
CANADA / JUDGMENT

R.A. v. W.A.

2018 BCSC 1910

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Supreme Court of British Columbia

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2018 BCSC 1910 R.A. v. W.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.A. v. W.A.,

2018 BCSC 1910

Date: 20181102

Docket: E142148

Registry: Vancouver

Between:

R. A. also known as

R.S.A.

Claimant

And

W. A. also known as W.B.

also known as W.I.M.B.

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for Claimant:

M. Evans

Respondent appearing in person:

W.A.

Counsel for FMEP

J. Anderson

Place and Date of Hearing:

Vancouver, B.C.

August 20, 2018

Place and Date of Judgment:

Vancouver, B.C.

November 2, 2018

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I. Introduction

- [1] These reasons for judgment address the issues argued at the hearing on August 20, 2018 (the "Hearing"), during which the parties made submissions with respect to three applications. The parties have two children of the marriage, a boy born May 2008 ("I.A.") and another boy ("Z.A.") born July 2010 (the "Children").
- [2] The first application was dated and filed January 5, 2018 by the claimant mother ("Jan. 5 Application"), and sought a variety of relief. At the Hearing, the claimant sought the following:
- a. A protection order - pursuant to s. 183(3)(a) of the Family Law Act, S.B.C. 2011, c. 25 - [FLA], that the respondent shall have no contact or communication with the claimant or the Children except by email or text to exchange parenting information (item 1);

- b. An order pursuant to s. 183(3)(a) of the FLA that the respondent not attend or enter the Children's school or home and the respondent not possess a weapon as defined in s. 2 of the Criminal Code, R.S.C. 1985, C-46 (item 2); and
 - c. An order pursuant to ss. 37 and 42 of the FLA that the respondent have no supervised visits with the Children until a psychologist has reviewed the situation (item 5).
- [3] The second application was dated January 15, 2018 and filed January 16, 2018 by respondent father ("Jan. 15 Application"), and sought a variety of relief. At the Hearing, the respondent sought the following:
- a. An order that the respondent have unrestricted contact with the Children, including attendance at their school and residence for drop off and pick up, as well as, court assigned counselling sessions for I.A. and the respondent (item 1);
 - b. An order that the respondent has "unrestricted in person time" with his Children, and communication by telephone and email with claimant to facilitate parenting time and parental responsibilities (item 2);
 - c. Interim shared custody of the Children (item 5);
 - d. An order setting out how parenting time with the Children will be shared on all breaks and holidays (item 8);
 - e. An order that "parenting time make up and enforcement" (item 9);
 - f. An order that the Children have visitation rights with their new brother and step-mother (item 11);
 - g. An order that the Children have visitation rights with their cousins (item 12);
 - h. An order dismissing the claimant's application that the respondent not possess weapons (item 3);
 - i. The s. 211 report to be prepared by Dr. Mary Korpach proceed as ordered by Mr. Justice Davies (item 4);
 - j. The division of assets in compliance with the order of Madam Justice Sharma (item 6);
 - k. An order directing child support based on T4 slips and business income statements and a direction to Family Maintenance Enforcement Program ("FMEP") respecting the disputed child support amounts (item 7); and
 - l. A ban on the claimant posting online, on social media, and social groups content that the respondent calls "slander" (item 10).
- [4] The third application was dated and filed April 26, 2018 by the respondent (the "April Application"), and sought a variety of relief. At the Hearing, the respondent sought the following:

- a. The removal of the claimant from the FMEP (item 3); and
 - b. Return of "holdings", which I understand being funds held in trust, from FMEP (item 4).
- [5] The director of FMEP attended to speak to the April Application with respect to the relief sought against FMEP.

II. The Issues

- [6] The application materials and submissions at the Hearing raise the following issues:
- 1. Should there be a protection or restraining order made against the respondent?
 - 2. Should there be a change in the current order concerning the care and time with the Children? Specifically:
 - a. Should there be a change in the allocation of parenting time?
 - b. Should there be a different allocation of parenting responsibilities with respect to who the Children may associate with?
 - c. Should there be an order compelling the respondent and the Children to attend counselling pursuant to s. 61(2) of the FLA?
 - d. Should the s. 211 report order by Davies J, proceed?
 - 3. Should there be a change in the respondent's current child support obligations?
 - 4. What, if any, relief should there be respecting the FMEP?
 - 5. Should this Court impose a conduct order on the claimant limiting her ability to post online?

III. Factual Background

- [7] The parties were married on September 19, 2007 in Vancouver, British Columbia. They separated on July 16, 2014.
- [8] The claimant was born and raised in Canada. She is trained as a registered nurse and met the respondent while working a one-year contract in Saudi Arabia. They moved to Canada and settled in the lower mainland. She started working as a nurse in approximately 2001 and last worked at Surrey Memorial Hospital in the Intensive Care Unit. Around July 2014, she took a leave from work. She has been on long term disability since late 2015.
- [9] The respondent was born in the United States but raised in England and Saudi Arabia. He has citizenship in those two countries as well as Canada. He is a pharmacist. As a couple, the claimant and respondent were granted a right to open a franchise for "The Medicine Shoppe" pharmacy. As a result of the trial decision, the respondent is the sole owner of the shares in this company. He also works for CDI College ("CDI") coordinating the pharmacy technician program in Burnaby, Edmonton, and Calgary.

IV. Litigation background

- [10] Unfortunately these parties have become involved in a high conflict family dispute that has involved a trial, an appeal, and numerous pre- and post-trial applications, all of which putting an emotional and financial strain on both parties.
- [11] The notice of family claim was filed August 7, 2014. On August 8, 2014, a without notice protection order was sought and granted by Master MacNaughton (as she then was).
- [12] On September 5, 2014, Master Scarth made Orders that included:
- a. Setting aside the protection order of August 8, 2014;
 - b. Provided for guardianship, parenting arrangements, and parenting time respecting the children;
 - c. Required that the parties not speak disparagingly of each other or discuss the litigation with the children;
 - d. Restrained certain property; and
 - e. Provided that Master Scarth be seized with this matter on an interim basis.
- ("Scarth September Order")
- [13] The Scarth September Order permitted the respondent to have parenting time with the Children for two weeknights and on weekends during the day. It also provided for a review of parenting time in November 2014.
- [14] On March 13, 2015, Master Scarth amended the parenting schedule and approved the consent orders that created restrictions on applying for citizenship and travel related documents for the Children ("Scarth March Order"). At this time, orders respecting guardianship, parenting arrangements and time, child support, dispositions of property, and document disclosure orders were also entered.
- [15] On May 5, 2015, Master Tokarek amended the parenting schedule. This order permitted overnight stays with the respondent on weekends, required the parties to surrender the Children's passports, and restricted the parties from applying for citizenship or travel documents for the Children.
- [16] The matter proceeded to trial before Madam Justice Sharma from June 22 to July 3, 2015. By consent, an order was granted on July 3, 2015 for joint conduct of sale of the family home located in Port Coquitlam (the "Family Home"). The reasons were pronounced on October 8, 2015, and are indexed as R.A. v. W.A. 2015 BCSC 1828 [Trial Reasons].
- [17] Prior to the trial, a s. 211 report had been prepared by Dr. Elterman dated April 22, 2015. The Trial Reasons set out the gist of Dr. Elterman's recommendations at paras. 77 and 78:

- [77] Dr. Elterman commented that "the children's attachment to both parents was strong and healthy and the boys clearly derive considerable pleasure from being with both parents although each of their parenting styles [is] quite different" and that the children "seemed playful and close" and "equally relaxed" with both parents.
- [78] He recommended that joint guardianship and 50-50 parenting time for each of the parties was ideal. He noted that this could not happen immediately and that the respondent would have to gradually increase his parenting time to a point where he could accommodate 50%. As of the date of the report, the respondent did not have suitable arrangements for the children to stay overnight with him; on one occasion when he had parenting time overnight, they stayed in a hotel.
- [18] The focus during the trial was on both parties' allegations of family violence against the other. Sharma, J. concludes on this issue at para. 29:
- [29] Although it appears the violent episodes were infrequent, I conclude there is a concern that the respondent will turn to physical force when he is angry or frustrated, and that he has not acknowledged or sought out any guidance to address this problem. This does have an impact on my determination of the best interests of the children.
- [19] The order from the Trial Reasons was filed on April 15, 2016 (the "Trial Order"), and contained the following orders respecting the Children:
- a. The claimant has sole custody and guardianship of the Children, except that both parties are considered the Children's guardians under s. 39(1) of the FLA (paras. 3-4);
 - b. The claimant has exclusive responsibility under s. 40(3)(a) of the FLA for parenting responsibilities with respect to:
 - i. Where the Children reside;
 - ii. Who they associate with;
 - iii. Decisions on education and what extracurricular activities they participate in;
 - iv. Whether to give, refuse or withdraw consent for the Children;
 - v. All decision making regarding the Children's legal and financial interests;
 - vi. Exercising any other responsibilities reasonably necessary to nurture the Children's development; and
 - vii. Making day-to-day decisions affecting the Children and having day-to-day care, control, and supervision, except during the time periods that the respondent can exercise these responsibilities while he is exercising parenting time only (para. 5);

- c. The claimant and respondent share parenting responsibilities for receiving legal notices and requesting and receiving information from third parties on the Children's health, education or other information (para. 6);
 - d. The claimant has primary residence of the Children (para. 10);
 - e. The respondent will have parenting time with the Children for three hours on Wednesday and Friday and during the day on alternative weekends (para. 11); and
 - f. The respondent's family will not act as the Children's caregivers (para. 13).
- [20] The respondent appealed the Trial Order and on December 3, 2015, Sharma J. pronounced the divorce order.
- [21] After the Trial Order, issues arose respecting parenting time. These issues culminated in the claimant unilaterally ceasing the respondent's time with the Children. That denial, in part, led to the respondent going to the claimant's residence on April 6, 2016 where he assaulted the claimant and, allegedly, her mother, in the presence of I.A.
- [22] On April 7, 2015, the respondent appeared before Judge Solomon respecting two counts of assault contrary to s. 266 of the Criminal Code. The respondent was granted bail on ten conditions including restrictions on contacting the claimant and being within 100 metres of any residence, workplace, or school of the claimant or her mother.
- [23] On April 22, 2016, the respondent applied for an order to enforce the Trial Order with respect to parenting. The claimant applied for an adjournment of that application. On April 28, 2016, Sewell J. granted the adjournment of the respondent's application to enforce the Trial Order. Sewell J. set a new date for the application and directed that, on an interim basis before the application was heard, the respondent be granted the right to telephone the Children on Tuesdays and Fridays. Finally, in the event the matter was not heard on May 11, 2016, Sewell J. directed that the respondent be permitted to continue contacting the Children on those days.
- [24] The respondent's application was eventually heard on June 2, 2016, the parties before Mr. Justice Davies. The respondent sought an order reinstituting parenting time and "make-up time" for the missed parenting time since March 4, 2016 pursuant to the Trial Order. The claimant sought an order that the Trial Order be varied or, alternatively, that any parenting time with the Children be supervised by a professional supervisor. She further sought a no-contact clause with respect to herself and the Children, an enforcement order, and an order to preclude the respondent from attending at her residence or the Children's school.
- [25] Mr. Justice Davies was provided with information that a Ministry of Children and Family Development ("MCFD") investigation had been started and a MCFD child protection social worker recommended that the Children be transported to and from visits with the respondent by an independent third party. Mr. Justice Davies concluded at paras. 24-27 that:

