

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20100512
Docket: E027402
Registry: New Westminster

Between:

Debbie Lynn Pollard

Plaintiff

And:

Kurt Dean Metivier

Defendant

Before: The Honourable Madam Justice Ker

Oral Reasons for Judgment

Counsel for Plaintiff

Appearing on her own behalf

Counsel for Defendant

L.N. MacLean

Place and Date of Hearing:

New Westminster, B.C.
April 27, 2010

Place and Date of Judgment:

New Westminster, B.C.
May 12, 2010

Introduction

[1] The plaintiff, Debbie Lynn Pollard, and the defendant, Kurt Dean Metivier, were married for six and a half years before they separated on March 2, 2004. They have two children; Nicholas, aged nine, and Alysha, age seven and a half.

[2] In this application the father seeks a variation of the access time and care and control that the parties have with their two children as outlined in a consent order made by Mr. Justice Leask on March 25, 2008. He seeks that the schedule currently in place be varied so that the parties share physical care and control of the children pursuant to their joint custody and guardianship agreement, and that the access schedule become a one week on/one week off rotation, with changeover to occur after school on Friday of each week.

[3] Mr. Metivier also seeks that the amount of child support he pays in the future be varied to reflect the 50 percent time sharing regime of a week-on/week-off access schedule, suggesting that the straight set-off method be applied using an income for the purpose of the *Federal Child Support Guidelines*, S.O.R./97-175 (the "*Guidelines*") of \$237,636.76 for him, and a *Guideline* income for Dr. Pollard between \$112,500 and \$158,500. On this point he seeks to have income imputed to Dr. Pollard, arguing that she is capable of working more hours than she currently does.

[4] Mr. Metivier also seeks to have the consent order of January 15, 2009 setting the child support he pays to Dr. Pollard be retroactively varied effective to May 1, 2009, to reflect the fact that he has had the two children in his direct care and control in excess of the 40 percent threshold required by the *Guidelines* for offset purposes. He argues that in fact the children have been in his care and control for over 45 percent of the time since May 1, 2009.

[5] Mr. Metivier also seeks under the retroactive variation of child support an acknowledgment that he has overpaid the amount of child support to Dr. Pollard from May 2009 through April of 2010 in an amount ranging from \$12,792 at the low end to \$25,480 at the high end.

[6] Dr. Pollard opposes all applications brought by Mr. Metivier and seeks to maintain the status quo for the access schedule, arguing no material change in circumstances and that for the purposes of child support Mr. Metivier does not have the children in his care more than 40 percent of the time.

Background facts

[7] The parties were married on August 4, 1997 and separated on March 2, 2004 after almost seven years of marriage. The parties were divorced on May 30, 2005. On March 25, 2008, Mr. Justice Leask granted a consent order at a JCC that contained a bi-weekly parenting schedule with approximately seven days out of fourteen given to Mr. Metivier, but with six changeovers in that 14-day schedule.

[8] The parties share joint custody and guardianship of their children as agreed to in the separation agreement from June 21, 2004.

[9] It is fair to say that both parties are dedicated, devoted parents, actively involved in the lives of their children. Both parties are committed to their children, love them very much, and want them to be a significant part of their lives. Both parties enjoy spending quality time with their children. Both parties are actively engaged in the upbringing of their children, teaching them various activities, performing parental roles when the children are in their homes, and for the most part there appears to be a significant level of co-operation between the two parties, which does reflect very positively on both parties as parents and their quality of parenting.

[10] The children appear to be doing very well in school and are fully engaged in a variety of activities, including soccer and dance, play dates with friends, and the usual activities of a seven and a half-year-old girl and a nine-year-old boy.

[11] The parties both have homes in close proximity to one another, approximately a five-minute drive from each other, with the children's school in between, thus allowing the children to have the educational opportunities that they deserve and the opportunity to spend as much time with each of their parents as is possible.

[12] Mr. Metivier argues and outlines in his affidavit that the children are confused by the overly complex access schedule that is currently in place given the numerous changeovers in the 14-day period. Mr. Metivier also asserts that since May 2009 he has exercised access to the children in excess of 40 percent of the time.

[13] The consent order for access as outlined for Mr. Justice Leask is as follows: week one, Mr. Metivier picks up the children after school on Tuesday at 5:30 p.m, (changeover number 1), and has them until he returns them to school at 8:10 a.m. on Wednesday morning, (changeover number 2). Dr. Pollard picks up the children after school on Wednesday at 5:30 p.m. and returns them to school at 8:10 a.m. on Thursday morning. Mr. Metivier picks up the children at 5:30 p.m. on Thursday, (changeover number 3), and has them in his care continually until the following Tuesday at 8:10 a.m. when he drops them off at the school. Dr. Pollard picks up the children after school on Tuesday of the second week, (changeover number 4), and has them in her care until Thursday at 5:30 p.m. when Mr. Metivier picks up the children at school, (changeover number 5), and has the children in his care from 5:30 p.m. until he drops them off at school on Friday morning at 8:10 a.m. Dr. Pollard picks up the children after school on Friday, (changeover number 6), and then has the children in her care through the weekend until the following Tuesday when the schedule reverts back to the first week of the schedule with Mr. Metivier picking the children up from school at 5:30 p.m. on the Tuesday.

[14] At the time the consent order was made on March 25, 2008, Mr. Metivier worked locally and in Western Canada for a food services company called Compass Group. By August 2008, however, Mr. Metivier changed employers to Sodexo, another food services company, and effectively was promoted to the position of vice-president, which required him to travel about 100 days per year with travel of four to six hours duration throughout Canada, primarily to Toronto, Montreal, Newfoundland, and Fort McMurray. This schedule and distance caused him to return exhausted from his travels and impacted on the quality of his time when he had the children in his care.

