
CANADA / JUDGMENT

R.J.M. v. A.N.M.

2018 BCSC 698

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.J.M. v. A.N.M.,

2018 BCSC 698

Date: 20180501

Docket: E50628

Registry: Nanaimo

Between:

R.J.M.

Claimant

And

A.N.M.

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Claimant appearing on his own behalf:

R.J.M.

Counsel for the Respondent:

K.C. Shupe (September 25-27, 2017)

S.M. Rotto (March 5-8, 2018)

Place and Dates of Trial:

Nanaimo, B.C.

September 25-27, 2017

March 5-8, 2018

Place and Date of Judgment:

Nanaimo, B.C.

May 1, 2018

Introduction

- [1] This is a family law proceeding. The parties, who I referenced to as the claimant and respondent throughout these reasons, began cohabitating in 2002, were married on February 22, 2004, subsequently separated in August 2007, and were ultimately divorced on January 16, 2012.
- [2] There were two children of the marriage, Child A, born in 2003, who is currently 14 years old, and Child B, born in 2005, who is currently 12 years old (collectively, the "Children").
- [3] To maintain the privacy of the Children and avoid causing any further anxiety for them, the names of the parties, the Children and other individuals that may identify the parties are anonymized.
- [4] The claimant seeks the following:
- i. to vary the order of Mr. Justice A.F. Wilson dated January 18, 2008 (the "Wilson Order") with respect to the decision-making authority on medical and educational issues relating to the parties' children, the drop-off time and place, and child support;
 - ii. that the respondent pay arrears in child support and provide ongoing disclosure of financial documents;
 - iii. terms regarding the parties' communications with one another; and
 - iv. the s. 211 reported dated October 25, 2016 prepared by Dr. Anita Snell and Dr. Peter Meuser (the "s. 211 Report") be excluded as evidence at trial.
- [5] The respondent seeks the following:
- i. to have the style of cause amended to reference her maiden name of A.N.C.; and
 - ii. to have the recommendations in the s. 211 Report followed, which would result in a variation of the Wilson Order; and

iii. some mutual conduct orders.

Background Facts

- [6] The claimant was born October 22, 1970 in London, England. He has one older sibling who at age 19 suffered a traumatic brain injury. His parents and older brother moved to Canada in approximately 1990, and he came to BC in approximately 1997. He trained and worked as a chef in London. Upon arrival in BC, he worked for a number of restaurants until 2003 when he was injured at work. He suffered a significant wrist injury and required a number of surgeries. He returned to work in security in the summer of 2016.
- [7] The claimant currently works full-time as a security guard and as a first aid officer. He lives in a duplex owned by his father. His father and mother reside in the other half of the duplex. His father, J.M., is actively involved in supporting the claimant and caring for the children -- his grandchildren.
- [8] The claimant has had a partner, L.S., since July 2017, who spends about four days of each week with him. When she stays, her daughter, aged 13, attends with her. L.S. has worked as a social worker in the field of child protection for approximately ten years. Her two children both suffer from autism and other mental health challenges and, as such, she has unique perspective on the support these diagnoses require.
- [9] The respondent was born on December 20, 1981 in Kitimat, BC. She has three younger siblings. She graduated from Grade 12. She has worked a variety of jobs, such as in a deli, at a call centre, in fast food restaurants, and doing cleaning.
- [10] The respondent currently works full-time as a counter person for an auto parts shop. She has held that position for approximately ten years. She lives with M.H., her common law husband. She has had a stable relationship with him for approximately six years.
- [11] This family law proceeding was commenced on September 5, 2007 by the claimant. At a Judicial Case Conference on January 18, 2008, the Wilson Order was made, which set terms respecting custody, guardianship, parenting arrangements, child support payments, s. 7 special or extraordinary expenses, Child Tax Benefit, and family debts.
- [12] On January 11, 2010, Madam Justice Dorgan ordered a report pursuant to s.15 of the Family Relations Act, R.S.B.C. 1996, c. 128. The report was ordered because the respondent was seeking a change to the parenting schedule of one week on and one week off. She had applied for sole custody of the Children and sought to be the primary parent regarding health and medical needs for both Children. The report dated June 17, 2010 was prepared by Lisa Bury, Family Justice Counsellor, and she recommended that the parents maintain joint custody and guardianship with the same parenting schedule of one week on and one week off.

- [13] On January 16, 2012, on the application of the claimant, Mr. Justice Crawford pronounced a divorce order and some modifications to the Wilson Order in respect to babysitting or childcare services for the Children and the shared parenting regime. The claimant also brought an application for cancellation of arrears and to reset an application for child support, which was adjourned to February 13, 2012.
- [14] On February 13, 2012, Mr. Justice Voith terminated the child maintenance and extraordinary expense order made by the Wilson Order and cancelled any and all arrears for child maintenance and extraordinary expenses. Voith J. then ordered child support based on the claimant's and the respondent's guideline income of \$21,395 and \$26,779 respectively. The resulting set off of the child support sums required that the respondent pay the sum of \$75 per month to the claimant. She has done so. In addition, Voith J. required the claimant to pay 44% and the respondent to pay 56% of all extraordinary expenses incurred on behalf of the Children (collectively, the "Voith Order").
- [15] On December 18, 2015, Mr. Justice Baird ordered the preparation of a report pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 ["FLA"], with liberty to apply for directions respecting the payment and person to complete the report.
- [16] On February 15, 2016, the matter was set for trial.
- [17] As noted, the s. 211 Report dated October 25, 2016 was prepared by Dr. Anita Snell and Dr. Peter Meuser over the period from May to mid-October 2016.
- [18] Dr. Snell was the lead Case-Investigator/Assessor and the primary author of the report while Dr. Meuser co-authored the report and contributed substantially in all matters pertaining to the assessment, planning, and preparation of aspects of the report.
- [19] The s. 211 Report will be discussed in greater detail later in these reasons; however, Drs. Snell and Meuser did recommend as follows:
- a) that the respondent have full responsibility for Child A and Child B's health care needs;
 - b) that the respondent ensures the claimant receives any and all medical and dental reports in a timely manner after each visit;
 - c) that the respondent is declared the Primary Caregiver;
 - d) that M.H. be recognized as the respondent's legal common-law partner and be free to behave as an acknowledged step-father;
 - e) that Child A and Child B, in consultation with their mother and their counsellor, should have significant input in making decisions about their current living arrangements and schedules;
 - f) that the respondent, the claimant and the claimant's parents educate themselves about Autism Spectrum Disorder, anxiety, anger issues and mental health issues in general;

- g) that the claimant and his parents gain a deeper understanding of what is considered appropriate and loving behavior toward children, AND to put this understanding into practice; and
 - h) that the respondent and the claimant attempt to resolve the bitter acrimony between them.
- [20] The parties agreed that a Hear the Child Report should be prepared. Joan Cotie prepared the Hear The Child Report in early September 2017 (the "Hear the Child Report").
- [21] This trial proceeded on September 25 and 26, 2017. However, trial on September 27, 2017 was adjourned on due to the claimant being ill. The remainder of the trial continued on March 5 to 8, 2018, with the claimant being self-represented throughout.

