

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *C.D.P. v. K.E.P.*,
2012 BCSC 1272

Date: 20120828
Docket: E110042
Registry: Vancouver

Between:

C.D.P.

Claimant

And

K.E.P.

Respondent

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

Counsel for Claimant: J.A. Janzen

Counsel for Respondent: A.E. Thiele and P. Khaira

Place and Date of Trial: Vancouver, B.C.
April 16-20, May 28-31,
and June 1, 4-5, 2012

Place and Date of Judgment: Vancouver, B.C.
August 28, 2012

[1] The parties were married on August 9, 1991 and separated permanently on December 17, 2010. They have four children – a daughter who was born in 1997, two sons who were born in 2001 and 2004, and a daughter who was born in 2006. This part of the Trial deals only with the question of the permanent order to be made regarding guardianship, custody and the access that the Respondent will have to his children. Disputes relating to support and to the division of family assets will be heard when the Trial continues.

[2] Regarding the questions which are now before the Court, it is the position of the Claimant that she should have sole guardianship and custody, that any access to the three older children should continue to be supervised, and that there should be no access by the Respondent to his youngest daughter who is now 6. It is the position of the Respondent that there should be joint guardianship and custody, that there is no reason why access to his three older children should be supervised, and that he should have access to his youngest daughter.

BACKGROUND

[3] This marriage had been in trouble since 2007. The parties were involved with a number of marriage counsellors as a result. Conjugal relations between the parties ceased in November, 2009. There was marriage counselling for five months during 2008 and 2009 and, throughout the counselling, the Claimant was of the view that there was “anxiety in the home” and a “lustful spirit in the home”. The Respondent states that there was much “shouting and yelling” in the home and that all of the children knew that the parties were involved in marriage counselling.

[4] The problems in the marriage included the view of the Claimant that the Respondent was physically abusive to some of the children, had touched his youngest daughter inappropriately, was regularly abusing alcohol, was lying about a number of things including the finances of the parties, and was watching pornography. These and other matters were discussed with some of the counsellors. In early 2010, the parties separated. The Respondent lived in a trailer park for about two months. He then moved back into the former matrimonial home.

[5] Regarding pornography, the Claimant testified that she went into the computer of the Respondent in the Spring of 2008 and found a number of pornographic virtual websites and that the Respondent denied at the time that he had ever watched pornography. At Trial, the Respondent stated that he was downloading movies in March 2007, a pop-up appeared, pornography was available, and he started to watch it. The Respondent states that he initially denied watching pornography as he was ashamed that he had done so, he later “came clean” and worked through the issue with friends by signing up for the “Covenant Eye” program which was installed in the Summer of 2008, and this program blocked all pornography.

[6] The Claimant gave as an example of a pattern of the Respondent not telling the truth the sale of the family home in 2009 when the funds were not used for the benefit of the family but to provide capital for the business of the Respondent.

[7] Regarding the consumption of alcohol, the Claimant was of the view that the Respondent was drinking one or two bottles of wine each night. The Respondent denies that he had been drinking that much and described his consumption as three or four glasses a night for up to six nights a week. The Respondent also states that he set up a “ledger” in the wine room so that he could prove to the Claimant that he was not accessing the wine that was available. The Respondent states that all of the wine was eventually given away to friends or clients. As he did not want his consumption of alcohol to be an issue, the Respondent states that he stopped drinking alcohol in the Spring of 2010. At Trial, the Respondent stated that he now has a glass of wine at the end of the day or if he has trouble sleeping, and that the glass he uses would hold about one-third of a bottle so that he would have about one bottle of wine a week.

[8] There is clearly a difference between how each party would discipline the children. The Claimant was against spanking while the Respondent believed that spanking in some situations was appropriate. In a particularly troubling incident, the Respondent dragged one of his sons across the floor when he refused to follow the

instruction that he assist his youngest sister to clean up her toys. At Trial, the Respondent admitted inappropriately physically disciplining his son on that one occasion, that he was remorseful and concerned, and that he stopped all physical discipline of his children after that particular incident.

[9] The Claimant became suspicious that the Respondent was touching their youngest daughter inappropriately. In one incident, the Claimant found the Respondent on top of their youngest daughter holding her arms tightly above her head and kissing and tickling her stomach and neck. At the time, their daughter had no clothes on. Despite the fact that the youngest daughter was asking her father to let her go and to stop, he did not. The Claimant kept a diary. The diary of the Claimant set out the following regarding the “tickling incident”:

I decided to go her & bring her with me. I found ... [the Respondent] on top her holding her arms tightly above her head (straddling her), kissing & tickling her tummy and neck. (His clothes were on.) She didn't like it & kept saying let me go, let me go – I said that's enough & grabbed her to go upstairs. I new [sic] he had been drinking, and really wasn't sure what that was all about. I never let ... [youngest daughter] again with the exception of a couple of times with ... [oldest daughter] watching her.

[10] In August of 2010, the Claimant became further suspicious when her daughter indicated that she was not being tickled by her father anymore in her private area. In an August diary note, the Claimant set out that their youngest daughter had just had a bath, was changing in her room, and was reminded that she should get dressed before going out to where there was a visitor:

She said oh don't worry mom, dad isn't going to tickle me here anymore (rubbing her naked private). He is going to tickle me here now (tickling her neck). She said I told him I don't like that.

[11] The Respondent testified at Trial that the Claimant asked him in April, 2010 if he was “inappropriate with the children”. He testified that he was surprised by this question. I record him as stating that it was the “first time she asked me flat out. I responded nothing inappropriate with the children”. However, he stated that this changed his perspective of how he interacted with the children and that: “instead of cuddling – now have to sit beside me – snuggle up but beside me”. He quotes that

the Claimant as saying that his youngest daughter was: "... acting inappropriately because I introduced evil into the home."

[12] From time to time, members of the family witnessed inappropriate behaviour by the youngest daughter of the parties including simulated masturbation, rubbing her vaginal area against people and furniture, and commenting that various objects looked like her father's "big fat penis". The three older children had exhibited such behaviour. The Claimant attributed this inappropriate behaviour of the youngest daughter to the fact that she was being inappropriately touched by her father.

FIRST REPORT TO THE MINISTRY FOR CHILDREN AND FAMILY DEVELOPMENT

[13] As a result of a remark made by the Claimant to their counsellor, a call was made by the counsellor to the Ministry for Children and Family Development ("Ministry") on August 6, 2010. The following notation was made by Kelly McIntosh of the Ministry at the time:

Caller contacted the White Rock/S. Surrey D.O. to advise that he just met with a couple ... [the Respondent] and ... [the Claimant]. ... [the Respondent] and ... [the Claimant] have been seeing the caller for the last 3 months. Prior to this they were separated. Today in session, ... [the Claimant] reported that on Wednesday, ... [youngest daughter] disclosed that her father had "tickled her vagina". Caller reports that when ... [the Claimant] said this in session, caller told her to go and get ... [youngest daughter] and bring her directly to MCFD [Ministry]. ... [the Claimant] is on her way to the office at this time.

Caller said that ... [the Respondent] denies touching his daughter and believes that Mom is coaching her. Caller said that ... [the Respondent] is not prepared to leave the family home. ...

P/C [Phone call] to ... [the Claimant], she advised that earlier in the week, ... [youngest daughter] was getting out of the bath and ... [the Claimant] was talking to her about changing in private. ... [youngest daughter] said that it was okay because now her Dad was tickling her on her neck and not on her vagina anymore, and pointed to her vagina. Later in the day, ... [the Respondent] was tickling ... [youngest daughter]'s neck and she said "see Mommy, he is not tickling me there (pointing to her vagina) anymore!"

... [the Claimant] said that she has noticed some odd behaviour from ... [youngest daughter] over the last several months including very sensual/sexualized behaviour after spending time with him. /c said that she had arranged for ... [youngest daughter] to see a therapist, but ... [the Respondent] refused to allow ... [youngest daughter] to meet with a therapist alone.

SW asked ... [the Claimant] was her plan was, she said that ... [the Respondent] is refusing to leave the home but she will go and stay in the [United] States with her dad, or get a hotel. SW advised that until the RCMP have assessed/investigated that the children should not have any contact with their Dad. ... [the Claimant] said that ... [the Respondent] was on his way to pick up the oldest daughter ... SW requested the ... [the Claimant] take the children and do this while SW contacts Surrey RCMP.

[14] A Ministry investigation began on August 9, 2010. At the same time, the RCMP commenced an investigation. The Respondent moved out of the matrimonial home. An RCMP officer interviewed the youngest daughter who was 4 at the time.

[15] There is this August 19, 2010 notation in the files of the Ministry:

“... [oldest daughter] instances – not all that inappropriate.” “RCMP not make leap to sex abuse.” “No red flags.” “Mother is now allowing that ... [youngest daughter] may learn differently sexual behaviours. It is not all out of the ordinary. Her daughter is ‘normal’. Mother is now open to the idea that ... [youngest daughter] may have a different personality than her siblings, and use a different language.” “Siblings had no disclosure re touching or discipline.”

[16] A message left with the Ministry from the RCMP was that an officer had:

... interviewed ... the ... [youngest daughter] this morning (August 13, 2010). [The child] did not make a disclosure, however, Janice [of the RCMP] feels that something is “going on” as every time Dad was mentioned ... [the child] “would shut down” and not respond. Janice will be interviewing all of the children this afternoon. Dad remains out of the home and Mum continues to be protective.

[17] The Respondent volunteered to take a polygraph test and, on September 13, 2010, a polygraph test was administered by the RCMP. The RCMP came to the conclusion that the Respondent was “truthful” when he answered “no” to the questions concerning his daughter and the allegation of inappropriate sexual touching. The particular questions asked of the Respondent regarding inappropriate touching were the following: (a) did you touch her vagina for a sexual purpose? (b) did you rub her vagina for a sexual purpose? (c) did you fondle her vagina for a sexual purpose?

[18] In response to the advice received from the RCMP, the Ministry provided a September 27, 2010 email to the RCMP stating: “It is nice to have this additional

piece of information to confirm what we had believed. I am sure it will make ... [the Respondent]’s life at home a little easier too.” “I will also be concluding this file.”

[19] On September 27, 2010, the Ministry wrote to the parties and advised that: “The investigation findings indicated that there is no need for further Ministry involvement to occur at this time.” The files of the Ministry and the RCMP were then closed.

[20] After the Report from the Ministry was received, the Respondent moved back into the matrimonial home and was there until December when he left for vacation.

[21] The response from the Ministry and the RCMP did not end the suspicions of the Claimant regarding the inappropriate touching of their youngest daughter by the Respondent. The response did not end the view of the Claimant regarding the trustworthiness of the Respondent and the view that the Respondent should not be alone with the children. In her diary under the September-November heading, the Claimant stated:

He still believes drinking isn’t a problem and refuses to get any help. I fear if he is alone w/ these kids & gets drunk, watches porn, he could rape one of the kids. He is not a caring, loving, safe father.

THE ROLE OF A PASTOR AND ATTEMPTS AT FURTHER COUNSELLING

[22] The Claimant was introduced to a local pastor (“Pastor”) who began counselling the Claimant in the Fall of 2010. The Pastor practices “nouthetic counselling” which is a form of pastoral counselling that holds that counselling should be based solely upon the Bible and focused upon sin. The Pastor described nouthetic counselling as repudiating mainstream psychology and psychiatry.

