
CANADA / JUDGMENT

R.M. v. N.M.

2014 BCSC 1755

COURT

Supreme Court of British Columbia

DECIDED

18 September 2014

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2014 BCSC 1755 R.M. v. N.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.M. v. N.M.,

2014 BCSC 1755

Date: 20140918

Docket: E030289

Registry: New Westminster

Between:

R.M.

Claimant

And

N.M.

Respondent

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for Claimant:

P.S. Virk

Counsel for Respondent:

J.H. Bryant

Place and Date of Hearing:

New Westminster, B.C.

January 29, 2013, May 21, 2013

November 12, 2013,

December 11 and 13, 2013

March 20, 2014

Place and Date of Judgment:

New Westminster, B.C.

September 18, 2014

Introduction

- [1] In 2008, the parties separated after living together for almost eight years. They are parents of two children ages 9 and 11. Before they were divorced, they settled all family law claims, including property, parenting and child support issues, by a separation agreement ("Agreement").
- [2] These applications concern proposed changes to the parenting arrangements and the claimant's child support obligations.
- [3] In 2009 the claimant changed his occupation resulting in a reduction in his income. He seeks a variation in his past and prospective child support obligations commensurate with his changed circumstances.
- [4] The claimant also wishes to expand his parenting time with the children. He recently changed his residence from Vancouver, BC to Langley, BC, and this relocation impacts the children and the parties' parenting arrangements.
- [5] The respondent believes the claimant's change of residence will be detrimental to the children without modification to the parenting schedule. She seeks enforcement of the Agreement regarding the claimant's past support obligations and a continuation of the current level of support.
- [6] The key issues in this proceeding are the intervening changes in the claimant's employment income on the claimant's support obligations and the change in residence on the children's parenting schedule.

Background

- [7] The parties' two children are E.M., born September 2003, and P.M., born July 2005.

- [8] When the parties separated, they both resided in North Vancouver. The claimant was a chartered accountant with Grant Thornton LLP in Vancouver. And the respondent was a product manager with Best Buy Canada.
- [9] On April 29, 2008 the parties entered into the Agreement resolving the issues of property division, parenting, child support and spousal support. Under the Agreement the parties continued as the children's joint custodians, and the children's primary residence was with the respondent. The Agreement included a very detailed process for addressing changes in their personal and financial circumstances. Since 2008, the parties have made mutually agreed changes to the parenting schedule and to the claimant's support obligations.
- [10] The parties are following parenting regime for the children set out in the Agreement except for some minor changes agreed April 2008.

[11] The claimant now cares for the children as follows:

Weeks 1 and 3: Thursday 3:00 pm to Friday 3:00 pm;

Weeks 2 and 4: Wednesday 2:00 pm to Sunday 5:00 pm.

[12] These provisions are an expansion from the dates set out in the Agreement:

Weeks 1, 2, 3, 4: Wednesday from 4:30 pm to 8:00 pm;

Every other week: Friday 4:30 pm to Sunday 5:00 pm.

[13] In 2009 the claimant agreed to a Guidelines income of \$206,000 and paid support under that Agreement until 2011. Since June 2011 he has paid monthly child support in the amount of \$153; the parties have not established the appropriate level of support as provided under the Agreement.

[14] The Agreement includes the following:

7. RIGHTS AND RESPONSIBILITIES OF GUARDIANS

(e) . they will resolve the disagreement through a Collaborative Law Process.

8. JOINT CUSTODY

(2) The primary residence of the children will be with [N.M.].

9. COMPREHENSIVELY DEFINED ACCESS

[R.M.] will be allowed to pick up the children from their school and/or daycare facility and he will have access to the children as follows:

A. WEEKDAYS

each Wednesday evening from 4:30 p.m. to 8:00 p.m.; and

B. WEEKENDS

every other weekend for the entire weekend from Friday at 4:30 p.m. to Sunday at 5:00 p.m.

C. SPECIAL HOLIDAY ARRANGEMENTS

On half of significant holiday times during the year including Christmas, school break, Spring school break, Easter school break, and Summer school holidays.

D. ACCESS FOR BIRTHDAYS AND OTHER SPECIAL DAYS

- (i) ½ day on [R.M.]'s birthday;
- (ii) ½ day [N.M.]'s birthday;
- (iii) ½ day on each child's birthday;
- (iv) Father's day from 5:00 p.m. the night before Father's Day to at least 5:00 p.m. on Father's day;
- (v) telephone and e-mail access to the children at all reasonable times; and,
- (vi) any other time agreed to by the parties.

10. SCHEDULED ACTIVITIES FOR CHILDREN

- (1) [N.M.] will provide [R.M.] with schedules of all organized activities in which the children are enrolled.
- (2) [R.M.] will first be consulted before enrolling a child in any activity.
- (3) The children will not be enrolled in any activity that falls within [R.M.]'s access time unless [R.M.] agrees in advance to the activity.

11. TRANSPORTATION

[R.M.] will be responsible for picking up and returning the children to [N.M.]'s residence or another location as [N.M.] reasonably direct

13. INTERFERENCE WITH ACCESS - COMPENSATORY ACCESS

If [N.M.] prevents [R.M.] from exercising regularly scheduled access, [R.M.] is entitled to compensatory access of equal amount at any date selected by [R.M.] that does not interfere with the children's education or scheduled activities.

22. NOTICE OF CHANGE OF RESIDENCE

[R.M.] and [N.M.] will each provide the other with notice of an intention to change residence of the new address and, if available, the telephone number as soon as possible, but in any event no less than 30 days before the change.

23. EFFECT OF THE RELOCATION ON CUSTODY/ACCESS

If [R.M.] moves more than 30 kilometers from [N.M.]'s current residence, then either parent may apply to court to vary the custody or access provisions of this Agreement in the best interest of the Children without regard to the arrangements subsisting under this Agreement before the move.

24. RELOCATION: NEED FOR CONSENT

Neither parent will move either child from the Lower Mainland of the Province British Columbia or further than 30 kilometers from his or her current address without:

- (a) the written consent of the other parent, or
- (b) a court order.

30. AGREEMENT ON GUIDELINE INCOME

- (1) [R.M.]'s income as stated and defined as ("[R.M.]'s Guideline Income") will be used for determining child support and his share of special and extraordinary expenses in accordance with Federal Child Support Guidelines.
- (2) [N.M.]'s income as stated and defined as ("[N.M.]'s Guidelines Income") will be used for determining [N.M.]'s share of the children's special or extraordinary expenses.
- (3) [R.M.] will, commencing June 1, 2008, pay as child support (the "Child Support"):
 - (a) the Table Amount determined in accordance with clause 9.1 to [N.M.], and
 - (b) [R.M.]'s share of the Special or Extraordinary expenses of \$1,999.00 will cover sports expenses, Collingwood private school fees and nanny expenses, all of which are contained in Schedule 2 and attached to this Agreement.
- (4) [R.M.] and [N.M.] will perform an accounting by May 31st of each year to ensure that each party has paid the appropriate share of the Special and Extraordinary Expenses for the previous year and the party who has paid less than required will pay the amount of the deficiency to the other party within three days of the conclusion of the accounting.

32. WHEN CHILD SUPPORT IS TO BE PAID

- (1) Child support and special and extraordinary expenses will be paid on the first day of each month starting on June 1, 2008.
- (2) The obligation to pay any child Support, whether the Table Amount or a share of the Special or Extraordinary Expenses, ceases in respect of a Child who
 - (a) marries,
 - (b) becomes self-supporting, or

- (c) becomes 19 years of age unless the Child remains a "child of the marriage" within the meaning of the Divorce Act or because of inability to become self-supporting due to illness, disability, the pursuit of education, or other cause.
- (3) [R.M.] and [N.M.] will provide the other on written request no more frequently than once in any calendar year, by May 31st in each year in which the obligation to pay Child support continues, with:
 - (a) a photocopy of the most recent income tax return inclusive of all tax information slips and schedules,
 - (b) the notice of assessment, if received,
 - (c) details of child tax benefits or other similar benefits received in the previous year and anticipated in the coming year, if known,
 - (d) particulars of the children's Special or Extraordinary Expenses anticipated for the coming year,
 - (e) the most recent annual statement of earnings, including overtime, and
 - (f) any other relevant information, to facilitate determination of the adjustment, if any, required to Child Support.
- (4) Any information a party must provide the other party that is not available by the required date must be delivered to the other party within three days of the information being received.

34. SPECIAL AND EXTRAORDINARY EXPENSES

- (1) The following are special and extraordinary expenses;
 - (a) nanny;
 - (b) private school;
 - (c) sports expenses;
 - (d) any health-related expenses that exceed insurance reimbursement of the children;
 - (e) that portion of the health insurance premiums attributable to the children;
 - (f) future expenses that [N.M.] and [R.M.] agree qualify, or, failing agreement, are determined pursuant to paragraph 15 of this Agreement to qualify as special or extraordinary expenses within the meaning of the Federal Child Support Guidelines.
- (2) [R.M.] and [N.M.] shall share the costs of special or extraordinary expenses in proportion to their respective Adjusted Guideline Incomes.

(3) [R.M.] shall pay [N.M.] his share of any special or extraordinary expense included in the prior month within one week of receiving satisfactory proof that the expense was incurred, if not included in the expenses covered by the normal monthly payment.

(4) [R.M.] will be credited with a payment of special or extraordinary expenses when funds from the RESP are applied to post-secondary expenses.

36. VARYING CHILD SUPPORT

(1) [R.M.] and [N.M.] will review Child Support and, if necessary, revise it to ensure that it accords with the requirements of the Federal Child Support Guidelines by June 1 of every year from the making of this Agreement with the first review to be completed by June 1, 2009.

