

CANADA / JUDGMENT

## R.A.G. v. T.A.I.D.

2023 BCSC 179

### COURT

Supreme Court of British Columbia

### DECIDED

8 February 2023

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2023 BCSC 179 R.A.G. v. T.A.I.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.A.G. v. T.A.I.D.,

2023 BCSC 179

Date: 20230208

Docket: E104666

Registry: Victoria

Between:

R.A.G.

Claimant

And

T.A.I.D.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph136 on June 2, 2023.

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

The Claimant, appearing in person:

R.A.G.

The Respondent, appearing in person:

T.A.I.D.

Place and Dates of Trial:

Victoria, B.C.

January 17-20, 23-25, 2023

Place and Date of Judgment:

Victoria, B.C.

February 8, 2023

Table of Contents

I. INTRODUCTION.. 4

II. FACTS. 4

A. Background Facts. 4

B. Procedural History. 6

III. ISSUES. 8

IV. CHANGE IN MATERIAL CIRCUMSTANCES. 9

A. Law.. 9

B. Analysis and Determination. 10

V. PARENTING TIME. 11

A. The Law.. 11

B. Parties' Positions. 12

1. Agreement on Holiday Parenting Time and Communications. 12

2. Parenting Time Arrangement During the School Year 14

C. Analysis and Determination. 15

1. Evidence Supporting Equal Parenting Time 17

2. The Respondent's Concerns About Equal Parenting Time. 21

VI. FINANCIAL ISSUES. 24

VII. CHILD SUPPORT. 25

A. Retroactive Child Support 25

1. Parties' Positions. 25

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|       |                                              |    |
|-------|----------------------------------------------|----|
| 2.    | Analysis and Determination.                  | 27 |
| B.    | Future Child Support                         | 33 |
| 1.    | Analysis and Determination.                  | 33 |
| VIII. | SPECIAL AND EXTRAORDINARY EXPENSES.          | 34 |
| A.    | Law..                                        | 34 |
| B.    | Parties' Positions.                          | 35 |
| C.    | Analysis and Determination.                  | 37 |
| 1.    | Private School                               | 37 |
| 2.    | Summary of Financial Obligations.            | 43 |
| IX.   | PAYMENT FOR THE HEAR THE CHILD REPORT.       | 45 |
| A.    | Parties' Positions.                          | 45 |
| B.    | Determination.                               | 46 |
| X.    | ORDER..                                      | 46 |
| A.    | General                                      | 46 |
| B.    | Non-Holiday Parenting Time.                  | 47 |
| C.    | Decision Making, Passport and Communication. | 47 |
| D.    | Holiday Parenting Schedule.                  | 47 |
| E.    | Child Support and Section 7 Expenses.        | 49 |
| F.    | Additional Section 7 Expenses.               | 49 |
| G.    | Exchange of Financial Information.           | 49 |
| H.    | Conduct Orders.                              | 50 |
| I.    | Other Issues.                                | 50 |
| XI.   | COSTS.                                       | 50 |
| XII.  | CONCLUSION..                                 | 51 |

## I. INTRODUCTION

- [1] The claimant, R.A.G., and the respondent, T.A.I.D., are highly intelligent academics who have unfortunately been locked in acrimonious litigation for over a decade. While this seven-day trial included issues regarding retroactive and prospective child support and special and extraordinary expenses, the essence of the dispute is whether the parties should have shared parenting time of their 15-year-old son, J.A.G. Currently, J.A.G. primarily resides with his mother, the respondent.
- [2] For the sake of J.A.G.'s privacy I have initialized his name and the names of the parties. I will refer to R.A.G. as the claimant or "father" and T.A.I.D. as the respondent or "mother". I have been intentionally vague regarding certain information that might easily identify the parties or J.A.G.

## II. FACTS

### A. Background Facts

- [3] The parties are both decorated academics with graduate degrees. The respondent holds two Master's degrees from prestigious universities and the claimant has a doctorate. They have held teaching and administrative roles at post-secondary institutions for decades. The parties met in 2006 at a conference organized by the respondent. At that time, the claimant was living and working in California and the respondent was living and working in Victoria. They both wanted to have a child and did so, having J.A.G. in late 2007.
- [4] The parties lived together in Victoria at the respondent's house from 2007 to 2009, but the relationship between them proved difficult from an early stage. Given this friction, the claimant left Victoria to take a job in Calgary and the respondent and J.A.G. remained in Victoria. In or around June 2010, in an attempt to reconcile, the respondent sold her house in Victoria and moved with J.A.G. to be with the claimant in Calgary. Unfortunately, the reconciliation was ill-fated and the respondent left Calgary with J.A.G. in November 2010.
- [5] Both parties testified as to the circumstances of the respondent's leaving Calgary. It appears common ground that the respondent and J.A.G. left Calgary abruptly while the claimant was away at a conference. The respondent informed the claimant of her departure with their son by leaving the claimant a note. The claimant testified that he was completely surprised by the departure. The respondent testified that given the level of conflict between the parties, her leaving with J.A.G. was inevitable.
- [6] In any event, this incident was clearly traumatic for both parties. The respondent testified that she had no choice but to leave Calgary because she felt she and J.A.G. were in a situation of emotional abuse and isolation. The claimant testified he was devastated by the respondent's sudden and unexpected departure and the loss of contact with J.A.G. I mention this event in some detail because, in my view, it likely set the stage for the ongoing conflict and trust issues between the parties throughout their decade of litigation.

- [7] After the respondent and J.A.G. left Calgary, the claimant exercised weekend parenting time with J.A.G. by travelling to Victoria on the weekends. The parties shared parenting time on J.A.G.'s school holidays and during summer. As will be described below, the claimant paid child support to the respondent. The monthly amount the claimant paid was reduced from the amount set out in the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines], to account for the additional expenses he incurred exercising his weekend parenting time.
- [8] In 2013, the claimant moved from Calgary to Vancouver to take a high-level administrative position at a university. He continued to have weekend parenting time with J.A.G. and rented accommodation in Victoria for that purpose. The parties continued to share parenting time during J.A.G.'s school holidays, including the summer.
- [9] In November 2017, due to organizational restructuring, the claimant lost his job in Vancouver. He was provided severance and moved to Victoria where he currently resides. The claimant found employment, albeit at a lower salary than his work in Vancouver, as an administrator for a college in Victoria. The respondent continues to be a university professor in Victoria.
- [10] J.A.G. is now 15 years old. He is currently enrolled in grade ten at a private school in Victoria. He has attended the same private school since 2011, when he began kindergarten. The respondent has primary care of J.A.G. and the claimant exercises parenting time on the weekends and on Wednesday evenings. The respondent pays for all expenses related to J.A.G.'s private school education. She does so because the claimant is opposed to private school on principle, did not want J.A.G. to attend private school, and did not want to fund private school education with his income.
- [11] J.A.G. has, by all accounts, suffered greatly from the conflict between his parents. While he is doing exceedingly well at school and achieving high marks, there was extensive evidence placed before the court that J.A.G. feels caught in the middle of his parents' conflict. J.A.G. has received counselling, but it is clear that despite his high achievement at school, the conflict and tension between his parents has impacted J.A.G.
- [12] The respondent owns her house in Victoria. She currently earns \$175,838 annually. She testified that she has incurred over \$220,000 in legal fees during this litigation. The claimant rents a house in Victoria. He currently earns \$139,639. The claimant testified that he has also incurred significant legal fees related to this proceeding.

## B. Procedural History

- [13] This matter has a long legal history with many applications and dozens of affidavits. Both parties have expended time, energy, and great sums of money in pursuing their interests through the courts. Given the lengthy procedural history, I will only describe the previous court proceedings I find relevant to the issues before me.
- [14] The claimant filed the notice of family claim on November 17, 2010.

[15] The most significant order in this matter is the consent order of Mr. Justice Johnston made on May 31, 2013 (the "2013 Johnson J. Order"). The 2013 Johnston J. Order included the following terms with respect to child support:

- the claimant will pay child support based on his income as calculated under the Guidelines. However, the applicable Guidelines income was reduced by \$400 per month to account for the fact that the claimant was exercising his weekend parenting time in Victoria despite living in Calgary at the time, requiring him to incur travel and accommodation expenses. The result was a monthly child support obligation of \$900.

- In July of each year, either party will have the right to seek, by no later than September 30 of that year, a review of the amount of child support that the claimant should pay based on the table amount of his then-current Guidelines income. Any change in the child support shall be retroactive to July 1 of the year of the review. If the review is not sought by September 30 of any year, then there shall be no variation for that year.

[16] The 2013 Johnston J. Order also contained the following terms regarding parenting decisions concerning education and activities, and expenses:

- The respondent will have parental responsibility for any and all educational decisions that are required and she will not make any of those major decisions without first notifying the claimant. If the respondent determines that private school education is appropriate, then she will pay for the costs of tuition, registration, after-school care and uniforms and all other expenses, excluding any expense for the claimant to attend any activities and excluding expenses for activities that the claimant has chosen for J.A.G. to attend.

- The parties shall each be solely responsible for the fees and associated costs of the activities that he or she offers to or chooses for J.A.G., unless they agree in advance to share the costs. This includes those additional fees, over and above school fees, that would normally and reasonably be charged for extra-curricular activities at any school. All of the costs that are agreed upon shall be shared equally by the claimant and the respondent.

- All extraordinary expenses that the parties agree to in advance shall be shared equally between the parties.

[17] On August 14, 2015, Mr. Justice Bracken varied the 2013 Johnston J. Order (the "2015 Bracken J. Order"). Mr. Justice Bracken varied the claimant's child support obligation from \$900 to \$1,035, based on the claimant's new higher income when he moved to Vancouver from Calgary. Mr. Justice Bracken determined that under the Guidelines, the claimant would be required to pay \$1,435 each month. However, Bracken J. applied a \$400 monthly reduction of child support to account for the expenses the claimant incurred because he was exercising his parenting time in Victoria while living in Vancouver.

