

CANADA / JUDGMENT

Wong v. Rooney

2020 BCSC 1387

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Supreme Court of British Columbia

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2020 BCSC 1387 Wong v. Rooney

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wong v. Rooney,

2020 BCSC 1387

Date: 20200917

Docket: E153328

Registry: Vancouver

Between:

Heidi Hoi Kie Wong aka Heidi Hoi Ke Harrison

Claimant

And

Edward Rooney

Respondent

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

(via teleconference)

Counsel for the Claimant:

V.K. Richards

Counsel for the Respondent:

S.K. Sheridan

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 20, 2020; and

September 11, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 17, 2020

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- [1] This is an application filed by the respondent, Mr. Edward Rooney, applying to vary the final order made April 19, 2017 with respect to the parties' parenting arrangements for their daughter, E. The claimant, Ms. Heidi Wong, opposes the application, and seeks to maintain the current parenting arrangements.
- [2] The respondent submits that there has been a material change in circumstances, and that it is in E.'s best interests to change the parties' regular school year, summer holiday and Thanksgiving parenting schedules. He also seeks to change the provisions for transporting E. to accord with the changes sought to the parenting schedules, as well as some provisions

with respect to E.'s passport. The claimant does not agree that there has been a material change in circumstances, and in any event disagrees that it would be in E.'s best interests to alter the parenting schedules and other arrangements in the manner sought by the respondent.

Preliminary Objection to Portions of Affidavits

- [3] The respondent raises a preliminary objection with respect to certain paragraphs of the claimant's affidavits made August 8, 2019 and July 27, 2020 in response to this application, on the basis that they include assumptions, conclusions, beliefs, opinions, hearsay and unattributed hearsay. Relying on *Sall v. Braich*, 2016 BCSC 253, he argues that the objectionable paragraphs should either be struck or ignored.
- [4] In response to this preliminary objection, the claimant argues that the paragraphs in question are permissible for a variety of reasons, including, in the case of hearsay from persons such as receptionists in medical offices, that the hearsay should be permitted under the principled exception to the hearsay rule because it would have been impossible for the claimant to obtain affidavits from the individuals in question. She further points to a number of paragraphs in the respondent's affidavits made in support of this application, dated July 15, 2019, August 13, 2019 and August 7, 2020, which she says contain equally objectionable material.
- [5] Supreme Court Civil Rules, R. 22-2(12) and Supreme Court Family Rules, R. 10-4(12) set out that:
 - (12) Subject to subrule (13), an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at trial.
- [6] Rule 22-2(13) of the Supreme Court Civil Rules and Rule 10-4(13) of the Supreme Court Family Rules allow statements on the basis of information and belief, if the source of the information and belief is given and the affidavit is made in respect of an application that does not seek a final order or a change in a final order, or by leave of the court.
- [7] This is an application for the variation of a final order, making hearsay statements presumptively inadmissible.
- [8] No information was provided by the claimant about any attempts on her part to obtain an affidavit from the unnamed medical receptionists and others whose hearsay evidence is referred to in her affidavit. I therefore reject any argument it was necessary for her to rely upon hearsay evidence.
- [9] There is no value for the court in receiving affidavits in which the parties speculate about the motivations and states of mind of one another. Nor is there any value in affidavits that simply reargue the case.

- [10] Following Sall at paras. 3-8, I have ignored all portions of the parties' affidavits containing such objectionable elements.
- [11] I have not ignored, but I have given very little weight to, the parts of both parties' affidavits in which they report statements which E. has purportedly made to them about the conduct of the other parent, or her own wishes and preferences. Her reported statements about such matters are of course hearsay. Quite beyond that, E. is only 6 ½ years old, and I have no doubt she loves and wishes to please both her parents. It is therefore not surprising that she would say to both of them that she misses them when she is with the other parent, and would like to spend more time with them.

Application for Sur-reply

- [12] Following the close of submissions, counsel for the claimant sought leave to provide submissions in sur-reply to an alternative parenting schedule proposed by the respondent in reply submissions. That alternative schedule was proposed by the respondent in response to a question from me. She also filed an additional affidavit from the claimant, made September 4, 2020. Counsel for the respondent did not object to the claimant making sur-reply submissions, but did object to the admissibility of the affidavit on the basis that it was filed and served late.
- [13] I heard counsel's submissions on sur-reply, including on whether the affidavit should be admitted, on September 11, 2020. The affidavit in question addresses two reasons why it is important to the claimant that E. be with her on Sundays, specifically, her extended family's tradition of eating Sunday dinner together and E.'s Sunday morning ballet classes in East Vancouver.
- [14] Counsel for the claimant referred to *Quigg v. Quigg*, 2019 BCSC 628 for the principles and test to apply in determining whether the affidavit should be admitted. At para. 20, Madam Justice Choi noted previous authority that indicated that "the court should exercise its discretion to admit late-filed affidavits sparingly, and only in clearly meritorious cases, where to exclude the evidence would result in a 'substantial injustice'." She went on to set out a three part test. Applying that test, I have determined that the affidavit should not be admitted.

Is there prejudice to the other party due to the lack of notice?

- [15] Counsel for the claimant says she provided a copy of the affidavit to counsel for the respondent on Friday, September 4, 2020; counsel for the respondent says the respondent did not get a copy until Tuesday, September 8, 2020. Either way, there is little or no prejudice, as the affidavit is brief, and the respondent could have, had he wished to, sought to file an affidavit in reply.

Will precluding the admission prevent a determination on the merits?

- [16] Precluding admission of the affidavit will not prevent a determination on the merits. There was already evidence about E.'s ballet classes. There was no evidence specifically about the Sunday family dinners, but there was evidence about the importance of E's connection to her mother's extended family. There is enough evidence before the court to determine the issues raised by the application.
- [17] Given that the respondent's proposed variation to the parenting schedule always included him having E. from Sunday at 10:00 a.m., which the claimant opposed, this is evidence which if the claimant thought it was important, she ought to have filed with her application response. It was not responsive to anything new in the alternative proposal made by the respondent in his reply submissions. The claimant has, in filing the affidavit, attempted to shore up her evidence, effectively splitting her case.

Do the interests of justice weigh in favour of allowing the admission?

