
CANADA / JUDGMENT

Vig v. Vig

2012 BCSC 898

COURT

Supreme Court of British Columbia

DECIDED

19 June 2012

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2012 BCSC 898 Vig v. Vig

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vig v. Vig,

2012 BCSC 898

Date: 20120619

Docket: E103754

Registry: Vancouver

Between:

Maria Adriana Vig

Claimant

And

Ole Norman Vig

Respondent

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Claimant:

Paul Daltrop

Counsel for the Respondent:

Carey Linde

Place and Date of Trial:

Vancouver, B.C.

May 30, 2011, October 3, 2011,

February 13-17, 2012

& April 5, 2012

Place and Date of Judgment:

Vancouver, B.C.

June 19, 2012

INTRODUCTION

- [1] This trial and judgment addresses various issues that remain outstanding between the parties. All of these issues relate to the children of the marriage.
- [2] The parties began living together in April of 1993. They married on June 25, 1994. They separated on September 5, 2006. A divorce order was made on May 30, 2011.
- [3] The wife (also referred to as the "mother") is 47 years old. The husband (also referred to as the "father") is 51 years old.
- [4] There are five children of the marriage:
- Anna Maria Vig, born in 1995 ("Anna") - now 16
- Emma Christina Vig, born in 1997 ("Emma") - now 14
- John Ole Vig, born in 1998 ("Jorn") - now 13
- Ella Sophia Vig, born in 2000 ("Ella") - now 11
- Maja Adriana Vig, born in 2000 ("Maja") - now 11
- hereinafter collectively referred to as the "children".
- [5] On May 30, 2011, a Consent Order was entered into with respect to family assets and liabilities.
- [6] The parties are agreed that there should be an order, with respect to all of the children, for joint custody and joint guardianship.
- [7] At issue in this trial are the following:
1. the terms of joint guardianship;
 2. parenting scheduling;

3. child support;
4. s. 7 expenses.

[8] As a general observation, and taking into account the evidence of both the parties and all of the other evidence in this case, I am satisfied that both parties are equally suitable and capable parents who love all of their children and want the best for them.

THE TERMS OF JOINT GUARDIANSHIP

- [9] The parties consent to an order for joint custody and joint guardianship in the terms of the standard Master Joyce model. However, they disagree with respect to two aspects of that:
1. whether one of them should have decision-making authority where they cannot agree, with liberty for the other to make a court application in that event; and
 2. whether the home of one of them should be designated as the primary residence of the children.
- [10] The wife seeks to be named as the final decision-maker in the event of disagreement. The position of the husband is that neither of them should have this authority, and the court should order that they will attend for mediation where they cannot agree.
- [11] Mediation as an alternative in this type of situation has been considered by this Court on a number of occasions. While it has the laudable advantage of attempting to avoid conflict in an already tense relationship, it has the disadvantage of not allowing for prompt decision making where it may be required. In all the circumstances, I am satisfied that it is in the best interests of the children for one of the parents to have final decision-making authority. I am satisfied that, in the circumstances of this case, that person should be the wife. The husband will retain the right to go to court, where he considers it appropriate, if he considers it necessary to make an application to overturn a decision made by the wife.
- [12] With respect to a designation for the primary residence of the children, I am satisfied that, in view of the findings made during the balance of this judgment relating to the parenting schedule of the parties, it will not be necessary to designate either of the residences as a primary residence. The parenting schedule will speak for itself.

PARENTING SCHEDULE

The Current Situation

- [13] The children have lived primarily with the wife since September, 2006. The husband has been entitled to access to the children every second weekend from Friday after school until Monday morning. In addition, in the off week, the husband has been entitled to access to the children on Thursday overnight from after school until Friday morning.