Issues

- [22] The pleadings, evidence and submissions raise the following issues:
- a. Has there been a material change in the circumstances such that an inquiry into the best interests of the Children should be undertaken?
 - b. If so, what is in the best interests of the Children in respect to the parenting time and arrangements?
 - c. Should retroactive child support be provided? If so, in what amount?
 - d. What should the current child support be?
 - e. What should the s. 7 special or extraordinary expenses be?
 - f. Should there be mutual conduct orders granted? If so, in what terms?
 - g. Future distribution of the s. 211 Report or other reports;
 - h. Issues relating to the Canada Child Tax Benefit and ongoing production of financial information; and
 - i. Costs.

Discussion

- a. Material change

Legislative framework

- [23] The key legislative provisions respecting the request for variance are ss. 37, 40(4), and 47 of the FLA. They read:

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

40 (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:

- (a) that parental responsibilities should be allocated equally among guardians;
- (b) that parenting time should be shared equally among guardians;
- (c) that decisions among guardians should be made separately or together.

47 On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

Applicable law

[24] The test to be applied on a variance application is the "best interests" of a child, as set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 [Gordon], which provides the following helpful guide:

[49] The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia:
 - (a) the existing custody arrangement and relationship between the child and the custodial parent;
 - (b) the existing access arrangement and the relationship between the child and the access parent;
 - (c) the desirability of maximizing contact between the child and both parents;
 - (d) the views of the child;
 - (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - (f) disruption to the child of a change in custody;
 - (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[Emphasis in original.]

Discussion

- [25] In this case, the claimant initially sought a change in the parenting arrangement having him be the sole decision-maker respecting the Children's medical and educational needs. In closing submissions, he suggested a division of responsibility for the Children's medical and educational needs between the parties.
- [26] The claimant seeks the change on the basis that since the Wilson Order, Child A has been diagnosed with autism and anxiety, and he has been appointed by the Ministry of Children and Family Development ("MCFD") as the parent in the Autism Agreement that was entered into with the Ministry.
- [27] A further rationale for the change would include the age of the Children. At the time of the Wilson Order, the Children were only five and three years old. At the time of this trial, the Children are 14 and 12 years old.
- [28] The respondent seeks a change in the current parenting arrangement so that primary residence of the Children will be with her and she will be the primary medical decision-maker for all medical and educational issues. She is agreeable to a set schedule for Child B's visits to the claimant, but wants to leave the decision on when Child A sees her father to Child A herself. She seeks the change on the basis that she is following her Children's wishes. She relies on the s. 211 Report and the Hear the Child Report to support her position. At the time of the Wilson Order, there was no s. 211 Report or Hear the Child Report to assist the court. Both of these reports have been tendered into evidence at this trial.
- [29] The Supreme Court of Canada has given guidance on the threshold issue of material change of circumstances. That is set out in the case of *Gordon* at paras. 11-12 as follows:
- [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued: *Baynes v. Baynes* (1987), 8 R.F.L. (3d) 139 (B.C.C.A.); *Docherty v. Beckett* (1989), 21 R.F.L. (3d) 92 (Ont. C.A.); *Wesson v. Wesson* (1973), 10 R.F.L. 193 (N.S.S.C.), at p. 194.

[12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

[Emphasis in original]

[30] As such, a parent applying for a change in a custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child. Once that threshold has been met, the court must then embark on a fresh inquiry into what are the best interests of the child, having regard to all relevant circumstances relating to the child and the ability of the respective parents to satisfy them.

[31] The Court of Appeal has noted that the newly expressed interests of an older child (13 years old) should be given considerable weight, and could constitute a material change in circumstances: *S.M.M. v. J.P.H.*, 2016 B.C.C.A. 284 at para. 22.

[32] While a child's views and wishes are not determinative, the courts should give considerable weight to the views of an older child, proportionate to their age and level of maturity: *O'Connell v. McIndoe* (1998), 56 B.C.L.R. (3d) 292 (C.A.), leave to appeal ref'd (1999), [1998] S.C.C.A. No. 576.

[33] I find, for the reasons listed above, that there has been a material change in circumstances and an inquiry into what would be in the best interests of the Children should be undertaken.

b. Best Interests of the Children

Claimant's position

[34] The claimant initially sought to have sole control over the medical and educational decisions for the Children and a minor adjustment on the parenting time and transfers. In his closing submissions, he sought the following:

- a. the claimant have decision-making responsibility for medical and educational supports related to the autism diagnosis and further assessment for Child A;
- b. the respondent have decision-making responsibility for arranging appointments related to dental and orthodontic work required by the Children;

- c. the respondent have decision-making responsibility for arranging appointments related to Child A's heart condition;
- d. the claimant have decision-making responsibility for arranging appointments related to Child B's tip toe issue;
- e. the claimant have decision-making responsibility for arranging appointments related to Child B's mental health issues; and
- f. the respondent have decision-making responsibility for Child B's education.

[35] The claimant disagrees with the recommendations made in the s. 211 Report and the Hear the Child Report. He submits that the current 50/50 arrangement with the Children spending one week with him and one week with the respondent is working. It has been in place for approximately ten years and provides consistency and predictability for the Children.

[36] The claimant seeks changes respecting the medical and educational decisions for the following reasons:

- a) Child A has been diagnosed with autism and anxiety, and he is the parent responsible under the Autism Agreement with the MCFD;
- b) the respondent inappropriately provided the s. 211 Report to individuals including Kim MacIntyre, the director of the day program provided at Claro Learning Centres - Autism Community Training ("Claro"), which resulted in a withdrawal of a placement in the Claro program for Child A;
- c) the respondent has cancelled needed medical appointments for the Children;
- d) the Children are not getting their medical and educational needs met because of the respondent's refusal to communicate and her refusal to accept Child A's diagnosis;
- e) the respondent unilaterally took Child B to a doctor, obtained a prescription for anti-anxiety medication, instructed Child B to hide the medication from the claimant, and placed the medication in a small plastic bag without any identifying information; and
- f) the respondent has failed to advise the claimant when the Children have suffered an injury and when a counsellor was hired, and failed to provide a resting cast that Child B needs to address a medical condition.

Respondent's position

- [37] The respondent's position is that the recommendations of Dr. Snell in the s. 211 Report should be followed. She is of the view that her Children are of the age and maturity that they should decide how much time they spend with each parent. She is of the view that the Children want to live with her as the primary residence and decide for themselves when they will see their father.
- [38] If the Children are residing with her, then she should have responsibility for the medical and educational decision-making. She claims that the reason she instructed Child B to hide the prescription medication was that she was worried of the response the claimant and his parents would have to Child B taking prescription medications for anxiety.

Section 211 Report

- [39] 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".
- [40] The role and weight to be given to s. 211 reports are summarized in *K.B. v. J.B.*, 2015 BCSC 704:
- [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.
- [41] The claimant took the position that the s. 211 Report should not be used in this proceeding on the basis that it had been inappropriately distributed by the respondent to people in the community and in particular, as noted, to Kim MacIntyre, director of the Claro program. In my view, the evidence does not support that the respondent distributed the s. 211 Report to

people in the community except to Ms. MacIntyre. This issue will be more fully canvassed in the section of these reasons on education for Child A, but the fact of the s. 211 Report being provided to an education institution does not render it inadmissible at a court proceeding.

