CITATION: Predotka v. Dudek, 2023 ONSC 7025
COURT FILE NO.: FS 16-21024
DATE: 20231221

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
Mateusz Predotka	Applicant	*Chelsea Hooper*, for the Applicant
– and –		
Agnieszka Dudek	Respondent	*John Legge*, for the Respondent
		HEARD: December 4th, 5th and 6th, 2023

M. KRAFT, J.

REASONS FOR DECISION

Overview

[1] Mateusz Predotka ("Matt") and Agnieszka Dudek ("Agnes") were both born in Poland. They met online and were married in Winnipeg on April 11, 2013. It was a short, two year marriage, and they separated on June 4, 2016, at which point they were residing in Toronto. Their daughter, E., was born on November 8, 2014. She is 9 years old.

[2] This case began in a very unfortunate way, causing the trust between the parents to be significantly eroded. Just after separation, on August 15, 2016, Agnes surreptitiously removed E. from daycare without notice to or obtaining Matt's consent and travelled with her and the maternal grandmother to Winnipeg (where the maternal grandmother lived). As a result of this incident and Agnes' mental health difficulties, the parties co-parenting relationship has been defined by mistrust. On consent, a temporary without prejudice order was made in August 2016, placing E. in Matt's primary care, and granting him temporary sole decision-making responsibility. This order has continued in place for the past 7 years. E. is thriving and doing well in school by all accounts. Agnes feels marginalized by Matt and seeks more parenting time with E. She also seeks to have decision-making responsibility for the major decisions that impact E., particularly for her medical and health-related decisions. It is a difficult task to determine how the parenting time should be divided and who should have decision-making

responsibility because while it is clear that both parents love the child very much despite their turbulent history, there is clear evidence that they cannot communicate effectively, and that they have totally different communication approaches, Agnes being more avoidant and Matt being more confrontational. This has resulted in the parents engaging in antagonistic communication and drawing negative assumptions about each other over the past 7 years. At the heart of this trial is E.'s needs and best interests, about which both parents are extremely concerned and committed to meeting.

[3] E. currently in Grade 4 at a Catholic school in Etobicoke. As stated above, she has been in the primary care of Matt with him having sole decision-making responsibility pursuant to a temporary, without prejudice consent order of Diamond, J., dated September 26, 2016. Since 2018, E. has had parenting time with Agnes every Wednesday, overnight to Thursday mornings and alternate weekends, from Friday, after school to Monday mornings, which amounts to her having 5 overnights out of 14 days with her mother. In 2019, Matt remarried and has a daughter H., E.'s step-sister, age 2.

Issues to be Decided

[4] The issues to be decided at this trial are as follows:

a. Is it in E.'s best interests for her current parenting schedule to change, where she spends 5 overnights out of 14 days with Agnes?

b. Who should have decision-making responsibility for important decisions about E.?

c. How should E. split her time with her parents on holidays from school, including the summer?

d. What amount of retroactive child support does Agnes owe Matt, if any? and

e. What is Agnes' ongoing child support obligation?

[5] For the reasons set out below, I find that it is in E.'s best interests to increase the parenting time she has with her mother and for her residency schedule to include 6 overnights out of 14 days with Agnes and 8 nights out of 14 days with Matt. I have concluded that neither of the decision-making frameworks proposed by the parties is in E.'s best interests. I have decided that it is in E.'s best interests that the parties make all reasonable efforts and take all reasonable steps to attempt to reach decisions respecting E.'s education, health, religion, and extra-curricular activities jointly. I have structured a detailed framework for the parties' decision-making regarding these issues. If the parties remain unable to reach a consensus after following this framework, they are to engage in mediation or parenting coordination to try and resolve the issue. If, after mediation or parenting coordination, the parties still cannot reach an agreement, then one party should be given the right to make the final decision on health related issues and the other party should be given the right to make the final decision on education, and extra-curricular activities (religion is not an issue), so that further court intervention is not required. I have concluded that it is in E.'s best interests that Agnes ultimately have final say on health matters and Matt have the final say on education and extra-curricular matters. In terms of E.'s holiday schedule, she shall spend equal time with the parents, pursuant to the

detailed schedule below as proposed by Matt. I have found that Agnes owes Matt retroactive child support in the sum of $12,136 for the period of January 1, 2017 to and including December 31, 2023, to be paid by her over a 36-month period. Starting January 1, 2024, Agnes will pay Matt child support in the sum of $114.00 a month, representing the set-off of Table child support each party owes the other under the *Federal Child Support Guidelines*, SOR/97-175 ("*CSG*"), to be adjusted annually, given the shared parenting regime I have ordered.

Parties' Positions

[6] Matt seeks to continue the status quo in terms of the parenting schedule as he believes it is in E.'s best interests. During the trial, Agnes' position was that she wanted to introduce an additional overnight during the mid-week following the weeks when E. is in the care of her father on weekends, so that in Week 1, E. would reside with her on Wednesdays, from after school to Thursday mornings, and Fridays, after school to Monday mornings, and in Week 2, E. would reside with her on Wednesday, from after school to Friday mornings. This would result with E. having 6 overnights out of 14 days with her mother, and 8 overnights out of 14 days with her father. However, in Agnes' closing submissions, she presented a draft order in which she appears to be seeking to have E. reside with Matt on Mondays and Tuesdays, with her on Wednesdays and Thursdays, and on alternating weekends with each parent, such that E. ends up living with the parties on an equal time-sharing basis. Matt does not agree that an increase in Agnes' parenting time is in E.'s best interests.

[7] Matt also seeks to continue the status quo with him having sole decision-making responsibility over the major decisions that impact E. He submits that he has kept Agnes apprised of every decision and regularly updates her about E.'s health and progress. He is happy to consult with Agnes but if the parties cannot agree on an important decision, he believes it is in E.'s best interests for him to have the final decision-making authority, as has been the case for the past 7 years. He believes that the parties cannot communicate or make decisions jointly. Matt has serious concerns about Agnes' parenting capacity and her ability to make appropriate decisions for E. Further, Matt believes that Agnes is negatively influenced by her mother, Irena Dudek ("Irena"), and believes that Irena is a negative influence on E.

[8] Agnes proposes that the parties share decision-making responsibility for the major decisions that impact E. and that she have sole decision-making over E.'s health and dental decisions. Agnes recognizes that her co-parenting relationship with Matt has been fraught with difficulty. She believes that Matt devalues her relationship with E. and acts as a restrictive gatekeeper to her having more time with her daughter. Agnes submits that while Matt tells her about decisions he has made for E., he tells her after the fact and does not engage in a true consultative process with her before any decisions are made.

[9] Agnes is a Personal Support Worker. In this capacity, Agnes is a part-time shift worker at Baycrest Health Centre and Trillium Health Centre. She recently started to work as a part-time shift worker with the Victorian order of Nurses. Agnes' testimony is that at Baycrest she either works a day shift from 7:00 a.m. to 3:00 p.m.; a night shift from 3:00 p.m. to 11:00 p.m.; or an overnight shift from 11 p.m. to 7:00 a.m. Agnes schedules her shifts around her parenting time, to the best of her ability. At Trillium, the shifts are generally 12 hours shifts. When asked by the Court, Agnes explained that generally Mondays is her day off so she will try and get a

"pick-up" shift; on Tuesdays, she works at Baycrest from 7:00 a.m. to 3:00 p.m.; on Wednesdays, she tries to get a "pick-up" shift, so sometimes it is 7:00 a.m. to 3:00 p.m. but it could be a later shift; on Thursdays, she works an evening shift so she can take E. to school in the morning; and on alternate Fridays, she works 7:00 a.m. to 3:00 p.m. (to coordinate with her parenting schedule). She also works weekends.

[10] Matt was a practising physiotherapist in Poland but he does not have the credentials to work in Canada. He went to school for massage therapy and graduated in 2018, but he has not yet written his exams and he is not licenced to practice in Ontario. Matt currently works at the Furniture Bank.

[11] Agnes has been paying Matt child support pursuant to a consent order of Monahan, J. dated July 28, 2018, in the sum of $350 a month. The child support was based on Agnes' estimated 2017 income. Agnes has paid child support to Matt pursuant to this order without fail. Matt seeks a retroactive adjustment to child support back to the date of separation to be based on the actual income Agnes earned in the years 2017-2023, inclusive. In terms of prospective child support, Matt seeks that Agnes pay him child support based on her 2023 income and adjust the child support annually when the parties file their income tax returns. At trial, Agnes took the position that she did not oppose a retroactive adjustment to child support; however, she argued that any retroactive child support order ought not to be made more than a year retroactively. However, in Agnes' closing submissions, Agnes' position changed. Agnes argues that there shall be no child support arrears ordered because Matt did not seek child support arrears prior to July 1, 2018; Agnes did not engage in blameworthy conduct; there is no evidence that E. suffered; there is no evidence of Matt's financial circumstances; and it would be prejudicial to her financially if she were ordered to pay Matt child support arrears. In terms of ongoing child support, if Agnes' parenting time with E. increases by the one overnight, she submits the parties will be in a shared parenting arrangement and therefore, the child support should be calculated by setting-off the table amounts each parent has to pay the other, pursuant to s.9 of the *CSG*.

Undisputed Facts

[12] To determine what is in E.'s best interests, a review of the parties' relationship and parenting history is necessary. By way of brief background, the undisputed facts on the record are as follows:

a. The parties met online in December 2013. At that time, Matt was living in Brampton, Ontario and Agnes was living in Winnipeg, Manitoba. They met in person in February 2014, when Matt went to Winnipeg to meet Agnes.

b. Matt and Agnes began dating and he moved to Winnipeg in March 2014. Matt and Agnes resided in Agnes' family home with her mother, Irena Dudek. At the end of March or early April 2014, Agnes found out she was pregnant. The parties became married on April 11, 2014.

c. From April to September 2014, the parties lived in Winnipeg with her mother, Irena. Matt worked in construction when the parties were in Winnipeg as he was unable to find other work.

d. In September 2014, Matt and Agnes moved to Calgary, Alberta for employment opportunities. In Calgary, Matt found a job at a moulding factory. He worked there until he was laid off in 2016.

e. E. was born on November 8, 2014, in Calgary. In December 2014, Matt's father came to Calgary from Poland to visit the parties and help with childcare. Agnes' mother did not come to Calgary to visit the parties or meet E. Matt's evidence is that Agnes' relationship with her mother was strained once he and Agnes moved to Calgary. Agnes and Irena denied this at trial.

f. Matt's father stayed in Calgary to help the parties until April 26, 2015. Matt's mother, also came from Poland to Calgary when E. was about 13 months old and stayed with them for 6 weeks, until December 30, 2015.

g. E. was baptized in Calgary in April 2015. Agnes' mother, Irena, did not attend E.'s baptism. Irena did not meet E. until October 2015, when E. was almost 1 year old.

h. Agnes' mental health became to deteriorate after E. was born.

i. Agnes and Matt lived in Calgary until March 2016, when they moved to Ontario, for employment opportunities. When the parties moved to Ontario, their relationship seriously deteriorated.

j. Matt returned to school in May 2016 for massage therapy and he graduated in 2018. He has not yet written his exams to be licensed to work in this field.

k. About 1 month before the parties' separated, in May 2016, Agnes called the police and made allegations that Matt had been abusive toward her. Matt was never charged in connection with these allegations and he denies ever being abusive toward Agnes. As a result of Agnes' report, Children's Aid Society of Peel became involved with the family. Agnes later told the CAS worker that she made a false allegation. However, at trial, Agnes denied that these allegations were false.

l. Matt decided to separate about a month after Agnes' allegations, in June 2016. Agnes had become anxious and depressed in Toronto, with no social supports in place. She was having difficulty sleeping and struggling. It is agreed that Matt was aware of Agnes' mental health struggles. Agnes went to Winnipeg with E. for two weeks on June 4, 2016, to visit her mother. The parties were separated when she left. When Agnes came back to Toronto, she returned to the parties' apartment in Mississauga but the parties did not resume their relationship.

m. E. started to go to daycare at the Lakeshore Community Centre in Etobicoke in July 2016.

n. One month after separation, Matt commenced this proceeding. Specifically, he sought an order prohibiting Agnes from removing E. from the jurisdiction. Matt brought a motion for a non-removal order, which was scheduled to proceed on August 29, 2016.

o. On August 15, 2016, without Matt's knowledge or consent, Agnes went to E.'s daycare, removed her and surreptitiously travelled with E. and her mother to Winnipeg. Irena had been in Toronto visiting the parties at the time.

p. When Agnes was in Winnipeg she recognized she was really struggling with her mental health. On August 25, 2016, Agnes called Matt from Winnipeg and told him that he should come and get E. For 17 days - from August 27, 2016 to September 12, 2016 - Agnes was hospitalized in Winnipeg. She was diagnosed with major depressive disorder with psychotic symptoms and a psychotic episode.