- [24] I am satisfied that there should not be a suspension of the respondent's parental time that was ordered after a nine-day trial and in respect of which the judgement was entered less than eight months ago.
- [25] I am, however, sufficiently concerned by the information contained in affidavit #9 of the claimant made on May 16, 2016, as well as by the issues related to the alleged assault of April 6, 2016, that the Ministry's recommendations concerning pickup and drop-off of the children should be implemented.
- [26] I will approve Mr. [P] to be the person who attends upon the claimant and the children for that purpose. The parties should arrange a place where that can be appropriate.
- [26] Mr. Justice Davies did not order a further s. 211 report. Finally, he directed that any further applications be heard by him or Sharma J., due to their familiarity with the issues.
- [27] On August 11, 2016, the parties were back before Davies J. because, since June 15, 2016, the claimant had refused to allow the respondent to see the Children. The allegation made by the claimant was that on that date, Mr. P, the third party who facilitated the drop off and pick up of the Children, put a cigarette on top of a leaf on I.A.'s hand. As a result of this alleged incident, there were complaints made by the claimant to the RCMP, school counsellors, and to the MCFD. The claimant also provided letters from school counsellors and the family doctor advising of their concern with issues of anxiety that I.A. was having.
- [28] Mr. Justice Davies noted that the RCMP and MCFD took no action in respect to the complaints and the MCFD had closed its file.
- [29] Further, Davies J. noted his concern that the eldest son may have to testify at the criminal trial. At para. 29 he concluded that:
- [29] It is with great reluctance that I am going to order that the ongoing parenting time between the respondent and the eldest child be stayed, pending the conclusion of the criminal proceedings. If those proceedings were not going to be concluded within the next two months, I would not make that order, but I am concerned that the insidious position in which the elder child is in makes it necessary to take such a drastic step.
- [30] That said, Davies J. made it clear that the Trial Order for parenting time should continue for the youngest son. At paras. 24-26, he states:
- [24] I see no reason whatsoever why there should not be full resumption of the father's parenting time with the younger child and I so order.
- [25] Since the Ministry has closed its file, the situation remains that that order will not be revisited until after the criminal trial, at which time either party can apply, but between now and the end of the criminal proceedings, I order that the access to the youngest child shall continue in accordance with the order I have already made.

- [26] I will accept absolutely no breach of that order. I need not remind counsel and the claimant that breaches of court orders are punishable by contempt proceedings, and I repeat that I will accept absolutely no breach of that order concerning the younger child.
- [31] Mr. Justice Davies also suggested that a "views of the child" report be prepared by someone who had no contact with the file. Finally, he changed the individual who would facilitate the drop off and pick up of the Children.
- [32] Ultimately, Davies J. ordered as follows:
1. There shall be a full resumption of the Respondent [W.A.] parenting time with the younger child [Z.A.] as set forth in the Order of Madam Justice Sharma on October 8, 2015 being:
 2. Every Wednesday and Friday from 3:30 pm to 6:30 pm; and
 3. Alternate Saturdays and Sundays from 11:00 am to 5:00 pm.
 4. The parenting time of the Respondent [W.A.], with the eldest child [I.A.] shall be stayed pending the conclusion of the criminal proceedings set for trial on September 20, 2016.
 5. Once [I.A.] has given his evidence, or the determination that he is not going to give evidence in the criminal proceedings in Provincial Court, there shall be a resumption of the Respondent, [W.A.'s] parenting time with [I.A.].
 6. The first two or three parenting time sessions of the Respondent, [W.A.], with [I.A.] shall be observed by someone independent of the parties, said observer to be as counsel may agree or as otherwise ordered by the court.
 7. The parenting time facilitators [Mr. M and Ms. S] are hereby ordered as alternatives to [Mr. P] and the parties may otherwise agree to other facilitators.
- [33] On September 20, 2016, the respondent pled guilty to one count of assault and on September 21, 2016, he was sentenced. He received a conditional discharge with a nine month probation order. The conditions included that the respondent not attend within a 200 metre radius of any workplace, place of education, or place of worship of R.A. or her mother.
- [34] On November 24, 2016, the parties were back before Davies J. who concluded that a s. 211 report was necessary to take a fresh look at the parenting of the Children. Davies J. ordered that Dr. Mary Korpach prepare the s. 211 report. At para. 5 of his reasons, Davies J. notes that:
- [5] I have also in the past said, and now will repeat -and this is mainly directed at [R.A.]-- What ever the relationship between you and [W.A.], and as poisonous as it is that must not also poison the children's relationship with their father.
- [35] Mr. Justice Davies also varied the Trial Order for parenting as follows:

2. Access between the Respondent and [R.A.] shall be resumed, and if possible that access will be resumed with his brother.
 3. The order of the Honourable Madam Justice Sharma, granted October 8, 2015, shall be varied by changing the access (parenting time) of the Respondent to the children of the marriage as follows:
 - (a) weekday access shall be suspended.
 - (b) weekend access shall be as follows:
 - (i) weekends 1 through 3: for three consecutive weekends commencing Friday, November 25, the Respondent shall pick up the children after school and drop them off on Sunday, November 26 at 6:00 p.m.
 - (ii) all weekends thereafter shall be on a 3/1 split, with the Respondent picking up the children after school on Friday and dropping them off on Sunday at 4:00 p.m. at a mutually agreed location at least one block away from the residence of the Claimant, and a relative of the Claimant shall pick up the children from the Respondent who will stay in his vehicle during the exchange, for three consecutive weekends, and then the Respondent having no access on the following weekend.
 4. The Respondent shall have at least 3 consecutive days during Christmas Break with the children in the first half of the break, and at least 3 consecutive days with the children during the second half of the break.
 5. The Respondent shall have telephone access with the children on Tuesdays and Thursdays between 6:00 and 7:00 p.m. with the Respondent initiating the call, and with the Claimant making the children available to receive the call.
- [36] Mr. Justice Davies seized himself of all further parenting applications. His intention was to revisit the parenting schedule after Dr. Korpach's report had been produced.
- [37] The appeal of the Trial Order proceeded on March 14, 2017 with reasons on March 16, 2017, indexed at 2017 BCCA 126 [Appeal Reasons]. The Court of Appeal allowed new evidence in respect to the criminal assault by the respondent on the claimant. On appeal, the respondent submitted that the trial judge should not have denied him joint custody or joint parental responsibilities, and should not have limited his parenting time as severely as she did.
- [38] The appeal was dismissed. Mr. Justice Groberman made the following comment at para. 37:

- [37] The parties appeared before a judge of the Supreme Court in November 2016 to deal with parenting issues. The judge found that there has been a material change in circumstances since the trial judge's order, a finding that both parties accept. The judge ordered a new report under s. 211 of the Family Law Act, and has made interim changes to Mr. A's parenting time. There is, in the result, no need to address any alleged deficiencies in the parenting time regime on this appeal.
- [39] The parties have renewed their litigation battle by each filing applications in January 2018.
- [40] On March 29, 2018, Madam Justice Gerow ordered that the matter be adjourned to April 19, 2018, for one day and could be heard in front of any judge. She further ordered that the respondent's wages shall not be garnished by the FMEP until the matter was heard on April 19, 2018 (the "Gerow Order"). The applications were adjourned generally on April 19, 2018.
- [41] The applications came before me on August 20, 2018 for one day. I note that, at the date of the Hearing, the s. 211 report ordered by Davies J. has not been obtained by the parties.

V. Discussion

1. The Protection Order

- [42] The original protection order of August 8, 2014, was set aside on September 5, 2014. The Trial Order did not provide any type of protection or restraining order.
- [43] On June 2, 2016, Davies J. was not prepared to make a protection or no contact, other than ordering that a third party be involved in the drop off and pick up of the Children.
- [44] On August 11, 2016, once again, Davies J. did not make any protection or no contact orders, other than varying the name of the individuals involved in the drop off and pick up of the Children.
- [45] On November 24, 2016, Davies J. varied the parenting time and specifically ordered that the respondent was entitled to pick up the Children from school himself. There was no supervision order made but, due to the probation order that restricted the respondent from being within 200 metres of the claimant's house, Davies J. ordered that the respondent drop off the Children one block from the home where someone would meet the Children and walk them home from there.
- [46] The probation order expired on June 21, 2017.
- [47] Based on the review of the evidence on the parenting issues, there is no basis for any protection or no contact orders, and I decline to grant one.

2. Parenting Issues

A. Legal Principles

[48] Section 37(1) of the FLA provides that a court must determine parenting arrangements based only on the best interests of the child. The factors that a judge should consider in assessing the best interests of the child are listed in 37(2)-(4) as follows:

- (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.
- [49] The views of the child should be considered, and in this case they are a significant factor, particularly relating to I.A.

- [50] Canada has ratified the United Nations Conventions on the Rights of the Child, Can. T.S. 1992, No. 3. Article 12 imposes an obligation to ensure that children are afforded the opportunity to be heard in any judicial proceeding affecting them. These obligations were discussed in *B.J.G. v. D.L.G.*, 2010 YKSC 44, a decision that has been cited with approval in a number of British Columbia Supreme Court decisions: see e.g. *M.Y.T.C. v. L.H.N.*, 2018 BCSC 1174; *A.A.A.M. v. Director of Adoption*, 2017 BCSC 2077.
- [51] Although a s. 211 report was ordered by Davies J on November 24, 2016, it has not been obtained. The reasons for this are not entirely clear, however the lack of report may be attributed, at least in part, to the claimant's expressed concern about putting the Children through the full report process and as well the costs of obtaining such a report.
- [52] As noted in *A.L. v. L.W.*, 2017 BCSC 964 at para. 8 [A.L.]:
- [8] Although the Court must make its decision based on all of the evidence, as Justice Martinson observed in *L.E.G. v. A.G.*, 2003 BCSC 412 at para. 22, a s. 211 report is "an important tool the court can use in reaching its conclusion".
- [53] The role and weight to be given to s. 211 reports are summarized in *K.B. v. J.B.*, 2015 BCSC 704 at paras. 8-10:
- [8] In terms of the preparation of and evidential concerns with such reports, Burnyeat J., in *Wu v. Sun*, 2006 BCSC 1891, at para. 3, said, "s. 15 reports are not governed completely by the evidentiary rules which would be in effect when dealing with reports requisitioned by one of the parties from an expert", and he described the authors of such reports as the "eyes and ears" of the court.
- [9] In *Wu*, at paras. 3-7, Burnyeat J. then engaged in a review of the case law that is relevant to the preparation of such reports. This review notes, among other things, that evidence for a s. 15 or s. 211 report is usually gathered over a series of interviews, that safeguards have been included in the process to protect the interests of the parties, that the report may be based on evidence that is not before the court, and that the court can then assess the weight of the opinions based on proof of the underlying facts and assumptions at trial.
- [10] This last point warrants some emphasis. Regardless of the information that goes to the report writer, the court ultimately has the discretion to review the background information presented in the report, carry out an independent assessment based on the evidence at trial, and come to a different conclusion as to the best interests of the child; *T.C. v. S.C.*, 2013 BCPC 217, at paras. 143-144; *Plant v. Kempton*, 2011 BCCA 171, at para. 11.
- [54] Unfortunately, in this case I do not have the benefit of a s. 211 report. Without this "important tool", I am forced to assess and discern what the Children's views are for the purposes of the s. 37 analysis from the materials supplied, including the affidavit evidence.