[15] In February 2010, Mr. Metivier accepted a new position as president of the Workforce Housing Division of Globe Modular Ltd. ("Globe"), also a manufacturer and distributor of buildings and installations for remote work camps. His new position requires him to be in charge of the selling and supervision of construction of housing for various camp operations that Mr. Metivier had previously been selling food services to in his capacity as vice-president with Sodexo. Mr. Metivier's new position now involves overseas travel to the Middle East and Asia, and the duration of his business travel is much longer than before and usually between four to six days in length.

[16] In his new position with Globe, Mr. Metivier has far more input and control over his schedule of business travel, such that his travel arrangements can be arranged around his parenting schedule. His business travel would be best achieved through a week-on/week-off schedule as far as any child custody access and care regime is concerned. In other words, Mr. Metivier would be able to arrange all his travel on the weeks the children are in their mother's care and be at home in the evenings with the children when they are in his care and control for an entire week.

[17] When not travelling, Mr. Metivier's work schedule is a Monday to Friday 9:00 to 5:00 schedule, which allows him to be at home and dealing with his children during their access times with him.

[18] Mr. Metivier's *Guideline* income for basic child support is outlined in his Form 89 financial statement sworn March 17, 2010 as \$237,636.76.

[19] Dr. Pollard is a chiropractor running her own business and in private practice. Her evidence discloses that she works 22 hours each week in terms of strictly patient treatment time. In addition to this she is required to address a significant amount of paperwork for patient charting and reports, as well as to take telephone calls from such places as ICBC, WCB, and medical doctors, reviewing x-ray reports and exercise programs, and providing nutritional advice. Dr. Pollard estimates, and I

accept, that at least an additional six hours per week is spent upon this paperwork, reviews and consultations with others.

[20] In addition to the above 28 hours of work a week, Dr. Pollard endeavours to work in four to six hours of additional treatment time such that she endeavours to work approximately 34 hours per week. Her work hours are flexible such that she is able to work mornings, afternoons, evenings, and weekends. Her schedule is diverse and includes prime time hours so that any patient can get into her office. Even with working prime time hours, Dr. Pollard deposes that is she is not fully booked with the 22 hours of scheduled available patient treatment time. Dr. Pollard would like to be able to work more hours to increase her income, but thus far has been unable to do so.

[21] Dr. Pollard clearly outlines in her affidavit that she is self-employed and is working many hours in an effort to build up her practice. Even with the build-up of her practice she is not able to work more hours or fully able to commit to 22 hours of patient treatment time per week as the hours are not always being filled. Based on her Form 89 financial statement sworn April 8, 2010, Dr. Pollard indicates that her 2009 income from her business, before adjustments are made, is \$103,152. However, a deduction of \$8,935 for corporate losses and expenses, an adjustment in accordance with schedule 3 of the Guidelines, results in a Guideline income for basic child support purposes of \$94,217.

[22] I accept Dr. Pollard's evidence that this corporate loss and business expenses are permissible as deductions, both under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and for the purposes of assessing child support.

[23] Counsel for Mr. Metivier accepts that losses should be deducted off the pre-tax profit of \$103,152 for the purposes of the issues addressing child support.

[24] Consequently, I find that Dr. Pollard's income for 2009, as stated in her financial statement, to be \$94,217 as a *Guideline* income for basic child support

purposes. The issue of whether income should be imputed to her is another matter which will be dealt with in the analysis portion of my Reasons.

Issues

[25] The issues raised on this application can be reduced to the following:

1. Should the current access schedule set out in the consent order of Mr. Justice Leask of March 25, 2008 be varied or rationalized so that it becomes a one-week rotation where mother has the children for one week and father has the children for the following week?
2. For the purposes of determining child support should income be imputed to Dr. Pollard on the basis that she is intentionally under-employed?
3. Should the current order for child support be varied prospectively on an offset basis such that Mr. Metivier's child support obligations should be reduced prospectively?
4. Should the consent order of January 15, 2009 addressing the issue of child support payable by Mr. Metivier to Dr. Pollard be corrected retroactively to May 1, 2009, if Mr. Metivier has the children in his care and control in excess of 40 percent of the time?

Analysis

Variation of current access schedule.

[26] Variation of custody and access orders is permitted both under s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and s. 24 of the *Family Relations Act*, R.S.B.C. 1996, c. 128 (the "FRA").

[27] The leading case on variation of custody and access orders is *Gordon v. Goertz*, [1996] 2 S.C.R. 27. In that case, which involved a proposed move by the custodial parent, McLachlan J. (as she then was) for the majority, summarized the law as follows at paragraph 49:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all

the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.

[28] In a variation application brought under the *FRA*, once the court has found a material change in circumstances, the court must apply the factors set out in s. 24(1)(a) to (e) of the *FRA* to determine the best interests of the child: see *Bruce v. Bruce* (1997), 26 R.F.L. (4th) 219 (B.C.S.C.).

[29] On the threshold issue of material change in circumstances the Court in *Gordon v. Goertz* stated at paragraphs 11 and 12:

11. The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued: *Baynes v. Baynes* (1987), 8 R.F.L. (3d) 139 (B.C.C.A.); *Docherty v. Beckett* (1989), 21 R.F.L. (3d) 92 (Ont. C.A.); *Wesson v. Wesson* (1973), 10 R.F.L. 193 (N.S.S.C.), at p. 194.

12. What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

[30] A change in circumstances must present a clear and distinct departure from what the court knew of the circumstances or could reasonably have anticipated when making the order: see *Canning v. Fearn*, 2000 BCSC 362. A change in

circumstances will not be material unless it was not foreseen or could not reasonably have been contemplated by the judge making the original order: see *B.D. v. L.K.*, 2004 BCSC 455.

[31] Does Mr. Metivier's changed employment responsibilities constitute a material change in circumstances such that the current access schedule as set out in the March 2008 order of Leask J. be the subject of a variation?

[32] It is clear on the evidence that at the time the original order was made Mr. Metivier's then employer only required travel within Western Canada with flights of one to two hours in length. In August 2008 Mr. Metivier changed employers and took on a more demanding position that required him to travel across Canada. In 2009 he took over 100 flights to various locations in Canada. The travel was demanding and left him exhausted when he returned home to be with his children.

