
CANADA / JUDGMENT

S.R.J. v. S.P.I.

2010 BCSC 1838

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1838 S.R.J. v. S.P.I.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.R.J. v. S.P.I.,

2010 BCSC 1838

Date: 20101126

Docket: E024061

Registry: Vancouver

Between:

S.R.J.

Plaintiff

And:

S.P.I.

Defendant

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Judgment

Appearing on his own behalf:

S.R.J.

Counsel for the Defendant:

L. Spencer

Place and Date of Hearing:

Vancouver, B.C.

November 22, 2010

Place and Date of Judgment:

Vancouver, B.C.

November 26, 2010

- [1] THE COURT: There are two applications before the court in this matter. S.R.J. seeks a change in the access and residency arrangements in relation to the parties' son. S.P.I. has applied for an order that S.R.J. contribute to the orthodontic expenses that will soon be incurred.
- [2] I will deal with S.R.J.' application first.

Background

- [3] The parties were married in 2000. They separated in October 2002 and divorced in November 2004. They have one child, a son, Robert, known to all concerned as "R". He was born March 8, 2001, is now 9 years old and, I believe, in Grade 4.
- [4] There have been at least five previous orders dealing with access and several other orders dealing with other matters. In June 2003, Madam Justice Boyd created the regime which has remained the basis of R's living arrangements since. The subsequent orders have simply modified that arrangement. The result is that in order to appreciate the current arrangements, one needs to examine several court orders. Whatever else happens as a result of the proceedings today, the access and living arrangements of R will be consolidated into and expressed in a single, comprehensive order.
- [5] R is and always has been in the joint custody of the parties. They are also his joint guardians. Since the parties' separation, he has lived primarily with his mother, the defendant. In Boyd J.'s June 16, 2003, order, she established a four-week access rotation.
- [6] In Week 1, R was to be with his father on Tuesdays and Thursdays from 4:45 until 7:00 p.m.; in Week 2, he was to be with his father on Wednesdays from 4:45 until 7:00 p.m. and for the weekend from Friday at 4:45 until Sunday at 4:00; in Week 3, the Wednesday evening access was to take place, and S.R.J. was to have his son in his care on Sunday from 8:30 until 4:00 p.m.; in Week 4, the access that occurred in Week 2 is repeated, namely Wednesday evening and Friday to Sunday weekend. In effect, this came to every other weekend, plus two evenings during the week following the first weekend access, and one evening and a Sunday in the week following the second weekend access.

- [7] On February 15, 2007, after a judicial case conference, the Sunday drop-off time was extended from 4:00 until 6:00 p.m. Madam Justice Loo also ordered that the parties make use of a specific family services organization to help them improve their communication. Whether the parties made use of that organization or not, their communication remained significantly unproductive. Access continued to be a problem, and in June 2007, Mr. Justice Davies made an order dealing with summer access and, by consent ordered, the preparation of a s. 15 report. S.R.J. was ordered to pay for that report, although both parties were to choose its author. The parties retained Dr. Koch, whose report is dated June 19, 2008.
- [8] In August 2008, with the benefit of that report and further submissions by the parties, Mr. Justice Masuhara increased S.R.J.'s access by adding overnight access every other week on Thursday nights. This has come to be referred to by the parties as the "Thursday night access". It has been the source of significant discord and disagreement.
- [9] In addition to the foregoing, Mr. Justice Masuhara ordered that S.P.I. was to accommodate S.R.J. by allowing him to have access with R in order to take R to baseball, hockey or similar activities, whether practices or games, and whether or not those activities fall on a time that would otherwise be S.R.J.'s access time.
- [10] Following Mr. Justice Masuhara's order in August 2008, S.R.J. began having access every other Thursday evening. That arrangement lasted until January 2009, when S.P.I. concluded that it was in R's best interest to terminate it. She told S.R.J. of her decision and the access reverted to what it had been prior to Mr. Justice Masuhara's order. S.P.I. made no effort to change the court order. S.R.J. could not afford counsel and, in effect, acquiesced in the unilateral change until March 2010 when, acting on his own behalf, he brought this application.
- [11] This application was first before the court in April 2010. It was adjourned then when it was apparent that S.R.J.'s affidavit material was incomplete. It was next set for hearing September 13th, but was adjourned due to insufficient court time. It was finally argued Monday of this week.
- [12] S.R.J. has not re-partnered since separating from S.P.I. He lives alone in a two-bedroom ground-level suite in North Vancouver. His house is about a five or 10-minute drive from S.P.I.'s home, also in North Vancouver. R's school is about a five-minute drive from S.P.I.'s home and a 10 or 15-minute drive from S.R.J.'s house.
- [13] S.P.I. has remarried. She did so in August 2009. Her husband, Mr. O., is divorced. He has two children: a daughter, 13, and a son, 10. He has access to his children every other weekend. S.P.I. is 45. She is a physical education teacher at a secondary school in North Vancouver.
- [14] S.R.J. is 48. He is employed as a millwright for a company that he has been with for some 18 years. He works Mondays to Fridays, leaving home at about 7:00 in the morning and arriving home at about 4:30 in the afternoon.