[23] Prior to providing counselling, the Pastor requires the completion of a “Personal Data Inventory Counselling Application”. The Claimant completed that form. Under the heading “Describe your relationship with your spouse”, the Claimant answered:

Initially we enjoyed one another’s comp. We enjoyed church + activities together ect. [sic] At the very beg. ... [the Respondent] did show signs of a

temper + some control issues to wanting his way or he would get angry, pout or regress ect. [sic] He seemed use [sic] to getting his way. He was 7 yrs older + had a lot more freedom than I did.

[24] The Claimant answered the question: “are you willing to have your pastor sit in on these counselling sessions?” by writing: “he isn’t interested in being part of the situation, not at length.”

[25] Under the heading “What is your main problem(s)?”, the Claimant answered:

Family issues, concerns, for treatment from my husband to the children. My relationship w/ my husband, he says that he was changed, he has no issues. w/ porn, drinking, inappropriate touching children, but his actions speak louder. He seems OK w/ immorality, lying + deceiving.

[26] Under the question “When did your problem(s) begin?”, the Claimant answered: “Initially 3-12 years ago. Spring 2007, new issues have arisen in the last 6 mths.”

[27] Under the question “Please describe any significant events that were occurring at that time”, the Claimant answered:

At the time, w/ ... a new home, all debts paid off and our 4th baby. For some reason ... [he] started to become mean, angry, w/drawn, all these patterns would arise at dif. times in the past as well. He admitted to looking at porn drinks lots of wine.

[28] Under the question “What have you done about this problem(s)?”, the Claimant answered: “Consulted 3 counsellors w/ husband, as to no resolve, new things seem to arise over time.”

[29] In answer to the question “Is there any other information we should know?”, the Claimant answered: “I’ve come to the conclusion that my husband is a deceiver and not a loyal companion. I trust in the Lord for whatever His future is for me and my family (children).”

[30] In addition to providing the Claimant with scripture readings, the notes of the Pastor also indicate that the Claimant should bring in “Ministry Paper”. From this, I conclude that the Claimant advised the Pastor regarding the report that had been

made to the Ministry. However, it is not clear whether the Pastor was made fully aware of all of the details and the outcome of the Ministry and RCMP investigations.

[31] In a series of emails between the parties, the Respondent requested the advice of the Claimant as to what her intentions were as “to whether or not you want to make the marriage work”. In a November 2, 2010 response, the Claimant requested that the Respondent stop “lieing” [sic], stop bringing wine into the home, “stop drinking as long as it’s there”, “stop lieing [sic] about pornography”, “stop slandering me and lying about me to people”, “stop ranting about other churches and there [sic] belief system, that’s [sic] just foolish”, and “you need to come clean, and admit what to do. That is what it is going to take.”

[32] In a November 19, 2010 email to the Claimant, the Respondent stated that they had been to counsellors for four years, “we are at an impasse”, divorce was a possibility, and:

If your intent is to restore the marriage, then your intentions should be clearly made as soon as possible as outlined in the previous email. The time of the separation will allow for that outcome to become completely established by the two of us, if restoration is what your intention is. If there is no response for the next 48 hours, I will start the process to prepare what the separation agreement might look like.

[33] In a November 20, 2010 email to the Respondent, the Claimant stated:

How is it that you consider it my fault, that you refuse to acknowledge, and seek personal help for these issues.

1. You abuse alcohol, and haven’t come clean with that, you also refuse to remove the 36 bottles from our home.
2. You are verbally abusive
3. You are abusive with the children
4. You tell lies and make up lies (deceiving) [sic] ex: the home we live in, the debt, the investors. (which I new [sic] none of)
5. Your tv viewing at 3 am is not 14A, you still haven’t, admitted that. What you consider appropriate is very questionable, and effects [sic] your behaviour.

As you know I have been going to Biblical counsel for a couple months now, with a Pastor and his wife. You are more than welcome to join me, there is no charge. He is a registered, Biblical counselor, for 30 yrs. You can contact

him by email to arrange this: He is willing to help. ... I think you will really like him.

[34] In a November 23, 2010 email to the Claimant, to the Pastor and to a number of their friends, the Respondent set out the following:

You claim that I am “abusive with the children”. That is a serious comment and if it is true then you should be pressing charges or having a third party involved to ensure their well being. The truth is that you are just throwing out accusations on a whim because it suits you. You need to take responsibility for your paranoid and flippant comments. I have already been through an investigation with Child Services and the RCMP major crime unit as a result of this kind of attitude and approach. After being cleared from that process, you still implied to ... [your youngest daughter's] play therapist that in your opinion they didn't do a proper job and there must be more to find out. It was then that I volunteered to go through a polygraph to have another level of proof to your allegations. Stop the insinuations! ...

We have gone to several pastors, counsellors, accountability groups for almost four years and I will not go to another counsellor unless it is clearly stated and agreed upon what we are trying to accomplish as I have previously noted.

1. Your issues with the marriage (this time I will have mine noted as well)
2. Your solutions for the issues.
3. The time span for these solutions.

Feel free to forward this email to this new counsellor. Again “we are separated” and the clock is ticking. And if you want to work through this with the new counsellor and then let me know when I can look regarding what you have worked out regarding points 1, 2 and 3 listed. ...

[35] Regarding the request of the Claimant that the Respondent participate in the counselling offered by the Pastor, the Respondent stated the following in a November 26, 2010 email transmission directly to the Pastor:

I have some hesitation with this. After a period of almost four years, we have been to many pastors counsellors, seminars, deliverance ministries, inner healing ministries, small groups, eldership, accountability groups etc. I am not interested in waisting [sic] anymore time or energy in moving along to the next guy.

I understand that pastors and counsellors have there [sic] own way that they like to do things so I don't want to present my requests unless it fits with how you might want to proceed. I will only go through a process if that process is written down ahead of time and documented along the way. It is my opinion that ... [the Claimant] and I go over the same things and there is no acknowledgement that issues have been worked through

If you want to, please read through our recent dialogue and let me know if what I am asking for fits with how you are wanting to help us. If this doesn't work for you, I understand and have no interest in going "round and round" another time.

[36] The Respondent indicated that he would be happy to have the Pastor provide counselling but that he wanted a schedule and an agenda from him as he was at the point of feeling that "maybe she doesn't want to remain married" "got the feeling she wanted a good reason to divorce me".

[37] The Pastor and his wife also began to develop a social relationship with the Claimant and the four children and the Pastor began to form an opinion about whether the youngest daughter of the parties had been touched inappropriately by her father.

[38] The Claimant obtained a copy of the publication "I Belong to Me". The publication was read a number of times to the four children by their mother in the Fall of 2010. The Preface to the publication states:

I BELONG TO ME is the first book in a projected series which will deal with the awareness of sexual abuse at a child's level. Providing children with knowledge about personal safety issues is the major preventative tool in dealing with this important issue.

[39] After posing a number of questions, a number of answers are set out in the publication. After dealing with appropriate touching and inappropriate touching, the question is asked: "But do you like to be tickled by someone even when you've asked the person to stop? Or to be kissed by grownups when you don't want to be kissed?" The question was also asked: "But what if the touch you didn't like came from someone you knew – like your babysitter, your brother, your Mom or your Dad?" The answer given regarding the last question asked is: "I'd tell a grown up that I trust." Included within those people who could be trusted are the following: "My teacher, a neighbour, one of my parents, my aunt, my uncle, my doctor, a nurse, my minister at church, a police officer or a firefighter."

[40] As a result of what she had observed, what she had been told by her youngest daughter, and what she had read in the publication "I Belong To Me", the

Claimant remained convinced that the Respondent had inappropriately touched their youngest daughter. In the context of the publication which equated being tickled by someone even after you had asked the person to stop as being inappropriate touching and/or sexual abuse, I am satisfied that the Claimant and the children began to equate what they had observed, what they had been told had occurred and what had actually occurred as inappropriate sexual touching.

EVENTS OF DECEMBER 2010

[41] In previous years, the family had taken a vacation in the Caribbean where the Respondent had a partial interest in a boat. In December, the Respondent left on his own for the Caribbean. Although there is a dispute about whether he actually received the communication, the Respondent was advised in an email in December that he was not welcome back in the matrimonial home. When the Respondent arrived back from vacation, the locks on the matrimonial home had been changed.

[42] The Respondent states that the Pastor contacted him when he got back and advised him that there were “court proceedings underway so I couldn’t access the home”. The Pastor denies that any such statement was made. There were no court proceedings underway at that time.

[43] The Respondent insisted that he be given access to the matrimonial home and advised he was prepared to “partition” the matrimonial home so that the part of the home he would occupy would be separate from the part of the home that would be occupied the Claimant and the four children. That arrangement was not acceptable to the Claimant. The Claimant and the four children moved out of the matrimonial home and into a “cabin” which had been arranged by the Pastor. The Respondent went back into the matrimonial home and resided there until it was sold.

[44] Despite the fact that the Pastor had come to the conclusion in December 2010 that the Respondent had inappropriately touched the youngest daughter of the parties, the Pastor took no action until immediately prior to a Judicial Case Conference which had been scheduled for January 18, 2011, after this Action

was commenced on January 7, 2011. The Pastor sought the advice of a friend who was a police officer and, as a result, decided that he would interview the four children to obtain confirmation of the misconduct of the Respondent which was alleged by the Claimant and which was suspected by him.

INTERVIEWS BY THE PASTOR

[45] In the first interview session on January 12, 2011, the Pastor, his wife, the Claimant and the youngest son and the youngest daughter of the parties were present. The interview was recorded.

[46] The youngest son was the first child interviewed. The youngest son was asked: "have you seen your dad do some things?" and "what things have you seen?" and he answered: "dad touched ... [youngest daughter's] privates". The youngest son stated that he was in the same room at the time watching football on T.V. but he did not know whether his father knew whether he had seen what occurred.

[47] The Pastor then asked the youngest daughter: "... do you remember what ... [youngest brother] is talking about?" After the youngest daughter was reticent to say anything, the Pastor stated:

It is very important for you to tell the truth ... and to speak – you know, your mommy's right here. You know we love you. But it is important for you to tell us what happened. You have told your mommy, have ... and you know something? We already know. Everybody here knows, but we need to hear you say what happened. We already know, but we need to hear you say. What did you tell your mommy? Do you remember now?

[48] In response, the youngest daughter answered "no". The Pastor then asked: "do you remember hearing what your brother said? Let me ask you this: is what your brother said about where your daddy touched you, is that true? After that question was asked, the youngest daughter answered "yes". The Pastor then asked: "was it true what ... [youngest son] said about daddy touching your special private parts? Was that true?" The youngest daughter answered: "yes". The youngest daughter was then asked where this incident had taken place and she indicated "Downstairs" "in the TV room". There was then a discussion about where it was that she was touched by her father and she responded: "I don't know". The

Pastor then asked: "did you daddy touch those special parts?" and the youngest daughter answered: "no". The response from the Pastor was: "he did not? now, are you telling me the truth?" The Pastor then asked: "now, you just said a little bit ago that your daddy did touch those special parts. Are you changing your story now?", and the youngest daughter answered: "no". The Pastor then asked: "well, he either did or he didn't" and the youngest daughter answered "didn't".