- [14] The foregoing schedule was formalized, on an interim basis, in a consent order made at a judicial case conference on July 16, 2007.
- [15] This schedule was followed by the wife, even when she was working out of town. Rather than giving the husband the opportunity of having access to the children on those occasions, the mother would call upon her own parents to step in.
- [16] All the children currently attend the same school. Dr. Krywaniuk noted that the parents' homes are a considerable distance apart and that transportation is somewhat of an issue. However, I am satisfied from the evidence of the husband that they live close enough to each other, and to the children's school, so that (except when the wife is working out of town), either is able to make last minute arrangements to attend at the other's home, or at the children's school, and to fulfill the functions of the custodial parent.

The Children's Current Views

- [17] Anna, now aged 16, has reached the age when she has decided what the parenting arrangements for her ought to be. She has chosen not to see her father.
- [18] Commencing in March 2011, Jorn decided not to go to his father's home for access visits, except for one overnight at Christmas time, 2011.
- [19] Emma, Ella and Maja continue the access pattern that has been in place since September 2006. Emma and Maja would like that to continue. Ella would like to spend an additional day every second week with her father.

Dr. Krywaniuk

- [20] Dr. Larry Krywaniuk has provided three written reports to the court in this matter:

August 15, 2008 - a s. 15 Custody and Access Assessment (s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128);

December 24, 2009 - an update of the previous s. 15 report; and

September 12, 2011 - a further update of the s. 15 report.

- [21] With respect to the latter report, the court had ordered a "views of the child" report but Dr. Krywaniuk provided a more comprehensive update of the s. 15 report. Both counsel agree that I should consider the contents of the report in its entirety.
- [22] In addition to the three reports being before the court, Dr. Krywaniuk gave oral evidence at this trial.
- [23] He interviewed both parents and all of the children with respect to each of the reports. His opinions (and recommendations) are based on a great deal of information.

- [24] A significant aspect of the three reports considered collectively is that the children's views with respect to the amount of time they wish to spend with their father have evolved from desiring a 50/50 split of time to one where they wish somewhere between no time and much less time with their father.
- [25] While this change might seem unsurprising in view of the fact that the children have aged, Dr. Krywaniuk adds an additional dimension of concern as to why their views have evolved in this way.
- [26] He is of the view that the wife has subtly influenced the children to want to spend less time with their father than was originally the case.
- [27] I accept Dr. Krywaniuk's opinion in this regard and I come to the same conclusion. I do not conclude that she has done so deliberately or consciously, nor does Dr. Krywaniuk. The wife made it clear, during her evidence, that she believes herself to be a better parent than the husband. I disagree with her, and I find that Dr. Krywaniuk disagrees with her as well. Nevertheless, I am satisfied that this is what is at the root of how and why she has influenced the children in the way that she has.
- [28] Dr. Krywaniuk testifies that the husband is more flexible in his views, and the wife has been effectively intransigent. The children are subtly influenced to take the path of least resistance - the husband will not "squack" as much as the wife.
- [29] In his most recent report, Dr. Krywaniuk said this:

There also has been somewhat of a shift in stated wishes for access. Whereas they previously were inclined towards a half and half type of access schedule, Emma and Maja now say that they are satisfied with the way things are. Ella, on the other hand said that she would like to be with her father every Thursday rather than alternate Thursdays.

[30] Further:

Psychological theory generally indicates that the bases for longer term and future family relationships are established when the children are younger and this is likely to be the case for this family as well. For this family, I feel it is too important an issue to simply be left to the whims of the children and that it requires the support of both parents. In this regard, it is also part of the obligation that each parent has to support the other in the eyes of the children. Perhaps because of the inherent imbalance in the access that has existed, it appears to me that Ms. Vig would have the most responsibility to promote the children's relationship with their father. It seems that she takes the attitude that the breakdown in the relationship between the children and their father is entirely his fault his responsibility, which I feel is not completely the case. Within the relatively limited time he has been able to see the children, it seems in this situation that Mr. Vig has been simply allowed to fend for himself in terms of his relationship with the children without Ms. Vig's support as a parent. Although Ms. Vig's overt level of anger towards Mr. Vig has diminished, which I think is a positive development, I think she continues to demonstrate considerable anger in a passive manner[,] which I feel has a negative influence on the attitudes of the children.