[42] Dr. Snell has been a registered clinical and forensic psychologist in British Columbia since 1997. She obtained her PhD in clinical psychology from the University of Victoria in 1997. She testified that she has prepared approximately ten s. 211 reports. This is her second time testifying in support of a s. 211 report that she prepared. There were no issues taken in respect of her qualifications to express the opinions in the s. 211 Report.

[43] For the purposes of the s. 211 Report, the following steps were taken:

Clinical interviews with the respondent; Clinical interviews with the claimant; Psychological testing of both the respondent and claimant; Parent-Child observations with both parents and the Children; Separate clinical interviews with the Children; Review of legal file, court orders, affidavits and information provided by counsel and /or respective clients; Interview of Tory Vitaly, counsellor for the Children; Interview of M.H., the respondent's common-law partner; Interview with J.M., the claimant's father; and Letter of support from the respondent's employer.

[44] I do need to comment on the length of the s. 211 Report, which consisted of 139 pages. There may be circumstances that support the need for a report of such a length, but the circumstances of this case did not.

[45] One of the objects of the Supreme Court Family Rules is to "secure the just, speedy and inexpensive determination of every family law case on its merits." This means that, so far as is practicable, the family law case should be conducted in ways that are proportionate to the interests of the children, the importance of the issues in dispute, and the complexity of the case.

[46] In the circumstances of this case, a s. 211 Report of 139 pages in length did not promote the just and speedy determination of the issues in dispute. I recommend that, in the future, experts tasked with providing such assessments give serious consideration to the value of concise analysis in assisting the court. I note that 139 pages is on the excessive end of the spectrum when considering the issues that should have been addressed.

[47] Dr. Snell testified that as the s. 211 Report is over 1½ years old, the recommendations may no longer be valid. She also testified that although her recommendations were significant changes to the parenting regime, all children need a certain level of stability. However, she could not say whether an autistic child needed greater stability than a non-autistic child.

[48] Based on a review of the s. 211 Report, and the testimonies of Dr. Snell, the claimant and his father, J.M., it is clear to me that the rapport that should have existed between the claimant and Dr. Snell was lacking. The s. 211 Report is replete with comments that support this:

· "The writer felt strongly that [the claimant] was not forthcoming during the first interview "

- "Over the course of three lengthy interviews [the claimant] tended to become quickly irritated and reacted defensively and at times aggressively when he was asked for elaboration, or when he didn't understand the question."
- "At one point he become openly mocking of the writer."
- "Openly sneering at the person responsible" for conducting the assessment.
- "[The claimant] was more interested and focused on maligning [the respondent] than he was on providing fulsome answers to the clinical interview questions asked of him."
- The claimant provided limited and "white-washed" responses.
- "[The claimant] did not make a sincere effort to provide information about who he 'is' and what truly occupies his time."
- The writer was left "[w]ithout the advantage of a robust Assessment (due to [the claimant's] unforthcoming and misleading responses to interview and Psychometric Testing questions) "
- The claimant was "deeply uncooperative with the Assessment process".
- The claimant failed to "substantially establish his credibility with the Assessor "

[49] In addition, some of the comments in the s. 211 Report and Dr. Snell's testimony seem to go beyond what needed to be said or seem to favor the respondent's evidence unduly. Examples include:

- a. The claimant cancelled the first scheduled appointment the day prior, providing the explanation that he was coming off night-shift and would be "too tired". Dr. Snell was critical of this, noting that "it is unclear why it was necessary to cancel the lengthy scheduled interview "

From the perspective of the claimant and this Court, it was a reasonable explanation and request.

- b. The claimant advised Dr. Snell that he had not tried any drugs. Dr. Snell commented, "no acknowledgement of 'experimentation' with drugs (very unusual in this writer's experience)".

Such a comment supports a preconceived assumption on this expert's part and implies that the claimant was lying on this topic as opposed to being truthful.

- c. Dr. Snell seemed to accept the daughters' evidence that the claimant was engaging in an active social/sex life.
- d. The claimant had unilaterally and without consultation taken Child A and registered her into a different school when it was the respondent's year to be the designated "Primary Caretaker".

Dr. Snell does not appear to have consulted with the claimant for an explanation of why a change in schools was needed. She seemed to accept that Child A's wishes to attend Wellington Secondary School should have been honored. However, as it turns out, Child A was placed into an adapted program that was better suited to her educational and medical challenges. The evidence at this trial supported that the respondent also now agrees that a mainstream school, such as Wellington, is not in Child A's best interest.

- e. Dr. Snell referred to the incident in the hospital when Child A was having heart surgery and that there was an issue, but the claimant did not provide details other than that counsellors and security got involved.

I note, however, that the claimant did provide details of why he was upset and he did advise Dr. Snell: "Grandparents took pictures of my daughter with tubes coming out and put them on Facebook. I objected They got Counsellors and Security involved."

- f. Dr. Snell comments that perhaps the claimant's long-term use of narcotics might potentially compromise his cognitive faculties.

I note however, that the information that the claimant provided to Dr. Snell was that after wrist surgeries, he was "prescribed Percocet and anti-inflammatories: I didn't develop a dependence. On and off after surgery, took until needed", and "I'm off all prescriptions right now before I was on Oxycodone and T3's." In contrast, no comment was made of the very significant drug use that the respondent reported, including using Special K and ecstasy so much so that the drugs "ate" my cartilage, horse tranquilizers mixed with meth My spine is damaged as well. Sinus is damage too from snorting, like a dripping faucet sometimes. I used drugs for 5-6 months, almost daily".

- g. The claimant's home was very cluttered and disorganized and did not appear or smell like it was subject to regular or thorough cleaning.
- h. The claimant and J.M. appear to be highly intolerant and uninformed about mental health issues in general.

This comment flies in the face of the claimant's decision to have Child A moved from a mainstream school to Transformations Learning Centre, a school setting designed to support Child A's learning challenges. It also is not supported by the assistance that the claimant sought from Jemana Elsharkawi, Behaviour Analyst/Clinical Director of the Salish Sea Behaviour Consulting, in August 2016 on strategies to deal with Child A's challenges, and the referral the claimant made for the WIAT-III testing to enhance an understanding of how Child A learns and to guide the development of interventions.

