IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nijjar v. Gill*,
2017 BCSC 1362

Date: 20170803
Docket: E150107
Registry: Vancouver

Between:

Jatinder Kaur Nijjar

Claimant

And

Lakhbir Singh Gill

Respondent

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Claimant:	Ron Huinink
Counsel for the Respondent:	Fanda Wu
Place and Date of Trial:	Vancouver, B.C. March 6-10, May 29-31, and June 1, 2, 2017
Claimant's Written Submissions:	June 15, 2017
Respondent's Written Submissions:	June 19, 2017
Place and Date of Judgment:	Vancouver, B.C. August 3, 2017

Overview

[1] This case concerns a father who walked out of his wife and child's life in 2007, when the child was just over four months old. The father then agreed that the mother had sole guardianship and custody of the child and this was incorporated into an agreement filed with the Provincial Court. Almost a year later, when he sent an email to the mother asking for a divorce, the father acknowledged that because he wanted to be on his own he was "sacrificing" his child, but he was not worried because he knew the child was in good hands.

[2] The father gave notice to the mother that he had some interest in knowing the child in early 2013, when the child was five years old. Some brief introductory meetings followed but by agreement they did not reveal the father's identity as a biological parent. He was introduced to the child as "mommy's friend". These meetings ended in the summer of 2014.

[3] At the time of trial the child was approaching ten years old, having been raised by his mother and not knowing who his father was.

[4] The child has some developmental or educational challenges.

[5] The father now seeks an order for joint guardianship and custody as well as some orders to facilitate introduction of the child to him. The mother opposes this.

[6] In addition, there are issues regarding past child support. While the father promised the mother he would give her $25,000 for child support for the first five years he was absent — 2007 to 2012 — he did not keep his promise, instead he spent the money on himself. The mother seeks past child support for those years. Eventually when the father started legal proceedings in 2014 he paid child support for the years 2012 and forward, but the mother claims that he underpaid child support and s. 7 expenses.

[7] I will now address the facts in more detail.

Background

[8] Ms. Nijjar (the "Claimant") and Mr. Gill (the "Respondent") were married on July 9, 2006. After their wedding the parties resided with the Respondent's parents.

[9] The parties had a son (the "Child") in mid-summer 2007.

The Respondent's Departure from the Family

[10] A few months later, in October 2007, the Respondent surreptitiously made plans to purchase a condominium for himself and to move into it on his own.

[11] On November 30, 2007 the Respondent effectively disappeared from the Claimant and Child's lives, leaving two notes behind with his parents. The Respondent was 32 years old.

[12] In one note the Respondent told his parents that he had decided to be on his own and not to come looking for him. The other note dealt with his intention to make financial arrangements for the Child.

[13] The note written by the Respondent to his parents read:

> To: Mom & Dad
>
> I am writing to you to tell you that I am leaving home. I am not happy here, and have decided to be on my own. I know what I am doing [i]s not right and you will be very upset but this is what I want. I want to say I am sorry, that I have hurt you, but I can not live my life this way any more. As far as my son goes please read the following letter and do as I have asked on the attached letter. I ask you please, do not come looking for me, as no one knows where I am. My friends do not even know where I am. So do not cause any more problems than you have to. I will not come back, and will be moving out of town soon. I wish you guys all the best and all the happiness in the world.
>
> [Emphasis added]

[14] The accompanying note set out the Respondent's intention to gift to the Child the Respondent's one-third share of property that he owned together with his father and brother, located on Arthur Drive in Ladner, BC (the "Ladner Property"). The note read:

> Date: November 30, 2007

> To: Whom It may Concern
>
> I Lakhbir Singh Gill, fully conscious and with full mental alertness am writing this letter to state. That the property owned by Satnam, Lakhbir, Sandeep Gill on 4283 Arthur Dr in Ladner BC. That my share Lakhbir Gill's share of proceeds are to go to his son [the Child]. After the disposition of the property, when the funds are distributed according to share, [the Child] is the receive my share for his well being. Once again I am writing this letter fully alert and with no pressure.
>
> Regards,
>
> Lakhbir Gill

[15] The Respondent had contributed $25,000 towards the purchase of the Ladner Property as his one-third share of it. At the time he separated from the Claimant he thought the value of his interest had increased. He admitted on his examination for discovery that he intended his note to be a binding legal document, so that when the property was sold his one-third share would go to his son.

[16] There was a mortgage on the Ladner Property and the property generated rental income to pay the mortgage payments.

[17] On January 28, 2008, the Respondent sent to the Claimant an email message regarding the transfer of his one-third share of the Ladner Property. In the message he told the Claimant that he had not signed the Ladner Property transfer papers, suggesting that he was concerned that his parents would not be fair with him. His email was somewhat incoherent but seemed to be an offer to have the Claimant purchase the Respondent's one-third share in the Ladner Property for $25,000 and then she would be entitled to recoup the fair market value of that one-third share later, which he suggested would be $35,000 or $40,000; or she could keep $25,000 (implicitly to be paid by the Respondent) and not demand child support for five years. In his email message the Respondent suggested that his child support obligations would be roughly $575 per month.

[18] The Respondent based the figure of $575 child support on his income from his full-time employment and the tables established by the Federal Child Support Guidelines, SOR/97-175, (the "Guidelines"). He did not include some additional income he usually earned each year working part-time at the PNE.

[19] The Claimant understood that one of the options set out in the January 28, 2008 email was for her to purchase the Respondent's share of the Ladner Property for $25,000. She did not agree to that idea.

[20] The Claimant did not respond to the Respondent's January 2008 email message.

[21] A couple of months later in approximately March 2008 the Respondent's parents purchased his interest in the Ladner Property for $25,000. He received cash and did not tell the Claimant or give her any money for child support, nor did he tell her that he had changed his mind about paying child support.

[22] At that time the Claimant was still living with the Respondent's parents, Balvinder Gill ("Mrs. B. Gill") and Satnam Gill ("Mr. S. Gill").

[23] Mrs. B. Gill testified at trial that the Claimant "knew" that they had paid $25,000 to the Respondent for his share of the Ladner Property.

[24] Mrs. B. Gill did not explain how the Claimant "knew" about the $25,000 payment to the Respondent and did not describe any conversation with the Claimant about this subject or how the Claimant reacted to such news. Furthermore, Mrs. B. Gill was somewhat evasive in her evidence about the fact that she and her husband did not follow the instructions which the Respondent had left in his note, namely, that the money be used for his son. Mrs. B. Gill tried to suggest, amongst other things, that this was because of the notary who handled the transaction although she waffled on this evidence and I do not accept it as true.

[25] In addition, it was my observation that Mrs. B. Gill, in giving evidence, was trying very hard to be helpful to her son, the Respondent, and this meant that at times she was not entirely objective and she overstated matters in his favour. As one example, she testified that when the Claimant developed an infection soon after giving birth, and ended up returning to her parents' home for a period of time, that the Respondent visited her every day. The Respondent's own evidence was simply that he visited the Claimant two or three times per week. This fact is not

determinative of any issue in the case but the evidence is illustrative of Mrs. B. Gill's tendency to favour the Respondent in her evidence.

[26] Furthermore, on several occasions Mrs. B. Gill identified that the source of her knowledge was statements she attributed to the Claimant's mother. These statements were hearsay and not admissible for the truth of their contents.

[27] The Claimant testified that she did not know that the Respondent had received the $25,000 from his parents and sold his interest in the Ladner Property. I prefer the Claimant's evidence on this over that of Mrs. B. Gill. If anyone in the Gill family was going to tell the Claimant about this matter, it would be the Respondent's role to do so, as he was the one who made the promise to her about child support. Indeed as part of her evidence Mrs. B. Gill testified that it was up to the Respondent to give the $25,000 to the Child if he wanted to do so.

[28] The Respondent's evidence that he did not tell the Claimant about receiving and using the $25,000 himself is consistent with his admissions and behaviour to the effect that he was a person who habitually avoided dealing directly with difficult personal issues.

[29] I find that what likely happened is that the Respondent's parents paid out to the Respondent his initial investment of $25,000 in the Ladner Property and neither the Respondent nor his parents let the Claimant know that this had happened.

[30] The Respondent spent the $25,000 on himself, towards his new furniture, new home, new car, and other expenses. This was so even though he had at least one other source of money, his RRSP. He also declined to make any monthly payments of child support.

[31] When the Respondent was pressed on examination for discovery about these decisions to spend the $25,000 on himself, contrasted to his promise to pay child support, he explained that at the time he did "what his heart said". That the Respondent believes his "heart" told him to favour himself above his child is a telling response. He admitted that he could have made other financial choices such as

renting instead of buying a residence, and not purchasing a new car, and he would have been able to easily economize and pay child support of $575 per month. However, as he admitted, he was only thinking of himself.

2008 Parenting Agreement

[32] In May 2008 the Respondent and Claimant signed an agreement that stated it was made pursuant to ss. 28 and 121 of the *Family Relations Act*, R.S.B.C. 1996, c. 128, ["*FRA*"]. It provided "that Jatinder Nijjar shall have sole custody and sole guardianship of [the Child]" (the "Parenting Agreement").

[33] The Parenting Agreement was filed in the Provincial Court on June 10, 2008.

[34] The Claimant's evidence was that before the Parenting Agreement was entered into she asked the Respondent if he wanted to have any contact with the Child and he told her he did not. However, she still felt it was open to the Respondent to come and visit if he wished to do so.

[35] The Respondent testified that the Parenting Agreement followed a discussion with the Claimant in which she said that if he gave her full sole custody, he would not have to pay child support; but if he wanted joint custody he would have to pay child support.

[36] I find it interesting that the Respondent's evidence in this regard amounts to an admission that he decided in 2008 that he would rather not pay child support than see his son and risk having to pay child support. The Respondent by his demeanour appeared to see nothing wrong with this choice.

[37] The Respondent told Dr. Korpach that the reason he agreed that the Claimant could have sole custody was because he trusted her. He did not tell Dr. Korpach it was part of deal whereby he would not have to pay child support.

[38] In any event, this proposition, that the background to the Parenting Agreement was the Claimant's agreement to trade child support for the ability to have sole custody of the Child, was not put to the Claimant in her cross-examination

and was inconsistent with her overall evidence and I do not accept it as true. I prefer her evidence that she asked the Respondent if he wanted to see their son, and he said no, and so the Parenting Agreement was entered into.

[39] It only makes sense that the person taking sole responsibility for the Child would want to have this recognized legally.

[40] Whether later, having the Parenting Agreement in hand, the Claimant decided it was not worth waking a sleeping dog and pushing the Respondent too hard for child support is a possible inference that can be drawn on the whole of the evidence. However, it was not a question put to her and so I am reluctant to draw this inference.

[41] Both parties received information from a counsellor at a Family Justice Centre, a government-funded resource centre, about the Parenting Agreement before signing it. Neither one suggested they did not understand it or had different intentions then set out in it.

[42] I am satisfied on the evidence that both the Claimant and Respondent were aware of the implications of the Parenting Agreement and intended it to have final effect, finally settling their relationships with the Child.

[43] Over time the Claimant on her own initiative created some opportunities for the Respondent to see the Child. Two or three times she brought the Child to the PNE, and if the Respondent was working she would let him know they were there so he could come by and see the Child, which he did, briefly.

From 2008 to 2012

[44] In the summer of 2008 the Claimant made a six week trip to India. She was able to afford this with her parents' help and because she worked for a travel agency. When she returned in September 2008 she moved into her parents' home rather than return to the Gills' residence. However, she did allow the Child to have a continuing relationship with the Gills, regularly receiving them as visitors to her

residence and also visiting them in their own home, and including them in important milestone celebrations in the Child's life.

[45] By email message from the Respondent dated October 7, 2009 he asked the Claimant for a divorce, suggesting they file joint divorce papers to save time and money, and that he would get the paperwork done. This note acknowledged his understanding that the Claimant had sole responsibility for the Child. The Respondent wrote that, "besides [the Child] which you have", there was really nothing else they had together. In the message he wrote:

> I dont have the words to say why I did what I did, but at that time it was what I wanted. I needed to get out of that house and be on my own, even if it was sacrificing my son. I often think of [the Child], but am not worried as he is in good hands.

[46] The above message highlighted a repeated theme in the Respondent's evidence: he repeatedly tried to appear insightful in admitting that he could understand that his actions hurt others and even his young son, yet at the same time he continued on in his behaviour, clearly undeterred by this knowledge and felt justified in doing what he did simply because it was what he wanted. It was confession without contrition.

[47] From 2008 to 2013 the Respondent by his own admission travelled the world, lived life to the fullest and enjoyed himself tremendously. In part he was able to obtain discount flights through his work or through a friend.

[48] The Respondent was not careful with his spending, despite working in the accounting field. In November 2011 his residence was foreclosed upon and he was forced to move out and rent an apartment. He ended up filing a consumer proposal, which consolidated all of his debt, requiring him to make monthly payments of $666 from 2011 to end of 2014 when he completed the payments.

[49] When the Respondent started court proceedings against the Claimant in the Richmond Registry of the Provincial Court in October 2014, he filed an affidavit in support sworn October 22, 2014. In that affidavit he stated "I recently sold my

townhouse and moved back with my parents". This was deliberately misleading to the court to try to paint a picture of financial stability, as the Respondent did not admit that his townhouse (actually a loft condominium) was foreclosed upon several years earlier.

