
CANADA / JUDGMENT

S.M.M. v. J.P.H.

2012 BCSC 1825

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.M.M. v. J.P.H.,

2012 BCSC 1825

Date: 20121205

Docket: 08-3987

Registry: Victoria

Between:

S.M.M.

Plaintiff

And

J.P.H.

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

The Plaintiff S.M.M.:

Self-Represented

The Defendant J.P.H.:

Self-Represented

Place and Date of Trial/Hearing:

Victoria, B.C.

November 26, 2012

Place and Date of Judgment:

Victoria, B.C.

December 5, 2012

Introduction

- [1] The parties S.M.M. and J.P.H. are the mother and father of three children, a son T. born in 1999, a daughter C. born in 2001 and a son J. born in 2004. The parties met in 1997 in India and started living together by mid-1998 in Comox, British Columbia where J.P.H. was an emergency room physician. The parties married in August 2001 and separated in September 2008.
- [2] In November 2009, they entered into a Shared Care Co-Parenting Support Agreement which had the goal of providing a process to assist the parties to build and maintain a "parental alliance" and to develop parenting plans. The parties were able to reach a resolution of the financial issues, entering into a Separation Agreement dated May 31, 2010.
- [3] Unfortunately the issues surrounding custody, guardianship, parenting schedules and living arrangements of the children proved to be less amenable to resolution. Following a 15 day trial, Mr. Justice Macaulay issued reasons indexed at 2011 BCSC 1084 dealing with the issues relating to the children. In summary, he ordered:
1. Sole custody to, and primary residence with, the mother, S.M.M.;
 2. Joint guardianship on the Joyce model;
 3. Reasonable and generous access to the father, J.P.H., including specified access so long as both parents continue to reside in the Cowichan Valley, or at least in the same community, with J.P.H. continuing to do similar shift work as at the time of the trial;
 4. Permission for S.M.M. to move with the children to Courtenay; and
 5. In the event that S.M.M. moves with the children to Courtenay, J.P.H. to continue to have reasonable and generous access, including specified access as before, with additional conditions relating to notice of access periods and the location of pick-ups and drop-offs.
- [4] J.P.H. applies to vary the Order. While it is the father's application, both parties submit that certain aspects of the Order have proved to be unworkable and each seeks to vary the terms, although with no agreement concerning the changes to be made.

The Reasons

- [5] The matter came to trial with an unfortunate history of conflict. Macaulay J. framed the issues at trial as follows at paras. 2 to 5:

Primarily at issue in this proceeding are the custodial and living arrangements for the children. S.M.M. wants to move permanently to the Comox Valley. She seeks sole custody, joint guardianship on the Master Joyce model, and permission to move the children with her to Courtenay. J.P.H. seeks an order for joint custody and joint guardianship. He envisions shared parenting with both parents continuing to live and work in the Cowichan Valley. If S.M.M. carries through with her proposed move to Courtenay, J.P.H. says that the children should live with him in the Cowichan Valley.

It is clear that the parents are unable to agree on the overall best interests of the children. In fact, the parental history since their separation in 2008 has been replete with conflict respecting the children. The parents are both intelligent and highly educated, yet they have not succeeded in putting aside their personal differences and communicating in a responsible way that advances the best interests of their children. This conflict provides the lens through which each parent views events as well as statements by the other. So long as the parents continue distrusting each other, the children are the real casualties.

All three children, but particularly the two boys, have demonstrated emotional and behavioural problems that are the probable result of being caught in the middle of the parents' many conflicts. The parents' continuing inability to model respectful communication, if it continues unabated, does not augur well for the best interests of the children.

Fortunately, apart from the conflict and its disturbing impact, the children are otherwise secure in the knowledge that each of their parents loves and supports them. The children are intelligent, talented and resilient. As one psychologist observed, "they are neat kids." The children appear to understand the essential personalities of their parents and continue to have close bonds with both. The challenge underlying this litigation is to chart a course that best nurtures the beneficial aspects of the parent-child relationships and avoids, or at least minimizes, the risk associated with continuing parental conflict.