Hear the Child Report

- [50] Ms. Joan Cotie, a mediator and facilitator, who has training as a social worker, carried out interviews of Child A and Child B in early September 2017. Child B indicated a wish that she spend four weeks with her mother and then three weeks with her father. She wished that there would be "no arguing and a happy life." She further noted that what would make things better for her would be "if they [her Mom and Dad] could just get along. They hate each other." A message that both of these parents have not listened to.
- [51] Child A's views were clearly against the claimant in that she reported that he was a "jerk, rude, and mean to me." She indicated that she wanted to live at her mom's home and see her dad when she wishes to see him. She reported that she did not like anything at her father's home and that he "scares me a lot. I'm really scared of him."
- [52] There were two notes put into evidence that were written by Child A and Child B. The claimant says that these were written by the Children in January 2017 to set out their wishes. In Child B's note, she states that her mother says bad things about her daddy and that her mother makes her say "mean things about daddy" and his family. In Child A's note, she states that she wants to keep the one week on and one week off schedule. It is clear that having the Children write such letters if at the instigation of the parents is highly inappropriate.
- [53] In addition to these two notes, there was a letter written by the respondent to her Children in September 2017, just before the commencement of this trial. I will comment further on this letter but, suffice to say, it supports that the respondent has been inappropriately attempting to influence the Children against the claimant.
- [54] I am also concerned that both assessments were carried out by professionals with no expertise in autism disorders or on the impact that Child A's diagnosis of Autism Spectrum Disorder - Level 1 has on her perceptions of her parents.
- [55] Ultimately, it is my responsibility to carry out an independent assessment to reach what is in the best interests of the Children.

Requirements of Wilson Order

- [56] The following paragraphs of the Wilson Order are of significant to this issue:
1. The Plaintiff and the Defendant shall have permanent joint custody of the children of the marriage with the parties alternating as primary caregiver each calendar year, with the Defendant the primary caregiver in 2008.
 2. The Plaintiff and Defendant shall have permanent joint guardianship of the Children. Joint guardianship means:
 - c. the primary caregiver, who has the primary responsibility for the day to day care of the Children, will have the obligation to advise the other parent of any matters of a significant nature affecting the Children;

- d. the primary caregiver will have the obligation to discuss with the other parent any significant decision which have to be made concerning the Children, including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of the Children;
 - e. the other parent will have the obligation to discuss the foregoing issues with the primary caregiver and each parent shall have the obligation to try and reach agreement on those major decisions;
 - f. in the event that the parents cannot reach agreement with respect to any major decision despite their best efforts the primary caregiver shall have the right to make such decisions; and
 - g. the other parent shall have the right, under s. 32 of the Family Relations Act, to seek a review of any decision which that parent considers contrary to the best interests of the Children: and
 - h. each parent will have the right to obtain information concerning the Children directly from third parties, including teachers, counselors, medical professionals and third party care givers.
3. The parties shall share care of the Children, such that the Children alternative between the parties' respective homes each Sunday between 12:00 and 1:00 pm.
- [57] The evidence at this trial supports that neither party had been complying with the terms of the Wilson Order.

Evidence of the other witnesses

- [58] J.M., father of the claimant, testified. He presented in a credible fashion. His evidence supports that he provides a great deal of support to the claimant financially and in respect to caring for his grandchildren. He has had to shoulder communication issues between the claimant and the respondent as well as assisting in the transfers of the Children. He and his wife are involved in taking the Children on camping trips and other activities. He agreed that the claimant's side of the townhouse was cluttered but clean.
- [59] L.S. is the claimant's girlfriend. She has been involved with the claimant since July 2017. She has worked as a children protection social worker in the past. She has two children of her own, both of whom have a diagnosis of autism. Her daughter is turning 14 this year. Her daughter has attended the Claro program since September 2017. L.S. testified to the positive experience her daughter has had at Claro and the drastic change in her daughter's behavior. She further testified to the funding advantages of the Claro program in that it allows access to programs that an individual's autism funding would not extend to.

- [60] L.S. spends approximately four days a week with the claimant. She testified to the trusting relationships she has developed with Child A and Child B. It was to her that Child B disclosed the September 2017 letter that the respondent had written. She testified to the loving relationships the claimant has with his daughters.
- [61] L.S. testified to the changes she has observed in Child A since she has been in the Community Education facility. She has observed an increase in anxiety, more "stimming" behaviours, being repetitive motions to try to calm herself, such as pacing, talking to her teddy bears and to herself.
- [62] M.H. is the respondent's common-law husband. He has lived with the respondent for almost six years. He is involved in caring for the Children through cooking meals, assisting with schoolwork and going for walks with them. He had one encounter with the claimant approximately two years ago at a transfer when the claimant approached him and there were some words exchanged about a spelling test. M.H. referred to this as "mild" aggression. He testified to the good relationship the Children have with their grandparents and the upmost respect he has for J.M.

Concerns with respondent's parenting

- [63] The respondent claims to be terrified of the claimant and cannot be in the same room with him. She advised Dr. Snell that "[f]emale teachers will not go near him." Her evidence on why she cannot be in the same room as the claimant was that in approximately 2010, when Child A was in Grade 2 or 3, she attended a parent-teacher interview and the claimant belittled her. She claims that she is so afraid to be in the same room for medical appointments primarily because of the claimant's behavior of being belittling at the parent-teacher interview.
- [64] The respondent contacted Dr. Pegg, a pediatrician who was scheduled to assess Child A for autism in October 2014. She told the doctor that if the claimant showed up at the same time she would call the police. On the day of the scheduled appointment, the respondent cancelled it because she was informed that Child A was not at school. However, it turns out that the claimant had picked up Child A so that he could bring her to the appointment. When the claimant and Child A arrived for the scheduled appointment, they were advised that it was cancelled. As a result of this cancellation, Child A was not tested for autism until June 2016 -- a delay that clearly was not in Child A's best interests.
- [65] Child B was diagnosed with a "tippy toe" issue. She ultimately had surgery on one leg to correct this issue. As part of the rehabilitation after the surgery, her treating physician directed that she wear a resting cast every day when she was not walking and when she was in bed. The purpose of the resting cast was to keep Child B's heel flat. The respondent arranged for the resting cast to be purchased at a cost of \$285. She did not send the resting cast with Child B when Child B went to the claimant's home. The respondent testified that the reason was because it was "a \$285 piece of equipment and I was concerned that I would

not get it back and I know that he would not agree to pay for any of that." The failure to allow the resting cast to travel with Child B to the claimant's home was not in Child B's best interests.

- [66] In February 2018, the respondent arranged to take Child B to a doctor because she was having anxiety issues, could not sleep, and was unable to control her anger. A prescription for an anti-anxiety medication was obtained. She did not advise the claimant about any of this. She instructed Child B to hide the medication from the claimant and not tell him about it. She facilitated this by having the pill-form medication removed from the prescription bottle and placed in a small plastic bag. These actions show a wanton disregard for the safety of Child B since if there had been some type of side effects or reaction to this medication, the claimant would have no knowledge of Child B taking such medication, of the type of medication, or of the dosage. It further demonstrates that the respondent is inappropriately instructing her 12-year-old daughter to be deceitful and is placing undue pressure on her. The respondent's actions in this regard show a significant lack of maturity and are in direct contradiction to the Wilson Order.
- [67] The respondent continues to maintain in her evidence at this trial that Child A's biggest issue is her anxiety and not her autism. The respondent testified that although autism can cause a problem in Child A's education, she sees Child A as "a normal teenage girl". This view is contradicted by the report of the Vancouver Island Children's Assessment Network (VICAN) and the assessments conducted by Salish Sea Behaviour Consulting. She initially supported that Child A be placed in a mainstream school but now agrees that this is not in Child A's best interests.
- [68] All of these examples support that the respondent has failed as a parent in ensuring that the best interests of her Children are placed first and foremost. It also supports the degree of animosity that the respondent carries against the claimant, which I find has influenced the Children's views of the claimant.