[50] After the Claimant returned to her parents' house in mid-2008 she continued living there and still does. The Claimant's younger sister Prabjot Nijjar ("Prabjot") also lived in the same house. All of the family members — the Claimant, her sister Prabjot, and her parents — played an active role in the Child's upbringing.

2012 Child Support Agreement

[51] The Respondent did not move quickly on his suggestion of getting a joint divorce but eventually did prepare the papers for a joint desk order divorce in 2012-2013.

[52] The Respondent learned as part of this process that it was necessary to have some proof that child support was looked after if he wanted to receive a divorce. He prepared a new "Written Agreement" pursuant to s. 121 of the *FRA*, setting out that he had annual income of $62,000 and that he would pay the Claimant $576 per month on the 15th of every month commencing June 15, 2012, and thereafter as long as the child is a child as defined in the *FRA* (the "2012 Child Support Agreement").

[53] No mention was made in the 2012 Child Support Agreement of the prior commitment to pay the Claimant support made in 2007 and 2008, when the Respondent had referred to committing $25,000 as his share of the Ladner Property to the support of his son, and his obligation to pay child support at $575 per month. No mention was made of arrears of child support either.

[54] The 2012 Child Support Agreement stated that the Respondent would provide the Claimant a copy of his filed income tax return on an annual basis starting June 30, 2013. However, he did not subsequently do this.

[55] Both parties signed the 2012 Child Support Agreement. The Claimant understood from the Respondent that this was because in order to get a divorce, he had to show that something was in place for child support.

[56] The 2012 Child Support Agreement said nothing about parenting time or custody or guardianship. The earlier Parenting Agreement from May 2008, acknowledging the Claimant had sole custody and guardianship, continued to be the operating agreement with no attempt on the Respondent's part to change it.

[57] Following the 2012 Child Support Agreement, the Respondent did not commence paying monthly child support as promised in it.

Desk Order Divorce Pleadings

[58] Eventually in early 2013 the Respondent prepared documents for a desk order divorce, including a Notice of Joint Family Claim, Child Support Affidavit attaching the 2012 Child Support Agreement as the agreement dealing with support of the Child, and an Affidavit-Desk Order Divorce ("Desk Order Divorce Pleadings"). He asked the Claimant to meet him at the courthouse where they would together sign them and file them, which she did. That was the first time she saw the documents, and she took no issue with them.

[59] The evidence suggests that neither the Respondent nor the Claimant made an effort to be entirely accurate about the parenting or child support arrangements in the Desk Order Divorce Pleadings.

[60] In Affidavit-Desk Order Divorce signed by both parties, the Respondent wrote that the Claimant "has custody of the [Child], with open visiting rights for [the Respondent]". The Respondent does not rely on this to suggest that there had been any change to the parties' agreement as set out in the Parenting Agreement.

[61] The description in the Affidavit-Desk Order Divorce of the Respondent having open visiting rights was not a suggestion that the Respondent had any guardianship or custody rights. At that time the Respondent wanted to visit the Child but was

agreeable to it being in the presence of and supervised by the Claimant. This is how the Claimant understood it. I find that both parties understood the Affidavit to be consistent with the fact that the Claimant still had sole guardianship and custody of the Child.

[62] The Respondent was identified as "Claimant #1" in the Desk Order Divorce Pleadings, and in the Child Support Affidavit he described his income as $62,000. He did not show the present Claimant any tax returns or other documents to support this stated income. He simply estimated the Claimant's income as $40,000.

[63] The Child Support Affidavit set out that the monthly amount payable by the Respondent was $576. The Respondent wrote in the Affidavit that the following arrangements had been made for Child Support:

> Did not ask for support, as both claimants families were supporting and helping [the Claimant]. [The Respondent] will make monthly deposit into [the Claimant's] bank account.

[64] The Respondent's parents never paid child support to the Claimant. This is significant because in his submissions at trial the Respondent repeatedly suggested they did provide financial assistance to Claimant. Other than allowing the Claimant to live in their house for a few months until she moved back into her parents' home, what they provided cannot be seen as anywhere close to significant financial support. They bought the occasional gift for the Child and for the Claimant but that was it. There is no evidence they offered to pay child support, or any school fees or other expenses of the child.

[65] The Respondent never made a monthly deposit of child support into the Claimant's bank account.

[66] The Child Support Affidavit attached the 2012 Child Support Agreement as the agreement dealing with support of the Child. That agreement, as mentioned above, set out that $576 would be paid monthly by the Respondent as of June 15, 2012.

[67] The Child Support Affidavit was sworn February 15, 2013. As of that date, the Respondent had paid no child support. Despite this, he drafted the affidavit to say that the amount of arrears of child support was nil.

[68] Both parties signed the Child Support Affidavit despite it containing false information about child support. They clearly did so in order to obtain a divorce. This reflects poorly on both of them.

[69] The Claimant's evidence was that she did not look closely at the Desk Order Divorce Pleadings until she got home after they were filed. She said she asked the Respondent about the fact that one of the documents said that arrears were zero, and he told her to trust him, it was necessary to say there were no arrears just to get the divorce.

[70] I did not find the Claimant's explanation to be satisfactory or believable. In an earlier affidavit she had a slightly different story about the arrears issue, suggesting that she did not think there were arrears because the Respondent had made arrangements to pay support for the earlier years.

[71] The Respondent, on the other hand, is very assertive and deliberately put the Respondent in the awkward position of having little time to consider the documents by presenting her at the courthouse with the Desk Order Divorce Pleadings as completed documents.

[72] That the Respondent knew he had put pressure on the Claimant to sign the Desk Order Divorce Pleadings by putting her in this awkward situation at the courthouse came through in his evasiveness when questioned at trial about the preparation of the documents. He tried to suggest in his evidence in direct that the documents were filled out in discussions with the Claimant. When asked for details of those discussions he could not recall them.

[73] At one point in cross-examination the Respondent suggested that he asked the Claimant what to put in para. 11 of the Child Support Affidavit, the paragraph dealing with arrears. However, this suggestion was not credible, especially

combined with his other admissions that they did not discuss arrears or the other contents of the Desk Order Divorce Pleadings.

[74] Indeed, the Respondent ultimately admitted that he and the Claimant had no discussions about the contents of the documents when they met at the courthouse and the Claimant saw the documents for the first time.

[75] That the Respondent well knew that there were arrears of child support at the time of the Child Support Affidavit is clear based on the fact he later paid arrears voluntarily from the date mentioned in the 2012 Child Support Agreement forward, in January 2015, just after he started new court proceedings in October 2014. I will come to this shortly.

[76] The parties were granted a desk order divorce on April 26, 2013, without the necessity for a hearing in court. The terms of that order concerned divorce only; there were no terms regarding the Child.

Contact between the Respondent and the Child

[77] Soon after the desk order divorce, approximately five years after the Respondent in his words "sacrificed" the Child, the Respondent made his first attempt to initiate contact with his Child, contacting the Claimant by email. The Claimant was not opposed but also wanted to proceed cautiously. The two parties agreed to gradually introduce the Respondent to the Child in 2013 by describing him as "mommy's friend". There were several meetings of the Claimant, Respondent, and the Child, mostly arranged around meals.

[78] I pause to note that at trial the Respondent admitted that he was the one who initially suggested he be introduced to the Child as "mommy's friend". He tried to create a contrary impression when he filed an affidavit in the Provincial Court Proceeding. In that affidavit sworn October 22, 2014 he stated that the Claimant was the one who "convinced" him it was better that he pretend to be her friend. This affidavit evidence was part of a false impression that the Respondent tried to convey

of the Respondent wishing to establish a father-child relationship and the Claimant posing a barrier to him doing so.

[79] I find that for both the Respondent and the Claimant, the introductions of the Respondent to the Child in 2013 and 2014 were an experiment, in part testing whether the Respondent seriously wished to pursue establishing a relationship with the Child.

[80] The occasional visits whereby the Respondent would share a meal or come to an activity of the Child's, with the Claimant present, continued from when they started in early to mid-2013 (the precise start-date is contested but is not necessary to resolve) into July 2014. On average the visits were roughly once per month.

[81] On more than one occasion the Respondent gave the Child expensive gifts such as an iPad or a remote controlled vehicle.

[82] In June 2013 the Claimant was diagnosed with a possible terminal illness. She was required to take time off work and take treatment including chemotherapy. She informed the Respondent of the situation.

[83] The Claimant says that in April 2014, when she was at the home of the Respondent's parents, the Gills, she overheard Mr. S. Gill say to the Child something to the effect of "you're going to be living with us very soon". Mr. S. Gill was hard of hearing and so spoke loud enough that the Claimant happened to overhear it.

[84] Mrs. B. Gill testified that she was present on that occasion and did not hear this said. However, Mr. S. Gill was not called to rebut this evidence nor was the Claimant challenged in cross-examination on her recollection of this April 2014 incident. I accept the Claimant's evidence as to what she overheard Mr. S. Gill say.

[85] Given that the Claimant at the time had a serious illness, this statement greatly upset her.

[86] The Claimant decided based on the remark she overhead not to continue visiting the Gills with the Child, and that was the last time Mrs. B. Gill and Mr. S. Gill visited with the Child. Up to this point, the Child's contact with them had been mostly at family gatherings, perhaps once per month on average.

[87] Nevertheless, the Claimant was open to continuing visits between her, the Respondent and the Child. There were a couple of restaurant visits in May 2014, no visits in June, and then a visit in early July 2014, dinner at a pizza restaurant.

[88] Subsequently on July 4, 2014, the Respondent sent to the Claimant angry text messages, seemingly out of the blue. He appears to have been harbouring anger that the Claimant was not facilitating visits between his parents and the Child. The Respondent and Claimant spoke on the telephone. The Claimant learned that the Respondent's parents' dog had died and Mr. S. Gill was upset and wanted to comfort himself by seeing the Child. The Claimant did not think it appropriate to send the Child over to the Gills to comfort them over the death of their dog. The Respondent told her he would just come and take the Child if she did not agree; the Claimant told him that would be over her dead body. The Respondent then criticized her for not being a good mother and told her he would take her to court.

[89] The Claimant then called the Respondent's parents. She testified that they said she was not capable of raising the Child on her own in a house with all women, insulted her honour and said they would show her their power and take the Child away. Mrs. B. Gill denied the contents of the conversation but did agree there was an angry telephone conversation and that she passed the phone to Mr. S. Gill.

[90] From this date forward, there was a complete breakdown in the parties' relationship. The Respondent made no further requests to see the Child, nor did the Gills.

[91] Other than the Claimant's refusal in July 2014 to send the Child to see Mrs. B. Gill and Mr. S. Gill when their dog died, there is no evidence that she imposed unreasonable barriers to the Respondent's wish to occasionally visit with the Child

beginning with his requests in 2013. The Respondent has pleaded in the Response to Family Claim herein factual allegations that falsely suggest the contrary.

[92] The Respondent has not seen the Child since July 2014.

[93] No challenge was made to the Claimant's evidence that she responded well to treatment and as of sometime in 2014 was considered cured of the illness that in 2013 seemed to potentially threaten her life.

The Present Litigation

[94] In October 2014 the Respondent sent the Claimant a hostile text message, telling her he was going to serve custody papers on her. He deliberately wanted to get an emotional reaction out of her, creating an impression that he had "connections" and "eyes on" her and her family. This terrified the Claimant so much that she reported it to the RCMP. She was still visibly upset at trial, crying when describing this incident which clearly frightened her.

[95] The Respondent was unable to provide an adequate explanation in his evidence as to why he was so threatening towards the Claimant.

[96] The Respondent initiated proceedings for custody in Provincial Court in October 2014, in which he sought to set aside the Parenting Agreement and sought an order for joint custody and guardianship of the Child (the "Provincial Court Proceeding").

[97] Apparently the Respondent's parents also initiated litigation against the Claimant in Provincial Court, seeking access to the Child. These pleadings were not put before me and the parties did not address any relief involving the grandparents of the Child, other than the Respondent submitted in argument that they could supervise his visits if supervised access was ordered.

[98] The Respondent has admitted that his parents are financing him in the present litigation. The Claimant's counsel submits that the Respondent is not that

interested in the Child and would not have pursued the litigation but for his parents, as it is their goal to be involved in the Child's life.

[99] In January 2015 the Claimant initiated the present proceeding.

[100] The Claimant and Respondent are currently approximately 42 years old.

Legal Principles

[101] Before I delve into more facts regarding the Child I will first summarize the applicable legal framework.

Parenting Legal Framework

[102] In the Provincial Court Proceeding, the Respondent seeks to set aside in whole or in part the Parenting Agreement.

[103] In the present proceeding, the Respondent advances a counterclaim which acknowledges the current arrangements for parenting are that the Claimant has sole custody and guardianship as set out in the Parenting Agreement. The Respondent seeks joint guardianship, joint custody, and reasonable and generous parenting time and access to the Child, and relies on the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and the *Family Law Act, S.B.C. 2011, c. 25 (the "FLA").*

[104] The Claimant in her Notice of Family Claim herein seeks sole custody and sole guardianship of the Child pursuant to the *Divorce Act* and *FLA*, and an order restraining the Respondent from directly communicating to the Child directly or indirectly, that he is the Child's natural father.