[49] There were then a number of discussions between the Pastor and the youngest daughter. Finally, the Pastor stated: "it wouldn't be a nice thing for people to expect you to carry around stuff that's happening to you on the inside because it hurts and it's hard and if you want that hurt to go away, you need to tell what happened. Now, when you were on the couch, what did daddy touch?" The youngest daughter answered: "my private". The Pastor then encouraged the youngest daughter to tell the family doctor: "... what you have told us here today, that daddy touched your private, right?"

[50] The Pastor reinforced that it was necessary to tell the truth: ... "so that your mommy and other people who love you can protect you." The Pastor then asked the youngest daughter: "do you want to live with your daddy by yourself?". The youngest daughter answered: "yes". After being told by the youngest daughter that she was not afraid of either the Pastor or her mother, the Pastor asked: "are you afraid of your daddy?" and the youngest daughter answered: "yes". The Pastor then said: "but if you want to live with your mom, and if you want to be protected so that nobody is going to touch your privates, you have to tell the truth. You have to speak and say why do you not want to live with your daddy. Why do you not want to be alone with your daddy?" The Pastor then interjected: "don't look at ... [youngest son]. He already talked. He said what happened, what he saw." The Pastor then asked a number of times to have the youngest daughter say what her father did, including asking her whether her daddy touched her while she was in her bedroom and why she did not want to be in her bedroom. The youngest child answered: "it's scary".

[51] The youngest daughter answered “no” to the question of whether she wanted to live with her daddy and whether she wanted to be alone with her daddy and then gave this answer to the question “why do you not want to be alone with your daddy?” The youngest daughter answered: “because he’s mean”.

[52] After being reminded by her mother that the name of the game played by her father was “the tickle game”, the Pastor asked her “where does daddy like to tickle ... [you]?” and she answered: “in the private”. She was then asked what she said to her father when that happened and she stated: “stop it”. When asked how many times “has daddy done that once or more than once?”, the child answered: “three times or four times”. When asked whether it happened “more than once or did it happen a bunch times”, the child answered: “just once”.

[53] What was recorded by the Pastor that day was transcribed on May 23, 2012. The transcript was not made available to the Ministry. It was not made available to the parties until a few days before the commencement of the Trial.

[54] The Pastor then had a discussion with a member of the Ministry. The Pastor was advised that it had been a mistake to have had the Claimant in the same room when questioning the two children and to have interviewed the children at the same time. The Pastor was advised that the first interviews were “flawed”. Despite the Pastor offering to be present when Ministry staff interviewed the children, the Pastor decided to re-interview the children himself. A second interview was arranged on the next day (January 13, 2011) at the office of the Pastor. This interview was also recorded. The transcript from the second interview was made available to the Ministry.

[55] At the January 13, 2011 interview, the Pastor and his wife met with one child at a time with neither the Claimant nor other siblings present. The oldest son was asked whether he knew why he needed to be away from his dad right now and he answered: “because ... [youngest daughter] been touched in a bad part.” He was asked whether he had seen his father touch his little sister and he stated: “I have seen him get close but not touch”. However, he did make a motion by putting his

hand up to the top of the inside of his leg. The Pastor and the oldest son then had this exchange: Pastor: "On the very top of her leg?"; Oldest son: "Yup"; Pastor: "Real close to her private parts?"; Oldest son: "Yes".

[56] In the questioning of the youngest son who was six at the time, the Pastor asked: "now I have to ask you kind of a hard question now and that is, have you ever seen your daddy do something that daddy's shouldn't do?" and the youngest son answered: "touch ... [youngest daughter's] private parts." The Pastor then asked: "now, so you saw, you are very very sure that you saw your daddy, and what did he do?" and the youngest son answered: "Touched ... [her] privates." He was asked whether he wanted to live with his dad and he answered "no". When asked why, he answered: "Because he is rude and disrespectful". He was asked to confirm whether his father had ever touched him "in ways that he shouldn't do", and he answered indicating no and "only ... [his youngest sister]."

[57] In the interview of the oldest daughter, she stated: "well Dad's not been behaving very nice" "because he is abusive. "He'll hit ... [her oldest brother] on the head if he doesn't pick up the youngest daughter's toys", "he'd call us names like 'loser' or 'babies' sometimes behind our back. He calls us: 'idiots' and stuff like that." When asked whether she wanted live with her mother or her father, she answered: "Definitely mom!" When asked how she felt about being alone with her dad she answered: "terrible" "because he's mean, he's got a temper, and he just, I don't like him." When asked about how she felt about the little ones being alone with their dad she answered: "bad", "well, whenever he drinks or has wine, he goes all weird and freaky and stuff." There was no attempt to question the oldest daughter about whether she had observed her father inappropriately touch her sister.

[58] In the second interview of the youngest daughter, she was asked whether she wanted to live with her father and she answered: "no!" "he's mean". When asked "what does that look like when daddy is mean?", she answered: "I don't know". When asked whether she wanted to be alone with her father, to have her father give her baths, to have her father take her to the washroom, or to be in the bedroom with

him, the youngest daughter answered: "no". When asked: "is there anything that your daddy does that you don't like him to do?", she answered: "no". The Pastor then asked: "what is the name of the game that your daddy plays with you?", "what do you call it?", "what does he call that game?", her answers to that were: "I don't know".

[59] The Pastor then asked the youngest daughter to draw a picture of a girl and, after she did, the Pastor asked her what to call the girl and she repeated the word "doggy" twice. He then asked: "now, is it ok for people to touch little girl's private parts?" and she answered "no". He asked her twice to put a circle around the place where daddy likes to play the tickle game and she is said to have pointed at the vaginal area of the girl that she has drawn. She then drew a circle around the vaginal area. She is asked whether she likes it when "your daddy plays the "tickle game"?" and she said: "no". She is then asked: "when he plays the "tickle game" what do you say to him? Is there anything that you say to him?" and she stated emphatically "stop it". She was asked whether she wants to live with her daddy and she said "no" and she was asked whether she wants to be alone with her daddy and she said "no" as well.

SECOND REPORT MADE TO THE MINISTRY

[60] After questioning the children, the Pastor decided that it was necessary to report what he had heard to the Ministry ("Second Report"). Courtney Martens of the Ministry made this record regarding a January 13, 2011 call from the Pastor:

Pastor ... recorded his conversation with the family. ... [youngest son] said that he "did not want to be with his father because he is mean, and he touches my sister's privates, I saw it". ... [youngest daughter] said initially that she did not want to talk about it. She was encouraged by saying that they only want her to tell the truth. Eventually she touched her private parts and said her dad likes to play the tickle game and touch her private parts.

[61] Ms. Martens recorded the following on January 15, 2011:

A phone call from Pastor He indicated that he interviewed the children separately last night, without the mother present. He has again recorded his interviews. (I had advised him yesterday that interviewing the children together with the mum present can be seen as prejudicing the children's response to questions particularly around custody and access issue.)

I should have further explained and now have, that any subsequent interviews of the children about protection issues should be done in consultation with MCFD workers. He was aware of the obligation to report which is why he initially called, but is now aware that there are a number of reasons that interviews of protection matters need to be done through or in conjunction with police and MCFD).

Caller said that ... [the Claimant] said to ... [youngest daughter] that she can't just continue to tell her mum, that ... [the Respondent] tickles her vagina but that she needs to be willing to tell someone else. This is when ... [the Claimant] asked caller if he would speak to the kids.

[62] After the Second Report was made, the RCMP was notified. The RCMP came to a quick conclusion as to what should be done. On January 21, 2011, Ms. Martens records this call from the RCMP:

He states that they will not be reinvestigating the matter. ... [the Respondent] was cleared. ... [the Respondent] is "now a victim of what his wife is doing". The ... [Pastor's] interview is inadmissible evidence. His direction to the CASO members is to conclude the file. RCMP "may" talk to ... [youngest daughter] again.

If there is any investigation, it will be public mischief against the wife.

INTERVIEWS OF THE CHILDREN BY MR. NOEL OF THE MINISTRY

[63] In a January 27, 2011 assessment, Patrick Noel of the Ministry stated: "There are no section 13 concerns here to indicate that the children are at risk of harm. This intake and file may now be closed."

[64] Despite that, Mr. Noel conducted interviews with the children. The oldest daughter was questioned on February 25, 2011. She described the Respondent as "mean, abusive, uncaring, self-absorbed". She stated that she had seen one incident where her father had spanked the oldest son on his bare bottom, but she had not seen any other incidents. She is quoted as saying that her father drank two bottles of wine every night, and that "he acts crazy when he drinks". She stated that she saw her father watching "half-naked women pole dancing" when that program was being shown on their television set. She is quoted as saying that her younger sister often ran half-naked around the house, but that she had never seen her rub her private parts on furniture. She was asked whether her younger sister had made any comments and "about Dad's privates?" and she stated: "She's never told me

anything." She was also asked whether her youngest brother had said anything about Dad's private parts, and she answered "no".

[65] The notes of Mr. Noel also indicate the following:

She [the oldest daughter] saw him under a blanket with ... [youngest daughter], it was about 7 8 p.m. She saw his hand moving and ... [youngest daughter] just had her underwear on. I asked her if ... [youngest daughter] usually went around the house with just her underwear on, and she said yes. She said their father was saying stuff like '... [youngest daughter] ... kind of sexy [youngest daughter] was giggling.

She thought it was weird because Dad never did that with her, that he was never close to any of the other kids, just ... [youngest daughter].

She did not tell anyone about this incident, and couldn't say why.

[66] At Trial, Mr. Noel was asked whether he was concerned that the oldest daughter of the parties was only telling the "under the blanket" incident late in the day and whether that was of concern to him, and he answered "yes".

[67] Mr. Noel interviewed the oldest son on March 23, 2011 and asked him whether there was "any bad touch to you?", and received the answer: "No, not me, but ... [younger sister]." "She told me that Dad touched her in the privates ... a few days ago.". When asked: "Why would she tell you that?", the oldest son of the parties answered: "I don't know. She was singing a song and just blurted it out." Regarding his father's consumption of wine, the oldest son of the parties described it as being "12 bottles at night time".

[68] On March 23, 2011, Mr. Noel interviewed the youngest son of the parties and asked the following questions and received the following answers from the child:

Q. Can you tell me anything he's said or done that's not nice?

A. He touched ... [youngest daughter]'s private parts. He dragged me on the floor because I was playing PS3 with ... [oldest son]. He dragged me by my arm across the room and up the stairs. It burned my back. He took me to the couch upstairs to watch football with him.

... [youngest son] said it made him feel not nice. This happened last year when he was 5 years old. He shared that his father is not nice, that he says bad words, he lies and told him that his mother was not nice.

Q. Tell me more?

A. I forgot.

Q. Tell me about ... [youngest daughter]?

A. I saw it on the couch when me, ... [oldest son] & ... [youngest daughter] were wrestling with dad.

Q. [Then] what happened?

A. I don't know ... when I was sitting on the floor I saw daddy touching ... [youngest daughter]'s private parts.

Q. Show me where. [teddy bear on the floor [youngest son] touched the groin area between the teddy bear's legs.]

Q. How many times?

A. One time. ... [oldest son] saw it too.

Q. Did anyone tell you that?

A. Yes and... [oldest son] told me to tell you all the things.

[... [youngest son] appeared anxious at this time (rubbing his hands, avoiding eye contact, up on his feet moving around a little).