[18] The parties have generally been operating under the terms of the 2013 Johnston J. Order and 2015 Bracken J. Order for the past 7 years.

[19] There have been several other court applications regarding holiday parenting times, travel with J.A.G., and the necessity of obtaining a Needs of the Child report under s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. An additional application concerned a subsequent change of the s. 211 report to a Hear the Child report. I will not go into detail regarding all of the other various court applications, other than to observe that the litigation between the parties has been contested, expensive, and prolonged.

### III. ISSUES

[20] There are five primary issues before the court:

- Whether parenting time arrangement should be varied to allow the parties equal parenting time of J.A.G.;
- Whether there are retroactive and prospective child support amounts owing and, if so, in what amount;
- Whether there are retroactive and prospective special and extraordinary expenses owing and, if so, in what amount;
- The amount of and mechanism to quantify special and extraordinary expenses, including whether the claimant should be responsible for expenses related to J.A.G.'s private school education; and
- Whether the respondent should be required to reimburse the claimant for half of the cost of the Hear the Child Report prepared for this trial on August 12, 2022, by Leanne Toews (the "Hear the Child Report") in the amount of \$2,361.53, being half of the total cost of \$4,723.05.

[21] I will address each issue in turn below. However, I will first consider whether there is a material change in circumstances such that I am able to vary the terms of the previous orders issued in these proceedings regarding parenting arrangements.

### IV. CHANGE IN MATERIAL CIRCUMSTANCES

#### A. Law

- [22] Pursuant to s. 47 of the FLA, the court may change, suspend or terminate an order respecting parenting arrangements if the court is satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.
- [23] The requirement for a change in circumstances sets a threshold that must be met before an application can proceed on its merits: *Williamson v. Williamson*, 2016 BCCA 87 at para. 34.
- [24] Specifically, the court must determine whether there has been a material change in the circumstances since the making of the prior order. Change alone will not suffice. Instead, at the threshold stage, the court must be satisfied that: (1) a change has occurred in the condition, means, needs or circumstances of the child and/or the ability of the parents to

meet the child's needs; (2) the change has materially affected the child; and (3) the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. A material change is one that alters the needs of the child or ability of the parents in a fundamental way, and must be a distinct departure from what the court could have foreseen. See *Williamson* at paras. 32-33, citing *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 1996 CanLII 191 at paras. 11-13.

- [25] To reiterate, only if the above requirement is met can the court proceed to consider whether the best interests of the child warrant a variation of the existing parenting arrangement.

## B. Analysis and Determination

- [26] There appears to be general agreement between the parties that the change in circumstance in this case occurred when the claimant moved from Vancouver to Victoria in November 2017.
- [27] I accept that the claimant's move to Victoria in late 2017 constitutes a material change in circumstances from the 2013 Johnston J. Order and the 2015 Bracken J. Order. I have no hesitation concluding that the ability of the claimant to meet the needs of J.A.G. changed when he moved to Victoria. Further, I conclude that J.A.G. is now 15 years old and, as set forth in the Hear the Child Report, has expressed his views regarding parenting arrangements. This information is new to the court and also supports a finding that there has been a material change. Given the foregoing, I am persuaded that there is a material change in circumstances that satisfies the first stage of the analysis under s. 47 of the FLA.

## V. PARENTING TIME

### A. The Law

- [28] Section 37 of the FLA instructs that, when deciding questions of parenting arrangements, the court must only consider the best interests of the child, with reference to several non-exhaustive factors:

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.

## B. Parties' Positions

[29] During the course of the trial, the parties came to an agreement regarding holiday parenting time and J.A.G.'s ability to contact the off-duty parent during the on-duty parent's parenting time. As such, before I address the parties' positions in respect of the issue of shared parenting during the school year, I will set out the terms of the agreement they reached during the trial.

[30] Before doing so, I wish to commend the parties for their cooperation in resolving some of the parenting issues on their own accord. In my view, it demonstrates a positive step in cooperation between the parties that hopefully will be carried forward to future parenting decisions respecting J.A.G.

### 1. Agreement on Holiday Parenting Time and Communications

[31] The consent agreement achieved at trial was reduced to writing, provided to the court, and read into the record. The parties agreed to the following arrangements:

There will be no change in the Johnston Order of 2013 regarding final say over education and medical decision-making. The respondent will retain these rights.

There will be no change in the order regarding who keeps J.A.G.'s passport. The respondent will retain the passport.

The order regarding required Skype access on Wednesdays and Saturdays will be set aside. There will be no court ordered Skype/phone access.

J.A.G. can communicate with either parent at will whenever and however he wishes, excepting:

During pre-determined special events (e.g. planned family events); and

During school time. Calls will be discouraged by either parent after 9:30 p.m. on nights before school.

#### Holidays - Summer

Per the existing order, the summer holidays will be divided equally.

The summer will be divided in the following way: 3 weeks, 3 weeks, half the remainder, half the remainder.

Each year, the first period will alternate with the claimant having the first 3 weeks in 2023.

Travel by J.A.G. on his own or with friends in the summer will be supported. Each parent will have final say as to whether J.A.G. may travel in their parenting time.

Where a trip is proposed by J.A.G. across the parenting periods, the parents will be open to considering it.

#### Winter Holidays (Christmas Break)

The winter holidays will be split equally per the existing order.

Christmas (December 25) and birthday (December 21) fall in the first half and will alternate between the parents with the claimant having Christmas and birthday (first half) in 2023.

#### Spring and Easter Holidays

Spring and Easter holidays will be split equally. Parents will alternate the first and second half, with the claimant having the first half in 2023.

For both Christmas and spring holidays the same rule applies to J.A.G.'s travel with friends, with the remaining time split equally between the parents.

[32] These arrangements agreed to by the parties during the trial do not appear to be a drastic departure from the current holiday schedule. However, as I understand the agreement, it provides the parties with more clarity regarding the mechanics of dividing the shared time during J.A.G.'s holidays. It also recognizes that given J.A.G. is now a teenager, he may wish to spend some of his holidays with friends.

- [33] The other aspect of the consent order is its elimination of the rigid structure through which J.A.G. was to contact the off-duty parent during the on-duty parent's parenting time. The evidence before me demonstrated that the rigidity of these calls was a source of conflict and stress between the parties. Namely, the inflexible prior arrangement caused distress for the off-duty parent if calls were missed during the proscribed time, as well as distress for the on-duty parent if a specific call time was scheduled to occur during an event with J.A.G.
- [34] Although perhaps it is unproductive to recount past grievances between the parties, one example of parental conflict over communications with J.A.G. received particular attention at trial. The incident concerned the claimant's insistence on a phone call with J.A.G. while the respondent and J.A.G. were on a holiday bicycle ride in Paris. The event distressed the claimant because he felt he was unable to speak with J.A.G. during this time and to share J.A.G.'s experience in Europe. The event distressed the respondent because she was unable to enjoy a special holiday experience in peace with her son. While there might be an element of justified grievance on each side of this dispute, the result is a profoundly negative and stressful interaction for both parties, with related impacts on J.A.G. I emphasize that such conflict is not in J.A.G.'s best interest.
- [35] All this is to say that I view the movement away from rigid call times as a positive development in this matter that advances the best interests of J.A.G. It is my hope that this step towards increased flexibility demonstrates that the parties are moving towards reducing stress and conflict between them.

## 2. Parenting Time Arrangement During the School Year

- [36] The main point of contention between the parties is whether the claimant should have equal parenting time during the school year. In my view, this is the genesis of most of the conflict in this matter. Put simply, the claimant, since moving to Victoria in November 2017, believes it is in J.A.G.'s best interest that parenting time be shared equally between the parents. The respondent disagrees.
- [37] The claimant asserts that all of the evidence at trial supports a finding that J.A.G. wants more time with his father and is asking for a shared parenting arrangement. The claimant points to the Hear the Child Report and the testimony of J.A.G.'s family physician, Dr. Govender, about what J.A.G. expressed to him.
- [38] The respondent's position on equal parenting time is nuanced. She says she is not opposed to eventually having equal parenting time. However, she is concerned that providing the claimant too much parenting time will be damaging to J.A.G. based on her view that the claimant has a history of exhibiting anger, emotional abuse, and coercive control. The respondent seeks conduct orders from the court that would require the claimant to take counselling, undergo psychological assessments, treat his anger issues, and take courses related to shared parenting. She submits that if he successfully completes those steps, there could be a graduated move toward equal parenting time. In essence, the respondent says that the claimant's additional parenting time should be conditional on him following

conduct orders for a period of time.

- [39] The respondent acknowledges that J.A.G. feels that he is put in the middle of his parents' conflict, but says that this is largely because the claimant discusses the conflict between the parties, including the litigation, with J.A.G. As well, the respondent says she accepts that J.A.G. has expressed his desire to spend more time with the claimant and that the Hear the Child Report is an accurate recitation of J.A.G.'s views. However, the respondent submits the court should approach the Hear the Child Report with caution because she alleges that J.A.G. has been coached by the claimant to want to spend more time with his father, and to say whatever he needs to in order to achieve that goal.
- [40] The respondent says she has experienced the claimant's behaviour of coercive control. She points to past litigation and threats of litigation, financial tactics such as refusing to pay for J.A.G.'s expenses, and the claimant blocking the respondent's ability to travel freely with J.A.G. as examples of coercive control exercised by the claimant over her and J.A.G.
- [41] The respondent says s. 37(2)(g) and (h) of the FLA requires the court to consider family violence when determining parenting arrangements. She also notes that, when considering the best interests of the child, a court must consider, among other things, whether psychological or emotional abuse constitutes a pattern of coercive and controlling behaviour directed at a family member: see FLA s. 38(d).
- [42] In respect of the allegations of family violence, the claimant repeatedly and unequivocally testified that he has never engaged in family violence. He asserts that there is simply no evidence of family violence before the court and that the respondent's claims of family violence against the claimant have no basis.