[33] Mr. Metivier now has new employment with Globe that will involve less business trips, but the trips will be much longer in duration, over six days, and require that he travel to Shanghai, the Philippines, the Middle East, and wherever Globe's products may be installed as part of the infrastructure for remote work camps.

[34] With Mr. Metivier's new position he also has considerable control over when he travels and can arrange the long distance travel such that he would not be travelling on long-haul trips during the weeks that he has the children in his care. When Mr. Metivier is not travelling his employment hours are 9:00 to 5:00 Monday to Friday at an office in the Lower Mainland.

[35] Dr. Pollard argues that Mr. Metivier's new job does not constitute a material change in circumstances, citing in part what she describes as Mr. Metivier's unstable work history in having changed jobs every 18 months. Dr. Pollard argues that Mr. Metivier's changes in employment have been many over the past three years and as such it is unknown whether the proposed new schedule will actually work or whether a further change will be needed if he changes employment again.

[36] It is clear on the evidence that while Mr. Metivier has changed employers in the past two years on at least three occasions, the changes have all been in the order of enhancing and advancing his career, and therefore increasing his earning potential. I find that Mr. Metivier's change in employment to becoming president of the Workforce Housing Division with Globe does constitute a material change in circumstances as the requirement for long distance overseas travel to countries like China, the Philippines, and the Middle East, and having meaningful access to the children, cannot be achieved under the current access regime and the order of Mr. Justice Leask.

[37] Mr. Metivier's new position and long distance travel represents a clear and distinct departure from what the court knew of the circumstances or could reasonably have anticipated when making the order. To put it another way, the change in circumstances was not foreseen and could not reasonably have been contemplated by the parties, or Leask, J., at the time the order was made.

[38] More significantly, however, this change clearly alters Mr. Metivier's abilities to meet the needs of his children in a fundamental way. He cannot manage or effect the travel that he must undertake for his new position on the current schedule. Even if he could manage to conduct overseas business travel to China or the Middle East on the current schedule, which clearly he cannot, his access time with the children would be rendered meaningless as he would be far too exhausted and jet lagged to be present and actively involved in his children's lives in any way, let alone a meaningful way as currently set out in the consent order of Leask, J.

[39] Mr. Metivier has satisfied me that with the responsibilities and duties of his new position, his business travel commitments constitute a material change in circumstances such that I can move to consider the issue of whether the proposed change should be made.

[40] In considering whether to make the proposed variation to the current access regime the court must give paramount consideration to the best interests of the child. Moreover, it is very important to remember that access is the child's right. Access

provisions are for the benefit of children, not parents: see *Young v. Young* (1993), 84 B.C.L.R. (2d) 1 (S.C.C.).

[41] A corollary to this principle is found in s. 16(10) of the *Divorce Act* which states:

16(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[42] Section 16(10) was interpreted broadly by the Court of Appeal in *Young v. Young* (1990), 29 R.F.L. (3d) 113 (B.C.C.A.), where Wood J.A. held at 205 that "contact" means:

... real communication, ... the opportunity to know each other well and to appreciate each other as individuals, and of the chance to preserve and share with each other that special relationship which ought to endure between child and parent.

[43] The majority of the Supreme Court of Canada in *Young* noted that this factor is the only one that the legislation has seen fit to single out in defining the best interests of the child. Contact is emphasized in the Court of Appeal judgment as a factor in establishing a "meaningful" relationship between the access parent and the child.

[44] At the same time, however, the principle of maximum contact is qualified as noted by L'Heureux-Dube, J. in *Young* at para. 125:

While the Act specifies that access is a value to be preserved, the objective in s. 16(10) that a child have "as much contact with each spouse" is immediately qualified by the proviso "*as is consistent with the best interests of the child*". Thus, it is clear that maximum contact is not an unbridled objective, and that it must be curtailed wherever the welfare of the child requires it. The best interests of the child remain the prism through which all other considerations are refracted.

[45] Under the *FRA* the court must give paramount consideration to the best interests of the child, taking into consideration the factors enumerated in s. 24 which provides as follows:

24(1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

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

[46] I wish to emphasize that in this case there is no disagreement about the parenting skills or devotion of either parent to their children. Both are very involved in the lives of their children and both appear to be excellent parents who live within minutes of each other. There currently is a joint custody arrangement and a fair amount of time spent with each parent when the children are not in school. The parents thus far have been able to step in and care for the children during the other parent's access time when flexibility is needed.

[47] Factors (a), (c) and (d) of s. 24(1) of the *FRA* are more or less neutral in the circumstances of this case as the access regime as currently set does not appear to be having an apparent significant negative effect on the children apart from some confusion as to which home they are to be in on any given day. The children are clearly bonded to each parent and enjoy significant love, affection, and similar ties with each parent.

[48] Nevertheless, an access schedule that involves constantly moving the children back and forth may not necessarily be in the child's best interests: see *Andrusiek v. Andrusiek*, 1999 BCCA 148.

[49] In *Lerner v. Lerner*, 2000 BCSC 1418, the court rejected a complicated access schedule on the basis that frequent shifting between homes is too disruptive for the children who should have one place they consider home.

[50] While there is no presumption that moving children between homes is not in their best interests: see *Wells v. Watson*, 2000 BCSC 622, I do find that the comments of Madam Justice Southin in *Andrusiek* at paragraph 15, that: "Too much to-ing and fro-ing founded on a rigid schedule is not in any child's best interests", to be noteworthy in the circumstances of this case.

[51] Co-parenting or shared parenting arrangements are not in any way unusual. Indeed the cases and reports filed by counsel for Mr. Metivier demonstrate that where such arrangements are in the best interests of the children the order should be made: see for example *S.J.B. v. R.A.B.* 2003 BCSC 1023; *Carr v. Carr*, 2001 BCCA 415; *Bossert v. Bossert*, 2001 BCSC 939; *H. v. H.*, 2003 BCSC 1399. Provided it is in the best interests of the children, shared parenting may well be the best arrangement for the raising of children.

