
CANADA / JUDGMENT

Y.A. v. M.N.

2019 BCSC 2107

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 2107 Y.A. v. M.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Y.A. v. M.N.,

2019 BCSC 2107

Date: 20191206

Docket: E091589

Registry: Vancouver

Y.A.

Claimant

And

M.J.M.N.

also known as M.J.N.

Respondent

Before: The Honourable Madam Justice Sharma

(In Chambers)

Reasons for Judgment

Counsel for Claimant:

C. Ashclarke

Counsel for Respondent:

F.C. Lowther

Place and Date of Hearing:

Vancouver, B.C.

June 24 & 25, 2019

July 2 & 3, 2019

Place and Date of Judgment:

Vancouver, B.C.

December 6, 2019

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I. INTRODUCTION

- [1] This judgment addresses two applications in this family law action, one brought by each party. The parties are former common-law spouses who began living together about May 2001, and separated December 28, 2008. They have one child, a daughter, born July 3, 2006 ("Y.N."). Since separation, the child's primary caregiver for the majority of time has been the claimant.
- [2] The respondent married his current spouse in 2013. At the time he filed his application they had one young child, but by the time of the hearing, they had two young children together.
- [3] The parties agreed to joint custody and guardianship of their daughter at a judicial case conference ("JCC") held October 2009 (the "2009 Order"). Both parties were represented by counsel. Clause 1 of the 2009 Order stated: "The parties shall share joint custody of [Y.N.] and the primary residence of [Y.N.] shall be with the [claimant]."
- [4] The 2009 Order also confirmed the parenting schedule the parties had been following for some time. As set out in clause 3 of the 2009 Order, the respondent's parenting time was to include at least Monday and Wednesday from 5:30 p.m. to 7:00 a.m., overnight to the following morning, and 10:00 a.m. to 9:00 p.m. every Sunday. At the time, his work schedule required the early exchanges during the week. I refer to this as the "2009 Parenting Schedule".
- [5] In addition, the parties agreed the respondent would pay \$613 a month in child support starting November 2009 based on the respondent's guideline income being \$65,523 (clause 12 of the 2009 Order). The parties further agreed, pursuant to clause 14 of the 2009 Order, to exchange copies of their personal income tax returns and all other necessary and supporting documentation for the previous calendar year by June 1 of each year. The amount of child support payable was to be adjusted to reflect any changes in the income of either or both parties.
- [6] In November 2014, the claimant sought payment of s. 7 special and extraordinary expenses. She had collected child support through the Family Maintenance Enforcement Program ("FMEP"), but was aware the respondent wanted to reduce his child support payments. I infer she wanted to fix the amount of his arrears of expenses at that point.
- [7] They attended another JCC on November 10, 2014. Neither party was represented by counsel. They consented to a variation of the first clause of the 2009 Order so that it would read: "The parties shall share joint custody of [Y.N.] with the residence of [Y.N.] shared between the residence of the Claimant and the Respondent equally as set out in [clause 3] of the [2009 Order]" (the "2014 Order"). However, no changes were made to clause 3 of the 2009 Order.
- [8] The parties followed the 2009 Parenting Schedule until February 2016, when they agreed to minor variations because the respondent's work schedule changed and he was able to drop the child off directly at school on his mornings (rather than at 7 a.m. at the claimant's

home). Under the revised schedule the respondent had parenting time Monday 4:30 p.m. (overnight) to Tuesday before school; Wednesday 4:30 p.m. (overnight) to Thursday before school and Sunday, 9:00 a.m. to 9:00 p.m. I refer to this as the "2016 Parenting Schedule". This schedule remained in place until September 2018. At that point, Y.N. no longer attended after school care so the respondent picked her up directly after school on his days at 3:00 p.m. Also, starting June 16, 2019, the claimant agreed the child would stay overnight with the respondent on Sunday.

- [9] Thus, the current schedule is the respondent has Y.N. on Sunday from 9 a.m. to before school Tuesday, and Wednesday from 3:00 p.m. overnight to before school on Thursday (the "2019 Parenting Schedule").
- [10] In her application filed September 26, 2017, the claimant seeks orders to do the following:
- a) vary or set aside the parenting arrangements as stipulated in the 2009 Order and the 2014 Order;
 - b) impute income to the respondent;
 - c) vary clause 12 of the 2009 Order (which sets out child support payments);
 - d) receive payment of retroactive child support and both retroactive and prospective s. 7 special and extraordinary expenses;
 - e) compel production of documents from the respondent, specifically a filed financial statement, his most recent record of employment, copies of bank statements and credit cards statements, copies of any loan or mortgage applications, a copy of his resume and any employment applications, and documentation previously requested for additional parenting time.
- [11] The respondent did not file a response to the claimant's application until November 14, 2017. He opposes all relief sought. He also filed an application on November 21, 2017, and seeks a number of orders which I have summarized as follows:
- a) An order pursuant to ss. 45 and 47 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], "particularizing and specifying the equal time parenting arrangements that shall take place". Specifically, the respondent's parenting time will be as follows:
 - i. Sunday at 9:00 a.m. until drop-off at school Tuesday at 9:00 a.m. (two overnights);
 - ii. Wednesday at 3:00 p.m. until drop-off at school Thursday at 9:00 a.m. (one overnight);
 - iii. Fridays to alternate between the respondent picking up Y.N. after school (or if there is no school, earlier in that day) on week one and dropping her off at "Japanese school" Saturday morning. In week two, Y.N. would remain with the claimant and the respondent would pick her up Sunday morning as indicated in i. above (so no pick up on Friday);

- b) Canceling clauses 2, 4 and 12 of the 2009 Order (relating to parenting responsibilities, claimant's entitlement to child support and retroactive s. 7 expenses respectively);
- c) Reiterating the parents are joint guardians, but shall share equally all parental responsibilities as set out in s. 41 of the FLA and in the case of disagreement, either party can apply to court to resolve the matter;
- d) Prohibiting and restraining the claimant from speaking with Y.N. about matters at issue in these proceedings, as stipulated in his notice of application at paragraphs 6(a) to (j);
- e) Order pursuant to s. 152 of the FLA to determine guideline incomes for 2016 and 2017 for child support.

[12] Unfortunately, the volume and often poor quality of some of the affidavit material added unnecessary time and complexity to this matter. What is particularly frustrating to the court is the affidavit evidence designed to portray the other party as a "bad parent" in a case where neither party takes the position that Y.N. should not have any time with the other party. Neither seeks sole custody. Both parties wanted to persuade me that their proposed schedule for parenting time was in the child's best interests. Yet, the difference between the two schedules is relatively minor. The difference appears to focus on disagreement about whether the respondent can have Y.N. overnight one more day per week. In that light, large amounts of the evidence adduced had limited, if any relevance, and of the evidence that had limited relevance, almost none was helpful.

[13] There has been a lengthy delay between the filing of the applications and the hearing. The primary driver of this delay was out of the parties' control. A s. 211 report was initially ordered on December 19, 2017. The author of the report was confirmed by a February 27, 2018 court order. However, it took almost a full year for the author to complete the report. This is disconcerting.