### C. Analysis and Determination

- [43] As with many family law cases, while both parents truly want the best for their child, each have very different views of how that should be achieved. In this case, the respondent believes that her son's stress is caused by the claimant putting J.A.G. in the middle of his parents and expressing anger. The claimant believes that the stress experienced by J.A.G. arises because J.A.G. wants to spend more time with his father in an equal parenting time arrangement, and because J.A.G.'s wishes are continually ignored by the respondent. In short, both parties agree that the current situation is not in J.A.G.'s best interest because it is detrimental to his well-being, but disagree as to the cause of the stress and therefore propose different solutions.
- [44] A change in the current parenting time arrangement is required and is in J.A.G.'s best interest. In determining what that change should be, I must be guided by the evidence. As I will explain below, I conclude that the evidence before me overwhelmingly supports a finding that it is in J.A.G.'s best interests to vary the parenting time arrangement so that the respondent and the claimant have equal parenting time alternating each week, with the exchange of J.A.G. occurring on Friday after school or otherwise as agreed to in writing by

the parties.

- [45] In my view, the major source of the stress in J.A.G.'s life, which also manifests itself as greater stress and acrimony between the parties, is the lack of equal parenting time.
- [46] I note, for instance, that the claimant testified that he believes J.A.G. wants to have more time with him, and that the claimant continues to pursue litigation because to not do so would not be honouring J.A.G.'s wishes. In other words, the litigation, at least since the claimant's move to Victoria in late 2017, appears to be largely driven by the claimant's desire, which he believes is shared by J.A.G., to have more parenting time.
- [47] The lack of equal parenting time also, as will be discussed below, appears to result in additional financial friction between the parties. In particular, it results in the respondent being required to pay more of the day-to-day expenses for J.A.G. and not being reimbursed for those expenses, often because she finds it ineffective to ask for reimbursement due to her conflict with the claimant. With shared parenting time, the claimant will be required to pay more daily expenses for J.A.G. during his parenting time, thus reducing some potential for additional conflict between the parties. I am hopeful that facilitating a reduction in conflict between his parents will likely contribute to ensuring J.A.G.'s best interests are served.
- [48] That said, I remain mindful that the task of the court in this matter is not to improve the parties' relationship. Although it is certainly better for children like J.A.G. if their parents are able to cooperate, the court must address the best interests of the child in their current circumstances. See *Harrison v. Haramati*, 2022 BCCA 302 at para. 29.
- [49] As such, I will now turn to the evidence in this case that I find establishes that an equal parenting time arrangement is in J.A.G.'s best interests.

#### 1. Evidence Supporting Equal Parenting Time

- [50] J.A.G. did not testify at the trial and, as such, his views, as expressed through the testimony of the witnesses, their documents, and the Hear the Child Report, are hearsay. Section 202 of the FLA allows a court to accept reliable hearsay evidence from a child:

202 In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:

- (a) admit hearsay evidence it considers reliable of a child who is absent;

- [51] I accept the evidence in the Hear the Child Report as reliable. Ms. Toews, the author of the report, is qualified in preparing reports of this nature. I accept that she has accurately captured J.A.G.'s views, expressed in a neutral manner. I am aware that in determining parenting arrangements, the views of the child are not determinative. However, I note the guidance on this point from our Court of Appeal in *Rupertus v. Rupertus*, 2012 BCCA 426 at para. 13, remaining mindful that in that case the court dealt with judicial interviews of children and not Hear the Child reports:

It is not uncommon for a judge attempting to resolve difficult issues of custody and access to speak alone with the children who are involved. Generally, what they have to say is not determinative, but it may provide the judge with context in which to understand better the whole of the evidence that must be weighed. (See generally, *L.E.G. v. A.G.*, 2002 BCSC 1455.)

[52] Further, J.A.G. is now 15 years old. Based upon the testimony of his parents, his high academic marks, and how he expressed his answers to Ms. Toews in the Hear the Child Report, I accept he is intelligent and thoughtful about his current circumstances and his wish for change.

[53] I accept the content of the Hear the Child Report as reliable. The Hear the Child Report contains many comments by J.A.G. indicating that he wants both parents to have equal parenting time. I note that J.A.G. makes no statements in the Report that he wants the status quo to continue or to have more parenting time with one parent. I reproduce the following statements made by J.A.G. in the Hear the Child Report which I find particularly persuasive in respect of his wishes for equal parenting time:

When asked about how the current living arrangements are working for him, [J.A.G.] replied "it's not enough, I wish it was...I was...I was with him more, I'm...I'm definitely happier with him so I wish I was that happy more of the time, fair enough?". He went on to say "yeah, as is going right now, I'm living, I'm alive, its fine but I just...it's just something that I wanted for a while, and even though you know. I'm surviving its fine I just...I wish it was different, because it doesn't feel fair that I'm living most of my life with somebody who I don't want to be like and less of my life with somebody who I do want to be like, and that seems dumb to me...always has".

When asked about how [J.A.G.] would like to share time between his Mother's house and his Father's house, he said "fifty-fifty [50/50], I would want to have half time with both of them so that I could learn from both of them, and so that it...ideally like week-off week-on, so that I would be able to live with both of them".

the schedule we have now for summer is fine, so the schedules for breaks are totally cool they way are [sic], in fact, they're basically how I want it to work anyway, which is except longer, right, because its equal time during the breaks.

[54] I accept that the above evidence of J.A.G. is that he desires equal parenting time with each parent. I have considered the respondent's concerns that J.A.G. has been coached by the claimant. However, in my view, there is no evidence to support her assertions that the claimant coached J.A.G. to answer in specific ways. Further, when asked by Ms. Toews about whether each parent encourages J.A.G. to spend time with the other parent, J.A.G. answered, "let's put it this way; he [the claimant] doesn't actively encourage me to hang, to hang out with my Mom, but he doesn't actively discourage it, and my Mom does actively discourage it [spending time with his Father]". In my view, this evidence goes some way to counter the respondent's argument that the claimant is attempting to influence J.A.G.'s choices regarding parenting time arrangements.

[55] The Hear the Child Report also describes J.A.G.'s view that the respondent is less encouraging of J.A.G.'s relationship with the claimant than the claimant is of J.A.G.'s relationship with the respondent. The Hear the Child Report expresses it as follows:

and then she always gets really tense and I kinda wish she didn't do that, 'cause if.. I understand why she does, 'cause she hates him with every fibre of her being, even though she'll deny it, it, it's just that I don't, I don't like not being able to talk about my Dad just 'cause it makes her feel sad, which, I mean, fair enough, I guess, but, I don't know, I don't like it, 'cause my Dad doesn't do that when I bring up my Mom, he just, he doesn't change anything, it just,..he's okay about, he's, he's okay talking about her under all normal circumstances, but she's not...when I- when I bring up my Dad, she gets, you know, huffy and kind of tense and that kinda thing, and I wish she didn't do that.

[56] These statements by J.A.G. also undermine the respondent's assertions that the claimant is coaching J.A.G. to be less supportive of his mother. If anything, the report demonstrates that J.A.G. perceives that the respondent does not make efforts to foster the relationship between J.A.G. and the claimant.

[57] I have also considered the respondent's assertion that the Hear the Child Report interview might be skewed because it was done immediately after J.A.G. spent three weeks with the claimant during the summer. I do not find this submission persuasive. Indeed, an alternate argument is that the reliability of the Hear the Child Report - and in particular those aspects of the report indicating that J.A.G. wishes to spend more time with his father - is enhanced after a longer stay with his father as opposed to just a weekend visit.

[58] I also find that the information presented by J.A.G. in the Hear the Child Report is corroborated by what J.A.G. told Dr. Govender during J.A.G.'s medical appointments. In my view, the testimony of Dr. Govender corroborates J.A.G.'s statements to Ms. Toews in that both express J.A.G.'s consistent position of his desire to have more time with his father.

[59] I also accept as reliable the hearsay evidence presented by Dr. Govender regarding what he was told by J.A.G. during their visits. Dr. Govender struck me as an unbiased witness who expressed genuine concern for J.A.G.'s well-being. I note that he was called as a witness for the respondent, but was critical of the behaviour of both parents. I also note that his evidence was that J.A.G. told him that J.A.G. supports the claimant's position for equal parenting. Dr. Govender was clear that J.A.G. has expressed to him that J.A.G. feels like he is in a "tug of war" between his parents. Perhaps the most compelling testimony from Dr. Govender was that when he asked J.A.G. what J.A.G. would do if he had a magic wand to change his circumstances, J.A.G. answered, "have equal parenting time with my parents."