- [6] In addition to the testimony of the parties and numerous lay witnesses, Macaulay J. heard from a number of expert witnesses. Dr. Elterman prepared two Custody and Access Reports and testified at trial. Dr. Mills, a psychologist who counselled T. concerning difficulties he was experiencing following the separation and later counselled the parents regarding communication issues, also testified. In addition, Macaulay J. heard evidence from Ms. Forbes and Mr. Young who had worked extensively with the parents as parenting coaches. Macaulay J. found that at the time of trial the parents continued to be in significant conflict, a situation for which both bore responsibility, stating at paras. 132 and 133:

On balance, what I draw from the SCCPS and the parents' involvement with Dr. Mills is that the parents continued throughout to be in significant conflict respecting almost every aspect of the daily lives of the children. I conclude that relatively little substantive progress has occurred despite the efforts of the various professionals.

I do not accept that one parent is more responsible for the lack of progress than the other. Both appear to be poorly equipped, due to their essential personalities, to take a solution-oriented, less confrontational approach. While S.M.M. may have been the passive aggressor and J.P.H. the more overt aggressor, both have been unable to set aside their personal differences and resolve issues in the best interests of the children. This does not augur well for the future given the parents' mutual awareness of the significant emotional problems that at least two of the children have had to deal with as a result.

[7] Macaulay J. concluded that S.M.M. had been the children's primary caregiver. He noted that the children had expressed a preference for equal parenting. He concluded that if equal parenting were practicable, it would be in the best interests of the children, but that given the level of conflict between the parents, it was not practicable in the circumstances, stating at paras. 225 and 226:

As stated at the outset, both parents love their children and are very involved in all aspects of their lives. While it is important that this continue, and I have no doubt that it will, it does not follow from that, or the de facto shared parenting, or the expressed views of the children, even when considered cumulatively, that an order for joint custody is in their best interests. Unfortunately, this is one of those rare cases where otherwise good parents are harming the emotional well being and, ultimately, development of the children because of their inability to model and carry out effective, non-confrontational decision-making respecting the best interests of the children.

Sometimes, the best interests of a child can be met in spite of some level of parental communication difficulty and animosity by involving a neutral third party, usually a professional such as Dr. Mills. The parents have tried those approaches here with little success. I accept the submission of counsel for S.M.M. that the level of conflict here is so high that continuing professional intervention is unlikely to succeed. Instead, it is likely that the parties would continue to expend additional resources pursuing court applications. That is not in the best interests of the children here.

[8] In the result, Macaulay J. awarded sole custody to S.M.M. He did so in the expectation that S.M.M. was better equipped to listen and consider input and that her frustration and animosity would subside if she were awarded sole custody. Unfortunately, as will be seen later, this expectation has not been realized. At paras. 227 to 229 Macaulay J. stated:

I am persuaded that the only way to avoid continuing conflict is to give one parent the authority to make final decisions in the best interests of the children. I find that S.M.M. is better equipped to listen and consider input from J.P.H. than he is able to listen and consider input from her. I am not persuaded that J.P.H.'s greater inflexibility will change in future. I fear that it would be reinforced if I ordered joint, rather than sole, custody.

On the other hand, the level of frustration and animosity that S.M.M. has displayed to this point will subside if she is awarded sole custody. She would no longer be frustrated and angered by J.P.H. either disobeying a clear court order, as he has to this point, or wearing down her resistance by relentlessly campaigning for the result that he desires. Lessening the opportunities for conflict is vitally necessary in the best interests of the children.

I order sole custody of the children to S.M.M. The children will, accordingly, primarily reside with their mother.

[9] Macaulay J. concluded that it was in the best interests of the children that J.P.H. continue to be involved as much as possible in their lives. To this end the Order was crafted to facilitate such involvement. He stated at paras. 230, 231 and 234:

An order for sole custody does not diminish the parenting role of J.P.H. The maximum contact principle can be addressed by a generous access order tied to his non-working schedule as much as possible.

It is in the best interests of the children that J.P.H. continue to be as involved as possible in their lives. He has much to offer.

