought that proceeding would lead to an interim order. In her application response, Ms. Phoenix also referred to the Marchand Order as final. I do not know why the parties both believe the Marchand Order to be final.
- [60] I find that the Marchand Order was made under the DA. The reference to the parties having "joint custody" of S. is indicative of an order under the DA. To the extent there is any ambiguity with respect to individual orders made, the doctrine of paramountcy applies and the orders are founded in the federal DA.
- [61] An order for corollary relief, such as custody and child support, in a divorce action cannot be a final order in the absence of an order for divorce: *Yu v. Jordan*, 2012 BCCA 367 at para. 47. Marchand J. did not grant an order for divorce. It follows that the entirety of the Marchand Order was interim in nature.

- [62] The Crossin Order varied the Marchand Order. It was made in response to Ms. Phoenix's May 13, 2019 application, which refers to both the DA and the FLA. In particular, the parts of the application seeking custody and child support specifically refer to the DA.
- [63] The June 17, 2019 Crossin Order, which was drafted by Ms. Phoenix's then counsel, does not refer to either statute. It specifies, however, that Ms. Phoenix has sole interim custody, and that child support is payable on an interim and without prejudice basis. The remaining terms are not stated to be either final or interim in nature.
- [64] I find that the Crossin Order was also made under the DA. Ms. Phoenix specifically relied upon that statute, at least with respect to custody and child support. Once again, any ambiguity will be resolved in favour of the paramount federal legislation. The custody and child support orders are explicitly stated to be interim (and in the case of the child support order, without prejudice). Given that the order as a whole was founded on the DA, and given that Crossin J. did not grant an order of divorce, it follows that the entirety of the Crossin Order is interim in nature.

What does the conclusion that the orders now in force are interim orders under the DA mean for the test for varying them?

- [65] The courts have considered the question of the test for varying interim orders under the DA on a number of occasions, and as the Court of Appeal stated in *Santelli v. Trinetti*, 2019 BCCA 319 at para. 123:
- [123] There is no provision in the Divorce Act to vary an interim order for corollary relief. Interim orders can only be varied pursuant to the court's inherent jurisdiction and in compelling circumstances: *Janmohamed v. Janmohamed*, 2014 BCSC 107 at para. 45. Under the FLA, a court may vary an interim order if there has been a change of circumstances or if there is evidence of a substantial nature that became available after the order was made: s. 216(3). The fact that variation applications are not easily pursued encourages parties who want to contest an interim order to wait to trial where the court can embark on an in-depth analysis of all of the circumstances to make a final order. This occurs frequently in trial courts.

[Emphasis added.]

- [66] There is good reason for the heavy onus placed upon a party seeking to vary an interim order for corollary relief made under the DA. As Madam Justice Martinson explained in *Hama v. Werbes* (1999), 2 R.F.L. (5th) 203 at paras. 9-10 (B.C.S.C. Chambers):

- [9] . . . too often family law disputes get bogged down on interim applications. Time and money that could be better used for other purposes are spent dealing with them. Interim applications can also "add fuel to the fire" in acrimonious disputes. This can be particularly detrimental to any children who are involved in the dispute. I noted that the remedy is to obtain an early and "final" resolution of the issues in dispute and that this will often require an early trial date.
- [10] I concluded that interim orders, once made, should only be varied when there is a compelling change of circumstances, such that one or both parties would be seriously prejudiced by waiting until trial.

[Emphasis added.]

- [67] I am confident both Mr. Phoenix and Ms. Phoenix want to achieve finality with respect to the matters in issue between them, including obtaining an order for divorce. Mr. Phoenix believed he was seeking final orders in his application. His application was filed under R. 10-6(3). However, under R. 10-11(1), final orders in a defended family law case can only be made after a trial, or by way of a summary trial in accordance with R. 11-3. This was not a summary trial, and I cannot make final orders on this application. I can only vary the interim orders made by Marchand J. and Crossin J., and that only if a compelling change in circumstances has been made out, such that a party would be seriously prejudiced by waiting until trial.
- [68] I will consider below whether circumstances have been established that demand any of the interim orders made to date be varied pending trial.

What is the most appropriate proceeding to resolve the matters in dispute?