- [60] Section 37(3) of the FLA provides guidance that a parenting arrangement 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. In my view, having regard for the totality of the evidence regarding J.A.G.'s circumstances, shared and equal parenting would best protect J.A.G.'s physical, psychological, and emotional needs.
- [61] With respect to s. 37(3) of the FLA, I have considered the respondent's concerns about the claimant's fitness as a parent, and in particular her allegations that the claimant has anger issues and engages in coercively controlling behaviour. I will discuss these claims in greater detail below, but generally find that the respondent's concerns are undermined by two factors. First, other than the respondent's own testimony, I find no additional evidence to support her claims. Indeed, her concerns about the claimant's parenting seem to be contradicted by J.A.G.'s own positive reporting of his experiences with his father, as expressed in the Hear the Child Report. Second, the present parenting arrangement has been in place for some time. That arrangement provides for essentially equal parenting time during the summer, winter, and spring holidays, as well as weekend and Wednesday parenting by the claimant. During trial, the respondent also consented to providing additional flexibility to the holiday parenting arrangement. To my mind, the fact that, for years, the respondent has not challenged a parenting arrangement that provides equal parenting for large portions of the year, including the prolonged summer school break, undermines the seriousness of her concern.
- [62] In sum, given J.A.G.'s wishes to have equal parenting time and my finding that the majority of the stress J.A.G. experiences is caused by the unequal division of parenting time, it is in J.A.G.'s best interests to have equal parenting time with each parent.
2. The Respondent's Concerns About Equal Parenting Time
- [63] My conclusion that the parties should share parenting time of J.A.G. is in no way an indictment of the respondent's parenting ability. It was clear on the evidence before me that she deeply cares for and wants the best for J.A.G., and makes many sacrifices she views are in the best interest of J.A.G. By all accounts, including by the claimant, the respondent is an excellent mother.
- [64] Equal parenting time reflects and respects the wishes of J.A.G. to spend more time with his father. In my view, the evidence indicates that much if not all of the tension between the parties, and J.A.G.'s feeling that he is caught in his parents conflict, is a result of the unequal division of parenting time. It is my sincere hope that by ordering that the parties will have equal parenting time, the stress on J.A.G. and the parties will lessen.
- [65] As well, although the respondent expressed deep concerns of the claimant's anger issues and his coercive control of J.A.G., as mentioned above, I did not see evidence of such behaviour.

- [66] However, I will discuss one incident testified to by both parties because, like the event previously described concerning the Paris phone call, it may be illustrative of the conflict and perceptions of the parties, and their impact on each other. I reference the incident in the hopes that the parties might learn from the damage that non-cooperative behaviour can cause.
- [67] In 2021, the respondent was told that her father's death was imminent. Her family lives in England and so the respondent had to make urgent arrangements to fly to the United Kingdom. The respondent testified that J.A.G. and his grandfather were close and it was important for the respondent and the family that J.A.G. travel with the respondent to see his grandfather and to attend the funeral.
- [68] The claimant was concerned that the return date in the flight itinerary provided to him by the respondent would mean that J.A.G. would be unable to participate in a school musical. The respondent provided a travel authorization that met the claimant's demand for the return date for J.A.G., but was unable to provide an updated flight itinerary with the revised date. The claimant testified that, on the advice of his lawyer, he would not sign the travel authorization form. As a result, the respondent travelled to England without J.A.G. While she was able to see her father and say her goodbyes before he passed away, J.A.G. was unable to do so and was unable to attend the funeral. Justifiably, in my view, the claimant's lack of flexibility and cooperation to allow J.A.G. to travel to England caused a great deal of anger, stress, and sadness for the respondent, and the potential for future regret for J.A.G. as he ages.
- [69] The claimant testified that he had concerns that the respondent would not honour the travel authorization because the flight itinerary had a later date. He says that he was driven by his concern that J.A.G. would not be able to participate in the school musical, which he understood was important to J.A.G.
- [70] In my view, this event provides an example of an instance where each party thinks their actions are taken in the best interests of J.A.G., but fail to realize that the actions also have negative consequences. The claimant's decision to prevent J.A.G. from seeing his grandfather before his death and attending the funeral was incredibly damaging to the relationship between the claimant and the respondent. Clearly, the event was traumatic and unexpected for the respondent, as she had very short notice of the critical health of her father. She testified she was under great stress booking bereavement flights and arranging for a leave from work. While the claimant might have been technically correct to demand proof of a return ticket for J.A.G., his decision demonstrates a lack of compassion and understanding of the impact of that decision on the relationships between the parties.
- [71] The respondent views this event as the claimant exerting coercive control over her and J.A.G. by preventing J.A.G.'s travel to England and denying him a chance to bond with family. From her testimony on this issue, I accept that this event was very upsetting for her and remains a wound caused by the claimant.

- [72] As I understand the parties' testimony regarding this event, when the claimant refused to sign the authorization without the change to the tickets, the respondent became very upset and there was no further conversation or attempt to alleviate the claimant's concerns. From the respondent's perspective the claimant had no intention of seeking a compromise and simply wanted to prevent J.A.G. from travelling to England, which may be true. From the claimant's perspective he did not trust that the respondent would honour the travel authorization and thought he was acting in J.A.G.'s best interest by protecting his ability to be in a school musical.
- [73] Based on the evidence before me regarding this event, I find the claimant's behaviour more blameworthy, but that is not my purpose of recounting the story. There is a Chinese proverb that states: "When there is trust, no proof is necessary. When there is no trust, no proof is possible." In my view this event is an example of how failing to trust or compromise, or trying to understand what the other party might need at a given time, erodes trust and damages the relationship. It is my hope that moving forward, the parties will make better efforts to empathize with the other parent's perspective and circumstances when making decisions. Effective shared parenting arrangements require cooperation and compromise.
- [74] As a final note on changing to an equal parenting arrangement, I note that the evidence before me is that both parents, individually, are providing a loving and stable environment for J.A.G. He is fortunate to have two dedicated, intelligent and loving parents who also have financial resources to meet his needs. J.A.G. recognized this in the Hear the Child Report, as reported by Ms. Toews:

When asked for his general advice for parents about making children happy when they are no longer together [J.A.G.] replied "honestly, be more like both of my parents, because they both do a lot of stuff well, um, be a lot like my Dad, but as a parent, be a lot like my Mom, but as a person, be a lot like my Dad, uh, because I've seen a lot of parents and I've met a lot of parents because I have a lot of friends and a lot of friends, mean, it means twice as many parents, right, so, um, and, and I've., .very few of them are actually doing as good of a job as either of my parents.

- [75] However, despite J.A.G.'s recognition that his parents are doing a good job, it is clear that the conflict between them is taking a heavy toll on J.A.G. and on them. While my hope is that the equal parenting time arrangement will reduce conflict and the "tug of war" over J.A.G., I will provide certain conduct orders as requested by the respondent at the end of this order in hopes of facilitating better and more effective communication between the parties. As I said at the end of the trial, the parties will be connected and have a relationship at least until J.A.G. becomes an adult. As such, in my view, it is in J.A.G.'s best interests, as well as in their own interests, to make every effort to communicate and cooperate on the many decisions they will be required to make together in the coming years regarding J.A.G.

## VI. FINANCIAL ISSUES

[76] Having set out my conclusion that the parties should exercise equal parenting time of J.A.G., I will now turn to the financial matters in issue. The new equal parenting time arrangement will have a significant impact on child support. I will therefore need to address the financial circumstances of the parties holistically in order to determine a final apportionment of retroactive and prospective child support, as well as special and extraordinary expenses.

## VII. CHILD SUPPORT

[77] The parties raise the issues of retroactive child support and ongoing child support. I will address the issue of retroactive child support first, as my consideration and calculation of ongoing child support is tied to the issues of special and extraordinary expenses as well as the parties' financial circumstances.

[78] Section 152(1) of the FLA provides that a court may change, suspend or terminate an order respecting child support and may do so prospectively or retroactively. However, s. 152(2) of the FLA provides that before making such an order the court must be satisfied that at least one of the following situations exists: (1) a change in circumstances; (2) evidence of a substantial nature that was not available during the previous hearing has become available; or (3) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

[79] Having ordered that the parties will now exercise equal parenting time of J.A.G., the circumstances have changed such that the child support requires adjustment.

### A. Retroactive Child Support

#### 1. Parties' Positions

[80] The respondent asserts that, when compared against the amount of child support calculated under the Guidelines using the claimant's actual income, the claimant has underpaid his child support by \$27,666 from January 2015 to December 2022. She appears to arrive at this amount by taking the claimant's income earned in each of those years and calculating an annual child support amount, then subtracting the amounts of actual child support the claimant paid during that time. I note that the respondent uses the language of "arrears" to describe this amount, but in fact the claimant has been paying the full amount of his child support obligations set out in court orders and, as such, this differential is not arrears. It is instead the amount that the respondent should have been paying if the child support set out in the orders had been adjusted.

- [81] Generally, the respondent's position with respect to the financial issues in this matter is that she incurs a vastly disproportionate amount of expenses related to J.A.G. than does the claimant. She has paid close to \$250,000 in costs associated with J.A.G.'s private school, and bears a bulk of regular and special and extraordinary expenses for J.A.G. She feels she was somewhat 'duped' by the claimant when he first moved to Victoria, because given that he had lost his job, she presumed that his child support payments would decrease.
- [82] The respondent testified she requested his financial information to make that downward adjustment starting in 2017, and in particular by way of an email dated May 9, 2018. She also testified that in 2019 she asked for the claimant's salary information via her lawyers, but was not provided the information until the final preparation for this trial. The claimant refused to provide the information on the basis that it would need to be part of a new consent order and he would not deal with the financial issues separately.
- [83] The respondent thought that the claimant's refusal to provide his new salary information was odd. She eventually concluded that the motive behind the claimant not providing his information was because his child support would actually increase, as he would no longer be able to deduct the amounts to account for his previously-necessary travel to and accommodation in Victoria to exercise parenting time.
- [84] In her closing submissions, the respondent stressed that in her view, child support is for the child. To that end, she says the claimant has not been paying his fair share for J.A.G. since January 2015. The respondent testified in cross-examination that she did not bring an application for a change in child support since 2015 because she was trying to keep the peace and felt that the cost of legal fees would be greater than the additional child support.
- [85] The claimant argues that he should not be required to pay retroactive child support. He says that he has always paid the amount of child support as required of him by court order. He acknowledges that based on the table amounts, since moving to Victoria in November 2017, he has been underpaying child support, but asserts that he was never asked to pay more.