In my opinion, Ms. Vig needs to continue the progress she has made in putting her own feeling aside and become more active in supporting Mr. Vig's role as a parent. As part of this, Mr. Vig needs to focus on his contribution to the breakdown of his relationship with the children. The situation may be easier to resolve once some of the other issues in the divorce settlement are complete. For the long term, it is my view that increased active participation by Mr. Vig in the lives of the children would be a positive factor in their lives.

[31] He also stated:

In general terms, the children are all expressing [the wife's] preference for the status [quo] rather than a more balanced pattern of access that seem[ed] to be the preference in the past. However, it was also not completely clear to me that these expressed sentiments completely reflected their inner feelings.

...

It may be that these perceived advantages, although perhaps with some subtle manipulation as Mr. Vig suspects, have allowed the children to select their own level of access. Mr. Vig generally sees this as a failure on Ms. Vig's part to support his role as a parent and the access that he has with the children. A more cynical view would be to say that she perceives that she has the "winning hand" and therefore does not need to put direct pressure on the children. In that sense, it may simply be that Mr. Vig has been "outmaneuvered" due to a combination of natural disadvantage in his position and subtle influence.

...

In brief, it is my recommendation that these parents share custody on an equivalent level although, in practical terms, it may not be possible to institute this immediately or equivalently for all five children. Anna and Jorn probably will require individual work but the other three children can have their access increased over time. I do feel that Mr. Vig's proposal has substantial merit and should be considered as part of the overall arrangements. In particular, he should have the option of "first refusal" on days when Ms. Vig is away due to her work.

[32] During his testimony, Dr. Krywaniuk said, among other things, the following (I paraphrase):

1. He last saw the children in the summer of 2011.
2. At the time of the original s. 15 report, August 15, 2008, he thought the best thing for all five children was shared parenting on a roughly 50/50 per cent basis. The children's perception of what is fair has changed from 50/50 to alternate weekends.
3. The children all know the husband wants them on a 50/50 basis.
4. He had the impression that the children were less inclined to tell their mother that they want more time with their dad.

5. They receive less pressure from their dad to comply with his wishes, although they know what his wishes are. They are more worried about opposing their mother. They feel they need to fulfill her emotional needs.
6. Dr. Krywaniuk has the feeling that pressure from the mother has built up and ground the children down. He does not know for sure.
7. He does not think the wife values the father's contribution very much.
8. Frequency of contact is more important with younger children. One-to-one time is also important.
9. The value to the children of extra time with their father is greater than the loss of value to them by spending less time with their mother (because she already gets so much time).
10. Ella had no difficulties stating that she wants to spend more time with her father, specifically every Thursday instead of every second Thursday.
11. Maja wants to continue as it is.
12. Dr. Krywaniuk was hesitant to suggest that a court order directing the children what to do might assist the mother in persuading the children to visit their father. He was concerned about the risk of making an order which would not be followed.
13. Dr. Krywaniuk made the following recommendations:
 - (a) the parents should be taking communication counselling and parenting training;
 - (b) a "form of 50/50 parenting", although he recognizes this is not realistic for several of the children;
 - (c) the court should "encourage" Anna to see her father;
 - (d) the doctor is concerned that Emma may not follow a court order and that I should not order her to go. Rather, the Court should encourage her to go;
 - (e) Jorn should be encouraged to see his father and attend counselling. Although Dr. Krywaniuk recognizes that Jorn does not want to visit his father, he thinks it is still in Jorn's best interests to have a relationship with his father;
 - (f) for Ella and Maja, something approaching 50/50 would be appropriate.

The Applicable Law

[33] Section 16(8) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) ("Divorce Act") states this:

- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

[34] Section 24(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 ("Family Relations Act") directs that in assessing the best interests of the children, the court must consider the following factors and give emphasis to each factor according to the children's needs and circumstances:

- (a) the health and emotional wellbeing of the child including any special needs for care and treatment;
- (b) if appropriate, the views of the child;
- (c) the love, affection and similar ties that exist between the child and other persons;
- (d) education and training for the child; and
- (e) The capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

The Wife's Argument

[35] Our Court of Appeal has said that as children age, they reach a point where they are deemed to be able to settle their own future.