- [18] The evidence contained in the affidavit is potentially relevant to the best interests of E. In Quigg, at paras. 36-37, Madam Justice Choi noted that in a family law case involving parenting, if a matter does not complete on a scheduled date, and continuations take place some time later, it is almost certain that other relevant facts will come to light, "but that cannot be the only basis to continually introduce new evidence. Otherwise, an application could continue interminably, with no end in sight. That is not fair to the parties or the process."
- [19] I agree with Justice Choi's observations. The interests of justice do not weigh in favour of allowing the admission of the affidavit.
- [20] I therefore order that Ms. Wong's September 4, 2020 affidavit not be admitted. I will consider the sur-reply submissions made by counsel for the claimant, insofar as they were not based upon the contents of that affidavit.

Background

- [21] The parties lived together in a marriage-like relationship for just under four years, from November 2011 to September 2015. E. is the sole child of the relationship, born on February 15, 2014. She is now 6 ½ years old.
- [22] After the separation, the parties lived together in the same residence, a basement suite in a home owned by the claimant's parents, until August 2016. The claimant continues to live in that home, which is located in East Vancouver. The claimant's brother and his wife and two children also continue to live in the upstairs suite in that home.
- [23] After moving out of the claimant's family's home, the respondent moved into a home owned by his mother located in Langley, where he continues to live.

- [24] At all material times, the claimant has been employed by the City of Vancouver, as a parking enforcement officer, and the respondent has been employed as a doorman at a nightclub in Vancouver. I will return to the specifics of their current employment arrangements later in these reasons.
- [25] There is a litigation history between these parties, which it is helpful to set out as background to the current application.
- [26] The trial of this matter was heard by Madam Justice Fisher in May - June 2016, and she delivered her judgment on June 24, 2016, indexed as *Wong v. Rooney*, 2016 BCSC 1166. At trial, the respondent sought to move to Sechelt with E., where his parents then lived, while the claimant wanted E. to continue to live with her in Vancouver. In her judgment, Fisher J. noted that there was no dispute that both parties were capable and loving parents. She found that the respondent's proposed move to Sechelt was a relocation within the meaning of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. She declined to permit the respondent to move with E. to Sechelt, finding that he had not established that the relocation was in good faith and that it was not in E.'s best interests. She ordered the respondent to move out of the Vancouver residence.
- [27] The parties' joint guardianship of E. had been established in an earlier March 11, 2016 interim order, and Fisher J. confirmed those terms. She declined to order that the claimant should have final decision-making authority in the event the parties were unable to agree on a matter of importance regarding E. Instead, she held that:
- [70] I agree with Mr. Rooney on this. Considering the dynamics between this couple, my sense is that they need an even playing field for decision-making, when neither one of them "has the hammer". I am hopeful that once things have settled down after this judgment, they will be able to make joint decisions concerning E. in her best interests. If they do reach an impasse, either party may seek directions from the court under s. 49.
- [28] Given that it was at that point uncertain where the respondent would reside, Fisher J. declined to make a final order with respect to parenting arrangements, stating that "the best that I can do in these circumstances is to make an interim order for parenting arrangements that will give some structure to this family until Mr. Rooney has resettled in a new residence." She noted that the earlier interim orders appeared to have worked reasonably well, so she declined to make any substantial changes to them. She ordered that E. was to continue living in the Vancouver residence unless otherwise agreed to be the parties or ordered by the court. The respondent was to have parenting time on alternate Mondays from 11:30 a.m. to 6:30 p.m.; Tuesdays from 9:00 a.m. to Wednesdays at 8:00 p.m.; Fridays from 11:30 a.m. to 6:30 p.m.; and alternating Sundays (when he did not have the Monday) from 11:30 a.m. to 6:30 p.m. The claimant was to have parenting time at all other times. The parties were at liberty to apply for a final order respecting a shared parenting arrangement once the respondent had resettled, which she noted might include more overnight access for the respondent, depending on where he lived. She hoped the parties might be able to do

this by consent.

- [29] As noted above, the respondent moved into his mother's home in Langley following trial. The parties were unable to reach agreement on parenting arrangements, and they returned to court in April 2017, when Fisher J. made the final order respecting parenting arrangements (the "Fisher Final Order").
- [30] The schedule sought by the respondent at that time would have had the effect of changing E.'s principal residence during the week to his home in Langley, as he would have had E. from Tuesday at 11:00 a.m. to Friday at 8:30 p.m., and every other Sunday from 11:00 a.m. to 8:00 p.m. Fisher J. held that was too drastic a change, which would not be in E.'s best interests, given her connection to her mother's home, extended family and community in Vancouver. At the same time, she was not prepared to accept the claimant's proposed schedule, which failed to take into account the respondent's work schedule. She concluded it was best to build on the interim schedule, providing more parenting time to the respondent, while balancing the need to keep E. secure in her familiar home and community.
- [31] Justice Fisher built the parenting schedule around E's upcoming first year pre-school schedule at Brain Bridge, under which E. would attend preschool Monday to Friday each day from 9:15 a.m. to 11:45 a.m. It also took into account both parties' work schedules.
- [32] The Fisher Final Order provided that the respondent would have parenting time with E. alternating Mondays from 11:30 a.m. to 6:30 p.m., to coincide with the claimant's days of work. The respondent was also to have parenting time with E. Tuesdays from 11:30 or after preschool at 11:45 to Thursday at either 11:30 a.m. or 9:15 a.m. for preschool. On Tuesdays, the claimant was to drop E. off at the respondent's home at either 11:30 a.m. or after preschool. Finally, the respondent was to have parenting time every Friday from 11:30 a.m. to 6:30 p.m.
- [33] Madam Justice Fisher declined to set holiday schedules, stating:
- [17] With respect to holidays, I think it is too soon to set any schedules for spring and summer. This will have to be done at some point before E. goes to kindergarten, but I will say this. The parties should understand that there should be some equitable sharing of these longer breaks, and E. should be able to spend longer periods with each parent as she gets older. For these spring break/summer holidays, people are usually able to work them out in either shorter or longer spurts as is best for the child.
- [34] She made some other orders with respect to parenting on birthdays, Christmas, Easter, Halloween and the like.