Concerns with claimant's parenting

- [69] The evidence supports that in the past the claimant's behaviour to the respondent has included belittling her, yelling at her, and causing her to develop a fear of him that has affected their ability to parent the Children. The claimant does appear to lack insight on how his past behaviour has affected the respondent.
- [70] I note that the claimant alleged to Dr. Snell that the respondent suffers from a bipolar condition. There was no evidence that supported such a claim. The evidence supports that the respondent has successfully held a job for the past ten years and is a reliable employee.

- [71] There appears to have been one complaint made about the claimant to the RCMP arising from an issue on the school grounds of Seaview Elementary. The claimant testified that he did confront some other children who had been bullying his daughter. The actions taken by the claimant were not appropriate and resulted in him being banned from the school property for a period of time. This was an isolated incident and hopefully the claimant has learnt the appropriate mechanism of dealing with these types of issues.
- [72] The claimant's failure to allow Child B to continue counselling with Ms. Vitaly resulted in the loss of a designation for Child B in the school system.
- [73] The claimant has also failed to accept that M.H. should play a role as stepfather to the Children, and there was no basis for the claimant to refuse consent to allow M.H. to pick up Child A from the Claro program. Although the claimant seeks to exclusively blame the respondent for the loss of the position for Child A at Claro, the evidence supports that his actions also resulted in the loss of that position.

Educational needs for Child A

- [74] Child A was assessed by the VICAN on June 22, 2016 (the "VICAN Report"). The VICAN Report noted that Child A was in Grade 7 but was working at a Grade 5 level in school. It was recommended that she have an individual education plan ("IEP") to include goals and interventions to address academic learning for literacy, language and communication, social interactions and behaviours of concern. It was further recommended that because of the complexity of Child A's needs, it was very important that any support aide be well trained and supported by professionals with expertise in intervening for children with autism spectrum disorders and other learning differences.
- [75] On August 23, 2016, Child A had a WIAT-III testing to assist in understanding her educational needs. A report dated September 2, 2017 to comment on the WIAT-III test result was prepared by Nicole Sara, Behaviour Consultant, and Jemana Elsharkawi, Behavior Analyst and Clinical Director of Salish Sea Behaviour Consulting. The final comments and recommendations were in part:

[Child A]'s academic skills appear to be weak as a result of her not having learned the skill; not because of an inability to learn which suggests that [Child A] has not received the level of support she requires in order to be successful. As [Child A] learns best in a 1:1 individualised setting, the ideal educational program for [Child A] would incorporate 1:1 academic learning alongside small group classes (e.g. art class) to facilitate social learning. Given [Child A]'s vulnerability (as it relates to her immaturity) [Child A] also requires supervision and support to maintain her safety.

- [76] In September 2016, Child A was assessed by Ms. Elsharkawi for the purpose of providing suggestions and recommendations for her learning and academic growth. The recommendation was that Child A attend an alternative learning program.

- [77] As a result of the professional advice that the claimant received, he registered Child A at the Transformations Learning Society, which offered specialized educational and therapeutic-based services to children diagnosed with exceptionalities. This was one of the programs that Ms. Elsharkawi recommended. Child A attended this program from September 2016 to June 2017.
- [78] The evidence of the respondent was that Child A hated the Transformations program. Child A reported to Ms. Cotie that the Transformations Learning Society was a school for children with high autism and that she should not be there. She wanted to attend Wellington, a mainstream school, for the 2017-2018 school year.
- [79] In May 2017, Shawna Cochrane, Executive Director of the Transformations Learning Society, recommended that Child A go to a different learning centre the following year where she will have the opportunity to socially interact with her peers. There were three options provided, with Claro being the first. Ms. Cochrane described it as an "excellent academic program with learners that are higher level, similar to [Child A]'s level." Ms. Elsharkawi also supported that Child A attend the Claro program for her academic learning.
- [80] Unfortunately, Child A's education then went off the rails for 2017-2018, as both parents failed to cooperate in having Child A attend any educational facility in September 2017.
- [81] The claimant pursued having Child A registered in Claro. The respondent pursued having Child A registered at Wellington.
- [82] On June 6, 2017, Child A was offered a seat at the Claro Nanaimo program for the 2017-2018 program year. However, the offer was revoked by Ms. MacIntyre, as stated in her email of June 7, 2017 to the respondent:

After speaking to [the claimant] earlier today and hearing his thoughts on whether [M.H.] can pick up (firm no), then reading [the s. 211 Report], I feel strongly that it is important to move forward with your court proceeding. I encourage you to have decisions around schooling, [M.H.'s] guardianship as a step-father, and control of Autism funding clearly laid out. I would encourage you to reapply to Claro Learning Centre and Kleos Open Learning for semester 2 of gr. 9 (end of January) or in grade 10, if you are interested at that time .

Unfortunately, under the current set of conditions, Claro is unable to follow through on offering a seat to [Child A] at this time.

- [83] In her email to the claimant of June 8, 2017, Ms. MacIntyre states:

After meeting with [the respondent] and [Child A], reading the additional court order and home study report and considering carefully the situation around dismissal permission from Claro, unfortunately, Claro is unable to serve [Child A] in the 2017-2018 program year

I encourage you to check out NUKO or Footholds as alternative options.

- [84] The end result was that Child A was not in any educational program at the commencement of this trial at the end of September 2017. Child A lost her position at Claro, and the claimant did not want her to attend a mainstream school. It is not clear in the evidence whether the other alternatives recommended by Ms. MacIntyre were pursued.
- [85] When this trial adjourned on September 27, 2017 as a result of the claimant's medical condition, I made it clear to the respondent and J.M. that steps had to be taken immediately to get Child A into some type of educational program. It was unacceptable that Child A was at home deprived of an education because her parents would not agree on a program for her.
- [86] The respondent agrees that a mainstream school is not appropriate since Child A gets tense and does not work well if put under a time frame. She concedes that a mainstream school is too busy and could cause Child A more anxiety.
- [87] Since October 2017, Child A was registered at Island Connect Education and has attended that program. There was limited information available about this program, although it appears to be a new program started in September 2017.
- [88] The weight of the evidence at this trial supports that the best educational facility for Child A to attend is Claro. The evidence supports that:
- a. the Claro program was recommended by the Transformations Learning Society and the behavioural consultant who assessed Child A;
 - b. the Claro program provides an individualize program with students learning in pods with usually three students and one mentor;
 - c. academic work is provided through the Kleos Open Learning;
 - d. the Claro program has a been in existence for many years;
 - e. the principal of the Claro program is known to Child A since it is her former principal from her elementary school; and
 - f. Child A will know L.S.'s daughter who also attends the same program.
- [89] Accordingly, I order that steps be taken to have Child A registered at Claro commencing in September 2018. If for some reason a position is not available at Claro, then an equivalent program should be identified for Child A to attend.
- [90] Child A's success at attending Claro requires that both parents be supportive of this and that they encourage her to attend. Child A should be given the opportunity to meet with the staff of Claro so she can become familiar with them.
- [91] She does know someone at Claro, L.S.'s daughter, who hopefully can assist in her transition to this new school.