Q. Why did you move here?

A. Cause he's not nice, my dad, to get away from him.

[69] Mr. Noel interviewed the youngest daughter of the parties on March 23, 2011. She was asked the following questions and gave the following answers:

Q. Can you tell me how he was mean?

A. He touched all of our privates, ... [older son], ... [younger son] and my privates.

Q. Where did he touch you?

A. In my privates.

Q. Can you show me where?

A. Right here between the legs. [showed me the groin area of bear between the legs]

Q. How long did he touch you?

A. Long time ... 6 years.

Q. Where were you when this happened?

A. On the couch in the old house ... huge house.

Q. Who else was in the room?

A. ... [older daughter], ... [older son]. ... [younger son], dad and me were in the room, mom came downstairs and we went downstairs and played ... that's it.

Q. Who?

A. Me, ... [older daughter], ... [older son], ... [younger son], then dad came downstairs to get wine, he likes wine. Mom used to like wine but not much, dad likes a lot of wine. He buys wine all the time.

Q. Who saw you get touched?

A. Nobody, I had a blanket on ... nobody else knew just me.

Q. How did that make you [feel]?

A. Bad.

Q. Why?

A. Cause ... I don't remember what I said.

Q. Were you wearing pants?

A. I was wearing shorts.

Q. With underwear?

A. Yeah.

Q. How many times?

A. One time, very fast ... then my mom came downstairs and said what are you doing ... I said hi, then I got popcorn.

Q. Was it wrong what your dad did?

A. Yeah.

Q. How did you know it was wrong?

A. Cause I turned 4.

Q. Did you tell anyone?

A. I told mom ... uh ... I don't remember.

Q. Did this happen before?

A. No.

Q. Just the one time?

A. Yes.

Q. Do you love your daddy?

A. No, cause he touched my privates.

Q. What happens when you do something wrong and your parents get angry?

A. I don't know.

Q. Did you ever tell anyone that your daddy has a big fat penis or kiss or privates? [... [younger daughter] started to giggle after I said kiss your privates]

A. No ... how do you kiss your privates ... [giggling] ... I like to say it cause it's funny. I told you ... you know ... kiss your privates ... it's funny.

[70] At Trial, Mr. Noel testified that the youngest daughter of the parties advised him that her father had only touched her “between my legs” one time and that she had not seen her father’s penis. He also stated that he was concerned that she said that her father had touched all of the children inappropriately, even though the two boys had not said that. In this regard, he stated: “Yes, I would have expected two boys to tell me if the concern given was from all four children.”

FURTHER EVENTS IN 2011

[71] In a February 8, 2011 email to the Claimant, the Respondent stated that he wanted to spend time and have access to his children, but that: “Financial support will be based on having access to the children.” “Please be aware that receiving \$3,200 a month of household income, I propose to make 50% available to you in exchange for access to the children.” “Until there is a written judgment from the Court, RCMP or the Ministry of Social Services regarding the need for supervised access to the children, I will not honour your preference of supervised visits.”

[72] The Pastor continued to be an advocate on behalf of the Claimant even though the Claimant had been represented by counsel. On February 12, 2011, the Pastor provided an email to a number of recipients including the Respondent. The email provided in part:

Again, assuming for the sake of discussion, that your wife is the horrible “crazy woman” that you claim, what would a godly “in Christ” father and husband look like? If you believe that ... [the Claimant] is mentally unstable and a danger to your children then please, tell us all why you would you leave your defenseless children with her for weeks, while you took off [in December] for a Caribbean vacation on your sail boat? How is it that you can speak of yourself as a loving and caring father, when you refuse to provide even a cent for them to live on? How are they supposed to even eat? And how is your son, ... [your oldest son], even to live without his expensive asthma medication? Were it not for the kindness of others in our church, your children could be starving, and ... [your oldest son] could be dead. It appears to me that your contempt for ... [the Claimant] has blinded you to your responsibilities to provide for your own children. How are these the actions of a godly “in Christ” father?

You said to me over the phone that you are prepared to provide for your wife and children if they would just move back into the “safety” of your home. And that failing, you would even provide for them if you could just have unsupervised access to your children on a regular basis. ... [Respondent]

your children are not bargaining chips! The reason that your wife and children have been in a safe house for these last two months is because the RCMP and the Ministry of Children and Family Development have instructed and urged safety until the behaviors you have been charged with by your wife and children can be sorted out. Your idea of putting in a door to separate the downstairs living area from the rest of the house, as being a safe alternative is at best laughable. Had ... [the Claimant] agreed to stay under these conditions, a door would have only provided you with the ability to ... (how shall I say this nicely?) ... you could do and say whatever you wanted to your little ones, and all this behind a locked door, where their mother could no longer protect them. Had ... [the Claimant] been willing to do this, then I would have called her "crazy!"

When we spoke over the phone, you claimed to be totally innocent of all the charges that your wife and children have brought against you. Time will tell. But here is a charge that God brings against you, a charge that should strike terror into your soul! And there is no question that this charge is absolutely true.

1 Timothy 5:8 "But if anyone does not provide for his own, and especially for those of his household, he has denied the faith and is worse than an unbeliever."

So please, stop with all your self-righteous rantings. No one is impressed. If you want to become the man of God, who you claim to be, then repent of your control-hungry, "wise in your own eyes", selfish words and ways. Come clean and take ownership of your sinful behaviors toward your wife and children. Admit to who you really are, and to what you have done. Terrible as your sins have been, there is forgiveness waiting when you repent. If I did not believe that sinful men like yourself could change, then I would have to go and do something else. However, for more than thirty years, I have had the privilege of seeing worse men than you repent, fully confess, and change for the glory of God and for the good of others. Your self-righteous train-wreck of a life can be forever changed. And this change begins with ceasing to be "wise in your own eyes".

[73] In an April 1, 2011 email to Ms. Martens, Mr. Noel stated: "I do believe that the mother has talked with her children about these incidents." That email was in response to a request for Ms. Martens asking "Did you get any sense from the children that they were all coached?".

[74] In an April 18, 2011 letter from the Ministry, the Claimant and the Respondent were advised: "There is insufficient information to substantiate the allegation that ... [their youngest daughter] was sexually abused by her father." In an April 18, 2011, letter to the Respondent, Ms. Martens on behalf of the Ministry stated:

There is sufficient information to suggest that there has been inappropriate physical discipline of your children by you.

As discussed during our meeting on April 5th, 2011, you have agreed to refrain from physically disciplining your children. You have also agreed to refrain from alcohol misuse while you are caring for your children. In order to address the above concerns, you stated that you are open to access services in the community which will be discussed below.

[75] In the April 18, 2011 Ministry letter to the Claimant, the Ministry stated:

... The Ministry is recommending that you access supports in the community for yourself and the children. A referral has been made for ... [the youngest daughter] with Child and Youth Mental Health in your area. I have also completed a referral for family support through Chilliwack Family Services. You can follow up with the referral by calling [a number was then set out]. I recommend that you access counselling support for yourself and the children through the Ann Davis Society. You can self-refer to this program by calling [a number was given].

THESE PROCEEDINGS

[76] On January 18, 2011, the parties attended a Judicial Case Conference, at which time a “section 15 report” was ordered. The Section 15 Report was available in November, 2011. At the Judicial Case Conference, the Respondent verbally requested access to the children but this was refused by the Claimant. In view of the Second Report made to the Ministry, it is highly unlikely that the Court would have made an order for access even if that opportunity had been available.

ACCESS AVAILABLE TO THE RESPONDENT

[77] The Respondent had no access to his four children between December 2010 and when a supervised visit with the three older children occurred on July 20, 2011. This visit came as a result of an agreement reached between the parties and their counsel. In that agreement, the parties agreed that there would be supervised access with the Respondent and his two sons commencing the following week and email access with his oldest daughter commencing at the same time.

[78] While the Ministry had recommended that access to his youngest daughter not commence until she received counselling, that counselling did not commence immediately. Even though counselling was ultimately made available to his youngest daughter, the Respondent has had no access with his youngest daughter since December, 2010.

[79] The parties appeared before Madam Justice Griffin on July 29, 2011. An Order was made on an interim basis that the primary residence of the four children would be with the Claimant who would have “sole interim custody and guardianship of the children”. It was ordered that the Claimant was to “keep the father fully informed of all matters concerning the children, including schools where they are enrolled and providing copies of school reports, information regarding extra-curricular activities they might be enrolled in, names of therapists and medical professionals treating any of the children, and providing copies of medical and counsellors’ reports”.

[80] An order was also made for regular supervised access to the three older children every Wednesday from 1:00 p.m. to 3:00 p.m. during the summer and every Wednesday from 5:00 p.m. to 7:00 p.m. starting September 7, 2011. Access to the youngest child was not ordered. It was also ordered that either party was at liberty to seek a review of the access at the earlier of the time the Section 15 Report was available, after sixty days had passed from the date of the Order, or after there was a material change of circumstances affecting the best interests of any of the children.

SECTION 15 CUSTODY AND ACCESS REPORT

[81] The Section 15 Custody and Access Report which was ordered on January 18, 2011 was available on November 15, 2011 (“Section 15 Report”). The Section 15 Report was prepared by Ms. Pam Cripps, a Family Justice Counsellor. The parties were not in a position to retain a private provider of a Section 15 Report.

[82] At the time the Section 15 Report was forwarded, Ms. Cripps did not have the documents of the Ministry. The disclosure package of Ministry documents was received by counsel on December 28, 2011. On January 11, 2012, the Ministry materials were forwarded to Ms. Cripps along with a request that she consider updating her Section 15 Report after reviewing the Ministry materials. Ms. Cripps declined to review the Ministry records and update the Section 15 Report.

[83] Ms. Cripps provided a very thorough analysis of the difficulties between the parties and detailed recommendations. Unfortunately, the recommendations have not been implemented. The following sets out some of the more pertinent portions of the Report:

(a) *Background*

[84] In the section dealing with “Background”, Ms. Cripps states:

... [the Respondent] continues to question ... [the Claimant]’s stability as it relates to her mental health, and her ability to properly care for the children. He would be willing to care for them solely if she were found to be unable, but minimally he would like unsupervised time with his children on weekends and supplementary independent access with the children to allow bonding. In addition to regular access, ... [the Respondent] would like the opportunity to travel with the children for vacations as they did previously, particularly to the Caribbean.

... [the Claimant] feels that ... [the Respondent]’s lack of acknowledgement of his angry and aggressive demeanour, his alcohol misuse and inappropriate behaviours with the children substantive her continue concerns that the children should be supervised in the care of their Dad, and that ... [their youngest daughter] should be given the opportunity to receive therapeutic support before she has contact with ... [the Respondent].

(b) *Health and Emotional Well-Being*

[85] Under the heading “Health and Emotional Well-Being”, Ms. Cripps noted as follows, regarding the four children:

(a) the oldest daughter of the parties:

... seems saddened by what she describes as “the loss of a father figure” in her life but she seems willing to move forward without any expectations that her lack of a relationship with her Dad will ever change.

... [she] is supportive and deferential of her Mum and defensive of negative things that her Dad has said about her Mum.

(b) the oldest son of the parties:

... appears sensitive to both of his parents’ feelings and he is both protective and supportive of his Mum. He goes in and out of wanting to see his Dad and is concerned that his Dad’s behaviour will change to become angrier if no one is supervising the visits any longer, which makes him apprehensive. He

shows reluctance to physical touch by his Dad, which could be his age, but he was affectionate and helpful with his Mum.