q. In and around that time, Matt was contacted by the Children's Aid Society in Winnipeg who advised him that they would support E. being placed in his care.

r. After hearing from Agnes in August 2016, Matt flew to Winnipeg while she was in the hospital. Matt visited Agnes in the hospital and went to Irena's home to retrieve E. E. was transferred into his care and they both returned to Toronto.

s. On August 30, 2016, Matt's motion for a non-removal order and interim custody of E. was heard by Corbett, J. Corbett, J. granted a non-removal order so that neither party was able to remove E. from Toronto. At the time this order was made, Agnes was in the hospital in Winnipeg. He did not grant an interim custody order in favour of Matt.

t. When Agnes was discharged from the hospital, her symptoms were in remission and she was given a one month supply of medication and told to consult with a psychiatrist when she returned to Toronto. Agnes' family physician made a referral for Agnes to see a psychiatrist and to have a psychiatric assessment at CAMH.

u. After Agnes was discharged from the hospital in Winnipeg, she retuned to Toronto and temporarily stayed with Matt and E. until October 2016. The parties did not reconcile.

v. Starting in June 2016 when Agnes made the report to the police, Children's Aid Society of Toronto became involved with the family. CAST became involved again when Agnes removed E. from Toronto in August 2016. In November 2016, CAST transferred the file to the Catholic Children's Aid Society ("CCAS").

w. On September 26, 2016, the parties attended a case conference, at which they reached an interim agreement. Diamond, J. made an order incorporating the terms of the agreement that Matt have interim full custody of E. (now referred to as "decision-making responsibility") and Agnes have "generous" but unspecified access to E. (now referred to as "parenting time") provided she obeys her

medication schedule. Agnes also agreed not to leave E. unsupervised with her mother.

x. At the recommendation of both CAST and CCAS, Agnes had supervised parenting time with E. between September 2016 and February 2017.

y. In January 2017, a report was made to CCAS from a third party about concerns Agnes had raised with them about having anxiety around her parenting of E. This is reflected in the CCAS Disclosure.

z. In January 2017, the assessment at CAMH which Agnes' doctor referred her to in August 2016, took place. Agnes was diagnosed with "major depression order, single episode, mild, in partial remission". Since July 23, 2018, Agnes has been under the care of a psychiatrist, Dr. Connell, who testified that she is compliant with her treatment plan and medication regime.

aa. Starting in February 2017, CCAS approved Agnes having unsupervised parenting time with E.

bb. On March 6, 2017, the parties appeared before Diamond, J. for a case conference, at which a request for the involvement of the Office of the Children's Lawyer ("OCL") was made.

cc. In March 2016, CCAS approved Agnes having overnight parenting time with E. Agnes began to have such overnight parenting time at the end of March 2017.

dd. Agnes completed the "Nobody's Perfect" parenting program through Woman's Habitat on May 17, 2017, as per the CCAS recommendation.

ee. On April 21, 2017, the OCL appointed Jared Norton to conduct a parenting investigation pursuant to s.112 of the *Court's of Justice Act*, R.S.O. 1990, c.C.43.

ff. In June 2017, Matt asked for consent from Agnes so he could take E. to Poland in the summer for two weeks to visit family. Agnes would not consent to the trip and, as a result, Matt had to cancel the trip given the non-removal order of Corbett, J.

gg. In the summer of 2017, Agnes started to work full-time as a PSW.

hh. On July 27, 2017, Jared Norton, on behalf of the OCL, issued a final report and recommendations that Matt have custody of E. and that E. have her primary residence with Matt.

ii. In January 2018, Irena alleged that Matt was sexually inappropriate with E. when she was in Toronto, at a parenting exchange. When the CCAS spoke with Agnes about this, Agnes advised them that she did not agree with her mother, but she did not speak up about it at the time.[1] Agnes also told the CCAS that she understood

[1] Contact Log by Susanne Defour, CCAS worker, on January 22, 2018 at 5:09 p.m.

that it was very serious that her mother had made such allegations and told the CCAS worker that "she told her mother that was wrong when they returned home." When the CCAS worker informed Agnes that "given the false accusation that her mother has made, along with her speaking negatively of Matt and using profanity around E. if Matt stated that he did not want E. around her mother [she] would support that decision." Agnes stated that she understood and stated that when her mother swore it just slipped out.[2]

jj. On April 6, 2018, the parties attended a case conference before Sanfilippo, J., at which they reached a temporary consent order which provided that:

i. when E. started to attend school, she would alternate March Break with both parents;

ii. when E. started to attend school, she would spend 3 weeks with each parent during the summer months;

iii. E. would spend New Year's Eve and New Year's Day with Matt;

iv. E. would spend Easter weekend with Agnes;

v. E. would spend Christmas Eve with one parent and Christmas Day with the other parent on an alternating basis;

vi. E. would spend Friday and Saturday of each Thanksgiving with one parent and Sunday with the other parent on an alternating basis;

vii. E. would rotate her birthdays with each parent on an alternating basis;

viii. E. would spend each parent's birthday with that parent;

ix. Where E. spends a holiday or birthday with one parent during her regularly scheduled parenting time with the other, the parent who loses parenting time will be granted compensating time with E. on the following weekend when they would not otherwise have parenting time;

x. Both parents were to encourage E. to maintain a loving relationship with the other. Telephone calls to the other parent were to be encouraged;

xi. If either parent has a spouse or other children, E. will spend her sibling's and parent's spouse's birthday with that parent;

xii. Should one parent be unable to have E. during his/her allotted time, the other parent will be given the right of first refusal to care for her during that time;

[2] Contact Log by CCAS worker, Tashana McLean, dated December 28, 2017 at 10:30 a.m.

xiii. Both parents will encourage E. in her schooling and social life, accommodation time her friends, sleepovers and other social events; and

xiv. The parents will consult with each other and collaborate in making decisions about E.'s schooling and extra-curricular activities.

kk. On April 27, 2018, after an access visit with Agnes, E. reported to Matt that her mother "had hit her and pulled her arm really hard". The CCAS worker spoke with E. and E. repeated that "her mother hit her on her hand, arm and bum. Mom hit her really hard. Mom said go to room."[3] At the time, Agnes denied using physical discipline with E. At trial, Agnes denied using physical discipline with E.

ll. On July 26, 2018, Monahan, J. ordered, among other things, that starting August 1, 2018, Agnes was to pay Matt child support in the sum of $350 a month; the parties were to provide each other with notification of a change in employment within 10 days of a change taking place; and Agnes was to be given credit for paying Matt $250 of child support in July 2018.

mm. On October 30, 2018, the parties attended a Trial Management Conference before Czutrin, J., at which they reached a consent temporary and without prejudice order that E. would have parenting time with Agnes as follows:

i. Every Wednesday, from after daycare/school to Thursday morning, return to daycare/school; and

ii. Alternating weekends, from Friday after daycare/school to Monday morning, return to daycare/school.

nn. At all other times, E. has resided primarily with Matt. Matt has been caring for E. and making the major decisions that impact E. since August 2016.

oo. The parenting schedule referred to in subparagraph nn. above and the decision making regimes set out in oo. continue to be in place today.

pp. Since March 2019, Matt has been working full-time at the Furniture Bank.

qq. On April 15, 2019, the parties were divorced by the order of Paisley, J.

rr. In December 2019, Matt remarried Lidia Borowiecka. They had a daughter, born on September 25, 2019. Their daughter H. is 2 years old.

ss. On June 11, 2021, at a case conference before Faieta, J., the parties agreed to have the OCL conduct an updated s.112 assessment report. On November 2, 2021, Mr. Norton delivered a final report with recommendations. The OCL recommended that,

[3] CCAS CPIN Disclosure, contact log, written by Tashana McLean, dated May 3, 2018 at 5:30 p.m.

i. The current parenting time schedule remain in place, with E. residing with Matt primarily and with Agnes, 5 overnights out of every 14 days;

ii. Matt continue to make final decisions for E. related to her health, education, religious and extracurricular activities, after consultation with Agnes;

iii. Agnes have direct access to the third party service providers involved with E.;

iv. Agnes continue to have treatment by Dr. Connell;

v. Neither parent speak negatively of the other parent directly or when in proximity to E.;

vi. Both parties ensure that third parties, including family members, not speak negatively of the other parent when around E.;

vii. Both parents seek parent education to improve their co-parent relationship;

viii. Agnes seek additional education as it relates to appropriate discipline strategies;

ix. Neither parent use physical discipline;

x. Both parents have the right to travel with E. including to domestic and international locations; and

xi. Both parents continue to use Our Family Wizard ("OFW") to communicate.

tt. In accordance with Mr. Norton's recommendations, Agnes took a Demystifying Anger program in 2022 through Catholic Family Services and Matt attended an online three-part private parenting workshop to address parenting after separation and divorce, and effective communication on September 25, 2023.

uu. Matt's Notices of Assessment filed in this trial demonstrate that his Line 150/15000 income for the years 2016 to and including 2022, was as follows:

i. In 2016, his line 150 income was $21,832;
ii. In 2017, his line 150 income was $17,878;
iii. In 2018, his line 150 income was $11,122;
iv. In 2019, his line 15000 income was $30,168;
v. In 2020, his line 15000 income was $33,954;
vi. In 2021, his line 15000 income was $35,299; and
vii. In 2022, his line 15000 income was $40,045.

vv. Agnes' Notices of Assessment filed in this trial demonstrate that her Line 150/15000 income for the years 2016 to and including 2022, was as follows:

i. In 2016, her Line 150 income was $14,612;
ii. In 2017, her line 150 income was $26,927;
iii. In 2018, her line 150 income was $48,369;
iv. In 2019, her line 15000 income was $49,251
v. In 2020, her line 15000 income was $56,524;
vi. In 2021, her line 15000 income was $58,213; and
vii. In 2022, her line 15000 income was $54,687.

Issues One and Two: Is it in E.'s best interests for her parenting schedule to change from the current schedule, where she spends 5 nights out of 14 days with her mother? Who should have decision-making responsibility over E.?

Matt's Position on Decision-Making Responsibility and Parenting Time

[13] Matt maintains that it is in E.'s best interests for him to continue to have sole decision-making responsibility over the major decisions that impact E. and that the current parenting schedule remain in place, with E. being in his primary care, based on the following:

a. He has demonstrated that he has made decisions that are in E.'s best interest since she was 1 years old. E. has thrived in his care and is doing well.

b. He selected E.'s doctor and dentist. He makes and attends all medical appointments with E. He has addressed any medical or dental issues that have arisen and kept Agnes informed at every stage.

c. He enrolled E. in her current school. He keeps in regular contact with her teachers. E. is doing well at school and demonstrates no behavioural or academic issues.

d. He has demonstrated a willingness to keep Agnes informed about E.

e. Agnes, on the other hand, has demonstrated that she has no interest in having communication with him regarding E. Agnes admitted during her testimony at the trial that she does not respond or follow up with Matt when he messages her on OFW advising her that E. is being taken for a medical test or is ill.

f. Agnes' work schedule varies and includes both day shifts and night shifts. Agnes, however, does not communicate with Matt about her work schedule and does not offer him parenting time if she is working and unable to look after E., contrary to the terms of the Sanfilippo, J. order, dated April 6, 2018.

g. Agnes' past decision-making skills have demonstrated that she has not made decisions about E. in an appropriate manner, such as working an overnight shift when E. is in her care, travelling during her parenting time and leaving E. with her mother, or surreptitiously removed E. from daycare and travelling with her without consent to Winnipeg.

h. Agnes has refused to allow Matt to travel with E. outside of Toronto based on the non-removal order, which was put in place in 2016, just after she removed E. from the jurisdiction surreptitiously.

i. The OCL has conducted two s.112 investigations and recommended in 2017 and in the updated report in 2021 that Matt have sole decision-making responsibility for E. and that E. reside primarily with him.

j. E. has been exposed to conflict between Agnes and her mother Irena and has communicated to Matt and Jared Norton that she is uncomfortable by this

k. Agnes attends at E.'s school outside of her parenting time to have more time with E. at the beginning of and/or end of the school day. When Agnes does this, she attempts to interact with E. and it is agreed that it is awkward for E. Matt has asked Agnes not to attend at E.'s school when it is not her parenting time but Agnes insists on doing so, having no regard for E.'s feelings or best interests.

l. Agnes has disciplined E. inappropriately, according to what E. has disclosed to him, including yelling at her, and hitting her.

m. Agnes and her mother, Irena, have had conflict in front of E. which causes E. anxiety. At the beginning of his relationship with Agnes, it was clear to him that Agnes and Irena did not have a good relationship; Irena was very critical of Agnes; Agnes was worried about her mother's reaction to finding out she was pregnant; and when Agnes was in the hospital in Winnipeg she expressed to him that she did not want to leave E. with her mother. Now, Agnes and Irena both deny having any difficulties in their relationship, which he argues is false, is not consistent with what Agnes disclosed to Jared Norton about her relationship with her mother, and as a result, he does not trust Agnes and/or Irena.

n. Agnes agreed in the September 16, 2016 temporary consent order not to leave E. unsupervised with her mother and yet she frequently does not comply with the terms of this order and leaves E. alone in the care of Irena regularly.

o. Agnes has a history of metal illness and he has concerns about her decision-making abilities and erratic behavior.