[105] The Respondent submits that the starting point for determination of the parenting issues in this case is the best interests of the child.

[106] The Claimant submits that the legal framework applicable to parenting issues in the circumstances of this case is the framework that applies to an application to vary a final order on parenting responsibilities and rights.

[107] The Claimant submits that this legal framework requires the applicant seeking to vary the parenting order to meet a two-step test: first, the applicant must show there has been a material change in the condition, means, needs or other circumstances of the child since the making of the final order; and second, if this threshold is met, the court must consider the best interests of the child afresh, as set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, and *Boychuck v. Singleton,* 2008 BCCA 355, considering s. 17(5) of the *Divorce Act* and then s. 24(1) of the *FRA*. The approach to establishing a material change of circumstances has been adopted for applications to vary an order for parenting arrangements pursuant to s. 47 of the *FLA*: *Williamson v. Williamson*, 2016 BCCA 87 [*Williamson*] at paras. 31-34. Only after this threshold is met can the judge "embark on a fresh inquiry into the best interest of the children" (*Williamson* at para. 34).

[108] The Claimant submits that the law regarding variation of an order dealing with parenting arrangements recognizes that there must be good reason to change the parenting circumstances settled in an order. The Claimant submits that underlying this legal framework is the recognition of the importance of stability in a child's life.

[109] The premise of the Claimant's position is that by filing the Parenting Agreement with the Provincial Court the agreement was converted into an order. The Respondent disagrees.

[110] The Respondent submits that filing the Parenting Agreement with the court simply made it enforceable as though it was an order of the court but it did not become an order, and so it did not mean that a party wishing to set it aside must meet the material change in circumstances test. Rather, the issue is whether setting aside the Parenting Agreement is in the best interests of the Child.

[111] I am of the view that the legal framework advanced by the Claimant is incorrect. The Respondent does not need to show a material change in circumstances. I accept that the Respondent has framed the legal test correctly in respect of the issues surrounding guardianship and parenting, namely: what are the best interests of the Child.

[112] The fact that the Parenting Agreement was entered into and the parties operated under it for several years is one of the background facts I can take into account when considering the best interests of the Child. But no court has yet passed on the issue of the best interests of the Child and that is the paramount consideration for this Court.

[113] I reach this conclusion on the following basis:

a) By filing the Parenting Agreement with the Provincial Court, it became the 2008 Parenting Order, enforceable as though it was an order of that court pursuant to s. 121(2) of the *FRA*.

b) Section 251 of the *FLA* provides that where an agreement or order made before the coming into force of that section provides a party with custody or guardianship, then those parenting responsibilities continue with respect to the child under the *FLA*. This applies to the Parenting Agreement. The present status of the parties is therefore that the Claimant is the sole parent with guardianship and parenting responsibilities under the *FLA*. The Respondent is not a guardian and has no current parenting responsibilities under the *FLA*. The Respondent concedes this.

c) The Provincial Court Proceeding commenced in 2014 by the Respondent was consolidated with the within action pursuant to s. 194(1) of the *FLA* by Order of Master Taylor on March 23, 2015. In the Reasons for Judgment of Master Taylor, indexed at 2015 BCSC 437, he held that while the 2008 Parenting Agreement became enforceable as an order of the Provincial Court upon being filed in that Court, it was not the same thing as becoming an order of that Court, relying on *Simpson v. Derouin*, 2009 BCSC 1263 at para. 43. I agree with Master Taylor's analysis.

d) Subsections 44(1) and (3) of the *FLA* provide for separated or separating parents to make agreements regarding parenting arrangements, and for those agreements to be filed as enforceable orders in either the Provincial

Court or this Court. Subsection 44(4) provides that on application the court must set aside all or part of such an agreement and replace it with an order of the court if satisfied that the agreement is not in the best interests of the child. These provisions are similar to the combined predecessor sections of the *FRA*, ss. 121 and 122. The effect of s. 44 in this case is that if the court is satisfied that the Parenting Agreement is not in the best interests of the Child, the court may set it aside, even given the fact that it was filed in the Provincial Court.

e) Section 51 of the *FLA* provides that the court may appoint a person as a child's guardian, but the applicant must provide evidence respecting the best interests of the child as described in s. 37.

f) Section 37(1) of the *FLA* provides that in making an order respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only. A long list of factors to be considered in determining the best interests of the child is set out in s. 37(2). According to s. 37(3), an agreement or order is not in the best interests of the child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

g) Section 47 of the *FLA* provides that the court may change an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in circumstances of another person. This section refers to orders, not to agreements. The change in circumstances test does not come into it in s. 44(4) when considering whether to set aside all or part of an agreement. I find that s. 47 therefore does not apply to the Parenting Agreement.

h) Subsections 16(1) and (8) of the *Divorce Act* provide that a court may make orders regarding custody or access, and in doing so shall take into

consideration only the best interests of the child as determined with reference to the condition, means, needs and other circumstances of the child.

i) Section 17 of the *Divorce Act* allows for the court to vary a custody order if satisfied that there has been a change in the condition, means, needs or other circumstances of the child occurring since the making of the custody order, taking into account only the best interests of the child considering that change. I find that this does not apply to the Parenting Agreement.

[114] Also relevant to the legal framework in respect of parenting issues are the following provisions:

a) Under the *FLA*, only a guardian has parental responsibilities and parenting time with respect to a child, as set out in ss. 40 and 41.

b) Section 59 of the *FLA* provides that the court may grant to a non-guardian parent rights of contact with a child, including supervised contact. Section 60 of the *FLA* permits the court to change these arrangements because of a change in the needs or circumstances of the child or a change in the circumstances of another person.

c) There is a principle known as the "maximum contact principle" set out in s. 16(1) of the *Divorce Act* and s. 10 of the *FLA*. The principle is that a child should have as much contact with each spouse as is consistent with the best interests of the child; and the court is to take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

d) A parent's past conduct is not relevant except to the extent it affects the best interests of the child: s. 37(4) *FLA*; s. 16(9) of the *Divorce Act*.

[115] The Respondent cites a number of authorities where the social science is referenced as support for the general proposition that children benefit from

relationships with both parents providing that it is not contrary to the best interests of the child, including *Bebb v. Bebb*, 2003 BCSC 1023 at para. 29; *Lygouriatis v. Gohm*, 2006 SKQB 448; and *Walker v. Maxwell*, 2014 BCSC 2357, aff'd 2015 BCCA 282.

[116] The Claimant submits that the circumstances of many cases involving the principle of maximum contact between a parent and child are distinguishable from the present case, because those cases involve the continuation of a pre-existing parent-child relationship. Continuing these relationships is seen to provide stability in the child's life and often therefore will be in the best interests of the child. The Claimant submits that the cases referring to the maximum contact principle relied upon by the Respondent deal with disputed parenting arrangements made soon after separation and are distinguishable on that basis.

[117] The Claimant submits that the maximum contact principle cannot be an operating presumption in this case given that the father gave up all parental responsibilities and rights of access to the Child in the Parenting Agreement in 2008. Here, the Respondent terminated the relationship with the Child when the Child was a baby, allowed that situation to continue for many years without any desire to change it, resulting in the situation where there is now no attachment between him and the Child and the Child is now 10 years' old.

[118] The Claimant submits that the stability that is so important in a child's life will be upset by a change to the arrangements agreed to in the Parenting Agreement.

Past Child Support Legal Framework

[119] As for child support, the parties disagree as to whether the relief sought by the Claimant relating to past child support is a claim for enforcement of arrears (the Claimant's position), or a fresh claim for retroactive support (the Respondent's position).

[120] The Claimant had no child support order in place until 2012.

[121] The Claimant's position would have the Respondent's promise to pay child support, made in 2007 and 2008, equivalent to a court order, the non-compliance with which founds a claim for arrears. The Claimant has provided no authority in support of this proposition and I do not accept it.

[122] It is clear that during the period of 2007 to May 2012 there was no court order dealing with child support.

[123] After this date, the June 2012 Child Support Agreement governed the parties. It provided for child support payable by the Respondent in the amount of $576 per month. It did not contain an annual adjustment clause but did provide that the Respondent would provide his filed income tax return and notice of assessment to the Claimant each year commencing June 30, 2013, which he did not do until after these proceedings were initiated.

[124] The parties both agree that the 2012 Child Support Agreement was filed in Provincial Court in 2012 pursuant to s. 121 of the *FRA* and therefore stood as enforceable as though a court order.

[125] There was never any enforceable court order to pay more in child support than what the Respondent did pay.

[126] I conclude that the Respondent's submissions are correct and that this is not a case dealing with arrears of child support. The proper legal framework in which to assess the Claimant's claim for past support is the framework that applies to the seeking of a retroactive child support order.

[127] The legal authority to make an award of retroactive child support is found in s. 15.1 of the *Divorce Act* and s. 170(b) of the *FLA*.

[128] The principles applicable to a claim for retroactive child support were established by the Supreme Court of Canada in *D.B.S. v. S.R.B.*, 2006 SCC 37, [*D.B.S.*], and continue to apply as noted in *Brown v. Kucher*, 2016 BCCA 267. The

Court is to consider four factors, exercising discretion as to how much weight to give each factor:

a) whether there is a reasonable excuse for why the retroactive child support order was not sought earlier;

b) the conduct of the payor party;

c) the circumstances of the child; and

d) whether a retroactive award would cause hardship.

Section 7 Expenses

[129] Section 7(1) of the Guidelines lists a set of child related expenses that fall outside the ordinary course. As a general rule, the parents are to share the listed expenses in proportion to their incomes after deducting the child's contribution, if any, pursuant to s. 7(2). The court retains the discretion, however, to divide the expenses differently: see *Zarins v. Cochrane*, [1998] B.C.J. No. 2116 (S.C.), varied [1999] B.C.J. No. 2876 (S.C.), supplementary judgment [1999] B.C.J. No. 2450 (S.C.).

[130] Sections 7(1)(d) and 7(1)(f) list expenses that are "special" or "extraordinary" associated with primary or secondary school education, other educational programs, and extracurricular activities.

[131] In *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39, 57 B.C.L.R. (3d) 186 at paras. 81-82 (B.C.C.A.), Prowse J.A. set out a two-stage enquiry into whether an expense falls within sections 7(1)(d) or 7(1)(f).

[132] At the first stage, it is necessary to determine whether the expense is "extraordinary", which is determined holistically considering, *inter alia*, the combined income of the parties, individual expense, the nature and number of activities, special needs or talents of the children, and the overall cost of the activities. If the expense is held to be extraordinary for the purposes of s. 7 of the Guidelines, the

court must then consider whether the expense is necessary in relation to the child's best interests and reasonable, having regard to the means of the spouses and those of the child, and to the family's spending pattern prior to separation.

[133] The Claimant is seeking a retroactive payment for past s. 7 expenses. In respect of this claim, the approach in *D.B.S.* will apply.

The Child

[134] I will now review the more detailed evidence regarding the circumstances and needs of the Child.

[135] The Claimant in her evidence explained the reports she has received from the Child's school in relation to his development and the steps she has taken consistent with the recommendations of professionals.

[136] The school records contain observations of the Child by educational staff and were admitted into evidence by agreement.

[137] When the Child started kindergarten he required speech therapy in the afternoons, which was provided to him for about 1.5 years. He was part of a program called "Small Talk" to work with speech therapists to assist him with language development. He was noted to have attention difficulties but was otherwise observed to be a happy and friendly child.

[138] A number of goals were identified by teaching staff in kindergarten, in individual education plans for the Child in 2012, to address communication, behaviour, and fine motor skills issues. The Child was observed to have difficulties with speech (unintelligible, grammatical errors), and to have word retrieval issues. He was also seen to have difficulties with fine motor skills for printing, drawing, colouring and cutting. The teaching staff also noted that the Child had some behavioural problems, difficulties with focus, self-regulation and independence.

[139] At the end of the 2012-2013 school year, teaching staff recommended that the Child have a full pediatric assessment to address their concerns around developmental delays, focus and attention.

[140] The school staff also noted some difficulties the Child was having with his motor skills and referred him to an assessment by an occupational therapist (OT). The OT assessed him in January 2013 and noted some problems, including a difficulty in staying focussed and on task, low muscle tone and fidgetiness.

[141] At the beginning of Grade 1 in the Fall of 2013 the school staff determined that special education services were needed for the Child.

[142] When the Respondent started to visit the Claimant and the Child in 2013, he did not ask to see any report cards and so the Claimant did not give him any. However, she did tell him that the Child was having learning difficulties at school. The Respondent suggested he would research Sylvan Learning Center and then he came back to her a couple of days later and said Sylvan would be great.

[143] Sylvan charged approximately $210 for an initial assessment then $60 per hour long session, and the sessions were two times per week. The Respondent initially said to the Claimant that he would consider helping to pay for it. In fact he never did.

[144] The Claimant arranged for the Child to receive private tutoring from Sylvan from September 2013 to November 2014. The Claimant felt that the Child enjoyed the process of learning with Sylvan and it was helping him. The total cost of sending the Child to Sylvan was $5,092.50.