[52] Insofar as the views of the children are concerned, they are not before the court on this application, nor would it necessarily be appropriate to elicit them in these circumstances, given their ages.

[53] The factor that does cause me concern insofar as the best interests of the children are concerned is that enumerated in s. 24(1)(e). If the current schedule of six exchanges in fourteen days is maintained, Mr. Metivier's ability or capacity to exercise his rights and duties of guardianship, custody or access with respect to the children is significantly compromised in the circumstances.

[54] Corollative to this is a corresponding deprivation to the rights of the children to be able to maximize their contact with both parents on a meaningful and adequate basis.

[55] I do find in the circumstances of this case that the current schedule that has six exchanges in fourteen days, when considered in the context of Mr. Metivier's new work schedule that requires international business travel, cannot be in the children's best interests.

[56] To leave the schedule as it currently is set would be to deprive the children of any meaningful access time with their father as when he is travelling, which he will have to do on a regular basis, he will return exhausted and unable to engage with them. Moreover, leaving the schedule as it is and trying to work around Mr. Metivier's travel obligations by "swapping times" and alternating the schedule on an *ad hoc* basis as Dr. Pollard suggests will only add further uncertainty and confusion over the times and who the children are to be with and when.

[57] While variation of the current schedule no doubt will bring some changes, the children are at a flexible enough age and appropriately and significantly bonded to both parents that they will be able to adapt. Moreover, Dr. Pollard's concerns about not seeing the children for seven days straight is in large part alleviated by Mr. Metivier's suggestion that if Dr. Pollard wishes to see the children during the week and the children are with him she can, if she wishes, pick the children up at school on Monday, Wednesday or Friday of the week they are not with her and spend a couple of hours with the children before their father picks them up. Both parties also support the right of first refusal for the other to provide child care when the other is unable to do so during their regular access time.

[58] The proposed change in access, while technically a variation of the existing order, does not amount to changing the location of where the children will be. It simply amounts to a rationalization of the schedule such that there will be less transitions during any 14-day period, more certainty as to where the children are to be on any given evening and less "to-ing and fro-ing" between their two homes. The children spend considerable time with each parent, the parents live within minutes of each other and the children's school. There is no real disruption involved apart from reducing the number of exchanges. The children are doing very well at school, are bright, happy, and well adjusted.

[59] Moreover, without a change, the evidence supports the inference that continuing with the current schedule will not necessarily be in the children's best interests as the current schedule will render access to their father meaningless,

given his international travel requirements and the impossibility of achieving that and reasonable access to the children within a schedule that requires exchanges six times in fourteen days.

[60] In the circumstances of this case, taking into account the principles of the best interests of the children and maximizing the contact of the children with both parents, Mr. Metivier's proposal of a variation to the current schedule is appropriate and accordingly will be made such that there will be shared parenting on a week-on/week-off basis.

Imputing income to Dr. Pollard.

[61] The next issue to address is Mr. Metivier's application to have income imputed to Dr. Pollard. As set out in Dr. Pollard's Form 89 financial statement, it discloses that she has a *Guideline* income for the purpose of child support assessments of \$94,217 after the corporate loss is deducted from her gross business income.

[62] Mr. Metivier argues that Dr. Pollard in only working 22 hours a week is intentionally under-employed and that with an additional 11 hours of work a week she could be earning 50 percent more. Mr. Metivier estimates that conservatively Dr. Pollard's true income should be attributed at between \$112,500 and \$168,500 based on her gross income from 2005 to 2008 as well as increasing her hours by 50 percent from 22 to 33 hours a week.

[63] Dr. Pollard opposes the application to have more income imputed to her and argues that the 22 hours a week she works is only patient treatment time. Her evidence clearly establishes that she works many additional hours doing charting, writing letters, and taking phone calls for ICBC, WCB, doctors, and other related activities.

[64] Section 19 of the *Guidelines* provides the court with a general power to decide that the income of a parent for *Guideline* purposes should be more than the

total income calculated. This section sets out the following non-exhaustive list of circumstances where the court has the discretion to impute income to a parent:

19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[65] In this case Mr. Metivier argues that Dr. Pollard is intentionally under-employed and relies on section 19(1)(a) to urge that a higher income be imputed to Dr. Pollard. In determining whether a party is intentionally unemployed or under-employed under section 19(1)(a) the court must determine whether the party has taken reasonable steps to obtain employment commensurate with the factors such as age, health, education, skill, and work history: see *Van Gool v. Van Gool* (1998), 44 R.F.L. (4th) 314 (B.C.C.A.).

[66] Imputing income for intentional under-employment does not require a finding of bad faith on the party, only that the parent is not earning to capacity. Generally to

determine if a parent is earning to capacity the court will apply the following general principles:

- (a) Parents who are healthy and can work have a duty to seek employment.
- (b) Reasonable income earning capacity will be based on consideration of a parent's age, education, experience, skills, health and all the job opportunities that are reasonably available.
- (c) Limited experience and skills do not justify a failure to pursue employment.
- (d) Persistence in unremunerative employment or unrealistic career aspirations will not be an excuse; and
- (e) Self-induced reduction in income will not justify the avoidance of child support obligations.

See *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.).

[67] The court has found under-employment and imputed income based on such considerations as:

- the payer's education, work record, abilities, health, past earnings, and absence of factors preventing the spouse from earning more: see *Schom-Moffatt v. Moffatt*, [1997] B.C.J. No. 2055 (S.C.);
- The prevailing opportunity in the industry: see *Cornborough v. Cornborough* [1997] B.C.J. No. 1981(S.C.);
- The payor's previous income, totality of financial resources, experience and business acumen and contacts: see *Braich v. Braich*, [1997] B.C.J. No. 1764 (S.C.).