B. Review of Affidavit Evidence

- [55] In this section, I will do my best to address each of the allegations made by the claimant in her affidavits and what I can discern the respondent's position to be. The focus will be on allegations made after the Trial Order.
- [56] First, the claimant alleges explicit books were downloaded onto the Children's personal iPhones in or around the last week of February 2016. Attached to the claimant's affidavit is a copy of what was downloaded. At the bottom of each page there is a date referenced being 2016-03-20, 11:39AM. This would have been a Sunday.
- [57] The respondent's position is that MCFD and the police have investigated these allegations and closed their files. He takes the further position that at the time of the downloads, the Children were in the claimant's care. Finally, the respondent submits that this issue was raised before Davies J. and was clearly not found to be of sufficient concern to justify varying the parenting schedule provided.
- [58] The claimant also alleges that the Children told her that the respondent showed them a video of a naked man. The MCFD made a complaint to the Abbotsford Police Department (the "APD"). As the police did not consider the allegation a criminal offence, they closed their file. The respondent's understanding is that the police concluded their file on March 16, 2016 and the MCFD texted him to advise that MCFD was not in charge of his visitation.
- [59] On March 8, 2016, the claimant alleges the respondent complained about her to the Surrey RCMP. It is not clear if the respondent did make any complaint but if he did, this incident has no relevance, in all of the circumstances, to the parenting issues before me. There has been an inordinate number of complaints made to police departments and to MCFD by both parties.
- [60] On March 24, 2016, the claimant met with a social worker at MCFD. The Children were reluctant to speak to the social worker at the MCFD office and they decided to conduct the interview at the Children's school on a later date.
- [61] On or about April 6, 2016, the claimant alleges that the respondent called her excessively, left messages on her parents' answering machine, and alleged, incorrectly, that she had an affair. The respondent agrees he was trying to make contact but says he was doing so because he was trying to exercise his parenting time that was being denied. This is the dispute that eventually lead to the respondent going to the claimant's home and assaulting her.
- [62] The issue of the assault and impact on the parenting time was considered by Davies J. in June and August 2016. He found that once I.A. gave evidence in the criminal proceedings, or it was determined that he would not give evidence, there should be a resumption of the respondent's parenting time with I.A.

- [63] In May 2016, the respondent attended and completed a 6 hour anger management counselling program with Moose Anger Management.
- [64] On May 30, 2016, the claimant contacted MCFD social worker expressing grave concerns regarding the Children's safety around the respondent. She notes, however, that the social worker was of the view there was no evidence to support her claims.
- [65] On June 17, 2016, the claimant reported to MCFD that she witnessed Mr. P put his cigarette out on a leaf and put it in the oldest son's hand, then shook him and pulled his hair. This allegation was denied by both the claimant and Mr. P. This file was closed by MCFD.
- [66] The claimant has produced letters from the school counsellor dated June 17, 2016; Dr. Haron Hassan, a doctor, dated June 22, 2016; and Gerry Bock, a counsellor, dated July 4, 2016. These letters raise concerns about I.A.'s anxiety and mental health. The information that these individuals received was one-sided. They had no information or explanation from the respondent. That said, the letters and the evidence of the claimant on I.A. waking up with nightmares do raise the concerns that I.A. is experiencing significant anxiety, which remains an ongoing concern.
- [67] It was on July 25, 2016, that the respondent last saw I.A.
- [68] On August 30, 2016, the claimant reported to MCFD that Z.A. told her that the person who supervises the visits had physically hurt him by grabbing his elbow and twisting it. The respondent and the person who allegedly hurt Z.A. were interviewed by the APD and both denied the allegations. The file was closed by the police department.
- [69] In September or early October, 2016 (date of the interview was not clear on records produced) Neil Gratton, the assigned social worker, interviewed I.A. I have the information from the interview as part of the MCFD file in an ICM Production report. This investigation was prompted by a report by the claimant that on September 19, 2016, I.A. reported he thought the respondent was going to kill or hurt him. Of significance, I.A. provided the following information, he was 8 years old at the time:
- a. He was not afraid of his father;
 - b. He would rate his visits with his dad at a 4-5 out of 10 meaning: "a [sic] ok time with dad but it could have been better";
 - c. He verified that he had no fear of his father hurting him on any of his access visits after April 2016;
 - d. He was asked why he reported that he felt his father would kill him and his response was "didn't know";
 - e. He was asked if anyone has ever mentioned that they were worried about him visiting his father and he replied "my mom";

- f. He said that before he goes to see his father his mother always went over a "Safety Plan" with him, which included "a phone with emergency numbers on it". He said that his mother also told him if he ever feels unsafe to run into a girls' bathroom and call 911;
 - g. He said that his mother told him to never believe his father's lies or "false promises" but he could not recall a time his father had lied to him or had hurt him other than when his father told him he would buy him a Superman costume made out of steel, which he had not;
 - h. He was not able to provide examples of what "feeling unsafe" would look like and said "I don't know why I am afraid of my father."
 - i. He said that his mother is fearful of his father hurting him. He said that while this does not cause him anxiety it is always on his mind before he sees his father;
 - j. He said he refuses to see his father due to what his mother told him about her own fear of him being hurt;
 - k. His mother has told him that she is concerned for his safety when he is with his father, she tells him that she does not want him seeing his father on a regular basis;
 - l. His mom does not want his brother visiting his father either;
 - m. He recalls having a good times with his father in previous visits;
 - n. He said that his father's friend burnt his hand with a cigarette butt when either his hand was out the window of a car or when the friend walked by him and brushed against his hand;
 - o. Regarding his brother's report of being grabbed by the arm during a visit with his father, he said he did not believe his brother was being truthful;
 - p. He said his mother always asks his brother about visits as soon as he got home;
 - q. He is very close to his mother and feels safe with her; and
 - r. He understands from his mother that he does not have to see his father right now. He said he was okay with that.
- [70] In November 2016, the claimant made a child safety report to MCFD making the following allegations:
- a. Z.A. came back from a visit with his father and reported that his father was going to come to the house and teach her a lesson;
 - b. Z.A. came back from a visit with his father and told her that his dad was going to go to the school and punch the school counsellor;
 - c. Z.A. told his father the punching bag was his mother and his father was laughing and egging him on;

- d. The respondent had shown him a picture of his mom with a beaten up face and was laughing about it; and
 - e. The respondent made a comic book about his beaten wife and showed it to Z.A.
- [71] On November 17, 2016, Mr. Gratton attended at the school to interview Z.A. Of significance, Z.A., who was six years old at the time, provided the following information:
- a. He said that he liked both homes, that he loves both parents, was very close to his mother, and that his relationship with his father was "good";
 - b. He said he wanted to have sleepovers at this father's house;
 - c. When asked whether he has any worries while with his father, he said he was worried about how his mom feels about him wanting more time with his father and that she does not want him to stay overnight with his father;
 - d. He reported that he enjoyed spending time with his father, his father was "nice", and liked to buy him things;
 - e. He said he was not afraid to visit his father and that he wanted to spend more time with his father because he was "fun";
 - f. He reported that his dad does not talk about his mother when he is with him, that he did not recall his father saying anything negative about his mother, and that his father never threatened to harm her;
 - g. He denied that his father ever threatened to come to the school and hit anyone;
 - h. He denied that his father showed him a picture of his mother's beaten up face;
 - i. He stated that his dad's friend did grab his arm but that his father was not going to have this person walk him to and from his parents' house any more;
 - j. He understood that his brother did not want to see his dad because he was afraid of him but he was not afraid of his dad; and
 - k. He said he wanted to see his dad more than he does but does not want to tell his mother about this.
- [72] On November 24, 2016, Davies J. made the order granting overnight parenting time with the Children.
- [73] The claimant asserts that she made her best efforts to facilitate I.A.'s time with the respondent but he refused to go. She claims that, as a result of a planned overnight visit on November 25, 2016, I.A. said he would kill himself if he were forced to see the respondent. The respondent agrees that these issues must be addressed and conceded that he did not want to force I.A. to see him without first getting counselling. He further agreed at the Hearing that he would be willing to pay for the psychologist for both of Children.

- [74] On November 29, 2016, a report from the school raised a concern that I.A. wanted to kill himself.
- [75] In the fall of 2016, the respondent met his current wife. They were married in the spring of 2017.
- [76] On December 2, 2016, a report was made to MCFD that I.A. had drew a picture that depicted him lying on the floor with blood spurting out and his dad standing over him with a knife. The picture had a caption saying: "I don't want to go on the sleepover" and "I'm scared that he's going to kill me".
- [77] On December 20, 2016, Anika Basset, a Complaints Specialist, from the office of the Provincial Director of Child Welfare and Aboriginal Services, advised the claimant, that the child safety report made to MCFD on November 9, 2016, had been closed.
- [78] On or about December 21, 2016, the claimant went to the Child and Youth Mental Health drop-in clinic to seek information on how to help I.A.
- [79] On January 5, 2017, the claimant took I.A. for an assessment by Dr. Kashif, a psychiatrist, who diagnosed the boy with post-traumatic stress disorder ("PTSD") related to the violence he witnessed by the respondent and the ongoing contact with his father. This doctor recommended that parenting time with the child be stopped given the negative effects it was having on the child's mental health. The report of Dr. Kashif dated January 5, 2017 concludes:

This is an 8-year-old, young boy seen in the START Program for an assessment. On the basis of history and observation [I.A.] seems to have symptoms of post-traumatic stress disorder. [I.A.'s] symptoms get precipitated by fear of being exposed to his biological dad resulting in increased anxiety and sometimes he makes threats of ending his life. [I.A.'s] symptoms are predisposed by witnessing alleged physical abuse and aggressive behaviour at home, parental separation and poor coping skills. [I.A.'s] symptoms are maintained due to ongoing contact with his biological dad despite having a negative impact on [I.A.'s] mental health.

- [80] The limitations of this report is that Dr. Kashif had no opportunity to hear from the respondent or consider why I.A.'s views had changed between September or early October 2016, when Mr. Gratton interviewed I.A., and the time of Dr. Kashif's assessment.
- [81] On January 20, 2017, Mr. Gratton and Ms. Cooke, another social worker, went to the school to speak with I.A. The principal reported that she had not noted any changes in I.A.'s behavior. She also said that Z.A. seemed happy to go with his father whereas I.A. was not, and quickly ran the other way when his father was present. The school reported no recent threats of self harm.
- [82] On February 1, 2017, the APD confirmed that their file was concluded and no charges or further investigative steps were required regarding the allegations against the respondent.

- [83] On February 9, 2017, a letter from John Jenkinson of Life Link Counselling Group confirmed that the respondent had attended 5 hours of counselling on January 25 and February 1, 2017 to address the failed marriage, concerns regarding co-parenting, communication/conflict resolution, as well as anger management and self-regulation strategies. The respondent is reported to have been on time for his appointments and fully and actively participated in the conversations.
- [84] On or about April 24, 2017, I.A. was placed on an Individual Education Plan ("IEP") for intensive behavior intervention or serious mental illness by the School District. I.A. was also placed on an adaptive program for academic support. Safety concerns in the IEP included self harm. By June 6, 2017, he was not yet meeting or approaching a number of the stated objectives.
- [85] On May 30, 2017, Mr. Gratton wrote to the respondent confirming that since the child protection report in April 2016 the MCFD had received 7 additional reports dating from September 2016 to January 2017. She stated:

At this time, the decision has been made that your children are not in need of protection/intervention through MCFD.