## 2. Analysis and Determination

- [86] Both the 2013 Johnson J. Order and the 2015 Bracken J. Order lowered the monthly child support that the claimant would otherwise pay under the Guidelines by \$400 per month. This was done to account for the increased costs the claimant incurred to exercise his weekend parenting time with J.A.G. in Victoria while he was residing outside of Victoria. However, when the claimant moved to Victoria, he no longer incurred those additional expenses. As a starting point, it thus appears that the claimant's child support obligation required a reassessment at that time, as the foundation upon which it was premised had changed.
- [87] The leading case on the assessment of retroactive child support is *D.B.S. v. S.R.G.*, 2006 SCC 37. In that case, the Court cautioned that retroactive awards are not always appropriate as they can impair the certainty and flexibility of prospective child support awards and can be

unfair to a payor by disrupting a predictable status quo: at paras. 95 and 96. However, the Court held that retroactive child support awards should not be seen as exceptional because, in certain cases, such an award is the only manner to ensure that a child is returned to the support they are rightly due: para. 97.

[88] The Court set out four factors that should be considered to determine whether retroactive child support should be ordered. I will deal with each in turn as applied to the facts of the case at bar.

[89] The first factor is whether there is a reasonable excuse for why the support was not sought earlier: D.B.S. at para. 100. The respondent says that she had requested the claimant's financial information when he moved to Victoria. Further, she says that she did not bring an application to the court because she was concerned that the legal fees of bringing the application for increased child support would outweigh any increase in child support she might gain.

[90] On May 9, 2018, there was an exchange of emails regarding financial information that I find relevant to this issue. I will reproduce the exchange in part:

The respondent wrote: "Let me know as soon as you have a new salary letter. Then we can adjust the child support accordingly. I assume it will go down slightly per the tables."

The claimant responded later that day: "This will need to be part of a new consent order, and I will not deal with it separately. There has been a significant change of circumstances and the Family Law Act is clear about the need for a reassessment of all agreements.

"Please let me know if you would like to self represent through the process of drafting a new order, or how you would like to proceed. I had suggested each of us draft a new order and negotiation [sic] something in the middle but your statement that you are unwilling to agree to [J.A.G.] being with me half time suggests that we are at odds on this and probably other aspects of the new circumstances ."

[91] It is clear to me that the respondent requested the claimant's salary information for the purpose of re-assessing child support. In my view, the respondent's erroneous belief that the child support amounts would go down should not be used against her when she was clearly asking for financial disclosure from the claimant regarding his new salary. In other words, without the new salary letter, the respondent was denied the ability to determine what the appropriate amounts of child support would be under the Guidelines.

[92] While the respondent could have forced the issue by bringing an application to disclose documents, it was not unreasonable to simply ask the claimant for documents for the purpose of reassessing the child support. His refusal denied her this opportunity.

[93] Further, I note that the 2013 Johnston J. Order contained a provision that the parties could "seek a review" of the support amounts after July and before September 30 each year. I find that the term of that order is somewhat vague, in that it does not define what is involved in

seeking a review. A review can plausibly encompass either asking for documents or filing a formal court application. However, I find that the spirit of the clause in the 2013 Johnston J. Order was to allow the parties to request a review, which would start with requesting accurate disclosure from the other party. To my mind, seeking a review first requires a basis for seeking that review. Thus, if a party does not share accurate financial information with the other party, it prejudices that party's ability to seek a review. In this respect, I note the Supreme Court of Canada's general emphasis on the importance of adequate, accurate, and timely financial disclosure in family matters, and in particular with respect to child support: see *Colucci v. Colucci*, 2021 SCC 24 at paras. 48-49.

- [94] The second factor is the conduct of the payor: D.B.S. at para. 105. The claimant candidly acknowledges that he has not been paying the accurate amounts of child support under the Guidelines based on his income. However, he argues that he has paid what he was required to pay as set out in the court orders. The claimant appears to put the onus on the respondent to bring a court application for increased child support. In my view, the language of the Court in D.B.S. is instructive: "[p]ut simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct.": at para. 107.
- [95] I accept that the claimant has honoured court orders to pay child support. Nevertheless, I find that upon moving to Victoria, when his circumstances changed, he should have made an effort to ensure that he was paying the proper amount of child support for J.A.G.
- [96] In particular, based on the evidence of the respondent that she inquired about the claimant's new income levels, and that the claimant appeared to resist her requests, I find that the claimant failed to take proper steps to ensure he was paying the correct amount of child support. The court in D.B.S. discusses when notice of the date of retroactivity is effective:
- [121] By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the status quo is fair, and his/her interest in certainty becomes less compelling.
- [97] In my view, this statement by the Court rebuts the claimant's argument that if the respondent wanted to increase child support she could have brought an application for the child support as part of the many other court applications in this proceeding. As practical as that may have been, it also fell on the claimant to ensure he was fulfilling his obligations to J.A.G. and paying the appropriate child support commensurate with his income and circumstances. This factor thus militates in favour of ordering retroactive payment of child support.

- [98] However, before moving to the remaining factors in D.B.S., I wish to emphasize that while I find the claimant should have shared his financial information when requested and should not have held up the reassessment process, I recognize that he did make all his court ordered payments. In doing so, the claimant did not actively avoid making any child support payments. I also acknowledge that he may have been under a mistaken belief that he was merely obligated to pay what the court had previously ordered.
- [99] The third factor to consider in assessing whether it is appropriate to award retroactive child support is the circumstances of the child: D.B.S. at para. 110. J.A.G. enjoys a high standard of living. However, as expressed by the respondent, she is concerned that without the claimant paying his "fair share" of child support and expenses, there is a risk that either J.A.G. will be unable to attend private school or his standard of living will decline when in the respondent's care because she will need to take on additional debt. I conclude, based on the evidence before me, including the parties' high income levels, that while there could be a change to J.A.G.'s standard of living, it would likely be only a modest change if no retroactive child support is awarded. As such, this factor only marginally supports an award of retroactive child support.
- [100] The fourth factor for the court to consider is whether an award of retroactive child support will cause hardship on the payor: D.B.S. at para. 114. The claimant does not have the financial means of the respondent, as he earns less income and does not have equity in a house. However, the claimant has pensions from his academic work and earns a high salary. Both parties have incurred significant expenses related to the litigation of this family matter. The claimant testified that he is living paycheque to paycheque. However, in my view, given his income, while an award of retroactive child support may cause some hardship upon him, such hardship will not be undue. Additionally, the sting of an award may be lessened somewhat by spreading an award of retroactive payment over time, as opposed to requiring a lump sum payment.
- [101] Having considered the above factors, I note that in D.B.S., the Court also stressed that a court's determination of a retroactive child support claim must be flexible and sensitive to the particular situation before it:

135 The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

- [102] Given the totality of the circumstances, I conclude that the claimant should be required to pay an amount of retroactive child support based on his level of income for the past three years. The greatest factor leading to this conclusion is that the child support amounts in the 2013 Johnston J. Order and the 2015 Bracken J. Order were clearly reduced to account for the claimant's travel and accommodation costs in exercising his parenting time in Victoria. In my view, it would be clear that when the claimant moved to Victoria, his child support obligations would need to be adjusted to at least account for the fact he was no longer incurring the \$400 monthly expense caused by exercising parenting time while living in Vancouver.
- [103] However, imposing an award of retroactive child support to 2015, as requested by the respondent, appears unfair. In 2017, when the claimant moved to Victoria, he had lost his job, and although he was provided severance, may have been uncertain about the calculations of his child support obligations. Further, the Court in D.B.S. held that as a general rule it is "inappropriate to make a support award retroactive to a date of more than three years before formal notice was given to the payor parent" at para. 123.
- [104] In my view, according to the evidence before me, while requests for financial information were made by the respondent in late 2017, and in the email reproduced above of May 9, 2018, I find that it is fair that the claimant be responsible for retroactive child support only from January 1, 2020, to January 31, 2023. Assessing an award of retroactive child support for a period of three years from the date of trial balances the apparent uncertainty of both parties regarding the impact of the claimant's move to Victoria on child support, and prevents burdening him with undue hardship. In making an order for such a time frame, I am attempting to balance the duties of the claimant to pay child support in the amounts to which he was obligated with the particular circumstances of this case, which includes the hardship on the claimant of having to pay a retroactive amount of child support that he had not anticipated.
- [105] I calculate the amount of retroactive child support owed by the claimant as follows (rounded to dollar amounts):

Year

The claimant's Income

Support Paid by the claimant

(i.e., \$1,035 x 12)

Table Amount under Guidelines

Yearly Guidelines Amount

(i.e., Table Amount x 12)

Yearly Shortfall

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(Guidelines Amount - Support Paid)

2020

\$127,787

\$12,420

\$1,178

\$14,136

\$1,716

2021

\$132,740

\$12,420

\$1,218

\$14,616

\$2,196

2022

\$139,639

\$12,420

\$1,274

\$15,288

\$2,868

2023 (January only)

\$139,639

\$1,035

\$1,274

N/a (one month only)

\$239

Total

\$7,019

[106] I conclude that the claimant has underpaid child support in the amount of \$7,019 from January 1, 2020, to the end of January 31, 2023.

## B. Future Child Support

### 1. Analysis and Determination

[107] Having determined that the best interests of J.A.G. are met by a shared parenting arrangement, I must now consider how such an arrangement will impact the child support payable by each party. The parties will now be exercising equal parenting time, and thus neither party has more than 40% of the parenting time of J.A.G. As such, the approach to determining future child support is set out in s. 9 of the Guidelines. Section 9 provides the factors that must be considered in setting the appropriate amount of child support in such circumstances, as follows:

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared parenting time arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[108] Yet, the analysis provided by the Guidelines calculations, and in particular the set-off between the incomes of the two parties, is only the starting point: *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 49. Instead, s. 9 of the Guidelines vests trial judges with a "broad discretion for conducting an analysis of the resources and needs of both the parents and the children": *Contino* at para. 68.