(2) If [N.M.] and [R.M.] do not review the Child Support as provided under sub clause (1), or review the Child Support and do not vary it in writing, both [R.M.] and [N.M.] are deemed to consider that the Child Support continues to satisfy the requirements of the Federal Child Support Guidelines.

(3) Any adjustment to Child Support under this clause will not apply retroactively, but will be in effect from the date of the review.

37. CHILD SUPPORT: MATERIAL CHANGE OF CIRCUMSTANCES

(1) If [R.M.] and [N.M.] and not reached agreement within 30 days after the notice under sub clause (3) is received, the issue will be resolved through mediation.

(2) Any adjustment to Child Support on a review under this clause will not apply retroactively, but will be in effect from the date of review.

(3) Either party, at any time, May request a review of Child Support by delivering a written notice to the other if there is:

(a) a material change of circumstances, such as a change of custody or primary residence, eligibility for Child Support, undue hardship, change in Child Support due the child turning 19 years of age or a change in the income of one or both parties.

38. FILE AS JUDGMENT

Either party May file a fully executed copy of this Agreement in the New Westminster Registry of the Supreme Court of British Columbia, pursuant to the Family Relations Act (British Columbia).

[15] The parties also agreed on the division of parenting time over holidays, birthdays, summer vacations and other important events. These days are essentially divided equally between the parties and have not changed.

[16] Decision making about the children's affairs was generally to be a joint decision.

[17] The Agreement was filed for enforcement in this Court on June 16, 2008.

- [18] At the time of the Agreement the parties agreed that R.M.'s Guidelines income was \$170,000 (R.M. is a chartered accountant in good standing in BC, England and Wales) and N.M.'s Guidelines income was \$100,000. Both parties were expecting to earn higher incomes in the future.
- [19] The claimant's actual income in 2008 was \$225,000 and in 2009 he earned \$206,000. The Agreement provided for changes in the claimant's child support payments to reflect the Child Support Guidelines for those years.
- [20] In December 2009, the claimant withdrew from his accounting partnership to pursue new business opportunities. His new business has not generated income at the level he received from his accounting firm.
- [21] Sometime after separation, the claimant moved to a residence in Yaletown, and in November 2013, he moved to a home in Langley BC. The claimant would like to achieve equal parenting time with the children and seeks a further extension of his parenting time. Due to the claimant's latest change in his residence, the respondent seeks a reduction in his parenting time due to the added commuting times between North Vancouver and Langley.
- [22] The parties obtained a "Views of the Child Report" from Robert Findlay, a family therapist and counsellor. Mr. Findlay said the children were unanimous in wanting more time with their father; he confirmed they do not object to the extra travelling time involved commuting to their father's new home.
- [23] The claimant resides with his fiancé, Zanet Benakova, in his Langley home. Mr. Findlay reported that her parenting style is a problem for the children although the claimant does not seem to recognize any issues.

The Applications

Respondent

- [24] On October 10, 2012, the respondent requested the following:
- (a) that the Agreement be enforced with respect to child support payments and special and extraordinary expenses;
 - (b) that the claimant's Guidelines income be retroactively imputed to July 1, 2011;
 - (c) that the claimant pay his proportionate share of special expenses and extraordinary expenses based on his imputed Guidelines income; and,
 - (d) an order varying the Agreement and establishing a new schedule of parenting time that would require less travelling for the children.

Claimant

- [25] On November 7, 2012, the claimant countered and requested the following:

- (a) an order adjusting the amount of child support payable from June 1, 2010 to May 1, 2011;
- (b) an order that the respondent reimburse the claimant for over payment of child support paid between June 1, 2010 and May 1, 2011;
- (c) that the Agreement be varied to remove paragraph 34(1) (a) requiring the parties to share child care expenses;
- (d) that each party proportionately share special and extraordinary expenses after agreeing to them in writing before incurring the expense;
- (e) that the respondent provide receipts for special and extraordinary expenses since June 1, 2008;
- (f) that the respondent reimburse the claimant for any over payment of special and extraordinary expenses as confirmed in the receipts the respondent produced;
- (g) that the respondent increase life insurance coverage from \$200,000 to \$500,000 and provide proof of such insurance to the claimant;
- (h) that the Agreement be varied to provide that the parties will share joint primary residence of the children;
- (i) that the parties' parenting time be readjusted to include alternating weeks from Wednesday at 3:00 pm until Monday mornings; if Monday is a holiday, then the children will return at 5:00 pm. In the other weeks, the respondent proposes that he will collect the children from school on Thursday and return them to the respondent at 3:00 pm on Fridays (including statutory holidays and professional days);
- (j) that the parties communicate about the children by email and text only; and,
- (k) that the respondent be restrained from approaching the claimant when picking up and dropping off the children.

The Application Materials

[26] The respondent's initial application was filed in October 2012. The claimant's response to that application was accompanied by his new application dated November 2012. On March 14, 2014 the respondent advanced a new notice of application seeking an order amending the Agreement to provide the claimant with parenting time during two days in weeks one and three from after school to 6:30 pm one night and after school to 7:30 pm the other night. In weeks two and four the respondent proposes that the claimant will collect the children from school two days a week and return them to the respondent's home at 6:30 pm one night and 7:30 pm the other night and care for the children from Friday after school until Sunday evening at 7:30 pm.

- [27] The respondent's applications cite as the legal basis for her claims the Agreement, the Family Relations Act, 1996 R.S.B.C., 1996 c. 128, the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) and the Guidelines.
- [28] The claimant cites the Family Relations Act, the Supreme Court Family Rules and the Family Law Act, S.B.C. 2011, c. 25 [Act] as the Legal Basis supporting his positions.
- [29] The application materials filed in this proceeding were woefully deficient when examined from the perspective of the rules. Neither party filed a written argument at the outset although the respondent provided a helpful written summary in reply. It is important to consider that the Rules of Court are designed to assist the parties in knowing in advance the legal and factual issues the will be addressed in argument. The Notice of Application is also important to provide the Court in advance with a fulsome description of the facts and legal argument on the issues.
- [30] In *Dupre v. Patterson*, 2012 BCSC 1561 Adair J. addressed this difficult issue. She said:
- [48] I agree with and adopt Master Bouck's comments concerning what a notice of application must contain. The same will apply with respect to an application response (Form 33), and the notice of application and application response under the Supreme Court Family Rules (Forms F31 and F32).
- [49] In *Fraser, Horn and Griffin*, *The Conduct of Civil Litigation in British Columbia*, 2nd ed. loose-leaf (Markham: LexisNexis, 2007) one of the leading texts on practice and procedure, the authors say this concerning the "Legal Basis" section of a notice of application, at p. 32-3 [notes omitted]:

The notice must set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the order sought should be granted (Rule 8-1(4)(c)). If appropriate, applicable cases may be cited. The argument to be made in chambers should be fully disclosed and should contain more than a cursory listing of the rules that might support the particular application.

- [50] The requirements under the current Rules represent a fundamental change from the practice under the former Rules of Court. Under the former Rules, Rule 44(3) and Form 55 (the form of notice of motion) only required a bare statement of the Rule or enactment relied upon. An outline (see Form 125 and former Rule 51A(12)), outlining the legal arguments to be made, was then delivered later in the exchange of motion materials and prior to the hearing. That is not the practice under the current Rules.

- [51] If a notice of application does not contain the information now required under the Rules, the party filing it has failed to give proper notice - to the opposing party and to the court - of the nature of the application. However, all too frequently, counsel in both civil and family cases are signing and filing inadequate notices of application and application responses. The notice of application filed in this case was not at all unique. However, such documents do not comply with the Rules.
- [31] Neither party referred to authorities to be relied on nor did they address any legal arguments in their notices of application.
- [32] The legal arguments on these applications were not revealed until oral submissions were made. The current Rules contemplate that counsel will apply their minds to the factual and legal issues and present those summaries in a way that assists the Court in preparing to hear applications in complex cases.
- [33] These applications are intended to be summary trials of the issues between the parties. They are final orders with significant implications for the parties and their children and the failure to adhere to the rules is not acceptable.
- [34] Neither party directly addressed the tension between the efficacy of the Agreement and other remedies under the Act. Nonetheless, I understood many of the respondent's arguments were to the effect that the Agreement continues to govern the relationship and obligations of the parties.

R.M.'s Reliability and Credibility

- [35] The outcome of these applications is dependent on the reliability of the party's evidence contained in their affidavits. I rejected the respondent's application to adduce a further affidavit at the November 12, 2013 hearing; it was prepared and served far too late and would have prejudiced the claimant.
- [36] R.M.'s affidavit evidence raises issues about his credibility and reliability. These reasons address the three separate notices of application together and I have considered all of the affidavit material filed in each application as it affects the overall result in all of the applications. The overriding considerations here are the best interests of the children which cannot be assessed without considering all of the evidence tendered.
- [37] Aspects of R.M.'s evidence have caused me to doubt his credibility and reliability. Statements made in his affidavits persuade me that I cannot rely on his evidence with any confidence and I am compelled to place less weight on his evidence in regard to the financial and parenting issues in this case.