The Position of the Parties

- [15] S.R.J. argues that the parties should have R in their care on alternating weeks. He argues that the current situation is not in R's best interests because it gives rise to numerous points of possible disagreement and, for reasons I will elaborate on later, the parties rarely miss a chance to disagree. They often disagree in R's presence. A week-on/week-off arrangement is easier to follow, more predictable, and more regular, and thus, according to S.R.J., will benefit R, both directly, due to its predictability and stability, and indirectly, through avoiding the parental conflict to which he has been exposed to this point.
- [16] S.P.I. argues that there should be a change in the regime, but the change should result in less, not more, access between R and his father. She suggests a more standard arrangement of every other weekend plus one overnight during the week preceding or following the non-access weekend. Although she suggests this change, she also argues that there has not been a material change in circumstances, or at least not one of sufficient magnitude to warrant the kind of change that S.R.J. is seeking.
- [17] In addition, she argues that S.R.J. has agreed to a compromise of his access entitlement through his conduct in the past couple of months, and that the court should hold him to that agreement.

Discussion

- [18] The access orders the parties seek to vary are final orders. It is incumbent on the party seeking to vary such an order to show a material change in circumstances. If such a change is shown, then the court is to embark on a "fresh inquiry" into what is in the child's best interest, but the inquiry is to be based on the findings of the judge who made the previous order and the evidence of any new circumstances. In this case, Mr. Justice Masuhara made the order that has most recently dealt with the issue of access. All of these legal propositions are set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at paragraph 49.
- [19] I am satisfied there has been a material change in circumstances. In fact, there have been several changes:
- (i) R is now older and more mature. Ordinarily, and even in this case, that may not be sufficient to engage the court's jurisdiction, but R's maturity and, more accurately, his sense of self-confidence is important in the circumstances of this dispute, for reasons I will address in a moment.
 - (ii) R plays hockey and this year has had to practise at 6:30 in the morning on Tuesdays. S.P.I. does not want to take him to practice, but is content to have S.R.J. do so, and as a result, for the past two months, R has been with his father overnight from after school on Monday until Tuesday morning when S.R.J. takes him to hockey practice and then to school.

(iii) S.P.I. changed the arrangements that Mr. Justice Masuhara ordered in January 2009, on the basis that she concluded it was no longer in R's best interest. She found that R had reacted in a manner that was of concern to her.

[20] While taken individually these matters might not rise to the level necessary to constitute a material change, collectively I am satisfied they do.

[21] Further, although S.P.I. notionally advances the position there has been no material change, she is seeking a variation in the position she takes in response to S.R.J.'s application, and thus, at least implicitly, acknowledges that such a change has occurred.

[22] Before turning to the broad issue, I will deal with the argument that S.R.J. has, by his conduct, accepted a compromise of this dispute and should be held to it. I deal with this issue in more detail than it would otherwise warrant, because the underlying facts reveal, in a concrete way, the parties' inability to communicate constructively.

[23] R has played hockey for the past three seasons. This year is his fourth season. The issue of his participation arose, to the extent I have been able to determine from the affidavit evidence and from the perspective of S.P.I., in January 2009. In an email sent January 23, 2009, she wrote to S.R.J.:

[R] is a sensitive child and is feeling pressure from you to attend hockey and wants me to talk to you. You deny any problems and force him to play.

Later in the same email she wrote:

Finally, do not sign [R] up for hockey next year. That is another source of his stress.

This email was the email in which S.P.I. unilaterally terminated the Thursday access. I will come back to it later in these proceedings.

[24] I note that the email was sent in January 2009. R played hockey, as I understand the evidence, the following season. The subject of hockey was addressed in some detail in a subsequent communication between these parties in June of 2009, and specifically a letter on the 22nd of that month. There is no suggestion in that letter from S.P.I. to S.R.J. that R did not want to participate in hockey.

[25] As I understand S.P.I.'s position, it is that S.R.J. registered R in hockey against her express wishes and then did not tell her about it. As I understand the position, the assertion that it was against her express wishes is based on the January 2009 letter. In any event, the first she learned of R's participation was when she received an email from his coach.

[26] I accept that S.R.J. did not consult with S.P.I. about registering R in hockey. I do not accept that there is any recent or current assertion by her that he ought not to have done that, although simple civility and common sense would suggest that it be discussed before it take place.

[27] In any event, the upshot of all this is that S.P.I. took the position that S.R.J. registering R in hockey would have two consequences: first, S.R.J. would pay all the expenses associated with R's hockey participation, and second, S.R.J. would be responsible for taking R to early morning hockey practices. S.R.J. was happy to do both of these things.

[28] As to the practices and S.P.I.'s concern about them, she wrote:

[T] and I will take [R] to his game on Saturday. The practices, being the hour they are, will disrupt this house too much and, as suggested, you should have [R] overnight and take him to those practices and then to school.

[29] So the upshot of this is that S.R.J. pays for R's hockey participation, has assumed exclusive responsibility for the early morning Tuesday practices, and into the mix, at least according to S.P.I.'s proposal, he is to give up his Sunday access on Week 3 in the schedule I have earlier alluded to.

