
CANADA / JUDGMENT

S.C. v. T.J.P.B.

2022 BCSC 418

COURT

Supreme Court of British Columbia

DECIDED

14 March 2022

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2022 BCSC 418 S.C v. T.J.P.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.C v. T.J.P.B.,

2022 BCSC 418

Date: 20220314

Docket: E62438

Registry: New Westminster

Between:

S.C.

Claimant

And

T.J.P.B.

Respondent

Before: Master Robertson

Reasons for Judgment

In Chambers

Counsel for the Claimant:

M.G. Perry

Counsel for the Respondent:

M. Zimmerman

Place and Date of Hearing:

New Westminster, B.C.

February 24, 2022

Place and Date of Judgment:

New Westminster, B.C.

March 14, 2022

- [1] This is an application for a s. 211 report to be conducted, and compensatory parenting time pursuant to s. 61 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") with an ancillary police enforcement clause and fines arising from wrongful denial of parenting. In response, the respondent seeks orders for a counsellor, a parenting coordinator and legal counsel for one of the parties' children, to be appointed.

Background

- [2] By way of background, the claimant is 46 years old, and the respondent is 43. Both are engineers. They were married in Venezuela on March 9, 2002 and were divorced by way of a Final Order granted by the Alberta Court of Queen's Bench on April 18, 2017 (the "Divorce Order"), as they were living in Grand Forks at the time. They have two daughters, N. who is now 20 years of age, and I. who is currently 9 years old, turning 10 in April.
- [3] The respondent, with the claimant's consent, moved to Squamish in 2019 for employment reasons. The Divorce Order had set out a parenting schedule, but in anticipation of the move to B.C., the Divorce Order was varied and a new parenting schedule with respect to I. (the "Child") was put in place by which the claimant was granted seven days parenting every 60 days, with FaceTime every week, and an additional three weeks in the summer. Given N.'s age, no further orders were made specific to her.
- [4] The claimant says that this schedule was put in place because he was remaining in Alberta while the respondent and children moved to B.C., considering the resulting logistics, including travel time, for the claimant to exercise his parenting time.
- [5] Subsequently, in December 2020, the claimant also moved to B.C. to be closer to the children, settling in Surrey. As he was then closer, he sought more parenting time, taking the position that the variation order was intended to address the circumstances of the parties living in different provinces. The respondent did not agree with any additional parenting time, leading to these proceedings being filed.

- [6] The parties appeared at a Judicial Case Conference on June 3, 2021, and agreed to a schedule whereby the claimant was to have parenting every other weekend, as well as FaceTime parenting. That schedule remained in place and appeared to be working until parenting time was denied on October 14, 2021.
- [7] As a result, the claimant brought an application for a declaration of wrongful denial and compensatory parenting time. I heard that application on December 14, 2021 and found that there had been a wrongful denial of parenting time by the respondent (the "December 2021 Order"). I set a further schedule for compensatory parenting time over the December holiday schedule. I also made mutual conduct orders in terms of the communication with the Child, and, as counselling was proposed, made an order allowing the respondent to arrange for counselling with Danielle Berman, with the costs of that counselling to be shared by the parties. I adjourned the relief relating to other remedies, namely the use of police enforcement clause and penalties.
- [8] The application today seeks further compensatory time for continued denials, and other remedies, in addition to seeking an order that Dr. Michael Elterman be retained to complete a s. 211 report as to:
- a) The Child's needs;
 - b) The Child's views; and
 - c) The ability of the claimant and the respondent to provide for the Child's needs.
- [9] The claimant submits that since the December 2021 Order, after a short period of time where the order was followed, parenting has continued to be denied. In particular, since the December order, up until the end of January 2022, when the application was filed, the claimant says 3 overnights, for a total of six days, of parenting time was denied, along with 6 FaceTime or phone calls.
- [10] There is some evidence given by the respondent that some of the stated times for which parenting is alleged to have been denied was actually agreed to by the claimant, or due to illness. Although I was unable to completely mirror the timing, it does appear that the calculated time of denied parenting does not include those times.
- [11] In any event, it is agreed by the respondent that the claimant is entitled to compensatory time, and that a s. 211 report would be helpful, given the issues as to the Child's reluctance to attend parenting, as is further discussed herein, with the costs being shared by the parties. However, the respondent argues that:
- a) the compensatory parenting should not occur except in conjunction with recommendations of a counsellor, which has been complicated as Ms. Berman indicated she would not treat the Child, or until the results of the s. 211 assessment are known;
 - b) that the appropriate party to conduct the s. 211 report is Dr. Ellie Bolgar;

- c) that a police enforcement clause and any other punitive remedies, such as fine, are inappropriate given the circumstances, and
- d) that there ought to also be orders regarding counselling, a parenting coordinator, and legal counsel for the Child, although no specific cross application was brought.