- [69] As noted above, it is clear that these parties need a final resolution of all of the matters in dispute.
- [70] Rule 10-3(7)(d) gives the Court the power to order a trial of a chambers proceeding. That subrule reads:

Power of the court

- (7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may . . .
- (d) order a trial of the chambers proceeding, either generally or on an issue, and order a pleading to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.
- [71] In *C.M.R. v. L.F.R.*, 2019 BCCA 371 at paras. 14-16, the Court of Appeal considered the test for when a chambers matter should be moved to the trial list. Essentially, if the parties raise triable issues, then the matter should be moved to the trial list.

- [72] It is clear to me, having thoroughly reviewed the many voluminous affidavits filed to date by the parties, that the final resolution of the matters in issue between them cannot be done by way of affidavit evidence alone, as it would be in a summary trial. In order to resolve the credibility issues arising on the parties' evidence, especially as they relate to the issues around the separation agreement and custody and parenting arrangements for S., it will be necessary for the Court to hear from the parties, in person, under oath, and subject to cross-examination.
- [73] I am also persuaded that it is appropriate for me to seize myself of the case. This means that I will preside over the trial, and all related applications. This will be an efficient use of judicial resources, as I have already become very familiar with the issues and evidence filed to date by the parties, which will hopefully assist the parties by resolving the outstanding issues more quickly than would otherwise be the case.
- [74] I will therefore convene a judicial case conference with the parties as soon as possible, at which time a trial date will be set on the earliest reasonably available dates. I will conduct one or more trial management conferences with the parties in advance of the trial to address any issues about the conduct of the trial, and ensure that it can proceed fairly and efficiently. I will also preside over any pre-trial applications either party may make.

Consideration of Orders Sought by Mr. Phoenix

Custody and Parenting Time

- [75] Mr. Phoenix seeks an order whereby once S. completes school in 2021, she will live with him for a year, and alternate years with Ms. Phoenix.
- [76] In this regard, Mr. Phoenix seeks to vary the Crossin Order made June 17, 2019, which provided that Ms. Phoenix would have interim sole custody of S., to provide for joint custody.
- [77] He also seeks to remove the paragraphs of the Marchand Order that granted Ms. Phoenix's application to relocate to Ladysmith, and determined that S. will remain primarily with Ms. Phoenix.
- [78] Taken together, the substance of what Mr. Phoenix is seeking is that the parties would have joint custody of S., and S. would live alternating years with each of her parents. I take it to be Mr. Phoenix's position that this arrangement should be ordered on a final basis, although he did indicate that S. might be permitted to choose where she wished to live when she is older.
- [79] I have already stated that I am unable to make any final orders on this application. I have set out above the general principles that govern applications to vary interim orders made under the DA. There are also some special considerations that apply in respect of applications, such as this, to vary interim custody orders made under the DA.

- [80] Unlike an application to vary a final custody order, there is no requirement for a "material change in circumstance": *Javid v. Kurytnik*, 2006 BCCA 565 at para. 5, leave to appeal ref'd [2007] S.C.C.A. No. 80. Generally, it is not in the best interests of the child to change interim custody shortly before trial: *S.I.B. v. F.H.B.*, [1994] B.C.J. No. 2524 (S.C. Chambers). However, if there is destructive behaviour that may cause harm to the children, the court can change interim custody shortly before trial: *A.D.B. v. E.B.*, [1997] B.C.J. No. 227 (S.C.).
- [81] On the materials before me, I am not persuaded that there has been a compelling change of circumstances that would justify varying the current interim custody orders prior to trial. I am not persuaded that there is destructive behaviour on Ms. Phoenix's part that could harm S., or that S.'s best interests would otherwise be served by the current interim custody arrangements being altered, particularly in the dramatic fashion proposed by Mr. Phoenix. I have directed that a trial be held within as short a period of time as possible. The appropriate time to consider what the permanent custody arrangements should be for S. will be at that trial.
- [82] The same reasoning applies with respect to the current interim orders related to the summer, Christmas and spring break parenting times for Mr. Phoenix set out in paragraph 10 of the Marchand Order, as varied in paragraph 3 of the Crossin Order. They will remain in place pending trial.
- [83] Mr. Phoenix also sought to eliminate the requirement, established in paragraph 3 of the Crossin Order, that his parenting times be at all times supervised by Ms. Koocher or another person agreed to by the parties. In her application response, Ms. Phoenix did not agree that Mr. Phoenix's parenting time should no longer be supervised. She also indicated that she was no longer comfortable with Ms. Koocher performing this role; however, in her oral submissions, she moved away from this position, and indicated that while she believed supervision continued to be necessary, she would accept Ms. Koocher performing this role.
- [84] It is clear on the materials that Ms. Koocher has unfortunately found herself caught up in the conflict between the parties. However, I have no doubt that she is a loving grandmother to S., and as Ms. Phoenix acknowledged, S. loves Ms. Koocher dearly. She has been a stable presence in S.'s life and needs to remain so.
- [85] I am not prepared to disturb the current interim order requiring parenting times with Mr. Phoenix to be supervised by Ms. Koocher or another person agreed to by the parties. This is an area in which it will be necessary for the Court to hear evidence from the parties, and perhaps other witnesses, in order to determine whether supervision should be required in the final order.