[14] The author was retained in March 2018, completed interviews by June 2018, but did not complete his report until March 6, 2019 (the "211 Report"). Accordingly, there is a live issue as to the weight I should attach to the 211 Report at this point because the conclusions are based on information gathered over a year ago.

[15] At the start of the hearing, the respondent also raised some preliminary objections and sought an adjournment of all or part of the issues in the applications. I denied those objections and the adjournment. The applications were set for two days, but it took three and a half days to complete the hearing.

II. ISSUES

[16] The following issues will address all topics raised in the two applications:

- a) Has there been a material change in circumstances?

- b) If so, what parenting schedule and allocation of parenting responsibilities is in the best interests of the child?
- c) How much child support should be paid?
- d) Is there any retroactive child support, s. 7 expenses or special expenses owed by either party?
- e) Should any conduct orders be granted in this case?

III. MATERIAL CHANGE IN CIRCUMSTANCES

- [17] The test for varying an order respecting parenting arrangements is that the court must be satisfied "there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person" since the initial order was made: FLA, s. 47.
- [18] In other words, the first step is to consider whether there has been a material change in the needs or circumstance of the child: Williamson v. Williamson, 2016 BCCA 87 at paras. 29-34. Citing Gordon v. Goertz, [1996] 2 S.C.R. 27, among others in those paragraphs, the Court of Appeal in Williamson explained that to justify variance of an order, the asserted change must have altered either the child's needs or a parent's ability to meet those needs in a fundamental way. At para. 33, the Court of Appeal adopts the material change in the circumstances test from Gordon. Before proceeding to consider whether to vary the initial order based on the best interests of the child, the applicant must establish:
- (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.

(Gordon at para. 13.)

- [19] The test for material change is based on what the parties actually contemplated at the time of the initial order, rather than what was known or could have been reasonably foreseen: Khangura v. Rogalski, 2017 BCSC 1753 at para. 31, citing Dedes v. Dedes, 2015 BCCA 194 at paras. 24-26. In Khangura, the order in question granted the claimant broad discretion and final decision making authority. Madam Justice Fleming, at para. 70, considered the claimant's flawed decision making, and concluded such decision making was not contemplated at the time of the initial order. As a result, it was a material change in circumstances.
- [20] In S.E.D. v. B.J.D., 2018 BCSC 1770 at paras. 43-44, Madam Justice Loo concluded a change in work schedule was a material change in circumstances because the current work schedule was not contemplated at the time of the contested order. The change in S.E.D. was from a two week rotating schedule to a four days on, four days off schedule.

- [21] The respondent submits he has been entitled to equal parenting since the 2014 Order, and takes the position that the onus is now on the claimant to establish a change of circumstances to justify something other than equal parenting going forward.
- [22] I disagree for a number of reasons. First, the 2014 Order specifically re-affirmed clause 3 of the 2009 Order, which allocated the parenting time. The only change was that the residence of Y.N. was declared to be equally shared, as opposed to the primary residence being with the claimant. The claimant's evidence is that she agreed to that wording at the JCC on her understanding that it was necessary to implement the respondent's desire to lower child support payments due to his then recent employment situation. She maintains, however, that the parties did not contemplate at that time any change in the amount of time Y.N. lived with either parent.
- [23] The facts support the claimant's position. The legislation was different in 2009 than it is today. Specifically, there is nothing in the FLA regarding assessing the best interests of the child, parenting time or allocation of parenting responsibilities that renders the declaration of the child's residence particularly important when no relocation is anticipated. Thus, the change in wording as to Y.N.'s residence does not necessarily mean the parties agreed there had been a fundamental change in parenting time. Most compelling on the facts in this case, however, is that the respondent's parenting time did not increase as a result of the change in the wording.
- [24] It is true that clause 3(d) allows for the parties to agree to changes in parenting time, but the evidence revealed no significant changes were made. Instead, the undisputed evidence is that the parties followed the 2009 Parenting Schedule, as revised slightly in 2016 and 2019. I find that to be a significant factor that favours the claimant's position.
- [25] The respondent asserted in April 2017, that he had been entitled to equal parenting time since November 2014. However, there was no evidence in the record before me (other than the respondent's assertions, all made after the fact in his affidavit) which document that the respondent sought equal parenting time before April 2017. The claimant deposed that the respondent made no verbal request for equal parenting time. The respondent deposed he made requests verbally, but they were rebuffed, and the claimant made it difficult for him to exercise equal parenting time.
- [26] I find his claim to be highly improbable, given no change was made to the 2009 Order regarding parenting time. Even if I were to accept that the claimant made it difficult to get more time with Y.N., which I do not find, if the respondent had a genuine belief that he was entitled to equal parenting time and that the equality in time was a priority for him, he could have enforced that term by going to court. He did not do so. Based on my view of all the evidence, I conclude the respondent did not believe the 2014 Order granted him equal parenting time until April 2017, when his lawyer first raised the issue.

- [27] Accordingly, I find the 2014 Order did not implement equally shared parenting time. I also find neither party believed the change in wording was meant to alter the parenting time as stipulated in the 2009 Order. I find the parties agreed to the change for the sole purpose of facilitating a change in mandatory child support because of the employment situation of the respondent at that time. I further find neither party conducted themselves nor believed that the 2014 Order implemented equal parenting time (regardless of its wording).
- [28] I conclude that the wording of the 2014 Order, read as a whole in conjunction with the 2009 Order, is not inconsistent with my findings. Therefore, the onus is on the respondent to establish a change in the child's circumstances to justify a change in the current parenting schedule.
- [29] The 2019 Parenting Schedule, which the parties have agreed to, no longer conforms to the specific schedule outlined in the 2009 Order. This does not make the 2019 Parenting Schedule inconsistent with the 2009 Order since clause 3(d) enables changes by agreement between the parties. The question is whether there are material changes in circumstances since the 2009 Order such that the order should be varied.
- [30] In this case, the child's family tree has changed with the addition of two half- siblings. I accept that it is possible that the birth of a new sibling could amount to a material change in circumstances based on the notion that bonds between siblings should be fostered.
- [31] More compelling, 10 years have passed since the 2009 Order. Generally, the parties have managed to co-parent and make improvements to their parenting schedule in the best interests of Y.N. Whether further changes are necessary is considered below. However, I find on the evidence before me, given the child's age, number of transitions that exist in the 2019 Parenting Schedule, change in the respondent's work schedule, presence of siblings in the respondent's home, and concerns regarding the claimant's decision making, there are material changes in Y.N.'s circumstances from those that were contemplated by the parties in 2009. These material changes will be canvassed in more detail throughout these reasons. As a result, I find the respondent has met the burden to establish that I can consider varying the final order to accommodate the best interests of Y.N.