- [35] In regards to E.'s passport, Fisher J. was not inclined to make any order about who should hold it, stating that if the claimant currently held it, she would leave it that way. She did make certain orders with respect to both parents providing each other with non-expiring travel authorizations for travel to Washington state; with five days notice of any short trips out of the province, and the passport being provided two days before short trips; and 14 days notice and the passport provided seven days before longer trips.
- [36] More broadly, Fisher J. expressed significant concerns about the parties' ability to work together as co-parents:
- [13] I certainly appreciate Mr. Rooney's concerns about Ms. Wong's decision-making. She must understand that she does not have sole-authority to make these decisions. However, I do not see any benefit to this family to leave decisions for them to discuss. From the evidence before me in the application, and in fact the evidence from trial, I am not confident that either party has shown any ability to consider the other's view about this.
- [14] Ms. Wong has some honestly held, very strong views about Bain-Bridge [sic] Preschool. Mr. Rooney has questioned all of those, but he does not seem to fight the battles he needs to fight. Sometimes couples need to appreciate which issue is the more important to one person than the other.
- [15] I have concerns about the tone and manner of Mr. Rooney's written communications about this. His long, detailed emails are very unhelpful. His recording of telephone conversations of third parties is, in my view, entirely inappropriate. His attitude creates a culture of distress and this attitude on his part must change if these parties are going to co-parent.
- [37] The parties returned to court a year later as a result of the respondent's application to vary the Fisher Final Order. In oral reasons delivered April 19, 2018, and indexed as Wong v. Rooney, 2018 BCSC 1201, Mr. Justice Mayer declined to vary the order. He recognized that both parties were caring parents who wanted to be with E. as much as possible, but he was concerned that E.'s needs and concerns were not being given appropriate consideration by them. At para. 5 he referred to "a presumption that maintaining the status quo is in the best interests of the child", which while not ironclad was a starting point, and at para. 11 emphasized that "final orders are final orders. They are intended to create some certainty for the families and for the children of the family."
- [38] Mr. Justice Mayer was not satisfied that there had been a material change in E.'s needs or circumstances as a result of the different preschool schedule she would have in her second year of preschool at Brain Bridge. He recognized that the new schedule, under which she would be attending preschool in the afternoons, would result in a reduction in E.'s time with the respondent. At para. 19 he said that "if this was a situation where there was a more significant change in terms of the amount of time E. could spend with her father, I may feel differently with respect to whether or not the materiality threshold was met", but that in this case, the evidence was unclear, and that the reduction in the respondent's parenting time would not be sufficient to prevent him from continuing to develop a strong bond with E.

- [39] Given his finding that there had not been a material change, Mayer J. held that it was not open to him to vary the Fisher Final Order. He did however direct the parties to have a discussion with respect to potentially agreeing to an adjustment of the current schedule consistent with an alternative argument that had been made on the claimant's behalf which would have increased the respondent's parenting time by having his time commence at 10:00 a.m. on Fridays and every second Monday, rather than 11:30 a.m. as set out in the order.
- [40] Mr. Justice Mayer also granted a declaration that the claimant could register E. at her local East Vancouver school for kindergarten starting in September 2019, but emphasized that he was not making an order that E. would attend that school. Rather, he set out a process for the parties to follow to discuss where E. would attend school for kindergarten in the hopes that they would be able to come to agreement on that issue, failing which they would need to return to court.
- [41] The parties were unable to reach agreement to adjust the parenting schedule in the manner discussed in Mayer J.'s judgment. Nor were they able to come to any agreement about where E. would attend kindergarten.
- [42] The parties again returned to court in December 2018 to address the respondent's application for a number of orders, including that E. attend an elementary school in Langley for kindergarten in September 2019, rather than the claimant's preferred school in East Vancouver, which is approximately one block from the claimant's home. Mr. Justice Affleck delivered oral reasons for judgment on December 6, 2018, in which he declined to order that E. attend school in Langley. He held that for E. to attend school in Langley would effectively change her place of residence to Langley, which he was not prepared to do.

Present Application

- [43] The present application was filed by the respondent on July 16, 2019. Originally scheduled to be heard on August 20, 2019, for a variety of reasons it was not heard until a year later, on August 20, 2020. At the request of the claimant, I heard further submissions as discussed above on September 11, 2020. In the one year period between the application being filed and ultimately heard, the parties were able to come to agreement on certain issues, resulting in a consent order entered December 18, 2019 (the "2019 Consent Order").
- [44] The 2019 Consent Order provides that:
1. the parties shall use their best efforts to communicate with each other in a respectful and fulsome way regarding the routine medical and dental appointments and school related matters for [E.] such that each party will be involved and each will have the reasonable opportunity to be involved in the scheduling of medical and dental appointments and other matters relating to schooling;

2. the order of the Honourable Madam Justice Fisher made April 19, 2017 is varied to add the following holiday and special times to paragraph 2 of that order:
 - a. the parties shall alternate the Professional Development Days from 9 a.m. to 8 p.m. in each of [E.'s] school years (September - June) ;
 - b. each year, with the Father on February 16 from 10 a.m. to 8 p.m.;
 - c. commencing in 2020, for spring break where spring break is defined as the period from the Friday that school gets out to the Sunday before school starts [with the claimant for one week, and the respondent for one week each year];
 3. the order of the Honourable Madam Justice Fisher made April 19, 2017 is varied to delete paragraph 2(g) and replace it with the following:
 - a. for Christmas, where the Christmas break is defined as the period from the Friday that school gets out to the day before school resumes [with the claimant for one week, and the respondent for one week each year];
 4. either party may enrol [E.] in an activity that falls solely within that party's parenting time at that party's sole cost;
 5. neither party shall enrol [E.] in any activity that falls within the other's parenting time without the other parent's prior written consent to the activity;
 6. if either party wishes the other to contribute to the cost of any activity for [E.], the party seeking contribution must obtain the other parent's prior written consent to the activity and to sharing the cost of the activity.
- [45] The parties are to be commended for having reached agreement on these matters. Issues surrounding E.'s medical appointments and activities have been significant irritants in the parties' relationship, and it is to be hoped that the terms of the 2019 Consent Order will have reduced the number of friction points between them. The parties have also been able to agree for E. to spend a week with each of them each Christmas and spring break, which is consistent with the hope expressed by Fisher J. in her April 19, 2017 judgment that the parties would be able to agree to an equitable sharing of the longer school breaks, with E. spending longer periods of time with each of them.
- [46] In light of the 2019 Consent Order, the following aspects of the respondent's application remain in issue for decision by the court:
1. an order varying the April 19, 2017 order so that the parties shall have shared parenting time with [E.] as follows (the "Regular Schedule") starting every year on the Friday before Labour Day and for the remainder of the school year as follows :
 - a. where [E.] will reside with the claimant