- [38] He demonstrated a dismissive attitude toward his contractual obligations under the Agreement and to his statutory obligations regarding his change of residence. He disregarded the covenants he made when settling the terms of the Agreement and precipitating these applications.
- [39] Indeed, R.M. clearly decided that paras. 22 - 24 of the Agreement regarding parenting issues and child support terms did not bind him and that he could simply apply to this Court for an order approving his decisions. R.M. candidly acknowledged that he did not comply with the Agreement regarding his proposed change in residence without any explanation other than the fact that he did not think the respondent would agree to his move.
- [40] R.M. also failed to comply with s. 66 of the Act. He simply changed his residence without regard to the respondent's right to notice and denying her a practical opportunity to address the issue before it was a *fait accompli*. He simply ignored his responsibility under the Act. in addition to the Agreement.
- [41] His attitude on the issue was also somewhat defiant; in his affidavit #6, he explained his views on the relocation issue as "I am not sure where [N.M.] wishes me to move". He said she had not suggested where he should live other than Yaletown.
- [42] In sum, his attitude towards breaching the Agreement appears to be "so what."
- [43] On the issue of moving to Langley, R.M. was also not forthright or honest in his affidavit material.
- [44] On October 23, 2013, he swore an affidavit addressing child access issues, and did not disclose that he was imminently moving to Langley. In other words, he swore his affidavit without revealing his plans to relocate his residence; these plans were obviously know to him at the time.
- [45] I have a larger concern with R.M.'s financial statement sworn before Mr. Virk on November 11, 2013.
- [46] Notwithstanding that he had signed the sale documents for his Yaletown property and had completed the purchase of the Langley property six days before, he untruthfully concealed both the purchase of the Langley house and the sale of the Yaletown residence. He knew that this change in his residence was a material factor in the parenting regime for the children but attempted to hide the fact from the Court.
- [47] In para. 2 of that affidavit he said "I do not anticipate any significant changes in the information set out in this financial statement." But the Langley house sale was obviously negotiated well before the November 5, 2013 completion date of the purchase. He appears to have signed the sale documents for his Yaletown property on November 11; given the usual sequence of events leading to the listing and selling of land, it is inconceivable to me that he did not know that he was selling the Yaletown property on November 11.

- [48] This conduct borders on perjury, and based on these factors, I place very little weight on R.M.'s evidence where it conflicts with the respondent's evidence or involves assertions regarding his employment and business prospects.
- [49] R.M.'s attitude towards his support obligations is equally obdurate.
- [50] I conclude that when the parties signed the Agreement, they believed that the parenting and support terms were in the best interests of the children. The processes agreed to were intended to permit variations of support and residence if the changes were in the children's best interest.
- [51] But the claimant has not followed the Agreement's terms for varying or reviewing support or changing his residence.
- [52] R.M. said he told the respondent that his employment was changing and then told her that he would be reducing child support.
- [53] He did not seek any of the reviews provided for in the Agreement. He simply just stopped paying the amount that the Agreement required.
- [54] Similarly, he changed his residence without following the Agreement or the provisions of the Act regarding that change.
- [55] His behaviour has been defiant and falls below any acceptable standard.
- [56] Although R.M.'s approach to these issues has been reprehensible, I must address the issues on this application with a view to the children's best interests.

The Issues

[57] This case has eight issues based on the parties' applications:

1. Should I impute a Guidelines income to R.M.?
2. What is the date of review for child support?
3. Should I retroactively vary the claimant's support obligations?
4. Should I adjust child support because of shared custody arrangements?
5. Should any special and extraordinary expenses be reimbursed?
6. Should I make an order that the respondent must increase the amount of her life insurance?
7. Should parenting time be varied? and
8. Should I appoint a parenting coordinator?

Applicable Law

Setting aside or replacing agreements for child support

[58] The Act deals with agreements affecting children, and it permits a court to set aside or replace a part of an agreement respecting child support:

148(1) An agreement respecting child support is binding only if the agreement is made

- (a) after separation, or
 - (b) when the parties are about to separate, for the purpose of being effective on separation.
- (2) A written agreement respecting child support that is filed in the court is enforceable under this Act and the Family Maintenance Enforcement Act as if it were an order of the court.
- (3) On application by a party, the court May set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150 [determining child support].

Determining child support amounts

[59] Section 150 of the Act addresses how a court determines child support:

150(1) If a court makes an order respecting child support, the amount of child support must be determined in accordance with the child support guidelines.

- (2) Despite subsection (1), a court May order child support in an amount different from that required by the child support guidelines if
 - (a) the parties consent under section 219 [persons May consent to order being made] or have an agreement respecting child support, and
 - (b) the court is satisfied that reasonable arrangements have been made for the support of the child.
- (3) The court must consider the child support guidelines for the purposes of subsection (2), but must not consider arrangements made for the support of the child to be unreasonable only because the amount required under the child support guidelines differs from those arrangements.
- (4) Despite subsection (1), a court May order child support in an amount different from that required by the child support guidelines if satisfied that
 - (a) an agreement or order respecting the financial duties of the parents or guardians or the division or transfer of property, other than an agreement respecting child support, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, and

- (b) applying the child support guidelines would be inequitable on consideration of the agreement, order or special provisions.
- (5) If a court makes an order respecting child support in an amount different from that required under the child support guidelines, it must give reasons for doing so.

Changes to child support

[60] Section 152 of the Act deals with changes to child support:

Changing, suspending or terminating orders respecting child support

152(1) On application, a court May change, suspend or terminate an order respecting child support, and May do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

Child support in shared custody situations

[61] Section 9 of the Guidelines addresses child support in shared custody situations:

Shared custody

- 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[62] In *Maultsaid v. Blair*, 2009 BCCA 102 [Maultsaid] the Court of Appeal outlined the analysis for shared custody situations at paras. 20, 24, and 30:

[20] With respect I have come to the conclusion the judge in this case erred in principle in holding as she did that the school time was neutral in the calculation of the time the parents have access. I take it as axiomatic that where an access order spells out the time at which the

access starts and ends, and there is no agreement that could be said to alter the terms of the order, the access parent does not have, in the language of s. 9 "a right to access" beyond that time. That is, it cannot be counted to the benefit of the access parent seeking to reach the 40 per cent level so as to move into the area of the court's discretion to relieve against payment of all or a portion of the Guidelines amount.

- [24] It is not clear in s. 9 how one is to calculate time. In some cases it may be appropriate to consider days because that is the tenor of the order or agreement setting out the right of access. In others, a calculation of hours may be appropriate.
- [30] I recognize this calculation brings the matter close to 40 per cent and appears arbitrary. However, in my view, it is not open to the court, faced with the express wording of s. 9, a court order particularizing "the right to access", and a measure of the time that falls short of the requisite 40 per cent, to ignore the words, the mandatory requirement, chosen by Parliament. In the words of the Alberta Court in *L.C. v. R.O.C.*, 2007 ABCA 158 (CanLII), 2007 ABCA 158, "there is no place for 'deeming' parenting time to be what it is not".
- [63] Saunders J.A. wrote the judgments in both *Maultsaid* and *Berry v. Hart*, 2003 BCCA 659 [Berry], and Berry also dealt with the difficult analysis of joint custody regimes and the 40% rule in s. 9 of the Guidelines.
- [64] In *Berry*, Saunders J.A. also noted that determining whether s. 9 of the Guidelines applies is a "matter of judgement" and not simply a "time accounting exercise." Rather:
- [9] One must also ask, considering that this approach may satisfy only the law of unintended consequences, whether the minutiae of such record keeping really determines whether s. 9 of the Guidelines applies. Rarely can anything be measured with precision. Even science recognizes that all measurements are subject to a margin of error.
- [10] In my view the issue is a matter of judgment not amenable to simply a time accounting exercise. I consider that in determining whether the threshold level for application of s. 9 is met the question is whether the paying parent spends such a sizeable percentage of time with a child or children that, on any reasonable view of the evidence and considering the advantage that may accrue to a child in spending the occasional additional day, part day or hour with a parent, one can say reasonably that the 40 percent or more level is achieved. It follows, in my view, that a court may assess child-parent time as meeting the s. 9 criteria without a tight accounting. That assessment should be made by considering the broader context of the parenting arrangement. It perhaps bears mentioning, further, that simply finding that a parental regime comes within s. 9 does not compel an automatic reduction in child support. That determination must be made considering all of the criteria in ss. (a) to (c) of s. 9.
- [65] Finally, in *Franke v. Franke*, 2008 BCSC 1145 Joyce J. helpfully and thoroughly summarized applicable jurisprudence on this issue at paras. 28-30:

[28] With respect, I do not agree with the defendant that the judgments of Koenigsberg and Neilson JJ. in *S.L.P. v. C.W.P.* stand for the proposition that the court can embark on an analysis of the factors set out in s. 9(a) to (c) even where the 40 percent threshold required by s. 9 is not met. In my view, Koenigsberg and Neilson JJ.'s reasons for judgment are examples of the application of the principle enunciated in *Berry v. Hart*, namely that in making the determination whether the threshold is met, the court need not microscopically examine the contested evidence with respect to every hour that the parties say they spend with the child to determine whether a close case falls on one side of the line or the other. They deal with the methodology for determining whether the threshold was met and do not, in my opinion, stand as authority that the section can be applied where the circumstances fall short of meeting the threshold. As Saunders J.A. stated in *Berry v. Hart* (para. 10), the essential question is:

whether the paying parent spends such a sizeable percentage of time with a child or children that, on any reasonable view of the evidence and considering the advantage that may accrue to a child in spending the occasional additional day, part day or hour with a parent, one can say reasonably that the 40 percent or more level is achieved.

[29] If the 40 percent threshold has been met, the appropriate amount of support must be determined in accordance with s. 9 of the Guidelines: *Contino* at para. 24. That does not necessarily mean that the resulting support order will be different from the order that would result if s. 3 applied but it does mean that the court must consider the factors set out in s. 9(a) to (c) in determining the appropriate amount of support: *Contino* at para. 30.

[30] In *Contino*, Bastarache J., writing for the majority, expressed the following views with respect to the proper application of s. 9 of the Guidelines:

There is no presumption in favour of awarding the amount that would be payable under s. 3 of the Guidelines and no presumption in favour of reducing the amount downward from the Guidelines (para. 31).

The court should not use a formulaic approach to the application of s. 9 of the Guidelines. The specific language of the section warrants emphasis on flexibility and fairness. The weight of each factor will vary according to the particular facts of each case (para. 39).