[109] In this case, a simple set-off of support obligations using the respondent's 2022 income of \$175,838 and the claimant's income for 2022 of \$139,639 suggests that the respondent is obligated to the claimant for support in the amount of \$284 per month. This is so because, with reference to the Guidelines amounts applicable to each income, the respondent's support obligation is \$1,558, as compared to the claimant's obligation of \$1,274.

[110] However, I must have regard for the overall share of expenses between the parties, including special and extraordinary expenses. Accordingly, I will now turn to the parties' claim for special and extraordinary expenses and revisit the appropriate amount of child support once the constellation of facts regarding the parties' financial situation are determined.

## VIII. SPECIAL AND EXTRAORDINARY EXPENSES

### A. Law

[111] Section 7 of the Guidelines deals with special and extraordinary expenses. Special and extraordinary expenses are to provide an amount to "cover all or a portion" of expenses listed in s. 7 of the Guidelines. They are based on the court's consideration of, among other

things, "the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child". The categories of expenses listed in s. 7(1) of the Guidelines relevant to the case at bar are as follows:

7(1)

- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (f) extraordinary expenses for extracurricular activities.

[112] In *Bodine-Shah v. Shah*, 2014 BCCA 191, Justice Smith of our Court of Appeal provided helpful guidance on the difference between listed s. 7 special expenses and extraordinary expenses:

[66] Special expenses listed in ss. 7(1)(a)-(c) and (e) are distinct from extraordinary expenses referred to in ss. 7(1)(d) and (f). Special expenses are defined as relating to child care, medical or dental insurance premiums, health-related costs, and post-secondary education. They must be found to be reasonable and necessary. Extraordinary expenses are not defined. Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities. They also must be found to be reasonable and necessary. Relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation. See *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 at paras. 81-82 (C.A.). In assessing "means", the court may consider the parties' capital assets, income distribution, debts, third-party resources, access costs, support obligations, receipt of support, and any other relevant factor: *Delichte v. Rogers*, 2013 MBCA 106, 37 R.F.L. (7th) 81 at para. 38. Courts may consider whether the non-custodial parent was consulted regarding the expense, though a lack of consultation does not automatically preclude a finding that the expense is reasonable and necessary: *Delichte* at paras. 39, 44.

## B. Parties' Positions

[113] The respondent submits that in respect of J.A.G.'s s. 7 expenses, there is a pattern of the claimant refusing to pay his fair share. She asserts that when she provides an expense to the claimant that she believes is for a special or extraordinary expense, the claimant questions

its legitimacy. The respondent says this requires her to make a decision to either litigate the expense or pay the full amount herself. She says that, in her experience, the legal fees of trying to have s. 7 expenses shared with the claimant are greater than the expense, and so she generally just pays the expenses herself.

- [114] By far, the largest potential s. 7 expense for J.A.G. is his private school tuition. I was provided with documentation that the tuition for this year (2022/2023) was \$27,510. I was provided with evidence that the tuition fee is expected to increase by 7.5% for the 2023/2024 school year to what I calculate to be \$29,573 and by another 6% to 7.5 % for the 2024/2025 school year to what I calculate to be \$31,347 to \$31,790. J.A.G. presumably has two years of private school tuition remaining for grades 11 and 12 which would see him completing his private school education in June 2025.
- [115] As set out above, in 2013, when J.A.G. was not yet in kindergarten, the respondent agreed to pay for private school education for J.A.G. She accepted taking on the full expense based on the claimant's desire not to have J.A.G. attend private school. The respondent maintains that she generally wishes to respect the claimant's principles regarding him not wanting to fund private schools, but says that without some additional money from the claimant it will be extremely difficult for her to continue to enrol J.A.G. at private school without making major sacrifices or increasing her debt.
- [116] The additional categories of s. 7 expenses provided by the respondent include the following:
- Karate lessons, which ceased in approximately 2020;
  - Riding (equestrian) lessons;
  - Japanese lessons;
  - Music lessons;
  - Pizza days at J.A.G.'s private school, which I understand are fundraising lunches;
  - Counselling for J.A.G.; and
  - Medical care expenses that are charges incurred by the respondent in excess of her medical insurance coverage for J.A.G.
- [117] The respondent testified that the non-private school expenses she pays for J.A.G., that she claims are special and extraordinary expenses, total approximately \$6,000 each year.
- [118] As I understood the respondent's position, she did not particularly care what the financial support from the claimant was called or how it was characterized, whether as ongoing child support, retroactive child support, or s. 7 expenses. She simply says that she requires some form of support or J.A.G.'s current standard of living, including his private school attendance, will be jeopardized.

- [119] The claimant's position is that he has always been clear that he would not contribute to the payment for private school. He asserts that the respondent agreed to this condition in the 2013 Johnston J. Order and it should continue to govern which party should pay for private school tuition. The claimant testified in cross-examination that he believes J.A.G. wants to continue at private school and that the claimant would not make any effort to remove him so long as the respondent was paying the tuition.
- [120] In respect of other expenses for J.A.G., the claimant asserts that he pays for expenses as they arise when J.A.G. is with him. He states that he pays for some of J.A.G.'s expenses including his cellphone, iCloud storage, and YouTube Music premium subscription. The claimant submitted a list of annual expenses he says he paid for J.A.G. in 2022, which totalled \$2,305. He does not seek reimbursement for a portion of these expenses from the respondent.
- [121] In response to the respondent's argument that the claimant refuses to pay for legitimate expenses, the claimant says that it is his right to question expenses submitted to him by the respondent. He says that his questioning should not be taken as a refusal to pay. As well, there are certain expenses that the claimant says he is unable to afford given his current income and indebtedness. One example is a school music band trip for J.A.G. to a foreign country, estimated to cost approximately \$3,400. While the claimant says he could not afford to pay for a portion of that trip, he points out that he was willing to pay for a portion of a local band trip that was less expensive.

### C. Analysis and Determination

#### 1. Private School

- [122] As mentioned above, by far the largest single expense for J.A.G. each year is his private school tuition. While the respondent wants to respect the claimant's desire not to fund private school education, the focus on child support and s. 7 expenses is the best interests of the child.
- [123] To that end, courts have considered whether private school tuition for secondary school is a valid s. 7 expense under s. 7(d) of the Guidelines. The assessment is fact-specific and requires an examination of the circumstances and needs of the child as well as the financial circumstances of the parents.
- [124] As stated previously, the claimant testified that he has always been clear that he does not want to pay fees towards J.A.G.'s private school education because, on principle, he supports public education. I accept that the claimant holds these views and is entitled to do so. However, my task remains to consider what, given the current circumstances, is in J.A.G.'s best interest, and whether private school tuition meets the criteria of an extraordinary expense pursuant to s. 7(1)(d) of the Guidelines. In this assessment, I must also consider the likelihood that, if the claimant is not required to contribute to tuition, J.A.G. will be unable to attend the private school or will face some other detrimental impact

as a result of the respondent being required to bear the entire burden of private school tuition. If I determine that private school tuition is at this point a valid extraordinary expense, I then must determine what is a fair allocation given the parties' circumstances.

[125] J.A.G. has attended the same private school for ten years, since he started school in kindergarten. He knows no other school experience. The Hear the Child Report provides that J.A.G. enjoys private school:

I admit that I complain about [the private school] a lot and for good reason because I think if I was untethered by my friends and relationship that I have created in the school environment, I would have chosen more art-driven curriculum, however I would never choose to go anywhere else because the people here are all relatively intelligent and interesting and I appreciate the school for what it does well more than I dislike for what it is lacking in.

[126] I was provided report cards for J.A.G. which demonstrate that he is doing extremely well at the school, achieving marks in the mid-to-high nineties. I note that while the claimant does not want to pay for private school, he testified that he thinks that J.A.G. is doing well at private school and supports J.A.G. in his endeavours at the school, including J.A.G.'s involvement in music and theatre.

[127] It bears repeating that while the claimant may not want to contribute money to private school on principle, the concern of the court is the best interests of the child. In my view, given the new change in parenting arrangement, J.A.G. should have the stability of the school he has attended for the past ten years. He participates in several programs, including music and drama, and is doing very well academically. Potentially forcing J.A.G. to change schools now for financial reasons, with only two years remaining in his high school education, is not, in my view, in his best interests. Indeed, I expect that the school environment in which J.A.G. has thrived has likely been one of the main constant touchstones for J.A.G. during the conflict he has witnessed between his parents. As such, I find that the school expenses are, in the circumstances of this case, required extraordinary expenses.

[128] In *D.S.W. v. A.K.W.*, 2018 BCSC 910, Madam Justice Young found that private school tuition costs were extraordinary expenses "in that they are not expenses that the claimant can reasonably cover from her income and child support": at para 89. While in the case at bar, the respondent testified she will do everything she can to keep J.A.G. at private school, her evidence was that without additional support in some form the tuition would be an economic hardship. To this end, I note that given the change in parenting arrangement, the respondent will no longer be receiving child support from the claimant.