IV. PARENTING

- [32] I have concluded that there have been material changes in circumstances to consider varying the 2009 Order as it relates to the 2019 Parenting Schedule. In assessing what parenting schedule should be ordered, the only factor is what is in the best interests of the child: FLA, s. 37(1). The best interests of the child are determined by the child's needs and circumstances which must be assessed pursuant to the factors listed in s. 37(2) of the FLA.

- [33] To do that, I must examine the current circumstances of Y.N. This requires some examination of what the parenting arrangements have been in the past. On that point, even if the wording of the 2014 Order entitled the respondent to equal parenting time (which I specifically reject), he clearly did not exercise that. Accordingly, there is no dispute about the history of actual parenting time each party exercised.

A. Section 211 Report

- [34] The parties consented in February 2018 to an order that Dr. Larry Krywaniuk complete a s. 211 report (the "211 Order"). The 211 Order set out in detail a number of issues the author should address in the 211 Report.
- [35] The 211 Report is dated March 2019, but the interviews were conducted April to June 2018. This puts the court in a difficult situation because, in addition to assessing the 211 Report on its merits, I must take into account the possibility that its conclusions are stale due to the delay.
- [36] In addition, there were significant problems with, and omissions from, the content of the 211 Report. In preparing for the hearing, counsel identified items that Dr. Krywaniuk was ordered to address. Most notably, he did not include his views, comments and conclusions on five discrete issues that the 211 Order mandated he address. At the time the hearing began, Dr. Krywaniuk had not addressed those issues.
- [37] The hearing did not complete on June 25, and was set to continue July 3 and 4. I directed counsel to advise Dr. Krywaniuk about the continuation of the hearing and the court's desire that he respond to the omitted issues. He responded, and without objection from either party, I admitted the doctor's responsive emails as exhibits at the hearing.
- [38] I realize that authors of these reports are in high demand and may be quite busy. However, the reports are expensive and often relied upon heavily by the court. The court always assumes that the authors have taken great care to complete the report with diligence.
- [39] It is therefore concerning to note that the 211 Report contained many more than the usual number of typographical and syntax errors. There were also several examples of Dr. Krywaniuk mixing up the first names of the claimant and Y.N. The parties identified a typographical error which led to confusion as to which parent provided certain information to him. Lastly, there were a number of sentence fragments which simply did not make sense. The nature and number of errors were not consistent with the report having been carefully reviewed.

- [40] The author of a 211 report is chosen, typically by agreement, by parties, but the author is the court's expert. I find these flaws in Dr. Krywaniuk's report significantly diminish the weight I can attach to the 211 Report. This is unsatisfactory especially when the parties had to pay for his report with their own funds, and because they had to delay having their issues brought to court. This is a troubling situation, but I can think of no way to address it other than to articulate my grave concerns with what has happened in this case.
- [41] Thus, I rely primarily on the affidavit evidence of the parties, which as noted above contained much inadmissible material. Nevertheless, I am satisfied, despite the inadmissible portions, I am able to find the facts necessary to decide the issues based on counsel's submissions and the admissible evidence.

B. Parties' Positions

- [42] The claimant wants to maintain the current schedule. The respondent wants the parenting schedule and parenting responsibilities to be shared equally. The respondent raises four main concerns about the claimant's position that parenting continue under the current schedule. I find two of them have no merit.
- [43] First, he claims the claimant reneged on her agreement to implement equal parenting of Y.N. It is true that former counsel for the claimant wrote to respondent's counsel on April 13, 2017, communicating that she was "agreeable to equal parenting time" based on the 2014 Order. However, the claimant immediately sought new counsel because she claimed her former counsel's communication was without instruction. I find her assertion to be credible. In part, I base that conclusion on the representations made in court by the claimant's current counsel. I have no reason not to accept as true those counsel's assertions which she made as an officer of the court.
- [44] Moreover, the claimant's previous counsel did not agree to any particular schedule, he only communicated a willingness to develop a "mutually agreed upon schedule". Since the 2014 Order maintained clause 3 of the 2009 Order, there was no requirement to achieve equal parenting time. Clause 3(d) left the option open to provide additional times as "agreed to between the parties." Although there was nothing preventing the parties from discussing and agreeing to additional time, there was also no basis for the respondent to demand equal time.
- [45] Secondly, the respondent alleges that during the relationship, the claimant's mental state and condition created problems because she was volatile, aggressive and at times violent. It is true that at the time of separation the claimant was arrested and charged with assaulting the respondent, but she was released on a peace bond. There are no other credible allegations of mental instability or violence contained in the material. More importantly, given that the respondent agreed to the claimant having the majority of parenting time of Y.N. up until at least April 2017, it is difficult to accept that he believed the claimant's mental state made it unsafe for her to have parenting time or custody of Y.N. Nor does he resist the

claimant having equal parenting time now. Given those facts, I do not accept the respondent has or has had a genuine belief that the claimant's mental state was relevant to the best interests of Y.N.

- [46] However, I also find that two of the reasons the claimant asserts for rejecting equal parenting time are unhelpful. First, she believes that the respondent is motivated only by financial concerns. I do not accept that is the respondent's motivation and believe him to genuinely want to spend more time with Y.N.
- [47] Secondly, she referred to an incident in August 2017 when Y.N. suffered a serious dog bite that required approximately 10 stitches to her face. The claimant alleges two things: first that the respondent was guilty of inadequate supervision; and second, that the respondent was wrong to expose the child to the same dog after the incident.
- [48] No parent can prevent every instance of harm that befalls his or her child. The issue is whether the respondent was irresponsible and placed Y.N. in harm's way. There is no evidence to support that the dog bite resulted from inadequate or negligent parenting.
- [49] As to the allegation that Y.N. continued to be around the dog shortly after the incident, the claimant's evidence is unattributed hearsay, and denied by the respondent.
- [50] I also note that reasonable parents may disagree about when or if a child should be exposed to a dog that previously bit the child. While the nature of this injury was serious, I am not persuaded on the evidence that it represents such a lapse in parenting judgment to weigh heavily on the issues before me. Specifically, the claimant has pointed to no other safety issues with Y.N. being in the care and custody of the respondent. I am reluctant to dismiss a claim for equal parenting time based on one incident.

C. Best Interests of the Child

- [51] The respondent raises the following concerns:
- a) The claimant inappropriately speaks to the child about the litigation and inappropriately allows the child to make important decisions not commensurate with her age; and
 - b) The claimant was non-cooperative in allowing parenting time that was not in strict compliance or extra to, but not inconsistent with any court order.
- [52] The claimant has the following concerns about equal parenting time:
- a) She submits equal parenting time does not represent the wishes of Y.N., who is now 13; and
 - b) The alleged lack of commitment to Y.N. while at the respondent's home because of the respondent's extracurricular schedule, and babysitting burdens placed on Y.N.