[68] When a parent chooses to work less than a regular work week the parent must justify the choice based on the children's needs or risk having income imputed: see *Barker v. Barker*, 2005 BCCA 177. In *Barker* the payer parent worked a four-day week in order to help his common law life who had cancer. Although an understandable decision it was not recognized as justifying under-employment under the *Guidelines*.

[69] Although Mr. Metivier may characterize Dr. Pollard's schedule as only working 22 hours a week, a careful examination and consideration of her evidence on this point establishes that she works much closer to 34 hours a week, essentially a regular work week. It is clear on the evidence that the 22 hours a week is only patient treatment times and does not encompass the many other activities attendant with a chiropractic practice.

[70] Moreover, Dr. Pollard has deposed that she would like to be able to have more patient treatment hours, and although her practice appears to be growing gradually thus far she has been unable to continually book more treatment time than the 22 hours, and is often unable to fill all that time.

[71] It is clear on this evidence that Dr. Pollard is working to capacity and definitely not intentionally under-employed.

[72] Consequently I am satisfied on the basis of the evidence before me that Dr. Pollard is not intentionally under-employed. Accordingly, the application to have a higher income imputed to her for the purposes of determining child support is dismissed.

[73] For the purposes of assessing respective child support obligations, I find Dr. Pollard's *Guideline* income to be \$94,217 as outlined in her Form 89 statement. Mr. Metivier's *Guideline* income is \$237,637 as outlined in his Form 89 financial statement.

Varying Child support prospectively

[74] Mr. Metivier seeks to have the issue of child support payable by him on a prospective basis varied from the amount of the consent order of January 16th, 2009, reduced to reflect the fact that he will have the children in his care and control for more than 40 percent of the time. Currently Mr. Metivier is paying child support to Dr. Pollard in the amount of \$3,003 a month and has been doing so since May 2009. As Mr. Metivier's *Guideline* income is currently \$237,636, he notes he should

have been paying \$3,130.16. Thus he has underpaid child support in the amount of \$127.16 for the past 12 months, which reflects an under payment of \$1,525.92.

[75] The terms of the January 16, 2009 consent order provides a mechanism for review of child support annually and to adjust it, if necessary, to ensure it accords with the requirements of the *Guidelines*. On April 29, 2009 Mr. Metivier applied to vary his child support payment obligations, but Madam Justice Holmes dismissed the application, as I understand it, because she was not satisfied that Mr. Metivier had the children in his care and control for more than 40 percent of the time.

[76] In order to vary an order addressing child support the applicant must establish a material change in circumstances: see s. 17 of the *Divorce Act*, ss. 20 and 91(4) of the *FRA*, and s. 14 of the *Guidelines*. A material change in circumstances remains the threshold test for variation of an order: see *Buckhold v. Buckhold*, 2006 BCCA 472. See also *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688.

[77] Mr. Metivier now argues that with the change or rationalization of the access schedule becoming one that the children are with each parent on alternating weeks, this constitutes a material change in circumstances and that by virtue of this change s. 9 of the *Guidelines* applies.

[78] Dr. Pollard opposes the reduction based largely on the assertion that Mr. Metivier does not and will not have the children in his care and control for over 40 percent of the time. However, I have found that the proposed schedule of alternating weeks with each parent to be in the best interests of the children in the circumstances of this case. Consequently Mr. Metivier will have the children in his care and control more than 40 percent of the time.

[79] Once parents are involved in access and custody schedules that have the children spending 40 percent of their time or more with each parent, different considerations apply for the issue of child support. Section 9 of the *Guidelines* is engaged whenever the "payor" parent has the custody of the children at least 40 percent of the time. This section provides:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[80] The three factors enumerated in s. 9 of the *Guidelines* structure the exercise of the court's discretion, all three need to be considered and no one factor should prevail

[81] The Supreme Court of Canada's decision in *Contino v. Leonelli-Contino*, 2005 SCC 63 is the leading information on the interpretation and application of s. 9 of the *Guidelines*.

[82] In *J.W. v. M.H.W.*, 2007 BCSC 1075, Mr. Justice Romilly conducted a comprehensive review of the decision in *Contino* and the analysis to be employed in considering child support in the context of the shared parenting and the factors enumerated in s. 9 of the *Guidelines*.

[83] At paras. 30-47 of *J.W.*, Romilly, J. wrote as follows:

[30] The Court in *Contino* considered the ways in which various courts had interpreted s. 9 and settled on a standard approach to be used nationally that would impose greater certainty while allowing for flexibility based on the circumstances of each case. Essentially, the framework of s. 9 requires a two-part determination:

1. Has the 40 percent threshold been met.
2. If so, what should be the appropriate amount of support.

Threshold Met

[31] In this case, I am satisfied that the first branch of this test has been met. Accordingly, I move to consideration of the appropriate amount of support.

Appropriate Support

[32] Section 9 provides a particular regime to determine spousal support in the case of shared custody that departs from the "payer/recipient model" used under s. 3 of the *Guidelines*. The most important difference for our

purposes is that s. 9, unlike s. 3, does not presume that the appropriate amount of support is the table amount. Rather, the court must apply all three factors listed within s. 9.

[33] These three factors provide a structure for the court's exercise of its discretion to determine the appropriate amount. As the factors are conjunctive, none alone is determinative. Consideration should be given to the overall situation of shared custody and the costs related to the arrangement. This holistic analysis provides "sufficient flexibility to ensure that the economic reality and particular circumstances of each family are properly accounted for" (*Contino*, at para. 27). The weight of each factor will vary according to the circumstances of each specific case (*Contino*, at para. 39).

[34] Section 9 does not impose any presumptions regarding the use of the table amounts, as the table amount serves as neither a presumed ceiling nor a presumed floor (*Contino*, at para. 31).

[35] Further, s. 9 must be interpreted in light of the underlying principles that animate the *Guidelines*, as set out in s. 1 as follows:

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

Section 9(a) – Table Amounts for Each Spouse

[36] This first factor requires that the court determine the "simple set-off" between the two spouses. This amount is the support payment calculated by determining the table amount for each of the parents as though each was seeking child support from the other. The amount payable is the difference between the two amounts (*Contino*, at para. 43).