Agnes's position on Decision-Making Responsibility and Parenting Time

[14] Agnes wants to have more input into the decisions that impact E. and she wants to have more parenting time with E. for the following reasons:

a. She has missed out on parenting time with E. because of historical events and given E.'s current age and stage of development, she believes it is in her best interests to have more parenting time with E. to further strengthen their bond during her adolescent years.

b. She has a loving and close relationship with E. that she works very hard to maintain. She encourages E.'s school, social and cultural life. She encourages E. to spend time with her friends, including having sleepovers. She encourages E. with her homework, and coordinates with her teachers. She attends parent-teacher meetings. She engages with E. to explore and encourage her interests.

c. Since 2018, the parties have communicated primarily through OFW. Prior to Covid, she repeatedly asked Matt to change the parenting schedule to accommodate her shift work schedule and he responded to her with accusations about her incompetence. Matt also accuses her of destroying things he has bought for E., such as a backpack, and following him and his wife, Lidia, in her car, which she denies. In general, Matt does not support E.'s relationship with her. He reacts toward her with hostility or fear in front of E. which causes stress and anxiety for E.

d. She took an ager management course and a parenting course as recommended by Jared Norton and the CCAS and understands how E.'s exposure to conflict between her and Matt is not in E.'s best interests. Toward that end, she changed the way she was responding to Matt in the messages in OFW. While Matt sees her non-response as disinterest, it is not. Rather, it was an attempt on her part to only respond to messages that required a response and to stop engaging in an unhealthy dynamic.

e. While Matt has looked after E.'s needs and demonstrated he is capable of making important decisions for E., he has not involved Agnes in these decisions nor has he consulted with her before making decisions for E. Rather, he advises Agnes of the decisions made after the fact, thereby, minimizing her parental involvement and demonstrating the lack of value he places on E.'s relationship with her mother.

f. Matt acts as a restrictive gatekeeper to her having time with E. and to her being involved in E.'s life. Matt continues to judge her for her mental health struggles which she experienced just after separation, notwithstanding that her depression is in remission and she has demonstrated that she is compliant with all treatment recommendations and continues to be under the care of a psychiatrist.

g. Matt judges her for the fact that her employment is comprised of shift-work which results in E. sometimes being cared for by her maternal grandmother. Matt does not like the maternal grandmother and attempts to paint her as "unfit", "irresponsible" or "disinterested" when that is not the case.

h. She tries to arrange her work schedule around her parenting time so she is present when she has overnight time with E. and will continue to do so, prioritizing her parenting time with her daughter.

i. Matt regularly sends the school court information to prove his custodial rights without regard to the fact that there is confidential information in the court material that is not necessary for E.'s school principal to know. In doing so, Matt has shown a complete disregard for Agnes' private medical information or respect for her as a

parent. Further, sending the school court documents is an attempt on Matt's part to paint Agnes in a bad light to E.'s school.

j. Matt attributes negative factors for Agnes trying to see E. at the beginning of a school day at school, outside of her scheduled parenting time and assumes that Agnes does not consider E.'s needs or best interests. Had Matt or his wife, Lidia, approached the situation differently by giving E. permission to say "hi" to her mother and maternal grandmother, E. would not experience any awkwardness. Instead, they continue to make negative assumptions about Agnes making it difficult for E. to display her emotions.

k. Matt has let E. know that he thinks Agnes is not a good parent which heightens E.'s anxiety around her mother, instead of encouraging her to have a positive relationship with Agnes.

l. Matt has demonstrated that he will not support or encourage a relationship between E. and Agnes and, as such, E. is being prevented from having strong, positive and meaningful relationships with both parents.

m. She is willing to support and encourage E.'s relationship with Matt, his wife and E.'s half-sister, unlike Matt who treats both Agnes and Irena with disdain.

n. Her mother plans to move to Ontario from Winnipeg and if she does, her mother will be able to help Agnes with childcare for E. when Agnes is working.

The Law:

[15] The only consideration the Court is to focus on when making a parenting order is the best interests of the children: s.16(1) of the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) ("*DA*")

[16] Primary consideration is to be given to a child's physical, emotional and psychological safety, security and well-being: s.16(2) of the *DA*.

[17] In cases involving parenting issues, all parties bear the evidentiary onus of demonstrating where the best interests of the child lie, and there is no legal presumption in favour of maintaining the existing parenting arrangements (*Persaud v. Garcia-Persaud*, 2009 ONCA 782 (C.A.)*; A.E. v. A.E.,* 2021 ONSC 8189 (S.C.J.), at para. 89; *K.M. v. J.R.,* 2022 ONSC 111 (S.C.J.), at para. 71).

[18] As the Supreme Court of Canada highlighted in *Barendregt v. v. Grebliunas,* 2022 SCC 22 (S.C.C.), at para. 8, the inquiry "is a heavy responsibility, with profound impacts on children, families and Society. In many cases, the answer is difficult - the court must choose between competing and often compelling visions of how to best advance the needs and interests of the child."

[19] The best interests inquiry is highly contextual in nature because of the numerous factors that may impact the child's well-being. The considerations that the court should focus on in carrying out the assessment, and the weight that should be accorded to each factor, will vary

depending on the unique features of every child and case. (*Van de Perre v. Edwards*, 2001 SCC 60 (S.C.C.), at para. 13; *Barendregt*, at para. 97; *B.J.T. v. J.D.*, 2022 SCC 24 (S.C.C.), at para. 55).

[20] The Supreme Court of Canada has emphasized that the analysis of the child's best interests in the context of parenting disputes must be undertaken from the lens of the child rather than the parents' perspectives; parental preferences and rights do not play a role in the analysis except to the extent that they are necessary to ensure the best interests of the child (*Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3 (S.C.C.), at paras. 74 and 202*; Gordon*, at pp. 50, 54, 68; *F. v. N.* 2022 SCC 51 (S.C.C.), at para. 61).

[21] As the Supreme Court of Canada stated in *King v. Low*, 1985 CanLII 59 (SCC), [1985] 1 S.C.R. 87 (S.C.C.), at para. 101, the ultimate aim of the courts in resolving parenting disputes is "to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult." However, the court has also recognized that "a child's best interests are furthered by a well-functioning and happy parent" and that this symbiotic connection must therefore be considered as part of the best interests assessment (*Barendregt*, at para. 169).

[22] In carrying out the best interests analysis, the court should not apply a standard of perfection to parents. As Megaw J. stated in *Prime v. Prime*, 2020 SKQB 326 (Q.B.), at para. 59:

> I am mindful the determination of the best interests of the children is not based on a picture of perfect parenting by either party. The course of family life is such that specific incidents, which do not actually endanger or adversely affect children, do not impact the final decision. The court must consider the entirety of the situation involving the children. Parents are not expected to be free of mistake or misstep. They are expected to have the best interests of their children in mind. And, they are expected to parent in accordance with these best interests.

[23] In allocating parenting time, the Court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child; s.16(6) of the *DA*.

Assessing the Best Interest Factors for Parenting Time

[24] In determining E.'s best interests in terms of a parenting schedule, the court is to consider the factors set out in s.16(3) of the *DA*. The relevant factors to E. in this case are referred to below under separate headings with my analysis of what is in E.'s best interests based on each factor:

Her needs, given E.'s age and stage of development, such as her need for stability;

a. E. is 9 years of age. Her need for stability is centred around a consistent parenting schedule that she can easily follow. Since 2018, she has been spending every Wednesday, from after school to Thursday morning with her mother and alternate

weekends with her mother, from Friday, after school to Monday mornings. It makes sense that this parenting schedule continues to be followed.

b. At trial, Agnes was seeking one additional overnight with E. on Thursdays in the week that she does not have parenting time with E. on alternate weekends. I find that this additional mid-week overnight on alternate weeks will not be a change of significant magnitude that it would cause instability for E. given her age and stage of development. Both parents confirm that E. is not currently enrolled in extra-curricular activities. Accordingly, the additional overnight on alternate weeks during the school with her mother, should not be disruptive to E.

The nature and strength of E.'s relationship with each parent, each of the child's siblings and grandparents and any other person who plans an important role in E.'s life;

c. E. has a close and loving relationship with both parents. Mr. Norton's 2021 OCL report is somewhat outdated at this point, but it does confirm that E. has close, positive and meaningful relationships with both parents. She disclosed to Jared Norton that she misses her mother sometimes when she is at her father's home and she misses her father sometimes when she is at her mother's home. E. is also close with her step-mother, Lidia, and her half-sister, H. E. is also connected and bonded with her maternal grandmother, Irena. Accordingly, the time sharing schedule proposed by Agnes will allow those bonds and relationships to grow and thrive.

d. Both parents should support a parenting schedule that encourages and supports E. having significant time with each of them, and her step-mother, half-sister and both sets of grandparents.

Each spouse's willingness to support the development and maintenance of E.'s relationship with the other spouse;

e. This is the one area of concern for the Court. It is clear based on the record before me, as well as the testimony of Matt, that he has significant concerns about E. when she spends time with her mother. He expressed his distrust of Agnes and his view that she is unable to make appropriate decisions for E. or discipline her properly. Matt also expresses significant concerns about Irena and her negative influence on Agnes and E. These concerns of Matt have clearly made their way to E. In Mr. Norton's updated 2021 s.112 report, E. told the assessor that she knows her father is nervous when she goes to her mother's home that she may yell at E. or hit E. I find that Matt's personal need to discredit Agnes as a mother has come in the way of his ability to place E.'s needs and best interests ahead of his own needs. It is not in E.'s best interests to know that her father is "worried" or "nervous" about her when she is in her mother's care. That concern and worry only serves to heighten E.'s own anxieties and worries and likely causes her to hyperfocus on things that happen at her mother's home to report to her father. In making his concerns known to E., Matt has placed E. in the middle of a loyalty bind between him and her mother. E. already has to adjust to two different homes with two different sets of parenting styles and rules, through no fault of her own. It is incumbent on Matt to

ensure that he not act as a gatekeeper to Agnes' parenting time with E. Jared Norton expressed in his 2021 recommendations that Matt has to learn boundaries between him and E. There is no evidence before the Court to demonstrate that Matt has put any such boundaries into place.

f. The extra overnight E. will have with her mother on alternate weeks will allow for E. to build on her existing bonded relationship with Agnes. While Matt and Lidia have accused Agnes of following them in her car, there is no independent evidence before the court that this is the case. Agnes has denied doing that. While all the adults do agree that E. is awkward and uncomfortable when they are all together at school events, this does not mean this discomfort is caused by Agnes alone as Matt and Lidia suggest. It is just as likely that E. is uncomfortable because she is aware that her father and Lidia do not like Agnes and Irena and that Agnes and Irena do not like Matt and/or Lidia. This cannot continue. Both parents have to give E. permission to have close and loving relationships with the other parent and extended family.

g. I find that Matt has engaged in restrictive parental gatekeeping in terms of Agnes. While it may well have been justified at the beginning of the separation when Agnes was struggling with her mental health, was released from the hospital, and she surreptitiously removed E. from Toronto, this restrictive gatekeeping has continued over the past 7 years. It is clear based on Matt's actions, his messages to Agnes on OFW, the fact that he sent the school court orders, etc. that his attitude and positions have been designed to limit Agnes' access, contact and involvement with E. These restrictions appear to be based on Matt's assertions that Agnes' involvement with E. places her at risk for harm, emotional distress, behavioural problems, adjustment difficulties or negative developmental impact. I am not persuaded that Matt's restrictive gatekeeping is necessary. Further, I find that Matt's perception that Agnes' parental incompetence is no longer justified and is rooted in his need to control the situation. It is imperative in my view that E. have more time with Agnes to counter Matt's perception of harm to her by Agnes so as to reduce the conflict for E. and so as to ensure that the quality of Agnes' and E.'s parent-child relationship is not harmed.

The History of Care of E.;

h. The history of E.'s care is that she has been in the primary care of her father for 7 years, which arrangement was reached on consent. While there is no doubt that the circumstances which led Agnes to surreptitiously leave with E. to go to Winnipeg at the time of separation were such that she was not well mentally and made this inappropriate decision without a clear head. However, Agnes did call Matt and let him know she felt she made a mistake and asked him to pick up E. in Winnipeg, demonstrating that even when she was unwell mentally, Agnes did place E.'s needs and best interests ahead of her own needs to make sure E. was with her father and no one else. Since then, Agnes has paid a hefty price for her actions. She was required to have supervised time with her daughter for months and was being scrutinized by CCAS until they felt comfortable to recommend unsupervised

parenting time and finally, unsupervised overnight parenting time. At all material times, Agnes remained under the care of a treating physician and psychiatrist. She has been compliant with her medication regime and there has been no suggestion otherwise. Jared Norton's 2021 updated s.112 assessment identifies that there are no capacity issue with either parent or identified risk factors for either parent.[4] It appears that Matt continues to be worried that that is not the case. When, in fact, the assessor clearly stated this two years ago. The Court also heard evidence from Agnes' treating psychiatrist that her depression is in remission.

i. While the history of E.'s care is such that Matt has had sole decision-making responsibility for the major decisions that impact E. and that he has done a good job with making such decisions, it does not follow that Agnes ought not to be able to participate in such decisions. The messaging on OFW between the parties shows that Matt keeps Agnes apprised of things going with E. medically/dentally. However, it is not clear from the OFW messages that he engages in a consultative process with Agnes before reaching any such decisions.