- [53] Both parties refer to events in the past, which they assert demonstrate the other party's inability to co-parent, or deficiencies in decision making. Few, if any of those are relevant or helpful to the court. By in large they illustrate somewhat differing parenting styles and customs within each household, none of which is superior to the other, nor has any detrimentally impacted Y.N. Many of the purported examples are either minor or trivial.
- [54] I do not find the evidence before me raises any concerns about Y.N.'s health and emotional well-being (s. 37(2)(a)), history of her care (s. 37(2)(d)), or her need for stability given her age and stage of development (s. 37(2)(e)) that would weigh in favour of either the current parenting schedule or equal parenting. While there were some contested allegations of family violence, there was no evidence that Y.N. was the target. Furthermore, neither party relied on these allegations with respect to Y.N.'s best interests in relation to parenting time. As a result, I find there is no need to consider ss. 37(2)(g)-(h) further. 1. Relationship with other Important People in Child's Life - s. 37(2)(c)
- [55] The respondent asserts that equal parenting time will better facilitate Y.N.'s relationship with his family, especially his other two children. In my view, there is a significant benefit to Y.N. having increased contact and interaction with her siblings, and her extended family.
- [56] As I understand it, the claimant's family is in Japan, and she travelled there with Y.N. a few times. That too is important to Y.N. However, because of logistics, maximizing contact with the claimant's family in Japan must be done during holiday times. As a result, an equal parenting schedule would not detrimentally impact this contact. Accordingly, this factor favours an equally shared parenting regime.
- [57] In this case, the factors that are most relevant to the decision about both parenting time and parenting responsibilities are those listed under ss. 37(2)(b), (f) and (i). The respondent submits the claimant's ability to exercise parental responsibilities is compromised based on past behaviour, and therefore Y.N. would benefit from parenting time that is shared equally.
- [58] Pursuant to s. 37(2)(i), I must consider 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". Nothing in the record reveals any serious concerns about the safety or health of Y.N. under either parent's care. However, "well-being" is a broad term. I find the evidence reveals that the parties have different parenting styles, and the communication between them has been less than ideal. The issue is whether these factors favour equal parenting time or the status quo.
- [59] The claimant's major complaint underscoring her opposition to equal parenting time is what the respondent does during his parenting time. She submits the respondent is too busy and does not spend enough individual time with Y.N. She points to his schedule which, at the time of the hearing, involved attending karate four of five weeknights. However, on two of those evenings the respondent taught a class which Y.N. attends.

- [60] The claimant also alleges this schedule leaves insufficient time for the respondent and his wife to assist Y.N. with her homework. She claims having an adult to help with homework is increasingly important as she enters high school. She also submits that while in the respondent's care, Y.N. is required to babysit and spends time with friends.
- [61] I do not share the claimant's concern about the respondent's schedule. Many parents have work or other commitments that may require them to be away from their children during evenings. In the respondent's case, that would only happen on a night Y.N. is in his care and he teaches a class that she is not attending. Presumably, the class does not last the entire time between after school and bedtime so she would still enjoy time with him. More importantly, the respondent is now married so there is someone who can act in a parent-like capacity to look after Y.N.
- [62] Two of those evenings the respondent teaches a class in which Y.N. is enrolled. Being able to share an athletic and cultural activity with one's parent is clearly beneficial to Y.N. and there can be no complaint about that time.
- [63] The respondent did seek an additional overnight (on Thursdays) both to achieve more equal parenting time, and to register Y.N. in an advanced class with a different teacher. The claimant opposes this on the basis that if they agree on the class, she could transport Y.N. I agree enrolling Y.N. in another class does not necessarily require a change in the schedule. The more difficult question is whether the parents can agree on enrolling her in another class.
- [64] With regard to homework, parents can reasonably disagree on the best approach to take regarding children's homework, especially as children get older. There is something to be said for reducing assistance to encourage children to develop study skills, time management and independence. Conversely, some parents prefer to be more directly involved to guide their children to reach those goals. Neither approach is right or wrong. The key is that parents communicate and cooperate to agree on an approach that works well for the child. This apparently has not yet happened. However, I am not persuaded that Y.N.'s homework regime in either home favours or disfavors equal parenting time.
- [65] Nor do I agree that Y.N. babysitting or spending time with friends while in the respondent's care is necessarily indicative that her best interests are not being met by the respondent. The strengthening of the sibling bond is clearly in Y.N.'s best interests. Babysitting also encourages maturity and responsibility. I also do not understand why spending time with friends is problematic, especially as Y.N. enters her teen years.
- [66] The respondent also raised a number of concerns regarding the claimant's parenting. His position is that the claimant has inappropriately allowed Y.N. to make important decisions when the child was too young to do so. He is also concerned that the claimant has unduly influenced the child. Those two concerns together cause him to suspect that Y.N.'s "views" are what have been inculcated into her by the claimant.

- [67] The extent to which parents should take into account a 13-year-old's views when making important decisions depends on the maturity and readiness of the child and the nature of the decision, in addition to the parent's philosophy about child-rearing. It is difficult to accept any 13-year-old should be allowed to dictate every important life decision, without parental oversight, guidance or ultimate veto. There is an important distinction between deferring to a child's decision on important matters and appropriately taking account of her views.
- [68] I find the claimant believed Y.N.'s views should be determinative and has believed that for at least two or three years (meaning when Y.N. was as young as 10). The claimant's affidavit evidence frequently alleges that the respondent does not take Y.N.'s view into account, nor does he listen to her. Moreover, the claimant's primary opposition to equal parenting time is her claim that Y.N. does not want it.
- [69] I agree with the respondent that the claimant's deference to Y.N. on major decisions is concerning. Also problematic is the clear indication that for at least the past two years, the claimant has communicated directly with Y.N. about the litigation. The respondent alleges the claimant intentionally manipulates Y.N. and he is concerned of the impact that has had and will continue to have both on Y.N. and on his relationship with the her.
- [70] I find the respondent's concerns about the claimant's interactions with Y.N. to be well founded. This is illustrated by what happened with Y.N.'s schooling in 2017. The parties disagree on certain details, but the following facts are uncontested:
- a) Y.N. started elementary school near the claimant's home. In the fall of 2016, the claimant began talking about Y.N. enrolling in French immersion, stating it was her desire;
 - b) The claimant applied to the school district for Y.N. to be enrolled at a different school for the purpose of "late" French immersion in February 2017, when Y.N. was in grade 5;
 - c) The claimant found out Y.N. was accepted into French immersion in March 2017;
 - d) Y.N. saw a specialist in June 2017, for assessment whether she had ADHD, and the issue of Y.N. wanting to attend French immersion was raised with the doctor;
 - e) Y.N. started French immersion in September 2017; and,
 - f) Y.N. struggled with French immersion and withdrew in October 2017, returning to her previous elementary school.
- [71] There is some dispute in the affidavit evidence about the claimant's communication with the respondent about this significant change to Y.N.'s schooling. In his second affidavit, sworn November 10, 2017 (the "Respondent's 2nd Affidavit"), the respondent deposed that the claimant did not inform him that she had submitted an application for Y.N. to attend French immersion in February 2017, or when Y.N. was accepted in March 2017. He claims he was not told until the end of the school year in late June 2017, that Y.N. would be switching schools. He admits he did not know what to do to stop the change at that time, and did not

take any action to do so.