(c) the youngest son of the parties:

... appears conflicted and confused about seeing his Dad and why his Mum thinks it is "unsafe to see Dad". He appears comfortable and happy when he is spending time with both parents and any concerns he verbalizes about his Dad seems to be centred on what he may have overheard or been told, rather than his own experience.

(d) the youngest daughter of the parties:

When ... [their youngest daughter] was three ... [the Claimant] began to see a noticeable difference in her behaviour, beginning with anger, aggression and fear of being left alone. She was regressing in her toilet training, continually "getting naked" and acting sexually provocative, above and beyond what seemed like typical child curiosity and exploration. Her behaviours progressed to the point of concern and ... [their youngest daughter] was taken to a play therapist, who confirmed that ... [their youngest daughter]'s play was significantly violent and destructive in nature with an emphasis on negativity that was "out of the range of normal age appropriate behaviours and very concerning".

Pastor, who has supported and mentored the children for the past year through their church, described ... [their youngest daughter] as "angry and defiant" when he met her and he stated that she acted in a "sexually perverted" way with "masturbatory behaviours and sexualized actions". His perception is that since ... [the Claimant] left the family home, ... [their youngest daughter] has become less defiant and verbose with a significant reduction in her screaming. He says that she continued to be afraid of the Police.

Pastor, indicated that prior to ... [the Claimant] leaving the family home, the children "lived in fear of Dad"; fearful of his "violence towards them and his temper". They reportedly shared that their Dad would "scream until he was red faced, grabbing the boys and dragging them" if he was upset. Since the separation between ... [the Respondent] and ... [the Claimant], Pastor states that "the children, as disturbed as they were, have changed incredibly and unbelievably". It is Pastor's assertion that the children were not openly receptive to having visits with their Dad initially but with the support and encouragement from him and ... [the Claimant's] they have been adjusting.

(c) *Views of the Children*

[86] In the section dealing with "Views of the Children", the following was set out by Ms. Cripps:

(a) the eldest daughter of the parties:

The kids don't really have a relationship with him I noticed as I got older", "he freaked out if something happened or if there was mess, screaming at everyone", once he moved out "we felt more safe because we were afraid of making him angry; we felt more peaceful", "we noticed that he got mad more easily when he was drinking", when they left the former matrimonial home, it was a bit boring "but we got closer as a family and with Dad it was always fighting a lot", she believed that they were not "allowed to see Dad at first because the Ministry people said no, but then supervised visits were okayed; we were hiding from him", "he wasn't hitting us but we worried he would", that, despite them not seeing their father, she stated "he never called us but he was allowed; he knew where we were at times, but he did not come or email", "we were hiding at first now we can see him", and that he was trying to be "super nice" on the visits but "if there was no supervisor, I would never go" because "he needs to admit to what he did; I think he may have abused ...[our youngest sister] because of what she would say or do", that "Dad was absolutely the sweetest to ...[youngest daughter]", the youngest daughter was "improving now, everyone notices she is better now that we are settled", that her father can be deceiving at times and she was disappointed at seeing an email by her Dad saying that her Mum is crazy when "she is not", that she feels that her Dad is "totally not safe at all", that she would like to "live with my Mum for the rest of my life and get on with life without Dad", that it would be better to spend time with her father if he was "not to be rude and mean to them", and if he was more "sweet, loving and caring about more than his stuff and put the kids first".

(b) the older son of the parties:

stated that he was closest to his mother because "she spends more time with me and Dad worked", he described the supervised sessions with his father as "going good I guess", "kind of awkward seeing him because we did not see him for a long time", "I kind of don't want to see him at all, I am okay seeing him but I do not want to also", that his father had been aggressive with him at times – hitting and dragging him into his room when he did not want to clean his room, that it used to be "fun as a family" but that things change when "Dad started being mean to ...[his youngest brother]", he pulled his arm and then tried to make it look nice to Mum", that his father would "drink wine a lot; 1 bottle every night", "he has a drinking problem", he indicated that the supervised visits would be "scary if Anita [the visit supervisor] was not there because he would be mean", and that he would not want to go if Anita was not there, that he recited an incident when he was left by his father to babysit his younger two siblings, and stated that he was afraid because his father "kind of just left", that his Dad could be dangerous sometimes, referring to an incident when his father took him and his siblings "really close to the train when we did not want to", that he was worried about hurting his father's feelings, but that "I can't be too far away from my Mum and I want to live with her", and that he would want to spend more time with his father if "he was not mean anymore" and if his Dad would not "touch us anymore".

(c) the youngest son of the parties:

stated that the visit with his father “is long enough”, that they did not want to go to his father’s house, but he was not sure why, but that he thinks that he would “maybe like to go to visit Dad’s house if he had toys there”, that he was not sure why his parents do not live together, that his parents were sometimes angry with each other (“Mum was mad a few times and Dad more times”), that “I only get along with my Mum but I kind of used to get along with Dad”, that his perception as to why the visit supervisor comes on the visits with his Dad is to “keep safe” and he indicated that his Mum had told him that “Dad was not safe”, that he was not scared of his father, “only if Anita was not there”, that he would like to see his father more often “for a little longer to have more fun” but that he was quick to add “I won’t want to go if Anita wasn’t there” as his mother would not say it was okay to see his father without Anita.

(d) the youngest daughter of the parties:

Regarding the views of the youngest daughter, Ms. Cripps noted that the younger girl changed the subject when they spoke about her father, and also stated “I don’t have a Dad; I forgot his name”. She does not remember why she is not seeing her father, and she says that she does not miss him, that “Dad didn’t really do fun stuff, no one sees Dad now”, that her mother has said that the children cannot see Dad, but she is not sure why, and that even if “all the kids went to see Dad, I would stay with Mum; it would be pretty dumb if I saw Dad and it would be boring”.

(d) *Parental Capacity*

[87] Under the heading “parental capacity”, Ms. Cripps noted this regarding the Respondent:

When ... [the Respondent] was observed interacting with the children, he seemed engaged and interested with them. [The two older children] were closed to receiving affection from their Dad but ... [the youngest son] was more willing to give hugs both at the beginning and end of the visit. [The two older children] ... interacted with their Dad with humour and smug sarcasm and ... [the youngest son] seemed happy to be spending time with his Dad.

[88] In dealing with the Claimant, Ms. Cripps stated:

... [the Claimant] has found it difficult to be supportive of the children’s visits with their Dad being unsupervised, but she has remained positive and encouraging to them about going on supervised visits. She is concerned, given the past experiences of ... [the Respondent]’s interaction with the children that without supervision ... [he] will not take caution to keep the children’s safety paramount. It is this apprehension and fears that the children have come to know exists for their Mum and therefore it also exists for them.

(e) Summary and Recommendations

[89] The Summary and Recommendations in the Section 15 Report are as follows:

... [The Respondent] and ... [the Claimant] struggled with marital and family issues for a few years prior to their separation that could not be overcome, despite their ongoing efforts to try to resolve their hurdles. The complications around expectations, a loss of trust and respect for each other combined with the complexities of ... [their youngest daughter]'s behaviours made it difficult for the parties to surmount.

The children express having a limited connectedness and insecurities with their Dad and the separation has exacerbated that for them, both in the extended absence and the underlying apprehension from their Mom, spoken or not.

The children expressed being fearful of being alone with their Dad due to the unpredictability and uncertainty of his demeanour and actions. While the visits between the three older children and their Dad had only been occurring for a short time at the onset of this assessment it is hard to say if their trepidation has gotten better.

It would seem important to provide an opportunity for the rebuilding of the relationship between the children and their Dad with continued regular contact. It may be beneficial for the children to continue with supervision for a while longer, either through an agency or with a person familiar and comfortable to them, with transition to unsupervised access for longer periods of time to allow for a variety of activities that cannot occur in a two hour week day visit. It will be important to the safety and security for the children that ... [the Respondent] not consume alcohol during his time with the children and that risky behaviour, regardless how fun they may seem to an adult, be avoided.

I recommend:

- The children shall reside with ... [the Claimant]
- The three older shall spend time with ... [the Respondent] as follows:
 - alternating Saturdays from 12:00 pm until 4:00 pm
 - opposing weeks from 5:00 pm until 7:00 pm on a week day evening agreed to by the parties
 - access shall be supervised until the end of 2011, by a party agreed to by the children, with a progressive transition to unsupervised access in early 2012
- ... [their youngest daughter] shall not have access with ... [the Respondent] until she has had an opportunity to receive some therapy and at the direction of the therapist and/or the Ministry of Children and Family Development
- The parties shall alternate spending time with the children on holidays and special occasions by agreement in advance starting in 2012

COUNSELLING AVAILABLE TO THE YOUNGEST DAUGHTER OF THE PARTIES***(a) Play Therapy***

[90] Darcy Bailey provided play therapy for the youngest daughter of the parties. Ms. Bailey saw the child approximately twelve times between September 2010 and January 6, 2011. Ms. Bailey made the following comments:

The observations of ... [youngest daughter] were that she frequently and consistently displayed in her play, very significant violent and aggressive play. Thematically, her play and stories were about killing, destruction and control. She enacted and repeated her play with significant violence and aggression. While in her play and story, ... [youngest daughter] would frequently make numerous negative remarks about the characters, verbalizing words such as: stupid; hate; kill, die and make comments such as 'she/he/it's bad; go to jail; kill it; cops are bad", while she violently played with the miniatures in the sand tray. This level of violence and aggression were noted as significantly out of the range of normal age appropriate behaviour and were very concerning. ... [youngest daughter] would also very inappropriately laugh at the figures being killed or dismembered (cutting off heads), or being hurt/beaten by another character, often saying it was "funny". This play was repetitive across many sessions, often using one miniature in particular (an alien) who played various roles throughout her play. At no time did ... [youngest daughter] make any direct, conscious verbal reference to her play and real life or people (ie. this miniature represents so-and-so ... etc.). However this is entirely normal and expected in the play therapy context where the use of symbol and metaphor is used to process problematic thoughts, feelings or perceptions; kids play out themes as a process of resolution.

With the Art Therapy, ... [youngest daughter] appeared generally uninterested, careless and applied minimal effort with the variety of materials available to her; it was noticed that typically kids her age would indulge in the range of materials and generally naturally be creative. When she made art, she would often end up smearing her work, ruing (sic) in it in some way and often not complete the endeavour. ... [youngest daughter] did not appear to have much appreciation of her work or abilities often saying her work was "stupid, ugly or I don't care".

Intermittently over time, ... [youngest daughter's] mother would inform that ... [youngest daughter] had continued to displaying aggressive sexual type behaviour at home.

The aggressive and violent type of play was consistent for many sessions, until the last few sessions that this therapist had seen her. In the last few sessions, ... [youngest daughter's] play appeared aggressive, however progressively much less violent. She engaged in the art making with some positive orientation and pride of her work. She also played in nurturing ways

(making pretend food and feeding). Her eye contact increased with this therapist, she would ask for assistance and help; her manners were apparent and her mood seemed a bit lighter and brighter. Overall, she appeared much more engaged and calm.

... [youngest daughter's] last session, a significant change was noticed. ...[youngest daughter] engaged with me directly, asking for help, asking for me to join her in the play, giving me roles to play out; her play was not aggressive at all. She engaged positively and creatively with the art, making effort and seeming to enjoy the process of creativity. Her interaction was much more age appropriate.