[145] By the end of Grade 1, in the spring of 2014, the need for special education services for the Child was again confirmed, with the Child continuing to have some of the same communication difficulties seen in kindergarten, but with some progress. The Child also continued to have attention difficulties.

[146] Also in the spring of 2014, the school reports noted that the Child "has some gross motor difficulties" and suggested he be enrolled in some sports programs to develop his skills. The Respondent did enroll the Child in some sports programs.

[147] In terms of the Child's social skills, the school records note that he easily goes off on a tangent and is only able to stay on topic speaking about 50% of the time; also, that in interacting with his peers he needed to "speak up for himself as he can be easily led". His reading had improved but he still had difficulties with comprehension. It was observed in a school report in May 2014, that the Child "will get down on himself when he makes a mistake".

[148] The child's school records were produced for Grades 2 to 4 as well. In summary, the Child has continued to have difficulties at school but is receiving lots of support for his difficulties.

[149] In the summer of 2016 the Child took summer school for one month to repeat his Grade 3 in reading, writing, language arts, and math.

[150] By the time of his first term Grade 4 records for the 2016-2017 school year the school was still providing support to the Child two or three times a week from resource teachers and he was participating in an one-to-one reading program. In terms of his personality, he "exceeded expectations" in that he was friendly, considerate and helpful. In terms of many other skills, such as language and math, he was considered "approaching/minimally meeting expectations". School staff recommended he continue reading at home daily, and be asked to summarize the story; that he practice writing and printing; and that he review basic math concepts and practice multiplication.

[151] The Child's 2017 report card noted that in Grade 4 he was still reading at the beginning Grade 3 level. A list of extra remedial work was given to the Claimant to undertake daily with the Child.

[152] After this litigation began, the Claimant could no longer afford Sylvan and so she hired a high school student to help tutor the Child, once per week, which the school recognized as one of the tasks to be completed at home.

[153] The school staff noted in 2017 that the Child is not learning as quickly as other children and they have arranged a psychoeducational assessment of his learning needs to help determine how they should shape his education to his learning abilities.

[154] The school staff also recommended a physiotherapy assessment which, at the time the Claimant gave evidence (March 2017), was expected to take place sometime after spring break.

[155] The Claimant describes the Child as energetic, that his mind runs at high speed and he tends to skip from one item to another quickly, which causes him some difficulties in his learning. Other observers of the Child also describe him as high energy.

[156] The Child has expressed to his mother that sometimes he feels left behind in school. He has been teased by other children about having to stay behind and finish his work.

[157] The Claimant described the routine she follows for the Child during weekdays, and weekends which are more relaxed. She described having rules for the Child with respect to when and how long he can use electronic devices. The Claimant has followed all of the school's recommendations about working with the Child to help him after school, such as doing extra reading and extra math and practicing other skills with him.

[158] The Claimant's sister Prabjot Nijjar also gave evidence about the Child.

[159] When the Claimant was on maternity leave the company she worked for went out of business. When she moved back into the Nijjar family home in 2008, Prabjot had just graduated from high school and had not started post-secondary education.

Prabjot offered to look after the Child so that the Claimant could work. Prabjot's evidence was that she postponed her own post-secondary education by two to two and a half years to look after the Child while the Claimant returned to work.

[160] I found Prabjot to be a credible witness.

[161] Both Prabjot and the Claimant testified that the Child developed more slowly than other children his age. He was slow to speak and so was required to have speech therapy.

[162] It was suggested in cross-examination that the Child's speech development may have been delayed because English was not the primary language in the home. However, Prabjot explained they spoke English and Punjabi roughly equally in the home, or perhaps a little more Punjabi with her father.

[163] The Respondent introduced no evidence to suggest that the Child was unique amongst his peers in hearing a second language other than English spoken at home. For all I know this was a common experience amongst his peers. There was no evidence that being exposed to two languages was the reason that the Child needed speech therapy and had communication difficulties. It would not explain his lack of attention or other issues noted by his school teachers.

[164] At times the Child told Prabjot that he was made fun of at school because he could not finish his work as quickly as the other children and had to stay back to finish it. Prabjot described how the Claimant was patient and encouraging to the Child.

[165] It was clear to me from her testimony that Prabjot has a close loving bond with the Child.

[166] Prabjot Nijjar testified that after the Child had a few meetings with the Respondent she heard him tell the Claimant "I don't like your big ugly friend". He also expressed to Prabjot that he did not like the Respondent. This seems to me to be a strange reaction to rather benign visits and causes me to wonder if the Child is

picking up on stresses between the Claimant and Respondent or if there is something awkward about the visits that could be addressed in the future with the advice of a therapist. It does, however, suggest that there is no affectionate relationship between the Respondent and the Child.

[167] Prabjot's evidence was that the Child has never talked to her about the subject of who is or was his father.

[168] The Claimant and Prabjot called their father by the Punjabi word for dad, "Daidi", which to the English-language ear sounds a lot like "daddy". Mr. Nijjar passed away in January 2010, when the Child was approximately 2 ½ years' old. Until then, the Child used the same appellation to refer to Mr. Nijjar, or the short form "Di".

[169] Prabjot began dating her now-husband Navroop Sehit in May 2012 and he soon became a part of the Nijjar household, visiting approximately three times per week. They became engaged and then married in the summer of 2015. The Child spends time with Mr. Sehit and asks him questions a boy might ask a man, such as questions about shaving. Sometimes the Child will spend overnight at the home of Navroop and Prabjot, and he refers to them as uncle and aunt.

[170] The Claimant testified that she is open to discussing with the Child any questions he might have about fatherhood and who his father is. He learned about reproduction in school, and asked her about it several months ago, and she confirmed that she did not have him by herself and was once married but was now divorced. She asked the Child if he had any more questions and he said he did not.

[171] More recently the Claimant asked the Child if he wanted to know about his own dad and he said he did not and she told him if he ever wants to know he can ask her about it. The Child shut the conversation down, asking why are we talking about this and indicating he was happy with his family as it is. The Claimant thought he was getting a little anxious or fidgety so she did not pursue it.

[172] All of this indicates to me that either the question of who the Child's father is might be a sensitive topic for the Child, or, the Child knows or thinks that it is a sensitive topic for his mother. The Child might have picked up on the fact that the mother is in this litigation, seen her upset or overheard her talking about it. This litigation has been costly and upsetting for both parties.

[173] The Claimant testified that she does not want to hound the Child about the topic but is ready and willing to talk to him about who his biological father is when the Child wants to know. She would like to broach the subject with him if she has the assistance of a therapist or counsellor on how to do so, with some ongoing counselling about it for the Child to the extent the Child might need it.

[174] In summary, the Child generally comes across as happy, friendly, and well-adjusted who has benefited from a strong bond and strong support from his mother, the Claimant, and benefited from other close adult relationships within the Claimant's family. The Child has no attachment to the Respondent and has not yet expressed an interest in knowing who his father is. There are serious concerns that the Child has some developmental challenges that are holding him back from learning at the pace of his peers in several respects. The Claimant is doing everything she can to find help through school resources, her own extra time with the Child, and other services to assist the Child.

Section 211 Report

[175] The Respondent made a request mid-trial that the Court interview the Child. No meat was put on the bones of this request, such as what the Court might wish to ask the Child and the value of the answers.

[176] I found the request to have the Court interview the Child to be lacking in sensitivity to the Child's circumstances.

[177] The Child does not even know there is a custody dispute going on. It would be extremely intimidating for this young Child to be interviewed by a judge.

[178] Because the Child does not know who his father is, and the Court was not yet in a position to know if it was in the best interests of the Child to reveal this to him, and the Court does not have psychological training to make such an important revelation to a Child, it made no sense for the Court to interview the Child mid-trial. It would be very strange and potentially harmful to the Child for a judge to ask him if he wants to know or spend time with his biological father and the answers would be entitled to next to no weight.

[179] Nevertheless, the unusual facts of this case make it very difficult for the Court to draw upon ordinary life experience in determining the best interests of the Child.

[180] Fortunately, after a series of interlocutory applications on January 11, 2016 Master Muir ordered an investigation and report to be prepared pursuant to s. 211 of the *FLA*. The *FLA* provides in s. 211:

> 211(1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 *[Care of and Time with Children]*, one or more of the following:
>
> (a) the needs of a child in relation to a family law dispute;
>
> (b) the views of a child in relation to a family law dispute;
>
> (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.
>
> …
>
> 211(4) A person who carries out an assessment under this section must
>
> (a) prepare a report respecting the results of the assessment,
>
> (b) unless the court orders otherwise, give a copy of the report to each party, and
>
> (c) give a copy of the report to the court.

[181] Because of a concern that disclosure of the biological father's identity might be harmful to the Child, Master Muir's order provided that the s. 211 assessment be in stages:

> 5. The parties shall cause to be prepared an investigation and report pursuant to section 211 of the *Family Law Act*, such investigation and report to be prepared by either Dr Mary Korpach or Dr Rebecca England, in the following stages and on the following terms;

> a. First, in Stage 1, to assess the psychological state of the Respondent in light of the abandonment by the Respondent of his biological child, [the Child] born July 14, 2007, at four months of age, and in light of his continuation of that abandonment thereafter until 2013;
>
> b. In Stage 2, to assess the psychological and emotional fitness of the Respondent to exercise access to a child of the age and special needs of [the Child];
>
> c. In Stage 3, if the Respondent is found in Stages 1 and 2 to be fit in the general sense to exercise contact with a child, and investigation and the written opinion of a qualified psychologist that it will not harm the emotional or psychological health of [the Child] to be told that the Respondent is his natural father, the anticipated benefit to [the Child] of any such contact and the time and implementation of such contact, if any; and
>
> d. The cost of such investigation and report shall be paid for by the Respondent, provided that the Respondent shall have liberty to pursue a different allocation of the cost of such investigation and report at the trial of these proceedings.

[182] Dr. Mary Korpach performed the s. 211 assessment in accordance with Master Muir's order, producing a report dated July 5, 2016. Stages 1 and 2 were performed, but, because of the conclusions, stage 3 was not. She therefore did not meet with the Child but only relied on other's descriptions of what he was like. Because of this, she qualified her comments about the Child to instead being about a child similar to the Child.

[183] The Respondent requested that Dr. Korpach attend trial for cross-examination, which she did.

[184] Cross-examination in my view revealed no weaknesses in Dr. Korpach's qualifications or opinions. I found her to be careful and thorough.

[185] Dr. Korpach carried out two extensive interviews of the Respondent; reviewed all of the school records then available; spoke to a special resource teacher who worked with the Child at school; reviewed certain affidavits filed by the Respondent, Mrs. B. Gill, and the Claimant and the documents attached to them; and interviewed the Claimant twice. She also spoke to two people provided by the Respondent as a reference: his boss and family doctor.

[186] Dr. Korpach set out in her report much of what the Respondent told her in response to her lengthy interviews. The Respondent confirmed in cross-examination that he said these things to her.

[187] Dr. Korpach assessed the Respondent's psychological state concluding:

> Psychological testing suggested clinical concerns associated with elevated and variable mood…, emotional lability, impulsivity, difficulty delaying gratification, cognitive overactivity (i.e, "racing thoughts"), inflated self-esteem, expansiveness, grandiosity, belief that he has special and unique talents, and antisocial attitudes or behaviour which have caused him difficulty. His profile is associated with a history of risk taking, excessive use of alcohol or substances, impulsivity, and/or disregard of social norms. Coping skills were assessed as generally ineffective, resulting in vacillation between rigid constraint, structure, and withdrawal, and periods of expansiveness, acting out, and sensation-seeking. Individuals with this profile tend to lack empathy, are self-focused, and impaired in their capacity to place others' needs ahead of their own or to maintain meaningful relationships.
>
> (p. 23)
>
> [Emphasis added]

[188] The Respondent, in Dr. Korpach's opinion, has not gained "real insight into his past behaviour, made significant or enduring changes to his judgment and impulsivity that fueled the abandonment, or resolved issues contributing to the internal 'pressure cooker' that led to his sudden departure" (p. 25). She noted that the Respondent's history:

> …indicates substantial impairment in his ability to maintain close non-conflictual interpersonal relationships, and particularly those requiring compromise or which require him to place his own needs secondary. Within relationships, he is easily irritated, rigid in pursing his own desires, and self-focused.
>
> (S. 211 report, p. 26)

[189] In Dr. Korpach's opinion the psychological features underlying the Respondent's abandonment of his family will not be resolved without extensive therapy — likely weekly therapy over two or more years. However, Dr. Korpach noted that the Respondent's personality makes it unlikely he will commit to longer term therapy "as he tends to minimize the true impact of his behaviour and externalizes responsibility" (p. 26).

[190] Indeed, the Respondent made clear in this trial that he refuses therapy and sees no need for it as he considers himself to be fine.

[191] When assessing the Respondent's psychological fitness to exercise access given the Child's age and special needs, Dr. Korpach noted that she had not assessed the Child directly and so chose to highlight considerations for the Court, given the evidence as to the Child's age and needs.