[72] The claimant's specific response to those facts is in her ninth affidavit, sworn November 15, 2017 (the "Claimant's 9th Affidavit") at para. 28:

I discussed [Y.N.'s] desire to enrol in French Immersion with the Respondent. He acknowledged this discussion in the fall of 2016 at paragraph 7(d). I told him in February 2017 during a telephone call that based on [Y.N.'s] wishes, I registered her for French Immersion. On March 29, 2017, I telephoned [Y.N.] to tell her that she had been accepted into the French Immersion program. I overheard her immediately tell the Respondent who was standing beside her. The Respondent is refusing to acknowledge that he was aware that [Y.N.] was enrolled in French Immersion. The Respondent picked up [Y.N.] from [the French Immersion school] twice per week. He was aware that she had changed schools and was attending the French Immersion program.

[73] In the same paragraph, the claimant pointed to a previous affidavit, to which was attached as an exhibit an email dated April 4, 2017. In the Claimant's 9th Affidavit, she deposed that in that email she was "specifically stating that I was registering [Y.N.] for the summer French session to get ready for French Immersion from September." Instead, the email to which she refers stated only that "[Y.N.] will attend Summer session." It says nothing about enrollment in September in French immersion.

[74] In the Respondent's 2nd Affidavit, he also pointed out that the claimant's affidavits sworn in May 2017 and September 2017 "say nothing about how the claimant changed [Y.N.'s] school, and changed [Y.N.] to be in French immersion" (emphasis in original).

[75] The claimant deposed, in her affidavit sworn May 24, 2017, that she lived across the street from Y.N.'s first school where she attended grade 5 and that "it has been particularly convenient for [Y.N.]". There is no mention about the change in schools that she deposed in the Claimant's 9th Affidavit was confirmed to the respondent on March 29, 2017. Worse, in her seventh affidavit, sworn on September 26, 2017, she deposed: "Currently, [Y.N.] attends Grade 6 at [the first school]." That was untrue when she swore that affidavit.

[76] By way of response, at para. 32 of the Claimant's 9th Affidavit, she stated Y.N. was at the first school on May 24, 2017, and that she had already addressed the "accidental omission of school change" in her September affidavit. She explained that inaccuracy in her eighth affidavit, sworn on November 5, 2017, at paras. 2 and 3:

I swear this Affidavit to a correction to my Affidavit #7 sworn on September 26, 2017. My Affidavit #7 was sworn to provide an update to my Affidavit #5 sworn on May 24, 2017. When I swore my Affidavit #7, I glossed over some of the information about the history and I did not read it carefully enough. At paragraph 5 of my Affidavit #7, there was an error. [Y.N.] was not attending [the first school] in September 2017.

While [Y.N.] previously attended [the first school], the Respondent was fully aware that [Y.N.] had moved to the French Immersion program at [the French school] commencing in September 2017. I had previously informed the Respondent in the Spring of 2017 that [Y.N.] had been requesting to move to the French Immersion program for two years and that we had made an application.

- [77] Her explanation is unpersuasive. For one thing, it was suggested the inaccuracy in the September 26 affidavit resulted from a "cut and paste" error from the May 24 affidavit. I have great difficulty accepting that since the May 24 affidavit refers to Y.N. being in grade 5. Also, she only addresses the error in identifying the school in the September affidavit, not the failure to intimate the change in her May affidavit. Finally, it is disconcerting that the claimant admits she completed an affidavit without reading it carefully because she "glossed over" it.
- [78] In any event, the respondent never suggested he did not know in November 2017 that Y.N. had switched schools. His point was that claimant's affidavit, sworn on May 24, 2017, is misleading for failing to mention that although Y.N. was conveniently attending the school across the street, the claimant knew that would not be the case in September 2017.
- [79] Of course, the more important concern is how the claimant implemented the change in schooling. The respondent says he did not know in May of the impending change because the claimant had not informed him of the application. He was not informed of the acceptance until it was, in his mind, a *fait accompli*. I prefer his version of these events to the claimant's.
- [80] The respondent deposed that he only saw documentation about the switch when he requested it from the school in the Fall of 2017. The claimant admits she provided no documents regarding the switch of schools to the respondent, but deposed that he "never asked me for any documentation regarding [Y.N.'s] enrolment", claiming that if he had she would have provided it.
- [81] In response to the suggestion that Y.N.'s enrollment in French immersion was done "secretively", the claimant deposed that "[a]t no time prior to October 17, 2017 did I receive any communication from the Respondent stating that he did not want [Y.N.] to be enrolled in the French Immersion program."
- [82] Having reviewed all the evidence, I find that the claimant did not inform the respondent until late June 2017, that Y.N. was already enrolled in French immersion to start in September 2017. I also find it is more probable than not that the school officials and doctor recommended against Y.N.'s enrollment in French immersion.
- [83] This episode is concerning. A child's schooling is a particularly important issue, and is one, regardless of who has "final say" that prudent parents would fully explore and discuss together. Certainly, moving a child into late French immersion should not be done lightly. In hindsight, given how swiftly Y.N. was removed from the program, the move turned out not to be a beneficial move for Y.N.

- [84] In this case, it is not the decision itself but how it was made that is relevant to the parenting issues. I find the claimant chose to follow through on what she says was Y.N.'s wishes (at age 11) in the face of what I find were signs she was not suited for late French immersion.
- [85] The claimant portrays her parenting style as being respectful and supportive of Y.N.'s views and choices. Unfortunately, I find on the evidence that she has inappropriately deferred to Y.N.'s view at an age when she was too young to take on that responsibility. I also find that the claimant did so without cooperating with the respondent, and there is a strong probability that she was less than transparent about the status of the application for late immersion.
- [86] The respondent claims he brought up the topic of Y.N.'s desire to go to French immersion with the doctor in June 2017 (before he was told by the claimant that the child was already enrolled). He claims the doctor advised against the switch. The respondent also deposed that he understood that the teachers at Y.N.'s first school strongly recommended against French immersion.
- [87] That evidence has the ring of truth because Y.N. was referred to a specialist to investigate a possible learning disability and/or behavioural issues. Most compelling is the fact that Y.N. was very quickly transferred back from French immersion. This is more consistent with the respondent's evidence that professionals advised against the transfer.
- [88] The claimant's response to the evidence in the preceding paragraph about the doctor's advice is that she is "unable to respond to this hearsay evidence", and that she advised the doctor that Y.N. was accepted into French immersion (para. 29 of the Claimant's 9th Affidavit). She similarly hides behind her assertion of hearsay in response to statements in the Respondent's 2nd Affidavit that the teachers at Y.N.'s elementary school advised against French immersion.
- [89] Claimant's counsel repeated this legal submission at the hearing. Hearsay is not necessarily inadmissible for chambers applications. While R. 10-4(12) of the Supreme Court Family Rules states affidavits can only contain what a person could say at trial, R. 10-4(13) provides an exception allowing an affiant to state evidence based on information and belief if the source of the evidence is given, and the order sought is not a final one. Neither party was clear on whether the order sought in their application was intended to be a final or not. If it is not a final order, I am satisfied that the respondent's statements meet the test. However, in any event, I find the claimant's failure to respond by only raising "hearsay" in her affidavit is evasive. Overall, taking into account the whole of the parties' evidence, I find it more probable than not that the respondent was not informed in a timely manner that the claimant had applied and Y.N. was accepted into late French immersion.
- [90] This ties into another major concern raised by the respondent about the claimant's possible manipulation of Y.N.'s interests and views. The claimant's submissions and affidavit material (and communication with the respondent) emphasize what Y.N. wants, even about parenting time. The claimant's primary position for opposing an equal parenting schedule is

that Y.N. does not want to change the schedule. This was her position in September 2017 when the child was 11 years old. In other words, the claimant is representing to the court that she spoke to Y.N. about the litigation and elicited her views.