[30] On October 21, 2010, S.P.I.'s counsel wrote to S.R.J., on a with-prejudice basis, advising that:

To be clear, [S.P.I.] is not in agreement that you will have overnight access Monday. She has agreed to this, so far as she assumed that you were accepting it as part of her offer. If you continue to exercise this Monday night overnight access, she will take that as your acceptance of her offer to settle this matter.

[31] Leaving aside the legal analysis, the effect of this was as follows, at least from S.R.J.'s perspective: He had registered R in hockey. R had already begun hockey, something he had participated in for three years before. S.R.J. had paid the costs of that. He had agreed to get up early in the mid-week to take him to the practice. This arrangement was already underway. After it was underway, S.R.J., if he was to avoid being perceived by R as the person responsible for the termination of his hockey participation was, in effect, to agree to a reduction in his access. Not surprisingly, S.R.J. did not agree. However, his response was typical of the manner in which he has responded to other aspects. That is to say, for the most part, there was no constructive engagement on the issue.

[32] It would have been better had he discussed this issue with S.P.I. It would have been better if S.P.I. had not reacted so angrily and, in my view, unreasonably. All of this is unfortunate. None of it was unpredictable. All of it is consistent with the sad history of these parties. I will return to this history in a few moments when I deal with the argument about S.R.J. being held to the agreement he is said to have accepted by his conduct.

[33] Counsel rely on two decisions, albeit only one of which deals with the notion of acceptance of an offer by conduct. That principle was applied in a family law situation in the case of C. v. C., 2006 BCSC 1543. The context, however, was with respect to the resolution of issues involving matrimonial property. The principle is that an offer must be accepted if it is to result in a binding agreement. Acceptance need not be expressed, that is to say either in writing or orally. Rather, it may be inferred from conduct. Whether that inference should be drawn is another matter. In this case, I would not draw it. S.R.J. made it clear he was not

agreeing to the "package deal", and that remained his position, although he did not necessarily communicate it particularly clearly or responsively.

- [34] Further, and more significantly, this court is obliged to act in the best interests of the children. That point is made in a host of cases including, interestingly, *Reeves v. Reeves*, 2010 NSCA 6, the other authority to which counsel has referred me. It may be that a child's best interests will be served by continuing a regime to which the parties have acquiesced. However, this is not one of those cases. All that has happened is that R has been able to play hockey, as he has done in the past. S.P.I. has not been prejudiced as a result of this arrangement. In fact, she gets to go to the games without the burden of the practices, and R certainly has not suffered.
- [35] I am satisfied that I am not only free but obliged to resolve this issue without regard to the asserted agreement.
- [36] I turn then to the issue of R's residence and the time he will have with each of his parents. As earlier noted, S.R.J. wants equal time on a week-off/week-on basis. That is an increase in the time that he presently spends with R. S.P.I. wants less time; that is, less than the existing orders provide.
- [37] I begin by noting the positive aspects of this case. It is obvious that R has the benefit of two parents who love him and want what is best for him. Although they each have their shortcomings, as we all do, neither is motivated by a desire to hurt the other using R as a proxy to that end. S.R.J. and S.P.I. have very different personalities. Their personalities are reflected in their parenting styles and in their inability to communicate constructively. The disagreements that result are often magnified by reason of the deep affection they both have for R and the certain knowledge they each hold that they know what is best for him.
- [38] The present dispute has its origins in the so-called Thursday access, which began in September of 2008 and was unilaterally terminated in January 2009. Like the issue relating to the putative settlement, the circumstances of this dispute reveal the underlying personality conflicts, and I will deal with them in a moment. Before doing that, I want to say something about R as a person.
- [39] As noted, he is 9 years old and in Grade 4 at a public elementary school in North Vancouver. Until this year, he had been attending a private Christian school. In a perceptive and very helpful s. 15 report, Dr. Koch described R, who was then seven, as a "vulnerable and immature" child, feeling significant stress, significant to the point of distress. He referred to him as "sensitive" and noted he was at "some academic and behavioural risk" at school.
- [40] I take from his report that R's risk of academic and behavioural difficulties in school was not because R was unable to do the necessary work or unable to control his behaviour, but rather because of the discord that existed between his parents and the effect that discord has had and continues to have on him.

- [41] Parental discord is difficult for any child. I suspect it is particularly so for R, given his personality. Notwithstanding that and notwithstanding their professed love for their son, these parties have been unable to avoid exposing him to continued discord.
- [42] The Thursday access was, according to S.P.I., simply too disruptive for R. S.R.J. thinks that, to the extent R had problems in the fall of 2008, it was not due to the Thursday access, which he points out occurred only every second week, but was due to the discord, not in S.P.I.'s relationship with S.R.J., but in her relationship with her then common-law spouse and now husband. S.P.I. and her spouse acknowledged there was a serious incident in October, although neither say when in October that incident was, but S.P.I.'s position is that R's problems began before that incident, and in any event he did not actually see it.
- [43] The incident in October 2008, by S.P.I.'s own account, involved a "loud verbal argument", and included her physically assaulting Mr. O.; she slapped him. She acknowledges that R heard the argument. S.P.I. and Mr. O. separated for two days in the aftermath of that event. I accept, as S.P.I. has deposed, that this was the only physical violence in the fall of 2008 between her and Mr. O., but I do not accept that there were not other significant difficulties prior to the separation or, for that matter, after. It simply does not make common sense to conclude that things were fine and then, on a sudden, there was an argument so intense that S.P.I. lost control of her emotions and assaulted her common-law spouse, causing him to leave the home for two days, and then he returned and then everything was fine.
- [44] I make this point because I think that most children are conscious of the kind of tension that R is particularly susceptible to experiencing. I make this point also because the notion that an overnight access visit every second week would cause significant upset does not, on its face, seem particularly likely. For all I know, there had only been two Thursday overnight access visits before the incident.
- [45] In addition, there is nothing in all the material that even hints that R does not enjoy the time he spends with his father. There is no suggestion he is reluctant to go on overnight weekends, day-long weekend visits, evening visits, or summer or Christmas visits. I am satisfied that the Thursday evening visits were not a problem in the fall of 2008, at least not from R's perspective.
- [46] Finally, and I think importantly, the explanation for R's problems in the fall of 2008 were foreshadowed by Dr. Koch. He wrote, at page 4 of his s. 15 report:

The conflict between these two parents is the single greatest stressor [R] continues to face. If these two parents could reduce their conflicted behaviour, the major beneficiary would be [R].

- [47] Following that report, R was exposed not just to ongoing conflict between his natural parents, but to significant and likely frightening conflict between his mother and his stepfather. I think that S.P.I. was mistaken in her diagnosis of R's problems in the fall of 2008. I do not think, however, that she advanced this as an excuse to terminate access. I accept that she honestly believed she was acting in R's best interest. I reach that conclusion,

that is to say the conclusion that she was acting in what she honestly believed was R's best interest, in part because S.P.I. offered other access times, aside from midweek access visits, shortly after she terminated the Thursday night visits.

- [48] Further, S.P.I. was wrong to simply ignore the court order. In addition, she has been inconsistent to a remarkable degree in that regard. In her January 23, 2009, letter to which I earlier referred, she wrote:

I do not care what the court order says. Thursday overnight is not working. Please take me to court if this does not sit well with you.

- [49] In March 2010, S.R.J. accepted that invitation and brought S.P.I. to court. In November 2010, S.P.I. deposed at paragraph 30 of her November 5, 2010, affidavit:

I have tried on several occasions to resolve this situation out of court, but I believe the plaintiff will refuse. He wishes to force me to come back to court at great expense just to hear his case.

In short, on the one hand she invites him to take her to court, and then criticizes him for doing just that.

- [50] In all of this, I am not to be taken as concluding that S.R.J. has no responsibility for the communication problems that exist. While S.P.I. is critical and likely rigid to a fault, S.R.J. is lackadaisical and casual, perhaps to a fault. These problems or personality styles feed off of one another. The more S.P.I. yells, the more S.R.J. shuts down. The more he shuts down, the more she yells. I use "yells" deliberately, and only partially figuratively. S.P.I., I have no doubt, raises her voice when dealing with S.R.J. directly. She also does that figuratively in her emails, as her frustration grows she resorts to all capital letters, something that S.R.J. aptly referred to as, in effect, yelling through her emails. S.R.J.'s response is simply to not respond.
- [51] I am not so naïve as to think that either of these parties will change, simply because I point out these issues. Indeed, I am not at all confident they will agree. What I am confident of is this: The parties do love their son. Their son is paying the price of their failure to address their own conduct and their obsession with focusing on each other's conduct. Further, I know that both parties have very laudable characteristics and both have much to offer to their son. I also think that both have the ability to change or at least moderate their behaviour, and I propose to give them one further opportunity to demonstrate that.
- [52] What I will do is this: The defendant's application to have Thursday access or its equivalent, which of late has become Monday overnights, discontinued, is dismissed. That is to say, paragraph 5 of her notice of motion. Her application to have paragraph 2 of Judge Masuhara's order, that is the paragraph dealing with cooperating to allow S.R.J. an opportunity to take his son to various sporting activities, is similarly dismissed. As to S.R.J.'s application, I am going to adjourn it generally, pending a further review of access and residency.

- [53] In the interim, R will continue to reside primarily with his mother. S.R.J. will have access on the following basis:
- (i) R will be in his father's care beginning on Fridays after school and extending until Sunday at 4:00 p.m., and I will come back to the start and finish times of these visits at the conclusion of these remarks. That access will start today, Friday, November 26, and continue every other weekend thereafter.
 - (ii) On Sunday, December 5, R will be with his father from 8:30 in the morning until 4:00 p.m., and that will repeat every fourth week.
 - (iii) R will be with his father one night during the week every week. That night will be the night before early morning hockey practice, for so long as there are such practices. When there are no early morning hockey practices, that night will be Tuesday night.
- [54] MR. SPENCER: I'm sorry, My Lord, Tuesday nights?
- [55] THE COURT: Monday night, sorry, hockey practice Tuesday morning, Monday night. The Tuesday and Thursday Week 1 evening access, that is the 4:30 until 7:00 p.m. access, more or less, is terminated. The Wednesday, Week 2 and 3, evening access is also cancelled.
- [56] The result of all of this is that there will be an additional overnight access. In fact, it is an additional overnight access every week, and three fewer evening accesses.
- [57] I make these changes for two reasons. First, notwithstanding the complexity of it, it is somewhat simpler than the arrangement now, and second, the need for shorter but more frequent visits, which probably was the genesis for the arrangement several years ago, is not as acute now that R is older.
- [58] Next, as to identifying the mid-week access, S.R.J. is to obtain the hockey practice schedule for R for the next month before the end of the previous month. In other words, before December 1st, he is to phone R's coach, get the hockey practice schedule, and then send that information to S.P.I. Both of these parties have access to email, that is the preferred method of communication.
- [59] The midweek access, overnight access to accommodate the hockey practice, will be the night before the practices that S.R.J. communicates to S.P.I. are to take place. If he does not tell her what those practice dates are before the end of the month, there will not be any overnight access. It is his responsibility and he needs to ensure that it is done. That is to say there will not be any midweek overnight access.
- [60] If there are weeks during the month in which there are no early practices, the overnight access will take place in any event. It should take place on the same night that the practices typically take place, because that will be easiest for R.
- [61] Next, if there is more than one early morning practice during the week, there will only be one overnight access. S.P.I. is to take R to that additional practice.