Section 9(a) requires the court to consider the amounts set out in the applicable tables for each of the spouses. A simple set-off approach is a useful starting point, especially in cases where there is limited information and the incomes of the parties are not widely divergent but caution should be exercised against a rigid application of the set-off. The set-off amount must be followed by an examination of the continuing ability of the recipient parent to meet the needs of the child and full consideration must be given to the last two factors (paras. 41, 44, and 49).

Section 9(b) does not refer merely to the expenses assumed by the payor parent as a result of the increase in access time from less than 40 percent to more than 40 percent. Section 9(b) recognizes that the total cost of raising children in shared custody situations may be greater than

in situations where there is sole custody. This does not mean that the payor parent is in effect spending more money on the child than he or she was before shared custody was accomplished. It means that the court will generally have to examine the budgets and actual expenditures of both parents in addressing the needs of the children and to determine whether shared custody has in effect resulted in increased costs globally. The actual child care expenses are to be apportioned between the parents in accordance with their respective incomes (paras. 52-53).

Not every dollar spent by a parent in exercising access over the 40 percent threshold results in a dollar saved by the recipient parent. It is possible to presume, in the absence of evidence to the contrary, that the recipient parent's fixed costs have remained unchanged and that his or her variable costs have been reduced only modestly by the increased access. When no evidence is adduced, the court should recognize the status quo regarding the recipient parent (para. 54).

In analyzing s. 9(c), the court should keep in mind the objectives of the Guidelines, which require a fair standard of support for the child and fair contributions from both parents. What is of particular concern under s. 9(c) is the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in each circumstance (para. 68).

Some factors to consider under s.9(c) are the actual spending patterns of the parents; the ability of each parent to bear the increased costs of shared custody (includes consideration of assets, liabilities, income levels, and income disparities); and, standard of living for the child in each household. (para. 69).

[66] Given the broad discretion of the Court conferred by s. 9(c), a claim by a parent for special or extraordinary expenses falling within s. 7 of the Guidelines can be examined directly in s. 9 with consideration of all the other factors.

Special or extraordinary expenses

[67] Section 7 of the Guidelines deals with special or extraordinary expenses:

Special or extraordinary expenses

7.(1) In a child support order the court May, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses May be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;

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

· Definition of "extraordinary expenses"

(1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

Sharing of expense

- (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

Subsidies, tax deductions, etc.

- (3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

Underemployment and imputing income

[68] Section 19 of the Guidelines addresses underemployment and the imputation of income to a payor spouse:

19.(1) The court May impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;

[69] *Donovan v. Donovan*, 2000 MBCA 80 [Donovan] summarized the important considerations in income imputation issues at para. 21:

The following guidelines May be considered when determining whether to impute income. (See Dr. Julien D. Payne, *Imputing Income, "Determination of Income, Disclosure of Income," Child Support in Canada*, Danrab Inc., August 3, 1999.)

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (*Van Gool v. Van Gool* 1998 CanLII 5650 (BC CA), (1998), 166 D.L.R. (4th) 528 (B.C.C.A.)).
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this May mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
 4. Persistence in unremunerative employment May entitle the court to impute income.
 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
- [70] In *Donovan*, the payor retired from a \$60,000 per year position as a policeman in the hopes that he could become a screenwriter and playwright. He believed that his situation was of "short-term pain for long-term gain", and he thought his income would still increase substantially in his new endeavor. The Court accepted that a payor parent becomes intentionally underemployed if that parent chooses to earn less than he or she is capable of earning.
- [71] The respondent also relied on *Watts v. Willie*, 2004 BCCA 600; *Kowbel v. Kowbel*, 2012 MBQB 250; *Koch v. Koch*, 2012 BCCA 378. I have considered those cases, and each of them adopts the reasoning in *Donovan*.

Discussion

1. Should I impute a Guidelines income to R.M.?
- [72] For the reasons that follow, I will impute Guidelines income of \$200,000 annually to the claimant for support purposes.
- [73] Under the provisions of the Agreement, variations in the claimant's support obligations were to be reviewed to ensure that his payments met the requirements of the Guidelines. In the absence of a review by June 1 of any year, the child support extant at that time was deemed to satisfy the requirements of the Guidelines. Any adjustments to child support would not apply retroactively.
- [74] The parties have agreed that the Guidelines will be used to consider ongoing support obligations including the provisions of s. 9.
- [75] The respondent contends that the claimant left his secure partnership at Grant Thornton in 2009 to pursue a risky business venture, and this choice absent the covenants in the Agreement, could result in a dramatic reduction in his income and a global reduction in his Guidelines support obligation. The respondent also argues that the claimant's income for Guidelines purposes should be \$206,000 and this imputation should be effective from

January 2010 forward. She argues that the claimant did not reasonably abandon his partnership and the income he would otherwise have earned at or about that level should be imputed to him.

- [76] In this case, the claimant bears the onus of adducing evidence to show that his career change and the resulting income loss were reasonable. He had the means of knowing the state of affairs at Grant Thornton in 2009 presumably he knew what prospects existed for employment with other accounting firms or in other businesses.
- [77] The claimant denies that he deliberately abandoned his partnership interest at the accounting firm thereby putting his family's economic security at risk. He left the firm because he perceived that the firm was doing poorly and that he would ultimately experience a reduction in income or loss of his position. He submits that his new business ventures were pursued in good faith and with the expectation that they would generate income equal to or better than his accounting practice income.
- [78] However, he did not provide any admissible evidence relating to the employment opportunities open to him at or after 2009 and provided no admissible evidence from management as to the likelihood he might have retained his partnership interest at Grant Thornton. The claimant acknowledges that his new businesses have not been as profitable within his expectations.
- [79] He deposes that his new business venture involves an investment of \$700,000. If he had not chosen to embark on a speculative venture, those funds might have also been available to generate income that would have otherwise benefited his children.
- [80] Currently, he is a director and minority shareholder in Cycle Component Network ("CCN") and 2Mevents Inc. ("2M"). And he also operates a sole proprietorship under the name "[M.] Business Consulting Services" (M. Consulting) that provides services to CCN, 2M, and other companies.
- [81] He did not describe the measure of his shareholdings in those corporations; he may hold 49% or 10% of the shares.
- [82] CCN and 2M provide online registration membership and fundraising services to charities and licensing bodies. He invested significantly in CCN including borrowing against his lines of credit with banks and liquidating his RRSPs. CCN is expanding its sales to the US, but it failed to do business in the United Kingdom. 2M also carried on business in England and Wales.
- [83] In his third affidavit (October 23, 2013), he gave a general commentary on the financial difficulties extant at Grant Thornton LLP in 2009. He said he had the partnership financial statements indicating that the firm was overstaffed and carried excess overhead. He did not produce any of those records on this application. He feared that after 2009 there would be "retrenchment" in the firm impacting all levels of the business. After leaving, he said his fears were vindicated, and he described several things that had happened with the firm after

his departure.

- [84] Counsel confirmed that the information concerning Grant Thornton's business performance since his departure came to him from other persons; he did not have personal knowledge of the facts set out in his affidavit, and he failed to state the source of this information and belief.
- [85] While I have already addressed R.M.'s credibility, this second flaw in his evidence bolsters my conclusions about his lack of credibility and defiant attitude. His failure to disclose that his conclusions were based on information and belief and failing to identify the source of the information render the evidence unreliable and non-compliant with the Supreme Court Family Rules. I observe that this application is for a final order and the October 23, 2013 affidavit does not comply with Rule 10-4 (13) and leave was not requested under Rule 10-4(13) (b)(ii).
- [86] In his second affidavit, the claimant said that he believes that his new business will be a great success and provide a much higher longer term earning potential than he had at Grant Thornton. He acknowledged that it has taken longer than anticipated to realize the rewards, but the companies are beginning to show potential. He said he has no opportunity to rejoin Grant Thornton as that company has been shrinking its operation areas; there is no evidence to support that conclusion.
- [87] For the purposes of this application, I accept that the claimant may have had some general concerns regarding Grant Thornton's viability. But I have considered his evidence with great caution due to his lack of credibility.
- [88] I do not accept that his affidavit includes admissible evidence confirming that his partnership interest in the firm was at risk in 2009 or that his income with the partnership was at risk. The evidence does not establish, on the balance of probabilities, that he would have been ousted from the partnership if he had not left or that his income would not have remained at its 2009 level. On this point, the evidence is simply insufficient and inadmissible.
- [89] In cross-examination, the claimant testified about the financial circumstances of CCN and 2M. He performs accounting services for these two companies and receives an income of \$2,000 per month from each of them. His total income is \$48,000 per year.
- [90] The claimant owns less than 50% of the shares of both companies and is a director of both companies.
- [91] His testimony regarding his earnings and ventures included the following. In essence R.M. asserted that his company lost a sizable amount of money in the years after its inception but was moving toward profitability.