Alexander v. Alexander (1988), 15 R.F.L. (3d) 363 (B.C.C.A.)

O'Connell v. McIndoe (1998), 166 D.L.R. (4th) 653 (B.C.C.A.)

[36] The circumstances of this case are analogous to those in J.S. v G.J.S., 2005 BCSC 1373, where Rice J. said, at para. 48, that the parties:

... cannot communicate with one another without rancour and have been unable to implement shared parenting or agree on an access schedule without frequent recourse to the courts. Consequently, I see little prospect for the cooperation, consultation and joint decision-making that is necessary to make joint custody workable. In light of this animosity, a joint custody order likely would increase opportunities for conflict, exposing the children to greater stress.

[37] Equal parenting is unworkable. The wife argues that she and her husband have continuing communication difficulties creating a situation similar to that described by Rice J. in J.S. v G.J.S.

[38] The wife refers me to the case of O'Connell v. McIndoe, with facts similar to this case. The court had concluded that the father had turned the child against the mother but the child's desire to spend more time with his father nevertheless dominated in the decision-making process.

[39] In determining the best interest of the children, the single most appropriate factor to consider is the views of the children, given their ages. This dispute has gone on for almost six years. Over time, as Dr. Krywaniuk notes in his reports, the views of the children have evolved. The father does not seek an order regarding Anna. Jorn refuses to see his father and only does so at the urging of the mother when his father attends to pick up the children.

Jorn requires counselling with the father at this point before a parenting plan can be put into effect. Emma, now 14, has expressed a desire in favour of the status quo. Her views ought to be respected. Even Dr. Krywaniuk supports the conclusion that the children should not be subject to court orders that they will not abide by. There is little point and the wrong message will be sent to the children.

[40] Maja has expressed that she is in favour of the status quo. The evidence is that Maja is mature and clear minded about her desires and wishes, as Dr. Krywaniuk points out. The wife agrees that Ella has expressed a wish to spend more time with the husband, and in particular, every Thursday overnight. The wife agrees.

[41] She indicates that she accepts the children's wishes and the recommendations of Dr. Krywaniuk, and therefore suggests the following orders be made:

1. Anna: no order.
2. Emma: no order.
3. Jorn: an order for counselling with a goal of renewing his relationship with his father. It should be up to the counsellor to determine whether or not the father and Jorn should attend together. Payment for the counselling should be arranged through both parties' insurance policies, and any balance should be paid in an amount proportional to their incomes.
4. Ella: access should be increased to add every Thursday, rather than the current alternate Thursdays, because this is what Ella wants.
5. Maja: unlike her twin sister, she does not want the additional Thursday night. She should remain on the existing access schedule.

The Husband's Argument

[42] The father argues that the wife should not benefit from her behaviour in causing the children's attitudes towards him to change. Neither should he suffer as a result of that behaviour. More importantly, it is not in the best interests of the children to observe that the court rewards the mother for behaviour of that kind. Rather, it is in the best interests of the children that the court should make an order which attempts to correct the negative influences on the children that the mother has created and encourage them to re-establish equal contact with their father, and a renewal of their original attitude towards him.

[43] It would be unfair for the court to consider the wife's current position as reasonable simply because she endorses what the children now want and Dr. Krywaniuk recommends. The children's current views and Dr. Krywaniuk's current recommendations only exist in their present form because of the wife's negative influences.