-
- i. every Wednesday at 10 a.m. to Sunday at 10 a.m. except for Fridays between 9 a.m. to 8 p.m.; and
 - ii. such other times as the parties may agree;
 - b. where [E.] will reside with the respondent
 - i. every week Sunday at 10 a.m. to Wednesday at 10 a.m.; and
 - ii. every Friday from 9 a.m. to 8 p.m.; and
 - iii. such other times as the parties may agree;
 2. an order varying the April 19, 2017 order, so that notwithstanding the Regular Schedule, the parties shall share [E.] for special and holiday times, and there will be no adjustment to the Regular Schedule to make up for any time lost as a result of these special and holiday times, as follows: .
 - h. commencing in 2020, during the school summer holidays, where the summer holidays will be defined to start on the Friday, that is after the last day of school, or on that Friday if it is the last day of school, until the Sunday before Labour Day,
 - i. with the Mother, alternating weeks from Friday at 6 p.m. to Friday at 6:00 p.m. commencing with the first Friday when school ends or after the end of school;
 - ii. with the Father, alternating weeks from Friday at 6:00 p.m. to Friday at 6 p.m., commencing with the second Friday after the end of school;
 - i. for Thanksgiving,
 - i. if the Father has [E.] on Thanksgiving Day as part of his regular parenting time, then the return time shall be extended to the next day drop off at school;
 - ii. if the Father does not have [E.] on Thanksgiving Day as part of his regular parenting time, then on the Sunday before Thanksgiving Day from 10:00 a.m. to Thanksgiving Day at 10:00 a.m.;
 3. an order varying the April 19, 2017 order so that, unless otherwise agreed to by the parties, the Father shall be responsible for transportation for [E.] for the above parenting time, except on Sundays or at the end of any special or holiday times for the Mother, when the Mother shall deliver [E.] to the Father's home at the specified times;
 4. an order varying the April 19, 2017 order so that
 - a. the Mother will give [E.'s] current passport to the respondent;
 - b. the parties will cooperate to obtain or renew [E.'s] passport and the Father will be responsible for applying to renew the passport from time to time, unless the parties otherwise agree in writing;
 - c. the Father will retain [E.'s] passport when not in use by either of the parties;

- d. the Father shall make available to the Mother for pick up, [E.'s] passport for any travel outside of British Columbia
- i. at least two (2) days prior to the travel if to Washington State for 24 hours or less; and
- ii. at least seven (7) days prior to travel outside of British Columbia for more than 24 hours;
- e. the Mother shall return the passport to the Father no later than 48 hours after her return to BC, or shall allow the Father to pick up the passport from her, if required by him;
- 5. costs against the claimant.

[47] The remaining parts of the orders sought by the respondent are either addressed in the 2019 Consent Order or merely reproduce earlier orders of the court, with a view to having all orders respecting parenting arrangements contained within a single order.

[48] The claimant opposes the orders which the respondent continues to seek. She says that the existing parenting schedule ought to continue in place. In the alternative, should the court find that a material change in circumstances has occurred, and that any changes ought to be made, the claimant proposes in respect of the Regular Schedule that:

- 1. the respondent will have parenting time from Wednesday at 3:00 p.m. to Friday at 8:00 p.m.;
- 2. the respondent will have further parenting time on alternating Sundays from 12:00 p.m. to 6:00 p.m.;
- 3. the claimant will have parenting time from Fridays at 8:00 p.m. until drop off at school Wednesday mornings at 9:00 a.m., except of the alternating Sunday afternoons.

[49] The claimant opposes the holiday relief sought by the respondent, but would in principle be prepared to agree to the parties each having one week of holiday time with E. in August. In respect of Thanksgiving, the claimant does not oppose the respondent having E. with him until 8:00 on whichever alternating Sunday or Monday he has her, in order to permit her to have a Thanksgiving dinner with his family. The claimant opposes the respondent's proposal with respect to transporting E., as it is predicated on his proposed parenting schedule. If the court orders any change in the parenting schedule, then the claimant proposes that the respondent be solely responsible for driving E. The claimant further opposes the orders sought by respondent with respect to E.'s passport.

Legal Framework

[50] Section 47 of the FLA provides:

On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

- [51] In *Williamson v. Williamson*, 2016 BCCA 87, the Court of Appeal adopted the test established by the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 in determining whether there has been a material change in circumstances under s. 47:
- [31] Although this Court has yet to consider s. 47 of the FLA, the Supreme Court has consistently interpreted this provision as requiring a material change in circumstances: see for example, *Gilmour v. Herrick*, 2013 BCSC 1591 at para. 13; *Bradley v. Bradley*, 2015 BCSC 1587 at paras. 21-23; and, *J.D.C. v. K.L.M.F.C.*, 2014 BCSC 2182 at paras. 261-262. Given the reasoning of this Court in *Boychuck and M. v. M.*, and the similarities between s. 47 of the FLA and s. 20 of the FRA, I conclude that a material change in circumstances is required under s. 47 of the FLA.
- [32] The first step in the analysis set out in *Gordon v. Goertz* is to "determine whether there has been a material change in circumstances since the making of the prior order": *Boychuck* at para. 14. The Court in *Gordon* explained what is necessary to establish a material change in circumstances:
- [11] 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....
- [12] 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. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.
- [Emphasis in original.]
- [33] At para. 13, the Court summarized what the applicant must establish before proceeding on the merits of the application:
- [13] 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.
- [34] Absent a material change in the needs or circumstances of the child, the inquiry can go no further. It is only after this threshold is met that the judge on the new application can embark on a fresh inquiry into the best interest of the children.
- [52] In *Dedes v. Dedes*, 2015 BCCA 194, the Court of Appeal reviewed the law, and stated:

[22] In *L.M.P. v. L.S.*, 2011 SCC 64, the Supreme Court again examined the test for variation. The Court held that "what amounts to a material change will depend on the actual circumstances of the parties at the time of the order" (para. 34).