- [92] In 2011, he owned a company described as 2M Limited (UK), and CCN loaned \$82,159 to 2M Limited (UK), and then in 2012, that amount increased to \$85,384. The claimant said that this loan was written off as uncollectible.
- [93] The CCN statements also reveal an inter-company loan from CCN to 2M Inc. (the Canadian Company). Oddly, in the 2M financial statements that loan is disclosed as \$100,441, a discrepancy of \$2,500.
- [94] 2M Limited (UK) also owed \$527 to 2M Inc.
- [95] The financial statements disclose that 2M is indebted to the claimant for \$77,814 and \$1,270 to a Phil Mohat, presumably the claimant's partner.
- [96] CCN was indebted to the claimant for \$661,468 as of September 30, 2012. That amount increased from \$588,086.
- [97] Mr. Mohat appears to have shareholder's loans of \$13,446 in 2011 and \$9,108 in 2012. R.M. did not identify the majority shareholder in any of his businesses. There was no indication that the majority shareholders in either companies had invested at the level of R.M.'s commitment. It appears to me that the only person to commit significant personal funds to these businesses was the claimant notwithstanding that he was a minority shareholder. I do not understand why R.M., as a minority shareholder in these two companies has committed approximately \$661,468 in shareholder loans, whereas the only other investor (presumably the other shareholder) appears to have investments of approximately \$10,000.
- [98] The claimant's evidence concerning his current business arrangements and investments, his occupation, and his prospects is of limited value in light of the general uncertainty for his businesses in their early stages.
- [99] He said he invested significantly in CCN and 2M with the expectation that they would "seek to be profitable in the foreseeable future." His aim was "to provide a secure future for myself and the children."
- [100] He said that his income was expected to be \$48,000 per year from his private consulting business. And he also expects to continue receiving a \$7,200 pension income from Grant Thornton. So in total, his income is only \$55,200. His 2013 financial statement suggests his Line 150 income for 2013 would be \$57,149.
- [101] CCN financial statements prepared by the claimant reveal that the company lost \$180,579 in 2011 and \$91,539 in 2012. In those two years the company payroll was \$196,530 (2011) and \$165,551 (2012)
- [102] In November 2013, R.M.'s personal lines of credit were up to \$958,000. Apparently, these three lines of credit were used to fund his business ventures and possibly the purchase of his Langley residence.

- [103] I have observed that in fiscal 2013, 2M was also indebted to shareholders for \$57,125 and to CCN \$107,229. The amount shareholder loans were not attributed to specific shareholder.
- [104] R.M.'s Line 150 income for 2009 was \$206,395 and \$99,688 for 2012.
- [105] Under the Agreement, the claimant paid child support to the respondent in 2008 based on a Guidelines income of \$224,939 and in 2009 on income of \$206,395. I presume these adjustments to his support obligations were made as a result of reviews contemplated by the Agreement.
- [106] The claimant continued to pay child support of \$3,352 per month throughout 2010 until June 2011, including special and extraordinary expenses.
- [107] Commencing in July 2011, the claimant reduced this amount to \$82 per month for support and \$71 for special and extraordinary expenses because his income from his new businesses had dropped substantially, and he believed \$153 per month was the appropriate payment under the Guidelines.
- [108] The respondent contends that I should impute income at his 2009 level because the claimant unilaterally quit his employment and has not established a sufficient reason for doing so. This argument engages a consideration of s. 19(a)(e) of the Guidelines.
- [109] Moreover, the respondent submits that the claimant has not provided evidence of other accounting positions that might have been available in the job market when he left Grant Thornton.
- [110] The claimant acknowledges that the new companies have been slower in achieving prosperity than he had anticipated, but he believes that strong growth is in the 2014 forecast. The claimant argued that he is a minority shareholder in the two companies that are the core of his new business venture. He did not explain how future profits might be distributed between the shareholders and he did not provide any persuasive evidence that his decision to leave the accounting partnership was reasonable.
- [111] The claimant said he invested \$665,000 of his own money in this business. The financial statements reflect that CCN is obliged to pay discretionary interest at the rate "3% plus prime, cumulative." This could produce additional income of at least \$26,600 per year.
- [112] The claimant contended that his reasons for leaving the accounting partnership were both negative and positive. He feared a long period of retrenchment as the firm downsized, and he was concerned that salaries would not go up and partners would not be admitted. He argued that his decision was designed to protect his economic future.
- [113] The claimant acknowledges that he did not apply for work at other accounting firms nor did he investigate other opportunities in the accounting field when he left Grant Thornton.

- [114] The claimant accepts that an amount should be imputed to him for the purposes of establishing his Guidelines obligation for child support. He argues that the issue to be decided on this point is only the appropriate amount of income to be imputed to him.
- [115] The claimant argued that Donovan did not apply in this case; indeed, R.M. paid support at the higher level notwithstanding he had no income during the early stages of leaving Grant Thornton.
- [116] He said that his assertion that his new companies' business is improving is sufficient to discharge the onus of proof that his decision was reasonable.
- [117] Although his application contains a claim for support from the respondent, R.M. conceded in argument that he is not seeking any support from her.
- [118] Considering the evidence about his partnership interest and his obvious accounting skills, I am not satisfied that R.M. discharged the burden of proving that a person of his age, skills, education and business acumen could not have maintained an income over \$200,000 per year since 2009. As mentioned, there is no evidence that the claimant considered alternative work; rather he decided to pursue the new business ventures to the exclusion of any other professional or employment prospects. He has not satisfied me that he could not have remained in the Grant Thornton partnership and continued to earn income in the order of \$206,000 per year, or alternate employment, with remuneration commensurate with his 2009 income.
- [119] Therefore, I find that his decision to leave the accounting firm and the income earned while he remained there was not reasonable.
- [120] The claimant suggested that I should impute income around \$130,000. The respondent argued that the imputation should be between \$170,000 and \$206,000. In her concluding argument, she said that \$206,000 based on his 2009 income was the appropriate amount to impute.
- [121] I recognize that income from a professional practice may vary over time.
- [122] Other than his Line 150 income of \$224,939 in 2008 and \$206,395 in 2009 I have no reliable evidence about the amount he would have earned if he had remained with his partnership or in some other accounting position. The best evidence available is his 2009 income.
- [123] Accordingly, I have determined that a fair imputation of R.M.'s ability to earn income is \$200,000 per year for the purposes of establishing his Guidelines income from June 2013 and into the future. R.M.'s support obligation after June 2013 will be settled based on an imputation of income at \$200,000 per annum.
- [124] His prior year's support obligations remain as defined in the Agreement.

2. What is the date of review for child support?

- [125] I have concluded that the date of review for child support is the date prescribed by the Agreement, and I confirm that date is June 1, 2013.
- [126] The parties applied their minds to the issues of support, including reviews and variation of the claimant's obligations. They agreed to review and, if necessary, to revise the amount payable to accord with the Guidelines by June 1 of each year. The Agreement contemplates that if no review is conducted, the parties are satisfied that the ongoing support meets the Guidelines requirements.
- [127] Most importantly, changes to child support would not apply retroactively from the date of any review. In fact, the parties were quite clear that adjustments to child support would not apply retroactively from the date of any review.
- [128] The Agreement also provides that either party may request a review of child support based on a material change in circumstances by delivering a written notice. The Agreement specified that mediation would be used to resolve any disagreement regarding support following a material change in circumstances.
- [129] The evidence establishes that child support was not reviewed after June 1, 2010 and the parties had agreed that there would be no retroactive adjustments to child support.
- [130] Although the claimant said that he informed the respondent that he was leaving his partnership at Grant Thornton in 2009 and his income may be reduced, he did not, at any time, initiate a review of his support obligations under para. 36 of the Agreement. Further, he did not give notice to the respondent claiming a material change in circumstances warranting a reduction or change in child support nor did he initiate mediation prior to his Notice of Application filed November 7, 2012.
- [131] This hearing began on May 21, 2013.
- [132] Curiously, the Agreement does not provide a mechanism for varying support if the parties failed to reach agreement under para. 37. Under para. 36, the parties may apply for specific enforcement of the Agreement to achieve a child support amount that properly corresponds with the Guidelines.
- [133] The hearing on this aspect of the application was concluded December 11, 2013.
- [134] I conclude that for the purposes of this Agreement the date of the review should be June 1, 2013 which is the day closest to the request for a review constituted by the claimant's application. Thus, I confirm that June 1, 2013 is the review date prescribed by the Agreement.
- [135] The claimant's motion does not specify whether he seeks a change to child support as part of a review that could be held after June 1 of each year or if he seeks a change to a material change in circumstances.

[136] I will consider the claimant's application as a review of his child support obligations under the Agreement and that the change is effective commencing June 1, 2013.

3. Should I retroactively vary the claimant's support obligations?

[137] I will not retroactively vary the claimant's support obligations for the reasons that follow.

[138] The claimant seeks a retroactive variation in his support obligations from June 1, 2010 to May 1, 2011 and to be reimbursed for any difference between the new amount and the amounts he has paid.

[139] I understood that the parties were agreed that I should address these questions under the Family Law Act and not the Family Relations Act.

[140] The negotiated agreement is an extensive settlement of all issues concerning the children including support. In sum:

1. Para. 36: captioned "varying child support" and it sets out a detailed process to deal with ongoing child support. The Agreement contemplates that reviews of child support will occur annually from June 1, 2009 onward.
2. Para. 36(2): if no review occurs the parties are deemed to consider that the existing support satisfies the Guidelines' requirements.
3. Para. 36(3): addresses the question of adjustments to child support which "will not apply retroactively, but will be in effect from the date of review".
4. Para. 37(2): precludes any retroactive adjustment to child support. Changes to the claimant's obligation are to be in effect from the date of review.
5. Para. 37: a review is triggered by a written request by one party specifying a material change in circumstances of the children or the parties, including "a change in the economic income of one or both parties".

[141] Under para. 36, no annual reviews of child support were scheduled, and the claimant made no written requests for a review under para. 37 until this application was commenced.

[142] The claimant said that he informed the respondent that he was changing employment in 2009 and his income would likely decrease.

[143] On November 6, 2009 the claimant addressed an email: "Dear friends and colleagues" in which he said his involvement with Grant Thornton was ending, and he said he was embarking on new business ventures. Around that time he said he spoke to the respondent and "sought to warn the respondent that his income would drop in the foreseeable future". He requested that she accept reduced child support, but she refused.