Decision-Making Authority

- [86] Mr. Phoenix seeks to vary paragraph 2 of the Crossin Order, which varied paragraph 5 of the Marchand Order, to provide that the parties will have the obligation to discuss significant decisions regarding S. with each other, and to restore the obligation set out in paragraph 5 of the Marchand Order that they reach agreement on those decisions. He further wishes to have the order amended to provide that his father, Mr. Bill Koocher, shall not be given access to S. without Mr. Phoenix's approval.
- [87] Mr. Phoenix further seeks to have paragraph 6 of the Marchand Order, which provides that where the parties cannot reach agreement, Ms. Phoenix is entitled to make decisions, with Mr. Phoenix having the right to apply to court for directions, varied to provide that where the parties cannot reach agreement, both parties would have the right to apply to court for direction.
- [88] With the exception of Mr. Phoenix's request for an amendment pertaining to his father having access to S., I am not prepared to vary these interim orders in advance of trial. While Ms. Phoenix continues to have interim sole custody of S. pending trial, it is appropriate that she retain decision-making authority where the parties cannot agree on significant decisions. These matters should be considered in light of all of the evidence and in the context of whatever other final orders might be made.
- [89] I deal separately with Mr. Phoenix's request that he should be the one to decide if S. has contact with Mr. Koocher. Ms. Phoenix indicated in her application response that contact between S. and Mr. Koocher is "open for discussion." This is an issue that appears to have arisen since the Crossin Order, and I consider it appropriate for the Court to deal with it now, on an interim basis.
- [90] I agree with Mr. Phoenix that he is best placed, as Mr. Koocher's son, to make decisions about whether S. should have contact with Mr. Koocher. The evidence before the Court is that Mr. Phoenix has had a very troubled relationship with his father. It is not appropriate for Ms. Phoenix to unilaterally make decisions about whether Mr. Koocher should have contact with S. Therefore, I make an interim order that Mr. Phoenix will be entitled to make decisions about whether S. has contact with Mr. Koocher, with Ms. Phoenix having the right to apply to the Court should she not believe that Mr. Phoenix's decisions in this regard are in S.'s best interests.

Child Support

- [91] Mr. Phoenix requests an order that Ms. Phoenix file a Form 8. He also seeks an order varying paragraph 7 of the Crossin Order with respect to child support, which requires Mr. Phoenix to pay Ms. Phoenix \$550 per month, on an interim and without prejudice basis. It is not entirely clear from Mr. Phoenix's NOA how he wants this varied. I believe he seeks an order that during the school year he would continue to pay \$550 a month, but with no payments required during times S. is with him, for example, spring break. Assuming the year on/year

off custody arrangement was ordered, he would seek an order that no child support be payable. He also seeks to have the Crossin Order varied from the 70/30 split for special or extraordinary expenses for S. to a 50/50 split.

- [92] On the materials before me, neither party has filed a Form 8 for some time.
- [93] As I told the parties during the course of the hearing, they both need to file Form 8s to permit the Court to determine what child support is properly payable for S. In the absence of current Form 8s, the Court cannot make a final determination on child support or responsibility for special and extraordinary expenses.
- [94] I therefore order both parties to file and serve complete Form 8s, with all required documents attached, within 30 days of the date of this judgment.
- [95] Mr. Phoenix has not established any basis upon which I would vary the current interim and without prejudice order relating to child support or the current interim order relating to special and extraordinary expenses. The lack of a current filed Form 8 from Mr. Phoenix makes it impossible for me to determine if a different amount of child support or contribution to special and extraordinary expenses would be appropriate.