I further order reasonable and generous access to the father, including the following specified access:

1. During J.P.H.'s regular days off, from after school on his first day off work, and if there is no school on that day, from 2:30 p.m., until 8:00 p.m. the evening before the day J.P.H. is scheduled to return to work, subject to:
 - (a) There shall be no variation of the exchange times set out above unless both parties agree in writing;
 - (b) The specific access set out above shall be interrupted and not take place during the school vacation, spring break and school summer holidays during which times the children will spend equal time with each parent as agreed, with liberty to apply if no agreement is reached, subject to:
 - (i) The children shall be with S.M.M. each year from 5:00 p.m. on December 23 until 1:00 p.m. on Christmas Day and with J.P.H. from 1:00 p.m. on Christmas Day until 5:00 p.m. on December 27, unless both parents otherwise agree in writing.

[10] Macaulay J. noted that the Order concerning access was premised on both parents continuing to reside in the Cowichan Valley or at least in the same community. However, S.M.M. was seeking to move to Courtenay. Macaulay J. concluded that it was in the best interests of the children to permit S.M.M. to move. In such event, the Order with respect to access was to be modified to retain as much flexibility as possible so as to maximize the time that J.P.H. could spend with his children. The reasons specify at paras. 245 and 246 that time spent with their father is to take priority over the children's activities outside of school:

The specified access order needs to be modified to retain as much flexibility as possible in the event S.M.M. moves with the children to Courtenay. In the event that S.M.M. moves with the children, J.P.H. will continue to have reasonable and generous access and specified access as already set out above but subject to adding the following conditions:

2. Effective December 1, 2011, if S.M.M. moves to Courtenay with the children, J.P.H. shall provide to S.M.M. at least 30 days' written notice of the access periods that he proposes to exercise for each four month period of every year, such four month periods to commence January 1, 2012, and continue thereafter;
3. If S.M.M. moves to Courtenay with the children, all pick-up and drop-offs of the children are to be at a location approximately mid-distance between Duncan and Courtenay, unless both parties otherwise agree in writing.

In my view, this gives the father the flexibility to maximize time with the children including, if he chooses to do so, by acquiring a second residence in Courtenay so that he can spend some additional time with the children during their school week if he is not working. While I appreciate that J.P.H. does not wish to rent or otherwise acquire a property in the Comox Valley, it is likely an affordable option once the west coast property sells.

Assuming that S.M.M. moves to Courtenay with the children, requiring advance notice for exercising access permits the whole family to plan ahead, taking into account the priority that contact with J.P.H. requires over the children's other activities outside of school.

Aftermath

[11] S.M.M. did move to Courtenay. Following her move J.P.H. rented a house in Courtenay to use during his parenting time with the children. Unfortunately, the terms of the Order were never given full effect and relations between the parties deteriorated. Both parties share responsibility for this unfortunate state of affairs, but in my view, S.M.M. bears the lion's share of responsibility.

[12] After the reasons were pronounced, J.P.H. forwarded a schedule of proposed access including times for the exchanges pursuant to Clause 5 of the Order. The list included two days that were not part of the schedule contemplated in Clause 3(a) of the Order. S.M.M. responded that she would not agree to any access outside of the "Court ordered Schedule". This position, which effectively ignores the language of the Order which provides for

reasonable and generous access including the specified access, resulted in a seemingly endless exchange of increasingly acrimonious correspondence.