[23] Madam Justice Smith synthesized this decision in *Powell v. Levesque*, 2014 BCCA 33, and said, at paras. 23–27:

In *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, a decision that was rendered after the decision under appeal, the Supreme Court of Canada reiterated the two-fold test for variation of a support order under the Divorce Act, R.S.C. 1985, c. 3 (2d Supp.) from *Willick v. Willick*, [1994] 3 S.C.R. 670 (for child support orders) and *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370, (for spousal support orders). The Court stated:

[31] Willick described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.

[32] That "change of circumstances", the majority of the Court concluded in *Willick*, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). *G.(L.)* confirmed that this threshold also applied to spousal support variations.

The Court added that whether a material change of circumstances has been demonstrated will depend on the actual circumstances of the parties at the time of the order (para. 34) and in general will require some degree of continuity, not merely a temporary set of circumstances (para. 35). [Emphasis original].

The Court further confirmed that the threshold test for variation is the same whether or not the previous support order incorporated provisions from an agreement between the parties. It reiterated (at para. 36) that the question remains: "Has a material change of circumstances occurred since the making of the order? (See *Willick*; *G.(L.)*; *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920.)"

The circumstances in *L.M.P.* involved an application to vary a spousal support order pursuant to s. 17(1)(a) of the Divorce Act. The issue was whether the separation agreement executed by the parties before the divorce proceedings was a factor to be considered in determining the former husband's application to vary the initial spousal support order. The majority concluded that it was not because s. 17(4.1) did not include "agreement" in the list of factors to consider in determining if the threshold test of a material change in circumstances had been established.

The Court distinguished the test for variation in s. 17(4.1), which refers only to whether a "change in the condition, means, needs or other circumstances of either former spouse has occurred", from the test for an initial order in s. 15.2(4), which requires the court to consider "any order,

agreement or arrangement relating to support of either spouse". If an agreement specifies or defines what type of change will or will not give rise to variation, courts should attempt to give effect to the parties' intention where those provisions are incorporated into the initial or previous order, as those provisions are presumed to have met the objectives for spousal support in s. 15.2(6) (paras. 33, 38-39). The Court further clarified:

- [39] Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order. The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances. [Emphasis added in Powell.]
- [24] The focus of the chambers judge was on whether Ms. Daniel knew or reasonably foresaw that she would marry Mr. Daniel and move to Ontario. This, however, is not the question to be asked. The questions are: was the proposed move of the children to Ontario a change in circumstances that was actually contemplated at the time the agreement was entered into, and if not, is it in the best interests of the children to move to Ontario?
- [25] As articulated in L.M.P., the test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered by agreement. A function of the material change threshold is to prevent parties from re-litigating issues that were already considered and rejected; in such cases, an application to vary would amount to an appeal of the original order (see Gordon at para. 15). As was stated by L'Heureux-Dube J. in Willick at p. 734, "the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions". See also G. (L.) v. B. (G.), [1995] 3 S.C.R. 370 at paras. 49–51 and Jakob v. Jakob, 2010 BCCA 136 at para. 40.
- [Emphasis added.]
- [53] In T.L.M. v. J.K.B., 2018 BCSC 2237. Mr. Justice Weatherill referred to para. 25 from Dedes and stated:
- [42] I take this to mean that the test is: firstly, based on what was actually contemplated at the time of the Savage Order (as opposed to what the parties knew or ought to have known); and secondly, that this court should have a flexible standard in considering whether a material change has indeed occurred.
- [43] While the mere passage of time and the maturity of a child is not in and of itself proof of material change, it is one of the factors the court can look at in the overall assessment of the circumstances. The needs of the child changing over time as he or she matures can be a material change (Gray v. Wiegers, 2008 SKCA 7 at para. 25; Legien v. Legien, 2012 SKQB 326 at para. 65).

[Emphasis added.]

[54] In *McKenzie v. Perestrelo*, 2016 BCSC 1215, Madam Justice Harris found that a child's pending enrollment in school, taken together with a parent's change in work schedule, constituted a material change in circumstances.

[55] If the court finds that there has been a material change in circumstances, then the court can embark on a fresh inquiry into what is in the best interests of the child: *Williamson* at para. 34.

[56] If the material change threshold is reached, the court's sole consideration must be the best interests of the child, as set out in s. 37 of the FLA:

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

Issues

- [57] The first issue I must decide is whether there has been a material change in circumstances. If that threshold is met, then I must go on to consider the second issue, which is what changes, if any, to the parties' parenting schedule would be in E.'s best interests.

Discussion

Has there been a material change in circumstances?

- [58] The first question I must decide is whether there has been a material change in circumstances since Fisher J. made her final order in April 2017.
- [59] E. was born on February 15, 2014. When the parties separated in 2015, she was just over 18 months old. When the respondent moved out in August 2016, she was 2 ½ years old. She was just over three when the final order was made in April 2017. Almost three-and-a-half years have passed since the final order was made. E. is now 6 ½ years old.
- [60] At the time the final order was made, E. was going to be starting preschool in the fall. The final order was crafted by Fisher J. around E.'s preschool schedule (under which she was to attend preschool in the mornings from 9:15 a.m. to 11:45 a.m.), and the parties' then work schedules.
- [61] When E. entered her second year of preschool in September 2018, the parenting schedule no longer meshed with her preschool schedule, as she was attending preschool in the afternoons from 12:30 p.m. to 3:30 p.m. This meant that the respondent had less effective parenting time with E. on Tuesdays, Wednesdays and Fridays, as three hours of his scheduled parenting time was now taken up by afternoon preschool classes.
- [62] In September of 2019, E. started full-time kindergarten. It was in anticipation of that change that this application was filed in July 2019. She is entering first grade in September 2020.
- [63] When Fisher J. made the final order in April 2017, she was clearly alive to the fact that E. was just over three years old, and her parenting schedule would need to change as she became older. At para. 17, she stated "respect to holidays, I think it is too soon to set any schedules for spring and summer. This will have to be done at some point before E. goes to kindergarten .".
- [64] E.'s young age was also foremost in Fisher J.'s mind in thinking about Christmas schedules, saying at para. 29, "Christmas will also be alternating years. I do agree that while E. is this young it should be split between December 24 and December 25".
- [65] While Fisher J. clearly hoped that, with the passage of time, the parties would be able to cooperate and agree to the changes that would be needed as E. got older, there is no doubt that she was fully aware that, one way or another, changes to the schedule would need to be made in time.