[37] Although the simple set-off is useful in estimating each parent's contribution, it does not, on its own, pinpoint the appropriate amount of spousal support. The set-off amount needs to be adjusted in light of the "conditions, means, needs and other circumstances of each spouse and child for whom support is sought" (*Contino*, at para. 49). The first adjustment in this regard is for the actual contribution that each parent makes, and how that amount compares to the table amount (*Contino*, at para. 50).

[38] I am aware that the recipient spouse normally has some fixed costs (e.g. housing) that do not change significantly with changes in access. Nevertheless, the court retains discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living between households (*Contino*, at para. 51).

Section 9(b) – Increased Costs of Shared Custody

[39] Under this section, the court must look at the situation to determine whether shared custody has increased the family's costs globally. Although this is generally the case with shared custody arrangements, it should not be assumed. Expenses should be apportioned between the parents in accordance with income (*Contino*, at paras. 52-53).

[40] Evidence of costs is important to the court's analysis in ss. 9(b) and 9(c), as the court must examine each party's budgets and actual expenditures to determine each party's fixed and variable expenses to the child. This type of evidence is so important that the court, in the absence of proper evidence, should consider adjourning the motion until such evidence is provided (*Contino*, at para. 57). The court should avoid making "common sense" assumptions about costs incurred by the payer parent, and should not apply "multipliers" to account for the costs of the recipient parent.

Section 9(c) – Conditions, Means and Needs

[41] This section grants the court broad discretion to analyze the resources and needs of both parents and children. The court should keep in mind the governing objectives of the *Guidelines* to ensure that a fair standard of support is provided with fair contributions from both parents. Under this section, the court should ensure that the standard of living of each child does not vary widely from one household to the other, and that each parent has the ability to absorb the costs required to maintain such a standard for each child (*Contino*, at para. 68).

[42] The following factors should be considered (*Contino*, at para. 69):

1. Actual spending patterns of the parents;
2. Ability of each parent to bear the increased costs of shared custody (which entails consideration of assets, liabilities, income levels and income disparities); and
3. Standards of living for the children in each household.

Claims for special or extraordinary expenses (falling under s. 7) may also be considered here.

Example of Application – *Contino*

[43] *Contino* provides an example of how a court should apply s. 9. Here, the payer father applied to vary his current child support obligations of \$563 per month. Section 9 clearly applied as the recipient spouse (wife) conceded that the lone child of the marriage spent at least 40 percent of his time with this father.

[44] To determine the simple set-off, the court had to determine the table amounts for each spouse under s. 9(a). As the husband's income was \$87,135, his table amount was \$688 per month. The wife's income was \$68,082, so her table amount was \$560 per month. Subtracting this amount from the husband's table amount left a set-off of \$128 per month.

[45] However, the court determined that the set-off needed to be adjusted under the circumstances. In applying s. 9(b), the court examined the parents' actual expenses. The father's budget indicated monthly expenses of \$1,814

for the child; the mother's budget indicated \$1,916. The ratio of income between the parties was 56:44 in favour of the father. Applying this ratio to the total expenses of \$3,730, the court found that the father should have paid \$2,089 (\$3,730 times 0.56), and the mother \$1,641 (\$3,730 times 0.44). As the father contributed only \$1,814, he should be required to pay the mother the difference of \$275.

[46] Finally, the court applied s. 9(c) to determine if any further adjustments needed to be made. The factors the court considered here were the difference in net worth; the lack of evidence that the mother's child-related expenditures had decreased with the father's increased access; the lack of evidence that the father's expenditures had increased with increased access; and the impact of a new support order on the child's standard of living in both households.

[47] This last factor was particularly important, as the recipient wife had recently purchased a house in the reasonable expectation that she would continue to receive child support on the order of \$563 per month. The court found that the mother felt this purchase to be in the child's best interest. This expense was not challenged by the father as being "inappropriate". On the basis of this factor, the court awarded the recipient mother \$500 per month in support. Although this amount was less than the table amount (\$688), it was more than she would have received from the Ontario Court of Appeal (\$399) or divisional court (\$100).

[84] For the purposes of the present application I adopt Romilly J.'s analysis as set out above. I am satisfied on the basis of the evidence and variation of the access schedule to be a one week on/one week off with each parent that the 40 percent threshold has been met.

[85] I must now move to a consideration of the appropriate amount of child support to be paid in this case.

[86] From the evidence before me, both parties appear to have substantial incomes, although Mr. Metivier's is currently more than double Dr. Pollard's. Indeed there appears to be a 70-30 ratio in favour of Mr. Metivier. It is apparent that both parties in this case are comparably matched in their devotion to their children and after accounting for the differences in their respective different situations I do not believe that either lives an entirely worry-free life. What is important to remember in all of this -- and I believe that the parties have tried to do this -- is that the proper focus of these proceedings must be to ensure the best possible outcome for their children while ensuring fairness between the parents.

[87] In this regard Mr. Metivier's relatively more prosperous financial situation is in many ways an advantage for the children given the shared custody situation. The best possible outcome from this situation is that both parents succeed and prosper as much as they are able to. The children are ultimately in an improved position where this is achieved.

[88] Having said this, there are definite differences between the parties' situation. Although Mr. Metivier earns significantly more than Dr. Pollard, he appears to have a larger debt load than Dr. Pollard.

[89] I have calculated the child support amount according to the *Guidelines* in accordance with the case law quoted above. I have made all calculations according to the numbers filed with the court in this application which record the parties' expenses and income, the latter of which appear to reflect the parties' income levels over the past two to three years.

[90] According to those calculations, and applying the simple set-off approach under Mr. Metivier's *Guideline* income, he would pay Dr. Pollard \$3,130 a month in child support. On Dr. Pollard's *Guideline* income she would pay Mr. Metivier \$1,370 a month in child support. Factoring in the total amount of special expenses that the parents will share monthly, Mr. Metivier would be required under the straight set-off approach to pay Dr. Pollard \$2,019 per month.