- [13] S.M.M. also took the position, through her counsel, that she was not prepared to make up or alternate any days J.P.H. missed from the "court-ordered schedule".
- [14] Through the course of these exchanges the parties were attempting to resolve schedules for spring break and the summer. These discussions were not productive.
- [15] On several occasions J.P.H. requested that he be able to take the children out of school for some short period of time to accommodate activities he wished to do with one or more of them. Each time he was refused with S.M.M. taking the position that she would not agree to any missed school. She then gave permission for J. to miss school to go on a four day trek with a school friend and his parents. Not surprisingly perhaps, J.P.H. found this inconsistency infuriating.
- [16] S.M.M. conducted herself in a very disturbing fashion at the time of the Labour Day weekend in 2011. According to the schedule that the parties had established, J.P.H. was to have the children over the weekend and into the first week of September. At S.M.M.'s request the schedule was modified, confirmed in writing, so that she would have the children on the Saturday and Sunday and then return them to their father who would have them until Wednesday. J.P.H. dropped the children off accordingly to the revised schedule. S.M.M. then refused to return them. She told J.P.H. that she had discussed the matter with her counsel and if he tried to pick the children up she would call the police.
- [17] In the course of her submissions on this application S.M.M. acknowledged that she had no intention of returning the children when she persuaded J.P.H. to amend the agreement and that she lied to J.P.H. Her explanation was that she felt that it was better for the children to be with her at their home for the start of school. It is regrettable that she did not turn her mind to the effect that such conduct would have on the possibility of respectful co-operative relations with J.P.H.
- [18] J.P.H. complains that S.M.M. would show up at activities during his time with the children, marginalizing his role and participation. She dictates or attempts to dictate what activities are to be undertaken during his time with them.
- [19] Finally, J.P.H.'s time with the children has been eroded by S.M.M.'s decision to push back the exchange times in order to accommodate the children's out of school activities, effectively treating time with their father as residue. This too in my view is contrary to, if not the letter, the intention of the Order. Clause 3(a) has pick-up times commencing immediately after school. Clause 5 states that access as specified in Clause 3 will continue, but pick up and drop offs are to be mid-distance between Duncan and Courtenay. Clearly this would push the drop off time back in order to accommodate travel to the drop off. However, there is no suggestion of delay beyond that. This is consistent with the statement in the reasons quoted above that J.P.H.'s time with the children is to be given priority over the children's out of

school activities.

- [20] As noted above, J.P.H. has not been blameless in the ongoing conflict. S.M.M. deposes that he has brought the children back late, sometimes making them late for school. He has failed to show up for scheduled visits, giving little or no notice. He has discussed plans and schedules directly with the children before they have been discussed with S.M.M. and finalized. When the parties have tried to negotiate times and schedules for various holidays, J.P.H. has made unreasonable demands, refused to compromise, often treating the matter as an "all or nothing" proposition. For example, S.M.M. did offer some time with the children to celebrate Father's Day. The time was not what J.P.H. wanted and so he refused to see them at all. J.P.H. and his new wife have also sent e-mails that are unpleasant and inflammatory.
- [21] Both parties complain that the other is making disparaging remarks about them to the children. Having reviewed the reasons of Macaulay J. and the portions of Dr. Elterman's reports quoted therein, I am satisfied that these complaints are well-founded.

Test for Variation

- [22] The Order was made pursuant to the provisions of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The provisions of the Act that deal with variation applicable with respect to this application are as follows:
17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
- o (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
- (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
- (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.
- [23] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, Madam Justice McLachlin, as she then was, for the court, described the requirements for a material change as follows at paras. 11-13:

The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued: *Baynes v. Baynes* (1987), 8 R.F.L. (3d) 139 (B.C.C.A.); *Docherty v. Beckett* (1989), 21 R.F.L. (3d) 92 (Ont. C.A.); *Wesson v. Wesson* (1973), 10 R.F.L. 193 (N.S.S.C.), at p. 194.

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

It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

Discussion

Custody

[24] J.P.H. seeks an Order for joint custody. Although I have concluded that many of the complaints that he has made about S.M.M. are well-founded, they do not amount to a change in the condition, needs or circumstances of the children and certainly not a change that could not have been or was not anticipated by the trial judge. The conflict and inability to communicate and cooperate shown by these parties was what led to the award of sole custody. There certainly is no sign of improvement in these critical areas since the trial, quite the contrary. Thus, the precondition for an Order for variation of custody has not been established.