I have spoken to [W.A.] about the previous concerns reported and am satisfied he will ensure his children are safe and cared for while in his care .

I have spoken privately to the children and am satisfied they are safe while in the care of their father. MCFD is aware that [I.A.] refuses to see him father and has not seen [W.A.] in several months. MCFD is aware [Z.A.] sees his father as set out in the court ordered access agreement. I have spoke to [Z.A.] on two separate occasions and am satisfied he is not in need of protection while in the care of either parent.

MCFD recognizes and does not dispute that [R.A.] has been the victim of a domestic assault in April 2016. MCFD does acknowledge that [R.A.] has since been proactive in ensuring she and your children are receiving services to deal with any trauma they may have suffered as a result.

MCFD was made aware of a diagnosis of PTSD regarding your [I.A.] based on information provided by [R.A.] and [I.A.]. MCFD is aware that [W.A.] is taking measures to support [I.A.] by not accessing his court-ordered visitation rights at this time. [W.A.] has expressed an interest in participating in counselling with [I.A.] MCFD is hopeful that this will occur in the future but not in the position to require it.

I hope this letter provides helpful clarification of MCFD's position with respect to your family's current circumstances. Your file at this office will now be closed.

- [86] In June 2017, the claimant alleges that Z.A. made statements that the respondent would come and teach her a lesson. She further notes that on or about June 9, 2017, when the youngest son was ill and could not participate in the court ordered visit the respondent called the Surrey RCMP who attended at the home. The respondent admits he called the police since he was denied his parenting time. He says the court order does not state that the child should not participate in a scheduled parenting time even if sick.
- [87] On or about June 12, 2017, the respondent wrote to Dr. Hassan advising him to stop seeing the Children immediately. The letter from the respondent indicates the reason for this request was that he felt that Dr. Hassan was "biased". Dr. Hassan, at the claimant's request, has continued to provide care for the Children. Dr. Hassan has been the Children's family physician since they were infants.
- [88] As a result of the claimant's fear that the respondent would assault her again and the expiry of the probation order on June 20, 2017, she moved to a safe house with the Children on June 17, 2017 and lived there until August 2017.
- [89] The respondent says that on July 29, 2017, when Z.A. was with him a message popped up on Z.A.'s phone from a Toronto phone number. The respondent opened the message. It was a photograph of a man's penis. The respondent exited the message and looked at previous messages received from that phone number. He alleges there was an exchange of texts in which this individual asked the claimant to send him nude pictures of her and she responded that she would only send body pictures. The respondent says he deleted the messages from Z.A.'s phone but transferred some pictures and a text message to his phone so that he had a record of what had transpired. He reported this incident to MCFD.
- [90] On September 29, 2017, Dr. Olson, a registered psychologist, who saw I.A. in June, July, August, and September 2017, commented that:

[I.A.] continues to endorse affective, cognitive and somatic features consistent with post-traumatic stress disorder (PTSD). He expresses concerns with his younger brother's behavior during visits with their father. He stated that he had frequent and intense worries that his father would assault his mother again. He states that his father lied and said negative things about his mother. For example, he reports that his father told him that his mother was putting poison in their food. He expressed concern that his father would take his younger brother to Saudi Arabia.

In terms of mental status, [I.A.] presents as a polite young person who describes feeling anxious about visiting his father and the impact of his father's influence on his brother.

- [91] In November 2017, the respondent sent emails to the claimant's relatives referencing that the Children had been exposed to the claimant and "her lover [sic] genitals picture." The claimant denies that she sent or received any nude pictures. The respondent admits he sent the emails but says that he did so because the phone plan is a family plan and so the whole family would get the messages. He claims that the nude photo was a picture of the claimant's ex-boyfriend. Attached to the respondent's affidavit is a copy of the photo of an erect penis

that he says was received on Z.A.'s phone. The respondent alleges that the claimant was attempting to frame him for the photos but did not pursue this once the matter was reported to the police.

- [92] In November 2017, the claimant claims that Z.A. told her that the respondent told him that his mother would be sick three times and the third time she would not be able to get out of bed. The claimant took these as a veiled threat by the respondent communicated through Z.A.
- [93] The claimant has been seeing Dr. Phyllis Ohm, a registered psychologist, since 2016. In a letter dated November 27, 2017, Dr. Ohm expressed concern, based on what the claimant told her, that the respondent's "email harassment" was evidence of a stalking behaviour and an obsession with the claimant.
- [94] In December 2017, the claimant asserts that the respondent's sister looked after Z.A. even though the Trial Order does not permit any of the respondent's family to act as the Children's caregivers. The respondent asserts the Children have "good support structure" and he is always present.
- [95] In December 2017, the claimant asserts that after Z.A. called her a "motherfucker" and "a piece of shit" after returning from visits with the respondent.
- [96] On January 10, 2018, counsel for the claimant wrote to the respondent advising that: "my client remains very concerned that you will use any intervening parenting time with [Z.A.] to show [Z.A.] inappropriate adult male genitalia your parenting time with [Z.A.] will be suspended in [Z.A.'s] best interest until January 22, 2018."
- [97] On January 14, 2018, one of the supervisors who had been attending with the respondent on the pick up and drop offs of Z.A. confirmed that the boy seemed happy and comfortable to go with the respondent.
- [98] In early February 2018, the respondent took a parental leave because his third son was born in early January, 2018.
- [99] The last time the respondent saw Z.A. prior to the Hearing was in May 2018. The respondent has spoken to Z.A. on the phone.

C. Best Interests of the Children

- [100] Section 37 of the FLA states that all orders for guardianship, parenting arrangements, or contact with a child must be made with consideration of only the best interests of the child.
 - i. Children's Medical and Emotional Needs

- [101] The evidence demonstrates that Z.A. enjoys visits with the respondent. In my view, there is no merit in the claims that he was injured by any of the supervisors. There is conflicting evidence on whether he was exposed to inappropriate movies and the circumstances surrounding the inappropriate photo that was on his phone.
- [102] There is no evidence that Z.A. has developed any type of emotional issues.
- [103] Z.A.'s last school report produced at the Hearing, is his Term 2 Grade 2 Student Progress Report which states that Z.A. was a kind, considerate student who was making satisfactory progress throughout the second term. The reports states that he was receiving learning support for literacy.
- [104] There is evidence that I.A. has developed some significant issues relating to the respondent. What is not clear is why he indicated he did not fear the respondent in September or early October 2016, when he was interviewed by the MCFD social worker, and yet by November or December 2016 he was allegedly threatening to kill himself if he had to see his father.
- [105] What is important is that I.A. currently appears to fear his father and is under significant mental stress. As such, any reunification attempt with the respondent must be done in a manner that respects I.A.'s emotional state and in a manner to prevent further estrangement.
- [106] The respondent agrees that I.A. needs to have counselling. He is prepared to fund that counselling.

ii. Views of the Children

- [107] With respect to Z.A., the evidence shows that Z.A. was enjoying positive parental time with the respondent until the visits were unilaterally stopped by the claimant.
- [108] There is no evidence that Z.A. fears the respondent.
- [109] The evidence provided regarding I.A., on the other hand, demonstrates that I.A. fears the respondent, has developed PTSD arising from witnessing the event of April 6, 2016, and suggests I.A. does not want to see the respondent at this time.

iii. Other Individuals in the Children's Lives

- [110] The claimant lives with her parents who have provided care for the Children for many years.
- [111] The respondent currently lives with his new wife and newborn son. His wife has developed a relationship with Z.A., but has not yet had an opportunity to do so with I.A. I find that it is important there be an opportunity for both Children to get to know their step mother and spend time with their half brother.

iv. History of Children's Care

[112] There is nothing in the history of the Children's care that raises issues as to the ability of these parties to care for their children. Problems arise, however, when they continually report each other to the MFCJ and the police on a wide range of issues. Except for the assault of April 6, 2016, it appears that none of the other complaints had any merit. If anything, this behaviour appears to be harming the welfare of the Children. Both parties need to stop this behaviour.

v. Need for Stability

[113] The evidence shows that the Children need stability and to have a relationship with both of their parents. For this to occur, a regular parenting schedule must be put in place for both Children once I.A.'s emotional issues have been adequately addressed.

vi. Ability of the Parents to Exercise Parenting Responsibilities

[114] The only concern I have in the parties' ability to exercise their parental responsibilities is the potential that the respondent secures employment with the Canadian Forces and is then posted away from the lower mainland or overseas. If, that occurs he will not be in a position to exercise any type of parenting responsibilities.

[115] If the respondent remains in the lower mainland there should not be any issue with his ability to exercise parenting responsibilities.

vii. Family Violence

[116] The respondent has plead guilty to assaulting the claimant on April 6, 2016. This incident demonstrates that the respondent is capable of family violence. The fact that he assaulted the claimant and, allegedly, her mother in the presence of I.A. raises significant concerns. That said, the respondent has completed his probation and undergone anger management courses since the assault. He has also come to appreciate how his actions has harmed I.A. He seems to understand that his actions have contributed to I.A.'s development of significant mental health issues, anxiety, and stress.

[117] At the present time, I see little evidence that supports that the respondent will be violent towards the claimant and no evidence that he would be violent towards his Children.

[118] I do not find that the respondent is unable to care for the Children. Indeed, his acceptance that I.A. needs immediate counselling, for example, shows that he understands the issues at stake and wants to do what he can to address them.

viii. Cooperation between the Parents

[119] Given the multiplicity of complaints made to the MCFJ and police agencies and the degree of animosity that these parties still have toward each other, it is clear that they are unable or unwilling to cooperate on issues affecting the well-being of the Children at this time. I am hopeful that in the future this will change and both will see that the needs of their Children must come first.

ix. Conclusions

- [120] In light of these considerations, it is my view that it is in Z.A.'s best interests to immediately resume parenting visits, including overnight visits, with the respondent. There is urgency in this since the respondent has applied to be a member of the Canadian Armed Forces and, if accepted, he may be posted overseas.
- [121] Since there is such turmoil in this family, I also see the need for the respondent and Z.A. to receive counselling together to ensure the father-son bond is maintained. In my view, this counsellor should be the same one that sees I.A.
- [122] At the Hearing, the parties agreed that Bob Finlay, a registered counsellor, should be appointed. If for some reason, Mr. Finlay is not available to immediately begin counselling sessions with the Children and the respondent, then the parties may agree on appointing a different counsellor or apply to the court.
- [123] With respect to I.A., it is my view that I.A. should immediately commence counselling with Mr. Finlay, or an alternative counsellor. The respondent should participate in counselling sessions with I.A. once the clinical counsellor agrees it would be productive to do so.
- [124] I find that it is in I.A.'s best interest, to resume seeing the respondent once Mr. Finlay, or the alternative counsellor, has determined that I.A. is mentally and emotionally ready to do so. Once that determination is made, I.A. should resume seeing the respondent on the same schedule as Z.A. That said, if the clinical counsellor recommends, there may be a phased schedule put in place.
- [125] As I have no evidence on how long this reunification process will take, I have to leave it for a future ruling or agreement of the parties when the parenting time should resume with I.A. I would hope that this can happen before the holiday break in 2018 so that both brothers can be with the respondent for overnight visits during the holiday break in 2018.
- [126] The goal is that the Children will gradually increase the amount of time they spend with the respondent until they are spending 50% of their time with each parent. In my view, this should be accomplished over the next six to eight months. That goal comes directly from Dr. Elterman's opinion. I note that circumstances have changed since the Trial. At that time, there was the following concern set out at para. 81 of the Trial Reasons:
- [81] His personal circumstances are not conducive to being able to provide primary care to the children 50% of the time, and no substantive plan has been put in place to change that situation. Obviously he cannot be faulted for the schedule dictated by his business, but by his own admission his working hours are unpredictable and likely to be long. While his children are young enough to require constant supervision, I find it would be too disruptive to the children's need for routine, stability and consistent care to be subjected to the vagaries of his business schedule.