[91] I note, however, that the jurisprudence does not permit the court to stop at this stage of the analysis.

[92] In the case of shared custody, the straight set-off approach for child support is the *prima facie* starting point, not the end point: see *Contino* at para. 49 and *Luedke v. Luedke*, 2004 BCCA 327 at para. 21.

[93] Turning to the question of increased costs of shared custody and applying the same method as that applied in the decisions in *Contino* and *J.W.*, I find that Mr. Metivier's proposed amount of child support under the set-off approach should be moderately adjusted upward. Mr. Metivier's budget indicates monthly child care

expenses of \$917. Dr. Pollard's budget indicates monthly child care expenses of \$1,038.58. The ratio of income between the parties is about 70-30 in favour of Mr. Metivier. Thus at this juncture, Mr. Metivier ought to be responsible for 70 percent of the total child care related expenses, and Dr. Pollard ought to be responsible for 30 percent of the total child care related expenses. Applying this ratio to the total child care expenses of \$1,955.58 a month, Mr. Metivier should be paying \$1,368.90 and Dr. Pollard should be paying \$586.67. As Mr. Metivier on his budget contributes only \$917, he should be required to pay Dr. Pollard the difference of \$451.90 to apportion the expenses in accordance with their respective incomes.

[94] Considering the financial realities of the parents in this case the straight application of the set-off approach may well lead to a significant variation in the standard of living experienced by the children as they move between households. As noted in the decision in *Contino* at para. 51, as far as possible the children should not suffer a noticeable decline in their standard of living as between the households.

[95] However, a factor that might militate against this much of an increased payment is the consideration of the third criteria found in s. 9(c) of the *Guidelines* and the fact that the defendant continues to carry a larger debt load.

[96] The means and conditions test in s. 9(c) also requires that I consider the net worth of each of the parents, which in this case is almost equal, with about a \$18,000 difference in favour of Dr. Pollard.

[97] As noted earlier, the set-off amount under s. 9(a) of the *Guidelines* is \$2,019, but as noted above, other circumstances require that it be adjusted. Based only on the sharing of child-related expenditures apportioned against the income of the parents, Mr. Metivier would be required to pay Dr. Pollard a sum of \$451.90. Based on the evidence and examining all of the costs of both parents, there does not appear to be any decrease in the variable or fixed cost to Dr. Pollard or a corresponding increase to Mr. Metivier's actual expenses.

[98] Finally, under s. 9(c) I must consider the impact of a new support order on the standard of living of the children. Here the court is dealing with a variation of a long-standing financial status quo order upon which Dr. Pollard incurred expenses on behalf of the children. Until this application was heard, Mr. Metivier was paying between \$3,000 and \$3,400 a month in child support. He currently pays \$3,003 and should be paying \$3,130 if just his income is considered.

[99] The straight application of the set-off approach will result in a substantial reduction in child support payments and no doubt a corresponding decrease in their standard of living in so far as their mother's home is concerned.

[100] In light of all these considerations, I find it is appropriate to exercise my discretion to modify the straight set-off amount that Mr. Metivier would otherwise pay and I fix the monthly child support to be paid by Mr. Metivier to Dr. Pollard at \$2,300 a month commencing on June 1, 2010, and payable on the first of every month thereafter.

Retroactive variation of child support.

[101] Mr. Metivier also seeks to have the new amount of child support he is to pay applied retroactively to correct the child support payments he has made since May 1, 2009, arguing that he has had the children in his care more than 40 percent of the time since May 1, 2009. He has provided in his evidence a spreadsheet tracking the hours based on the schedule contained in the consent order of March 25, 2008. On his calculations, including the access time when the children are at school but in his care, he argues he has established that he has the children 40 percent of the time.

[102] Dr. Pollard opposes this portion of the application and provides her own calculations as to time the children are in each parent's care. Dr. Pollard calculates that for this time period the children have been in Mr. Metivier's care only 37 percent of the time. She does not include the time the children are at school in her calculations but has failed, according to Mr. Metivier, to deduct the overall hours they are in school to the total time as it relates to access.

[103] I recognize that Dr. Pollard may be wrong on her calculation of who is to be credited with the times with respect to when the children are in school. As Meiklem J. noted in *H v. H*, 2003 BCSC 479 at paras. 12-14:

[12] I have reviewed *de Goede v. De Goede* and the several cases cited therein in support of the conclusion that the weight of authority favoured the conclusion that school time should not accrue to the benefit of the non-custodial parent. Several of the cited cases also rejected arguments from non-custodial parents to exclude school time from the calculations altogether. In one of the cases, *Crofton v. Sturko* (13 January 1998) Victoria Registry No. 5939/32257 (S.C.), Master Patterson expressed the rationale for not excluding school time as follows:

In calculating the percentage of time, it is in my view, appropriate that time spent by the children in school be included in the calculation as time with the parent having care and control. There are good practical reasons for this, including the fact that even although a child is at school, if he or she becomes ill, then the parent who is caring for the child must take some steps, to bring the child home, to see the family doctor, or to do whatever else is appropriate in the circumstances. In addition, school hours vary from time to time, there are field trips, sporting events, and discretionary days, all of which will require parental involvement.

[13] Master Patterson's comments were endorsed in *Cross v. Cross* (unreported) June 30, 1998, New Westminster Registry, Docket No. D030328 (McKinnon, J.).

[14] This analysis seems to presume the approach adopted in some cases that care and control resides solely with the "custodial" parent at all times except when the children are in the actual physical custody of the non-custodial parent. But the Guidelines also speak of "right of access to". Where the parent exercising access to children has joint custody and guardianship, as in this case, and the school attendance begins and ends wholly within the defined access period, I think that leads properly to the conclusion that that parent has a "right of access to, or has physical custody of" the children during that specific attendance at school. By that reasoning I would add alternating Monday school attendances to the computation of Mr. H.'s time for the purposes of s. 9 of the Guidelines. This would bring Mr. H.'s percentage of time exercising a right of access up to approximately 38% according to the defined access schedule.