- [44] To the extent that the parties have difficulty communicating, it is because of the wife. If there is any reason why shared parenting on a roughly 50/50 basis will not work, the reason is the wife's behaviour in improperly influencing the children.
- [45] Dr. Krywaniuk is of the view that "increased active participation by Mr. Vig in the lives of the children would be a positive factor in their lives", and recommends "that these parents share custody on an equivalent level although, in practical terms, it may not be possible".
- [46] Counsel for the husband argues against Dr. Krywaniuk's approach as follows: in essence, he suggests that the children need the independent direction of a judge so that they can exercise their inner feelings towards their father without feeling they are betraying their mother.
- [47] He argues that the court should be proactive and order the children to see their father and that merely encouraging them is "useless". The court should order the children, the parents and the grandparents and they should be expected to comply.
- [48] It is agreed between the parties that Anna can determine for herself the time she wishes to spend with either parent.
- [49] The parties' position with respect to Jorn is the most divergent. The husband is suspicious that the wife is influencing Jorn to not spend time with his father.
- [50] The husband would like to see something approaching shared parenting, but recognizes that this will not currently be realistic with respect to Anna or Jorn.
- [51] With respect to each of the children:
- Anna - he agrees that there is no point making an order;
- Jorn - reluctantly, he agrees;
- Emma, Ella and Maja - should be 50/50 and week on/week off.

Conclusion

- [52] I am satisfied that the wife treats the husband unfairly, and does so to the detriment of her children who have been denied the amount of time that would have benefitted them. He is as capable and loving as the mother and has available time to fulfill his parental duties; arguably, he has more available time than her since her work involves travel.
- [53] Nevertheless, in view of the current state of affairs, and my view of the evidence of Dr. Krywaniuk, a 50/50 shared parenting arrangement is not realistic at this time.
- [54] I also endorse the views of Dr. Krywaniuk that ordering the children to comply runs the grave risk of achieving non-compliance. Therefore, except for the two youngest children, I am unable to accede to the pro-active approach that the husband argues is appropriate.

[55] There is nothing in the evidence that could lead me to any conclusion other than to adopt the recommendations of Dr. Krywaniuk. I am satisfied that these recommendations are in the best interests of the children, as considered in light of s. 24(1) of the Family Relations Act. In that regard, I will make orders to achieve the following:

Anna -

Anna will be encouraged to see her father.

Emma -

Emma will be encouraged to see her father.

Jorn -

Jorn will be encouraged to see his father and to attend for counselling with the goal of strengthening his relationship with his father.

Ella -

The parents will share custody of Ella, who will spend 60% of the time with her mother, and 40% of the time with her father.

Maja -

The parents will share custody of Maja, who will spend 60% of the time with her mother, and 40% of the time with her father.

[56] The 40% of the time that Ella and Maja will spend with their father represents two weeks out of every five. It need not be the same two weeks, nor need the weeks necessarily consist of seven consecutive days. Nor need Ella and Maja attend together in the same weeks.

[57] All of the foregoing can be varied between the parents by consent. I do not intend to set a rigid schedule.

[58] I am satisfied that the comments of Rice J. in J.S. v. G.J.S. to the effect that the parties "cannot communicate with one another without rancour" are not applicable in this case for two reasons. First, I am satisfied that the communication difficulties are primarily one-sided, that is, the wife's difficulty. Secondly, I am satisfied that the evidence in this case does not extend to the extent described by Rice J. in J.S. v. G.J.S. I am satisfied that, despite the communication difficulties which have existed, these parties are capable of communicating to the extent that they can work this out as best suits their availability and the needs of the children.

[59] These orders reflect the views of all of the children except Ella and Maja, one of whom wishes to continue with the status quo, the other of whom wishes to add an additional overnight every second week. In coming to this conclusion, I have given their views serious consideration, together with their ages. I have also been influenced by the comments and recommendations of Dr. Krywaniuk, especially where he noted the following in his most recent report:

1. "the bases for longer term and future family relationships are established when the children are younger";
2. "increased active participation by Mr. Vig in the lives of the children would be a positive factor in their lives";
3. "it is my recommendation that these parents share custody on an equivalent level although, in practical terms, it may not be possible to institute this immediately for all five children".

[60] If the other children were younger, I would have ordered the same 60/40 arrangement for them.

[61] In addition, both the husband and wife shall have the option of "first refusal" on days when the other is away due to his or her work.