- [127] These difficulties are no longer present. The respondent's personal circumstances have changed: he now lives in a four bedroom condo with a new wife and baby son and the Children are older. In my view, these changes suggest the goal of 50/50 custody within six to eight months is a realistic one.
- [128] Since the respondent may be posted overseas in the future, I find that there should not be any change in the parental responsibilities respecting the Children as set out in the Trial Order except in respect to the Children's relationship with their stepmother. These Children do need stability in their lives.
- [129] Since there has been extensive judicial involvement in this proceeding with a number of judges and masters involved, it is my view this matter requires oversight by one judge. I will seize myself of this matter with a view that both of these parties must recognize that they should be putting the Children's best interests first. They must act in a respectful and courteous manner to the other and to take active steps to encourage the Children's relationship with the other party.
- [130] In my view, seizing myself of this proceeding is also necessary because the claimant has unilaterally disobeyed the parenting orders in the past. That conduct should not and will not be condoned. I echo the words of Davies J. on August 11, 2016, that court orders must be obeyed and any breaches are punishable by contempt.
- [131] Compliance with orders made by courts are essential for the administration of justice. As Walker J. observed in *Grewal v. Nijjer*, 2011 BCSC 332, aff'd 2011 BCCA 505 at para. 20:
- [20] It is not up to litigants to decide whether or when they will obey court orders, or whether they will only comply with some of them. Court orders must be complied with. Otherwise, the administration of justice falls into disrepute, significant costs are incurred by parties attempting to enforce compliance, and delay results. This cannot be tolerated.
- [132] The allegations that have been made in the numerous affidavits are the ones that should be put into the past. In the future, the parties should be focused on the Children and how to best support their academic, psychological, and emotional well-being.
- [133] I further note that the best interest of the Children are not furthered with the continual complaints to the MFC, Surrey police department, APD, and RCMP by both parties that results in the Children being interviewed by police officers and MCFD social workers. Repeated interviews and investigations can take an emotional toll on children: see e.g. *AA. v. S.N.A.* 2009 BCSC 387 at para. 42. The parties must recognize that choosing to continue down this path may further harm the Children.

D. The s. 211 Report

- [134] The parties have not proceeded with the s. 211 report even though ordered on November 24, 2016. In my view, at this stage with the current plan for the Children to see a clinical counsellor, the s. 211 report should be put on hold. If the current plan is successful, then the need for a s. 211 will be eliminated and the costs will be avoided by the parties.
- [135] If the current plan is not successful, then the necessity of the s. 211 report will resurfaced. As I have seized myself of this proceeding, this is a decision that can be made in the future if necessary.

E. Right to see the Respondent's Family Members

- [136] The Trial Order provided that the respondent's family not act as the Children's caregivers. The rationale for this was set out in para. 68 of the Trial Reasons:
- [68] The respondent made it clear he had informed his family of his accusations against the claimant (such as the alleged affair with a former classmate). He implied his family believes his allegations. Neither his mother nor his sister has lived in North America. An email exchange between the claimant and the respondent's sister demonstrates that his sister's attitude toward the respondent inviting a prostitute into his home differs from what I consider to be a reasonable response. The sister wrote [punctuation added for clarity]: "if you were sleeping with him & doing ur job as a good wife, looking good, house clean, no saying no when he needs fucking, he wouldn't look 4 something else or go with someone else". Clearly, the sister would face a learning curve to appreciate the social norms of Canadian society. Combined with my previous findings about the respondent's failure to adhere to the parties' religious traditions, I find it is not in the children's best interests for the respondent's family to act as the children's caregivers.
- [137] While the respondent's sister and her children had been living in Vancouver for a period of time, the respondent advised that his sister has since moved to Texas on a permanent basis.
- [138] In my view, if the respondent's sister and her children are visiting Vancouver the Children ought to be permitted to visit them. I emphasize, however, that the Trial Order remains. The respondent's family should not act as the Children's caregivers.
- [139] This order does not apply to the respondent's new wife and the stepmother of the Children. She ought to be permitted to provide care for the Children when the respondent is exercising his parenting time. If the clinical counsellor agrees it is appropriate, I.A. can be introduced to the stepmother and his half brother as part of the reunification program with the respondent.

3. Child Support Issues

A. Legal Principles

[140] The respondent seeks to vary the child support ordered in the Trial Order to be paid in accordance with the Federal Child Support Guidelines, S.O.R./97-175 ["Guidelines"]. The claimant submits, by contrast, that there be no change in the amount of child support she receives.

[141] The objectives of the Guidelines are set out in s.1:

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[142] Applications to vary child support orders are governed by s. 17(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) ["DA"], or s. 152 of the FLA. Section 17(4) of the DA states:

- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[143] Section 152 of the FLA is similar wording but slightly broader.

[144] The discretion to make an order of retroactive child support is found in ss. 15.1 and 17 of the DA or ss. 152 or 170(b) of the FLA (depending on whether it is a variation order or not). At para. 133 of *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.] Mr. Justice Bastarache, for the majority of the Supreme Court of Canada, directs trial judges to consider four factors when assessing whether retroactive child support is appropriate:

- a) Is there a reasonable excuse for why support was not sought earlier?
- b) Was there any blameworthy conduct on the part of the payor parent?
- c) Is a retroactive award appropriate in light of the child's past and present circumstances?
- d) Will a retroactive award cause hardship to the payor parent or to his or her other children?

[145] He notes that no factor is determinative on its own, and the factors ought to be assessed in a broad and holistic manner: at para. 99.

[146] At paras. 120-125 of D.B.S., the Court states that the commencement date for an award of retroactive child support should not be restricted to the date upon which an application to a court or formal notice is given, but rather it should be the date of effective notice by the recipient parent to the payor parent. Effective notice was defined as "any indication by the recipient parent that child support should be paid": para. 121 of D.B.S. The Court suggested that this is generally when the topic is broached.

[147] In this proceeding, a material change in circumstances is not needed because the Trial Order recognized that child support should be adjusted after the exchange of financial information.

B. Background

[148] The Scarth September Order provided at para. 4(a):

The Respondent must pay to the Claimant \$700 before September 15, 2014, and thereafter, \$1,000 per month for child support, without prejudice to the Claimant's right to seek retroactive child support from an earlier date;

[149] The Scarth March Order, dismissed the respondent's application to vary child support and ordered, commencing on April 1, 2015, the respondent pay child support of \$1,000 per month by way of cheque to the claimant.

[150] In October 2015, the Trial Order provided the following orders relevant to child support:

14. The Respondent is found to be a resident of British Columbia and is found to have a gross annual income of \$80,249.79;
15. The Respondent will pay to the Claimant the sum of \$1,212 per month for the support of the Children, commencing on the date of separation, July 16, 2014, and continuing on the first day of each and every month thereafter, for as long as the Children are eligible for support under the Family Law Act or until further court order;
17. The Respondent will pay to the Claimant \$4,444 in retroactive child support;
18. The Respondent will pay child support to the Claimant by way of cheque;
19. For so long as the Children are eligible to receive child support, the parties will exchange copies of their respective income and corporate tax returns for the previous year, including all attachments, by no later than May 31 each year and copies of any Notice of Assessment or Reassessment provided to them by Canada Revenue Agency immediately upon receipt, with child support to be adjusted, if necessary, for the following year beginning July 1 of each year based upon the Respondent's financial information.

[151] The child support issues were addressed at paras. 5-10 of the Appeal Reasons:

- [5] The order at trial required Mr. A. to pay \$4,444 in retroactive child support as well as ongoing support of \$1,212 per month, based on what is described in the order as a "gross annual income" of \$80,249.79. It is apparent that the support order represented the table amount under the Federal Child Support Guidelines.
- [6] We were advised that Mr. A. paid the retroactive child support, as well as the ordered monthly support until June 2016, though his payments were often late. We were also advised that in July 2016, Mr. A. unilaterally reduced his payments to \$432 per month. He says that his guideline income fell to \$28,000 for the 2015 taxation year. The bulk, if not all, of Mr. A.'s "arrear" in child support arise from his unilateral reduction in support payments.
- [7] There is, unfortunately, ambiguity in the child support adjustment provision of the order. The relevant provision reads:
- 19 For so long as the Children are eligible to receive child support, the parties will exchange copies of their respective income and corporate tax returns for the previous year, including all attachments, by no later than May 31 each year and copies of any Notice of Assessment or Reassessment provided to them by Canada Revenue Agency immediately upon receipt, with child support to be adjusted, if necessary, for the following year beginning July 1 of each year based upon the Respondent's financial information.
- [8] The difficulty is that the provision, while stating that support is "to be adjusted" does not explicitly set out how it is to be adjusted. There are various possibilities. The adjustment might be "automatic", based on a tax return and the table set out in the Federal Child Support Guidelines. Alternatively, it might require agreement or a court order. If agreement or a court order is required, it is not clear what sort of interim adjustment, if any, is to be made, or who bears the onus of bringing the matter to court for resolution.
- [9] The result is that Mr. A.'s support obligations between July 2016 and today are a matter of conjecture. We cannot know whether he is abiding by those obligations without a definitive interpretation of an ambiguous court order. Because of this lack of clarity, we concluded that this Court should proceed to hear the appeal. The issue of whether Mr. A. is in compliance with his support obligations will have to await clarification in the court below.
- [10] I make the obvious observation that, particularly in high-conflict family cases, it is essential that obligations under court orders are easily ascertainable. Where an order provides for adjustment of child support, the mechanism for adjustment should be fully articulated.
- [152] The Trial Order respecting child support has not been varied by the agreement of the parties or by a court order.
- [153] On May 3, 2018, the parties appeared before Mr. Justice Funt, who ordered that both parties file updated Form F8 Financial Statements at least 2 weeks prior to any hearing (the "Funt Order").

C. Evidence relating to the Respondent's Income

[154] Madam Justice Sharma determined that the fairest determination of the respondent's income should be the respondent's total income reported on line 150 of his 2014 tax return: para. 88 of the Trial Reasons. That amount was \$80,249 and based on the Guidelines the amount he was ordered to pay was \$1,212 a month.

[155] Since the respondent was paying \$1,000 a month as interim support as at the date of trial, the Trial Order required that the sum of \$4,444 be paid as retroactive child support. The respondent paid this amount on January 29, 2016.