Compensatory Parenting and Orders regarding Denial of Parenting

The Law

- [12] There is no dispute as to the applicable law.
- [13] The issues of wrongful parenting are provided for in ss. 61 and 62 of the FLA, with fines and police enforcement for such denial being available under ss. 230 and 231.
- [14] Under s. 62, denial of parenting will not be wrongful in circumstances where:
- a) The guardian reasonably believed the child might suffer family violence if the parenting time were exercised;
 - b) The guardian reasonable believes the enforcing parent was impaired when the parenting was to be exercised;
 - c) The child was suffering from illness when the parenting time was to be exercised and a written statement from a medical or nurse practitioner was provided;
 - d) In the 12 months before the denial, the enforcing parent repeatedly failed to exercise his parenting;
 - e) The enforcing parent informed the guardian that parenting time was not going to be exercised without reasonable notice; and
 - f) Other circumstances the court considered to be sufficient justification for the denial.
- [15] In this application, there is no evidence to support a finding under s. 62(1)(a) to (e). Rather, the respondent relies on the "other circumstances" to support that the denial was not wrongful, namely the current mental health of the Child.
- [16] While I previously found that the denial of parenting prior to the December 2021 Order was wrongful, there are further circumstances that have arisen since then which the respondent seems to be arguing not justifies the denial, although also agrees that the claimant is entitled to compensatory time, at some point.
- [17] In this respect, the starting point on any application regarding wrongful denial of parenting, as noted in *A.N. v. A.M.N.*, 2021 BCSC 2228 at para. 17 ("A.N."), is that court orders are to be complied with and once a denial of parenting time has been established the onus shifts to the offending parent to show that the denial was not wrongful. Only reasonable denials of parenting time will excuse a denial.

- [18] The basis for the denial is the Child's reluctance to participate or attend parenting with the claimant. A child's reluctance to participate in parenting, on its own, is not a reasonable basis for a denial. It is wrongful for a parent to deliberately fail to use his or her parental authority to override children's wishes: A.N., citing (K.E.F.) v. (T.W.P.), 2016 BCSC 1706.
- [19] In K.R. v. J.W., 2016 BCSC 225 ("K.R."), the Court concluded as follows:
- [59] A parent need not say the word "no" to scheduled parenting time for them to communicate a denial nor must they physically prevent the parenting time from occurring for it to be a wrongful denial. The cumulative effect of less definitive words and actions may suffice
- [60] When a child is resisting the parenting time accorded a parent by the order or agreement, it is appropriate to view the origins of that resistance. A parent who encourages that resistance by words and/or actions can, in my view, be said to be denying parenting time and, depending on the circumstances, it may be a wrongful denial.
- [20] The claimant argues that it is this type of a scenario which has occurred here, in that the respondent, at best, has failed to exercise her parental responsibility by taking all appropriate steps to encourage and facilitate the parenting or, at worst, has contributed to the alienation that now exists.
- [21] In terms of relief for a wrongful denial, that relief is discretionary. In exercising that discretion, as with all parenting applications, the court is to consider the best interests of the children, in accordance with s. 37 of the FLA.
- [22] The court's discretion under s. 62 of the FLA can be exercised by not imposing any consequence or remedy at all with respect to a wrongful denial: K.R., at para. 23.
- [23] Ultimately, the remedies available under the FLA are not intended to punish, but rather to secure compliance with conduct orders: A.N. at para. 33.

The Evidence

- [24] Turning then to whether or not there has been continued wrongful denial, or if the denial is justified since the December 2021 Orders, the claimant directed the court to correspondence including a November 2021 email from the respondent to the claimant's counsel suggesting that parenting occur on a particular schedule, but that the Child could stay home "if she wants to", or receive phone calls "if she wants to". That, he submits, shows that the respondent is not taking an active role, but is instead content to let the 9- year-old Child control parenting.