- [144] The claimant does not resile from the Agreement; he relies on other parts of the Agreement that restrict the respondent's entitlement to contributions for special and extraordinary expenses unless the proper procedure was followed.
- [145] His request for retroactive variation of support must be governed under s. 148(3) of the Act.
- [146] Nothing in s. 148 or s. 150 authorizes the Court to prospectively or retroactively change a child support order. Section 152 allows the Court to make changes to orders retroactively but not to agreements about child support. The same option is not available in s. 148 dealing with agreements about child support.
- [147] I am satisfied that the parties were in the best position to assess their abilities to meet the needs of the children when they made the Agreement. They put their minds to optimum mechanisms to address changes in their circumstances and the Court should not interfere with their agreement unless the children's interests would be compromise without the changes requested by the claimant.
- [148] The Agreement dealt with changes to those amounts, and, to the extent that neither party sought to review the support terms on an annual basis on a material change in circumstances (save and except this application) there is no evidence to suggest that the children's needs will not be met if the Agreement remains unchanged and enforceable.
- [149] The Agreement is an agreement under s. 148 of the Act. It was made after separation and can be replaced if the Court determines that it would make a different order on consideration of the matters as set out in s. 150.
- [150] I find that the order can be made under s. 148 on a prospective basis only; the Court does not have the power to retroactively replace part of the Agreement with respect to child support. In my view, where the parties have addressed issues in a separation agreement that were clearly designed to provide mechanisms for dealing with changes in circumstances, they intended to adopt these mechanisms to eliminate the need to recalculate and change their obligations in a more adversarial process. Agreements between parties on support issues should be given considerable weight. see *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37 para. 76-79.
- [151] In any event, I am satisfied that the Agreement also takes into account the factors described in s. 150 of the Act. The Agreement contemplates that child support will be payable based on the Guidelines as does s. 150(1).
- [152] I have made a finding imputing income to the respondent. In my view, the claimant's obligations under the Agreement conformed to his obligations under the Act and the Guidelines.

[153] The parties did not address the question of reducing or cancelling arrears of maintenance under s. 174 of the Act, and I make no comment on whether this section would apply to the circumstances of this case. In view of my conclusion imputing income to the claimant as of June 2013, it is unlikely that he would be entitled to relief under s. 174; however I am not deciding that issue at this time.

[154] In sum, I conclude that:

1. Under the terms of the Agreement, the claimant was obliged to make child support payments at the amount payable immediately before June 1, 2010 until the review of his obligation. As a result, the claimant's obligations for child support do not change from June 1, 2010 to May 1, 2011 and the claimant has not overpaid his support for the children;
2. Under s. 148 of the Act, the parties' Agreement is binding in so far as it was made after separation. The support provisions of the Agreement will not be replaced because I would not make a different order after considering the matters set out in s. 150 of the Act; and,
3. Although the Court may change an order respecting child support prospectively or retroactively, this power does not extend to making changes to agreements notwithstanding that an agreement may be enforceable as if it was a court order.

[155] Support payable until June 1, 2013 is, under the Agreement, unchanged from the amounts payable before June 2011. There will be no retroactive adjustment to child support; any change to the claimant's child support, at least on the basis of income that might have been imputed from 2010 forward would be minimal as I would have imputed income at \$200,000 from January 2010 until June 1, 2013.

[156] I will further address his prospective child support in the next section.

4. Should I adjust child support because of shared custody arrangements?

[157] For the reasons that follow, I order that the respondent pay \$2,000 child support per month after June 1, 2013 in accordance with the terms of the Agreement.

[158] The claimant argued that his support obligations for the children should be adjusted to take into account that his right to access or physical custody of the children exceeds 40% of the time over the course of a year, and that the amount should be after considering the respondent's income. The claimant says that the 40% parenting time can be measured either in total hours he parents the children or the total number of days the children are with him; in either case his time exceeds 40% of the total.

[159] The respondent argues that, at the time of the Agreement, the claimant's parenting time was less than 40%, so s. 9 of the Guidelines should apply to mandate that the claimant continue making ongoing support payments. The respondent contends that to strip her of full child support because the claimant's time has crept up to 40% would be unfair and irrational. She contends that the terms of the Agreement adequately deal with questions of quantum and variation of child support payments. She argues that the respondent ignored

the contractual terms regarding support and should not be relieved of his obligations. She argued that if I conclude that the claimant now has 40% of the parenting time, her support should be reduced by a nominal amount of \$100 per month.

- [160] In this analysis, the Court is required to take into account the increased cost of shared custody arrangements and the conditions, means, needs and other circumstances of each spouse and the two children.
- [161] I have preferred to calculate the time based on the number of days the children will sleep at each parent's house with a further adjustment for time they are in the father's care on alternating Wednesdays. But I am mindful of the Court's comments in *Berry*, and the various other cases that mentioned earlier.
- [162] The order I intend to make is based on the fact that the children will be in the claimant's care from Wednesday after school until 7:00 pm and from Thursday 3:00pm until Monday morning during one sequence and from Thursday afternoon to Friday afternoon during the other week. I have counted 16 school weeks in the fall term, and 25 weeks after Christmas to the end of the school year. There are seven statutory/school holidays and spring break during these weeks. The length of spring breaks for the children may be subject to change. For the purposes of this calculation I will assume a two week break.
- [163] After taking into account breaks and statutory holiday (which are shared equally) during the weeks when the children are at school, the children will reside at the claimant's house for 97.5 nights and the respondent's home for 175.5 nights. On the balance of 92 nights the children's care will be divided equally between the parties.
- [164] I recognize that the claimant will care for the children on alternating Wednesdays and I will allot him a further credit for the purposes of addressing his support obligations and allocate the equivalent of 10 days care; in sum, a fair allocation of parenting time and responsibility divided by days, results in the respondent caring for the children for 42 % of the year. This analysis cannot be approached on strictly a mathematical basis due to variables in the calendar and my conclusions are an informed estimate of the parties' respective roles. In reaching this conclusion I am mindful of the decision in *Maultsaid* at para 18 and 25 where the Court confirmed its view that the issue is a matter of judgment and not a simple time accounting exercise.
- [165] The claimant will have physical custody of the children for not less than 40% of the time during the year which leads to a consideration of ss. 9(b) and (c) of the Guidelines. Therefore, the Court is required to consider the increased cost of shared custody arrangements and the circumstances of the parents and children.
- [166] In this case, the claimant's November 2013 financial statement reveals that his monthly expenses fell from \$6,138 in October 2012 to \$3,543 in November 2013. These expense levels were confirmed by the claimant at a time when he had already purchased his Langley home.

- [167] The respondent's expenses from October 2012 were \$13,474.42. She did not file a 2013 financial statement.
- [168] The respondent argued that no evidence supports the suggestion the claimant's costs increased because of his increased time with the children.
- [169] Although the claimant described aspects of expenses that have changed in light of his new circumstances, he did not particularize those increased expenses from having the children in his care for any additional time. He said his costs of food, outings, sporting equipment and associated costs have increased. He did not give any estimate of the amount of the increase.
- [170] I find that the claimant's increased transportation costs have substantially increased by reason of the additional time he cares for the children in his new residence, and those expenses would appear to have been within the claimant's contemplation when he relocated with regard to the Agreement.
- [171] Under s. 9(c), I am satisfied that the respondent's financial circumstances are stable and she bears a substantial responsibility in maintaining the children in their activities in the community. She continues to shoulder the greater share of the children's expenses; her home is the children's primary residence. The evidence was less than helpful from the claimant in explaining how his costs will change.
- [172] The Guidelines mandate that the claimant pay \$2,734 per month of child support, and the respondent's offsetting obligation is \$1860. With set off, the claimant would be required to pay \$874.
- [173] The respondent contends that s. 9 of the Guidelines does not compel an automatic reduction in child support when 60/40 balance is achieved. The determination must be made after considering the criteria in ss. (a) to (c). She relies on *Green v. Green* 2000 BCCA 310 and *Lavoie v. Wills* 2000 ABQB 1014 [Lavoie].
- [174] In *Lavoie*, the Court considered that the marginal increase in a payor's costs warranted a small decrease in the support level payable. The respondent in this case argues that the claimant did not prove any reduction in costs and that any reduction should be in the order of \$100.
- [175] I find that the marginal increase in time the children will be with the claimant does not justify a full set off of support obligations.
- [176] In spite of the limited information available, I intend to adjust the claimant's ongoing responsibility to reflect the anticipated modest changes in his expenses relating to the increase in time he cares for the children.

- [177] The primary residence of the children will remain in the respondent's home in accordance with para. 8(2) of the Agreement. The claimant's monthly expenses of \$13,474 of which \$1767 is specifically allocated to the children's needs. I recognize that the child care expenses may be reduced as a consequence of the decisions made in these reasons. There is no indication that the respondent's expenses will diminish for any reason except for the incremental costs of daily living.
- [178] It is important to achieve a reasonable balance between the burdens shared by these parents; the respondent will remain responsible for the children's primary residence. It is not appropriate to conflate the issues of parenting time with parental responsibility when the distance between the parties residences impact on their schooling, activities and historical connection with their neighbourhood.
- [179] In the circumstances, I order that the claimant pay child support in the amount of \$2,000 per month.
5. Should any special and extraordinary expenses be reimbursed?
- [180] For the reasons that follow, the claimant will reimburse the respondent for his proportionate share of child care expenses totalling \$10,182.
- [181] The claimant argues that the respondent has received substantial contributions towards extraordinary and special expenses in the past and has not provided documentary confirmation of those expenses. He seeks to recover back the monies he has paid since 2008 where those costs have not been supported by receipts produced to him.
- [182] The respondent deposed that she paid \$13,850 from July 2011 to September 2012 for child care expenses, including the before and after school daycare and nanny costs.
- [183] She claims an additional \$1,439 for payments to fly her mother from Britain to Vancouver so that she could provide some additional daycare.
- [184] She contends that the claimant is responsible for a proportionate share of these costs, and he has not paid any portion of those expenses to date.
- [185] The respondent also alleges that the children have been involved in various sporting programs from July 2011 to September 2012. She has spent a total of \$4,005 on these costs without support from the claimant.
- [186] The respondent deposes that she paid \$726 in MSP expenses for the children, \$187 for other medical expenses, and \$301 for life insurance.
- [187] The claimant submits that the respondent incurred the daycare expenses and nanny expenses without consulting him and without his consent, contrary to para. 17 of the Agreement. The claimant also suggested that his obligation to contribute to expenses related to the children's care by third parties should be reduced because she claimed those benefits as deductions to her income, and that the parties made an agreement that she

would pay for some nanny costs without contribution from him. So he is not obliged to make contributions to those expenses because the respondent did not follow the steps required in paras. 15, 17 and 34 of the Agreement.