[156] The Trial Order allowed for the adjustment of the child support based on the parties' tax returns as of July 1st of the following year. The mechanism for the adjustment was not addressed in the Trial Order.

[157] The respondent's personal tax returns show the following income reported on line 150 with the Guidelines amount:

YEAR

INCOME

GUIDELINE AMOUNT

2014

\$80,249.79

\$1212.00

2015

\$28,319.61

\$437.00

2016

\$58,636.03

\$890.00

2017

\$95,191.66

\$1,457.00

[158] The respondent explains that his income fluctuates. The reason the respondent's income dropped to just over \$28,000 in 2015 was a result of this fluctuation.

- [159] On April 28, 2016, the respondent's counsel provided the claimant's counsel with a copy of the respondent's personal and corporate tax returns. He advised that the corporation was experiencing a loss and suggested that using the respondent's income of \$28,319.61 with the Guidelines amount of \$438.00 per month. A request was made for the claimant's guideline income so that the extraordinary expense sharing ratio could be determined.
- [160] As a result of this change in income, the respondent unilaterally changed the amount of child support he was paying to the claimant in July 2016. He did so on reliance on the Trial Order that provided an adjustment provision. The change in child support was opposed by the claimant. The amount of child support the respondent commenced paying in July 2016 was \$437 per month based on his 2015 income of approximately \$28,000.
- [161] In June 2017, counsel for the respondent requested that the claimant produce her 2016 tax return so that child support adjustments could be made. It is not clear from the affidavit evidence if this information was provided by the claimant. I have not located copies of the claimant's 2015, 2016 or 2017 tax returns in the evidence provided at the Hearing.
- [162] In July 2017, the respondent unilaterally changed the amount of child support he was paying again to reflect his income. From July 2017 onward, he consistently made payments of \$849 to reflect his increase in income.
- [163] In early 2018 the respondent and his new wife had a son. The respondent took a parental leave from his job as program director at CDI but continued to make payments to the claimant. He commenced receiving EI of \$1,952 a month. His pharmacy business is still operating at a loss. If he joins the Canadian Armed Forces, however, he would expect to earn approximately \$85,000 per year.
- [164] If the Guidelines were applied to the respondent's incomes as set out in line 150 of his personal tax returns the amount of child support he should have paid is as follows, if the adjustment is made on July 1 of each year:

PERIOD

AMOUNT

July 16, 2014 to June 2016

\$29,088.00 (\$1,212 x 24)

July 2016 to June 2017

\$5,244.00 (\$437 x 12)

July 2017 to June 2018

\$10,668.00 (\$889 x 12)

July 2018 to Oct 2018

\$5,828.00 (\$1,457 x 4)

TOTAL:

\$50,828.00

[165] If the sum of \$1,212 is used as the amount of child support, the amount owed over the same period would be \$63,024. If the Guidelines had been used and the amount of child support adjusted, the respondent would have overpaid a total of \$12,196.00.

[166] The amount of child support that the respondent has paid since the registration with the FMEP is as follows:

YEAR

AMOUNT PAID

2015

\$5,525.00

2016

\$11,373.52

2017

\$7,719.00

2018 (as of Aug 1)

\$24,770.32

[167] These amounts include interest, statutory default fees, and statutory land title fees.

D. Conclusion

[168] I do not see a reason why the intent of the Trial Order should be displaced. The Trial Reasons provided, in part, at para. 92:

[92] The parties should exchange financial information each year for the purpose of re-assessing the appropriate child support payments based on the respondent's income tax returns.

[169] As such, I find that the amount of child support that the respondent should have paid is reflected above at para. 164.

[170] The challenge is how to best address the overpayment in child support by the respondent since July 2016 while ensuring that the Children's best interest are met.

[171] In my view, this can be achieved by an order that the claimant reimburse the respondent the sum of \$12,196 plus interest pursuant to the Court Order Interest Act, RSBC 1996 c. 79. I will leave it for the parties to work out the appropriate interest that should be paid.

- [172] I do not see this as a hardship on the claimant since she received a lump sum amount from FMEP, sometime after May 2018, of \$15,497.62. However, it may be that the claimant has incurred s. 7 expenses that the respondent has not paid in accordance with the Trial Order. If the claimant is owed money for s. 7 expenses from the respondent, she is entitled to offset those s. 7 expenses against this amount.
- [173] I find that the respondent's guideline income to be used for child support should be \$95,191.66 with the child support amount to be paid, based on the Guidelines, of \$1,457 commencing on November 1, 2018.
- [174] There should be a mechanism for changing child support in the future. There was no mechanism provided in the Trial Order. I will vary para. 19 of the Trial Order to allow for a change in the child support amount by agreement of the parties or by court order. In doing this, I am anticipating that the parties should not have to return before me each year to have the appropriate amount of child support set. This is something that should be agreed to by the parties and an application should only be needed if there is some legitimate reason to depart from the Guidelines. Should either party be unreasonable in withholding consent this is a matter that will be dealt with in a costs award against the unreasonable party.
- [175] If in the future the parties have equal parenting time, then an adjustment to the child support would have to be made in accordance with the Guidelines.
- [176] The Funt Order required updated Form F8 Financial Statements to be filed at least two weeks prior to the hearing of the applications. The claimant did not comply with this order. The respondent filed his updated financial statement on August 13, 2018. As I do not have the claimant's current income, as a result of her failure to comply with the Funt Order, I cannot make an order varying the s. 7 expenses and the percentages paid by each which is set out in the Trial Order.
- [177] There must be an adjustment done on the s. 7 expense sharing based on the parties' income. I understand from the claimant's counsel that an application respecting the s. 7 expenses is forthcoming. That application should be set down so this issue can be resolved in a prompt manner.

4. FMEP Issues

- [178] On May 25, 2015, the claimant enrolled with the FMEP. At that time the arrears owed according to the FMEP account statement was \$6,200. The ongoing maintenance was \$1,000 a month. The respondent paid the \$1,000 for August, September, and October 2015. In November 2015 the maintenance amount was varied to \$1,212 per month. The respondent paid this amount in November 2015 and December 2015. He also made the retroactive payment of child support arrears of \$4,444 on January 29, 2016. Commencing in January 2016 the respondent made the following payments:

TIME PERIOD

PAYMENT AMOUNT

January/February 2016

\$462.90

March 2016

\$385.45

April 2016

\$437.05

May 2016

\$1,212.00

June 2016

\$1,783.17 (some due to garnishment proceedings)

July 2016

\$0

September 2016-June 2017

\$4,375.00 (\$437.50/month)

April 2018

\$1,787.70

May 2018

\$1,212.00 plus \$16,799.62

(from the respondent's equity in his condo)

July and July 2018

\$2,424.00 (\$1212.00/month)

[179] The actions taken by the Director of Maintenance Enforcement

(the "Director") was as follows:

- a. Filing of the Trial Order against property owned by the respondent pursuant to s. 26 of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FMEA]. The Director registered the Trial Order on March 6, 2018;

- b. Issuance of a notice of attachment to Her Majesty The Queen in Right of Canada pursuant to s. 15 of the FMEA and the Family Orders and Agreements Enforcement Assistance Act, R.S.C., 1985, c. 4 (2nd Supp). The Notice of Federal Interception was issued on March 5, 2018; and
- c. The Director reported the amount of arrears to a credit bureau report agency as permitted by s. 43(3) of the FMEA.

[180] As of May 1, 2018, the child support arrears had accumulated to \$19,080.42, inclusive of statutory interest and fees, on the basis of the \$1,212 monthly child support. The breakdown of this amount is:

Arrears

\$17,019.44

Interest

\$710.98

Statutory default fees

\$1,200.00

Statutory land discharge fee

\$150.00

[181] One of the reasons the arrears accumulated was because the respondent unilaterally reduced the amount of child support paid due to a decrease in his income in 2015. The position of the Director is that there is no jurisdiction to vary the amount of court ordered child support unless the parties agree or there is another court order. The Director requires the signed agreement of the parties on a form titled "Consent to Adjust Child Support" as evidence of both parties' consent to a revised child support amount. As such, the Director continued to enforce the Trial Order requiring the payment of \$1,212 per month since the claimant enrolled with FMEP.

[182] After FMEP became involved, the respondent sold his condo. In order for the property to be sold, the respondent had to release the registration of the maintenance order filed by the Director. The Notary handling the conveyance undertook to pay the existing arrears and an amount to be held in trust by the Director for future security of the child support payments.

[183] On May 2, 2018, a trust cheque in the amount of \$15,497.62, payable to the claimant on the account of the arrears, and \$1,300, payment to the Director on the account of fees, was received. A trust cheque in the amount of \$72,200 was also received "for future security of the child support obligation", which the Director held in trust for the benefit of the parties in an interest-bearing trust account.

[184] The EI benefit funds payable by the federal government to the respondent that were received pursuant to the Notice of Federal Interception were returned to the respondent in compliance with the Gerow Order.

[185] As a result of the payments made by the respondent in May 2018, the respondent currently remains with a positive balance as of the end of July 2018.

A. Legal Principles

[186] The relevant statutory provisions are in the Family Maintenance Enforcement Act, RSBC 1996, c. 127 [FMEA] are ss 16(1 to 9), 26 and 45:

Withdrawal of notice of attachment

16(1) If the attachee responds in accordance with the regulations to a notice of attachment, the director must,

- (a) by serving a notice of withdrawal on the attachee, withdraw the notice if the attachee satisfies the director that
 - (i) no money or benefit is due and owing or is likely to become, during the term of the notice of attachment, due and owing by the attachee to the debtor,
 - (ii) the director has not supplied the attachee with sufficient information with respect to the debtor to enable the attachee to make any deductions, or
 - (b) refuse to withdraw the notice if the director is not satisfied as to any matter referred to in paragraph (a).
- (2) On application by the debtor, the director may withdraw a notice of attachment if the debtor satisfies the director that the notice contains or is based on a material error.
- (3) If an attachee fails to pay in accordance with a notice of attachment served on the attachee or fails to respond in accordance with the regulations to the notice, on application by the director, the court may order payment by the attachee of the amount unpaid.
- (4) If the director refuses to withdraw a notice of attachment, on application by the attachee or the debtor in accordance with the regulations, the court may
- (a) summarily determine whether or not
 - (i) the attachee is liable under the notice, or
 - (ii) the notice contains or is based on a material error, or
 - (b) determine that an issue or question necessary for the determination of the liability of the attachee be tried.

- (5) If the court determines that the attachee is no longer liable or determines that the notice contains or is based on a material error, the notice of attachment no longer has any effect and must be withdrawn.
- (6) If the court determines that the attachee is liable, it must order payment by the attachee of the amount unpaid.
- (7) An order under subsection (3) or (6) may be enforced by the director in any manner that a maintenance order may be enforced.
- (8) The director must withdraw a notice of attachment by serving a notice of withdrawal of attachment on the attachee if
 - (a) the debtor enters into a voluntary payment arrangement that is satisfactory to the director,
 - (b) the debtor has fully satisfied his or her obligations under the maintenance order and no further payments will be due from the debtor to the creditor, or
 - (c) any other prescribed circumstances apply.
- (9) The withdrawal of a notice of attachment by the director does not prevent the issue of another notice of attachment in respect of the same debtor and the same attachee. [ss. 10 not reproduced]

Registration in land title office

26(1) A maintenance order may be registered in a land title office in the same manner as a charge is registered and is deemed for the purposes of Part 5 of the Court Order Enforcement Act to be a judgment as defined in section 81 of that Act if an application is made under this section for the registration and the application is accompanied by,

- (a) if registration is by the director, a copy of the maintenance order, or
 - (b) in any other case, a copy of the maintenance order certified by a proper officer of the court.
- (2) The creditor may apply for registration of a maintenance order unless it is filed with the director.
 - (3) With the consent of the creditor, the director may apply for registration of a maintenance order that is filed with the director.
 - (4) The creditor's consent is not required for an application under subsection (3) if the debtor has at any time defaulted in a payment required under the maintenance order.
- (4.1) If a maintenance order registered under this section is varied, the maintenance order as varied is deemed to be registered and has the same priority as the registered maintenance order.
- (5) Sections 83 (1), 95 and 111 of the Court Order Enforcement Act do not apply in respect of a maintenance order registered under this section.