- [92] It would be very disappointing to this Court should Child A refuse to go to Claro. I have every expectation that her parents will give her the necessary encouragement to at least try it for a year.
- [93] To provide the necessary assurance to the administration of Claro, Child A can be picked up by the claimant, the respondent, M.H., J.M., L.S. and any other person that the parties agree can perform this task. This hopefully will address Claro's concerns on the pick-up procedure.

Educational needs of Child B

- [94] At this time, Child B is completing Grade 7. She starts high school in September 2018. It appears there are two public schools that she could attend: Dover or Wellington.
- [95] Child B has expressed a concern about attending Dover because of some past bullies will be attending that school as well. She would like to attend Wellington.
- [96] The parents should both engage in a conversation with Child B, with the school district, and hopefully with each other to resolve which high school would best suit Child B's needs.
- [97] Child B should be registered for high school in a timely manner. A repeat of what happened to Child A should not occur.

Future potential alienation issues

- [98] The alienation of a child from a parent is a grave concern. In *Kwan v. Lai*, 2016 BCSC 1626 at para. 42, reference was made to *A.A. v. S.N.A.*, 2009 BCSC 387, and of particular relevance, the following comments made by Justice Martinson:
- [79] However, in high conflict custody cases the stakes are particularly high; children can be seriously harmed by the ongoing acrimony and lack of a timely resolution. ...
- [86] Phil Epstein Q.C. and Lene Madsen, in their Family Law Newsletter, Epstein and Madsen's This Week in Family Law, have recently commented on two alienation cases, emphasizing how these cases must be identified early and dealt with immediately. In "Epstein and Madsen's This Week in Family Law" . . . they commented on *L. (J.K.) v. S. (N.C.)*, 54 R.F.L. (6th) 74 (Ont. S.C.J.):

There is an important lesson here. Courts must respond more quickly to the alienation issue. The longer it goes on, the more difficult it is to overcome the effects of alienation. Alienation cases are almost always high conflict matrimonial cases. ...

[Emphasis by Martinson J.]

- [99] The concept of alienation was addressed in *A.L.* at paras. 59 and 60:
- [59] With respect to possible alienation of the daughter, Dr. England stated:

In the writer's opinion, there are some aspects of [the daughter's] views that are consistent with what one finds in alienated children. To preface further discussion, it is important to clarify how the word 'alienation' is being used in this assessment as this term has been used by various writers in different ways. In the writer's opinion, previous conceptualizations of 'alienation' which largely blame the favoured parent, contribute to ongoing conflict. This is because parents who already have limited skills in dealing with conflict during their relationship, now engage in conflict post-separation regarding who is to blame for the alienation. In the writer's opinion, the reformulation of parental alienation syndrome published by Kelly and Johnston (2001) [Family Court Review, vol. 39, No. 3, 249] is a superior model which places the focus on the child, takes a family systems approach to understanding the alienated child, and has no a priori assumptions regarding the behaviours of the favoured parent as a causal agent. In fact, they note that particularly with adolescent children "... alienating behaviour by a parent is neither a sufficient nor a necessary condition for the child to become alienated." Rather, this model directs that factors related to each parent and the child be identified as they may play a role in the alienation taking hold.

In Kelly and Johnston's model, the alienated child is one "who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent." [at 251]. Therefore, a child may have negative experiences with a parent, but the key is that their negative feelings are disproportionate to their direct experience with that parent.

Alienation is seen as the end point of a continuum where a child may initially have an affinity with one parent while having positive relationships with both parents, they may develop an alliance with one parent and feelings of ambivalence towards the other parent, they may become estranged from one parent as a consequence of witnessing or being the target of abusive behaviours, or they may become alienated and express rejection towards a parent with whom they have no history of physical or emotional abuse. The alienated child's views while perhaps having a kernel of truth are significantly distorted and exaggerated reactions and thus it is a pathological response.

Alienation is a complex phenomenon which results from the interaction of several factors. These factors may be related to the dynamics in the parents' relationship, the reason for separation, different parenting styles, and certain child-related factors (e.g., temperament, age, gender, sibling relationships).

[60] I agree that the definition that Dr. England adopts from the Kelly and Johnston model is appropriate for family law cases. I note, in particular, a child may become an alienated child through no fault of either parent. Dr. England's approach also recognizes the difference between alienation and estrangement: see *Williamson v. Williamson*, 2016 BCCA 87 at para. 41.

[100] I am concerned that if the respondent's views were implemented, the situation would progress very quickly to the claimant not seeing Child A at all. I believe that Child A is at the beginning of the continuum where there is a significant risk that she will become alienated from the claimant. Once this occurs, it will be very difficult to overcome. I am not convinced that given the degree of "hostility" the respondent has towards the claimant, she would actively encourage Child A to see her father.

[101] I am disturbed by the letter she wrote her two daughters just before the commencement of this trial in September 2017, in which she stated:

Miss you both and hope all is well. Court is for sure next week so just get through this week and you'll never have to see them again unless you choose. Use the phone for emergencies don't turn it on and off as it makes noise .You're both such brave girls and i love you both and think of you all the time. You got this remember her can't hurt you girls. Focus on the good next week. As always I'm here if you need me

[102] That type of letter is inappropriate and, again, the writing of such a letter demonstrates a level of immaturity on the respondent's part that is concerning. It is clear that the respondent has drawn the Children into the court "battle" by suggesting what would happen. These types of actions put added stress and anxiety on children in high-conflict matrimonial cases and, therefore, should not occur. This is especially clear in light of L.S.'s testimony that Child B provided the letter to her and expressed the stress she was feeling and the pressures that were being placed on her.

Conclusion on parenting time and responsibilities

[103] As I directly expressed to both parents at the conclusion of the evidence, I hope the future will bring a new dynamic in which they are respectful and courteous, and in which they take steps to encourage their daughters' relationships with the other party. Both parents owe a duty to ensure that the Children's relationships with each of them are enhanced and supported. The best way to achieve this goal is for them to move away from the past and look to a future in which they support one another in the raising of their daughters. It is of utmost importance that the Children's academic, psychological and emotional well-beings are fostered by both their mother and father.

[104] To this end and to ensure that the Children are not subject to any further infighting, lack of educational pursuits, delays in medical care, or other harmful actions of their parents, I am seizing myself of this matter.

[105] In the future, all applications will be heard by me unless they are urgent and I am unavailable to hear the matter. I am hopeful that with the knowledge that I will be in the background to ensure that these Children's best interests are always considered, further judicial intervention will not be needed.