I have been informed by her mom that [youngest daughter] had been really upset recently and did not want to come to therapy. She has not been since.

The origin of why [youngest daughter's] behaviours were violence ant (sic) aggressive is not known at this time.

(b) Heal Team

[91] The youngest daughter of the parties was referred to the "Heal Team" at Fraser Valley Health on December 9, 2010, and had an appointment with Dr. Paul Korn on December 14, 2010. A request was made for a forensic examination looking specifically at indicators of sexual abuse. Under the word "Assessment", it was noted: "A normal examination neither validates nor negates the possibility that abuse may [have] occurred in the past." "... [youngest daughter] presents with a history of increased sexual behaviours, which tend to increase when her father is at home." Under the heading "History" is the following notation:

... [youngest daughter] has a longstanding history of inappropriate sexualized behaviour. This has been brought to the attention of counselors from their family church, as well as MCFD and police. ... [youngest daughter] touches herself, rubs her vagina on tables, and has rubbed herself on her father. She has been noted to refer to a number of objects as similar to her father's penis. She has alluded to specific types of games called the tickling game and the rubbing game. She often removes her clothes, has gone into areas of a room and has spread her legs apart. According to her mother, this behaviour is more prominent when her father is at home, but during times when he [is] away, the behaviours diminish.

... [youngest daughter] has also had problems with soiling and urinating indiscriminately in areas of the house, although she is toilet trained.

[92] The "Plan" that was set out was as follows:

Counselling for issues surrounding potential sexual abuse was provided in the clinic today both by myself and by social worker,

This clearly is a very difficult situation, but we would strongly recommend the continuation of intensive counseling for ... [youngest daughter], as well as continued counseling for the parents.

[93] Priscilla Ang has a Masters Degree in Counselling. Ms. Ang started counselling the youngest daughter of the parties in October, 2011. In her April 12, 2012 report, Ms. Ang set-out the "Progress" as follows:

... [youngest daughter] is a playful, lively and intelligent child who is very personable. She appears to enjoy engaging in play activities. At this time, she has already participated in the art therapy group.

Upon entering therapy, the client's mother reported that ... [youngest daughter] was exhibiting sexually inappropriate behaviours such as masturbation, exhibitionism and the use of sexually inappropriate language. Sleeps disturbances such as nightmares and fears of sleeping in her own room, as well as aggressive behaviours such destruction of objects, hitting and anger outbursts, were also reported behaviours towards triggers in relation to the alleged sexual abuse. In session, general themes of aggression and protection have emerged in her play, possibly indicative of feelings of anger, confusion, guilt and feelings of loss resulting from the sexual abuse and changes in her nuclear family dynamics.

In therapy we have worked on allowing the client to experience a safe space where she can work on increasing her knowledge and awareness of personal boundaries, which will enhance her understanding and sense of safety and decrease her feeling of confusion in relation to the alleged abuse. Providing psycho-education on personal safety and boundaries in the form of play, art and expressive therapy is aimed at enhancing her knowledge on ways to keep herself safe and ways to respond to potentially dangerous situations. This knowledge will not only provide awareness, but may also serve to increase her self-esteem and assertiveness in situations. In addition, we have been working at helping ... [youngest daughter] to identify and understand her feelings, and finding healthy ways to express and manage these feelings, which will be helpful in decreasing the client's sense of confusion, and other accompanying feelings, in relation to the alleged abuse. This awareness and expression will allow the necessary validation that will allow her to feel safe and supported. A growing sense of safety will not only allow her to heal from the trauma and to develop a healthier sense of self, but also hopefully gradually address the source of her sexually inappropriate behaviours, sleeps disturbances aggression.

At this time, ... [youngest daughter] appears to still experience some confusion in relation to her understanding and experiences of her alleged abuse and how this relates to relationships with family members. Although she has displayed a growing sense of trust and comfort in her relationship with the therapist, she still appears to struggle with the exploration of her feelings as demonstrated by her play.

Recommendations

It is recommended that ... [youngest daughter] continues to attend counselling, which will allow her to explore and address her feelings surrounding the alleged abuse, the change in family dynamics resulting from the alleged abuse and be in a safe place while she explores and strengthens her personal boundaries and ways to keep herself safe.

[94] At Trial, Ms. Ang confirmed that the information about the child was provided to her by the Claimant. Ms. Ang described that the play behaviour of the child "presented confusion and aggression" but Ms. Ang was not prepared to express an opinion as to why that was the case. Ms. Ang stated that she did not know the source of the "sexually inappropriate behaviours, sleep disturbances and aggression", that her goal is "to try to get her to cope with what she is struggling with", that "any child in a marriage breakdown situation might benefit from the therapy she was providing", and that "the therapy was to be neutral so as not to reinforce assumption of sexual abuse". Ms. Ang is of the view that the continuation or cessation of therapy should be a decision to be made between the parent [the Claimant] and the therapist. Ms. Ang was not prepared to express an opinion about whether counselling should continue or whether court ordered access was inconsistent with the on-going therapy.

REPORTS REGARDING THE SUPERVISED ACCESS VISITS

[95] A review of the reports of the access supervisor for the period July 20, 2011 through April 12, 2012 indicates that there is a continuing question from the three older children about why the visits should be undertaken and even though there is cooperation by their father in the presence of the supervisor. The two boys appear to engage quickly with their father but the eldest daughter continues to be somewhat standoffish and avoids physical contact such as hugging. The two boys appear not to be hesitant to hug their father. The Respondent appears to be genuinely interested in the welfare of the children and their activities. The children seem to be controlling where the visits take place and this is often to stores where the children have products that they hope their father will purchase for them. In the Section 15 Report, the three children expressed concern if the visits were not to be supervised

in the future. However, the Section 15 Report did recommend that there be “a progressive transition to unsupervised access in early 2012”. That did not occur.

DISCUSSION AND CASE AUTHORITIES

[96] Section 16(10) of the *Divorce Act*, R.S.C. 1985, c. 3, states that “the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child ...”. However, this “maximum contact” principle is displaced where there is a risk of harm to the child: *Young v. Young* (1993) 45 S.C.R. 3.

[97] Here, the risk of harm alleged by the Claimant is that some of the children but especially their youngest daughter may have been subject to inappropriate touching and that the consumption of alcohol and the temper of the Respondent constitute further risk of harm to all of the four children. The Claimant goes further. In her Diary, the Claimant went so far as to suggest that the Respondent “could rape one of the kids”.

[98] In *K. (K.L.) v. K. (E.J.G)*, [2010] B.C.J. No. 2001 (S.C.), the court concluded that a parent: “... who alleges abuse must prove her allegations on a balance of probabilities” (at para. 16). That statement was upheld in *K. (K.L.) v. K. (E.J.G)*, (2011) 19 B.C.L.R. (5th) 32 (C.A.) where Donald J.A., on behalf of the Court, stated that there was a difference between the “real possibility” of sexual abuse test used in child protection cases and the test that should be used in determining what is in the best interests of a child which is whether there could be a finding on a balance of probabilities that abuse did or did not occur (at para. 41).

[99] The test of what is in the best interests of a child involves an enquiry into the risk of future harm: *Young, supra* where McLachlin J., as she then was, stated on behalf of the Court:

I conclude that the ultimate criterion for determining limits on access to a child is the best interests of the child. The custodial parent has no “right” to limit access. The judge must consider all factors relevant to determining what is in the child’s best interests; a factor which must be considered in all cases is Parliament’s view that contact with each parent is to be maximized to the

extent that this is compatible with the best interests of the child. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access - what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. It goes without saying that, as for any other legal test, the judge, in determining what is in the best interests of the child, must act not on his or her personal views, but on the evidence.

(at para. 24)

[100] I cannot conclude that the Claimant has shown on a balance of probabilities that abuse of the youngest child occurred. I cannot conclude that there is a risk of future harm. In arriving at that conclusion, I deal with the evidence as follows:

(a) Conclusion reached by the Ministry and the RCMP

[101] The fact that the RCMP decided that the denials of the Respondent were true and that criminal proceedings would not be undertaken does not prove the innocence of the Respondent or that the abuse of the youngest child did not occur. However, I am satisfied that I can take into account that those who are experienced in ascertaining whether child abuse has occurred have twice reviewed the question and, on one occasion, have questioned the children of the parties and, on both occasions, have concluded that protective proceedings or criminal proceedings were not warranted.

(b) The Polygraph Examination Taken by the Respondent

[102] The fact that the Respondent took a polygraph examination and that, on the basis of that examination, the RCMP no longer considered him to have inappropriately touched his youngest daughter is not proof of his innocence. However, I am satisfied that I can take into account the fact that the Respondent requested a polygraph test as part of my overall assessment about whether the allegations of abuse are likely to be true: *Carrier v. Tate*, [2007] B.C.J. No. 2348 (S.C.); and [2009] B.C.J. No. 838 (C.A.).

(c) *The Interview Conducted by the Pastor*

[103] In reviewing the transcripts of the two interviews conducted by the Pastor, I have reached the conclusion that the Pastor made virtually every mistake that could have been made by someone interviewing a child. Accordingly, I give no weight to the answers that were provided by the four children during the interviews conducted by the Pastor or to the conclusions reached by the Pastor about whether there had been inappropriate touching.

[104] At the first interview, the youngest son was interviewed in the presence of his youngest sister and she was then asked to confirm what her brother had said rather than what she recalled. This puts the youngest daughter in the impossible position of having to disagree with what her brother had just said when he is in the same room with him. Additionally, the youngest daughter is merely asked to confirm what her brother had said, rather than stating what she recalled. Second, when the Pastor heard an answer that he was not expecting to hear or, possibly, that he was “hoping” to hear, he sought out a “consistent” answer that was more in accordance with what he expected to hear. Third, there were numerous leading questions which suggested the answer to be given and which did not require the children to recount what they had recalled but rather to adopt the version being put to them by the Pastor. Fourth, any child providing an answer that was not in accordance with the expectations of the Pastor was challenged about whether they were telling the truth or about whether they were changing their story. Fifth, the presence of the Claimant at the first interview allowed her to remind her youngest daughter what she should be saying and the story she should be repeating. Sixth, when a child provided an answer that was not in accordance with what the Pastor was expecting, the Pastor moved to a different tack in order to obtain the answer he was expecting. Seventh, the Pastor stated to the youngest daughter that both her brother and mother have said something happened before asking her to confirm it. This puts the child in the difficult position of having to say that her brother and mother are incorrect if she did not agree with what they said. Eighth, the Pastor reinforces in the youngest daughter’s mind that it is not safe for her to be with her father. It is not surprising

that a child, being told by a pastor that it is not safe for her to be with her father, then adopts that position. As well, the youngest daughter also indicates that she does want to live with her father before the Pastor then questions the child about that answer. Ninth, the youngest daughter denies a number of times that her father touched her “special parts” but that answer is not accepted by the Pastor who presses the child until he gets the answer that he expects. Tenth, the Pastor almost threatens the youngest daughter by indicating that if she wants to live with her mother and if she wants to be protected so that nobody is going to touch her privates, she has to tell the truth. He then concludes that she has to say why she does not want to live with her father even though she has just said that she does want to live with him. Eleventh, the answers of the youngest daughter on most matters which are critical to my consideration of whether she was inappropriately touched or not are so inconsistent that it would be inappropriate to rely on those parts of what she answered to come to the conclusion that she had been inappropriately touched. Twelfth, many of the answers provided by the three older children are inconsistent with what they said previously or said later to others who put questions to them.