- [66] The judgment of Mayer J. a year later in April 2018 is also instructive. Mr. Justice Mayer declined to make any changes to the parenting schedule at that time, holding at para. 17 that he was not "fully satisfied that there has been a material change in the needs or circumstances of [E.]." But, like Fisher J. the year before, he recognized that material changes would occur with time, and that alterations to the parenting schedule would need to be made as E. gets older. He stated at para. 19 that "if there was a situation where there was a more significant change in terms of the amount of time that [E.] could spend with her father, I may feel differently with respect to whether the materiality threshold was met." He further directed the parties to discuss the possibility of amending the parenting schedule to give the respondent more parenting time on Friday and Monday mornings before preschool. Unfortunately, the parties were unable to agree to making such a change.
- [67] Now, with E. entering the second year of full-time elementary school, the parenting schedule ordered by Fisher J. when she was about to enter the first year of preschool makes very little sense. Parenting times that begin at 11:30 a.m. or immediately after a morning preschool session do not translate to a school schedule where E. is in school roughly from 9:00 a.m. to 3:00 p.m. daily.
- [68] Further, the parties' work schedules have changed since the final order was made. In the past, the respondent worked as a doorman Friday and Saturday nights from 9:30 p.m., and Monday nights from 11:30 p.m., to 3:30 a.m. He also worked some Thursday and Sunday nights. His work has been significantly impacted by the COVID-19 pandemic. He was laid off on March 15, 2020, and as of July 10, 2020, he had been recalled to work Fridays and Saturdays from 10:00 p.m. to 3:00 a.m.
- [69] For her part, the claimant was working full-time with every other Monday off when the trial was heard, but she was planning to start working part-time, Mondays, Wednesdays and Fridays, with every other Monday off. When E. started kindergarten in September 2019, the claimant returned to full time work, working Monday to Friday 7:00 a.m. to 3:00 p.m., with alternating Mondays off. In December 2019, the claimant's work schedule changed to include two days working from home per week, and she has some flexibility as to her hours and can choose which days she works from home. Since the pandemic started, she has been working from home all the time, with only limited exceptions. She states that her employer is now talking about the possibility of making this working from home arrangement permanent.
- [70] In *Willick v. Willick*, [1994] 3 S.C.R. 670, referred to above by the Court of Appeal in *Dedes*, Madame Justice L'Heureux-Dube stated that "the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion". Following *T.L.M.*, I am persuaded that this Court should have a flexible standard in considering whether a material change has occurred, particularly in circumstances where the original final order was made when the child was very young, and had not yet started school. The needs of E. have changed with her entry into full-time elementary school, and her parents' practical capacity to meet her needs have changed with the changes in their respective work

schedules. While each case must be decided on its own facts, I conclude that, as in McKenzie, this is a case in which the child's enrollment in full-time elementary school, taken together with the changes in the parties' work schedules, and especially the claimant's return to full-time employment, meet the materiality threshold.

[71] There has been a material change in E.'s circumstances within the meaning of s. 47 of the FLA.

Should the parenting schedules be altered?

[72] Having determined that there has been a material change in circumstances I must now determine what, if any, changes to the parenting schedules are appropriate. In making this determination, s. 37(1) of the FLA provides that my sole consideration should be the best interests of the child.

[73] I will structure my analysis around the criteria which s. 37(2) of the FLA sets out must be considered.

[74] In terms of E.'s health and emotional well-being, the evidence before me, as well as the judgments of the previous judges who have considered this family's circumstances, make clear that she is loved by both of her parents, and that both of her parents are capable of meeting her health and emotional needs.

[75] I have been concerned by evidence in both parties' affidavits about conflicts around the scheduling of medical and dental appointments, as well as the events of a distressing visit to Children's Hospital in June 2018. It is to be hoped that the terms of the 2019 Consent Order agreed to by the parties in December 2019 addressing these issues have been and will continue to be of assistance in avoiding a repetition of these issues. It is essential for both parents to keep in mind that focussing on "whose parenting time" any given medical appointment may fall on is, at best, irrelevant to E.'s best interests, and may in fact be damaging to her.

[76] I also noted allegations, all denied, that one or the other parent had "interrogated" E. about her time with the other parent. Such questioning would obviously be contrary to E.'s emotional well-being, and must be avoided.

[77] In terms of E.'s views, I have already stated that in light of her young age, I place little weight on anything either parent has reported about her views. I accept that she loves both of her parents, misses them when she is not with them, and would likely like to have more time with both of them. That last factor is important, as it suggests that parenting schedules should to the extent possible maximize E.'s actual time with her parents.

- [78] Turning to the nature and strength of E.'s relationship with significant people in her life, it is clear on the evidence that E. enjoys close and abiding relationships with both her paternal and maternal extended families. Both of her grandmothers provide care for her, and she is close to her cousins on her mother's side who live in the same house as E. and her mother. It is important that any parenting arrangement ensures the continuity of all of those relationships.
- [79] Given E.'s young age, I place less weight on her friendships with her peers. I accept that most of E.'s friends likely live in East Vancouver, in the catchment area for her school. However, as noted by Mr. Justice Ball in *D.R.K. v. S.G.G.*, 2017 BCSC 1635, in relation to a child who was approximately seven years old, children of E.'s age are in a stage of life where new relationships are formed relatively quickly.
- [80] I consider together the history of E.'s care and her need for stability. E. has had the benefit of the shared care of both her parents throughout her life. The April 2017 Fisher Final Order maintained a shared parenting regime, and it is obvious that a shared parenting regime should continue in place. E. is getting older, and as predicted by Fisher J., she has started to have longer periods of time at Christmas and Spring breaks with both of her parents. This should also occur over the summer holidays.
- [81] E. would also benefit from a parenting schedule that provides stability and predictability so that she can regularly attend her extracurricular activities such as sports, dance, and Sparks, on their scheduled days.
- [82] I am concerned about the length of the commute between the parties' residences. The parties' evidence about how long the drive between their homes differed. The respondent says that drive normally takes him 40-45 minutes, while the claimant says that it takes her about one hour and 25 minutes in rush hour traffic. On either party's estimate, that is a long time for a child to sit in a car. This is particularly problematic in relation to the respondent's Friday parenting time. He picks up E. from school and drives to his home in Langley before turning around to take her back to the claimant's home. On the current parenting schedule (and given that E. is now in full-time school), that means he picks her up at about 3:00 p.m. and has to have her back to the claimant's home by 6:30 p.m., meaning that much if not most of that parenting time is spent in a car.
- [83] As Ball J. said in *D.R.K.*, for a child, walking to school is clearly preferable to driving to a school that is 25 or 30 minutes away. While I must balance all other factors, a parenting schedule which minimizes to the extent possible the time spent commuting will be in E.'s best interests.
- [84] That said, I fully appreciate the reasons why each of the parties have chosen to reside where they have, in homes owned by their parents, and the benefits to E. of doing so, despite the length of the commute between them. I am confident that each party is able to provide E. with a nicer home by living in their current residences than they would be able to provide were they to rent suites on the open market in the Lower Mainland. Further, by living in the