[25] As an example of that continuing after the December order was pronounced, the claimant referred to correspondence between the parties' counsel regarding the ongoing issues, and one particular incident where the respondent indicated that the Child did not want to go with the claimant for parenting on December 30, 2021. During that incident, compensatory parenting time had been arranged, and the child expressed reluctance to partake. The email exchanges between the parties is as follows:

Claimant: Please talk to her, tell her that I love her very much, that you love her, that we will have fun as usual. Please help her come with me today, and please send her snowpants. Please tell her that we will be opening the gifts today. Thanks in advance.

Respondent: You can tell her that yourself.

[26] Another exchange, via text, occurred on January 7, 2022, as follows:

Respondent: She doesn't not [sic] want to come out

Claimant: Hi [T], I thought we agreed on this. Please tell her I would like to see her.

Respondent: I already told her.

Claimant: It is very cold outside. I will get [sic] my car

Respondent: She is coming to speak with you.

Respondent: She is crying.

Respondent: She does not want to speak with you.

Respondent: or come out

Respondent: I cannot physically force her

Claimant: Why is she crying. Please tell her that I love her.

Claimant: What have you told her [T]

Claimant: I am going to get my car. It is too cold. Will wait in my car.

Claimant: Hi [T], that's [sic] is not right. What you are doing is so wrong in many levels.

Claimant: Please tell my daughter I love her.

Claimant: And the last time she was with me I bought her her Tylenol.

Respondent: Stop Lying.

Respondent: You are [sic] her phone number

Respondent: Have

Claimant: You know what you have done. Please rectify.

Respondent: Send email. Call her. You he [sic] her phone number

Respondent: have

Claimant: You agreed [T] to enable parenting time today. Please tel [sic] my daughter I love her.

Respondent: The 211 child report will be the solutions.

Claimant: Please tell my daughter we need to talk.

Respondent: I prepare the bag with cloths [sic] for her

Respondent: I brought her to the door

Respondent: She started crying and I will not physically force her

Respondent: Call her to her phone

Respondent: She sat in the stairs and started to cry.

Claimant: Please call me and put her in [sic] the phone

Claimant: Please tell her I love her

Respondent: You asked in court to have access to her phone. Now you have

Claimant: After you had blocked me for over a year. What do you expect.

Respondent: just out of curiosity, if you care about her, why do you want to force her to go with you, even if she is very sad about it?

[27] The exchange then became quite heated, with accusations by both parties against the other, and neither of them communicating in an appropriate or respectful way.

[28] The claimant also points to language he deposes has been used by the Child, a 9 year old, after the December 2021 Order which suggests some influence of adults, including alleged statement by the Child that it was her "human right" (notably, in the respondent's affidavit, she referenced Article 12 of the United Nations Convention on the Rights of the Child) and that it was her choice to return home from parenting with him, allegedly telling the claimant that the respondent had told the Child that that was what the order provided for.

[29] Further, the claimant deposes, parenting is much less problematic when he picks up the Child from the school, suggesting that there is influence being exercised in the home, as that is where the difficulties arise. Although this is denied by the respondent.

[30] The claimant also deposes that he had a warm loving relationship with the Child, in support of which he has introduced a sworn affidavit of a prior landlord as to his observations as to the claimant's parenting which he witnessed while working from home, which were of a caring parenting relationship. That, the claimant argues, changed for no apparent reason in October 2021.

- [31] At the very least, the claimant argues, these incidents and communications illustrate the unsatisfactory approach being taken by the respondent which supports a finding that she is not exercising her parental authority to encourage a healthy relationship with the claimant, including by way of insisting on compliance with court ordered parenting schedule. At worst, the claimant argues that the communications between the parties and comments as made by the Child support a finding that there has been either overt alienation or estrangement as a result of the claimant's conduct.
- [32] From the respondent's perspective, she denies any inappropriate influence on the Child, but argues that the current circumstances are such that it would be harmful to the Child to insist upon and force her to attend parenting when she does not want to.
- [33] In this respect, the following evidence is relied upon by the respondent in support of her position that if there has been any estrangement, it is due to the claimant's actions, and that it was reasonable for her to deny the parenting:
- a) The claimant has had a history of anger management problems, including altercations with employers. These instances appeared to have happened many years ago and are dated.
 - b) The claimant refused to allow the Child to call the respondent when she was with him on December 16, 2021. This created reluctance for the Child to go with him the next time, as she did not wish to be in that position again.
 - c) The claimant told the respondent's brother that the respondent had mental health issues.
 - d) When the October 2021 denial occurred, the claimant involved the police which caused trauma to the Child and created a rift in the claimant's relationship with her. As a result of that, the Child is now fearful of police involvement.
 - e) The Child has expressed to third parties, such as the school principal, that she does not want to have parenting with the claimant.
 - f) There was one incident after the Child refused to go with the claimant, that he parked outside the house both on that day, and the next day. It was not clear what was meant by this evidence precisely, and was more a suggestion that this could have been intimidating.
 - g) On January 13, 2022, when the claimant went to pick up the Child from school she sought to flee, nearly running into traffic. The respondent suggests that this refutes the position of the claimant that there is less reluctance when the pick up is not done at the claimant's home. I did not take this to be an allegation that the Child sought to run into traffic to harm herself.
 - h) On February 3, 2022, one of the mother's of a friend of the Child told the respondent that the Child had told her that she was making plans to "escape" school so that she could avoid parenting with the claimant. This evidence was hearsay and not from the mother directly.