[129] In *L.H.M.K. v. B.P.K.*, 2012 BCSC 435, this Court held that generally private school fees are considered extraordinary expenses:

- [128] Private school fees are generally considered extraordinary educational expenses under s. 7(1)(d) of the Guidelines: *Crofton v. Sturko*, 1998 CanLII 3234 (BC SC), [1998] B.C.J. No. 38 (S.C.). In *Cochrane v. Zarins* (1998), 1998 CanLII 4270 (BC CA), 36 R.F.L. (4th) 434 (B.C.C.A.), the Court considered the following factors to determine whether or not to allow private schooling fees as extraordinary expenses: (a) the parents' history of private schooling; (b) the children's history of private pre-schooling; and (c) the ability of the non-custodial parent to pay for the expense.
- [129] In *Van Deventer v. Van Deventer*, 2000 BCCA 9, the Court allowed private school fees under s. 7 because the parent opposing the expenses was content to have the child attend private school when the parties were together, and there was no change in circumstances to which the opposing parent could point to establish that the expense was no longer necessary or reasonable.
- [130] I do not find the factors in *L.H.M.K.* to be overly helpful for my analysis of whether J.A.G.'s private school tuition is an extraordinary expense under s. 7(1)(d) of the Guidelines. However, I will address each consideration briefly.
- [131] First, in considering the parents' history of private schooling, I understand that neither parent attended private school. However, as was abundantly clear from the testimony of the parties, private school education for J.A.G. was important for the respondent, but is opposed on principle by the claimant. Given the diametrically opposed views on private school by the parties, this factor is neutral for my decision.
- [132] Second, regarding J.A.G.'s history of private pre-schooling, J.A.G.'s decade of education at private school presents a strong rationale for him to continue with private school for his final two years of high school.
- [133] In terms of the claimant's ability to pay, I accept that paying for an equal share of private school would create some financial hardship on the claimant, but I would not consider the financial hardship to be undue. Indeed, the claimant's opposition to private school is based on principle, and not solely on his economic means. Further, I have the ability to adjust the amount that the claimant will be required to pay for a share of J.A.G.'s private school education so as to limit the hardship to an amount I deem acceptable.
- [134] To the factors set out in *L.H.M.K.*, I would add that, importantly, s. 7(1) of the Guidelines requires that a court take into account the best interest of the child when assessing the validity of a special or extraordinary expense. In my view, the greatest factor supporting my finding that J.A.G.'s private school is an extraordinary expense that should be shared by the parties is that it is in his best interests at this point in time to continue at the private school. It is not a sufficient answer in my view that the claimant be relieved from paying for private school at this stage of J.A.G.'s education on principle, when J.A.G.'s continued attendance at the school is in his best interest. I accept that the circumstances may have been different when J.A.G. was first entering school at kindergarten or even middle or high school. However, he is now midway through high school after a decade at the same institution. He

has had sufficient turbulence and uncertainty in his life such that putting the stability of his schooling in jeopardy at this point--with only two school years remaining is not, in my view, in his best interests.

- [135] Further, while the respondent states that she would find a way to fund J.A.G.'s continued attendance at the private school without s. 7 support from the claimant, given that she will not be receiving child support from the claimant because of the shared parenting arrangement, it is unfair for her to have to shoulder the burden of private school entirely on her own. I am concerned that if she were required to do so, J.A.G.'s best interests would not be served because the respondent's financial circumstances would be stressed, resulting in a potentially lower standard of living for J.A.G. or requiring him to potentially leave the school for his final years.
- [136] Section 7(2) of the Guidelines provides that the guiding principle in determining the amount of a s. 7 expense is that the expense is shared by the parties in proportion to their respective incomes. In this case the proportionate share between the parties is 56% (the respondent) and 44% (the claimant). I reach this number using the sum of their respective 2022 incomes, being \$175,838 for the respondent and \$139,639 for the claimant ( $\$175,838 / \$315,477 = 56\%$ , and  $\$139,639 / \$315,477 = 44\%$ ).
- [137] However, the above is not necessarily the end of the inquiry. The court retains discretion to divide the parties' obligations to pay a special or extraordinary expense other than in proportion to their incomes in order to do justice between them in the circumstances of the case: *Burseth v. Burseth*, 2017 BCSC 2076 at para. 164, citing *A. v. B.*, 2013 BCSC 60.
- [138] In this case, given the claimant's resistance to initially enrolling J.A.G. in private school and the fact that the respondent has been the driving force behind J.A.G.'s attendance at the school, I conclude it is appropriate to reapportion the claimant's share of the private school fees to be 30 per cent. This apportionment leaves 70 per cent of private school expenses to be borne by the respondent. As stated above, the tuition fees this year were \$27,510 and are expected to potentially rise to \$31,790 in J.A.G.'s final year. I also note that there are additional expenses related to the school including uniform fees and after school fees which are paid by the respondent through the school account. For simplicity I will set the private school expenses at \$30,000. Thus, the claimant is to contribute \$9,000 per year for the remaining two and a half years of private school education or \$22,500 in total, commencing in February 2023 until J.A.G. has finished private school in 2025. I will set out below how this amount is to be paid on a monthly basis by the claimant as opposed to as a lump sum.

- [139] I am aware that the respondent has already paid for J.A.G.'s tuition for the current school year, and seeks support from the claimant for that expense. However, the parties will only now have shared parenting time of J.A.G., with related implications for their child support obligations and entitlements. As such, I find it appropriate that the claimant commence contributing to the expenses relating to the private school expenses from February 2023 onwards.
- [140] I accept that the parties should share the costs of counselling services for J.A.G. in proportion to their salaries. Pursuant to s. 7(1)(c) of the Guidelines, professional counselling is a valid special expense. Further, given the past conflict and the parties' general agreement that counselling has been beneficial to J.A.G., I find it is a proper special expense that should be shared.
- [141] I recognize that the claimant expressed some concern with Dr. Magali Brulot continuing as J.A.G.'s counsellor. In my view, there should be at least some additional sessions with Dr. Brulot, if she is available, in order to provide J.A.G. with continuity. If the parties are unable to agree whether Dr. Brulot should continue as J.A.G.'s counsellor, I propose, but do not direct, that Dr. Brulot be asked to recommend a number of counsellors from whom the parties will select a counsellor for J.A.G.
- [142] I also conclude that, pursuant to s. 7(1)(c) of the Guidelines, J.A.G.'s health related expenses that exceed insurance reimbursement should be shared between the parties in proportion to their salaries. In respect of the "overages" of health insurance for J.A.G., it appeared that both parties incurred these expenses. Both parties have medical and dental insurance for J.A.G. through their employment, but these programs are not coordinated. I direct the parties to make best efforts to coordinate their health insurance programs so as to avoid unnecessary expenses that could be covered by the other parties' insurance programs.
- [143] In respect of the additional s. 7 expenses claimed by the parties, I am not satisfied that they meet the criteria of special and extraordinary expenses. There was no evidence that J.A.G. had any special or extraordinary abilities in music or riding that required lessons. In my view, these are expenses that should be borne by the parent deciding to enroll J.A.G. in those programs. That said, it was clear to me that both parents wished to nurture J.A.G.'s interest in music. Thus, although I will not make an order regarding the sharing of expenses relating to lessons and school trips, I believe the parties should endeavour to coordinate the payment of these types of expenses as they arise. In doing so the parties may wish to consider sharing the expenses in proportion to their incomes. To provide the parties with the option to consider these additional expenses as they arise, I will order that the parties continue to share reasonable special and extraordinary expenses to which they agree in proportion to their incomes.
- [144] Having determined the issues of retroactive child support, prospective child support, and s. 7 expenses, I will now set out the monthly payments between the parties.

## 2. Summary of Financial Obligations

[145] In summary, as a starting point, the following payments are to be made between the parties:

- The claimant is to pay retroactive child support in the amount of \$7,019, in monthly installments of \$234 commencing within ten days of the date of this order and then on the first day of the month for 30 months to August 1, 2025;
- The claimant is to pay to the respondent s. 7 expenses for annual private school tuition of \$9,000 (30% of \$30,000) for two and one half years or \$750 per month for 30 months commencing within ten days of the date of this order and then on the first day of the month for 30 months to August 1, 2025; and
- Based on the Guidelines table amount of support, the respondent is required to make monthly payments of child support to the claimant commencing ten days after the date of this order and then on the first day of each month in the amount of \$284 until August 1, 2025.

[146] The Court in Contino stated that the simple set-off serves only as a starting point for the inquiry into the appropriate amount of child support in a shared custody arrangement, and provided the court with some flexibility in setting the amount of child support obligations:

[49] Hence, the simple set-off [of the parties' child support obligations under s. 8 of the Guidelines] serves as the starting point, but it cannot be the end of the inquiry. It has no presumptive value. Its true value is in bringing the court to focus first on the fact that both parents must make a contribution and that fixed and variable costs of each of them have to be measured before making adjustments to take into account increased costs attributable to joint custody and further adjustments needed to ensure that the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought. Full consideration must be given to these last two factors (see [Julien D. Payne and Marilyn A. Payne, *Child Support Guidelines in Canada 2004* (Toronto: Irwin Law, 2004).] at p. 263). The cliff effect [a drastic change in support resulting from a rigid application of the set-off that may not be warranted considering the parents' financial situations and the standard of living in each household] is only resolved if the court covers and regards the other criteria set out in paras. (b) and (c) as equally important elements to determine the child support.

[Emphasis in original; parenthetical comments are taken from *C.A.E. v. S.W.C.*, 2017 BCSC 534 at para. 15].

- [147] In my view, having consideration for all of the factors and the circumstances of this case, I find that commencing within ten days of the date this order is pronounced, the claimant is to pay to the respondent the amount of \$700. I arrive at this amount by taking the claimant's retroactive child support obligation of \$234 per month for 30 months, plus the s. 7 private school expenses of \$750 per month for 30 months, less the amount of child support that the respondent would be required to pay to the claimant under the Guidelines.
- [148] I have crafted the payments so that the retroactive payments and the s. 7 private school tuition fees will cease at the end of the summer when J.A.G. completes private school in August 2025. As such, I expect the support arrangements will need to be revisited at that time, if not sooner should the parties' income levels change. I will order that the parties may agree in writing to a different arrangement or seek further order of the court if they are unable to agree.