- (6) If a maintenance order is registered on application by the director, the registrar of titles must note that fact in the register.
- (7) Despite the Land Title Act but subject to subsections (10) and (11) of this section, the registrar of titles must not register the discharge or postponement of a maintenance order that is registered under this section unless the discharge or postponement is signed
 - (a) by the creditor, if the creditor applied for registration of the order, or
 - (b) by the director, if the director applied for registration of the order.
- (8) Before signing a discharge or postponement of a maintenance order under subsection (7), the director must send by ordinary mail to the creditor a notice of the director's intention to sign the discharge or postponement.
- (9) The inability of the director, after reasonable effort, to notify the creditor of the director's intention to sign the discharge or postponement of a maintenance order does not render the discharge or postponement ineffective.
- (10) On application by
 - (a) the person against whose land a maintenance order is registered, or
 - (b) the creditor, if the director refuses to sign a discharge or postponement of a registered order,the court may make an order discharging or partially discharging the registered order or an order postponing the registered order to allow the registration of a charge.
- (11) If a maintenance order is registered under this section against land charged under section 170 (d) of the Family Law Act, the registrar of titles must not register the discharge or postponement of the registered order without an order under subsection (10).
- (12) The court may, in an order made under subsection (10), impose any conditions as to security or otherwise it considers necessary and reasonable.
- (13) An order must not be made under subsection (10) unless notice has been given to any person in the manner, including service by mail or by public advertisement, that the court requires.

Provision unenforceable

- 45. A provision in an agreement or a maintenance order by which a creditor agrees, or that requires a creditor,
 - (a) not to file a maintenance order with the director,
 - (b) to withdraw a maintenance order that is filed with the director, or

- (c) to file with the court or the director a notice stating that the creditor does not wish to have a maintenance order enforced by the director

is not enforceable.

[187] A maintenance order can act as security for not only the payment of arrears but also for future support payments: *Harvey v. Gould*, (1959) 18 DLR (2d) 590.

[188] In *B.D. v. L.D.B.* 2003 BCCA 0189 [B.D.], the Court of Appeal considered a decision made by a chambers judge on an application brought by the purchasers of certain real property to release a judgment that was registered against the title. Eventually, while the parties agreed the title should be cleared, the issue remained as to whether the funds should be released unconditionally to the husband or whether all or a part of the funds should be held as security for the child's future support: at para. 4. The chambers judge ordered that of the amount in trust \$45,000 be held in trust effectively on "a declining balance basis (as child maintenance was paid) over the next seven years or so" without imposing an alternative form of security under s. 26(12) of the FMEA: at para. 7. The chambers judge further noted that the cases under the predecessor to s. 26 indicate that "the purpose of security is to secure payment of maintenance and not simply to fetter the property or assets of the paying spouse": at para. 4.

[189] In analysing this decision, Madam Justice Newbury, writing for the court, comments at para 12:

[12] This leaves the question of whether alternate security should be ordered, aside from the question of Mr. B.'s future place of residence. As counsel for Ms. D. stated, there is a dearth of case-law at the appellate level concerning s. 26(10) and its predecessors (which may be traced back in similar terms through the Family Relations Act, S.B.C. 1972, c. 20, s. 34, the Supreme Court Act, R.S.B.C. 1960, c. 374, s. 44, the Supreme Court Rules, 1906, O. 70a, s. 7, to the Supreme Court Rules, 1890, s. 7 (M.R. 960)). What case-law there is supports the proposition that alternate security should not be insisted upon in every case, but that it may be thought appropriate where the paying party has deliberately refused to comply in the past or is likely to refuse to pay in the future: see *Witherow v. Witherow* [1994] B.C.J. No. 2124 (B.C.S.C.), at para. 21; *Langstaff v. Langstaff* [1999] B.C.J. No. 327 (B.C.S.C.). I would also add that where the paying party is applying to have an existing charge released, the onus would appear to be on him or her to show that alternative security is no longer necessary to protect the interests of the child.

[190] Newbury J.A. agreed with the chambers judge that the focus should be on the child's needs and that a "cautious approach to ensuring that [the child's] future support is secured". Newbury J.A. further notes that: "the degree of animosity between the parents obviously continues undiminished, notwithstanding all the courts orders they have obtained": at para. 13.

[191] This Court considered in *Lerstol v. Lerstol*, 2007 BCSC 0129 a list of matters to review when determining whether to discharge a security as enumerated by Mr. Justice Rosenberg in *Kumar v. Kumar* (1988), 48 D.L.R. (4th) 559 (Ont. H.C.) [Kumar], at para. 18:

1. Has the spouse against whom the order is made habitually been in arrears?
2. Is there a real danger either through leaving the country or in some other way of the spouse avoiding the obligation under the support order?
3. Will the support order unreasonably interfere with the ability of the spouse to manage his/her business affairs?
4. Is the spouse substantial to the extent that there is no real danger that the support will not be enforced by other means?
5. Has there been an indication of strenuous opposition by the spouse against the support order and a refusal or reluctance to recognize the order?
6. Has the spouse given or offered substantial security for the payment that could stand in place of the registration of the support order and the change created thereby for a reasonable period of time?

[192] It is worth noting that the FMEA has similar wording to the Ontario statute considered by Rosenberg J. Finally, Rosenberg J. comments that while these factors are useful considerations, there "are no hard and fast rules limiting the discretion of the court in determining whether or not to discharge the support order": at para. 18.

B. FMEP's Position

[193] The position of the Director of the FMEP is that there is a statutory mandate to enforce the payment of support orders and so long as there remains arrears in support or an ongoing support obligation, the ability of the Director to enforce the support order should not be lightly interfered with.

[194] The Director further submits that the respondent has not provided any evidence to support the setting aside of the Notice of Attachment pursuant to s. 16 of the FMEA, which requires evidence of a material error.

[195] The Director opposes the removal of the matter from the FMEP on the basis any such order would violate s. 45 of the FMEA.

C. Respondent's Position

[196] Ultimately, the respondent's position is that he has overpaid the claimant for child support and the Director should not have filed the Trial Order against his title to the condo. The respondent says that commencing on July 1, 2016 he should have been paying \$437 per month. Commencing on July 1, 2017 he should have been paying \$849 per month. Commencing on July 1, 2018, he should have been paying what the Guidelines would

require. While the respondent, for the most part, made payments in accordance with these calculations based on his income, FMEP required the respondent to pay \$1,212 per month starting in November 2015.

[197] The respondent further submits that while he was represented by counsel, every effort was made to get the claimant to agree to a revision of the child support amount in accordance with the Guidelines, the Trial Order, and the Trial Reasons. The claimant refused to do so. The evidence produced at the Hearing supports the following efforts were made:

- a. The first request for adjustment was on April 28, 2016, with the provision of the respondent's personal and corporate tax returns to the claimant's counsel. The request made was that the child support be reduced to \$438 per month in accordance with the Guidelines.
- b. On February 2, 2017, further letter from the respondent's counsel to the claimant's counsel seeking a response to the request made nine months ago. The letter notes as follow: "As you will recall, this issue has been getting delayed because of the priority of [W.A.] being able to deal with his parenting time and the problems that arise from time to time in the course of him being able to exercise it."
- c. On March 15, 2017, respondent's counsel provided claimant's counsel with a copy of the 2016 income tax return and NOAs of the respondent and his corporation.
- d. On April 24, 2017, the respondent's counsel advised that May 24 and 25, 2017 has been set aside on the issue of child maintenance arrears.
- e. The May 24 and 25, 2017 chambers hearings did not take place. The evidence does not disclose the reason why the matters were not heard.
- f. On June 6, 2017, the claimant's counsel confirmed that the claimant did not dispute that the respondent's income from CDI as reported on his T4 was \$56,000.
- g. On June 21, 2017, the lawyer acting for the claimant withdrew as counsel.
- h. On July 21, 2017, FMEP advised the respondent that a Consent to Adjust Child Support form would have to be completed and signed by both parties. If the FMEP received the signed consent form then the program would adjust the records to reflect the new amount.
- i. On October 24, 2017, the respondent filed a notice of intention to act in person.
- j. The January 15 Application was filed that sought clarification in respect to child support.
- k. On January 17, 2018, a new lawyer, Dia Montgomery, was retained by the claimant to act only on matters pertaining to the Children.
- l. On March 16, 2018, the FMEP advised the respondent that because a signed consent Form had not been received, there could be no adjustment made to the ongoing payment due on the file.

m. On March 26, 2018, a new lawyer, Michael Evans, was retained by the claimant to act in this proceeding. He requested an adjournment for the matter set for March 29, 2018. The applications were adjourned to April 19, 2018 and then adjourned on April 19, 2018. The application did not proceed on that day but was set for May 3, 2018. The applications were not heard on May 3, 2018 and ultimately the applications were heard, before me, on August 20, 2018.

[198] The respondent further submits that the claimant has delayed the hearing of the applications.

[199] The respondent is seeking the return of money held by FMFP as security for future child support. He says that he wants to have the ability to invest the funds. He claims that he needs that money to live on and support his new family. He has a new wife and a newborn son. His wife is pregnant with their second child.

[200] He further seeks to have the file removed from the FMFP and that he will supply the child support cheques directly to the claimant.

D. Analysis

[201] First, it is important to note that the funds that were paid in trust to the Director are a portion of the respondent's equity in the sale of his condo. The claimant has no right to any of this equity as a family asset.

[202] Considering the first criteria set out in Kumar, I do not find that the respondent has been habitually in arrears. He was in arrears at the time of the trial as noted in the Trial Decision at para. 94:

[94 Accordingly, since July 2014 to the date of trial, the respondent's cumulative interim child support responsibility was \$12,700. I agree with the claimant's position and find that while the respondent transferred about \$12,100 into the joint account, he withdrew and spent at least \$1,600, and certainly more, on his own expenses effectively reducing the amount he paid in child support. Taking into account the testimony and bank records, and the submissions of counsel, I find it fair to attribute \$2,000 of withdrawals from the joint account to be his. This means in reality he paid \$10,100 of the \$12,700 in the child support that he owed as of the trial date. The claimant is entitled to \$2,600 in retroactive child support. This amount should be paid in full on a one-time basis, or, accounted for in the distribution of funds from the sale of the house.