[105] I have also reached the conclusion that what was said by the four children in the two interviews conducted by the Pastor were the words of others, rather than their own words, as to what they recall occurred. I find that the children had been prompted by the Claimant prior to the interviews conducted by the Pastor. For instance, the youngest son is asked in “have you seen your dad do some things?” and, without prompting, the child answers: “dad touched ... [youngest daughter’s] privates”. It is clear from that and from other examples that the children had been told why they were being interviewed by the Pastor, what topics would be discussed, and what answers were expected. If it was otherwise, the answer given to the question “have you seen your dad do some things?” cannot be explained.

[106] Despite the fact that the Pastor became convinced in December of 2010 that the youngest daughter had been inappropriately touched, the Pastor made no complaint to the Ministry. I find that he undertook the interviews for the purpose of

assisting the Claimant to take the position at the upcoming Judicial Case Conference and otherwise to oppose any access requested by the Respondent and for the purpose of building a case that the Respondent had physically abused some of the children and had inappropriately touched his youngest daughter. If the Pastor genuinely believed that the child had been inappropriately touched by the Respondent, he should have made a report to the Ministry and the RCMP as soon as he arrived at that conclusion.

[107] I find that the Pastor conducted the two interviews in a way that was singularly inappropriate and ineffective and in an egregious attempt to influence the subsequent decisions of not only the Ministry but also the Court. I find that the timing of the interviews, the scheduled date of the Judicial Case Conference and the complaint by the Pastor to the Ministry were not coincidental.

[108] I also find that the Pastor became an advocate for the Claimant and not an independent observer with the professional qualifications which would allow him to express an opinion about whether there had been inappropriate touching of the youngest daughter of the parties. A February 12, 2011 email to a number of people, including the Respondent is indicative of his belligerent and aggressive approach to the Respondent. I find that the two interviews conducted by the Pastor do not in any way assist me in coming to the conclusion about whether the Respondent inappropriately touched his daughter.

(d) The Section 15 Report

[109] It is clear from the Section 15 Report that there has been an alienation of the children from their father. For instance, the youngest son of the parties is quoted as saying that he has been told by the Claimant that it is “unsafe to see dad”. Under the heading “Health and Emotional Well-Being”, Ms. Cripps notes that the two sons appear comfortable with their father and the oldest daughter seems “saddened” by the loss of a father figure. It seems unlikely to me that this would be the reaction if they genuinely feared their father and were of the belief that he had inappropriately touched their youngest sister.

[110] Regarding the “Views of the Children” section, Ms. Cripps indicates that the primary concern of the oldest daughter relates to his temper and that she is assuming that there is abuse of her youngest sister because of what “she would say or do”. I take from that statement that the oldest daughter has equated the bizarre behaviour of her sister based on the assumption that it was caused by actions of her father rather than on other causes. The concern of the oldest son appears to be the past aggression of his father and the possibility that his father “has a drinking problem”. As the oldest son would have no way of analyzing whether there was a drinking problem, I can only assume that this is an assumption raised by an adult with the oldest son and not an observation that he could make. Regarding the youngest son, it is clear that his mother has indicated to him that it would not be safe for him to be visited by his father if the access supervisor was not present.

[111] It was the recommendation of Ms. Cripps that access be supervised until the end of 2011 and unsupervised thereafter. I think it highly unlikely that unsupervised access to the three older children would have been recommended by Ms. Cripps if she was of the belief that the youngest daughter had been inappropriately touched or if she was of the belief that the three older children would be endangered by unsupervised access.

(e) *The Views of those Counselling the Youngest Daughter*

[112] Ms. Bailey appears to have made considerable progress in dealing with the youngest daughter of the parties. It is unfortunate that the therapy undertaken by Ms. Bailey came to an abrupt stop when Ms. Bailey was advised by the Claimant that her youngest daughter “had been really upset recently and did not want to come to therapy”. When the assistance being provided by Ms. Bailey appears to have been making some improvement in how the youngest daughter dealt with life, is in inexplicable to me why the therapy came to an end. It is inexplicable why the Claimant would not have continued to bring her daughter to the therapy offered by Ms. Bailey. While I am reticent to come to the conclusion that the Claimant felt that successful therapy would lead to access by the Respondent with his youngest

daughter and, for that reason, the therapy should come to an end, it is difficult to reach any other conclusion.

[113] I see two difficulties with the therapy now being provided by the “Heal Team”. First, it is clear that the Heal Team proceeded on the assumption that there was “potential sexual abuse”. Second, Ms. Ang was of the view that the continuation or cessation of the therapy being provided should be a decision made between her as the therapist and the Claimant. In those circumstances, I think it highly unlikely that the Claimant will ever be satisfied that the therapy should not continue because that will mean that access might then be available to the Respondent.

[114] While it is encouraging to see that the therapy that has been made available for the youngest daughter appears to be of assistance to her, there is nothing about the therapy which would allow me to conclude that the cause of her behaviour was the inappropriate touching of her by the Respondent. Such a conclusion is mere speculation. It would be just as persuasive to come to the conclusion that the inappropriate behaviour of the youngest daughter came as a result of the considerable turmoil in the family as a result of the matrimonial difficulties.

(f) *Testimony of the Claimant*

[115] The Claimant relies in part on the “tickling” incident. On review of the various reports made regarding that incident and the evidence of the Claimant and the Respondent, I conclude that the Claimant exaggerates the story every time she tells it. As well, it is difficult for me to conclude that a father tickling his daughter, whether or not she has clothes on, can always be found to be guilty of inappropriate touching.

[116] No decision by the Ministry, the RCMP, or the Court will convince the Claimant that her youngest daughter was not inappropriately touched by the Respondent. In this regard, the Claimant was asked under cross-examination whether there was anything “he could do or say to convince her” and she answered: “I believe what ... [our daughter] has told me”, “no other explanation other than what ... [she] has told me and continues to tell me.” Regarding the polygraph test that

was taken by the Respondent, the Claimant under cross examination stated: "I am not convinced", "he has a way of saying things that he believes", "I don't think a polygraph is full-proof", "I believe you can tell a lie and believe it is the truth."

[117] It was not clearly established whether the Diary of the Claimant was kept contemporaneously or whether it was manufactured after the fact. Because months and not months and days are set out in the Diary, I can conclude that the Diary was not kept contemporaneously. Rather, I conclude that it was created after the fact to justify the position that was being taken by the Claimant. As well, the belief of the Claimant set out in the "September-November" heading that, if the Respondent was alone with the kids and "gets drunk, watches porn", that he could "rape one of the kids", is not supportable. I find that this statement is indicative of the delusions of the Claimant and the extent to which she is prepared to go to justify her position regarding guardianship, custody and access.

[118] Faced with a failing marriage, some unacceptable behaviour on behalf of the Respondent, and bizarre behaviour by her youngest daughter, the Claimant has allowed her judgment about whether or not her daughter has been inappropriately touched to be clouded by her suspicions that it is the case and by her animosity towards the Respondent. In dealing with the likelihood that the "tickling" incident constituted inappropriate touching, I take into account that the Respondent knew that the other children were close at hand and that the Claimant was going to return at any moment from the upstairs of the home with clean pyjamas for her daughter. Taking into account the setting and the context of the alleged inappropriate touching, I think it unlikely that the "tickling" incident would have taken place if it was for the purpose of inappropriate touching. As well, I also take into account that the words "tickle game" and "rubbing game" that the Claimant now attributes to their youngest daughter did not appear in the August 2010 report made to the Ministry and/or the RCMP.

[119] While the Claimant relies on what she has been told by her youngest daughter, I am satisfied that the words have been put into the mouth of the youngest

daughter by the Claimant and that there has been no spontaneous utterances by the youngest daughter prior to the thought of inappropriate touching has been raised by the Claimant with her youngest daughter.

(g) *Statements Made by the Other Three Children*

[120] The oldest child, who is the one child most capable of seeing and recognizing something untoward, said nothing to the RCMP in August 2010, and nothing to the Pastor on January 13, 2011. As well, she had no explanation as to why she had never mentioned to anyone before February 25, 2011 an incident of seeing her father and her younger sister under a blanket with her father's hand moving and him using the word "sexy" to her younger sister. What the two boys say to various parties is inconsistent and, where there is a consistency, the answers given are virtually identical, which allows me to conclude that what they were to say has been carefully orchestrated.

Conclusion regarding whether the youngest daughter of the parties was inappropriately touched

[121] I have concluded that the Claimant is not correct in her belief that her youngest daughter was inappropriately touched by the Respondent. I find that the youngest daughter of the parties was not inappropriately touched by the Respondent. I am satisfied that the Claimant genuinely believes that inappropriate touching has occurred. At the same time, she has been able to convince her three older children and the Pastor that inappropriate touching occurred. However, I am satisfied that her perceptions have been clouded by a failing marriage, her abhorrence of the possibility that harm would come to her children, an imperfect and sometimes unfeeling and less than ideal spouse, and a firm belief in what would constitute appropriate behaviour within a marriage. I am satisfied that the Claimant has interpreted otherwise innocent acts by the Respondent to constitute sexual abuse. On a balance of probabilities, I find that the abuse alleged by the Claimant has not been proven by the Claimant. I make the finding of fact that the abuse did not occur.

[122] Having reached that conclusion, I cannot also conclude that the Respondent is an ideal father. In the past, he has used alcohol to an excess, he has disciplined some of his children inappropriately, and he has watched and may have once exposed one child to pornography. I also cannot conclude that the Respondent has always acted in the best interests of the children. It was unacceptable and irresponsible for the Respondent to take the position that financial support would be based on access and that, if access was not available, financial support would not be forthcoming. Financial support is an obligation and is not to be used as a “trading chip” for access.

[123] Even if I am found to be incorrect regarding my conclusion that there was not inappropriate touching of the youngest daughter by her father, there still must be a full enquiry regarding what is in the best interests of the child: *P. (V.M.) v. P. (D.B.)* (2006) 36 R.F.L. (6th) 259 (Alta. C.A.) where Fraser C.J. on behalf of the Court stated:

Once the trial judge accepted, as he did, that the child had been sexually assaulted, a material change in circumstances had been established. This then required a fresh inquiry into the best interests of the children as regards access. The trial judge's finding that it had not been proven on a balance of probabilities that the father had committed the assault did not determine whether, in these circumstances, it was in the best interests of the children to maintain unrestricted access. In answering that question, the trial judge was required to go on and assess the risk of future harm to the children, *Young v. Young* [1993] 4 S.C.R. 3; *B.S. v. R.T.* (2002), 212 Nfld. & P.E.I.R. 167 (Nfld. S.C.) (at para. 3).

[124] I am satisfied that there should be a maximization of the contact that the Respondent has with his four children. Having reached that conclusion, I am aware of the difficulties that such an order creates. I am satisfied that the Claimant will approach increased contact with scepticism and fear. The Claimant has convinced the three oldest children that abuse of their youngest sister occurred and that it is not “safe” to be with their father on an unsupervised basis. Any declaration by the Court that the alleged abuse of the youngest daughter of the couple did not occur might be

interpreted by the three other children that their mother has been less than truthful with them or that her judgment as a parent and as a protector of them is flawed.