[192] Dr. Korpach concluded that the Respondent's psychological and emotional make-up would likely affect a child similar to the Child. Dr. Korpach set out the Respondent's characteristics that would impact a child at pages 26-27 of her report. In summary, it was her opinion that the Respondent is emotionally immature and lacks sensitivity and social judgment. In particular it is her opinion that the Respondent cannot distinguish between a child's wants and needs, which would be particularly problematic if the child has developmental challenges. She is also of the view that the Respondent's tendencies toward entitlement and grandiosity may interfere with the Child's schedules and routines, and that the Respondent's general impulsivity, irritability, and poor interpersonal judgment may pose a risk to the well-being of a child like the Child.

[193] Dr. Korpach noted that children who have similar characteristics to those reported to be the Child's, including multiple developmental delays, tendencies toward an anxious personality, or to attention and over-activity, do best when they have a stable and routine home environment. Disruption in a regular home regime can cause great upheaval and carry over into the school environment. Furthermore, over-stimulating environments, or environments involving parental conflict, tend to cause greater emotional distress for these types of children and can interfere with the child's development cognitively and otherwise, potentially thwarting the additional services that are being provided to them (at pp. 28-29 of her report).

[194] The Respondent takes issue with Dr. Korpach's opinions. The chief criticism is that she did not meet or interview the Child, and so it is submitted that she reached incorrect opinions regarding the Child's needs, level of adjustment, and

developmental delays, in essence overstating the Child's special needs. The Respondent also criticizes Dr. Korpach for not observing the Respondent with the Child.

[195] I find these criticisms without merit.

[196] The reason Dr. Korpach did not interview the Child was because the Court did not ask her to do so, and there were concerns that interviewing the Child might not be appropriate since the Child did not know that the Respondent was his father and did not know about this proceeding. For a similar reason there was no assessment of the Respondent interacting with the Child.

[197] I found Dr. Korpach's description of children similar to the Child to be consistent with the evidence regarding the Child.

[198] In cross-examination of Dr. Korpach and in submissions the Respondent focused on the use of the word "anxious" to describe the Child, as though it was an incorrect description that undermined Dr. Korpach's opinions. In my view this approach put too much weight on one word. Dr. Korpach did not diagnose the Child as having an anxiety disorder nor did she put too much weight on the notion that he might be somewhat anxious.

[199] There was evidence that the Child is anxious about his difficulties in school, in the ordinary sense of the word, including apologizing when he hands in work, becoming easily frustrated, getting down on himself when he makes a mistake, and being reluctant to speak during class discussions, as noted in some of the school reports. This is consistent with the evidence of the Claimant and Prabjot.

[200] The evidence is very compelling that the Child has some developmental and learning delays and that stability and routine will be extremely important to assist him in progressing in school; and that he is likely to require considerable time engaging in remedial services out of school.

[201] As noted by Dr. Korpach, it is not uncommon for children with problems similar to the Child's to experience larger and larger gaps in learning and functioning as they age, relative to their same age peers. This makes stability all the more important for children like the Child.

[202] I found that Dr. Korpach had sufficient data to reach the conclusions she did in her report without the necessity of interviewing the Child or watching the Child interact with the Respondent. I find that the data she relied on was consistent with the evidence at trial.

[203] Dr. Korpach did comment on the question of the "family secret". In her opinion, it is generally best for a child to learn of a significant family secret, such as the identity of a father, at an earlier rather than later age. However, she recommended that if such disclosure was to occur, it would enhance a child's well-being to do so under the guidance of a therapist. She recommended preliminary sessions between the counsellor and Child to establish rapport, a session between the Child and the Child's caregiver (the Claimant), and then follow-up appointments. In her view it is not necessary to have the newly-disclosed parent part of the sessions.

[204] In her evidence at trial, Dr. Korpach noted that it would be preferable to wait for this therapy and disclosure until sometime after the litigation, when the litigation-related stress in the caregiving parent had diminished; and where, as here, a psychoeducational assessment is pending, to wait until after that assessment as well.

[205] The Claimant is willing to have the Child learn that the Respondent is his biological father, but following Dr. Korpach's recommendation, to have this revelation introduced through a qualified therapist or counsellor so that any emotional problems that might arise from learning of the abandonment can be dealt with. She would also like to wait until after the Child's psychoeducational assessment has occurred.

[206] The Respondent submits that he is in favour of using a therapist to provide counselling to assist the Child in learning about his father. At one point the Respondent said he was willing to pay the cost of the counselling for the Child to assist in revealing his identity to the Child. He changed his mind once this case went to trial.

Analysis of Parenting Issues

[207] In considering the parenting issues in this case, there is no dispute that the Claimant is a good parent and well capable of exercising her parenting responsibilities.

[208] The Respondent and Claimant agreed in 2008 that the Claimant should be sole guardian and have sole custody of the Child. There is little doubt that the Respondent, when he left the Child in 2007, wished to disclaim all responsibility for the Child and all involvement in the Child's life, and wished the Claimant to be the sole person exercising parenting responsibilities over the Child. This continued year after year. This continued through to the time when the Respondent first tried to make contact with the Child through the Claimant in 2013 and continuing after that contact began, into the first half of 2014. During the latter years the Respondent wished to have some limited contact with the Child but did not express any wish to have guardianship or parenting responsibilities. He made no effort to pay any child support.

[209] The only thing that changed was that in July 2014 the Respondent became angry with the Claimant for not agreeing to his request to be able to take the Child to visit his parents who were upset at their dog's death. The Respondent's anger spilled into a statement of war: he was going to take the Claimant to court. And then that is what he did, starting a proceeding against her in October 2014, for the first time taking the position that he wanted to be joint guardian and have joint parenting responsibilities. Up to that point, there was no complaint by the Respondent about his contact with the Child.

[210] The issue for this Court to determine is what are the Child's best interests in relation to the Respondent having parenting rights and responsibilities or access?

[211] In considering the best interests of the Child, the following factors set out in s. 37 of the *FLA* are particularly relevant in this case:

> 37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.
>
> (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
>
> (a) the child's health and emotional well-being;
>
> ...
>
> (c) the nature and strength of the relationships between the child and significant persons in the child's life;
>
> (d) the history of the child's care;
>
> (e) the child's need for stability, given the child's age and stage of development;
>
> (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
>
> ...
>
> (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
>
> ....

[212] It is also important to consider the child's psychological and emotional safety, security and well-being, factors set out in s. 37(3).

[213] It is important to focus on the Respondent's ability to exercise guardianship and parenting responsibilities with this Child i.e. in the circumstances of this Child's development, taking into account the Child's age, characteristics and well-being.

[214] While often past conduct within a marriage relationship is irrelevant to parenting issues, I find that the Respondent's past conduct in abandoning the Child for several years is relevant both in terms of assessing the Respondent's parenting

ability and in assessing the Child's history of relationships, attachments, and need for stability.

[215] In considering the factors set out in s. 37 of the *FLA* I find Dr. Korpach's observations regarding the Respondent, particularly at pp. 23-26 of her report which I will not repeat in full here, are particularly relevant and entitled to weight as these were consistent with the evidence at trial and my own assessment of the Respondent's ability to parent.

[216] I find that the evidence revealed the following about the Respondent: he has a lack of genuine empathy and responsibility; his proclamations of being a coward are the same as he made soon after he abandoned his family and without any real remorse or attempt to improve his behaviour; he does not have an instinct to put the Child's needs ahead of his own and instead his instinct is to put his own needs first; he is dismissive of any concerns expressed by the Claimant about the Child and of the Child's special needs, especially if they conflict with his desire to be playful and have fun with the Child as a friend; he is impatient and intolerant towards others when he does not get his way and lashes out in anger quickly.

[217] The visits the Respondent had with the Child in 2013 and 2014 did not appear to build a relationship between them. The one time the Respondent lit up with enthusiasm about the Child was when he described an occasion when they played a video game together at a restaurant-arcade meeting arranged with the Claimant. It was a shooting video game; one character in the game would die while the other one would re-load. The Respondent said that he and the Child were both excited during the game and gave each other "high-fives" afterwards. The Respondent described the experience as "heartwarming".

[218] The Respondent described to Dr. Korpach his interest in playing video games with the Child, yet referenced a particularly violent and mature-themed game as the one he was interested in, seemingly unaware of how inappropriate it would be for this Child's age.

[219] The Respondent described to Dr. Korpach that he wanted to be like the Child's big brother. He agreed in cross-examination that he does not know how to be a parent so he wants to be a friend or brother to the Child. This is an understandable approach to building a new relationship and implicitly acknowledges that it would be presumptuous and potentially disturbing for the Child if the Respondent was to assume a role as a person of authority over the Child, given how little he knows about the Child and their lack of connection.

[220] Throughout the trial the Respondent tried to belittle the Claimant's concerns about the Child being behind in his schooling and development. His approach was basically that since the Respondent did not see these problems in his few meetings with the Child, they must not exist, despite having received as part of this case the Child's school records which identify significant concerns about the Child's progress and development. It was most revealing that the Respondent showed no interest in reading the Child's school records. This was consistent with the pattern of the Respondent not wanting the responsibility and work of being a parent.

[221] What seemed to concern the Respondent about the Child's schooling was not how the Child was doing but that the Respondent might have to contribute to the cost of tutoring for the Child. When asked on examination for discovery about why he had not contributed to the cost of tutoring despite requests by the Claimant, the Respondent became very hostile, stating: "why am I gonna go out of my way, bust my ass to help the kid when I see nothing". He suggested that perhaps more one-at-one time at home would help the Child.

[222] The above evidence was given on a second examination for discovery on March 15, 2016 and was despite the Respondent having admitted on an earlier examination for discovery on July 29, 2015 that there are some limits on what a parent can do and sometimes it is necessary to go to outside professionals, and that the Claimant had not sent the Child to tutoring as a luxury. On the earlier discovery, the Respondent had suggested he would come up with a plan to contribute towards the $5,000 or $6,000 annual cost that had been incurred on tutoring.

[223] By the time of the second examination for discovery, when it was clear that the Respondent had not contributed to the cost of tutoring, the Respondent stated that he had his own courses to pay for, to advance his own career, so why not wait a year until his own courses were done and they could revisit the topic of tutoring for the Child. He also complained that he had not been given enough information about the Child's progress, but when it was pointed out that he had received the school reports and reports of other specialists, he admitted he had not reviewed them. He suggested that they should just let the son's needs pass in the present school year.

[224] When asked about this at trial during cross-examination, the Respondent became visibly angry. He suggested that with the child support he was paying, the Claimant could pay for the tutoring.

[225] The Respondent also had a tendency to relate his own experiences as a child to being equivalent to his son's experiences. For example, when he learned from the Claimant that the son had learning challenges, the Respondent assumed it was similar to his own problems in being slow to learn handwriting when he was a child, and that it was normal and the Child would eventually pick it up. Indeed this was also a repeated theme: where the Child might be thought of as behind in some things, the Respondent described it as "normal" that some kids developed early and some did not.

[226] Interestingly, the Respondent required a tutor from the years of 5 to 8. However, he was unwilling to see this parallel between himself and his Child, likely because it might cost him money.

[227] Of course reasonable parents might differ on the need and scope of tutoring for a Child. But the Respondent's evidence regarding tutoring was just one of several red flags in the evidence raising a concern about the Respondent's ability to put the Child's needs before his own and to co-parent; to listen to and respect the views of the Claimant regarding the Child if they differed from his own; to be patient and consistent as opposed to impulsive and quick-tempered.

[228] The Respondent quickly lost his temper in dealing with the Claimant seemingly out of the blue and this escalated disproportionately in his July and October 2014 communications with her. He admitted telling Dr. Korpach that he sometimes feels like he is in a pressure cooker and is impulsive.

[229] The Respondent clearly anticipates considerable conflict if there was to be co-parenting. The Respondent spoke to Dr. Korpach about his wish to have a say on what rules apply to the Child, and that he believed he would have to ask a judge to throw the hammer at the Claimant if she did not cooperate.

[230] I find it likely that if the Respondent is given any guardianship or other parental responsibilities he will be incapable of seriously considering any special needs of the Child that might interfere with the Respondent's own self-gratification and he will be dismissive of the Claimant's point of view where it conflicts with his own.

[231] The Respondent admitted in cross-examination that he has no more skills in relation to parenting than he did in November 2007 when he abandoned the Child. He also admitted he knows nothing about the Child, his wants and his needs. While this admission was probably not intended by him to be an admission that he is not a capable parent, I do find on all the evidence that it is an accurate assessment of his parenting abilities in relation to a now ten-year old child who has been raised by the Claimant with her family's support and involvement.

[232] Yet the Respondent is not a bad man and he has good qualities. He is very charismatic and exuberant. The Claimant saw those good qualities in him when she married him after a long friendship and when she was willing to have him exercise some contact with the Child.

[233] If the Respondent had separated from the Claimant but continued to have a relationship with the Child the Respondent would have a much stronger case. The problem is the considerable time that has gone by since the Respondent separated

from the Claimant and made the decision in 2008 that he wanted no role in the Child's life.

[234] The evidence indicates that this Child has some special needs which makes having a stable home and learning environment even more important to his future than these things already are for most children. I find that giving the Respondent legal parenting responsibilities and rights with respect to the Child would likely place too much of a burden on the Child and create insecurity and instability for him, threatening his development as he struggles with increasing demands of school. The Child is vulnerable, in age and development, with no history with the Respondent to speak of, no bond between him and the Respondent, and it would place him at high risk if he was placed in the legal care of the Respondent.