- [106] It is my view, in consideration of all of the evidence I have heard, that it is not in the best interests of the Children to change the current parenting schedule. It should remain on the schedule that has existed over the past ten years, with alternating weeks with each parent. This will provide the stability and predictability that the Children deserve and will hopefully continue to foster relationships with both parents.
- [107] In respect to the parenting responsibilities, it is clear that the Wilson Order has not worked in the past. There is some merit in the claimant's proposal to divide the responsibilities so it is clear who has the primary decision-making responsibilities with respect to certain tasks. I would have been inclined to make such orders, however, I have confidence that these parents have learned from their past errors and that with me as the judge seized overseeing this matter, the future will be different. The parties shall work together as parents to ensure that their Children's academic, medical and psychological well-beings are met. Their Children deserve to have parents who work together to ensure their best interests.
- [108] To assist in the communication between the parties, I order that they try the "Our Family Wizard" program or a comparable program for one year. I do not see the need for these parties to require the use of the tone-controlled aspect of the program. Should either of them be disrespectful in their communications, they will be in contravention of the mutual conduct order they both consented to.

c. Retroactive Child Support

- [109] The claimant seeks retroactive child support to be paid in accordance with the Federal Child Support Guidelines, S.O.R./97-175 ["Guidelines"]. The respondent submits that there be no change in the amount of child support she pays if the current parenting schedule continues.

Legal principles

- [110] 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.

- [111] Section 9 of the Guidelines entails that if parties are sharing the parenting time of the child(ren) roughly equally, that is, "not less than 40% of the time", then there will be a set off of the child support amounts. Orders with set offs of child support must clearly state that both parties have an obligation to pay child support to ensure that both parties receive child tax benefits: *Letoria v. The Queen*, 2015 TCC 221).
- [112] 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.
- [113] Section 152 of the FLA contains similar wording but is slightly broader.
- [114] The discretion to make an order of retroactive child support is found in ss. 15.1 and 17 of the DA and ss. 152 or 170(b) of the FLA (depending on whether it is a variation order or not). The circumstances in which retroactive child support may be awarded were addressed in *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.]. The Supreme Court of Canada directed trial judges to adopt a broad and holistic approach in the application of four factors, summarized at para. 133, none of which is determinative on its own:
- 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?
- [115] At paras. 120-125 of *D.B.S.*, the Court stated 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" (*D.B.S.*, para. 121). The Court suggested that this is generally when the topic is broached.
- [116] There are circumstances where it is reasonable to infer that effective notice has been given to a payor parent even in the absence of a specific request. Both parents have a legal obligation to contribute to the support of their child after separation.

Analysis

- [117] The Voith Order made on February 13, 2012 provided a guideline income for the claimant at \$21,395 and for the respondent at \$26,779.

[118] The claimant was not working as of 2012 and did not return to any employment until the summer of 2016. He claims he was unable to work because of his ongoing wrist injury. The last surgery he had on his wrist was in 2014.

[119] In 2016, the claimant commenced working as a security guard, earning \$16,528 that year.

[120] In 2017, the claimant earned \$28,332.

[121] The respondent's position is that the claimant could have obtained some type of minimum wage job from 2012 until he returned to work in the summer of 2016.

[122] The respondent has worked at the same job for the past ten years. Her incomes have been \$33,381 for 2014; \$36,032 for 2015 and \$36,970 for 2016. It is anticipated that in 2017 she will earn about the same amount as in 2016.

[123] The respondent submits that she has paid for many of the Children's expenses since 2012, including:

Counselling for the Children:

\$5,600

Wedges for Child B:

\$410

Guitar lessons and guitar for Child B:

Approximately \$900

Gym and personal trainer for Child A:

\$440

Physiotherapy expenses:

\$780

Medical Services Plan premiums:

\$4,800

[124] The respondent submits that going back to 2014, she has paid out-of-pocket approximately \$13,000.

[125] The claimant submits that he has also paid for some expenses for the Children, although particulars were not provided.

[126] It is not clear that the claimant made a request for retroactive child support until this matter came for hearing. His evidence during the trial on this issue was unclear.

[127] I do not find that the respondent has engaged in any blameworthy conduct in this regard. She should be commended for the efforts she has made to pay for expenses for the Children to provide an outlet for stress, such as gym costs and a personal trainer for Child A and music lessons for Child B.

[128] I think a more appropriate approach is that the respondent absorb the past out-of-pocket costs to offset any additional child support that should have been paid when considering the disparity of income. I have also factored into this consideration that there is some merit in the respondent's position that there was some income that the claimant could have earned, even on a part-time basis, prior to securing full-time employment in the summer of 2016.

[129] I apply the reasoning set out in *Dyck v. Bell*, 2015 BCCA 520 at para. 50:

[50] Finally, D.B.S. recognizes that the fact that a parent contributes to a child in ways other than through child support may be relevant in assessing whether the parent's conduct is sufficiently blameworthy to justify a retroactive award:

109 Finally, I should also mention that the conduct of the payor parent could militate against a retroactive award. A court should thus consider whether conduct by the payor parent has had the effect of fulfilling his/her support obligation. For instance, a payor parent who contributes for expenses beyond his/her statutory obligations may have met his/her increased support obligation indirectly. I am not suggesting that the payor parent has the right to choose how the money that should be going to child support is to be spent; it is not for the payor parent to decide that his/her support obligation can be acquitted by buying his/her child a new bicycle: see *Haisman v. Haisman* (1994), 22 Alta. L.R. (3d) 56 (C.A.), at paras. 79-80. But having regard to all the circumstances, where it appears to a court that the payor parent has contributed to his/her child's support in a way that satisfied his/her obligation, no retroactive support award should be ordered.

[130] The evidence in this case supports that the respondent has contributed financially to the Children's activities and expenses in a way that has had the effect of fulfilling her support obligations. This mitigates against any retroactive award.

[131] It is also my view that imposing retroactive child support on the respondent will cause a hardship on her in all of the circumstances.

[132] After considering the evidence in light of the considerations in D.B.S., I am of the opinion that no retroactive award of child support should be made.

d. Current Child Support

[133] There should be an adjustment of the child support payments at this time. In the circumstances, there has been a relatively significant change in the respondent's income, which should be reflected.

[134] I find that the guideline income of the claimant is \$28,322 and the respondent is \$36,970.

[135] Based on the Guidelines, the amount of child support to be paid on a monthly basis is \$454 from the claimant and \$591 from the respondent.

[136] The set-off principles apply under s. 9 of the Guidelines such that the respondent will pay \$137 monthly to the claimant.

e. Section 7 Special or Extraordinary Expenses

[137] Under this new regime of cooperation, the parties will consult on the expenses for their Children, will agree to the need for the expenses, and will exchange invoices for the costs of the expenses incurred.

[138] The parties will reimburse each other on the following percentage basis: the claimant paying 43% and the respondent paying 57%.

[139] The following are appropriate s. 7 special or extraordinary expenses for the Children:

- a. Music lessons and equipment;
- b. Counseling;
- c. Medical devices recommended by the Children's treating health care practitioners;
- d. Physiotherapy or other therapies recommended by the Children's treating health care practitioners
- e. Gym passes and trainers;
- f. School supplies;
- g. Orthodontics;
- h. Glasses; and
- i. Cell phone and cell phone usage.

[140] I have included cell phone expenses in special or extraordinary expenses as I view them as related to childcare and extracurricular activities in the circumstances of this case. As the Children are now 12 and 14 years of age, and have several adults involved with their care and transport, I find it appropriate for their safety, security, and best interests that they have cell phones so they can be in contact with their parents and others who are charged with their transport or care.