- [62] After hockey season is finished, the midweek access will continue. The date is to be agreed on by the parties prior to the end of February 2011, and if they do not agree, the night will be Tuesday.
- [63] Finally, these arrangements will be reviewed on June 15, 2011. I am seizing myself of that review. It will be set at 9 o'clock in the morning with the parties to attend by telephone. I make those arrangements for two reasons: (i) to try to keep the costs down; and (ii) to facilitate the hearing.
- [64] If the arrangements that I have set out are working, and working without significant difficulties, it is likely there will be no change after that review, except for perhaps minor tweaking. If the arrangements are not working, that is to say if the parties continue to behave as they have to this point, they can expect a substantial change in R's residence arrangements. If it appears that, in spite of what I have said, S.P.I. is not prepared to deal civilly with S.R.J., it may be that the result will be a week-on/week-off arrangement such as S.R.J. suggests is necessary now. On the other hand, if it appears that S.R.J. is not prepared to deal responsibly, that is to say respond to requests, deal with school matters responsibly and properly, and address other issues in a productive way, then the regime may change in the other direction; that is to say revert to a simpler alternative weekend access arrangement.
- [65] What the parties can be assured of is this: If they are unable to deal with these issues as mature adults and truly put R's interest to the forefront, there will be a change. It may be a radical change. What they cannot know is what form that change will take.
- [66] I close on this issue with two observations: First, parents everywhere deal with issues like this every day in a responsible and civil way. There is no reason why these parties cannot deal with this circumstance in a similar way. Second, as I have indicated, you both have much to offer your son. I do not want to deny him that benefit, but I will if I conclude that the cost of that benefit is outweighed by the stress that he feels as a result of your inability to deal maturely and civilly with one another.
- [67] Finally, you should read the following paragraph at page 4 of Dr. Koch's report regularly and generally before you take any steps which might be cause for concern:

The conflict between these two parents is the single greatest stressor [R] continues to face. If these two parents could reduce their conflicted behaviour, the major beneficiary would be [R]. The children of harmonious divorced parents do not differ in their mental health and wellbeing from those children of harmoniously married parents, whereas children reared in intact families with substantial conflict or dislike between the parents fare much worse with respect to their mental health and general wellbeing.

- [68] The message could not be clearer. Children suffer when their parents engage in needless conflict. If these parents want to, in effect, walk the walk as opposed to simply talk the talk, they will modify their behaviour in the best interest of their child, and in doing so they will look not to the behaviour of the other parent, but to their own behaviour and take responsibility for that.
- [69] There will be an order, by consent, that these parties are not to speak about this case in the presence of R, nor are they to make disparaging or uncomplimentary comments about each other in the presence of R. I am usually reluctant to make orders of that kind, because I am not convinced the court can enforce common sense and common human decency. In this case, I do it for two reasons: first, the parties consent and I gather take some comfort in an order of that kind; and secondly, it serves to underscore the particular need in this case for reminders of that sort as these parents continue to deal with one another and their son.

Section 7 Expenses

- [70] The issue in this respect is the cost of R's braces. S.R.J. acknowledges he is to pay half, but says that half is half of the net of insurance. S.P.I. says that half is half of the entire amount. S.P.I. has insurance, but she pays for that insurance. She argues that S.R.J. should not receive the benefit of her insurance, because he has not paid the premiums for it. S.R.J., I think, argues that his monthly support is used in part for that insurance, and as a result he is entitled to the benefit of it. The insurance premiums are \$24.36 a month.
- [71] I am going to assume that half of this premium is for the coverage of R, the other half being for S.P.I.'s own coverage. I will fix the amount notionally attributable to R at \$12 a month. I will assume it is paid from January 1st, 2009. S.R.J. is to pay half of the orthodontic expense, net of S.P.I.'s insurance coverage, plus the sum of \$600. That additional \$600 is to be paid or added to the first payment that S.R.J. is to make.
- [72] I have assumed that the orthodontic coverage that S.P.I.'s insurance provides is about 50 percent of the cost of the orthodontic expense. Notwithstanding that there will be some delay between when the bill is to be paid and when the insurance reimburses, S.R.J. is to pay one-quarter of the gross bill plus \$600 on presentation. S.P.I. is to pay the remainder and recover the balance from her insurance.
- [73] I am not satisfied that there is any need to make orders with respect to any of the matters raised in paragraphs. 1 through 4 of the notice of motion of S.P.I. and those matters are dismissed, except as noted above.
- [74] Before I deal with the issue of costs, do either of the parties have any submissions they want to make on that matter?