- [188] The claimant also argues that the characterization of "nanny expenses" in the Agreement ought to be expunged because the respondent's expenditure on a nanny duplicates daycare expenses he already pays for. Further he contends that daycare expenses could be reduced if the children were to stay with him over Sunday nights.
- [189] Further, the claimant argued that the respondent's mother's flight costs would have been incurred in any event, and they do not constitute an agreed upon special expense claim.
- [190] The claimant argues that he has not received the copies of receipts or confirmation of the respondent's expenditures from 2008 to 2011, and he alleges that he paid a disproportionate share of those costs without proper documentation, and now he wants reimbursement for any expenses he may have paid for which the respondent is unable to produce the supporting receipts.
- [191] The claimant argues that he should not be responsible for paying for his son's hockey expenses. He alleges that the respondent agreed that she would pay their son's hockey expenses and he would pay their daughter's riding costs.
- [192] In addition, he asserts that his contribution to RESPs for the children at the rate of \$333 per month should be credited to him. I do not agree.
- [193] RESP plans may be important to provide for the children's long-term future. However, those contributions must be viewed in the context of the children's day-to-day needs and expenses. It may be that financial planning for the children's long-term education goals is within the capacity of the parties; it may be a laudable goal. However those issues must generally be assessed based on the circumstances of the parties when the children pursue post-secondary education and should not be permitted to relieve a parent from meeting the immediate needs of their children.
- [194] I accept the claimant's assertion that the respondent agreed to pay the entirety of P.M.'s hockey costs because they had no agreement on that activity. She deposed that she may "have overlooked consulting" the claimant regarding some of the children's activities.
- [195] And I accepted that the claimant is paying some costs for E.M.'s horse riding activities as part of an understanding he had with the respondent that neither would be required to share the others costs of hockey and equestrian activities.
- [196] In addressing the respondent's claim for child care expenses under the Agreement, I accept that those expenses were reasonable and necessary in managing the respondent's household. The parties agreed to share special and extraordinary expenses, including a nanny, in proportion to their adjusted Guidelines incomes.

- [197] The parties had agreed that the respondent would employ daycare to care for the children in December 2008. Paragraph 34(1)(a) confirms that a nanny is a special and extraordinary expense.
- [198] The respondent claims travel costs for her mother coming to Vancouver from Britain in December 2011, March 2012, July 2012 and September 2012. The total for these charges was \$3,668.
- [199] The respondent explained these expenses as necessary to provide daycare to facilitate the children's care for various reasons. But the claimant was not consulted with regard to these expenses. The claimant argued that the respondent's mother would have come to provide assistance to her daughter and for an ordinary visit, and that he should not be obligated to pay half of that amount.
- [200] In the circumstances, where the claimant was not consulted before the decision was made to invite her mother to care for the children, I am not satisfied that those costs form a proper claim for special or extraordinary expenses. I am of the view that the respondent's mother's travel expenses do not fit within the description of "nanny" costs. Ordinary child care costs have tax benefits or implications to the parties and it is not reasonable, on the limited evidence available to conclude that the respondent's mother's travel costs should be considered a special or extraordinary expense.
- [201] The claimant argued that he should not be responsible for nanny expenses that were incurred without his approval. The Agreement did not predicate his responsibility to share child care expenses based on his consent to the use of a nanny; rather the respondent was obliged to consult the claimant before selecting a nanny. She agrees that she did not consult with the claimant before selecting a nanny; nanny costs are a specified expense of the Agreement obviously in the contemplation of the parties when they entered the Agreement.
- [202] The respondent's failure to consult the claimant regarding the choice of nanny does not extinguish his obligation to contribute to that expense.
- [203] The Agreement does not give the Court the authority to cancel or remove terms relating to child support. Section 148(3) permits the Court to set aside or replace a child support order if it would make a different order on consideration of the matters set out in s. 150 of the Act.
- [204] In my view, child care expenses (including nanny costs) remain necessary while the children are in the respondent's care. In the circumstances, I am not convinced that the respondent's entitlement to a contribution to child care costs while she is at work would not be included in an order under s. 150. I declined to cancel or remove that term of the Agreement.

- [205] However, I find the claimant must share the costs set out in para. 33 of the respondent's first affidavit, except for \$1,562 that was for costs of their son's hockey.
- [206] In the result, the claimant will reimburse the respondent for his proportionate share of child care expenses totalling \$10,182.
- [207] The division of special and extraordinary expenses will be in accordance with the proportions based on the parties' incomes as described in these reasons, namely \$200,000 per annum for the claimant and \$130,000 for the respondent.
6. Should I make an order that the respondent must increase the amount of her life insurance?
- [208] For the reasons that follow have concluded that the respondent is not obliged to increase her life insurance.
- [209] The Agreement required the parties to obtain reciprocal insurance policies naming the other as beneficiary for as long as the children are entitled to support.
- [210] Under the Agreement, the claimant's policy was to be \$500,000, and the respondent's policy was \$200,000.
- [211] The claimant seeks an order compelling the respondent to increase the insurance coverage required in the Agreement from \$200,000 to \$500,000.
- [212] The Agreement incorporates the parties' obligations to obtain life insurance payable to the other in prescribes amounts of insurance. It does not contemplate a variation of that obligation requiring the respondent to increase the amount of insurance. Further, the Agreement includes no provision that allows the Court to vary the Agreement to require an increase in the benefits payable under the respondent's policy. And no authority was cited to authorize the imposition of a change in this obligation.
- [213] Section 170(e) of the Act authorizes the Court to make an order against a person who has a contract of life insurance to designate a spouse or child as a beneficiary and to pay premiums.
- [214] But s. 170 is confined to a situation where one spouse already has a contract of life insurance in place; it does not permit the imposition of an obligation to obtain new or additional insurance coverage.
- [215] There is no authority to make the requested order; accordingly, I dismiss that item of the claimant's notice of application.
7. Should parenting time be varied?
- [216] I will not make an order changing the children's primary residence at this time. But I will make an order varying the time that the children spend with the claimant.

- [217] The claimant seeks a variation in the Agreement that would alter the children's primary residence from the respondent's home to a joint primary residence regime.
- [218] The respondent challenges the claimant's assertion that the children's best interests will be served by increasing his parenting time in light of his change of residence. She argues that the amount of time spent travelling back and forth to Langley deprives the children of important time for other needs. She contends that the claimant's access time should be reduced to eliminate some of the trips between North Vancouver and Langley and suggests that the claimant spend more time with the children in North Vancouver.
- [219] As a result, she wishes to reduce the number of evenings the children reside in the claimant's house and requiring the claimant to visit the children on Thursday evenings in North Vancouver.
- [220] She contends that the claimant acted out in a high handed and irresponsible manner when he moved to Langley without providing notice under the Agreement or under the Act.
- [221] First, I will address the claimant's obligations preparatory to changing his residence under the Act and under the Agreement.
- [222] Sections 65-71 of the Act prescribe the statutory obligation of a parent who plans to change the location of his residence where such a change may significantly impact the child's relationship with a guardian.
- [223] Section 65 states:
- 65(1) In this Division, "relocation" means a change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with
- (a) a guardian, or
 - (b) one or more other persons having a significant role in the child's life.
- (2) This Division applies if
- (a) a child's guardian plans to relocate himself or herself or the child, or both, and
 - (b) a written agreement or an order respecting parenting arrangements or contact with the child applies to the child.
- 66(1) Subject to subsection (2), a child's guardian who plans to relocate himself or herself or a child, or both, must give to all other guardians and persons having contact with the child at least 60 days' written notice of
- (a) the date of the relocation, and
 - (b) the name of the proposed location.

68 If a child's guardian gives notice under section 66 [notice of relocation] that the guardian plans to relocate the child, the relocation may occur on or after the date set out in the notice unless another guardian of the child, within 30 days after receiving the notice, files an application for an order to prohibit the relocation.

70(1) If the court makes an order under section 69 [orders respecting relocation] that permits a child's relocation, the court may make any of the following orders:

- (a) subject to subsection (2) of this section, if the order made under section 69 affects an agreement or order that allocates parenting arrangements between the relocating guardian and another guardian, an order under section 45 [orders respecting parenting arrangements] or 47 [changing, suspending or terminating orders respecting parenting arrangements], as applicable;
- (b) any order necessary to ensure that the relocating guardian complies with the terms of the order permitting relocation, including an order to do one or more of the following:
 - (i) give security in any form the court directs;
 - (ii) transfer specific property to a trustee named by the court.
- (2) In making an order under subsection (1), the court must seek to preserve, to a reasonable extent, parenting arrangements under the original agreement or order.

[224] Section 69, addresses the case of parties who do not have substantially equal parenting time (as in this case) s. 69(4) provides:

- (4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,
 - (a) the relocating guardian must satisfy the court that
 - (i) the proposed relocation is made in good faith, and
 - (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and
 - (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise.

[225] The initial burden of proof in this case is on the claimant to prove:

1. the proposed relocation was made in good faith; and,
2. he has proposed reasonable and workable arrangements to preserve the relationship between the children and the parents and others who have a significant role in the child's life.

[226] If the relocation meets the two criteria it will be considered in the best interests of the children unless the other parent satisfies the Court otherwise.

[227] I note that s. 70(2) requires the Court to preserve, to a reasonable extent, parenting arrangements under this Agreement.