- i) On February 7, 2022, the Child told the respondent that she found a place she could go where her father would never find her. After that, the claimant checked her phone and found a screen shot of a google page search of "how can a nine year old run away forever", which she then found in her computer's search history.
- [34] Finally, the claimant relies upon a late filed affidavit from N., the parties' oldest child as to the Child's current mental well being. The respondent objected to this affidavit's admissibility.
- [35] The test as to the admission of a late affidavit has been set out in *Quigg v. Quigg*, 2019 BCSC 628. After considering Supreme Court Family Rule 10-6(13), and the object of the rules generally, at para. 21 the Court applied the same test as that used in allowing witness testimony without the required notice having been given, namely:
- a) Is there prejudice to the other party due to the lack of notice?
 - b) Will precluding the admission prevent a determination of the case on the merits?
 - c) Do the interests of justice weigh in favour of allowing the admission?
- [36] The claimant argued that there was no prejudice to the claimant in that they could have sought to tender a response, although the time to do so was quite tight in order to make it into the binder by its filing date. More significantly, the claimant argued that the evidence was necessary for a full determination on the merits, and that the interests of justice weight in favour of allowing it.
- [37] After hearing argument on this point, I agreed to admit the affidavit in so far as it included new or fresh evidence that could not have been obtained prior to the original response materials being filed. There were some portions of the affidavit that addressed allegations of conduct that were dated, and in fact had allegedly occurred prior to the December hearing. I did not consider or admit those portions as I found them to be prejudicial and not in the interests of justice to be included.
- [38] However, the more recent evidence is of a nature that it is within the interests of justice that it be admitted to enable the court to consider the full merits of the application, the evidence being relevant, necessary and coming to the recent attention of the respondent.
- [39] This evidence can be summarized as follows:
- a) N. did not want to get involved in this matter, as she is on good terms with both parents, however feels compelled to do so now given her communications with the Child.

- b) Specifically, she saw the Child on February 17, 2022 and the Child indicated that she did not want to see the claimant, that she was afraid, and started to cry. N. expressed to the Child that the claimant just wanted to fix his relationship with her, and asked her some questions to try to determine the source of the Child's reluctance, including whether the Child felt "alone" when she was with the claimant. The Child's response was 'No, I feel like I want to die'.
- c) N. has spoken to the Child since, and the Child has asked apparently asked "should I commit suicide" and indicated that she had considered jumping out the window, drowning herself, getting into the oven, and other methods to end her life.
- d) The Child told N. that she feels the adults in her life are against her, noting the instances when teachers or the police got involved when she did not want to see the claimant.
- e) N. has been in attendance during some of the claimant's parenting time and acknowledged that the claimant always makes an effort to do fun things, that he shows interest in the Child's activities, although doesn't always have enough healthy snacks.
- f) N. said that she has now spoken with the Child a number of times, and that the Child indicates that she generally felt safe with the claimant until the October 2021 incident when the police were called. She also indicated that she felt interrogated by the claimant, and that she is "cornered" including by having to promise to come back before he drops her off. As a result, she is very anxious about spending time with him.