CHILD SUPPORT

Retroactive Child Support

[62] On September 5, 2008, Grist J. made an order for interim child support in the amount of \$1,746 per month. The order is silent with respect to s. 7 expenses.

[63] The wife argues that there should be an order for retroactive child support because the husband's income has increased since the time of the Judge Grist order, which order was based on the husband's income at that time.

[64] Applying that analysis, the wife claims the additional amount that should have been paid totals \$2,752.

[65] The husband does not dispute the wife's analysis or the amount. He argues simply that he already pays the wife approximately one-half of his income every month. He has no more money to pay.

[66] While I accept the husband's evidence with respect to the limits of his financial resources, I must also have regard to the wife's financial limitations. Considering all the circumstances of this case, I am satisfied that these arrears must be paid and I so order.

[67] In all the circumstances, I am satisfied this is an appropriate case where the arrears should be ordered to be paid, and I do make that order.

Future Child Support

- [68] The husband is employed as a food service supervisor with Corrections Services Canada earning between \$70,000 and \$75,000 per year.
- [69] The wife is employed as a flight attendant. Her current income is \$45,453 per year working on a full-time basis; however, she works only part time.
- [70] Unfortunately, I am unable to resolve two issues necessary for the determination of future child support on the basis of the evidence and submissions which I have heard. Those two issues are:
1. The precise current incomes of the husband and wife from which Guideline payments should be determined during the current year.
 2. The proper application of s. 9 of the Child Support Guidelines in view of my decision with respect to the 60/40 shared custody of Maja and Ella.
- [71] With respect to the husband's income, his employment income varies from year to year. In a recent year, he earned considerably more from this employment (as a result of the need to fill in for other employees) than is usual. In addition, he has an income from a farming business which he shares with his parents; in at least one recent year, he suffered a loss from this business.
- [72] With respect to the husband, the income documents which have been entered in evidence reflect the following:
1. in 2010, his income tax return indicates a total income of \$70,453.49;
 2. his financial statement of May 30, 2011 indicates employment income of \$72,232.86 less a loss of business income in the amount of \$3,346.81 for a total of \$68,886.05;
 3. his financial statement of February 16, 2012 indicates employment income of \$72,232.86 and other income of \$2,453.18 for a total of \$74,686.05.
- [73] Closing submissions, in writing, from counsel suggested a different figure than any of the foregoing. Further, there was uncertainty during oral submissions as to whether what was expressed in the written submissions was correct.
- [74] In the final result, and on reflection of all the evidence, I am unable to determine the husband's current income with the precision necessary for this judgment.
- [75] With respect to the wife's income, she works less than full time, and it is unclear to me what percentage of time she is working at present.
- [76] With respect to the s. 9 issue, I heard no submissions from counsel for the husband. Counsel for the wife, in response to a question from the court indicated that such a shared custody order would result in the father paying standard Guideline payments with respect to the three older children, together with a payment for the two younger children based on a simple set-off as discussed in *Contino v. Leonelli-Contino*, 2005 SCC 63.

- [77] However, there are a number of court decisions which suggest that may not be the most appropriate approach, and since these other decisions have now been brought to my attention, I wish counsel to have the opportunity to consider them and make submissions with respect to them, as well as any other cases that may bear on this point.
- [78] In that regard, I would draw counsels' attention to *Sadkowski v. Harrison-Sadkowski*, 2008 ONCJ 115; *Hilton v. Hilton*, 2011 BCSC 206, *Cyr v. Cyr*, 2009 BCSC 308, *Burns v. Burns* (1998), 40 R.F.L. (4th) 32 (ONSC), *Wouters v. Wouters*, 2001 SKQB 142, and *Wilkie v. Wilkie*, 2009 SKQB 119. There may be other relevant cases as well.
- [79] Before I can determine the question of future child support, I need to hear from counsel with respect to these two issues.
- [80] I will be content to have counsel make their submissions in writing if they prefer. If they do so, I will leave it to them to set out their own schedule and to advise me, through the Registry, when they have come to that arrangement. However, I will put a restriction on the length of the submissions which should be no more than four pages each, double spaced. They need not include any quotations of paragraphs from case law. Instead, they can simply provide me with a joint case book, and refer me to paragraphs by number.
- [81] If counsel prefer to set the matter down for hearing, I will leave them to make the necessary arrangements.