## IX. PAYMENT FOR THE HEAR THE CHILD REPORT

### A. Parties' Positions

- [149] The claimant seeks a reimbursement for half of the costs of the Hear the Child Report. On September 12, 2019, the parties originally were ordered by Justice Power to obtain a s. 211 report for the purposes of this trial. Power J. ordered that the claimant pay the up-front costs of the s. 211 report, but could seek a reapportionment of the cost when the issues with respect to parenting time were litigated. The claimant at the time expressed concern about the financial hardship that paying for the s. 211 report would place upon him.
- [150] As discussed above, on February 18, 2022, Justice Hardwick ordered that a Hear the Child Report replace the s. 211 report. The claimant paid the upfront costs of \$4,723.05, for the Hear the Child Report prepared by Ms. Toews. I note that the Hear the Child Report was considerably less expensive than the s. 211 report, which was expected to cost in excess of \$20,000.
- [151] However, in *R.A.G. v. T.A.I.D.*, 2022 BCSC 380, Hardwick J. also expressed concerns that the claimant did not diligently follow Power J.'s order in having Dr. Heiner complete the s. 211 report: at para. 32. More importantly for the issue before me, Hardwick J. ordered that the claimant pay for the Hear the Child Report:
- [43] The costs of the views of the child report are to be borne exclusively by R.A.G. The basis for allocating costs to him is clear at first instance in the order of Madam Justice Power, and I have made my comments as to the concerns about his diligence in pursuing the s. 211 report at first instance.
- [152] Despite this finding, and without drawing it to my attention at the trial, the claimant seeks reimbursement from the respondent for half of the costs of the Hear the Child Report.

## B. Determination

[153] As is clear from my reasons for judgment, I have placed great importance on the Hear the Child Report. I consider it a vital piece of evidence that allows me to better understand J.A.G.'s views. This is especially so in a case such as this where each parent holds strong, and opposed, views of what is best for their child. Without the Hear the Child Report, I would be placed in a more difficult situation to determine what parenting arrangements would be in J.A.G.'s best interest.

[154] Justice Hardwick expressed concern regarding the claimant's diligence in pursuing the s. 211 report ordered by Power J., which resulted in the requirement for it to be replaced by a Hear the Child Report. Indeed, it appears that this was the basis for Hardwick J. to order that the claimant bear the entire cost of the Hear the Child Report. I find no reason to interfere with Hardwick J.'s conclusion. The claimant will bear the entire cost of the Hear the Child Report.

## X. ORDER

[155] For clarity, the following is a summary of the orders of the Court.

[156] The Court orders that:

### A. General

- The order of Mr. Justice Johnston of May 31, 2013, and the order of Mr. Justice Bracken of August 14, 2015, are varied only to the extent necessary to give effect to this order, unless agreed to in writing by the parties or by further order of the court.

### B. Non-Holiday Parenting Time

- Unless agreed to in writing by the parties or varied by court order, during the school year the parents shall have shared parenting time of J.A.G. Commencing on the first Friday after this order is pronounced, the claimant shall have parenting time of J.A.G. from that Friday after school to the following Friday morning, when the claimant will return J.A.G. to school. The respondent will then have parenting time of J.A.G. after school on that Friday until the morning of the following Friday, at which time the above arrangement will repeat.

### C. Decision Making, Passport and Communication

- There will be no change in the order of Mr. Justice Johnston on May 31, 2013, regarding final say over education and medical decision making. The respondent will retain these rights.
- There will be no change in the order regarding who keeps J.A.G.'s passport. The respondent will retain the passport.
- J.A.G. can communicate with either parent at will whenever and however he wishes, except:

- i. During pre-determined special events (e.g. planned family events); and
- ii. During school time.

Calls will also be discouraged by either parent after 9:30 p.m. on nights before school.

#### D. Holiday Parenting Schedule

· The parties shall divide equally J.A.G.'s summer holiday time as follows:

- i. The summer will be divided in the following way: 3 weeks, 3 weeks, half the remainder, half the remainder.
- ii. Each year, the first period will alternate between the parties with the claimant having the first 3 weeks of the summer holiday in 2023 and subsequent odd-numbered years and the respondent having the first 3 weeks of the summer holiday in 2024 and subsequent even-numbered years.
- iii. Travel by J.A.G. on his own or with friends during the summer holiday will be supported. Each parent will have final say as to whether J.A.G. may travel during their parenting time.
- iv. Where a trip is proposed by J.A.G. across the parenting periods, the parents will be open to considering it.

· The parties shall divide equally J.A.G.'s winter holidays (school Christmas break) as follows:

- i. Christmas (December 25) and J.A.G.'s birthday fall in the first half and will alternate between the parents, with the claimant having Christmas and the birthday (first half) in 2023 and the respondent having the first half in 2024.

· The parties shall divide equally J.A.G.'s spring and Easter holidays as follows:

- i. The parties will alternate the first and second half of the spring and Easter holidays, with the claimant having the first half of that holiday in 2023 and the respondent having the first half in 2024.

· For both Christmas, spring and Easter holidays the same rule applies to J.A.G.'s travel with friends as articulated with respect to summer travel. The remaining time will be split equally between the parents.

#### E. Child Support and Section 7 Expenses

· Commencing within ten days of the date this order is pronounced, until August 30, 2025, the claimant shall pay \$700 to the respondent on the first day of each month unless varied by written agreement of the parties or further order of the Court.

· The claimant shall adjust his initial payments set out in this order to account for any payments he made on February 1, 2023, pursuant to previous orders.

## F. Additional Section 7 Expenses

- The parties shall share reasonable special and extraordinary expenses in proportion to their incomes upon agreement by both parties in writing. The party requesting reimbursement shall provide the proof of the expense and an explanation of why it is a proper expense to the other party upon request.
- The parties shall share the expenses related to J.A.G.'s health-related expenses that exceed insurance reimbursement, including professional counselling services, in proportion to their incomes upon providing to the other party proof that the expenses were incurred. The party submitting the expense to the other party should be reimbursed within 60 days of providing proof of the expense unless otherwise agreed to in writing between the parties.
- The parties are directed to make best efforts to coordinate their health-related insurance programs for J.A.G. to cover expenses that are not covered solely by one party's insurer, or is in excess of the allowable amounts covered by one party's insurer.

## G. Exchange of Financial Information

- The parties shall exchange copies of their Notices of Assessment from the Canada Revenue Agency for the purpose of recalculating support payments on or before July 1 of each year. If the parties wish to recalculate child support they will inform the other party of that intention in writing within 30 days of receiving the Notice of Assessment.

## H. Conduct Orders

- The parties will:
  - i. put the best interests of J.A.G. before their own interests;
  - ii. encourage J.A.G. to have a good relationship with the other parent and speak to J.A.G. about the other parent in a positive and respectful manner;
  - iii. make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism; and
  - iv. not blame, criticize or disparage the other parent to J.A.G.

## I. Other Issues

- The claimant is required to bear the full cost of the Hear the Child Report.
- Justice Gibb-Carsley is not seized of this matter, but the parties may request that future applications be heard before Justice Gibb-Carsley.
- The Registry shall draft this order.

## XI. COSTS

- [157] The general rule in respect of costs is that the party who is substantially successful is entitled to his or her costs: *Gold v. Gold*, 106 D.L.R. (4th) 452, 1993 CanLII 1248 (B.C.C.A.) at para. 19. This general rule accords with the rule that costs follow the event, as expressed in Rules 16-1(7) and 16-1(9) of the Supreme Court Family Rules, B.C. Reg. 169/2009.
- [158] *Gold* has been interpreted as setting the standard of "substantial success" for the recovery of costs: see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd, 2002 BCCA 454 at para. 45; *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16; and *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 345 at para. 13. In *Fotheringham*, Mr. Justice Bouck determined that substantial success is equated with a party achieving approximately a 75% success rate. Mr. Justice Bouck wrote:
- [45] [S]ubstantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [159] In my view, there has been mixed success in this trial. The claimant has been successful in his application to vary the parenting time arrangement. The respondent has been successful in her claims for retroactive child support and a portion of her s. 7 expenses related to private school tuition. As such, the parties shall bear their own costs.
- [160] If there are any matters regarding costs or other issues that the parties wish to bring to my attention, they may do so by scheduling an appearance before me, by video, through Supreme Court Scheduling.

## XII. CONCLUSION

- [161] Having now spent several days of court with the parties, it is evident to me how much they love and care for J.A.G. and want the best for him. I am also acutely aware of the past conflict and tension between the parties. However, I observed two highly intelligent individuals conducting themselves with civility and respect in the courtroom while navigating emotionally difficult terrain.
- [162] It is my sincere hope that this judgment provides some closure to the parties so that they may work together in a more cooperative and collaborative manner to put J.A.G.'s best interest at the forefront of their decisions, which will necessarily require, in my view, respecting their possible differences in views and parenting decisions. From the information before me, J.A.G. appears to be doing well in his school and extracurricular activities. While there is a long history of conflict and litigation, my hope continues to be that the parties will take steps to communicate in a more positive manner and show more flexibility towards applying the orders related to parenting time and sharing of expenses, such that court intervention is not needed when there is a difference of interpretation.

[163] I am aware that once J.A.G. completes high school, the parties will again be required to decide how to best continue to support J.A.G. Given that the private school tuition will no longer be an expense, I expect that the parties will need to revisit the terms of this order. Again, my hope is that the parties might be able to come to an agreement without the need for additional litigation regarding J.A.G.'s support arrangements once he completes high school and, presumably, commences post-secondary education.

[164] Finally, I encourage the parties to try to communicate with courtesy and respect. There will necessarily be an ongoing relationship of some form between the claimant and the respondent following this trial. In my view, it is important that the parties find a way to navigate how to communicate and make decisions in a manner that encourages building their relationship, to the benefit of J.A.G., in a constructive manner.

"Gibb-Carsley J."

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