- [91] It is difficult to accept that directly involving a 10-year-old in litigation regarding parenting time is in the child's best interests. The claimant took the same attitude toward the schooling issue. Equally concerning, the claimant appears to use Y.N. as a conduit to the respondent for information about Y.N.'s situation. This was reflected in the evidence, among other places, by the claimant's reliance on allegedly overhearing Y.N. tell the respondent about her acceptance into French immersion. Regardless of whether that actually happened, the fact that the claimant would give that evidence indicates she believed that would have been an appropriate way to convey important information to the respondent.
- [92] The concern about the claimant's position is that they are stated in an absolute manner rather than tying her approach to deferring to the child's wishes in her best interests on an issue-by-issue basis. Instead, the claimant places undue weight on Y.N.'s statements as justification for her legal position.
- [93] I acknowledge that the 211 Order appointing Dr. Krywaniuk specifically directed him to answer very specific questions about parental communications, including about parenting time and schooling. As noted above (paras. 35 to 36) despite his report being delivered a year after his appointment, he neglected to address those matters. In addition, although the 211 Report canvassed Y.N.'s views, for the reasons I have discussed and will discuss further, I place, at most, minimal weight on the report.
- [94] In Dr. Krywaniuk's email response to the parental communication issues, he wrote that he did not have the "impression that [Y.N.] felt a significant amount of pressure coming from one parent or the other even though she may have understood what their preferences were." Earlier in the same paragraph he wrote, "[Y.N.] told me that she didn't really discuss the matter with either parent although she said her mother asked her what she would like."
- [95] Given the passage of time, it would be highly improbable that Dr. Krywaniuk relied on his memory or impressions, and it was incumbent upon him to at least identify what he looked at before providing his response. The only thing he says in this regard is that he "explored the issue of [Y.N.'s] attitudes and experience with regard to the parenting schedule in a direct and indirect fashion" as part of his overall assessment.
- [96] I do not find Dr. Krywaniuk's response helpful. I do not know what the responses are specifically based on. It is unclear to me what expertise as a psychologist Dr. Krywaniuk brought to his analysis as opposed to simply repeating what people said to him with a cursory comment regarding his impression about what was said. That provides little insight. For that reason, in addition to those expressed above at paras. 14 and 34 to 41, I decline to place any weight on the 211 Report.

- [97] Given the claimant's decision-making history, including, but not limited to the French immersion example, I am concerned that her approach to major decisions is one she feels can be fully dictated by Y.N. That was her position when she filed her application and Y.N. was only 11 years old. This leads me to question whether at that age, any of Y.N.'s views, were truly her own. By deferring to Y.N. when discussing parenting time and other issues with her, absent the respondent, the claimant had ample opportunity to influence Y.N. even if she did not intentionally set out to do so.
- [98] In my view, some adjustments to Y.N.'s regime are necessary to account for what I have found to be the claimant's less ideal approach. This favours the respondent's position, and I therefore agree the best interests of Y.N. would be better served by a parenting schedule in which each party's time is shared equally.

D. Parenting Responsibilities

- [99] The 2009 Order was granted under the Family Relations Act, R.S.B.C. 1996, c. 128, so there is obviously no explicit reference to the parental responsibilities enumerated in s. 41 of the FLA. However, the content of the 2009 Order is generally consistent with a model where the parties are meant to discuss and reach agreement, absent agreement the claimant could make the decision (clause 2(f)).
- [100] The claimant wants to retain ultimate decision making authority; the respondent opposes this. The claimant submits there is an advantage to giving one party ultimate decision making authority because that reduces the likelihood the parties will end up before the court. However, that certainty cannot come at the expense of Y.N.'s best interests.
- [101] I find that the claimant's ultimate decision-making power led her to inappropriately defer to Y.N. and place insufficient weight and respect on the respondent's views. The claimant also limited the respondent's involvement in making important decisions. The claimant puts the obligation on the respondent to be involved, rather than respecting her obligation to involve the respondent in important decisions about Y.N.'s life. In addition to the claimant's decision to put Y.N. in French immersion, she failed to forward important school documents to the respondent because he did not ask. This behaviour was not in compliance with the 2009 Order, or the true spirit of achieving cooperative, shared parenting.
- [102] I also note that despite the parties' characterization of the degree of acrimony or number of disputes in their relationship, the parties, to some degree, have cooperated. This is not a high-conflict case.
- [103] Given my concerns regarding the claimant's approach of deferring decision making to Y.N., possibly in the absence of input from the respondent, I conclude giving final decision-making authority to the claimant is not in Y.N.'s best interests. This conclusion is adjunct to the implementation of equal parenting time.

[104] Pursuant to s. 39(1) of the FLA, both parties are Y.N.'s guardian. Pursuant to s. 40(2) unless otherwise agreed to or ordered, guardians can exercise all of the parenting responsibilities set out in s. 41. Thus, they are obliged to reach agreement on major decisions affecting Y.N.

[105] For all the preceding reasons regarding parenting, and to bring the 2009 Order in line with the language of the FLA, I vary clause 1 of the 2014 Order so that it will now read as follows: "Each party is the Child's guardian and the parties shall share parenting time of the Child equally".

[106] Clause 2 is varied to read:

The parties share equally all of the s. 41 parental responsibilities for the Child under s. 40(2) of the Family Law Act, as follows:

- a) In the event of the death of a guardian, the surviving guardian will be the only guardian of the Child;
- b) Each guardian will have the obligation to advise the other guardian of any matters of a significant nature affecting the Child;
- c) Each guardian will have the obligation to discuss with the other guardian any significant decisions that have to be made concerning the Child, including, but not limited to, significant decisions about the health (except emergency decisions), education, religious instruction and general welfare;
- d) The guardians will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;
- e) In the event the parties cannot reach agreement on a significant decision despite their best efforts, the parties will first seek to resolve the issue by seeking the assistance of a mutually agreed to third party, including but not limited to a mediator, a parenting coordinator, or a respected family member involved in the Child's life;
- f) If, despite the measures outlined in the preceding paragraph, the parties are unable to come to an agreement, either guardian may apply to the court for direction under s. 49 of the Family Law Act; and,
- g) Each guardian will have the right to obtain information concerning the Child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.