Findings on Wrongful Parenting

- [40] I am satisfied based on the evidence before the court that the respondent has, since the December 2021 Order, continued to wrongfully deny parenting. The communications between the parties suggest, as the claimant argues, that the respondent has made the decision to take a hands-off approach with the claimant's parenting, which amounts to a failure to fully exercise her parental authority, and a wrongful denial of parenting time.
- [41] The denial was not justified. The denial of parenting time started shortly after the December 2021 Order. The evidence shows that the mental health concerns did not come to the respondent's attention until late January or early February 2022. In other words, they could not have been a basis for the wrongful denial. To the extent they may justify it, the respondent ought to be seeking an order to vary, rather than simply ignore the court order.

Compensatory Parenting Time

- [42] Based upon these new concerns as to the Child's mental health, the respondent argues that any compensatory parenting ought to be coordinated with the assistance of a counsellor, and along with their recommendations, or once the s. 211 findings are known.

- [43] I find that the claimant is entitled to compensatory parenting time of three overnights of two days each, plus six FaceTime or telephone calls, for the parenting wrongfully denied up to and including January 27, 2022.
- [44] However, I agree that in these circumstances, despite my finding that parenting has been wrongfully denied, that the timing of compensatory parenting ought to coincide with the recommendations of a counsellor, which is further addressed below, or the s. 211 author, whichever is received first.

Police Enforcement Clause and Fine

- [45] With respect to the police enforcement clause, it is with some irony that many of the troubles with the Child that are now being relied upon to support such a clause appear to have occurred after the claimant sought to involve the police in enforcing the parenting order in October 2021.
- [46] I pause to note that the circumstances of that police involvement are in dispute, with the claimant saying that it had to do with an altercation with the respondent's new partner. Regardless, the police refused to enforce that order because of the absence of the police enforcement clause and, since then, the issues have arisen.
- [47] The claimant acknowledges that police involvement may and could have had an impact, although argues that the resistance is due to the actions of the respondent. He also says that he has no intention of using the clause. Rather, he sees it as an important signal to the respondent to not continue with what he believes are interference tactics as described above.
- [48] However, the police involvement and message that it sent may have had a serious impact upon the Child and her relationship with the claimant, as she appears to have become more entrenched in her position to control parenting after that time. The respondent's reaction to that incident could be, and likely also is, a contributing factor. It is the various sources for the Child's anxiety that a s. 211 report will ultimately opine upon, including with recommendations as to how to address them.
- [49] Similarly, the claimant seeks the fine as it sends the same message to correct behaviour and, the claimant argues, is appropriate given that the refusal has continued despite the finding of wrongful denial in the December 2021 Order and the above continued conduct which, the claimant argues, shows a continued failure of the respondent to actively encourage and facilitate the claimant's parenting time, preferring an inappropriate approach that allows the Child to control the parenting, adding unnecessary stress to her.
- [50] In *L.J.G. v. N.B.*, 2017 BCSC 350, at para. 87 the Court noted that the less intrusive sanctions under s. 61(2) are preferred over the highly intrusive and stressful police enforcement order under s. 231(4) in the first instance. If there are less intrusive measures available, they should be pursued.

- [51] I agree with the respondent that in these circumstances and given the uncertainty with the Child's current emotional well being, particularly given the evidence that it may be a result of the previous police involvement, and the parties' reaction to it, it would not be in the Child's best interests to have a police enforcement clause. I adjourn that relief.
- [52] However, the evidence supports a finding that the respondent continues to wrongfully deny parenting. The respondent has not satisfied the court that any of the conditions in s. 62 exist to support that denial. While there is now a mental health concern, the evidence as to when that came to light is well after the continued post December 2021 denials.
- [53] As such, I do agree that it is appropriate to order a fine. Having regard to the various cases brought to the court's attention, I find that \$2,500 is the appropriate amount for such a fine.

S. 211 Report

- [54] As the only issue in dispute regarding the s. 211 report is the appropriate author, it is not necessary to repeat the law that is applicable to making the order in the first instance.
- [55] The respondent took issue with the application being brought by the claimant as it was, she says, the respondent that first proposed the s. 211, and proposed three authors, Dr. Colby, Bob Finlay and Dr. Ellie Bolgar.
- [56] The respondent suggests that by bringing the application himself, the claimant is trying to control the process, including as to who the author ought to be by, notably, choosing an author that was not one of the three suggested by the respondent. In reply, the claimant noted that the proposal made by the respondent was the more limited views of the child report, not the full forensic report.
- [57] The claimant argues that Dr. Elterman is the appropriate author. The respondent argues that it ought to be Dr. Bolgar, who was proposed by the respondent from the outset.
- [58] Both authors were able to start the process relatively quickly, such that that factor is largely neutral.
- [59] The claimant relies upon Dr. Elterman's experience as set out in his curriculum vitae ("CV"). Specifically, Dr. Elterman has been conducting such assessments since 1982, has provided evidence in some 4,000 plus cases, and has been accepted as an expert in numerous cases before this court. Some of the court's comments on his role as an expert were specifically cited.
- [60] The respondent did not include in his original response materials a copy of Dr. Bolgar's CV. By way of a late filed affidavit, that CV was put before the court. The claimant initially objected to the admissibility of the late filed affidavit, however agreed to withdraw that objection in the interest of judicial efficiency given court time constraints.