[235] Further, I find that giving the Respondent legal parenting responsibilities and rights would likely lead to conflict with the Claimant as the Respondent does not respect her views, trivializes the Child's needs without taking the trouble to educate himself about those needs, and would likely disrupt the Claimant's carefully laid plans for supporting the Child's needs.

[236] One of the concerns with only one person having guardianship of a child is what happens if that person dies. However, that is not a determining factor when it comes to guardianship as many children are raised by single parents.

[237] In the present case the Claimant at one time had a disease that was life-threatening. She has been cured of that disease. It is still a fact of life that her premature death could occur accidentally or by another illness, but even if that was the case it would not necessarily lead to the Respondent being the natural choice to assume guardianship. The Child's history indicates if that unhappy situation was to occur a viable option would be to have the Claimant's sister Prabjot act as guardian rather than a complete stranger in the Child's life, the Respondent.

[238] Prabjot bonded with the Child as a baby and helped raise him, and has a close loving relationship with him, and the Child is close to her husband. This is in contrast to the Respondent who is a virtual stranger to the Child.

[239] The Claimant submits that the closest experience one can draw on as a comparative to the present situation is a situation where a parent gives up a child to adoption. The biological ancestor who gave up the Child for adoption does not have the right to come back into the Child's life and exercise parental responsibilities and control over the Child's future.

[240] Adoption may be analogous to the present situation, but at the same time ordinary experience tells us that many adopted children also want to know who their biological parents are. The parents of the adopted child will have to assess when the child is ready to learn this information; introductions can potentially be made; and in many cases a very rewarding relationship can develop that is respectful of the role of the adoptive parents and guardians. If a healthy relationship can be formed between an adopted child and his biological parents, the child undoubtedly will benefit from it.

[241] Here the Claimant has raised with the Child the question of whether he wants to know more about the subject of his father and he has not wanted to discuss it. We can only speculate as to why the Child has responded this way. He may be uninterested, but he may also have worries about this information that are unfounded and that a counsellor can help him deal with.

[242] The Respondent in final submissions put forward an alternative position to the position advanced in his pleadings. It was submitted on his behalf that he was willing to go along with a staged approach to his parenting arrangements as follows: that the Child receive counselling first, revealing to the Child that the Respondent is his father; then the Respondent would be permitted to have some daytime parenting time with the Child supervised by the Respondent's parents; then the Respondent's parenting time with the Child could be increased and unsupervised; after which either side could come to court for a review of parenting arrangements without having to establish a material change in circumstances. However, under this

alternative position the Respondent still seeks to be appointed a guardian of the Child and to share in decision-making regarding the Child.

[243] I agree with one aspect of the Respondent's submissions: that it will be in the best interests of the Child that the Child receive counselling along the lines described by Dr. Korpach — an approach that establishes rapport between the therapist and the Child first; and then works with the Claimant and Child so as to reveal in a safe way to the Child the fact that that the Respondent is his father; and then assists the Child in dealing with this revelation.

[244] I also agree that on the present state of the evidence, with counselling, it will be in the Child's best interests to not only know who his father is, but also to have the opportunity to meet and form a relationship with the Respondent under terms of access that are gradual and structured to meet the Child's needs and do not disrupt the Child's special educational or psychological needs.

[245] But there are two important caveats, first having to do with the Respondent's parenting responsibilities; and second having to do with the counselling of the Child.

[246] The first caveat has to do with the Respondent's parenting responsibilities. In my view it is not in the best interests of the Child to give the Respondent any guardianship authority over the Child in order to protect the Child's sense of security and because I have concluded that the Respondent does not have the proven ability to exercise legal guardianship and parenting responsibilities and is unlikely to be able to co-parent, given the facts of this case including the Child's characteristics and the Respondent's characteristics.

[247] Therefore any staged approach to the Respondent eventually having some access to the Child, as it evolves, would have to respect the Claimant's role as sole guardian.

[248] I have concluded that the best approach to the facts of this case and the best interests of the Child is provided for by s. 59 of the *FLA*, where the Respondent as parent is not made guardian of the Child but is granted some access.

[249] The second caveat has to do with the counselling.

[250] The goal of the counselling is to help the Child learn who his father is, be introduced to the Respondent as his father, and to cope with the gradual development of a relationship with the Respondent.

[251] It is important that neither parent attempt to manipulate the counselling experience or attempt to use it to create evidence for an ongoing court battle.

[252] The Court's dilemma is this: on the one hand, in order to have a therapeutic relationship it may be important that the Child's counsellor be entitled to keep their discussions confidential; on the other hand, until that counselling takes place neither the parents nor the Court has the benefit of that counsellor's advice as to how gradual development of a relationship between the Respondent and Child might best be structured in the Child's best interests.

[253] The Claimant recognizes that the Child might want to know and eventually develop a relationship with his biological father. That recognition is evidenced in her past dealings with the Respondent. The Claimant did not create unnecessary hurdles or barriers to the Respondent's desired interactions with the Child. The Claimant did not harbour ill-will to the Respondent for his past conduct and was not motivated to exclude him from her son's life, quite the opposite. The Claimant expressed concern over how access between the Child and the Respondent might unfold, and she rightfully wants a considered approach that is sensitive to the Child's circumstances to avoid harm to the Child.

[254] While I do not have sufficient evidence before me to craft the ideal access regime, I have concluded that some access is better than none at all. I am reminded of an aphorism popularized by Voltaire, "the perfect is the enemy of the good", which is apt in matters of parenting.

[255] The potential for the Respondent to cause psychological harm to the Child, particularly given the Child's vulnerabilities and the Respondent's history, is real. But this can be ameliorated by the counselling, by structured and limited access, and by

ensuring that the key guardianship and parenting responsibilities remain with the Claimant. Importantly, it is my conclusion that if all access is denied, there is a greater potential for the Child to be harmed by the loss of the opportunity to form a relationship with his biological father.

[256] Nevertheless, given the evidence before me, I must necessarily be cautious in crafting an approach to access.

[257] I conclude that the Child's best interests will be better served if the Child comes to learn that the Respondent is his father through the assistance of a qualified counsellor, working with the Child and the Claimant, who will provide any necessary ongoing therapy to the Child as a relationship between the Child and the Respondent commences and gradually develops.

[258] The situation of the Child not knowing who his father is, and of this being a sensitive topic because of the Respondent's unexplained abandonment of the Child, is a situation created by the Respondent. I find it appropriate that he be responsible for the cost of such counselling. I will address this below when I address s. 7 expenses.

[259] The counselling should commence after the psychoeducational assessment of the Child which is planned by the Child's school, provided that school assessment takes place within seven months of this order.

[260] If the counselling of the Child does not commence within ten months from the date of this judgment (this timeline being predicated on the assumption that some time will be needed for the psychoeducational assessment to take place and for the Respondent to provide the retainer for the counselling), the parties have liberty to apply before me for a further order regarding the timing of such counselling.

[261] The Respondent and Claimant should exchange views and try to reach agreement on the choice of the counsellor, but if they cannot agree, the Claimant has the right to make the final decision on the choice of counsellor. It is important in my view that the counsellor chosen to provide the Child's therapy be someone who

is willing to provide advice to the Claimant and Respondent as to when introduction of the Child to the Respondent, as father, is emotionally safe for the Child, so that introduction and then limited access envisioned by this decision may begin, and some continuing therapy to the Child and advice to the parties as access unfolds.

[262] I grant the Respondent access to the Child, to start within a reasonable time after counselling of the Child has commenced, on the following basis: the Respondent will have supervised daytime access to the Child on six occasions, at a minimum of once per month; the date, location, length of time of the access visit, and choice of supervisor and supervised environment is to be mutually agreed upon by the parties.

[263] While the parties are required to work out the structure of this limited access, it is my expectation that they will do so taking into account helpful recommendations by the Child's counsellor.

[264] I am expecting over the course of these initial access visits, and subsequently, that the parties will attempt to work together towards the establishment and building of a relationship between the Child and the Respondent that will not interfere with the Child's other needs and activities, especially his activities designed to support his education.

[265] It has not escaped me that I have only provided for six months' worth of supervised access visits. If all goes well, and the parties work together respectfully, and the Child begins to form a relationship with the Respondent, I expect that eventually the Claimant as sole guardian will be willing to agree to unsupervised access visits between the Respondent and Child.

[266] I am hopeful that establishing these starting parameters on the parties' respective roles in relation to the Child will mean that there will be no need for the parties to come back to Court.

[267] I am expecting the parties to put this litigation behind them and work together in the future and that in doing so, they will eventually come to treat each other

reasonably: the Respondent will not get angry and will accept the situation if he is told that the Child has some activity or schedule that makes his request for access unreasonable on a certain day or is told that his planned activity is inappropriate given the Child's state of development; and the Claimant will realize that it is important for the Child to build a relationship with the Respondent, and she will try to facilitate it and allow it to be separate and different from the Child's relationship with her.

[268] Neither party should see their roles as in competition.

[269] I also order that each party refrain from saying any disparaging things about the other party in the Child's presence. I encourage both parties to say positive things about the other parent in the Child's presence: if they do they will find this will enhance the Child's sense of security and stability.

[270] The goal of this gradual access and building of a relationship with the Respondent will be to not upset the Child's stability and security and education, things the mother has worked so hard to put in place, but instead to enhance the Child's life by helping him form a healthy relationship with someone, his father, so he knows there is another person in this world who cares about him.

[271] I recognize that the precise start date of access leaves room for disagreement because it depends on the counselling. I also recognize that there is room for disagreement over the terms of supervision, and room for disagreement over how access should unfold after the initial six visits. I will be seized of any court application to resolve such disputes.

[272] I will build in a right of review over the question of how much access to the Child the Respondent should be permitted as follows: no sooner than 18 months from the date of this judgment, and without the necessity of showing a change in circumstances pursuant to s. 47 of the *FLA*, the parties will be permitted to bring applications before me pursuant to s. 59 of the *FLA* concerning the terms and form of any contact the Respondent should have with the Child.

[273] This right of review will not apply to my conclusion that the Claimant should be sole guardian of the Child with sole parental responsibilities regarding the Child, which is a final decision.

[274] So that there is no confusion about this, I will order that Respondent is prohibited from taking any steps to contact the Child directly without the Claimant's consent, and is prohibited from taking any steps or from encouraging or causing others to take steps to reveal to the Child that the Respondent is the Child's biological father without the Claimant's consent. This order is of course subject to the exception of the other orders I have made, including providing for the counselling of the Child associated with revealing the Respondent's identity as biological father.

[275] My analysis of the parenting issues has focussed on the *FLA*. However, I have also considered the application of s. 16(1) of the *Divorce Act,* which empowers courts to make orders respecting the custody of or the access to any or all of the children of the marriage. I reach the same conclusions using the language of that *Act*, namely: I conclude that it is in the best interests of the Child that the Claimant have sole custody of the Child, and that the Respondent not be granted any custody rights to the Child, but have only limited access following counselling on the terms I have set out above. The father's limited access will be restricted such that it will not include any of the same rights of a guardian.

Child Support

[276] I turn to the issue of child support. The Respondent paid no child support for the years since he left the marriage, from December 1, 2007 and forward, even continuing during his attempt to introduce himself to the Child in 2013 and into 2014. He only paid child support, calculated from 2012 on, after in October 2014 starting a lawsuit against the Claimant to set aside the 2008 Parenting Agreement.

Amount of Child Support Paid

[277] The evidence is that once the Respondent started the Provincial Court Proceeding in October 2014 he decided to clear up his estimate of arrears of child

support in order to assist his position in the case. He determined arrears from the date of the 2012 Child Support Agreement i.e. June 15, 2012, based on the figure in that agreement of $576 per month. He arranged a lump sum payment by borrowing money and this was ultimately paid in January 2015, in the amount of $20,736 based on $576 per month from June 2012 to May 2015.

[278] In June, July and August 2015 the Respondent paid $666 per month in child support.

[279] The Respondent has continued to pay child support since then, with some adjustments upward based on matching the child support tables to his income.

[280] The Respondent appears to always have understood that his child support payments should be based on his full income.

Amount of Past Child Support Claimed

[281] The Claimant is claiming for arrears of child support that the Claimant says should have been paid in two general time periods:

a) prior to the 2012 Child Support Agreement, from December 2007 through May 2012, when no child support was paid. Based on the Respondent's income, the Claimant calculates this past child support obligation as totalling $33,000 rounded to the nearest thousand;

b) additional child support that the Respondent ought to have paid from June 2012 through May 2015 had the Respondent paid child support based on his total income and disclosed his tax returns as he was obligated to do under the 2012 Child Support Agreement. Here the Claimant says the Respondent underpaid child support by $2,004 during this time period (underpayment of $30 per month from June - December 2012; $58 per month during 2013; $54 per month during 2014; and $90 per month in January through May 2015).

[282] In summary, the Claimant says the past arrears of child support owed by the Respondent total $35,811.

[283] The Respondent says that this is not a proper claim for arrears but instead is a claim for retroactive child support. As set out above, I agree with the Respondent's legal analysis in this regard.