E.'s views and preferences, giving due weight to E.'s age and maturity, unless they cannot be ascertained;

j. E. was quick to tell Mr. Norton in 2021 that her preference is to continue to reside with her father. She also disclosed that she experiences stress due to what she experiences as arguments between her mother and grandmother.

k. When E. spoke of her views and preferences to Mr. Norton she was 6.5 years of age. She is now 9 years old. Her views are one factor the Court must consider. I have considered her comfort in having her primary residence with her father, and the new parenting schedule provides that E. will have 8 overnights out of 14 days with Matt and 6 overnights out of 14 days with Agnes.

E.'s cultural, linguistic, religious and spiritual upbringing and heritage;

l. Both parties share a Polish background and similar religious backgrounds.

m. Both parents are comfortable with E. remaining at the Catholic school system. Neither parent has raised any religious, spiritual, cultural or religious issues, other than the fact that Matt wants to be permitted to travel with E. to Poland to visit his extended family and expose her to his home country. I agree that this is important exposure for E. and that either parent ought to be free to travel with E. for this purpose, with some safeguards in place.

The ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting E.

[4] See page 20 of Mr. Norton's 2021 assessment report.

n. On this factor, both parents require assistance. As Mr. Norton stated in his 2021 updated assessment report,

   i. "E. is aware that her parents do not get along, and has disclosed her belief that her parents, as well as her grandmother and step-mother, Ms. Borowiecka, do not like one another."

   ii. "[E.] has further indicated she has heard her mother and grandmother say negative things about her father and step-mother, albeit in Polish. [Agnes] denies that this occurs."

   iii. "Both parents say that they do not involve [E.] in conflict or speak negatively of the other parent to her."

   iv. "[Matt] has acknowledged that E. has asked him questions about her mother, and though he maintains he tries to provide neutral child focused responses, he may not fully appreciate the impact that his words and opinions have on E."

   v. "E. is clearly picking up on the tensions which exist between all family members, as well as the current and historic narratives held by each parent."

   vi. "Further, E. is aware that her father can be 'nervous' for her when she goes to her mother's residence."

   vii. "While it does not seem that either parent is intentionally seeking to negatively impact E. or her relationship with the other parent, both parents may minimize their true contribution to E.'s emotions and beliefs".

   viii. "While both parents do want the best for E. and appear to work hard to ensure her wellbeing, both parents can and should do better to ensure she is buffered from their own negative opinions about the other parent or other family members, and should actively support her in having healthy and positive relationships with both parents as well as other family such as her stepmother, sister and maternal grandmother."

   ix. "Matt would benefit from additional programming on how to have more appropriate boundaries when communicating with E. about her mother and what he perceives to be [Agnes'] challenges as an individual and parent."

   x. "The co-parent dynamic that exists between [Matt] and [Agnes] is problematic. It is evident that [Matt] does not think highly of [Agnes] as a parent or in her ability to make decisions in the best interests of E."

   xi. "While [Agnes] is more measured in her description of [Matt], it also appears that she herself does not hold [Matt[in high regard."

xii. "E. is aware of the strained relationships and true feelings that exist between her parents and other family members and appears to at times be torn between these feelings and reluctant to freely express her affections."

xiii. "It is clear that E. is sensitive to her parents' opinions and there is concern that her continued immersion in an environment of negativity will further impact her ability to have positive authentic relationships with all family members as she ages."

o. Based on the past 7 years, the Court has little faith that either parent will be able to cooperate and communicate with one another effectively to co-parent E. As a result, the parties will continue to communicate on OFW and endeavour to respond to one another within 12 hours of receiving a message, unless it is an emergency and if that occurs, they shall respond faster.

p. Given the past difficulty with each parent trying to reach E. when she in the care of the other parent, the non-resident parent shall telephone the resident parent between 6:30 and 6:45 p.m. every day. The resident parent shall ensure that E. goes to her room or is given private space in which she can have that call. E. shall be free to contact either parent whenever he/she wishes.

q. Further, given Agnes' difficulty in obtaining information about E. from Matt and being told about decisions which have been made for E. after the fact, I find that it is very important that Agnes have input into all of the decisions that impact E. and have the final authority to make medical and health related decisions about E., if the parties cannot agree. In this way, E. will see that both of her parents are involved in a meaningful way in her upbringing.

r. In addition, Agnes has not shared details about her work schedule or travel schedule with Matt. This has created further anxiety on his part because he has not been aware of who is caring for E. on those occasions. Both parents must communicate who is looking after E. if he/she is not going to be present for a significant period of time. As a result, a right of first refusal must be put in place and followed by each parent, if he/she cannot look after E. for 48 hours or more.

Decision-Making Responsibility Considerations

[25] A joint decision-making framework has many advantages. It allows each parent to have a meaningful say in the upbringing of his or her child. As the child grows older, he/she will appreciate this. If there is an order for sole custody, he may believe that one parent is more important than the other. Generally speaking, it is in a child's best interests that each parent have maximal involvement in his or her upbringing: *Watson.v Reiter*, 2011 ONSC 3309 (CanLII), at para. 48.

[26] However, joint decision-making is not a panacea. If the court makes an order for joint decision-making responsibility, there must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another.: *Kapalanis v. Kaplanis*, 249 D.L.R. (4th) 620, at para. 11 and *Ladisa v. Ladisa*, 2005 CanLII 1627 (ONCA).

[27] As set out by Chappel, J., in *S.V.G. v. V.G.*, in 2023 ONSC 3206 (CanLII), at para. 107, section 16.3 of the *DA* gives the court a wide discretion to craft a tailor-made decision-making responsibility framework that supports and promotes the best interests of the child before the court, taking into consideration the unique facts of each case. The options available to the court include the following:

a. It may grant sole decision-making responsibility in all areas to one spouse.

b. It may grant joint decision-making responsibility in all areas to both spouses.

c. It may grant joint decision-making responsibility to both spouses in one or more areas of responsibility, but give sole decision-making authority in the other areas to one spouse or allocate those other areas of decision-making between the spouses.

d. Alternatively, it may allocate each party sole decision-making responsibility in separate specified areas, with no provision for joint decision-making in any areas.

e. Another option open to the court is to require the parties to engage in all reasonable efforts and take all reasonable steps to make some or all significant decisions jointly, but to designate which party has final say in each area of decision-making in the event of disagreement. This option typically includes a detailed decision-making framework that establishes timelines for parties to exchange their positions and information on issues and requires them to take particular steps in an attempt to decide matters jointly.

[28] With respect to option #5, Chappell, J. noted in *S.V.G. v. V.G.*, that it is important to emphasize that it is quite distinct from an order where the court grants one party sole decision-making responsibility but requires them to consult with the other party before making a final decision. The latter model requires the sole decision-maker to solicit and consider the other parent's input but nothing more. Option #5 requires much more of both parties, in that the expectation is that they will both "roll up their sleeves" and actively engage in all reasonable efforts to reach a consensus. In paragraph 108, Chappel, J. elegantly explained, that "while the distinction may appear subtle on its face, it is important and can yield different results for a child than an order for sole decision-making with consultation. It gives the party who does not have "final say" greater involvement in the decision-making process and more opportunity to ensure that the other parent obtains all relevant information to reach the best decision for the child. For these reasons, it is an important alternative that lies between options of a sole decision-making with consultation framework and a straight joint decision-making arrangement (*McBennett v. Danis*, 2021 ONSC 3610 (S.C.J)). The Ontario Court of Appeal recognized this as a distinct decision-making framework and upheld it on appeal in the cases of *T.J.L. v. E.B.*, 2019 ONSC 6096 (S.C.J.), aff'd 2021 ONCA 75 (C.A.) and *Bourke v. Davis*, 2021 ONCA 97 (C.A.)."

[29] In deciding on the appropriate decision-making responsibility regime, the court is required to consider all possible frameworks, and not simply those proposed by the parties (*Chomos v. Hamilton*, 2015 ONSC 5208 (S.C.J.), at para. 109; *Jackson v. Mayerle*, 2016 ONSC 72 (S.C.J.); *Ruffudeen v. Coutts*, 2016 ONSC 3359 (S.C.J.)). Furthermore, as the Ontario

Court of Appeal noted in *M. v. F.*, 2015 ONCA 277 (C.A.), notwithstanding the positions of the parties, the court may decline to make any decision-making designation if such an approach is considered to be in the best interests of the child.

[30] A rich body of caselaw evolved over the years regarding the factors that the courts should consider in formulating decision-making regimes that support the best interests of children. Chappel, J. in *S.V.G. v. V.G.*, went through the case law principles which apply in determining whether it is in the best interests of a child to order joint decision-making responsibility in all or some areas respecting the child's well-being, and I have reproduced these principles below:

a. There is no presumption in favour of granting joint decision-making responsibility to both parties in some or all areas (*Kaplanis v. Kaplanis*; *Ladisa v. Ladisa).*

b. Joint decision-making in some or all areas should only be considered as an option if the court is satisfied as a threshold matter that both parties are fit parents and able to meet the general needs of the children (*Kaplanis; T.E.H. v. G.J.R.*, 2016 ONCJ 156 (O.C.J.), at para. 446; *McBennett*, at para 97).

c. In order to grant joint decision-making in some or all areas, there must be some evidence before the court that despite their differences, the parties are able to communicate effectively in the areas under consideration for the sake of the child. Where there is a history of significant conflict that has impacted the functioning and parenting of the parties and the wellbeing of the child, these factors will support an order for sole decision-making responsibility (*Roth v. Halstead*, 2017 ONCJ 593 (O.C.J.), at para. 299). The rationale for this principle is that the best interests of the child will not be advanced if the parties are unable to make important decisions regarding the child under a joint decision-making arrangement (*Kaplanis; Roy v. Roy*, 2004 CarswellOnt 8591 (S.C.J.), reversed in part 2006 CanLII 15619 (ON CA), 2006 CarswellOnt 2898 (C.A.); *Levesque v. Windsor*, 2020 ONSC 5902 (Div. Ct.); *Brown v. Brown*, 2021 ONSC 1753 (S.C.J.)).

d. The fact that there is some evidence of communication and cooperation does not, however, dictate in and of itself that joint decision-making must be ordered. The trial judge must carefully assess in each case whether the parties' ability to cooperate and communicate about issues relating to the child is sufficiently functional to support an order for joint decision-making (*Berman v. Berman*, 2017 ONCA 905 (C.A.), at para. 5).

e. The court is not required to apply a standard of perfection in assessing the parties' ability to cooperate and communicate with each other on matters relating to the children. As Quinn J. remarked in the often-quoted case of *Brook v. Brook*, 2006 CarswellOnt 2514 (S.C.J.), "the cooperation needed is workable, not blissful; adequate, not perfect." The existence of occasional conflict does not necessarily preclude an order that involves elements of joint decision-making, and the court should consider the entire record of the parties' communication to obtain a clear

sense of the nature and extent of the discord (*Grindley v. Grindley*, 2012 CarswellOnt 9791 (S.C.J.); *Sader v. Kekki*, 2013 ONCJ 605 (O.C.J.), at para. 115).

f. The fact that one party insists that the parties are unable to communicate with each other is not in and of itself sufficient to rule out the possibility of a joint decision-making order in some or all areas. The court must carefully consider the parties' past and current parenting relationship and reach its own conclusions respecting the parties' ability to communicate, rather than simply relying on allegations of conflict by one or both of the parties (*Kaplanis,* at para. 11; *Ladisa; Brown,* at para. 83). The question to be determined is whether the nature, extent and frequency of the conflict between the parties is such that requiring them to decide issues jointly is likely to impact negatively on the well-being of the children.

g. If the evidence indicates that the parties, despite their conflict with each other, have been able to shelter the child from the turmoil reasonably well and make decisions in the child's best interests when necessary, an order involving joint decision-making may be appropriate (*Ladisa*). The issue for the court's determination is "whether a reasonable measure of communication and cooperation is in place, and is achievable in the future, so that the best interests of the child can be ensured on an ongoing basis" (*Warcop v. Warcop*, 2009 CanLII 6423 (ON SC), 2009 CarswellOnt 782 (S.C.J.); *Lambert v. Peachman*, 2016 ONSC 7443 (S.C.J.); *Brown*, at para. 84).