Access

[25] Both parties have sought to have the court impose an access schedule, citing the need for certainty and stability and the inability of the parties to agree. Certain factors have made the defined schedule in the Order unworkable to a degree. S.M.M. has moved. The reasons contemplate that flexibility will be required to adapt to the move while preserving as much time as possible for the children to spend with their father. J.P.H. has remarried. His spouse is working and has one of her children living with her part of the time. The west coast

property has not sold and so there are financial constraints that it was hoped the sale would have alleviated. While J.P.H. initially rented a property in Courtenay, he has given it up and that option, at least for the foreseeable future, does not seem practicable.

- [26] The schedule J.P.H. proposes is premised on alternating weekend access with longer access on vacations. S.M.M. is in favour of the weekend access, arguing that the children do better when their school week is not interrupted, but does not favour any reduction in her time with the children during holidays.

Time of exchange

- [27] J.P.H. proposes that the default time of exchange be 6:00 p.m. S.M.M. agrees that 6:00 p.m. is a reasonable time for the children to be returned, but seeks 8:00 p.m. as the time when the children will be delivered to J.P.H. Her rationale is that two of the children have soccer practice. As noted above, it is my view that S.M.M. has permitted the children's activities to displace time J.P.H. spends with them. Accordingly, the default time for delivery of the children to J.P.H. is 6:00 p.m. It may well be that J.P.H. will wish to pick up the children at their activities. If so, it is open to the parties to agree in writing to another time.

Place of Exchange

- [28] J.P.H. proposes to change the place of exchange to the Nanaimo Pool. S.M.M. opposes this, arguing that the pool is further for her and she already travels an additional 24 kilometers past the halfway point. In addition, she submits that the present location is familiar to the children and conducive to an efficient exchange. She is concerned with the possibility of further conflict and disorganization if the exchanges occur at the pool.
- [29] It appears that the current default location for exchanges is working well. Therefore, the Inland Island Highway/Northfield Road parking lot will remain the default location subject to the parties agreeing in writing to another location.

Scheduled Telephone Conference

- [30] J.P.H. seeks an Order that the parties conduct a scheduled weekly telephone conference to permit the parents to collaborate on the following week's schedule. S.M.M. opposes telephone communication because the parties' level of communication is so poor. In addition, she notes that the Order requires changes to the schedule to be in writing and that weekly meetings do not allow for time-sensitive communication.
- [31] It is without doubt in the best interests of the children for these parties to learn to communicate with each other in a respectful and effective manner. However, I have no reason to believe that the imposition of a scheduled telephone conversation would be a positive tool to that end, and in fact, see a potential for mischief. I decline to make the Order.

Schedule until September 2013

[32] Notwithstanding the level of acrimony between the parties, their proposals are in fact not that far apart. The main difference is that J.P.H. proposes to take the lion's share of holiday time to compensate for an alternate weekend schedule during the school time. I think that in the spirit of maximizing contact with both parents, it is appropriate to fix somewhat greater holiday time for J.P.H., but not to the extent that he proposes because it is also important for the children to have sufficient holiday time to spend with their mother.

[33] The schedule for the period December 14, 2012 to August 31, 2013, subject to changes agreed to in writing, will be as follows:

Days with JPH

- December 14, 15, 16
- December 25 commencing at 2:00 p.m. to January 5
- January 18 to 20
- February 1, 2
- February 15 to 18
- March 1 to 3
- March 15, 16
- March 25 to 31
- April 1 to 6
- April 12, 13
- April 19 to 21
- May 3, 4
- May 17 to 20
- May 31 to June 2
- June 14 to 16
- June 22 to 25 (T)
- July 4 to 21
- August 9 to 25

Future Schedule

[34] Following the expiration of the access times determined in these reasons, Clause 5(a) of the Order continues to be in effect. Accordingly, commencing August 1, 2013, J.P.H. will provide S.M.M. with written notice of the access periods he intends to have the children during the next four month period. Thereafter he will provide S.M.M. with seven days notice in writing if he does not intend to exercise his access on a day or days he has designated.