[203] While the respondent did initially reduce the amount of child support he was paying, he did so because he believed he was entitled to do so, as a result of the adjustment provision in the Trial Order and the Trial Reasons. It is clear that the respondent, through counsel, attempted to negotiate with the claimant's counsel on a reduction of the child support in accordance with the adjustment provision and the Guidelines. While the process by which the respondent reduced his payments was incorrect (if an agreement could not be achieved he should have sought a variation by way of a court application), the result reflected the

goals of the Trial Order and Trial Reasons. The respondent's approach was neither malicious nor unprincipled. This is supported by the Appeal Reasons and the comment that there was a lack of clarity in the child support adjustment provision.

- [204] The findings I have made on child support and the amounts that the respondent should have been paying, to some extent, supports that the respondent's position has fundamentally turned out to be a correct one. He believed he was acting in accordance with his rights and obligations, as set out in the Trial Order and Trial Reasons. The Respondent has consistently made support payments in accordance with the amount listed in the Guidelines in accordance with his income.
- [205] The second criteria, whether there is a danger, either through leaving the country or in some other way, of avoiding the obligation, is also not met. While Sharma J. found that the respondent may leave and return to Saudi Arabia, that risk has been greatly reduced now that he has remarried and has a new family. That said, there is a likelihood that he may join the Canadian Forces and be posted abroad. Even if that occurs, the respondent's salary will be paid by the federal government. As a result, there is a mechanism for, enforcing any future child support, by way of a further Notice of Attachment to Her Majesty the Queen, should the respondent not pay.
- [206] As to the third criteria, whether the support order unreasonably interferes with his business affairs, there is evidence that his current pharmacy business continues to lose money. The respondent submits that he wants the funds returned so he can support his new family and invest them. His updated financial statement sworn August 10, 2018 sets out his current financial situation:

Employment income

EI benefits

Self-employment income

\$9,153.62 annual

\$19,145.00 annual

\$-7,000.00

Annual expenses

\$69,152.12

Vehicle

\$49,000.00

Financial assets

\$3,000

Pensions and RRSPs

N/A

Business interests

\$-235,203.17

Debts

Secured

Unsecured

\$49,000

\$150,000

[207] The respondent further argues that he has absorbed the debt of the family and the business.

[208] It is clear from the updated financial statement that the respondent is in need of funds. He continues to pay off his former legal counsel the amount of \$1,000 per month. Approximately \$65,000 remains owing.

[209] The fourth criteria is, whether there is a real danger that the support will not be enforceable by other means. If the respondent commences working for the Canadian Forces, there is no real danger that it will not be enforceable. If the respondent continues to be only self-employed as a pharmacist, there is a greater substantive challenge for collection, assuming that the respondent does not voluntarily pay the child support which the court orders. At this stage I conclude that there is little risk that the support will not be enforceable by other means, particularly given my seizure of this proceeding.

[210] The fifth factor is whether there has been an indication of strenuous objection to the support order or a refusal or reluctance to recognize it. The respondent has recognized his support obligations and has paid what he thought was owed under the Guidelines. He was wrong in unilaterally reducing the child support but it was not an unreasonable step considering the wording of the Trial Reasons and Trial Order. He attempted through his counsel to have the claimant agree to the variation but she refused to negotiate.

[211] Finally, the respondent has not offered any other security except his assurance that he does not want to ignore his responsibility to his Children and is prepared to pay child support on a regular basis.

E. Conclusion

- [212] Looking at the totality of the circumstances, including the finding that the respondent has overpaid child support, it is my view that the majority of the security that the Director holds should be returned to the respondent. As the chambers judge noted in B.D., "the purpose of security is to secure payment of maintenance and not simply to fetter the property or assets of the paying spouse": at para. 4.
- [213] That said, I direct that the Director hold back \$20,000, which in my view is sufficient to secure payment of maintenance, in an interest bearing trust account. If, for some reason, the respondent does not pay the court ordered child support, the claimant and the Children then must have that fund available to them as security. The remaining \$52,200 with accrued interest shall be immediately paid to the respondent.
- [214] Section 26(10) of the FMEA provides that if a person against whose land a notice of maintenance order is registered applies to court, that court may make an order discharging or partially discharging the registered order. In this case, the order is no longer registered on the title in the Land Title Office. Instead, the title was cleared and the respondent's equity in the property was paid to the Director. In my view, the logic in s. 26(10) applies equally to the funds currently held by the Director. There is no reason why a court should be able to discharge a maintenance order on property held as security but not discharge funds held in trust as security.
- [215] In *D.S.W. v. J.A.K.*, 2012 BCSC 1977 [D.S.W.], Mr. Justice Barrow considered an application to discharge a maintenance order registered under s. 26 of the FMEA. In *D.S.W.*, the matrimonial home was sold and, in order to allow the sale to complete, the wife agreed to discharge the registered support order from title on the basis that the husband would pay the money into his solicitor's trust account pending the outcome of the application, in which the wife sought alternative security for future support. While Barrow J. cites the principles from B.D., he ultimately determined that the proceeds of sale were necessary to stand as security under s. 26(10) and (12) "until further ordered". This ruling, however, also suggests that the court has the authority to order funds be discharged or removed when appropriate.
- [216] Finally, the respondent's application for an order withdrawing the claimant from participation in the FMEP cannot be granted. Section 45 of the FMEA prohibits an order that forces a creditor to withdraw a maintenance order filed with the Director.
5. Conduct Orders Respecting on Social Media Posts
- [217] The respondent is seeking an order prohibiting the claimant from posting comments that "slander" him. Specifically, he takes issue with the claimant posting a photo of herself taken after the assault on April 6, 2016 to social media.
- [218] Sections 222 and 227 of the FLA provides authority to make orders respecting conduct:

Purposes for which orders respecting conduct may be made

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending final determination of a family law dispute.

Other orders respecting conduct

227 A court may make an order requiring a party to do one or more of the following:

- (a) give security in any form the court directs;
- (b) report to the court, or to a person named by the court, at the time and in the manner specified by the court;
- (c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222 [purposes for which orders respecting conduct may be made].

[219] These provisions suggest the court has a broad discretion to craft appropriate conduct orders to further the objectives in s. 222 of the FLA.

[220] In this case, the respondent asks for an order preventing the claimant from posting negative things online that "slander" him. I am not satisfied that any such order should be made. The posting of photographs of the claimant showing her injuries is something she is entitled to do. If she chooses to disclose that it was the respondent who caused these injuries, she also is entitled to do so.

[221] Slander is the action of making a false spoken statement damaging to a person's reputation. The posting of a photo of her bruised face and the accusation the damage was inflicted by the respondent is not false.

[222] I do ask the claimant to reflect that one day her sons will be accessing social media sites and how her comments may impact them. I reiterate that I am hopeful these parties can forge a new path of reconciliation such that they treat each other in a respectful manner.

6. Division of Family Assets

[223] The respondent asks this court to finalize Sharma J.'s order dividing the family assets. He notes specifically that the pension has not been divided and that the home furniture has been divided unfairly, that he received "junk".

[224] The Trial Reasons provided that the Canadian Pension Plan is to be divided. It is not clear to me why this has not happened but hopefully the claimant's new counsel will ensure this issue is resolved.

[225] With respect to the furniture, there is no evidence before me of what the family furniture was, (except some photos), the value of the furniture, or what each party kept. I am hopeful that with the far more pressing issues that these parties face this is an issue that can be resolved as between the parties either on their own or with the assistance of a mediator. In any event, the evidence before me does not allow me to make any such determination at this time.

VI. Conclusion

[226] The following is a summary of the orders made:

1. Paragraph 19 of the Order of Justice Sharma dated October 8, 2015 is varied to add the following sentence: Any adjustment to the child support amount shall be agreed to by the parties in writing or by further order of the court.
2. Both Children will attend counselling with Bob Finlay. If Mr. Finlay cannot see the Children on an immediate basis, the parties may agree to a different clinical counsellor. If the parties cannot agree to a different clinical counsellor, the parties may return before me to seek a court order appointing one for them.
3. The respondent is entitled to immediately resume seeing Z.A. on the parenting schedule set out below:
 - a. The respondent will have parenting time on one weeknight commencing from 4:00 p.m. until the following day at 9:00 a.m. each week. The parties can decide which weeknight works best and if they cannot decide, it will be on Wednesday from 4 p.m. to Thursday at 9 a.m.
 - b. Every second weekend from on Friday from 5:00 p.m. to Sunday at 4:00 p.m.
 - c. Every Spring Break, Christmas holidays, the summer holidays, the religious holidays known as Eid, the parties will equally share the time.
 - d. This schedule will start with the weekday overnight visit commencing the week of November 12, 2018 as set out in para. 3a above.
 - e. On Friday, November 16, 2018 at 4:00 p.m. the respondent will pick up Z.A. Z.A. will spend the weekend of November 17 and 18, 2018 with the respondent. Z. A. will be returned to the claimant on Sunday, November 18, 2018 at 4:00 p.m. The alternative weekends will then commence.
 - f. The children can be picked up or dropped off at the claimant's residence but the respondent is to wait in his vehicle.

(the "Parenting Schedule")

4. The respondent is entitled to resume phone contact with both Children on the same terms as set out in the Order of Justice Davies dated November 24, 2016.
5. The respondent is to resume parenting time with I.A. on the scheduled proposed by the clinical counsellor with a view that the reunification between I.A. and the respondent take place as soon as possible.
6. Once the clinical counsellor has agreed that parenting time with the respondent and I.A. can proceed then both Children are to see the respondent in accordance with the Parenting Schedule.
7. The Parenting Schedule should be gradually increased with a goal that within six to eight months the claimant and respondent will each have equal parenting time.
8. The Children are entitled to be cared for by their stepmother during parenting time with the respondent.
9. The respondent will initially pay for counselling for the Children with the ultimate responsibility to be shared by the parties as a s. 7 expense.
10. The respondent is found to be a resident of British Columbia and is found to have a gross income of \$95,191.66.
11. The respondent will pay the claimant the sum of \$1457.00 per month for the support of the Children commencing on November 1, 2018 and continuing on the 1st day of each and every month thereafter, for so long as the Children are eligible for support under the Family Law Act or until further agreement of the parties or court order.
12. The claimant will pay the respondent the sum of \$15,497.62 plus interest pursuant to the Court Order Interest Act R.S.B.C. 1996 c. 79, for the overpayment of child support.
13. The claimant is entitled to deduct the amount of s. 7 expenses that the respondent owes from the \$15,497.62 she owes to the respondent. The s. 7 expenses have not yet been determined.
14. Adjustments must be made to the proportions owed by each party for s. 7 expenses from July 1, 2015 to date based on their respective incomes.
15. There is a stay on the payment of the \$15,497.62 to the respondent until the s. 7 expenses issue has been resolved.
16. The Director of the FMEP shall immediately pay the sum of \$52,200 and all accrued interest to the respondent.
17. The Director of the FMEP is entitled to keep the sum of \$20,000 to be held in an interest-bearing trust account as security for future child support.

18. The respondent's application to have the claimant removed from the FMEP is dismissed.
19. Justice Forth be seized with this proceeding and will hear all future applications unless urgent and she is not available to hear the matter.
- [227] There has been divided success on these applications. I will order that all parties including the Director will be responsible for their own costs. I reiterate my warning that if in the future the parties are unreasonable in their approach or if there are further breaches of court orders, in particular with respect to the respondent's parenting time, there will be costs ordered and potentially other sanctions.

"The Honourable Madam Justice Forth"

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