SECTION 7 EXPENSES

The Wife's Argument

- [82] The wife claims a retroactive contribution from the husband for s. 7 expenses.
- [83] She claims that the husband has not contributed to expenses in the amount of \$33,337.48. She claims that this is the amount that she has paid after contributions were made from some combination of the husband's and her insurance plans.
- [84] She seeks reimbursement from her husband based on a proportionate share of their incomes. She claims that, on that basis, he should be paying 61.4% and the wife should be paying 38.6%.
- [85] Therefore, the husband's share at 61.4% is \$20,469.21, which is the amount of her claim for retroactive s. 7 expenses.
- [86] The components of that \$33,337.48 figure are as follows:

1.

orthodontics

\$1,375.00

2.

accomplished learning (for Jorn)

\$9,294.68

3.

dentist

\$25.00

4.

psychologist (Anna)

\$990.00

5.

orthotics (Jorn)

\$415.00

6.

vision therapy (Jorn)

\$4,500.00

7.

glasses (Anna, Emma and Maja)

\$562.06

8.

music classes (Maja, Anna, Ella and Emma)

\$4,380.00

9.

school fees (including bus transportation and supplies)

\$3,392.99

10.

music lessons

\$5,460.00

11.

swimming lessons

\$2,942.75

TOTAL:

\$33,337.48

[87] An enforceable order is also required on an ongoing basis to require the husband to contribute to s. 7 expenses and not just those that the husband decides are reasonable.

The Husband's Argument

[88] The husband makes three arguments:

1. He was not consulted with respect to these expenses in advance. If he had been consulted he would have agreed to those that attracted 100% insurance coverage from either his or the wife's (or both) insurance coverage. However, where insurance coverage is not available, he would not have agreed because they simply cannot afford it. He already pays his wife approximately one-half of his net income. He simply does not have the money for any additional expenses.
2. He believes that almost all of the foregoing list of expenses could have been done with more insurance coverage, or at least a larger contribution if the wife had only consulted him in advance.
3. The wife does not work full time. She should be working full time and therefore paying a higher proportionate share of any such expenses.

Conclusion

[89] I have already noted that the evidence does not enable me to conclude that the wife could work more hours or, that there are more hours available at her place of employment to be worked.

[90] I am satisfied that the wife displays great animosity towards the husband, and does not involve him in decision-making concerning the children to the extent that he should be involved.

[91] If I were satisfied that the wife had not made arrangements to ensure that both their insurance plans had been "consulted" before incurring any of the expenses, then I would not order reimbursement. However, she testified that she did so, and there is no evidence, other than the husband's general assertion, that this is not the case. Therefore, I will not order any reduction in his share as a result of that consideration.

[92] I am satisfied that all of the claimed expenses are proper s. 7 expenses, except for those relating to music.

- [93] While I am satisfied that music is an important and laudable activity in which to encourage children, I am also satisfied that it is not necessary, particularly in a family where the resources are scarce. I would take this view, even if the total expense for music classes and musical lessons was less than \$9,840, which seems somewhat excessive.
- [94] Therefore, I am satisfied that these are not appropriate s. 7 expenses, that the husband was not consulted with respect to them, that the family cannot afford them, and that the wife will have to bear this expense on her own. The balance, once the expense for music is subtracted, totals \$23,497.48.
- [95] I am satisfied that the husband is responsible for 61.4% of \$23,497.48 for a total of \$14,427.45, and I will order that he will pay that amount to the wife as retroactive s. 7 expenses.
- [96] With respect to ongoing expenses, the parties will share s. 7 expenses in amounts proportionate to their incomes, but only after they have each consulted the other about the nature of the expense and about the possibility of both their insurance companies providing coverage. Where one parent incurs what would otherwise be a s. 7 expense, and it is subsequently determined that one or both of their insurance plans would have covered part of it, the other party will not be responsible for paying a proportion of that expense. The foregoing requirement for consultation about insurance coverage will not be required where a s. 7 expense must be paid on an emergency basis.
- [97] Where either party does consult the insurance plans of both parties, they will provide correspondence and/or other documentation to the other party evidencing that they have done so and what the results were.
- [98] Where their combined insurance plans pay a portion of the s. 7 expenses, but there is still a balance owing, the parents will share that expense on a proportionate basis, even if one of them is of the view that they cannot afford it.