[284] Further, the Respondent submits that there should be no retroactive child support order because too much time has passed and it would be unfair, and the Respondent cannot afford it.

[285] The Respondent has no significant assets and claims to owe his parents $140,000 related to his litigation costs. However, the Claimant points out that his mother admitted in her testimony that the parents would not require him to pay back the loan if he could not do so, and instead would carve it out of his expected inheritance so as to equalize the inheritance as between the Respondent and his brother.

Child Support December 2007 to June 2012

[286] The first issue relating to child support has to do with the December 2007 to June 2012 time frame, before the 2012 Child Support Agreement dealing with child support, but after the Respondent had pledged his $25,000 interest in the Ladner Property for the maintenance of the Child.

Explanation for the Claimant's Delay in Seeking Retroactive Child Support

[287] There is a factual issue as to when the Claimant first gave effective notice that she was going to seek retroactive child support for the 2007-2012 time frame. Effective notice was described in *D.B.S.* as "any indication by the recipient parent that child support should be paid": para. 121.

[288] Mrs. B. Gill testified that she overheard the Claimant tell Mr. S. Gill that she did not need child support and wanted to raise the Child herself. This proposition,

that the Claimant said this to Mr. S. Gill, was not put to the Claimant in cross-examination and I do not accept it.

[289] I find there was never any statement by the Claimant to the Respondent or his parents that she did not want child support.

[290] The Respondent admitted on examination for discovery that he had never indicated to the Claimant that he was not going to make good on his promise, made when he left his note in 2007, to pay child support for five years pledged through his interest in the Ladner Property. I find that it would have been out of character for the Respondent to seek this agreement, because his habit was to avoid the uncomfortable issues.

[291] The Claimant testified in a general way that the Respondent told her that he was having financial difficulties but would provide her with child support once his financial situation improved, and she accepted that. Over time she would occasionally ask him about it, and he would repeat his promise to pay it, but would state he was having a temporary financial crisis. Her evidence was he told her to trust him and she did, as she believed he would eventually pay what he promised.

[292] The Respondent denied that the Claimant ever asked him about child support. However his evidence also did not suggest that the Claimant had ever agreed that he did not have to pay what he had promised to pay in child support.

[293] Nevertheless, the Claimant's evidence as to raising the issue of child support with the Respondent is very vague and unsatisfactory. She did not provide any details of conversations and I am not satisfied she ever directly let him know that she was expecting him to make good on his pledge of $25,000.

[294] The Claimant provided no details of any conversation between her and the Respondent in which she insisting on child support being paid during the 2007 to 2012 time period, for example: what was said; when was the conversation; was it in person or on the telephone; what did she do to follow up.

[295] With respect, even if the Claimant did trust the Respondent, at a certain point she must have known that he was not trustworthy in respect of the 2007-2008 promise to pay child support. As noted in *D.B.S*. at para. 123, it is not enough for a recipient parent to raise the issue of child support, it is necessary that discussions move forward, and if they do not, legal action should be contemplated. For this reason, the Court in *D.B.S.* held at para. 123 that there should be a rough guideline (which can vary depending on the facts) of not going back more than three years from the date formal notice is given.

[296] It is clear that if the Claimant ever asked the Respondent about child support in the 2008-2012 time frame, she did not receive any satisfaction that child support would be paid and did not move forward on the issue. Certainly by the time the parties entered into the 2012 Child Support Agreement the Claimant knew that the Respondent's promise to pledge $25,000 in child support had not been fulfilled and yet she did not object to that agreement addressing child support as commencing in June 2012.

[297] Likewise at the time of the Desk Order Divorce Pleadings, the Claimant knew that nothing had been done about the $25,000 pledge in child support made in 2007, yet did nothing to assert any expectation that this would be paid. While I accept that she took little time to consider those pleadings before they were filed, she did have the opportunity to object to being rushed or to raise an issue after the pleadings were filed and after she had more time to consider the issue of arrears.

[298] I find that for at least a time period after the Respondent left at the end of November 2007 the Claimant may have been lulled into thinking that there was a $25,000 asset that he was going to make available to her for child support, due to the Respondent's promise.

[299] However, the Claimant has not persuaded me that she was lulled into this notion for years, including past June 2012 when the 2012 Child Support Agreement was presented to her. At least by the time of the 2012 Child Support Agreement it was obvious that the Respondent had not made good on his earlier promise. If the

Claimant continued to think he would make good on his earlier promise, this was wishful thinking only.

[300] There was no evidence by the Claimant that after June 4, 2012 when she signed the 2012 Child Support Agreement, she specifically asked the Respondent about the $25,000 pledge of child support for the time period preceding that agreement or made it clear that she was still expecting this pledge to be fulfilled.

[301] After signing the 2012 Child Support Agreement stating that child support would commence June 15, 2012, the only effective notice from the Claimant to the Respondent that she was going to assert a claim to child support for the 2007 to 2012 time period was when she filed her Notice of Family Claim on January 15, 2015.

Conduct of the Payor Parent

[302] There is no doubt that the Respondent's conduct in not providing the child support he promised in 2007-2008 is blameworthy.

[303] The Respondent pledged his $25,000 interest in the Ladner Property to the maintenance of the Child when he left the family, by way of his note on November 30, 2007 and by his email to the Claimant in January 2008.

[304] The Respondent then changed his mind and took the $25,000 for himself, and spent it but never informed the Claimant of this until the present litigation.

[305] During this time-frame of 2007 to 2012, the Respondent was making a good income ranging from the low to high $60,000's roughly and could have curtailed his own personal spending and paid child support but did not do so.

Circumstances of the Child

[306] There was no evidence regarding how the non-payment of child support affected the Child's needs and general circumstances during the time frame of 2007-2012.

Hardship

[307] The size of the retroactive award child support award being sought by the Claimant for the 2007 to 2012 time period is substantial.

[308] I do not accept the Claimant's submissions that this Court should assume the Respondent can come up with the money by borrowing from his parents. There was no evidence as to the Respondent's parents' financial resources and the obligation to pay child support is his.

[309] The Respondent does not have the assets to draw upon to pay the retroactive child support sought for the 2007-2012 period. While it is possible to structure such an award as payable in monthly instalments, it is nonetheless clear to me that if the Respondent is responsible for such a large award it would cause him financial hardship, especially since he is required to pay ongoing child support and given the findings I will set out below regarding s. 7 expenses.

Conclusion Regarding Retroactive Support 2007-2012

[310] While the Respondent's blameworthiness is considerable in not fulfilling his initial promise to pay child support, a promise he made in 2007 and repeated in 2008, I conclude that all of the other factors weigh against making an award of retroactive child support for the period December 1, 2007-June 14, 2012. In reaching this conclusion, I give particular weight to the fact that this retroactive child support was not raised or insisted upon by the Claimant as late as the 2012 Child Support Agreement or at the time of or soon following the Desk Order Divorce Pleadings. Given the evidence regarding the Respondent's current lack of assets (in part due to his own frivolous spending, I acknowledge), I find that it would be inappropriate to impose a retroactive order now for the 2007 to 2012 time period.

Child Support from June 2012 to May 2015

[311] The Claimant in her Notice of Family Claim set out that she did not know the Respondent's income and that she sought child support.

[312] The Respondent in his Response to Family Claim pleaded that he had met all child support obligations pursuant to a written agreement dated June 4, 2014, a typographical error but meaning the 2012 Child Support Agreement.

[313] The Claimant in a Response to Counterclaim filed herein stated that the child support arrangements pursuant to the 2012 Child Support Agreement required the Respondent to revise the amount of child support annually upon disclosing each year his income tax information to the Claimant; and that his Guideline income was higher than he had disclosed.

[314] In fact the 2012 Child Support Agreement did not have an express clause escalating child support in accordance with increases in the Respondent's income.

[315] Nevertheless, I accept the Claimant's point that the Respondent well understood that the 2012 Child Support Agreement contemplated that he would produce his income tax returns annually and the only reason for this was to allow the Claimant to make a claim for a variation in child support payments based on his actual income.

[316] In June 2015 the Respondent did adjust upwards the child support he was paying to reflect his actual income. He has continued to do so and there is no claim for retroactive child support or arrears of child support from this date forward. However, the Claimant does complain that the Respondent is occasionally late in making his payments of child support.

[317] Considering the factors in *D.B.S.* I find:

a) There was not an excess passage of time from June 2012 until 2014 when the parties started litigation against each other. While child support was not paid during that time, both parties knew and understood it ought to have been paid. The fact that the Respondent took steps to pay arrears of child support dated back to the June 2012 Child Support Agreement in late 2014- early 2015 when he commenced the Provincial Court

Proceeding is evidence that he understood he had a child support obligation dating back to June of 2012.

b) The Respondent was blameworthy in not paying child support or producing his income tax returns following the 2012 Child Support Agreement. He knew pursuant to that agreement that he had obligations in this regard, and had to know that the expectation was that if he made a higher income than set out in the 2012 Child Support Agreement the Claimant could claim he should pay more in child support.

c) The circumstances of the Child were that the Child needed additional supports to assist him in school including tutoring and that the Respondent was financially strapped in providing these supports to him. Had the Respondent paid timely child support in accordance with his income, it would have provided at least some relief for the financial strain on the Claimant in trying to meet the Child's needs.

d) The Respondent had notice in early 2015 by virtue of the Claimant's Notice of Family Claim that he might have greater child support obligations based on income than what he had actually paid. Had he made proper arrangements at that time to pay his full obligation, he likely would have been able to do so. I find that the arrears sought of $2,004 for this period is not a quantum that will create a hardship for the Respondent, given his income.

[318] I conclude that the Claimant is entitled to judgment against the Respondent for $2,004 in relation to the Respondent's underpayment of child support from June 15, 2007 to May of 2015.

Future Child Support

[319] Going forward, I order that the Respondent pay child support in accordance with the Guidelines based on his full income as identified at line 150 of his income tax return, the amount to be adjusted each year as of June 15 based on the

Respondent's income tax return filed that year for the previous year. The Respondent is required to provide the Claimant with a copy of his income tax return for the previous year's income by May 15 each year, and at the same time provide a copy of his notice of assessment received in relation to the income tax return filed the previous year.

Section 7 Expenses

[320] The Claimant advances the following claims for the Respondent's contribution to s. 7 expenses, proportionate to the parties' incomes:

a) the Claimant seeks an order that the Respondent pay or contribute to the Child's tutoring at Sylvan in 2013 and 2014, as a retroactive s. 7 expense; and,

b) the Claimant seeks an order that the Respondent pay the future costs of the counselling for the Child addressed above.

[321] No other claims for s. 7 expenses were advanced by the Claimant in argument.

Retroactive Payment of Tutoring Costs

[322] The Claimant seeks an order that the Respondent pay pursuant to s. 7 of the Guidelines all or part of the past costs for the Child's tutoring expenses with Sylvan in 2013-2014. These costs totalled $2,212.50 in 2013 and $2,880 in 2014.

[323] Applying the analysis in *D.B.S.* in relation to retroactive claims, I find:

a) The Claimant involved the Respondent in the decision to send the Child to Sylvan for tutoring in 2013, and in doing so the Respondent concurred that this was a reasonable and necessary expense. The Respondent also indicated that he would try to assist with the cost of it. When the Respondent did not contribute to the cost, the Claimant gave notice in her Notice of Family Claim filed in January 2015 that she was seeking an order for his contribution.

b) The Respondent is blameworthy in not contributing to the cost of tutoring at Sylvan after agreeing with the Claimant that it was a reasonable expense and indicating he would try to contribute to the cost.

c) The cost was a significant and extraordinary cost for the Claimant to bear alone and this would have cut into her ability to afford other programs for the Child. I infer from all of the evidence that the Child could have benefited from extracurricular programming or less financial strain in the household and the Child's circumstances would therefore have improved had the Respondent contributed to the cost of tutoring.

d) Paying a proportionate amount of the past Sylvan costs will not be a hardship for the Respondent if the order is structured to allow for monthly payments over time.

[324] This leads to the question of what the parties' incomes were in 2013 and 2014.

[325] The Claimant's actual income in 2013 as disclosed at line 150 in her 2013 tax return was $14,593.60; in 2014 it was $15,934.21.

[326] The Respondent's 2013 notice of assessment indicated that his total income that year was $68,054; his 2014 notice of assessment indicates that his line 150 income was $71,310 that year.

[327] If the Sylvan expenses were divided proportionately to the actual incomes in 2013 and 2014, the Respondent would be responsible for approximately $1,821 in 2013 and $2,353 in 2014, for a total of $4,174.

[328] The Respondent urges the Court to impute income to the Claimant for the 2013 and 2014 years, suggesting that she be imputed to have income of $30,000.

[329] Further, the Respondent submits that the Claimant was excessive in incurring the Sylvan expense, given her income and it is too great an expense for the Respondent to afford on his income as well.

[330] In my view the Respondent in 2013 sanctioned the Claimant placing the Child in Sylvan for tutoring and it would be unfair for him to now take the position that it was too expensive.

[331] I also find that it would be unfair to impute income to the Claimant for 2013 and 2014 for the purpose of calculating the sharing of the expense for tutoring. The Respondent did not suggest to her that she needed to work longer hours in order to generate more income to pay for Sylvan. The Claimant had serious health issues in 2013 and 2014 requiring treatment and leave from employment. She was not deliberately under-employed. I do not find that she could have generated more income in those years than she actually did.