- [61] Dr. Bolgar's CV does not indicate the breadth of experience that Dr. Elterman has as a witness. However, she appears to have the same educational qualifications. As to her experience, she has had a private practice since 2006, specializing in high-conflict family matters, trauma, stress, and parenting coordination, among other things. She has been a clinical consultant and supervisor with respect to child protection issues since 2007.
- [62] Counsel for the claimant advised the court that he did a CanLII search and only found four references to her involvement in reported decisions, with only one indicating that she conducted a s. 211 report, but on a more limited views of the child basis, not a forensic analysis as will be required in this matter.
- [63] Of course, that there are no reported decisions referencing Dr. Bolgar does not mean that she is not qualified to undertake a s. 211 report as being sought here or that there is any issue with her evidence being accepted by this court.
- [64] The claimant argued that given that such an author becomes the eyes and ears of the court, the court must be satisfied that appropriate level of experience for the author to take on that role. Dr. Bolger, in his submission, does not yet have that experience.
- [65] There was only one decision referred to by the parties involving a dispute as to the appropriate author of a s. 211 report, *K.J.C. v J.E.C.*, 2019 BCSC 1908. In that decision the Court considered whether or not Dr. Elterman or Dr. Koopman ought to be the author. Because Dr. Koopman's CV was not before the court, the Court ordered that Dr. Elterman was to be the author. As such, this case was not of any assistance.
- [66] I am satisfied that both Dr. Elterman and Dr. Bolger have the appropriate qualifications to prepare a s. 211 report and conduct the forensic analysis needed. Neither is obviously preferable over the other, however I will order that Dr. Bolger prepare the report for the simple reason that she was one of three parties proposed by the respondent and the claimant decided to proceed with none of the parties proposed, in favour of a fourth party. In other words, had the claimant proposed any one of those three there would likely not have been any dispute on this issue.

Other Issues

- [67] The respondent argues that the court ought to make an order for a parenting coordinator, and for counselling. Similarly, he suggests that the court ought to appoint a lawyer for the Child. There is, however, no application before the court for any of this relief. Nonetheless, I will consider these issues.
- [68] Addressing the parenting coordinator first, the respondent argues that the use of the s. 211 process is a transactional one, intended to provide a report for the court. It is not intended to provide ongoing assistance or coordination as would be done by parenting coordinator. The claimant disagrees, noting that s. 211 reports often include recommendations for that coordination, with the author, in some instances, providing that assistance.

- [69] The claimant does not say that a coordinator will not be useful, but that the use of a parenting coordinator ought to be based on the s. 211 results.
- [70] I don't see any urgency to the implementation of a parenting coordinator at this time, and as such am not prepared to make that order without an application. That is without prejudice to any later application the parties may wish to make.
- [71] As to the counselling, this was agreed to by the parties previously, and was subject to the December 2021 Order. There was some delay in having the counselling commence with the agreed upon counsellor, Danielle Berman. The evidence as to what happened with that counselling is not entirely clear. Ms. Berman met with the Child and the respondent, and had some communications with the claimant, then opted to no longer treat the Child. Counsel for the respondent argues that there was interference by the claimant.
- [72] The evidence before the court includes a letter from counsel for the respondent dated January 24, 2022, that states "Ms. Burman [sic] has advised that she is not equipped to deal with the Parties and [the Child] as it relates to their dispute". If there had been inappropriate interference by the claimant I would have expected that that would have been raised in this letter, particularly given the other issues raised by counsel in their dealings with each other.
- [73] There is also an email exchange dated January 28, 2022 between the respondent and Dr. Berman which the respondent argued supported a finding of inappropriate contact by the claimant. I was unable to make any such conclusion or finding based on the email. What the email showed is a clear disconnect in terms of the counselling, its scope in terms of whether it was to be family counselling or just of the Child, and Dr. Berman's involvement given the timing of counsel's letter noted above.
- [74] In any event, the respondent now suggests that the Child ought to immediately seek counselling with Alison Jones, relying upon s. 49, and s. 244 of FLA.
- [75] The claimant's position is that, given that the s. 211 can be done on a relatively quick basis, that this is also a matter that can wait until the results of the s. 211 are known and we know what the underlying issue is, noting that the counselling approach needed to address estrangement versus alienation can be quite different.
- [76] The issues raised above as to the Child's emotional well being, particularly the evidence of possible suicidal ideations and desire to run away, are very concerning and are ones that require urgent attention.
- [77] It is unfortunate that those issues came to light so close to the hearing date. I suspect that had there been an opportunity, counsel would have been able to work with the parties to come to an agreement on counselling to take place for the Child with her own counsellor as soon as possible.