Good Faith of the Relocation

[228] The claimant did not give the required 60 days' written notice of the date and name of the new location of his proposed move. This notice period is intended to allow the parent to apply to court within 30 days of receiving the notice to prohibit the relocation and the relocation cannot occur until on or after the date set out in the notice.

[229] The claimant recognizes he breached the Act and the Agreement when he changed his residence without prior notice to the respondent. He argued that these failures were of no consequence because the respondent would have refused consent to the move and he would have been making the application now before the Court.

[230] He did not address the "good faith" issue in submissions; however I accept that his reasons for moving were not motivated by an improper purpose although the timing of his move was improper behaviour.

[231] Nonetheless, the claimant lives in Langley nearer to the east boundary of the district, and he did not provide any evidence to support the choice of residence that far from North Vancouver.

Reasonable Arrangements Proposed by the Claimant

[232] Although the claimant has moved to Langley, he contends he is able to transport the children to their activities in North Vancouver, to school and to their mother's home in a timely way. He wishes to achieve an equal division of the parenting time and responsibilities of the children and believes that their experience in his new residence includes many advantages he was not previously able to provide. He argues that he is self-employed and has a more flexible schedule that permits him to attend to many of the children's activities. He is prepared to facilitate transportation of the children to and from Langley and believes that the more parenting time he has with the children, the more it will improve their lives.

[233] He rejects the respondent's assertions that the additional transportation between Langley and North Vancouver imposes a negative burden on the children and will have long-term adverse consequences.

[234] Neither child expressed any concerns about the travel time from the claimant's home to their school or activities in North Vancouver and both children wish to spend more time with the claimant.

- [235] The commute is obviously a challenge insofar as North Vancouver has been the center of the children's community life since before the parties separated. The parties disagreed on the duration of the trip from Langley to North Vancouver. It is clearly within 37 to 50 min.; the time will obviously depend on the nature and extent of traffic.
- [236] The respondent described the children's fatigue and challenges occurring when the children are awoken early to travel to their school from Langley. It seems obvious that the extra travel time will impact the children at some level but the competing issues are whether improved time with their father balances the extra time lost to early morning travel.
- [237] It is important to reiterate that the claimant chose to live in Langley without obtaining consent or giving the requisite notice under the Agreement and the Act.
- [238] The circumstances involving these children now include tension and challenges to the activity schedules. I have no doubt that the increased time driving between their parents residences will impact their lives. The respondent's home remains the children's primary residence. Many of their ongoing social, recreational and sporting activities remain in North Vancouver. Their new Langley residence will obviously afford them significant social and recreational activities. It is hard to imagine that, as the children grow older, the tension between their residence in North Vancouver and Langley will not become more stressful.
- [239] The claimant's fiancé, Zanet Benakova, with whom the claimant resides, seems to be a source of tension and discord according to the children. Conversely, the respondent's partner seems to have a good relationship with the children without discord.
- [240] To achieve the optimum balance between both residences, the new arrangements will undoubtedly impact the children's activities in North Vancouver and may result in some limitations on their options.
- [241] I accept that the claimant wishes to expand his time with the children to the level where he is parenting the children 50% of the time.
- [242] I also recognize that the children wish to have more time with their father.
- [243] Nonetheless, the claimant's decision to move to Langley, without apparently considering accommodation that would be closer to North Vancouver, is completely unexplained and unreasonable.
- [244] The reality is that by moving to Langley the claimant has introduced a further burden on the children's time that could and might have been assessed before moving.
- [245] In my view, the claimant will not be able to achieve equal parenting with the respondent while he continues to reside in Langley.
- [246] To expect that the children will commute from Langley to their North Vancouver schools on an ongoing basis is both unreasonable and unnecessary.

- [247] Although such an arrangement might be feasible, it would significantly impact the children's time. They could sit in their father's car for up to one-and-a-half to two hours per day - if not more in rush hour traffic. The question is whether the benefits outweigh the detrimental impact on the children. I am not satisfied that it would be appropriate to change the children's primary residence at this time. The children may want more time with their father; but it is difficult to conceive of a plan that could accommodate more evenings in their father's home without requiring substantially increased travel to their school and activities.
- [248] In my view the claimant will need to demonstrate flexibility with regard to the children's activities in North Vancouver. That is their primary residence in the place that they have been raised. The additional advantages resulting from his new residence must be secondary to the children's need for a primary residence.
- [249] I have concluded that there is a very narrow balance favouring the children's continued time in the claimant's home notwithstanding the drawbacks of prolonged travelling. It would be best for the parties to create a schedule that minimizes the number of trips. In the absence of such agreement this order will settle the ongoing parenting schedule.
- [250] In the result, I order that the claimant's parenting time will be:
- Weeks one and three: Wednesday 3:00 pm to 7:00 pm and Thursday 3:00 pm to Monday 9:00 am;
- Weeks two and four: Thursday 3:00 pm to Friday 3:00 pm.
- [251] In my view, this schedule will result in the children travelling from Langley to North Vancouver eight mornings per month and will minimize the disruption in the children's lives and will give them better quality time with their father on the alternating weekends.
- [252] If after April 2015 either party wishes to revisit the parenting schedule solely because all of the adverse effects of travel on the children, they are at liberty to seek a further review of this schedule. I am very hesitant at suggesting a return to Court to solve problems for this family; they should be solved between the parties. However in the absence of an agreement the parties are at liberty to apply to change this schedule.
8. Should I appoint a parenting coordinator?
- [253] For the reasons that follow, I am appointing a parenting coordinator.
- [254] In my view, the nature and extent of the parties' affidavit material on this application indicates their inability to achieve rational compromise to important questions involving their children.
- [255] Court applications are expensive, cumbersome and at times unhelpful in solving the real problems concerning the care or parenting of children.

[256] I am satisfied that this family will benefit by the use of a parenting coordinator as provided for in s. 15 of the Act.

[257] I am satisfied that it is in the best interests of the children that some flexibility remains in the parenting arrangements provided for under the Agreement and this order.

[258] The parenting coordinator is to make determinations regarding:

1. scheduling of children's activities;
2. variations regarding the children's pick-up or drop-off time; and
3. substitution of parenting time where it would be in the best interests of the children to be with one or the other parent on times that do not conform to the order and the Agreement between the parties.

[259] I recognize that there may need to be additional terms authorizing parenting coordinator to act. The parties may wish to address those terms or refining the details in paragraph 257. The parties will have liberty to apply for further directions or alterations in this order for the appointment of a parenting coordinator.

Other Claims

[260] The claimant sought orders relating to communication between the parties regarding the children and contact between the parties when the children are picked up or dropped off.

[261] The respondent wanted communications with respect to the children to be limited to e-mail and text messages only. Although e-mail and text messaging is an efficient process to communicate information, it is difficult to contemplate why the parties cannot have direct communication this many years after separation. It must surely be in the best interest of the children that the parties be able to communicate orally.

[262] I will direct that the exchange of information regarding the children's needs, education and health be dealt with by e-mails or text messages. Other than that restriction I will not attempt to regulate the behavior of either party.

[263] The circumstances of this family do not suggest that violence is a factor or that the children are at risk from exchanges between the parties. The impact of a court order restraining one party's activities is serious and should not be invoked to control conversations occurring when the children are exchanged.

[264] The affidavit evidence is somewhat contradictory on this point and, if the claimant's version of events is accurate, does not warrant judicial intervention.

Conclusion

[265] I order:

1. the respondent's application to enforce the Agreement be allowed with respect to child support payments and special and extraordinary payments based on the claimant's Guidelines income imputed to be \$200,000 from June 1, 2013 to the present;
2. the respondent's Guidelines income is \$130,000;
3. the claimant will pay child support of \$2,000 per month commencing June 2013;
4. the claimant will pay child support from June 2011 to June 2013 at the amount paid during 2009 and as required by the Agreement;
5. the claimant will pay his proportionate share of special and extraordinary expenses of \$10,182 (child care costs) and \$2,443 (recreational costs) based on the respondent's Guidelines income of \$130,000 and his income of \$200,000. The parties will continue to pay expenses in conformity with the Agreement;
6. the claimant's claims regarding child support and retroactive repayments are dismissed;
7. the claimant's claim for copies of receipts for special and extraordinary expenses from June 2008 and for reimbursement of expenses is dismissed;
8. the claimant's request to compel the respondent to increase life insurance coverage from \$200,000 - \$500,000 is dismissed;
9. the claimant's request to shared joint primary residence of the children is dismissed;
10. the claimant's request for alterations in parenting time is allowed in part and his parenting time will be at the times set at in the Agreement except as follows:

Weeks one and three: Wednesday 3:00 pm to 7:00 pm and Thursday 3:00 pm to Monday at 9:00 am;

Weeks two and four: Thursday 3:00 pm to Friday at 3:00 pm.

11. with regards to the children's activities, parenting issues and changes requested, the parties will communicate by e-mail or text message only;
12. the claimant's request for a restraining order during pick-up and drop-off of the children is dismissed;
13. the parties will engage the parenting coordinator who will be authorized to:
 - (1) make determinations regarding the scheduling of children's activities, variations regarding the time of pick-up or drop-off of the children;
 - (2) direct substitution of parenting time where it would be in the best interests of the children to be with one or the other parent on times that do not conform to the order and the Agreement between the parties; and,

- (3) make decisions regarding the children's activities where the parties are unable to agree on activities the children should be engaged in.
14. The parties will communicate with each other on matters concerning the children's health, education and activities by e-mail and/or text message.
- [266] The parties will have liberty to speak to the question of the terms of reference for the parenting coordinator.

Costs

- [267] The parties also have liberty to make written submissions as to costs. The respondent will provide her submissions by October 7, 2014 and the claimant's submissions will be delivered by October 14, 2014.

"The Honourable Mr. Justice Armstrong"

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Prepared on 29 October 2026 · Esheria