- [75] MR. SPENCER: I do, but before we turn to that, My Lord, perhaps I could get some clarification, since I am going to be drafting the order, with respect to my client's application to cancel the Thursday overnights, paragraph 5 of her motion, that is dismissed. Paragraph 2, with respect to the issue about cooperation as to sports, that is also dismissed. [S.R.J.'s] application is adjourned generally or adjourned to June 15th?
- [76] THE COURT: June 15th.
- [77] MR. SPENCER: All right, thank you, and with interim primary residence with my client, the mother. [R] is to have parenting time with [S.R.J.], Friday after school, will that be --
- [78] THE COURT: What is the current pick-up arrangement now on those days?
- [79] MR. SPENCER: What's happening now is that my client gets [R] after school on Fridays, and [S.R.J.] comes by her residence at, I believe, 4:45, so I think that if it were every other Friday and [S.R.J.] has spoken about flexibility in his work, and considering that he's put forward the argument that there's often --
- [80] THE COURT: Yes, yes.
- [81] MR. SPENCER: -- a conflict at the door, it would be best if he actually picked the child up at school.
- [82] THE COURT: Right. What time is that?
- [83] MR. SPENCER: And that, I believe, is 3 o'clock or 3:15, but he can find out from the school. One of the things that [S.R.J.] said repeatedly in his argument, I'm not trying to reargue the case, but just to inform [S.R.J.] about that is he said, "She prevents me from being -- "
- [84] THE COURT: Yes.
- [85] MR. SPENCER: " -- involved in school." He is a joint guardian, he has a court order that allows him to get information from the school.
- [86] THE COURT: Okay, that is fine.
- [87] MR. SPENCER: Certainly he can find out what time school ends, 3:00 or 3:15, and he can pick [R] up --
- [88] THE COURT: All right.
- [89] MR. SPENCER: -- from the school.
- [90] THE COURT: Thank you.
- [91] MR. SPENCER: All right, and that's to begin today.
- [92] THE COURT: Yes.
- [93] MR. SPENCER: I don't know if [S.R.J.] has just taken the morning off or the day off.

- [94] THE COURT: Yes, okay.
- [95] MR. SPENCER: And it's to go to Sundays at 4:00 p.m.?
- [96] THE COURT: What is the current arrangement?
- [97] MR. SPENCER: The current arrangement, I think --
- [98] S.R.J.: Sundays at six.
- [99] THE COURT: Okay, it will stay at six.
- [100] S.R.J.: So not Thursdays anymore, is that right?
- [101] MR. SPENCER: No.
- [102] THE COURT: No.
- [103] MR. SPENCER: Fridays to Sundays at 6:00 p.m., all right, thank you. That's every other weekend then.
- [104] THE COURT: Yes.
- [105] MR. SPENCER: Commencing Sunday, December 5, from 8:30 a.m. to 4:00 p.m., and every fourth week thereafter?
- [106] THE COURT: Yes, that is the same as now.
- [107] MR. SPENCER: Yes, and overnights, the night before hockey practice.
- [108] THE COURT: Right.
- [109] MR. SPENCER: So long as there is a hockey practice, and when no hockey practices, it will be Mondays overnights, because --
- [110] THE COURT: Right.
- [111] MR. SPENCER: -- to be consistent for [R] right now it's Mondays overnights.
- [112] THE COURT: Yes, yes.
- [113] MR. SPENCER: Okay, and I took it that I was going to draft the order. I know Your Lordship has said Mondays, 4:30 to 7:00 and Wednesdays 4:30 to 7:00, are terminated, but I was going to draft it that all previous --
- [114] THE COURT: Yes, out.
- [115] MR. SPENCER: -- access orders are terminated --
- [116] THE COURT: Right, yes.
- [117] MR. SPENCER: -- just so that there's one comprehensive --
- [118] THE COURT: Please, yes, yes.