h. In addition, where there has been some conflict in reaching decisions, the court should consider whether the differences in perspectives and the sharing of information supporting those perspectives have ultimately resulted in more positive outcomes for the child. Evidence of challenges in working through parenting issues that result in better results for the child may support joint rather than sole decision-making (*Campbell v. Lapierre*, 2017 ONSC 1645 ONSC (S.C.J.), at paras. 48-50).

i. In analyzing the ability of the parties to communicate, the court must delve below the surface and consider the source of the conflict. The Ontario Court of Appeal has clearly stated that one parent cannot create conflict and problems with the other parent by engaging in unreasonable conduct, impeding access, marginalizing the other parent, or by any other means and then justify a claim for sole decision-making in their favour on the basis of lack of cooperation and communication (*Lawson v. Lawson*, 2006 CarswellOnt 4736 (C.A.)*; Ursic v. Ursic*, 2004 CarswellOnt 8728 (S.C.J.), aff'd 2006 CanLII 18349 (ON CA), 2006 CarswellOnt 3335 (C.A.); *Andrade v. Kennelly*, 2006 CarswellOnt 3762 (S.C.J.), aff'd 2007 ONCA 898 (CanLII), 2007 CarswellOnt 8271 (C.A.)). Where the parties are both competent and loving parents, but one of them is the major source of the conflict, this factor may support an order for sole decision-making in favour of the other party (*Alqudsi v. Dahmus*, 2016 ONCJ 707 (O.C.J.); *Liu v. Huang*, 2020 ONCA 450 (C.A.)). Alternatively, judges have often opted for orders for joint decision-making rather than sole decision-making with one parent in these circumstances, where they have been satisfied that the best interests of the child require a balance of influence and authority between the parties in addressing important parenting

decisions (*Bromley v. Bromley*, 2009 ONCA 355 (CanLII), 2009 CarswellOnt 2210 (Ont. C.A.); *Hsiung v. Tsioutsioulas*, 2011 CarswellOnt 10606 (O.C.J.); *Sinclair v. Sinclair*, 2013 ONSC 1226 (S.C.J.); *Lonsbury v. Anderson*, 2019 ONSC 7174 (S.C.J.), at para. 16; *Saunders v. Ormsbee-Posthumus*, 2020 ONSC 2300 (S.C.J.), at para. 65).

j. However, where an objective review of the historical and more recent evidence clearly indicates that there has never been an ability to cooperate or communicate effectively, and that both parties are responsible for this dynamic, joint decision-making is not an appropriate order (*Hildinger v. Carroll*, 2004 CarswellOnt 444 (C.A.); *Kaplanis; Ladisa; Graham v. Bruto*, [2007] O.J. No. 656, aff'd 2008 ONCA 260 (C.A.)). This principle applies even where both parties are attentive and loving parents (*Izyuk v. Bilousov*, 2011 ONSC 6451 (CanLII), 2011 CarswellOnt 12097 (S.C.J.), at para. 504). In these circumstances, hoping that communication between the parties will improve once the litigation is over does not provide a sufficient basis for making an order that includes elements of joint decision-making responsibility (*Kaplanis; Brown*). There must be a clear evidentiary basis for believing that joint decision-making would be feasible (*Iannizzi v Iannizzi*, 2010 ONCA 519 (C.A.), at para. 2).

k. The quality of each party's past parenting and decision-making, both during the parties' relationship and post-separation, is a critical factor in determining whether an order for joint decision-making in some or all areas is appropriate (*Milford. v. Catherwood*, 2014 CarswellOnt 7879 (O.C.J.)).

l. In some cases, the parties are clearly able to cooperate and jointly support the best interests of the child in some areas of decision-making but have a pattern of conflict and lack of collaboration in other specified areas. In these circumstances, a hybrid type of decision-making structure that provides for joint decision-making in the areas that have never been problematic but that allocates the remaining areas out to each party for sole decision-making may be the most appropriate outcome (*McBennett*).

m. In addition, in situations where there is conflict regarding a course of treatment or therapy for a child, evidence that a parent has drawn the child into the conflict by attempting to make them an ally in their position on the issue may support an order for decision-making in favour of the other party (*Gugus v. Gilodeau*, 2020 ONSC 2242 (S.C.J.), at paras. 24 and 33).

n. The wishes of the child will also be relevant to the determination of the appropriate decision-making disposition in cases involving older children. Although a child's wishes in such circumstances may not necessarily synchronize perfectly with the child's best interests, "the older the child, the more an order as to custody requires the co-operation of the child and consideration of the child's wishes" (*Kaplanis*, at para. 13).

o. Evidence as to how an interim parenting order has worked, and in particular, whether the parties have been able to set aside their personal differences and work together in the best interests of the child, will be highly relevant to the ultimate decision regarding the appropriate decision-making regime.

p. The caselaw has also established some valuable principles and guidelines for assisting the courts in deciding whether to make orders that divide out specified areas of decision-making responsibility to each party, also known as Parallel Parenting. These would include orders requiring the parties to attempt to make decisions jointly, but which grant each party final say in specified areas of decision-making in the event of disagreement. These types of decision-making frameworks evolved as a means of meeting the needs of children in circumstances where both parties have been active and competent parents, and the child would benefit from both having a say on important matters, but the conflict between them is such that a traditional joint decision-making order or an order for sole decision-making in favour of one parent would not be in the child's best interests. Courts have recognized there are many merits to these types of regimes in appropriate cases. They give both the child and the parents the benefit of maintaining each parent as a meaningful player in the child's life, over and above time-sharing with the child. In addition, by delineating clear areas of decision-making between the parties, these arrangements have the potential in appropriate cases to disengage the parties and reduce parental discord (*Hensel v. Hensel*, 2007 CarswellOnt 7010 (S.C.J.), at para. 30; *Jackson v. Jackson*, 2017 ONSC 1566 (S.C.J.) at para. 69). The cases highlight the following factors and considerations as being relevant in deciding whether an order that allocates separate aspects of decision-making responsibility between the parties is in a child's best interests:

   i. The strength of the parties' ties with the child, and their historical level of involvement with the child are critical to the analysis. These factors are now specifically referenced in section 16(3) of the *Divorce Act*. In most cases where specified areas of decision-making have been allocated to the parties, both parents have played a significant role in the child's life on all levels (see for example *Andrade; H.(K.) v. R.(T.K.)*, 2013 ONCJ 418 (O.C.J.); *B.(M.) v. T.(D.)*, 2012 ONSC 840 (S.C.J.); *Hoffman v. Hoffman*, 2013 ONSC 395 (S.C.J.); *Jackson v. Jackson; McBennett*).

   ii. The relative parenting abilities of each parent and the quality of their decision-making respecting the child are also important considerations. Section 16(3) now specifically highlights the history of care of the child and the ability and willingness of each party to care for and meet the needs of the child as mandatory considerations in carrying out the best interests analysis. Where one parent is clearly more competent, responsible and attentive than the other, this may support an order for sole decision-making in their favour rather than an allocation of decision-making areas between them (*Ryan v. Scott*, 2011 CarswellOnt 5924 (S.C.J.); *Hajkova v. Romany*, 2011 ONSC 2850 (CanLII), 2011 CarswellOnt 3237 (S.C.J.); *Scervino v. Scervino*, 2011 CarswellOnt 7845

(S.C.J.); *H. (K.) v. R. (T.K.)*; *Izyuk v. Bilousov; Hoffman*; *Warner v. O'Leary,* 2014 CarswellNS 319 (S.C.); *Suchanek v. Lavoie,* 2014 CarswellOnt 1236 (O.C.J.)*; Jackson v. Jackson*).

iii. A desire to ensure formal equality of influence between the parents is not in and of itself sufficient to support a claim for dividing up aspects of significant decision-making (*L.(L.) v. C.(M.),* 2012 ONSC 3311 (S.C.J.); *Jackson v. Jackson*).

iv. A history of family violence or any evidence suggesting that there is a significant power imbalance between the parties are factors that must be considered before allocating specific areas of decision-making responsibility between the parties, as this type of dynamic may frustrate the objective of achieving an equilibrium of influence through such an order (*Hildinger*; *K.(V.) v. S. (T.); H.(K.) v. R.(T.K.); Docherty v. Catherwood*, 2013 CarswellOnt 11366 (S.C.J.); *L.(L.) v. C.(M.)*; *Ganie v. Ganie*, 2014 ONSC 7500 (S.C.J.); *Tiveron*; *Jackson v. Jackson*).

v. An order allocating aspects of decision-making between the parties will not be considered appropriate where the evidence indicates that one party is seeking this arrangement solely as a means of controlling the other parent, rather than as a means of fostering the child's best interests (*H.(K.) v. R. (T.K.); S.(S.) v. K.(S),* 2013 ONCJ 432 (CanLII), 2013 CarswellOnt 10801 (O.C.J.); *Jackson v. Jackson; L.B. v. P.E.*).

vi. The extent to which each parent is able to place the needs of the child above their own needs and interests is often a compelling consideration. Evidence that a party tends to place their own wishes and needs over the child's overall best interests will often vitiate against an order separating out aspects of decision-making, even if that party is in all other respects a loving and competent parent (*Potter v. DaSilva*, 2014 ONCJ 302 (O.C.J.); *Heuer v. Heuer,* 2016 ONCJ 201 (O.C.J.); *Alqudsi; Jackson v. Jackson*).

vii. The court should carefully consider all of the evidence in the case and determine whether allocating areas of decision-making between the parties is more likely to de-escalate the conflict between the parties or inflame it. Section 16(3)(i) reflects the importance of this factor by specifically listing as a mandatory consideration in the bests interests analysis the ability and willingness of each party to communicate and cooperate, in particular with one another, on matters affecting the child. If an allocation of decision-making responsibility between the parties is likely to intensify the conflict, an order granting sole decision-making responsibility to one party may be more appropriate (*H.(K.) v. R.(T.K.); S.(S.) v. K.(S.); Suchanek; Jackson v. Jackson; McBennett*).

viii. The court will consider the nature and intensity of the conflict between the parties, and whether the parties are likely to at least be able to navigate basic

issues such as scheduling and interpretation of the order under a regime that separates out the various aspects of decision-making. The court should be particularly vigilant in considering whether the dynamics between the parties are such that they are likely to have disputes regarding the scope of each of their areas of decision-making responsibility in situations where the dividing line may be unclear. In *H.(K.) v. R.(T.K.)*, Sherr J. referred to this potential problem of unclear boundary lines between areas of decision-making as "the spillover effect." If it is unlikely that the parties will be able to manage basic issues such as scheduling and potential spillover challenges, an order that divides up aspects of decision-making will likely not be appropriate as it will simply serve as a catalyst for further parental strife (*H. (K.) v. R. (T.K.); S.(S.) v. K.(S.); Izyuk v. Bilousov; Suchanek; Jackson v. Jackson; McBennett*).

ix. With respect to parental conflict, the court should also carefully consider whether one party is the major cause of discord between the parties. If this is the case, an order granting sole decision-making to the other party may be the more appropriate choice (*H.(K.) v. R. (T.K.); Graham*; *Warner*).

x. Ultimately, with respect to parental conflict, an order granting each party specified areas of decision-making will generally not be considered appropriate where it is clear from a careful review of all of the evidence that one or both of the parties will never be able to disengage from combat. In such circumstances, delineating areas of decision-making will not achieve the goal of alleviating the conflict for the sake of the child but will simply provide a further breeding ground for parental dissonance (*Seed v. Desai*, 2014 ONSC 3329 (S.C.J.); *Nloga v. Ndjouga*, 2015 ONSC 5925 (S.C.J.); *Ruffudeen; Jackson v. Jackson*).