[107] Clauses 4 to 11 of the 2009 Order remain unchanged. Clause 3 is addressed in the following section.

E. Conclusions about Parenting

- [108] In summary, having considered all the evidence, submissions and statutory provisions, I find it is in the best interests of Y.N. to have equal parenting time with each parent.
- [109] Given that a new school year, and presumably activities, have started since the applications were heard, I am unaware if the particular schedule proposed by the respondent (at paragraph 1 of his application) is still workable. Regardless, I find it requires too many transitions for Y.N. during the week, and therefore I do not order that schedule.
- [110] The parties need to agree to a schedule that minimizes the number of transitions for Y.N. during the week, but results in as close to equal time with each parent as possible. That time is not calculated by how many "waking" hours Y.N. is in the presence of either party. The time should be calculated on the basis of an equal number of week days and weekend days over a two-week period (a day being counted as including the overnight). Thus, some configuration of a 5-5-2-2 schedule over a 14-day cycle should be implemented. Because I am unaware of the family's current situation, and there is a possibility that the 5-5-2-2 schedule is unattainable for some reason, the parties can agree to any other schedule that achieves equal parenting time. In the event that the 5-5-2-2 is completely unattainable because of Y.N.'s activities, and the parties are unable to come to an agreement about an alternate arrangement, the parties have leave to appear before me for the limited purpose of seeking approval of which party's proposed schedule best accords with these reasons for judgment. However, I emphasize that the parties should strive for an arrangement that minimizes the number of weekly transitions between households for Y.N. and most closely matches a 5-5-2-2 schedule.
- [111] Accordingly, clause 3 of the 2009 Order is varied to provide for equal parenting time as agreed to by the parties in accordance with the direction in the preceding paragraph.

V. CONDUCT ORDERS

- [112] The respondent seeks a number of conduct orders. Many are superfluous because they affirm existing responsibilities either under the 2009 Order, or are the normal obligations of any guardian. The claimant objects to others as inappropriate.
- [113] The main dispute relates to an order that the claimant be refrained from speaking with Y.N. about matters in dispute in these proceedings, especially parenting time. The claimant submits because of her age, it is appropriate for Y.N. to discuss her preferred schedule with her mother because the parties ought to respect Y.N.'s wishes regarding parenting time.
- [114] As noted throughout this judgment, I have found that the nature of the claimant's deference to Y.N.'s views on important decisions has not always been in Y.N.'s best interests. The claimant asserts she merely asks for Y.N.'s views and does not influence Y.N. However, based on the facts before me, I find that is highly improbable and represents a somewhat naïve view, even if the claimant did not intend to influence Y.N.

- [115] Y.N. is at an age where her views should be considered by her parents, but this does not mean they should defer to those views. However, the weight the parties should give to Y.N.'s views will naturally increase as Y.N. grows older.
- [116] Ideally, with respect to the parenting schedule and this judgment, Y.N. should only know that the parents disagreed about the schedule, a judge made this decision and both parents will respect and abide by it. The parents should avoid expressing any disappointment or discussing why they think this decision was made. Doing so would only serve to confuse Y.N. and could be, in my view, a tactic to elicit sympathy with that parent and unintentionally influence her views.
- [117] Having said all of that, I find it inappropriate to make an order at this time. I assume both parties will heed the preceding comments and the existence of an order may have the unintended affect of creating more opportunities for the parties to seek further court orders.
- [118] The claimant also objects to an order that each party provide, within 30 days of the order, a current list of all third parties that provide services to Y.N., and to update that list as necessary. It is not clear to me why the claimant opposes the order. It is clearly sensible because it ensures each parent has appropriate contact information, and can therefore take responsibility to contact the service providers directly for information. I therefore grant that order.
- [119] The respondent seeks an order requiring almost all communication between the parties be via email. The claimant objects, submitting that there has been no issue or allegation of inappropriate communication. While that appears to be true based on the evidence, a major concern in this case is the claimant's disinclination to fully involve the respondent in significant decisions. I also acknowledge that the respondent has not always promptly responded to email communication, and that too is not appropriate.
- [120] However, I do not find the situation to have risen to the level of prohibiting all but very limited verbal discussions between the parties. I therefore do not grant that order.
- [121] The claimant does not object to the following, which I do order:

Neither party will make any negative, insulting, derogatory or disparaging comments about the other parent, or the other parent's family, within the presence or hearing of Y.N., or in any communication. Neither parent will permit any other person to make any negative, insulting or derogatory or disparaging comments about the other parent, or the other parent's family, within the presence or hearing of Y.N.

VI. CHILD SUPPORT AND S. 7 EXPENSES

- [122] In the application filed September 26, 2017, the claimant sought to impute income to the respondent. In support of that, she also sought production of copies of statements of every bank account and credit card, held jointly or solely by the respondent, and copies of every loan and/or mortgage application from January 1, 2016, to present. She also sought his most recent record of employment and his resume and any job applications he submitted from January 1, 2016, to present.
- [123] It was my understanding those documents have never been produced. Instead, in an affidavit made during the hiatus of the hearing (on July 2, 2019), the respondent supplemented his previous affidavits and provided "certain information about deposits and [withdrawals]" relating to a line of credit and bank account. However, the exhibits attached to that affidavit are not statements pulled from any website, but are spreadsheets prepared by the respondent. Those documents are not sufficient to meet his disclosure obligation. They do not represent the best evidence and as material compiled solely by him, their reliability is questionable.
- [124] Since the 2009 Order, the respondent has paid child support based on an income of \$65,523. The claimant asserts that since 2014, the respondent has not paid child support in accordance with the guidelines because his real income was higher.
- [125] The respondent agrees that his guideline income in 2014 was \$83,308, whereas he paid child support based on a lower income. He agrees he owes \$1,992 retroactive child support for that year. Similarly, he agrees for 2015, he owes \$972, based on his income of \$74,234. In other words, he admits that he underpaid child support.
- [126] Both parties filed a Form F8 in June 2019. The claimant submits the respondent's F8 is not accurate and she seeks to impute income to him.
- [127] The income tax returns attached to the F8 records line 150 taxable income of the parties as follows:
- a) 2016: The claimant's income was \$15,750.07, and the respondent's was \$43,006.66.
 - b) 2017: The claimant's income was \$12,808.98, and the respondent's was \$36,166.25.
 - c) 2018: the claimant's income was \$22,460.16, and the respondent's income was \$25,765.50.
- [128] The claimant started full-time work in July of this year, and she submitted that she anticipated her total 2019 employment income will be \$25,503, to which will be added the amount she receives for the Canadian Child Benefit. There was a slight discrepancy between the figures in the material submitted to me about her total 2019 expected annual income. Rather than my fixing an amount, the parties should rely on the filed tax records. It would be premature in any event for me to specify any amounts in an order.