Holiday Access

[35] In the absence of written consent of the parties, the following will be the default schedule for holidays:

- (a) the Christmas access specified in Clause 3 of the Order continues;
- (b) in addition, J.P.H. will have the children until January 3 at 8:00 p.m. except where January 3 is the first day of school in which case he will return the children on January 2 at 8:00 p.m.;
- (c) Spring Break - J.P.H. will have the children from the Friday which is the last day of school at 6:00 p.m. to the Sunday that is the day before school re-opens at 8:00 p.m.; and
- (d) Summer holidays - J.P.H. will have the children from the first Thursday following the last day of school, for 17 days with the exchange to take place on a Sunday. This will be followed by the children spending 19 days with S.M.M. with an exchange to take place on a Friday. They will then spend the next 17 days with J.P.H. with the exchange to take place on a Monday. Following this, the children will spend the rest of the summer vacation with S.M.M. up to and including Labour Day.

Optional Additional Access

[36] J.P.H. proposes that he be granted additional optional access upon 30 days notice for up to one week every three months for each child either separately or together. As noted in the reasons, the purpose of requiring the advance notice stipulated in Clause 5(a) is to permit the whole family to plan ahead. The proposed relief runs counter to this principle. I decline to grant this relief.

Travel

[37] J.P.H. seeks an Order that the noncustodial parent be at liberty to travel with the children both inside and outside Canada when the children are in his care. He also seeks an Order providing that the noncustodial parent shall have the right to take the children out of school for a total of six days throughout a school year. S.M.M. is opposed to the children missing school. In addition, she submits that each holiday must be considered on a case by case basis depending upon when J.P.H. wants to take the children, whether the children would miss activities and how long they would be gone. In her submission, as custodial parent she has the final decision over where and when the children take vacations.

- [38] S.M.M. as custodial parent has made a rule that the children will not miss school. She states, and J.P.H. does not contradict this, that J.P.H. was consulted and agreed to let J. miss school for the trip with his friend's family, but emphasizes that this was a special circumstance. In my view, this decision was hers to make as custodial parent. J.P.H. has not satisfied me that there is a good reason to depart from this rule. Accordingly, I will not grant the Order he sought concerning taking the children out of school. Of course if both parents agree, they are free to make exceptions.
- [39] However, if the vacation falls within J.P.H.'s time with the children and if the children are not going to be taken out of school, it should be J.P.H.'s decision to take the children on vacation. I agree with J.P.H.'s submission that S.M.M. has used her role as custodial parent to marginalize J.P.H.'s involvement in the children's lives. Her attempts to exercise control over the manner in which he spends his access times with the children is an aspect of this problem. In my view, the children's activities should not determine the choices he is able to make in this regard, nor should S.M.M. have an effective veto. Therefore, J.P.H. shall be at liberty to travel with the children both inside and outside Canada when the children are in his care, provided that the children are not taken out of school for such travel. Again, the parties are at liberty to agree in writing to changes in this provision.

Children's Activities

- [40] J.P.H. seeks an Order that each parent will determine what activities the children undertake during the time that the children are in their care. S.M.M. seeks an Order that she determine, in her sole discretion, what children's activities are important, that the parent who has the children in his or her care shall be required to ensure that the children attend those activities while in their care and that if that parent is not available to take the children to the activities, the children will stay with the custodial parent during that time to ensure the activity is not missed.
- [41] Children's activities are important. Reasonable parents acting in their children's best interest will collaborate in the selection of activities and cooperate in their scheduling. Reasonable parents will strike a balance between children's activities and time with each parent. In this case, however, the parties have not followed this sensible course. The children's activities have been given a disproportionate priority over J.P.H.'s time with the children, restricting his time with them. S.M.M. has used the activities to exercise control over how J.P.H. spends time with his children.
- [42] No Order can compel these parents to be reasonable and cooperative with each other. However, I am satisfied that the Order sought by J.P.H. is necessary, not to vary the Order, but to implement it. Accordingly, there will be an Order that each parent is at liberty to determine the activities the children will participate in during the time that the children are in his or her care.