[31] Evidence that a party is interfering with or not supporting contact between the child and the other parent, alienating the child from the other parent or marginalizing the other parent's role will often be a significant factor in determining whether an order allocating specified areas of decision-making to the parties is appropriate (*Lefebvre v. Lefebvre*, 2002 CarswellOnt 4325 (C.A.); *Chin Pang v. Chin Pang*, 2013 ONSC 2564 (CanLII), 2013 CarswellOnt 7824 (S.C.J.); *Rodriguez v. Guignard*, 2013 CarswellOnt 503 (S.C.J.); *Potter*). In *Rigillo v. Rigillo*, 2019 ONCA 548 (C.A.), at para. 12, the Ontario Court of Appeal emphasized that "[d]ecision-making authority assists in ensuring that a parent's relationship with his or her child is not marginalized." Section 16(3)(c) of the *DA* now specifically establishes that the court must as part of the best interests analysis consider each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse. Further to these considerations, the caselaw reflects the following:

a. Where the parent with primary care has engaged in this type of conduct, but that parent is otherwise very loving and competent, the courts have often considered a reversal of decision-making responsibility as too drastic a measure and have opted for a division of areas of decision-making as a means of protecting the other parent's role and influence in the child's life. In *Grindley*, the court emphasized

that the goal of this type of order in these circumstances is not to protect the interests of the parent, but rather to foster the child's respect for both parents and their sense of security in the care of both parents. (For other cases in which areas of decision-making have been divided between parties in these circumstances, see *Plugers v. Krasnay*, 2014 ONSC 7078 (S.C.J.), aff'd 2016 ONCA 279 (C.A.)*; Cox v. Stephen*, 2003 CarswellOnt 4554 (C.A.)*;Andrade; Batsinda*; *Sgroi v. Socci*, 2007 CarswelllOnt 8526 (O.C.J.); *Suchanek; McBennett*).

b. Where the non-primary parent is loving and attentive but has engaged in undermining or alienating behavior, this is often a factor that tips the balance in favour of sole decision-making responsibility to the other parent if they are also competent (*Griffin v. Bootsma*, 2005 CanLII 35095 (ON CA), 2005 CarswellOnt 4702 (C.A.); *Perron v. Perron*, 2010 ONSC 1482 (S.C.J.)).

c. If both parties are involved in severe alienating and undermining conduct, the court may conclude that neither can be trusted to exercise sole decision-making responsibly. In such circumstances, if both parties are equally competent and loving parents, allocating the incidents of parental decision-making between the parties may provide an effective means of keeping both of them in check, protecting the child from exposure to damaging parental conflict and ensuring that the child benefits from the contributions that both parents can make to decision-making. The concern in these types of situations is that an award of sole decision-making responsibility to one of the parties may result in that party using their decision-making authority as "an instrument of oppression" in a manner that undermines the child's best interests (see *Hart v. Krayem*, 2016 ONSC 5754 (S.C.J.); *Desjardins v. Desjardins*, 2013 ONSC 2283 (S.C.J.)).

d. The geographical distance between the parties is another factor that may impact on whether an order dividing the various areas of decision-making responsibility between the parties is in the child's best interests (*H.(K.) v. R. (T.K.)*).

[32] In this case, there is no evidence that these parties can communicate effectively with one another. The record indicates that the parties have very little ability to communicate with each other effectively. The Court has thousands and thousands of messages between the parties from OFW before it, demonstrating that the conflict is extreme.

[33] In my view, however, it is important that both parents are involved in the important decisions that impact E., particularly, since Agnes feels marginalized by Matt and the evidence is clear that Matt does not value E.'s relationship with her mother. In these circumstances, I am persuaded that one party or the other must be given decision-making authority over each of the matters that impact E. The question is which party should be given that authority and for which decisions.

[34] Both parties, in my view, have exhibited characteristics that are problematic. Matt remains fixed in his view that Agnes poses a threat to E. and has no ability to see the strides she has made. As a result, his communication with her and the decisions he makes have taken on a punitive and restrictive approach to co-parenting as opposed to cooperative or flexible. Agnes

is more avoidant in her communication style but she also does not hold Matt or Lidia in high regard. As a result, Agnes admitted that she has not told Matt when she travelled and was away during her scheduled parenting time, or who was looking after E. when she is working.

[35] Agnes has had to endure significant consequences as a result of decisions she has made and has generally had to accept the limitations placed on her by Matt and the CCAS. While she appears to be defeatist in her acceptance of these limitations, Agnes has pursued the relief she believes is in E.'s best interests to have more time and to be more involved in decisions that impact E. Agnes has also persevered in her attempt to engage in self-care and look after her mental health while also holding two employment positions to be able to make ends meet. Instead of being punished for her work commitments, Matt should have been able to try and accommodate her schedule, recognizing that Agnes was using her best efforts to earn money in a field that is grossly underpaid.

[36] I am not persuaded if Matt continues to have decision-making responsibility over the major decisions that impact E. that he will start to consult with Agnes now after 7 years of making decisions on his own and telling Agnes about them after the fact. I have no evidence on record that Matt has or will involve Agnes in these important decisions. As a result, I have designed a specific consultative process and structure that should ensure both parties' involvement and opinion about the important decisions that affect E. *prior* to such decisions being made. It is a parallel parenting decision-making regime.

Ordering Mediation and/or Parenting Coordination

[37] In *S.V.G. v. V.G.*, the court referred to the Association of Family and Conciliation Courts' Guidelines for Parenting Coordination, 2019 AFCC Task Form on Parenting Coordination ("*AFCC Guidelines*"). Parenting coordination is a hybrid legal-mental health service that is intended to assist co-parent who have difficulty making parenting decision jointly to communicate effectively, comply with parenting agreements or orders and shield their children from the impact of parental conflict (*AFCC Guidelines*, at page 2.) The role of a parenting coordinator ("PC") is not to develop a parenting plan, but rather to assist the parties in implementing, interpreting and applying the terms of an established plan, and in nuancing the issues in relation o the plan if agreed to and if necessary: *Aliv v. Obas,* 2021 ONSC 3412 (S.C.J.), at para. 60.

[38] As Audet J. commented in *Jirova v. Benincasa,* 2018 ONSC 534 (S.C.J.), at paras. 11-12, parenting coordination as a dispute resolution model includes two main components, namely the "non-decision-making" portion and the "decision-making" component of the process:

> [11] This resolution model includes two components: the non-decision-making component and the decision-making component. During the non-decision-making component of the process (the mediation phase), the PC *assesses* the family dynamics to obtain a better understanding of the parenting issues and challenges, *educates* the parties about child development matters and the impact of parenting conflict on the children, *coaches* them regarding communication skills and parenting strategies, and *mediates* disputes as they arise.

> [12] During the decision-making portion of the process (the arbitration phase), which is triggered when resolution through mediation is not possible, the PC makes a binding decision on the issue in dispute after having provided both parents with an opportunity to be heard. During both phases of the process, the PC is generally given expanded investigative powers to assist in his or her mandate to mediate or adjudicate on the issue, such as the ability to speak with professionals involved with the family as well as the ability to interview the children, when he or she deems it necessary and in the children's best interest to do so. Parenting Coordination is a way for parents to settle parenting disputes with cost-efficiency, procedural flexibility and expeditiousness.

[39] The courts have widely accepted that the services of parenting coordinators are an integral part of the family law system and highly beneficial for both parents and children. As the court stated in *Sehota v. Sehota*, 2012 ONSC 848 (S.C.J.), at para. 24:

> [T]he court values the work of such professionals for the vast potential it holds for easing many of the difficulties litigants face. In particular, the court usually sees the children being benefitted by the help of a parenting coordinator because that person can help the parents to put their children's interests first, to understand how conflict hurts children and to cooperate in spite of their past sorrows and hurts.

[40] The Ontario Court of Appeal has weighed in on the integral and important role that both mediation and arbitration play in the Family Law system. In *Petersoo v. Petersoo,* 2019 ONCA 624 (C.A.), it commented as follows, at para. 35:

> [121] Mediation/arbitration is an important method by which family law litigants resolve their disputes. Indeed, the courts encourage parties to attempt to resolve issues cooperatively and to determine the resolution method most appropriate to their family. The mediation/arbitration process can be more informal, efficient, faster and less adversarial than judicial proceedings. These benefits are important with respect to parenting issues, which require a consideration of the best interests of children. The decision of an arbitrator, particularly in child related matters, is therefore entitled to significant deference by the courts: see *Patton-Casse v. Casse*, 2012 ONCA 709, 298 O.A.C. 111, at paras. 9, 11.
>
> [122] The use of these parenting coordination services should be encouraged where appropriate in furtherance of the direction that has been given by both the Supreme Court of Canada and the Ontario Court Appeal regarding the overall benefits of Family Law litigants resolving issues outside of the court process. The determination of whether the court may order parties to participate in parenting coordination services, including an arbitration component, absent consent from both parties must be undertaken keeping these overall considerations in mind.

[41] The courts have ordered parties to participate in parenting coordination services, namely the cases of *Brennan v. Lander,* 2020 ONSC 1696 (S.C.J.) and *Misiuda v. Misiuda,* 2021 ONSC 5258 (S.C.J.). In the latter case, MacLeod J. ordered the parties to jointly retain a parenting coordinator "to resolve any disputes between the parties concerning the children and the interpretation of the Parenting Order," thereby giving the parenting coordinator decision-making powers.

[42] A "family dispute resolution process" is defined in section 2(1) of the *DA,* which the court can order the parties to attend pursuant to section 16.1(6) of the *DA.* In *S.V.G. v. V.G.*, Chappel, J. concluded that a "family dispute resolution process" does not encompass the functions of the parenting coordination roles that involve the parenting coordinator making final binding decisions regarding parenting disputes between the parties, including the arbitration component of the role. However, the other functions of a PC, which are either clearly geared towards assisting the parties to reach agreement between themselves regarding parenting disputes, or they are functions that support the parties in attempting to resolve such disputes, were found to fall within the definition of a family dispute resolution process in section 2(1) of the *Divorce Act."* I agree with this reasoning.

[43] The new duty on parties pursuant to section 7.3 of the *DA* to attempt to resolve family law disputes through a family dispute resolution process where appropriate, coupled with the introduction of section 16.1(6) of the *DA*, reflect a policy shift that mediation can be ordered by the court regardless of consent. The comments of the Supreme Court of Canada in *Colucci* and the Ontario Court of Appeal in *Meloche* encouraging parties to resolve their Family Law disputes outside of court wherever possible support this principle.

[44] I conclude that sections 16.1(4)(d) and (5) of the *Divorce Act* provide further authority for the court in making a final parenting order to require parties to participate in the non-decision-making components of parenting coordination to attempt to resolve any future parenting disputes before seeking relief from the court. However, I agree with Chappel, J. that the court cannot require parties to participate in the aspects of parenting coordination that grant the parenting coordinator authority to make final binding decisions about parenting issues.

[45] I make the following findings:

a. For medical and health related decisions for E., the parties will alternate in each year as to who will be responsible for scheduling and taking E. to her appointments. E. shall continue to attend her current doctor and dentist. Further, the parties will take the advice of the health professionals involved with E. before making any decisions that will impact her. If they cannot agree on a medical/health related decision they shall engage in mediation/parenting coordination to try and resolve the issue. If after such processes, the parties still remain unable to agree on a medical/health-related decision, Agnes will have final decision-making responsibility for these decisions.

b. For extra-curricular decisions for E., each parent shall have the option to schedule one extra-curricular activities for E., taking into account E.'s views and preferences and will be responsible for taking her to such activities on his/her parenting time.

If the activity happens on the weekend, then both parents will have to consent to E. being enrolled in that activity. If the parents, after consulting meaningfully and engaging in a mediation/parenting coordination process, cannot agree on a decision about an extra-curricula activity for E., Matt will have final decision-making responsibility for these decisions.

c. E. shall continue to attend the Catholic school in which she is enrolled and continue her education within the Toronto Catholic District School Board system. Any educational-related decisions shall be divided after meaningful consultation between the parents and consultations with E.'s teachers and engaging in a mediation/parenting coordination process. If the parties, however, still cannot agree on an education-related decision, Matt will have final decision-making responsibility for these decisions.

d. There appears to be no issue about religion.

Issue Three: How should E. split her time with her parents on holidays from school, including the summer?

[46] In terms of a Holiday schedule for E., I have adopted the detailed holiday schedule proposed by Matt, since Agnes did not raise any issues with his proposal during her evidence. The draft order submitted by Agnes, in her closing submissions *after* the conclusion of the trial, provides a different holiday schedule than that proposed by Matt. However, Agnes did not testify about why the holiday schedule proposed by her in the draft order was in E.'s best interests.

Issue Three: How much does Agnes owe Matt in terms of retroactive child support?

[47] From July 2018 to 2023, Agnes paid Matt child support for E. in the sum of $350 a month, other than in July 2018, when she paid $250.

[48] Agnes did not pay child support for E. in 2016 and 2017. She began to pay child support for E. in July 2018. Despite Monahan, J.'s order setting out that the parties were to update each other with annual financial information, neither party did so. As a result, Agnes' child support payments have not changed since that order.