[332] When the Claimant's treatment was over and her health returned she did generate income close to $30,000.

[333] I find that the Claimant is entitled to judgment against the Respondent for $4,174 representing his proportionate share of the Sylvan expense, as a past s. 7 expense. This may be paid in monthly instalments of $200 commencing on August 15, 2017 and the 15th day of every month thereafter, with the final instalment being such lesser amount as is required to pay the balance. Of course the Respondent is at liberty to make larger payments or to pay it off in a lump sum.

Future Counselling Costs

[334] As I have indicated, both parties agree that the Child should receive counselling to provide a safe way for the disclosure to him of the Respondent as his father, as was recommended by Dr. Korpach. I have described the nature of the counselling above.

[335] The Child is likely to face some difficult self-esteem issues. He might have difficulty dealing with the concept that he was abandoned by his father, and might blame himself. He might need assistance in dealing with the introduction of his father and in dealing with the access visits. There is no doubt that counselling is a good idea and would be an extraordinary but appropriate s. 7 expense.

[336] Given that the issue arises out of the Respondent's abandonment of the Child, and taking into account the Respondent's past conduct in not paying child support during many of the years of abandonment, I consider it appropriate to make the Child's counselling a cost payable by the Respondent alone.

[337] However, neither party called evidence on the cost of such counselling, although I did hear evidence as to the cost of Dr. Korpach's assessment. Dr. Korpach's assessment cost $8,000 according to the Respondent plus additional costs for her to attend court.

[338] As a start, I will order the Respondent to pay up to $10,000 towards the cost of such counselling, such amount to be inclusive of any retainer required by the chosen therapist.

[339] Should the counsellor require more funding for ongoing therapy, and should the parties be unable to agree on the cost, they have liberty to apply before me for a further order.

Other Issues

[340] There were a number of other issues raised by the parties that I will address briefly.

Late-Produced Physiotherapy Records

[341] After the Claimant's case closed and the Respondent's case began, there was a hiatus in the trial due to scheduling issues.

[342] During her direct evidence in March, the Claimant mentioned that the school was hoping to have a physiotherapist ("PT") conduct an assessment of the Child sometime after spring break.

[343] This assessment occurred during the hiatus in the trial. The Claimant then received the report of the assessment in May 2017. The report is dated April 16, 2017("PT Report"). The Claimant neglected to mention to her counsel that she had

received the report until the trial resumed in June. The records were then produced by her counsel to the Respondent's counsel.

[344] The Claimant sought to re-open her case to introduce the PT Report as admissible business records but not as expert opinion evidence.

[345] The Respondent objected to the introduction of the records, submitting that it would be necessary to allow the Respondent the opportunity to cross-examine the author of the PT Report before admitting the evidence. The Respondent declined the option of cross-examining the Claimant with respect to the PT Report.

[346] The PT Report was marked Exhibit F for identification, and the ruling on its admissibility was reserved to be dealt with in this judgment.

[347] I note that the Respondent's case took considerable issue with the Claimant's evidence regarding her own observations of the Child's motor skills. The PT Report, if admitted, could provide some corroboration of the Claimant.

[348] I find that the PT Report is not admissible for a number of reasons, including its late production and the failure to call any evidence to prove the reliability or necessity of calling the evidence in it this way, or that the contents were recorded contemporaneously and in the usual and ordinary course of business.

[349] However, even without the observations of the Child set out in the PT Report, I accept the Claimant's evidence that he is somewhat behind his peers in his physical abilities as well as in his learning abilities, and this is consistent with the school records that were produced at the start of the trial.

The Slap

[350] The Claimant testified that the Respondent slapped the Claimant once when they had a heated argument in the summer of 2007, when she was pregnant and they had a disagreement about attending a wedding reception. The Respondent denied the Claimant's evidence in this regard. The Claimant's sister gave evidence

that the sister told her about the incident at the time, which rebuts any suggestion that the allegation is recently fabricated.

[351] If the slap happened, it was inappropriate behaviour. However, it was a one-time incident and the circumstances did not suggest that the Respondent was going to be repeatedly violent, and until the present trial the Claimant did not suggest that it made the Respondent an unfit parent.

[352] I do not find there is any threat of violence or actual violence that needs to be taken into account in making decisions in this case about parenting.

[353] I do, however, find on the whole of the evidence that the Respondent can quickly lose control of his emotions and react in an angry way to circumstances that do not please him. This was evident in some of his text messages and email correspondence, as well as his demeanour under cross-examination when at times it was clear he was becoming extremely irritated with the questioning. It was also evident in the answers he gave when interviewed by Dr. Korpach. I have taken into account the Respondent's impulsivity and lack of self-control as one of several factors I weighed in making my decisions about parenting.

The Respondent's Conduct towards the Child

[354] The Claimant had some negative observations of the Respondent's conduct towards the Child once the visits arranged by her started in 2013. These include: the Respondent taking the Child to a men's washroom and the Child returning having wet his pants somewhat with the Respondent embarrassing the Child about it; the Respondent giving the Child an iPad when the Child was six when she told him she thought the Child was too young and needed to work more on reading and writing; the Respondent reacting in an upset way to the Child on one occasion by pretending that he would throw the Child's shoe over a bridge; the Respondent's distraction on his cell phone when with them.

[355] The Claimant testified that after the bathroom incident the Child told her that he did not like her big friend, and he scared him.

[356] The Respondent had different recollections of some of these events.

[357] I prefer the Claimant's evidence over that of the Respondent.

[358] However, I note that none of the incidents the Claimant recounted were considered by her at the time as cause to terminate the Respondent's visits with her and the Child. I find that these incidents were not so serious as to be determinative of the question of what is in the best interests of the Child.

[359] More compelling, perhaps, is that the totality of the evidence about the Respondent's interactions with the Child indicated to me that there is as of yet no bond between them; the Respondent is not someone the Child feels close to or comfortable with. Also important is the fact that the Respondent did not take a serious interest in the Child's schooling or activities.

The Paternal Grandparents' Conduct Generally

[360] The Claimant says that the Respondent's parents, particularly Mr. S. Gill, regularly bad-mouthed the Respondent once he left the home. She testified to the effect that as the Child got older this bothered her, and she was worried that the Child would learn that the Respondent was his father.

[361] The Claimant also expressed concerns about the food that the Gills fed the Child.

[362] The Claimant did not approve of a situation where Mr. S. Gill told the Child to lie about his age to go down a waterslide that was supposed to be for older children only. The Claimant was correct to note that children should not be taught that lying when it suits you is acceptable and she was also correct to note that there could have been a safety concern as well.

[363] Nevertheless, I do not find these allegations to be material or determinative of any issue before me. I am not being asked in this case to determine whether or not the grandparents should have access to the Child.

[364] I think it likely that if the April 2014 incident had not occurred, and had the Respondent not threatened to take the Child away from the Claimant against her wishes in July 2014 and then started a lawsuit, some of these issues could have been smoothed over so long as the Gill grandparents remained respectful of the Claimant's authority and direction over her Child's care when the Child was with them, including being respectful of her wishes regarding how to manage the fact that the Child did not know that the Respondent was his father.

[365] I also am puzzled by the Claimant's evidence that when she recently showed the Child a video of the senior Gills saying hello to him, he reacted very angrily and was very upset, and even wet his bed that night. All of this seems very strange. If he did not care about the Gills one would think he would not react at all to a video from them. If he is angry at the Gills, why is this so -- does he feel abandoned by them, or does he feel they have hurt the Claimant because he is aware they are suing her? Either of these latter two choices are not a healthy situation. Perhaps this is an issue that can be explored in the counselling to be funded by the Respondent, if there is time to do so.

Future Section 7 Expenses

[366] The Respondent will have an obligation to contribute to reasonable and necessary extraordinary expenses in the future, pursuant to s. 7 of the Guidelines. This should be based proportionately on each other's income.

[367] The Claimant's 2016 employment income as shown on her T4 form was $35,477.91. The Claimant's Form F8 Financial Statement sworn on February 24, 2017 identified that she has some union dues that come off this in the amount of $148.90.

[368] The Respondent's Form F8 Financial Statement sworn February 1, 2017 identifies that his current employment income is $70,600.08, less union dues of $97.02 for net current income of $70,503.86.

[369] For ease of reference, I find that a proportionate share of s. 7 expenses going forward requires the Respondent to pay 67% of such expenses and the Claimant to pay 33%.

[370] Normally both parents have a say in what s. 7 expenses are incurred.

[371] Here, because the Claimant is the sole parent with guardianship responsibilities, she will ultimately be the one making the decisions about what extraordinary expenses are necessary to incur for the Child. However, the Respondent will have the ability to disagree with her as to particular expenses being reasonable and necessary.

[372] Should the Claimant wish the Respondent to contribute to s. 7 expenses in the future, leaving aside the counselling expense that I have already mentioned, she should inform the Respondent of the nature of the expense and basis for it. Should the Respondent refuse to agree that it is reasonable and necessary and refuse to contribute a proportionate share of the expense, the Claimant will have the right to seek an order that he contribute to the same.

[373] Obviously the legal cost of seeking several court orders relating to s. 7 expenses could outweigh the amount of contribution being sought. For this reason, I will order that any application to deal with s. 7 expenses can address an accumulation of such expenses over time reaching back retroactively up to three years. This is not to say that a party can delay for three years in making a request for a contribution as such requests should be made in a timely way.

[374] I note that if there is a need to bring such an application it would be efficient to bring it at the same time as any application regarding parenting access, as the parties' communications and conduct in relation to the Child's needs may be relevant on both applications.

Conclusions

[375] I have found that it is not in the Child's best interests that the Respondent have guardianship or parenting responsibilities over him pursuant to the *FLA* or any custody rights under the *Divorce Act*. I have determined that the Claimant is the Child's sole guardian and sole person with parental responsibilities under the *FLA* and sole custodian under the *Divorce Act*.

[376] I have found pursuant to s. 59 of the *FLA* that it is in the best interests of the Child that the Respondent be granted access to the Child on terms described in this judgment, following a period of counselling of the Child.

[377] The counselling should take place after the psychoeducational assessment of the Child, but if that is delayed and counselling does not commence for more than ten months from the date of this judgment, the parties have liberty to apply before me for a further order regarding the timing of the counselling.

[378] The Respondent is ordered to pay the costs of the counselling. On a preliminary basis, the Respondent's responsibility to pay the cost of such counselling will be capped at $10,000, with any costs greater than this subject to agreement of the parties or further order of the Court.

[379] The Respondent is granted limited access to the Child, starting at a reasonable time after counselling has commenced, on the following basis: the Respondent will have supervised daytime access to the Child on six occasions, at a minimum of once per month; the date, location, length of time of the access visit, and choice of supervisor and supervised environment is to be mutually agreed upon by the parties.

[380] I will be seized of any application arising from this judgment (unless I indicate otherwise, for example, if due to my other judicial commitments it will be inconvenient to the parties and will result in a delayed hearing).

[381] There will be a right of review as follows: no sooner than 18 months from the date of this judgment, and without the necessity of showing a change in circumstances pursuant to s. 47 of the *FLA*, the parties will be permitted to bring applications before me pursuant to s. 59 of the *FLA* concerning the terms and form of any contact the Respondent should have with the Child.

[382] The right of review will not apply to the decision that the Claimant is sole guardian and custodian of the Child with sole parental responsibilities, which is a final decision.

[383] The Respondent has no right to contact the Child directly.

[384] The Claimant is granted judgment against the Respondent for retroactive child support in the amount of $2,004.

[385] The Claimant is granted judgment against the Respondent for a retroactive contribution to Sylvan tutoring costs in the amount of $4,174. This may be paid in monthly instalments of $200 commencing on August 15, 2017 and the 15th day of every month thereafter, with the final instalment being such lesser amount as is required to pay the balance.

[386] Going forward, I order that the Respondent pay child support in accordance with the Guidelines based on his full income as identified at line 150 of his income tax return, the amount to be adjusted each year as of June 15 based on the Respondent's income tax return filed that year for the previous year. The Respondent is required to provide the Claimant with a copy of his income tax return for the previous year's income by May 15 each year, and at the same time provide a copy of his notice of assessment received in relation to the income tax return filed the previous year.

[387] The preparation of the court order reflecting this judgment should include in it the current child support payable by the Respondent as of June 15, 2017. I understand the parties are in agreement as to the amount currently payable.

[388] Likewise the Respondent is to pay a share of s. 7 expenses going forward in an amount proportionate to the parties' incomes. That proportionate split currently requires the Respondent to pay 67% of the cost and the Claimant to pay 33% of the cost. The Claimant should inform the Respondent of the nature of the expense and basis for it. Should the Respondent fail or refuse to contribute, the Claimant is at liberty to seek a retroactive award of s. 7 expenses reaching back three years from the date of notice of her application.

[389] On balance the Claimant was successful on the main issues that took up trial time in this case which would ordinarily entitle her to her costs. If the parties are unable to sort out costs of this matter they have liberty to seek a further hearing before me.

"The Honourable Madam Justice S. Griffin"