homes owned by their respective parents, they are able to maintain E.'s relationships with her extended families on both sides, which is definitely in E.'s best interests.

- [85] It is clear on the evidence that both parties are able to exercise their parenting responsibilities. While they each have complaints about the other's behaviour, they also both recognize the other parent's ability to care for E.
- [86] There are no issues of family violence, so I need not consider this factor.
- [87] In terms of the ability of the parties to cooperate, the evidence before me is replete with instances of poor communication on both parties' parts. Any ambiguity in the court's previous orders has been seized on and given rise to needless conflict. While I am heartened by the fact the parties were able to negotiate the terms of the 2019 Consent Order, I am of the view that it is in E.'s best interests to ensure that the parenting arrangements are as clear as possible. The current schedule, predicated as it is on E.'s first year preschool schedule, is simply not applicable to her current circumstances, and needs to be amended.
- [88] Finally, there are no relevant civil or criminal proceedings.
- [89] Having considered the s. 37 factors, I turn to a consideration of the parties' positions on the amended Regular Schedule. In brief, the respondent's proposed schedule would have E. reside with the claimant every Wednesday at 10:00 a.m. to Sunday at 10:00 a.m. except for Fridays between 9:00 a.m. to 8:00 p.m., and with the respondent every Sunday at 10:00 a.m. to Wednesday at 10:00 a.m., and every Friday from 9:00 a.m. to 8:00 p.m. The claimant counters with a proposed schedule under which E. would reside with the respondent every Wednesday from 3:00 p.m. to Friday at 8:00 p.m., and alternating Sundays from 12:00 p.m. to 6:00 p.m., and with the claimant from Fridays at 8:00 p.m. until school drop off on Wednesday morning at 9:00 a.m., and alternating Sunday afternoons.
- [90] In reply, in response to a question from me questioning the Friday parenting time, counsel for the respondent made an alternative proposal that instead of alternating Sundays, he would have E. with him every Sunday from 10:00 a.m. to Monday at school drop off. The claimant objected to this alternative in her sur-reply submissions, on the basis that it was important for E. to be able to attend ballet and spend time with her maternal extended family on Sundays.
- [91] Having considered the parties' positions, and the entirety of the evidence, I have concluded that the preferable schedule is essentially that initially proposed by the respondent, except for the Friday parenting time. This means that, unless otherwise agreed to by the parties, during the Regular Schedule E. will reside with the claimant every Wednesday from school drop off time to Sunday at 10:00 a.m., and with the respondent every Sunday at 10:00 a.m. to Wednesday at school drop off time.

- [92] Under this schedule, E. will have three overnights with the respondent every week, one more than she currently has, and Sunday every weekend. She will have four overnights with the claimant, and Saturday every weekend.
- [93] Under this schedule, the respondent will not have any parenting time on Fridays. While I recognize that he has historically had parenting time with E. on Fridays, the current schedule, under which much if not most of that time is spent in a car, is not in E.'s best interests. I appreciate that he has proposed that the end of his Friday parenting time be extended from its current 6:30 p.m. to 8:00 p.m., which would mean that a shorter proportion of the Friday parenting time would be spent in a car. Even with that proposed extension, however, the amount of driving time would still be disproportionate to the total amount of parenting time, and not in E.'s best interests. It will be better for E. to extend other periods of time with the respondent, in lieu of the Friday parenting time.
- [94] In terms of commuting between East Vancouver and Langley, it is clear to me that, for a variety of reasons, it is in E.'s best interests for the respondent to have responsibility for the majority of the commuting. Therefore, unless otherwise agreed to by the parties, the respondent shall be responsible for transporting E. for all parenting times, except on Sundays or at the end of any special or holiday times for the claimant, in which case the claimant will be responsible for delivering E. to the respondent's home at the specified times. This means that the respondent will drive E. to school in East Vancouver three mornings each week, and home to Langley two afternoons each week. While this is still a lot of commuting time for E., the schedule I have ordered will eliminate the Friday commute between East Vancouver and Langley and back.
- [95] On the respondent's current work schedule, he will not be responsible for transporting E. any morning after he was worked until 3:00 or 3:30 a.m. If he regains his Monday shift, then he would be responsible for transporting E. to school Tuesday morning after such as shift. However, I accept his evidence, uncontradicted by the claimant despite her stated concerns, that he has and would be able to safely do so.
- [96] I appreciate that this schedule will mean that E. cannot attend the Sunday morning dance classes at the East Vancouver community centre. While I do not discount the importance of such extracurricular activities, the fact is that there are other dance classes in the Lower Mainland. In terms of non-school time with the claimant, E will still have Saturdays with her mother, and will have the added time on Friday after school and evening. This should provide ample opportunity for E. to enjoy time with her maternal extended family.
- [97] In setting this schedule, I have also taken into account the claimant's evidence that she has some flexibility in terms of her hours of work and is able to choose which days she works at home, even if she ceases to work entirely from home. This means that she can arrange her schedule so as to optimize her parenting time with E. on Wednesdays, Thursdays and Fridays.