[49] Matt takes the position that Agnes owes him retroactive child support for the period September 2016 to November 2023 in the sum of $15,600. If the month of December 2023 is added into the calculation, Matt's child support arrears calculation would amount to $15,764, calculated as follows:

a. Agnes's Line 150 income in 2016 was $14,612. Her table child support obligation for one child was $90 a month. For the 5-month period from when the parties separated on August 1, 2016 to and including December 31, 2016, Matt calculates that Agnes owes him child support of $450.00;

b. Agnes' line 150 income in 2017 was $26,927. Her table child support obligation for one child was $222 a month or $2,664 for the year. Agnes did not pay child support to Matt in 2017;

c. Agnes' Line 150 income in 2018 was $48,369. Her table child support obligation for one child was $448 a month, or $5,376 a year. Agnes paid child support of $2,000 to Matt. Accordingly, she owes $3,376 for 2018;

d. Agnes's 2019 Line 150 income in 2019 was $49,251. Her table child support obligation for one child was $454 a month, or $5,448 a year. Agnes paid child support of $4,200 to Matt. Accordingly, she owes $1,248 for 2019;

e. Agnes' 2020 Line 15000 income was $56,524. Her table child support obligation for one child was $522 a month, or $6,264 a year. Agnes paid child support of $4,200 to Matt in 2020. Accordingly, she owes $2,064 for 2020;

f. Agnes' 2021 Line 15000 income was $58,214. Her table child support obligation for one child was $538 a month, or $64,56 a year. Agnes paid child support of $4,200 to Matt in 2021. Accordingly, she owes $2,256 for 2021;

g. Agnes' 2022 Line 15000 income was $54,687. Her table child support obligation for one child was $504 a month, or $6,048 for 2022. Agnes paid child support of $4,200 to Matt in 2022. Accordingly, she owes $1,848 for 2022;

h. Agnes' 2023 Line 15000 income was $54,687. Her table child support obligation for one child was $504 a month, or $6,048 for 2023. Agnes paid child support of $4,200 to Matt in 2023. Accordingly, she owes $1,848 for 2023.

[50] During the trial, Agnes argued that any period of retroactivity should only be one year. This is despite the fact that she did not provide Matt with annual disclosure of her income or change her child support obligations going forward since the 2018 child support order was made. However, in her closing submissions, Agnes argues that Matt should be denied any child support arrears because a) he did not seek arrears prior to July 1, 2018 until trial and the three-year cap should apply; b) the quantum of child support paid since the consent order of Monahan, J. was agreed to; c) it is unreasonable for Matt to request to overturn an amount of interim support reached through settlement, after a 5-year delay; d) she exhibited no blameworthy conduct because she made regular disclosure to the Matt; e) there is no evidence that E. suffered or will suffer if child support arrears are not paid; f) the court has no evidence about Matt's actual financial situation; and g) her financial situation is precarious, she has significant debt, she works multiple jobs to make ends meet.

Law

[51] Parents have an obligation to support their children in a way that is commensurate with their income. The obligation of parents to support their children and the children's right to be supported by their parents exist independent of any legislative enactment or court order. *D.B.S. v. S.R.G.*, 2006 SCC 37 ("*D.B.S.*"), paras. 38-40, 48 and 54.

[52] The *CSG* do not require automatic disclosure of changes in a payor's income: *D.B.S.*, at para. 58.

[53] Upon an application being made to the court for retroactive child support, the court has the jurisdiction to make an award of child support retroactively, including in situations where a payor parent has been paying based on a prior court order: *D.B.S.*, paras. 62-74.

[54] Retroactive awards are not truly "retroactive", since they merely hold payors to the legal obligation they always had to pay child support commensurate with their income: *D.B.S.*, para. 2.

[55] In order to consider an application for retroactive support the court must do two things. First, it must use its discretion to determine whether an award for retroactive support is appropriate. Second, it must determine the most appropriate date for the commencement of a retroactive order.

[56] Prior to making a retroactive award of child support, the court should have regard for the following four factors:

a. The reason for the recipient parent's delay in seeking child support; *D.B.S.*, at paras.100-104;

b. The conduct of the payor parent; *D.B.S.*, at paras. 105-109;

c. The past and present circumstances of the child, including the child's needs at the time the support should have been paid; *D.B.S.*, at paras 110-113; and

d. Whether the retroactive award might entail hardship; *D.B.S.*, at paras. 114-116.

[57] Once the court determines that a retroactive child support award should be ordered, the award should, as a general rule, be retroactive to the date of effective notice by the recipient parent that child support should be paid or increased. Rather, "all that is required is that the topic is broached", but to no more than three years in the past; *D.B.S.*, at paras. 118-125.

[58] In *Michel v. Graydon* [2020] 2 S.C.R., at para. 31, the Supreme Court of Canada confirmed that when a payor parent fails to pay the appropriate amount of child support, the recipient parent is left to shoulder the burden. If the recipient parent does not have the means to provide their child reasonable support, the child suffers.

[59] Retroactive child support is not exceptional relief: there is nothing exceptional about relief that creates a systemic incentive for payor parents to meet their obligations in the first place: *D.B.S.*, at para. 5; *Michel*, at para. 31.

[60] A payor parent who diligently pays the child support amount ordered by a court must be presumed to have fulfilled his/her support obligation towards his/her children. Acting consistently with the court order should provide the payor parent with the benefit of predictability, and a degree of certainty in managing his/her affairs. However, the court order

does not absolve the payor parent of the responsibility of continually ensuring that the children are receiving an appropriate amount of support.

[61] In this case, Matt issued an application a month after the separation. Initially, however, he did not seek child support from Agnes. It was not until he served his Amended Application, dated February 21, 2018, that Matt sought child support from Agnes.

[62] In her closing submissions, Agnes argued that it is unreasonable for Matt to try and overturn the agreed upon quantum of child support, retroactively. I do not agree with this position. Paragraph 16 of Justice Monahan's consent order, dated July 26, 2018, clearly states that Agnes' payment of $250 to Matt in July 2018 "shall be calculated towards any retroactive child support which may be owing by her to Matt, if such is ordered on another motion or trial, and shall not prejudice Matt from claim[ing] any retroactive child support." This makes it clear, therefore, that the child support order was without prejudice to Matt's right to seek retroactive child support at trial.

[63] Further, in Agnes' closing submissions, she argues that she did not engage in blameworthy conduct because she provided Matt with financial disclosure at the time the parties entered into the consent child support in 2018. While that may be true, the consent order of Monahan, J. provides at paragraph 20 that "the parties shall provide each other notification of any change in address or employment, including full particulars about the change, within ten (10) days of the change taking place." Paragraph 21 obliges the parties to notify each other and the Director of the Family Responsibility Office ("FRO") of any change in his/her employment. During her testimony, Agnes admitted that she did not advise Matt or the FRO that her income increased or changed after the consent order was entered into.

[64] Blameworthy conduct has been characterized as "anything that privileges the payor parent's own interests over his or her children's right to an appropriate amount of support". In these circumstances, Agnes was hospitalized shortly after separation. She then required a period of time to adjust. In 2016, Agnes earned $14,612. I decline to order retroactive child support to Matt during 2016. In 2017, Agnes was following the direction of the CCAS and was seeing E. pursuant to their direction. E. was in the primary care of Matt. There is no information on the record that Matt told E. he would be seeking child support from her. In 2017, Agnes earned $26,297.

[65] Matt's Amended Application in which he sought child support from Agnes is dated February 21, 2018. By July 2018, Agnes consented to pay Matt child support for E. and a consent order was reached, in which Agnes agreed to pay child support for E. in the sum of $350 a month. It can be understood why Agnes had a reasonably held belief that she was meeting her child support obligations when she was complying with the July 2018 consent order and continued to do so. However, when one looks at Agnes's reported income in 2018 of $43,369, it is clear she was underpaying child support to Matt. She would have known that by the end of April 2019 when she filed her income tax return. She had a positive obligation in the consent order to advise Matt and the FRO of her changed employment income and did not do so. As set out in para. 54 of *D.B.S.*, "under the federal scheme, a payor parent who does not increase his/her child support payments to correspond with his/her income will not have

fulfilled his/her obligation to his/her children". Agnes did not do so and in this manner, therefore, I find that she did engage in blameworthy conduct.

[66] In the circumstances, I exercise my discretion not to order retroactive child support in 2016. Agnes' child support obligation in 2016 amounted to $90 a month for 5 months from August to December 2016, or $450 for that year. Agnes was hospitalized during that time period. Her earnings were minimal. No order for retroactive child support will be made for 2016.

[67] Agnes's closing submissions state that Matt did not seek retroactive child support until July 1, 2018. I do not agree. As stated above, Matt amended his Application on February 21, 2018, which I find is the date that Agnes had effective notice that Matt would be seeking child support from her. Accordingly, the presumptive date of retroactivity is the date of effective notice, being February 21, 2018. In *Michel*, the SCC expanded on this concept to find that the date of retroactivity of child support awards should correspond to the date when the support ought to have been paid, at para. 131. Following *Michel*, that would take the date of retroactivity to the date of separation. In an attempt to measure the payor's interest in certainty with the interests of the child's right to receive child support in an amount commensurate with a payor's income, I exercise my discretion to order retroactive child support for E. to January 1, 2018.

[68] For the period January 1, 2018, to and including December 31, 2023, I order Agnes to pay retroactive child support to Matt of $12,136, calculated as follows:

[69] Year	Agnes' Line 150 income	Table child Support owing	Child support paid	Underpayment	Subtotal or arrears
2018	$48,369	$448 a mo. or $5,376	$2,000	$3,376	$3,376
2019	$49,251	$454 a mo. or $5,448 a year	$4,200	$1,248	$4,624
2020	$56,524	$522 a mo. or $6,264 a year	$4,200	$2,064	$6,688
2021	$58,214	$538 a mo. or $6,456 a year	$4,200	$2,256	$8,944
2022	$54,687	$504 a mo. or $6,048 a year	$4,200	$1,848	$10,792
2023	$54,687	$504 a mo. or $5,544 a year	$4,200	$1,344	$12,136

[70] I order Agnes to pay Matt child support retroactive from January 1, 2018 to and including December 31, 2023 in the sum of $12,136, payable at the rate of $337.11 for 36 months.

Issue Four: What sum of child support should Agnes pay to Matt prospectively?

[71] Since I have ordered that Agnes shall now have parenting time on 6 overnights out of 14 days, she crosses the threshold of being in a shared parenting arrangement as defined in the *CSG* because she has not less than 40% of the parenting time with E. over the course of a year, particularly when the holiday schedule is considered.

[72] Section 9 of the *CSG* requires a two-step analysis. Firstly, it must be established that "as spouse exercises a right of access to, or has physical custody or, a child for not less than 40% of the time over the course of a year." Secondly, if the 40% threshold has been met, the court must then determine the spouses' child support obligation by taking into account the provisions in subsections 9(a) through (c).

[73] Section 9 of the *CSG* provides that the amount of the child support in a shared parenting time arrangement shall be determined by considering a) the amounts set out in the applicable tables for each of the spouses (this is commonly known as the set-off amount); b) the increased costs of shared parenting time arrangements; and c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[74] As Bastarache, J. noted in *Contino v. Leonelli-Contino,* 2005 SCC 62 (CanLII) at para. 27, "The three factors structure the exercise of the discretion. These criteria are conjunctive: none of them should prevail…Consideration should be given to the overall situation of shared custody and the costs related to the arrangement while paying attention to the needs, resources and situation of parents and any child."

[75] I find that the new parenting schedule I have ordered, along with the holiday time Agnes will have E. clearly amounts to her having parenting time with E. for not less than 40% of the time over the course of the year.

[76] The starting point is to determine the simple set-off amount, as set out in s.9(a) of the *CSG*. Based on Matt's Line 15000 income in 2022 of $40,055, he would owe table child support for E. in the sum of $360 a month. Based on Agnes' Line 15000 income in 2022 of $54,867, her table child support obligation for one child is $506. Accordingly, starting January 1, 2024, the set-off of the table child support obligations results in Agnes owing Matt child support in the sum of $146 a month.

[77] The second step is to review the Child Expense Budgets. For this to occur, the court must look at the parents' actual spending patterns, based upon child expense budgets, and not just make assumptions about spending. There was no evidence led by either party in terms of child expense budgets. Accordingly, this analysis could not be undertaken by me.

[78] The third step is to consider the ability of each parent to bear the increased costs of shared custody and the standard of living for the children in each household. In assessing these factors, a court should look at the income levels of each parent, the disparity in incomes, and the assets and liabilities of each: *Contino,* para. 68.

[79] In reviewing Agnes' sworn financial statement, dated September 25, 2023, she has a negative net worth of ($42,104). Her income in 2022 was $54,867 a year. Matt's sworn

financial statement, dated November 10, 2023, his net worth is $22,479.49. His debts only amounted to $2,000.71. Matt's income was less in 2022 than Agnes' income, being $40,045. However, there is no evidence before the court as to his wife, Lidia's income, and her contribution toward that household's expenses.

[80] Accordingly, without proper evidence led by either party of the increased costs of shared parenting arrangements or the conditions, means needs and other circumstances of Matt, Agnes or E., the court is left to consider only the set-off of the table amounts owing by each parent.

[81] If s.7 expenses are incurred on E.'s behalf, and consented to by each spouse, such consent not to be unreasonably withheld, the parties proportionate obligation to contribute to such expenses is 58% for Agnes and 42% for Matt.

Disposition

[82] This court makes the following order:

E.'s Habitual Residence

a. Pursuant to s.22 of the *Children's Law Reform Act*, Ontario is E.'s ordinary and habitual residence.