- [78] The concern raised by counsel was not so much that counselling may not be needed now given these issues, but that the use of Alison Jones may be cost prohibitive, particularly with the parties taking on the cost of the s. 211 report.
- [79] Notwithstanding that there is no application before the court today, I am prepared to make an order to address the urgent needs of the Child for counselling.
- [80] In the correspondence with Ms. Berman there did appear to be some miscommunication as to her role and somewhat of an open door that if that could be clarified, that she may be able to treat her. Hopefully the parties can contact her and make those arrangements, particularly if the Child was open to counselling with Dr. Berman.
- [81] As such I order that the parties shall immediately arrange for counselling of the Child, with a counsellor who will treat the Child only. Other than for scheduling and billing purposes, the claimant and respondent are not to communicate with that counsellor, unless such communication is initiated by that counsellor. If the parties are unable to agree to a counsellor by March 15, 2022, counselling shall be undertaken by Alison Jones, or her affiliates. The cost for counselling shall be equally shared by the parties.
- [82] With respect to the legal counsel, the court has the authority to make an order for the retainer of counsel under either ss. 201 or 203 of the FLA. Under those provisions, the court may "at any time" appoint a lawyer for the child.
- [83] A legal counsel is generally appointed where the conduct of the parties is so severe that neither party is able to act in the children's best interests. As noted in *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286 at para. 64 there must be an advantage, apart from convenience, that would be afforded by such an appointment.
- [84] In *K.J.C. v. J.E.C.*, 2019 BCSC 1908, the Court concluded at para. 26 that even if there was severe conduct to warrant an appointment, it was not necessary where a s. 211 report was pending.
- [85] The evidence before the court today does not show conduct that supports such an order being made at this time, or that such representation will be available. As such, I will not make that order, however, that is without prejudice to any further application that the respondent may wish to make in that respect.

Orders Made

- [86] To summarize, the Orders I make are as follows:
- a) Pursuant to s. 211 of the FLA, Dr. Bolgar shall be retained to prepare a full s. 211 report that assesses:
 - i. The Child's needs;
 - ii. The Child's views; and

iii. The ability of both the claimant and the respondent to provide for the Child's needs;
(the "211 Report")

with the parties to share the costs of the report equally.

- b) The parties shall immediately arrange for counselling of the Child, with a counsellor who will exclusively treat the Child. Other than for scheduling and billing purposes, the claimant and respondent are not to communicate with that counsellor except in response to communication initiated by that counsellor. If the parties are unable to agree to a counsellor by March 21, 2022, counselling shall be undertaken by Alison Jones or her affiliates. The cost for counselling shall be equally shared by the parties.
- c) The claimant is entitled to compensatory parenting time of three overnights of two days each, for a total of 6 days, plus six face time or telephone calls in respect of the wrongfully denied parenting up to and including January 27, 2022. The compensatory parenting time shall be exercised at such times and in such manner, including as to whether it ought to be with overnights, as is recommended by the Child's counsellor, or as recommended in the 211 Report, whichever recommendation is received first.
- d) The application for a police enforcement clause is dismissed.
- e) The respondent shall pay a fine of \$2,500 to the claimant as a result of her wrongful denial of parenting.

[87] I am not making any orders at this time as to the use of parenting coordinator or appointment of legal counsel for the Child.

[88] As to costs, as there has been divided success, each party shall bear their own costs.

"Master Robertson"

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