[141] The above is not meant to be an exhaustive list, but is intended to give guidance to the parties on what should be paid for in the best interests of the Children.

f. Mutual Conduct Orders

[142] At trial, the respondent's counsel provided proposed mutual conduct orders. The claimant agreed to the terms.

[143] The evidence supports that these parties do need some guidance on what should and should not be discussed with the Children. The Children should have parents who treat each other with respect, and I reiterate Child B's comments that she wishes "No arguing and a happy life" and "everyone happy".

[144] Compliance with the mutual conduct orders will hopefully go a long way in demonstrating to the Children that their parents will be respectful to each other in the future. The parties should leave the Children out of their disputes, their animosity, and the litigation process. They should instead focus their energy on being supportive parents.

g. Future distribution of s. 211 reports

[145] The respondent states that she provided the s. 211 Report to Ms. MacIntyre because it was requested.

[146] The information contained in s. 211 reports should not be provided to school officials unless there is some compelling reason to do so.

[147] In the future, neither party should provide the s. 211 Report to others, and especially not the Children. The purpose of the report is to assist the court in determining justiciable issues, not for getting an upper hand in out-of-court disagreements.

[148] I also note that in an email to the Wellington School on May 10, 2017, the respondent referenced the s. 211 Report and stated her view that the report granted her primary custody and control of decisions respecting her daughters. She states further: "Which means end of September [the claimant] will no longer be able to make major decisions." The respondent should not have made such comments to school officials.

[149] The parties should be providing appropriate court orders to school officials but not commentary on what is contained in s. 211 reports, inaccurate summaries of the impact of that report, or speculation on what will happen in a court action.

h. Child Tax Benefit and Future Financial Disclosure

[150] The claimant submitted that the respondent was receiving Canada Child Tax Benefit for both children. The tax returns provided by the respondent do not support this. In the respondent's 2014 tax return, she claims for one child under the age of 18.

[151] The claimant is entitled to one-half of the Canada Child Tax Benefit based on the shared custody regime that has been in place since the parties separated.

[152] The parties should exchange financial information in June of each year so that any adjustment to child support can be made.

Summary of Orders

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

- a. BY CONSENT, the parties agree that the transfer time and date should be changed to Friday at 3 p.m., with the pick-up being at the Children's respective school or at Tim Horton's if the Children are not at school on the Friday, subject to further agreement between the parties.
- b. BY CONSENT, the parties will:
 - i. put the best interests of the Children before their own interests;
 - ii. encourage the Children to have good relationships with the other parent, and speak to the Children about the other parent and that parent's partner in a positive and respectful manner;
 - iii. make a real effort to maintain polite, respectful communications with each other, and refrain from any negative or hostile criticism, communications, or argument in front of the Children.
- c. BY CONSENT, the parties will not:
 - i. question the Children about the other parent or time spent with the other parent beyond simple conversational questions;
 - ii. discuss with the Children any inappropriate adult, court or legal matters; or
 - iii. blame, criticize or disparage the other parent to the Children.
- d. BY CONSENT, the parties will encourage their respective families and friends to refrain from any negative comments about the other parent and his or her extended family, and from discussions in front of the Children concerning family issues or litigation.
- e. The parties will use a computer communication program such as Our Family Wizard, or an equivalent program, to communicate.
- f. The costs of the communication program will be paid for equally by the parties.
- g. The need for this communication program will be reviewed after one year and if both parties agree that the communication program is no longer needed then it can be discontinued. If either party is of the view that this communication program should be continued then it will be continued.
- h. The following parenting time will be implemented:
 - i. The respondent will have the Children from the commencement of the school winter break to Christmas Day at 2 p.m., and the claimant from 2 p.m. on Christmas Day to the end of school winter break, commencing 2018, and the schedule will be reversed for each subsequent year;
 - ii. The respondent will have the Children for Easter each year;
 - iii. The claimant will have the Children for Thanksgiving each year;

- iv. The claimant and respondent will each have the Children for one two-week period during the summer holidays so that family trips can be taken;
 - v. The claimant and respondent will provide a minimum of one-month's notice on the timing of this two-week period;
 - vi. The Children's spring break will be divided equally between the parties;
 - vii. The Children will alternate spending their birthdays with the claimant and respondent; and
 - viii. The Children will spend time with the claimant on Father's Day and with the respondent on Mother's Day.
- i. Child A should be registered at the Claro program for September 2018. If the Claro program is not available, then an equivalent school program should be found for Child A to attend.
 - j. The respondent's common-law husband, the claimant's father, and L.S. are entitled to transport, pick up, and drop off the Children at school, school activities, recreational activities, and medical and other health care appointments.
 - k. The style of cause is amended with the respondent's name as A.N.C.
 - l. The claimant is found to be a resident of British Columbia and is found to have a gross annual income of \$28,322.
 - m. The respondent is found to be a resident of British Columbia and is found to have a gross annual income of \$36,970.
 - n. The respondent will pay to the claimant the sum of \$137 per month for the support of the Children, commencing on May 1, 2018 and continuing on the first day of each and every month thereafter, for so long as the Children are eligible for support under the Divorce Act or until further agreement of the parties or Court order.
 - o. For so long as the Children are eligible to receive child support, the parties will exchange:
 - i. copies of their respective income tax returns, for the previous year, including all attachments, not later than the first day of June each year; and
 - ii. copies of any Notices of Assessment or Reassessment provided to them by Canada Revenue Agency, immediately upon receipt.
 - p. The parties will pay their proportionate shares for the Children's special or extraordinary expenses. The parties' proportional shares are 43% for the claimant and 57% for the respondent.
 - q. The party incurring the s. 7 special or extraordinary expense shall provide the other party with a receipt for reimbursement.

- r. The following expenses shall be considered special or extraordinary expenses for the Children:
 - i. Music lessons and equipment;
 - ii. Counseling;
 - iii. Medical devices recommended by the Children's treating health care practitioners;
 - iv. Physiotherapy or other therapies recommended by the Children's treating health care practitioners
 - v. Gym passes and trainers;
 - vi. School supplies;
 - vii. Orthodontics;
 - viii. Glasses; and
 - ix. Cell phone and cell phone usage.
- s. No other expenses will be considered special or extraordinary unless agreed to by the parties in advance or by further Court order.
- t. Justice Forth be seized of this proceeding and will hear all future applications unless urgent and she is not available to hear the matter.

Costs

- [154] Neither party was particularly successful in this action. Both parties have acted in manners that were contrary to the best interests of the Children. Accordingly, I order that each party will pay their own costs.
- [155] There is the issue of the payment for the s. 211 Report and for the attendance of Dr. Snell at trial. The evidence supported that the s. 211 Report cost approximately \$12,657. A portion of that cost was paid for by Legal Aid. The remainder was paid for by J.M. The respondent should be responsible for paying for one-half of the s. 211 Report. I find, however, that the respondent should not have to reimburse for her share of the s. 211 Report since she will be paying the costs of having Dr. Snell attend trial in Nanaimo on two occasions.
- [156] The end result is that J.M. is not being reimbursed for the cost of the s. 211 Report. This provides another example of how J.M. continues to financially support both the claimant and the respondent and is going beyond his role as the grandfather to these Children. His actions should be commended.

"The Honourable Madam Justice Forth"

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