[125] Regarding whether supervised access of the three older children should be eliminated so that access is unsupervised, the three children have been influenced by their mother to believe that such unsupervised access would put them in danger. Regarding access by the Respondent with his youngest daughter, she has now spent almost a third of her life “without a father”.

Custody and Guardianship

[126] I am satisfied that it is in the best interests of all of the children that there be joint guardianship even though the ideal cooperation necessary for joint guardianship and custody does not exist: *Rice v. Rice*, (1995), 17 R.F.L. (4th) 328 (V.C.S.C.). I order joint guardianship even though there is not, at present, an appropriate relationship between the children and their father (*Lee v. Lee*, 2001 BCSC 295), and despite the difficulty between the parties to communicate freely and openly: *Dhillon v. Dhillon*, [1998] B.C.J. No. 1820 (S.C.). I am satisfied that there should be an order in accordance with the “Master” Joyce joint guardianship model.

[127] The Respondent testified that he was content with the information he was receiving and, accordingly, I make permanent the order that was made on July 29, 2011 so that the Claimant must keep the Respondent “... fully informed of all matters concerning the children, including schools where they are enrolled and providing copies of school reports, information regarding extracurricular activities they might be enrolled in, names of therapists and medical professionals treating any of the children, and providing copies of medical and counsellor’s reports”. Additionally, I order that the Respondent will have access to any materials ordinarily available to a parent at the schools of the children and will have unlimited access to the medical and dental records maintained by the doctors, dentists and counsellors of the children.

[128] I am satisfied that the major decisions that must be made regarding the children should be made by both parents as they cooperate to do that which is in the

best interests of the children. Recognizing the difficulties that have existed between the parties, I order that, if there is any dispute regarding those matters which are ordinarily decided by joint guardians, then the views of the Claimant shall prevail. However, the Respondent will be at liberty to apply to the Court to have a review of the decisions reached by the Claimant.

[129] Although I find that the Respondent inappropriate physically disciplined one of his sons on one occasion, I am satisfied that this incident which occurred a number of years ago is not sufficient to cause me to restrict the parenting relationship of the Respondent with his children, providing, at the same time, that there will be an order that the Respondent will be prohibited from any physical discipline of his children. Regarding alcohol misuse in the past, I am satisfied that this is not sufficient reason to restrict the parenting relationship of the Respondent with his children providing, at the same time, that there will be an order that the Respondent will not consume alcohol while caring for the children and for a 24-hour period prior to any parenting time. Regarding the previous viewing of pornography, I am satisfied that this is not sufficient to cause an order to be made to restrict the parenting relationship of the Respondent with his children, providing, at the same time, that there will be an order that the Respondent will not allow his computer to be available to his children during any access visits and that the "Covenant Eye" program which had earlier been installed in his computer and which blocked all pornography being viewed, will be restored to the computer of the Respondent.

[130] It is appropriate for an order for joint custody to be made so that both parents will participate in the decision making process for the education, health, and well being of the four children. I am satisfied that it is appropriate for these parents to continue to share the same duties, rights, and responsibilities towards the four children. However, the responsibilities of everyday parenting with physical care and control will remain with the Claimant: *Anson v. Anson*, (1987), 10 B.C.L.R. (2d) 357 (Co. Ct.). In *Anson*, joint custody was imposed even though it was opposed by the mother and the cooperation between the parents was less than ideal. I am satisfied that both parents have the capacity to cooperate so that they will make the best

interests of the children paramount. While I have taken into account the inability of the parties to cooperate or communicate appropriately in the past, I am still satisfied that a joint custody order is in the best interests of the children.

Access

[131] The access ordered by Griffin J. should be amended to reflect not only what was recommended in the Section 15 Report but also what I believe is in the best interests of the children.

[132] It is the position of the Claimant that the present schedule should stay in place so that supervised access of the three older children continues and so that there is no access to the youngest daughter of the parties.

[133] The submissions of the Respondent regarding access can be summarized as follows:

- (a) that there be unsupervised visits every Saturday from 12:00 p.m. to 4:00 p.m. with the three older children or, at the option of his eldest daughter, with only the two boys, commence immediately;
- (b) regarding access with his youngest daughter, the Respondent submits that weekly supervised access on Thursdays from 5:00 p.m. to 7:00 p.m. commence immediately and that, after there have been six supervised access visits, his youngest daughter shall join her siblings every Saturday from 12:00 p.m. to 4:00 p.m. for unsupervised access;
- (c) that, 90 days after the first visit of his youngest daughter with him, the access with all four children will be increased to one visit each weekend alternating between Saturdays from 10:00 a.m. to 6:00 p.m. on one weekend, and on Sundays from 10:00 a.m. to 6:00 p.m. on the next weekend, with the Respondent having liberty to take the children to church services “at the organized church he intends to join”;

- (d) that 180 days after the first visit of the youngest child with him, the "Regular Access Schedule" will be every second weekend with all four children from Saturday at 10:00 a.m. to Sunday at 6:00 p.m. and every second week with the children on Wednesdays from 5:00 p.m. to 7:00 p.m., alternating each visit between an access visit with the two boys and an access visit with the two girls;
- (e) regarding holiday access, the Respondent proposes that there be a one-week access visit with all children every Christmas holiday commencing at 1:00 p.m. on Boxing Day in every even number year and commencing at 1:00 p.m. on Christmas Eve in every odd numbered year;
- (f) commencing in 2013, the Spring Break and the Easter long weekend will be divided so that, if the Spring Break is a two-week holiday, the Claimant and the Respondent shall each have an uninterrupted one-week holiday with the children and the Easter long weekend will fall under the Regular Access Schedule;
- (g) if the Spring Break is a one-week holiday, the Claimant shall have the children with her for the one week Spring Break, during which time the Regular Access Schedule will be suspended in odd numbered years, and the Respondent shall have access with the four children for the Easter long weekend commencing at 1:00 p.m. on Good Friday and ending at 6:00 p.m. on Easter Monday. In even numbered years, the Claimant will have the children with her for the Easter long weekend, during which time the Regular Access Schedule will be suspended and the Respondent will have the four children with him for the Spring Break commencing at 10:00 a.m. on the day following the last day of school and ending at 6:00 p.m. on the day preceding the children's first day back to school;
- (h) in the summer of 2013 and continuing in every summer thereafter, the Respondent would have two 2-week summer periods with all four

children, one of which would commence at 1:00 p.m. on the Thursday immediately preceding the August long weekend and ending at 1:00 p.m. two weeks later;

- (i) during the Christmas school break, the Respondent would give notice in September of any year to restrict his Christmas access visit to an overnight access visit commencing at 2:00 p.m. on Christmas day and ending at 2:00 p.m. on Boxing Day in exchange for an access visit with all four children for the entire two-week Spring Break holiday for a trip to the British Virgin Islands. The Claimant is to cooperate with the Respondent to obtain passports for the children for the purpose of such a trip, and to sign any travel permission letters required.

[134] At Trial, the Respondent testified that he is not attending church, he is presently living in one of the unsold units in the project that he is developing for sale, that he is living alone, and, if the unit sells, he would have to find a property to rent. In those circumstances, I am satisfied that it would be inappropriate to provide the Respondent with Sunday access or overnight access.

[135] I recognize that it is in the emotional and economic interests of the parties not to have to make further applications to the Court. However, there is nothing in evidence regarding the current dwelling of the Respondent, so that I am not in a position to ascertain whether there are sufficient bedrooms to accommodate overnight access. At the same time, if the unit presently occupied by the Respondent is sold, there is nothing in evidence which would deal with the suitability of future rented premises.

[136] On the question of Sunday access, religious upbringing and attendance at church has been a very important part of the life of the parties and of their children. Presently, the Respondent has no regular church. Until the Respondent chooses a church and the Claimant is in a position to ascertain the suitability of the same from her point of view and from the point of view of the children, I am satisfied that it would be inappropriate to order Sunday access.

[137] Regarding the suggestion that the question of unsupervised visits every Saturday and whether the oldest daughter will decide whether that will be with the two boys only or with the two boys and her as well, I am satisfied that the decision about that access should not be left "at the option of his eldest daughter". It is singularly inappropriate to put any child in that position. It is inappropriate to require a child to chose between her father and her mother and between the nature of the access that the child will have with one of her parents.

[138] In view of the uncertainty relating to the housing of the Respondent and his intentions regarding attendance at church, I am satisfied that no order should be made for any overnight access, including what occurs 90 and 100 days after the first access visit the Respondent has with his youngest daughter, at the Christmas school break, at the Spring Break, and at the Easter long weekend.

[139] The Respondent will be at liberty to apply to vary the order that I make regarding access if and when he starts to attend church on a regular basis and if and when his permanent residence is known so that the appropriateness of that residence for overnight access can be ascertained.

[140] For the three older children, access will be on Wednesday between 1:00 p.m. and 7:00 p.m. and on Saturday between 10:00 a.m. and 4:00 p.m. during each July and August. When the three older children are in school, the access will be between the end of school and 7:00 p.m. each Wednesday and between 10:00 a.m. and 4:00 p.m. each Saturday. I see no need for the access to be supervised and, accordingly, the access visits with the three older children after September 1, 2012 need not be supervised.

[141] Regarding the youngest child of the parties, I am satisfied that it would be inappropriate for access to be unsupervised immediately. Because of what the child has been told by her mother and others, I anticipate that there may be considerable apprehension about access in the Claimant and in the child. I order that there be weekly access after January 1, 2013, on either a Tuesday or a Thursday and at a

time convenient to the child, her mother and her father. The duration of the access will be no more than two hours each day.

[142] If Ms. Ang is prepared to meet, from time to time, with the Respondent and the youngest daughter of the parties as part of the counselling that she is providing, then I order that there be such contact. If Ms. Ang is not prepared to meet with the youngest daughter and the Respondent as part of the counselling that she is providing and in any event, there will be supervised access sessions on a weekly basis for two hours with an access supervisor, the Claimant, the youngest daughter of the parties, and the Respondent for the months of September and October, 2012. By including the Claimant, I am hoping that the youngest daughter will feel that she is safe and protected from anything that may have previously been of concern to her. In November and December 2012, supervised access will continue but without the presence of the Claimant. Starting in January 2013, access by the Respondent to his youngest daughter will be unsupervised. If the parties cannot agree on the day of the week when the access during September through December 2012 is to be undertaken, then the Respondent will decide on the day.

[143] Regarding the counselling being received by the youngest daughter from the Heal Team at Fraser Valley Health, the original Plan contemplated that there would be "continued counselling for the parents". I am satisfied that such counselling should be commenced. I am also satisfied that any decisions regarding counselling should be made jointly by the parties, and not solely by the Claimant. Any decision which is made in due course that the counselling can cease is to be made jointly by the parents with the counsellor.

[144] If the parties cannot agree on the particular day when access will be available on a regular basis, then the decision will be made by the Respondent. In making that decision, the Respondent must take into account the schedule of the children relating to school, extracurricular activities, and recreational activities scheduled.

CONCLUSION

[145] There should be joint custody and joint guardianship. The Order for joint guardianship shall be in the “Master Joyce” format. The provisions in the Order of July 29, 2011 relating to the information that will be provided by the Claimant to the Respondent will be continued. The access of the Respondent to his children will be as set out above. The parties will be in a position to speak to the question of costs after the conclusion of the remainder of the issues to be heard at Trial or after there has been a settlement of those issues.

“Burnyeat J.”

Burnyeat J.