- [119] MR. SPENCER: All right, and then I didn't quite understand Your Lordship at this point; you said [S.R.J.] is to obtain the next month's hockey schedule before the 1st of the month, send it by the start of the month to [S.P.I.], and if [S.R.J.] doesn't do this before the end of the month there will be no midweek access?
- [120] THE COURT: No overnight access during the week, that is right. So what I want to ensure is [S.R.J.] has a responsibility, because the hockey practice might change.
- [121] MR. SPENCER: Yes.
- [122] THE COURT: They do sometimes.
- [123] MR. SPENCER: And that's -- yes.
- [124] THE COURT: What I want to do is address that, so get the schedule from the coaches, send the schedule to [S.P.I.] and say, "Look, here is the schedule, the night before each of these practices is going to be the overnight visit." If there is more than one practice in the week, you just get one.
- [125] MR. SPENCER: And that will for now be the Monday overnight.
- [126] THE COURT: Right.
- [127] MR. SPENCER: And Your Lordship made a comment though that if there is more than one, let's say there's a Thursday morning practice as well, is Ms. - I want to tell her this, so that she knows where she stands - is [S.P.I.] required or does she have the ability to choose about taking [R] to that early morning?
- [128] THE COURT: She can choose.
- [129] MR. SPENCER: And if --
- [130] THE COURT: She can ask [S.R.J.] to take him, if she wants.
- [131] MR. SPENCER: If -- hopefully, and when hockey season ends, it will be - and I think Your Lordship may have misspoken here - it will be the Tuesday overnight or will it continue to be the Monday overnight?
- [132] THE COURT: Well, I said Tuesday. The only reason it is Monday is because Tuesday is the practice.
- [133] MR. SPENCER: Midweek is usually better. I was wondering if Your Lordship was thinking --
- [134] THE COURT: Yes.
- [135] MR. SPENCER: -- Wednesday?

- [136] THE COURT: Okay, Wednesday is fine. Whatever works. If you want Wednesday, that is fine. That is subject to you. You can agree otherwise. It will be Wednesday if you do not agree otherwise, but I want you to agree by the end of February as to the midweek access, and I say the end of February, because hockey is generally over around then, at least for young players.
- [137] S.R.J.: So the Wednesday would continue, I'd have him overnight.
- [138] MR. SPENCER: After hockey season, Wednesday overnights to Thursday morning.
- [139] S.R.J.: Okay, take him to school.
- [140] MR. SPENCER: I hate to bring this up, but it has been a point of contention. Is it the court's order that if [R] is sick, let's say then there's a Monday overnight for the Tuesday morning hockey practice, and [R] is to be taken, obviously showered, dressed, take him to school with a lunch on Tuesday. If [R] is sick during Tuesday up to the end of school, whose responsibility is that? I wouldn't have raised it, but Your Lordship has noted there's poor communication, it's been an issue in the past.
- [141] S.R.J.: She offered that to me, and I'd be happy to do it.
- [142] MR. SPENCER: All right.
- [143] THE COURT: All right.
- [144] S.R.J.: That would be fine.
- [145] MR. SPENCER: So during the day from Monday --
- [146] THE COURT: [S.R.J.], what you need to do is for the school day following your overnight access, if there are difficulties which require you to go to the school, either because [R] is sick or something else happens, you go.
- [147] S.R.J.: Okay.
- [148] THE COURT: You need to tell the teachers that.
- [149] S.R.J.: Okay.
- [150] THE COURT: They are not going to know.
- [151] S.R.J.: Right.
- [152] THE COURT: So you need to tell them that.
- [153] MR. SPENCER: And what time shall the Monday overnights start then? They start at 4:45?
- [154] THE COURT: Well, that raises the same issue about picking up from school. Are you able to pick him up from school?
- [155] S.R.J.: I can pick him up from school.

[156] MR. SPENCER: Well, what I was thinking though is if it happens, then every other weekend, [S.R.J.] will be having -- oh no, I suppose -- I'm sorry, I was going to say that [S.P.I.] wouldn't see --

[157] THE COURT: No, no, she will see him Sunday night.

[158] MR. SPENCER: -- her son. She'll see him Sunday night through to Monday morning, okay.

[159] THE COURT: So pick him up from school, just to arrange the --

[160] MR. SPENCER: So that will be every week, Monday.

[161] THE COURT: Yes, yes.

[162] S.R.J.: I would still retain my Sunday, full-day Sunday access.

[163] THE COURT: Yes.

[164] S.R.J.: Okay.

[165] MR. SPENCER: Every fourth week.

[166] THE COURT: Every fourth week, yes, same as you do now.

[167] MR. SPENCER: All right, and then [S.R.J.] had the first application, if he wishes to address the court on costs. I have some submissions on costs.

[168] THE COURT: Yes, what do you want to say about costs, [S.R.J.]?

[SUBMISSIONS RE: COSTS]

[169] THE COURT: A couple of things just before I deal with costs. My purpose in setting the review and the way that the review is going to be taking place is twofold. The first purpose is obvious, it is up to the parties to demonstrate that they can behave in a way that allows me, in conscience, to continue to have their son fully participate in the lives of each of them, something that would be valuable for him, provided the cost of doing that is not too high. That is the first reason.

[170] The second reason I have set the review in the manner that I have is to avoid you coming back before yet another judge, the fifth or sixth judge in this proceeding.

[171] Finally, I want to do it in a way that is as inexpensive for you as possible, so you do not have to appear in person, it is generally less expensive. I am going to set some rather summary rules for how the application is going to be addressed, and the summary rules are these: If either party wants a change in the existing arrangement, they are to set that out in an affidavit which they will file and deliver to the other side by the 1st of June, 2011. The other side then has until June 7th to respond to the affidavit. It may be that both of you file affidavits saying, "Gee, I don't think this is working and here is why," on June 1st, and each party will have a chance to respond by June 7th. The point is that by June 7th, all of the affidavit material will be in the court file and we will have the hearing on the morning of

June 15th at 9 o'clock.