THE ORDERS

- [99] The parties will share joint custody and joint guardianship of their five children. The joint guardianship will be in the terms of the standard Master Joyce model. The wife shall have final decision-making authority where the parties cannot agree, with liberty for the husband to make a court application if he disagrees with the wife's exercise of this discretion in any instance.
- [100] The schedules with respect to when the children will reside with either of the parties shall be as follows:

1. Anna may reside in whichever of her parent's homes she chooses. The Court encourages her to spend time with her father and seek to improve her relationship with him. The Court also encourages the father to seek to improve his relationship with Anna, to the extent that she will permit him to do so.
 2. With respect to Emma, she may reside in whichever of her parent's homes she chooses. The Court encourages her to spend time with her father and seek to improve her relationship with him. The Court also encourages the father to seek to improve his relationship with Emma, to the extent that she will permit him to do so.
 3. Jorn may also reside in whichever of his parent's homes he chooses. The Court encourages him to see his father, spend time with his father and seek to improve his relationship with him. The Court also encourages the father to seek to improve his relationship with Jorn, to the extent that he will permit him to do so.
 4. Residency for Ella will be divided so that she spends 60% of her time with her mother, and 40% of her time with her father.
 5. Residency for Maja will be divided so that she spends 60% of her time with her mother, and 40% of her time with her father.
 6. With respect to Ella and Maja, in addition to the 60/40 split, both parties shall have the option of "first refusal" on days when the other is away due to his or her work.
- [101] All of the foregoing orders with respect to scheduling and access may be changed or varied by agreement between the parties.
- [102] The Court encourages Jorn and the father to both attend for counselling with a goal of renewing their relationship. The parents will make the necessary arrangements if Jorn is willing to attend. It will be up to the counsellor to determine whether or not the father and Jorn should attend together.
- [103] The parents will take communication counselling and parenting training.
- [104] Wherever counselling has been ordered, payment will be arranged through both parties' insurance policies, and any balance will be paid by the parties in an amount proportionate to their incomes.
- [105] The husband is ordered to pay to the wife retroactive child support in the amount of \$2,752.
- [106] The determination with respect to future child support is adjourned to await further submissions.
- [107] The parties will exchange financial information including tax returns and Notices of Assessment, and other relevant documentation by no later than July 1 of the following year, or as soon thereafter as received.

- [108] Their Guideline income, and the amounts to be paid, will be recalculated each year in accordance with the relevant financial information.
- [109] The husband shall pay \$14,427.45 to the wife as retroactive s. 7 expenses.
- [110] With respect to future s. 7 expenses, the parties shall contribute to those expenses in amounts proportionate to their incomes, but only after they have each consulted the other about the nature of the expense and about the possibility of both their insurance companies providing coverage. Where one parent incurs what would otherwise be a s. 7 expense, and it is subsequently determined that one or both of their insurance plans would have covered part of it, the other party will not be responsible for paying a proportion of that expense. The requirement to consult about insurance coverage will not be present where a s. 7 expense must be incurred on an emergency basis.
- [111] Where either party does consult the insurance plans of both parties about s. 7 expenses, they will provide correspondence and/or other documentation to the other party evidencing that they have done so and what the results were.
- [112] Where the parties combined insurance plans pay a portion of the s. 7 expenses, but there is still a balance owing, the parents will share that expense on a proportionate basis, even if one of them is of the view that they cannot afford it.

"Silverman J."

The Honourable Mr. Justice Silverman

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