[104] Mr. Justice Meiklem went on to note, however, at para. 15 that:

[15] While I think it is only logical to acknowledge that care and control lies with the parent having access for school or daycare hours falling wholly within a defined access period, at least in the case of joint custody and guardianship, I do not accept the argument that school or daycare hours should accrue to the parent who leaves the children at school or daycare at the end of a defined access period. If the defined access period ends at the

time of the drop-off, then the care and control of the children passes to the other parent at that time. I think this is so even under the umbrella of a joint custody and guardianship order where there is a clear allocation of the time during which the children are in the care and control of each parent, as there is in this case.

[105] I do note the evidence of Dr. Pollard indicates that she is essentially the first person that the school calls to respond to the children's needs if there is illness or a problem at school as her schedule is more flexible. Dr. Pollard notes that there have been a few exceptions when the school has been unable to reach her and has contacted Mr. Metivier or his wife, but for the most part Dr. Pollard is the first responder to the school's queries.

[106] The evidence of Mr. Metivier contradicts Dr. Pollard's assertion that she is usually the first person the school calls even when the children are in the care and custody of Mr. Metivier.

[107] The conflict in the evidence and the vague nature of when such events have occurred in the past makes it difficult to determine which parent has actually had the children in their care or control for what exact period of time, particularly during school hours over this retroactive time period.

[108] I find that it is also unclear on the evidence that between May 1, 2009 and January 31, 2010 Mr. Metivier actually did have in excess of 40 percent custody, given his travel time and Dr. Pollard's evidence he did not start taking the children on the Tuesday night/Wednesday morning part of the schedule until September 2009.

[109] I am not satisfied that the evidence clearly establishes that during the period May 1, 2009 to January 31, 2010 Mr. Metivier actually averaged 40 percent care and custody of the children, given the trade-off between the parents, the uncertainty of the extra time Dr. Pollard spends with the children when she picks them up after school at 2:15 p.m. on Mondays and Friday for scheduled activities or play dates, and then drops them at Mr. Metivier's home at 5:45 p.m. and the vagaries of who responded to school calls about the children.

[110] Moreover, the evidence is devoid of any suggestion that the parties, particularly Mr. Metivier, endeavoured to review the issue of child support after the April 29, 2009 application to the court was dismissed. Clause 5 of the January 15, 2009 consent order provides that where the parties do not review the child support, both parties are deemed to consider the child support continues to satisfy the requirements of the *Guidelines*. In these circumstances I find it would be inherently unfair to now retroactively review and vary the child support already paid to the end of January 2010.

[111] With respect to February to April of 2010 the totality of the evidence appears to be much clearer that Mr. Metivier did in fact have the children in his care and custody over 40 percent of the time. Therefore, there needs to be a retroactive adjustment and the adjustment will be a recognition that he has overpaid \$703 a month for a total of \$2,109 for the period of February 1 to April 30, 2010. That amount can be either repaid by Dr. Pollard or Mr. Metivier's prospective child support payments can be reduced by \$100 a month until the \$2,109 has been repaid, starting with the next child support payment on June 1, 2010.

Conclusion

[112] Based on the foregoing reasons the consent order of March 25, 2008 will be varied for the purposes of the access schedule to the following: the parties shall share physical care and control of the children pursuant to their joint custody and guardianship regime, each as to 50 percent of the calendar year, and that the parties share a week-on/week-off rotation with the change-over to occur after school on the Friday of each week commencing with the plaintiff mother having the first week and every alternate week thereafter and the defendant father having the second week and every alternate week thereafter, subject to the holiday care and control schedule.

[113] I have declined to impute income to Dr. Pollard as sought by Mr. Metivier. I find Dr. Pollard's *Guideline* income to be the \$94,217 for the purposes of determining

child support. Mr. Metivier's *Guideline* income for child support purposes is \$237,637.

[114] For the purposes of prospective child support, based on the new access schedule, which amounts to a shared or co-parenting arrangement, the offset approach to child support is applied but modified upwards as outlined above so that Mr. Metivier will pay \$2,300 a month, effective June 1, 2010.

[115] I am not satisfied on the totality of the evidence that the defendant had the children in his care 40 percent of the time between May 1, 2009 and January 31, 2010, and have declined to retroactively correct and vary the child support order for that period of time.

[116] I am satisfied on the totality of the evidence that the defendant did exercise access and control of the children in excess of 40 percent of the time for the period of February 1, 2010 to April 30, 2010. Accordingly, there should have been an offset to child support as calculated above and he has overpaid child support by \$703 a month for a total of \$2,109 for that period.

[117] Dr. Pollard can either repay Mr. Metivier that amount outright, or Mr. Metivier can reduce his prospective child support payments by \$100 a month starting June 1, 2010 until the overpayment has been repaid.

[118] On this application the parties have had divided success. Mr. Metivier has not succeeded in his argument with respect to imputing a higher income to Dr. Pollard, nor has he succeeded in his application to have the child support amount varied retroactively to May 1, 2009. He has, however, had a measure of success with the issue of varying the access schedule and with the amount of child support payable prospectively as well as a minor retroactive correction for child support for the month of February through April 2010.

[119] Having regard to these circumstances, in my opinion the proper order for costs would be that the parties bear their own costs of this application.

(Submissions)

[120] The week-on/week-off schedule will start on Friday, May 28 with that week starting with Dr. Pollard. So Dr. Pollard after school Friday, May 28, you will have the children for a week. Mr. Metivier will have the children for a week starting Friday, June 4 after school. And then you will alternate back and forth from then.

(Submissions)

[121] Mr. Metivier will be responsible for pick-up after school. Otherwise alternate arrangements are made either in terms of child care or some agreement is reached between the two parties.

K.M. Ker, J.

Ker, J.