- [172] You should not take it that you are not allowed to agree on any changes that you choose to consider. You do not have to have me resolve any issues, but to the extent, if there are major issues and you say, "Look, this just is not working," and you want to change it, fine. Put it in an affidavit, say what you want to happen, and say why you think the existing arrangement is not working, and I will deal with it.
- [173] I am not going to make an order about Christmas and spring break. It has not been a significant problem. I know [S.R.J.] takes the view that he is simply dictated to and that is not a particularly helpful way to address things, but those extended access times allow the parties an opportunity to put into effect that which I hope they will be able to put into effect in the longer term; namely, some discussion about how they are going to deal with it.
- [174] My own view is this. [S.R.J.] has limited holidays available. I gather, from the material, that [R] has a pretty good relationship, indeed a close and, for all I know, quite a productive relationship with his paternal grandparents. The arrangement would typically be one that allows [R] to be with his dad on the days that his dad has holidays. It may also extend to a couple or more days when [R] can be with his grandparents and his dad can go to his grandparents' house, and they can all enjoy an evening dinner together or something of that nature. That is what reasonable people would do.
- [175] If the arrangement is that [R] goes to daycare all day because his dad is working, whereas Mom is home, because her hours generally correspond with the elementary school hours, that would not be a reasonable arrangement. Most parents would say, "Gee, that is kind of crazy to have the child with a babysitter when he can be with one of his parents".
- [176] Somewhere between those two extremes there is an obvious and common-sense solution, and I am not going to impose it today. Rather, I think it is an ideal opportunity for the two of you to think seriously about what you are doing to your son by continuing this disagreement, and begin the process of some kind of constructive dialogue over those two matters, so that is why I am not dealing with it.
- [177] MR. SPENCER: In terms of the costs then, to the 15th of June or --
- [178] THE COURT: Yes, yes.
- [179] MR. SPENCER: -- each party shall bear their own?
- [180] THE COURT: Yes, I will. I can tell you this: Prior to hearing your submissions, I was going to order costs in a lump sum, in a relatively modest amount (your client was going to pay some costs). I am not going to do that. I was going to do that because I wanted to mark my disapproval of simply ignoring the court order. I know what the email says, "I don't care what the court order says". You need to care and it will be enforced.

- [181] I was going to order costs to mark my disapproval of that. I am not going to now. I will simply adjourn the matter of costs to the June hearing and I will deal with the issue then.
- [182] MR. SPENCER: There is one final matter, and I don't think the court should make this an order, but in light of Your Lordship's comments, the parties, I believe, years ago attended separately Parenting After Separation.
- [183] THE COURT: Yes.
- [184] MR. SPENCER: I'm wondering if Your Lordship would make a recommendation to the two that if they can see their way --
- [185] THE COURT: Yes.
- [186] MR. SPENCER: -- to do this, that they should attend together a Parenting After Separation course.
- [187] S.R.J.: Could I say one thing? This is an email that I just got and Mr. Spencer has it too, he actually brought it to me, and it's from the defendant, where she says, and this is just a couple of days ago, where I emailed or I called from work and left a message, just -- or I talked to her, and I said, "Today is my Wednesday access, according to the court order. What am I going to do? What are you going to do if I come by to pick up [R]?" And she just said, "No, you can't -- you can't see him." So there's just that.
- [188] She also puts in here that as far as his hockey on December 4th, he's not going to be there. "We have family plans in place. The timing does not work." The court order has said over and over, I'm supposed to be able to take him to these sports, and she still ignores them. So is there any way that can be -- something can be put forward that just says, "Look, the court order in place is -- you have to abide." I mean, I'm reasonable, if it was, you know --
- [189] THE COURT: Sit down.
- [190] S.R.J.: -- something very serious.
- [191] THE COURT: I have no doubt, [S.R.J.], you think you are reasonable, and maybe you are. My advice to both of you is this: You get emails like that, keep them, and I will expect to see them in your affidavit in June.
- [192] S.R.J.: Okay.
- [193] THE COURT: If that kind of rigid, unilateral response carries on, I will put an end to it by changing the arrangements, because it just is not helpful.
- [194] On the other hand, if you continue to not respond in a way that is reasonable and responsible, especially in terms of schoolwork and those kinds of things, I will deal with that as well.

- [195] What both of you should do now is say, look, any reasonable person looking at the history of your behaviour would say that it is not a model to be emulated by parents. I am not going to be able to unravel all of the disputes that you have had to this point. What you need to focus on now is what is going to happen in the future, not what has happened in the past, because if you do not, you will simply condemn your son to further exposure to your disputes. Whether he actually sees it does not matter; he feels it. I have no doubt he feels it in his core, whether you are fighting with each other or fighting with your new spouse. If you care for your son, you will address that.
- [196] As to the recommendation that they attend Parenting After Separation together, I think that is very sensible. I think both of you would benefit from it and I make that recommendation. If you cannot do it together, do it separately. It is a time for you and it is the last time for you to demonstrate that you can put together a relationship that allows your son to benefit from both of your admirable qualities. If you cannot do that, one of you is going to lose. You do not know which one yet, but one of you will.
- [197] Ultimately, your son is going to lose. That is really all that I am concerned about. I will not say more about it than that.

Barrow J.

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