Communication with Children

- [43] J.P.H. seeks an Order that the children be permitted and provided with the means to have private conversations with the other parent at a regular time and/or at the children's request. He complains that S.M.M. has listened in and on occasion cut off the conversations he has had with the children. S.M.M. states that the children talk on speaker phone because both parents do not want them holding the telephones close to their heads. She states that the children are able to call the other parent as they choose. She seeks an Order limiting the time of calls and other forms of communication, such as texting, noting that J.P.H. has called after the children's bedtime or in the morning on school days.
- [44] I agree that the children should be permitted, and provided with the means, to have conversations in private with the other parent and make an Order to that effect. In addition, however, calls and communications from the parent must not disrupt the children's routines. Accordingly, there will be an Order that neither parent who does not currently have the children in their care will initiate communications with the children after 8:00 p.m. or in the mornings on a school day.

Disparaging Remarks

- [45] S.M.M. seeks an Order that neither parent speak negatively about the other parent in front of the children. It was evident from the reasons that both parties have spoken negatively about the other parent in front of the children. I am satisfied that they continue to do so. It should go without saying that such conduct is damaging to the children.
- [46] However, these parties are intelligent people who have been separated for several years. They are well past the early period of separation during which strong feelings often overwhelm the judgment of even reasonable people. They have had the benefit of considerable counselling concerning their communication. All apparently to no avail. I have no reason to believe that making an Order would provide a workable tool to assist these parents in exercising self-control and, therefore, I decline to make the Order.

Police Enforcement

- [47] J.P.H. seeks a police enforcement clause. I decline to grant this relief. I understand the frustration that led him to seek this relief, particularly in light of S.M.M.'s conduct on the Labour Day weekend in 2011, described above. S.M.M.'s conduct has caused him to conclude that she can ignore court orders with impunity. In addition, since the trial S.M.M. has involved the R.C.M.P. in their disputes over access. However, in my view, having the police involved in enforcing access will only further damage these children who are already the victims of their parents' conflict.

Residence of the Children

- [48] J.P.H. seeks an Order that the children be able to choose to reside primarily with either parent. He submits that the children are old enough to have their wishes considered. S.M.M. is opposed.
- [49] I do not grant this relief. The children's wishes were one factor that was considered at trial. There is no evidence of a material change that would justify a variation of the primary residence Order. S.M.M. was and remains the primary caregiver for the children. In any event, the children are not of an age where their preferences become essentially determinative.

Private School

- [50] J.P.H. wants T. to register in private school. He submits that during the marriage both parties planned for this, and in fact, proximity to private schools was one of the factors that led the parties to settle in Duncan. S.M.M. is opposed, at least at this time, for reasons she has outlined in her affidavit. Each party asserts that T. supports their position.
- [51] I am not granting the relief sought by J.P.H. First, in my view this is not the sort of decision that it is appropriate to delegate to the child. In these circumstances involving T. further in the decision will only place him in the centre of the parent's conflict. That is clearly not in his best interests.
- [52] S.M.M. has the final say in such decisions pursuant to the Order, subject to the right of J.P.H. to seek review. No material change has been shown that would warrant variation of the terms of the joint guardianship Order. I have considered the submissions and evidence of both parties with respect to this issue and am not satisfied that J.P.H. has made a case to override S.M.M.'s decision.

Venue

- [53] J.P.H. seeks an Order moving this file to the Duncan registry. S.M.M. opposes. I am not granting this relief. At present it is roughly equally inconvenient to each party to have matters heard in Victoria. In my view, it is appropriate to maintain this rough equality.

Costs

- [54] Both parties have sought costs. S.M.M. submits that the application was unnecessary and notes that more than one appearance was necessary because J.P.H. did not have his materials prepared in time.
- [55] Since both parties sought orders on the basis that they were unable to resolve these matters without the assistance of the court, I think that it cannot be said that the application was unnecessary. As noted above, in my view, S.M.M. bears the lion's share of responsibility for this round of difficulties arising from the wrong headed view she took of the terms of the

Order. However, it is important for parties to have their materials prepared and delivered in accordance with the deadlines specified by the rules in order to permit an orderly and efficient hearing process and to avoid expensive and inconvenient adjournments. In addition, success has been divided.

[56] In the circumstances, I award costs to neither party.

"Ross J."

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