Divorce

- [96] Mr. Phoenix has requested an order for divorce. I cannot make a final order for divorce on this application. Further, under s. 11(1)(b) of the DA, it is the duty of the Court:
- (b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made;
- [97] The Court will be in a position to grant a divorce upon making a final order for child support after trial.

Other Orders Sought

- [98] Mr. Phoenix sought an order that Ms. Phoenix pay a fine of \$1,000 for contempt of court. On the materials before me, Mr. Phoenix has failed to establish any basis for finding Ms. Phoenix in contempt, and I therefore decline to make such an order.
- [99] Mr. Phoenix also sought an order that Ms. Phoenix take a course on parental alienation and attend counselling. I am not able on the basis of the conflicting affidavits before me to make any finding with respect to Mr. Phoenix's allegations that Ms. Phoenix has engaged in parental alienation or that she requires education or counselling. Mr. Phoenix may pursue these issues at trial, should he wish to do so.

[100] For the same reasons, I am not prepared to grant any of the other variations or orders requested by Mr. Phoenix. All remaining issues should be addressed at trial so that final orders, if appropriate, can be made.

Best Interests of S.

[101] I wish to remind the parties that it is their obligation, as it is the Court's, to make decisions regarding S. solely in her best interests. The materials before me make clear that the parties have at times had difficulties putting aside the conflict and ill will between them to focus on S.'s best interests.

[102] S.'s best interests will be served by Mr. Phoenix and Ms. Phoenix engaging in respectful communications with one another at all times, and in facilitating each other's active participation in S.'s life, including through cooperating in the facilitation of telephone and video calls with S. This is especially important given the distance the parties live from one another. It is not necessary to vary the interim orders contained in the Marchand and Crossin Orders to accomplish this end--what is necessary is that both parties comply with the orders, in both letter and spirit.

[103] The Marchand Order includes the following:

13. Mr. Phoenix and Mr. Phoenix will: (a) put the best interests of S. before their own interests; (b) encourage S. to have a good relationship with the other parent and speak to S. about the other parent and that parent's partner in a positive and respectful manner; (c) make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument especially in front of S.
14. Ms. Phoenix and Mr. Phoenix will not: (a) question S. about the other parent or time spent with the other parent beyond simple conversational questions; (b) discuss with S. any inappropriate adult, court, or legal matters; or (c) blame, criticize or disparage the other parent to S.

[104] Paragraph 10 of the Marchand Order as varied by paragraph 3 of the Crossin Order provides that Mr. Phoenix will have "[l]iberal and generous electronic communications via telephone, Skype, and/or Facetime at reasonable times to be agreed upon by the parties".

[105] Phone and video calls between S. and the parent she is not currently with have been a recurring issue between the parties. I have considered making additional interim orders setting a schedule for electronic communications between S. and the parent she is not currently with, and explored that with the parties during the hearing. They both told me that more recently, they had been dealing with these issues better, taking a more flexible approach.

- [106] I think it is important to encourage the parties to continue to work these issues out between themselves, taking into account that electronic communications should be liberal and generous, and at reasonable times to be agreed upon between them. There is no room here for a unilateral or inflexible approach by either party, and S.'s best interests must guide their mutual decisions about facilitating electronic communications with the other party.
- [107] If significant issues occur prior to trial with respect to phone and video calls with S., either party may file an application for further interim orders to address these issues.
- [108] Until all matters in issue can be finally decided after trial, it is imperative that both parties comply with the existing interim orders, including the obligations just referred to.

Conclusion

- [109] In summary, I have not varied the existing orders, which I have found to be interim orders under the DA. The Marchand Order, as varied by the Crossin Order, will remain in place pending trial.
- [110] I have made an additional interim order that Mr. Phoenix will be entitled to make decisions about whether S. has contact with Mr. Koocher, with Ms. Phoenix having the right to apply to the Court should she not believe that Mr. Phoenix's decisions in this regard are in S.'s best interests.
- [111] I have ordered both parties to file and serve completed Form 8s, with all required documents attached, within 30 days of the date of this judgment.
- [112] I have ordered that this matter be transferred to the trial list. I will convene a JCC with the parties as soon as possible to schedule a trial on the earliest reasonably available dates.
- [113] I have seized myself of this case, and will preside over the trial, any pre-trial applications and trial management conferences.
- [114] Costs of this application will be in the cause.
- [115] Should the parties require any further directions pursuant to this judgment and the orders I have made, they may contact Kelowna Supreme Court Scheduling to request to appear before me.

"Lyster J."

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