- [98] In light of this Regular Parenting schedule, it is unnecessary to make the order sought by the respondent regarding Thanksgiving as he will have E. with him on Sundays and Mondays. While I heard no submissions on this point, I would be prepared to order a variation of the Regular Parenting schedule in the claimant's favour in order to ensure that she and her family are also able to enjoy Thanksgiving dinner with E. There are a number of ways that could be arranged, and I will leave it to the parties to discuss and agree on a mutually acceptable arrangement, failing which they have leave to come back before me to fix the Thanksgiving special schedule.
- [99] I turn to a consideration of the respondent's application for E. to have alternating weeks with both parents during the school summer holidays. The claimant opposes this part of the application, although she would be prepared to agree to E. having one week with each parent in August.
- [100] In keeping with the comments of Fisher J. in her judgment declaring the final order, I am of the view that it is in E.'s best interests for her, subject to the parties' contrary agreement, to spend alternating weeks with her parents throughout the school summer holidays. E. is getting older, and she has already begun spending alternating weeks with her parents at Christmas and Spring break, without any evidence of any difficulties arising as a result. One week intervals over the summer will enable E. to enjoy extended periods of time with her parents and extended families, and for her families to make vacation plans with her.
- [101] The only remaining matter to be determined is the respondent's application to vary the Fisher Final Order with respect to E.'s passport, which is opposed by the claimant. Under the terms of that order, the claimant holds E.'s passport, and is to "provide" the respondent with E.'s passport for any travel outside of British Columbia.
- [102] There have been ongoing issues between the parties with respect to E.'s passport, with the respondent complaining that the claimant refuses to provide him with E.'s passport when he provides her notice as set out in the order, and the claimant complaining that the respondent requests the passport when he does not in fact intend to travel with E. and that he wrongly insists on her delivering the passport to his home rather than picking it up from her home. More generally, the claimant says that there is no need for the passport for E. to travel with the respondent to Washington State.
- [103] The evidence makes clear that E.'s passport, and compliance with the Fisher Final Order in respect of it, has been an irritant for both parties. There is no evidence, however, that the respondent has been prevented from taking E. to Washington State at any time as a result of those irritations.

[104] Despite the fact that there is no evidence that E. has suffered any direct harm as a result of the ongoing passport issues, it is in E.'s best interests to attempt to minimize any unnecessary triggers for dispute between the parties. The passport does not belong to either party; it is held by them for the benefit of E., and should be treated consistently with that fact.

[105] I accept that it may not be strictly necessary for a child of E.'s age to travel with a passport when going to the United States by a land-crossing with a parent, but it is understandable that anyone travelling across the border with a minor would strongly prefer that the minor travel with a passport.

[106] With those considerations in mind, I make the following orders with respect to E.'s passport. In order to ensure clarity, I have incorporated the aspects of the Fisher Final Order relating to E.'s travel and passport that remain unchanged:

1. The respondent and the claimant will each provide the other with a non-expiring notarized travel authorization to allow each party to travel with E. to Washington State for up to 24 hours;
2. The respondent and the claimant shall each provide the other with:
 - a. At least five (5) days prior notice of their intention to travel with E. to Washington State for 24 hours or less; and
 - b. At least 14 (14) days notice of their intention to travel with E. outside British Columbia for more than 24 hours;
3. At the start of each parenting time in the Regular Schedule, the party who is responsible for transporting E. will bring E.'s passport with them, and:
 - a. In the case of the claimant, she will bring the passport with her when she drops E. off at the respondent's residence on Sunday at 10:00 a.m. and give it to the respondent or in his absence an adult member of the respondent's family;
 - b. In the case of the respondent, he will bring the passport with him when he drops E. off before school on Wednesday morning, and will deliver the passport to the claimant's residence, where he will give it to the claimant, or in her absence an adult member of the claimant's family, or in their absence, the respondent and claimant will discuss and agree in writing on another secure place or person for the respondent to leave the passport; or
 - c. Comply with such other arrangements for the delivery of the passport as the parties may agree;
4. At the start of each one week parenting time during the Christmas, Spring and Summer school breaks, the party responsible for transporting E. to the other party's residence will bring E.'s passport with them and deliver it to the other party;

5. If either party wishes to travel outside of British Columbia with E. at any time not specifically addressed in this order, they are to give notice as required, and the other party is required to deliver the passport to the party who intends to travel in a time and manner to be agreed to in writing between them; and
 6. The parties will cooperate as may be necessary to obtain or renew E.'s passport, and the claimant will be responsible for applying to renew E.'s passport from time to time, unless the parties otherwise agree in writing.
- [107] As I trust I have made clear, the intention behind these orders is for the parent who has parenting time with E. to hold the passport during that time. I have not included within that general scheme special times such as Easter or Thanksgiving, leaving it to the parties to sort out those details as necessary. The fact that each party will, as a result of these orders, generally have E.'s passport in their possession when they have parenting time with E., does not eliminate their mutual obligation to provide notice to the other party of their intention to travel with E. as set out above. To be clear, such notification needs to be specific. It is not appropriate for the respondent to provide general notice of an intention to travel, regardless of whether he has any specific intention to do so. Both parties are entitled to know when E. will in fact be travelling with the other party outside of British Columbia.

Summary

[108] In summary, the following are my orders:

1. The April 19, 2017 order is varied so that the parties shall have shared parenting time with E. as follows (the "Regular Schedule"), starting every year on the Friday before Labour Day and for the remainder of the school year as follow:
 - a. where E. will reside with the claimant
 - i. every Wednesday at 10 a.m. to Sunday at 10 a.m.; and
 - ii. such other times as the parties may agree;
 - b. where E. will reside with the respondent
 - i. every week Sunday at 10 a.m. to Wednesday at 10 a.m.; and
 - ii. such other times as the parties may agree.
2. The April 19, 2017 order is varied, so that notwithstanding the Regular Schedule, the parties shall share E. for special and holiday times, and there will be no adjustment to the Regular Schedule to make up for any time lost as a result of these special and holiday times, as follows:
 - a. commencing in 2021, during the school summer holidays, where the summer holidays will be defined to start on the Friday that is after the last day of school, or on that Friday if it is the last day of school, until the Sunday before Labour Day,

- i. with the claimant, alternating weeks from Friday at 6 p.m. to Friday at 6:00 p.m., commencing with the first Friday when school ends or after the end of school;
- ii. with the respondent, alternating weeks from Friday at 6:00 p.m. to Friday at 6 p.m., commencing with the second Friday after the end of school;
3. The April 19, 2017 order is varied with respect to E.'s passport as set out above;
4. The parties have leave to appear before me if they cannot reach agreement on the Thanksgiving schedule; and
5. As the respondent has been substantially successful, he shall have his costs.

"Lyster J."

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