A. Imputing Income

- [129] The applicable legal principles are not in dispute. Pursuant to s. 19(1) of the Federal Child Support Guidelines, SOR/97-175, the court may impute such amount of income to a party as it considers appropriate in the circumstances.
- [130] Under s. 19(1)(a), the court may consider whether a spouse is intentionally under-employed or unemployed, and pursuant to s. 19(1)(f) the court can consider whether the payor has failed to fulfill a legal obligation to provide income information.
- [131] The claimant bears the burden of establishing an evidentiary basis for imputing income: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36. Before the court can impute income, it must find that a parent is intentionally under-employed, but is no requirement to show bad faith: *Hanson v. Hanson*, 1999 CanLII 6307 at paras. 10, 13 (B.C.S.C.). That test is met if a parent chooses to earn less than he or she is capable of: *Earle v. Earle*, 1999 CanLII 6914 at para. 18 (B.C.S.C.). The court looks to what is reasonable in the circumstances having regard to the age, education, experience, skills and health of the parents, in addition to work history and work availability: *Marquez* at para. 37, citing *Van Gool v. Van Gool* (1998), 44 R.F.L. (4th) 314 at para. 34 (B.C.C.A.).
- [132] Importantly, a voluntary decision to "down tools" if one still has capacity and opportunity to earn income will not be sufficient to defeat an application to impute income: *Watkins v. Watkins*, 2013 BCSC 1983 at para. 22. Also, courts have recognized that where a parent is self-employed, the evidentiary burden to establish reasonableness must fall at least in part on that person because he or she has unique knowledge of relevant facts: *G.A.E. v. J.C.E.*, 2004 BCSC 22 at para. 21.
- [133] Section 19(1)(f) of the Federal Child Support Guidelines permits a court to impute income to a spouse that "has failed to provide income information when under a legal obligation to do so". When put in this position, the court has no alternative but to do the best that it can to impute an appropriate amount of income: *Sullivan v. Struck*, 2015 BCCA 521 at para. 71.
- [134] During the relationship, the respondent was the primary income earner. From the date of separation until about the Spring of 2016, the respondent worked as a full-time construction safety officer for Kindred Construction. He was either laid off or terminated from that position and began work as general contractor in the Spring of 2016.
- [135] The claimant was employed as a personal banking representative at a financial institution in 2014 and 2015. However, she had a motor vehicle accident in November 2014, and claims that detrimentally impacted the jobs she could do. She found the banking job too difficult because of the time she had to stand. From late July 2018, the claimant was a part-time receptionist/office assistant at Nikkei National Museum & Cultural Centre in Burnaby. She switched to full-time work in July 2019.

- [136] The respondent opposes the imputation of income to him. He claims that he needed to change jobs because of his stress levels, and the desire to spend more time with his family. He claims he switched from being a safety officer to a site supervisor or manager, which he stated would allow him to spend more time at home with his family. The claimant reasonably asks how one could be home more as a site supervisor than a safety officer. I agree with the claimant that both jobs would seem to require on-site presence.
- [137] These applications were filed in 2017, and the respondent has known since then that the claimant wanted to impute income to him, and that she sought detailed financial disclosure in pursuit of that. Despite that, he did not produce an F8 until November 7, 2019, and he resisted producing the full range of financial records she requested at the hearing. Because he is self-employed, I agree with the claimant that he did not provide adequate disclosure to allow the court to assess the reliability of his financial information in the F8.
- [138] It is difficult to accept that the respondent's income dropped so dramatically after 2015. Among other things, during this time he built a new large house, and continued to grow his family, with two more children. He took a vacation at least once to Hawaii.
- [139] There was no independent evidence that he is incapable of earning income commensurate to what he was earning before separation. Even if I believed that he did choose to work and earn less (which I do not), the fact that he did so for laudable reasons (to spend more time with family) does not defeat a finding that he is intentionally under-employed based on the disparity between his pre and post-separation income. No rational person would earn that much less income while growing their family at the same time, unless they had had other sources of income to make up the income differential. There was no evidence to that effect.
- [140] The respondent has been on notice for two years that his financial situation was being challenged. As an independent contractor, he had an obligation to be proactive in producing documents. Not only has he not done that, he has actively resisted more thorough document production, despite consenting to an order for further documentation. I find it is appropriate in these circumstances to draw an adverse inference from his failure to produce more specific documents. Specifically, I find that his disclosure of the sought-after documents would reveal his "true" income rather than what he has reported on his income tax returns.
- [141] Remarkably, in the face of his lack of disclosure, the respondent sought a retroactive reduction of child support and claims there should be no child support paid going forward. Both claims are unsupportable.
- [142] For those reasons, the claimant has persuaded me that income should be imputed to the respondent. I find the evidence supports imputing an annual income of \$74,234 to the respondent starting with the year 2016.

B. Expenses

[143] The respondent has not paid any s. 7 expenses for two years on what I have found to be an unsupported claim that he earned very little. No good reason exists at law or on the evidence provided to me, why he should not be ordered to pay his proportionate share now.

[144] The respondent owes money to the claimant for child care, Japanese school and dental expenses for 2018 and the first half of 2019. I did not understand him to dispute the amounts paid by the claimant, and I am satisfied her evidence about the amounts was credible and reliable. I grant an order that the respondent pay his proportionate share based on a comparison of the claimant's reported income and the income imputed to the respondent.

C. Calculations

[145] Based on the evidence, in addition to the amounts the respondent accepts he owes as identified above in para. 125, the respondent owes an additional \$972 in retroactive child support for each of the years for 2015 and 2016. Because the table amounts changed effective in November 22, 2017, the amount he owes must be calculated differently for 2017 and 2018. On the assumption FMEP continues to pay the claimant \$613 up to and including November 2019, the total retroactive amount the respondent must pay for child support is:

Monthly Amount

Amount

Months

Paid

Owing

Paid, 2014 to October 2019

\$613.00

69

\$42,297.00

Owing, 2014 to November 2017

\$694.00

47

\$32,618.00

Owing, December 2017 to November 2019

\$708.29

23

\$15,582.38

Subtotal

\$42,297.00

\$48,200.38

TOTAL UNPAID OWED

\$5,903.38

[146] Starting December 2019, assuming the parties implement an equal parenting time as ordered, and based on the difference between the income imputed to the respondent and the claimant's income (in other words, applying the set-off), the respondent will owe the difference to the claimant. Because of the discrepancy in the claimant's material about her income (as identified above at para. 128), I leave that to the parties to calculate.

[147] I accept that the claimant's submissions based on her calculations of retroactive expenses owed by the respondent were supported by the evidence. The percentage the respondent owes each year has been increased because of his imputed income.

[148] Specifically, I find that he owes retroactive amounts as follows:

- a) for 2016: \$3,674.42;
- b) for 2017: \$2,168.37;
- c) for 2018: \$1,998.74, and;
- d) for 2019 (only up to June 30) \$714.21.

[149] This totals \$8,555.74, and I grant the order sought by the claimant that the respondent pay that amount.

VII. COSTS

[150] In my view, success in this case was evenly divided. Each party shall bear their own costs.

"Sharma J."

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