Major Decisions

Pursuant to s.16.1(4)(b), 16.2 and 16.3 of the *Divorce Act,* the parents shall make major decisions affecting E.'s life by opening communication and making reasonable efforts to understand the other's perspective, keeping in mind that decisions relating to E. must be made in a manner consistent with her best interests, subject to subparagraphs (c) – (f) below. The parents shall engage in all reasonable efforts and take all reasonable steps to attempt to make significant decisions respecting E.'s health, education, religion and extra-curricular activities jointly.

Medical and Health Decisions

b. Pursuant to s.16.1(4)(b), 16.2 and 16.3 of the *Divorce Act,*

i. In carrying out their responsibility to attempt to reach significant decisions respecting E.'s medical and health decisions jointly, the parties shall at minimum take the following steps:

1. The party raising an issue ("the initiating party") shall advise the other party ("the responding party") in writing of the issue to be decided, their position regarding the issue and the reasons supporting their position, and they shall produce any documentary materials that they want the responding party to review in considering the matter.

2. The responding party shall within 10 days of receiving the message from the initiating party consider the issue, review the materials produced by the initiating party, conduct their own research on the matter, consult with any third parties if they consider this necessary to reach an informed decision, advise the initiating party in writing of their position and the reasons for that position and produce to the initiating party any documentary materials that they want the initiating party to review in considering the matter.

3. The parties shall both take into consideration the views and preferences of E., if appropriate.

4. The parties shall both take into consideration the recommendations of any professionals involved with E. in relation to the issue before formulating their position on the matter.

5. The initiating party shall within 10 days of receiving a response from the responding party consider that party's position and any documentary materials that they have produced in support of it, conduct any further research or inquiries they consider to be appropriate on the issue, and confirm in writing their position on the issue after having undertaken these steps.

6. If the parties are unable to reach agreement on the issue after taking the steps set out above, and either of them requests a second opinion from a professional qualified to provide guidance on the issue, the parties shall forthwith take all necessary steps required to obtain a second opinion.

7. The parties shall confer with each other again about the issue within 7 days after obtaining a second opinion.

8. If the parties remain unable to reach a consensus on the matter, they shall forthwith take all necessary steps to jointly retain either a mediator or a parenting coordinator to assist them in reaching a joint decision. They shall be equally responsible for the cost of this service. They are not required to submit the issue to arbitration.

9. If the parties remain unable to reach a joint decision despite the assistance of a mediator or parenting coordinator, Agnes shall have final decision-making responsibility on the issue.

ii. E.'s doctor shall continue to be Dr. Jabor. If another physician has to be selected in the future for any reason whatsoever, the parents shall consult with each other and select a mutually agreeable paediatrician and/or physician in Etobicoke. If the parties are unable to agree, the applicant shall provide to the respondent the names of three fully certified paediatricians and/or physicians in Etobicoke who are accepting patients and the

respondent shall select one from the list to be E.'s paediatrician and/or physician.

iii. If E.'s physician is not available when required, the parent who has E. in his or her care and control shall be at liberty to take the child to his or her own physician or to an available walk-in clinic. In such event, the parent shall ensure that the other parent and Dr. Jabor (or any physician who has replaced Dr. Jabor) is provided with information respecting such visit.

iv. The parties shall provide E.'s paediatricians/physicians with a copy of the Final Order with respect to decision-making and parenting time and direct the physicians to cooperate with both of the parties.

v. In even-numbered years, Agnes shall be responsible for arranging and taking E. to all of her regularly scheduled medical appointments and will keep Matt fully informed in this regard. In odd-numbered years, Matt shall be responsible for arranging and taking E. to all of her regularly scheduled medical appointments and will keep Agnes fully informed in this regard. Both parties shall have direct and independent access to E.'s medical files and to any of E.'s doctors. All doctors will be given immediate written authorization to release any present or further information requested to both of the parties.

vi. Should E. be in the hospital, the non-resident parent shall be notified forthwith and equal times will be allotted for each parent to visit the child individually. In a dire situation, both of the parties shall attend.

vii. E.'s dentist shall continue to be Toronto Lakeshore Dentist. If another dentist has to be selected in the future for any reason whatsoever, the parents shall consult with each other and select a mutually agreeable dentist in Etobicoke. If the parties are unable to agree, the applicant shall provide to the respondent the names of three fully certified dentists in Etobicoke who are accepting patients and the mother shall select one from the list to be E.'s dentist.

viii. If E. requires cosmetic medical care (i.e. braces), the parties may each obtain up to two quotes for said medical procedure. The parties shall present said quotes to the specialist responsible for E.'s cosmetic medical procedure (for example: E.'s dentist if she required braces) and the parties shall jointly decide in consultation with the medical specialist which quote offered provides the best medical treatment at the most efficient cost. If the parties cannot agree, the respondent shall have final decision-making authority over cosmetic medical care.

ix. If E. needs emergency medical care while with one parent, that parent shall promptly notify the other of the emergency and he or she shall consult with and consider the views of the other parent in addressing such

emergency. Both parents may attend at the hospital or doctor's office. The parents shall jointly consult with the physicians or, where it is not possible, the parties shall make an urgent medical decision in consultation with the physician/specialist and agree to be bound by the consensus emergent medical opinion.

x. In even-numbered years, Matt shall be responsible for arranging and taking E. to all of her dental appointments and visits and will keep Agnes fully informed in this regard. In odd-numbered years, Agnes shall be responsible for arranging and taking E. to all of her dental appointments and visits and will keep Matt fully informed in this regard.

xi. Medical prescriptions for E. shall be given to the receiving parent in their original bottles or vials. Should any antibiotic or other medication be prescribed for E. the name of this medication and its schedule for administration shall be emailed to the receiving parent and the medication shall be provided to the parent receiving E. or left with the school upon transition taking place.

xii. Each parent shall provide permission to E.'s physicians to release information to the other parent, and such permission shall be provided in writing if required by a physician to release information.

xiii. Each parent shall obtain relevant records/information from E.'s physicians directly.

<u>Education Decisions</u>

c. Pursuant to s.16.1(4)(b), 16.2 and 16.3 of the *Divorce Act*,

i. In carrying out their responsibility to attempt to reach significant decisions respecting E.'s education jointly, the parties shall at minimum take the following steps:

1. The party raising an issue ("the initiating party") shall advise the other party ("the responding party") in writing of the issue to be decided, their position regarding the issue and the reasons supporting their position, and they shall produce any documentary materials that they want the responding party to review in considering the matter.

2. The responding party shall within 10 days of receiving the message from the initiating party consider the issue, review the materials produced by the initiating party, conduct their own research on the matter, consult with any third parties if they consider this necessary to reach an informed decision, advise the initiating party in writing of their position and the reasons for that position and produce to the

initiating party any documentary materials that they want the initiating party to review in considering the matter.

3. The parties shall both take into consideration the views and preferences of E.

4. The parties shall both take into consideration the recommendations of any professionals involved with E. in relation to the issue before formulating their position on the matter.

5. The initiating party shall within 10 days of receiving a response from the responding party consider that party's position and any documentary materials that they have produced in support of it, conduct any further research or inquiries they consider to be appropriate on the issue, and confirm in writing their position on the issue after having undertaken these steps.

6. If the parties are unable to reach agreement on the issue after taking the steps set out above, and either of them requests a second opinion from a professional qualified to provide guidance on the issue, the parties shall forthwith take all necessary steps required to obtain a second opinion.

7. The parties shall confer with each other again about the issue within 7 days after obtaining a second opinion.

8. If the parties remain unable to reach a consensus on the matter, they shall forthwith take all necessary steps to jointly retain either a mediator or a parenting coordinator to assist them in reaching a joint decision. They shall be equally responsible for the cost of this service. They are not required to submit the issue to arbitration.

9. If the parties remain unable to reach a joint decision despite the assistance of a mediator or parenting coordinator, Matt shall have final decision-making responsibility on the issue.

ii. E. shall continue to attend Holy Trinity Catholic School until she commences Grade 9 and remain in the Toronto Catholic District Board school system. If E. is not able to continue at this school, the parties shall discuss and agree to an alternate school.

iii. The school shall provide each parent with any and all information that either parent may request or require.

iv. While E. is in the care of her father, Matt shall arrange for E.'s before and after school care. While E. is in the care of her mother, Agnes shall arrange for E.'s before and after school care.

v. The resident parent shall have the daily responsibility of ensuring that all of E.'s homework/projects are completed in a timely manner when E. is in his or her care.

vi. Documents for the school and agenda that are to be signed by one or both parents shall be signed by one or both of the parents and not be delegated to a third party.

vii. Both parties may attend parent-teacher meetings. They shall arrange on their own behalf for a separate meeting. Each parent may communicate freely with E.'s teachers and with the school principal. The parties shall provide E.'s school with a copy of this Order and request that the school cooperate with each parent in accordance with the terms of this Order.

viii. It is each party's responsibility to stay up to date on any relevant educational matters (special events, concerts, time of parent-teacher meetings, etc.). Each parent shall request from the school that he/she be provided with all notices, report cards, etc. All notices brought home by E. from school shall remain with E. until both parties have initialled the notice to show they have read and recorded the information.

ix. The parties shall rotate their attendance on E.'s school field trips. Agnes shall attend E.'s first school field trip and Matt shall attend E.' second school field trip and the parties shall rotate their attendance as such thereafter. In the event that a parent is unable to attend his or her scheduled school field trip with E., then the other parent may attend. The rotation schedule would then resume. For example, if Matt is scheduled to attend E.'s school field trip and he cannot attend and Agnes cannot attend either, then the regular rotation would resume whereby Agnes would attend the next school field trip.

Extra-curricular Activity Decisions

d. Pursuant to s.16.1(4)(d) of the *Divorce Act*,

i. E. shall not be registered in more than two regularly scheduled extra curriculars activities per week, with each parent being entitled to select one, unless the parties otherwise agree in writing. A parent in selecting an activity shall consult with the other and appreciate that if he or she selects an activity that the other parent, for whatever reason is unable to ensure the child's attendance when the child is with the other parent, that the other parent shall not be obligated to ensure E.'s attendance at the activity.

ii. E.'s preferences regarding activities and lessons shall be taken into account and given age-appropriate weight.

iii. The resident parent shall decide on E.'s activities and be responsible for taking E. to those activities on his/her designated days.

iv. Each parent shall be entitled to all information (name of leader/instructor, school and location, etc.) of any activity E. is enrolled in. The parties shall obtain schedule's and other necessary information, including dates of special events, directly from the instructors and/or coaches of the activity. If one parent receives oral notice of any special activity or change of schedule, that parent shall promptly inform the other parent of that activity or schedule change.

v. Each parent may attend the regularly scheduled games or competitions, as well as the associated special events (e.g. games, concerts, recitals, shows, performances, etc.) The parents shall remain cordial during these occasions and not use them as an opportunity to discuss child-related arrangements and issues. Each parent is free to decline to attend an event if he or so chooses.

vi. If the parties cannot agree on any of E.'s extra-curricular activity-related decisions after consulting with one another and taking E.'s views and preferences into account, the applicant shall have final decision-making authority over these decisions.

Religion

e. Pursuant to s.16.1(4)(b), 16.2 and 16.3 of the *Divorce Act*,

i. Both parties are at liberty to expose E. to the religion of their choice, including taking the child to church with them. Neither party will try and persuade E. that any religious denomination is better than the other.

Day-to-Day Decisions

f. Pursuant to s.16.1(4)(b), 16.2 and 16.3 of the *Divorce Act*, day-to-day decisions for E. shall be made by the residential parent. Day-to-day decisions include decisions such as whether E. receives over the counter medication, whether E. does not attend school due to illness etc.

Regular Residency Schedule

g. Pursuant to s.16.1(4)(a) and 16.2(1) of the *Divorce Act* E. shall reside primarily with Matt and have parenting time with Agnes as follows:

i. In Week one:

1. Wednesday, from after school/daycare/camp until Thursday morning; and

2. Friday, from after school/daycare/camp until Monday Morning return to school/daycare/camp.

ii. In Week Two,

1. Wednesday, from after school/daycare/camp until Friday morning.

h. Pursuant to s.16.1(4)(a) and 16.2(1) of the *Divorce Act*, parenting transitions shall occur to/from E.'s school/daycare or camp where possible. This applies to both the regular schedule of parenting time and the holiday schedule.

i. Pursuant to s.16.1(4)(a) and 16.2(1) of the *Divorce Act* , where there is no school or camp on a day that E. is to transition to Agnes' care, the transition shall occur at 3:00 pm with Matt dropping E. to Agnes's home. Where there is no school or camp on a day that E. is to transition to Matt's care, the transition shall occur at 9:00 am with Agnes dropping E. to Matt's home. This applies to both the regular schedule of parenting time and the holiday schedule.

The Holiday Schedule

j. The holiday schedule shall override the regular schedule as follows:

i. Easter - The parties shall alternate having parenting time with E. during Easter (from Good Friday at 9:00 am until Easter Monday at 6:00 p.m.) after which the regular parenting time schedule shall resume. Matt shall have parenting time during Easter in even-numbered years beginning in 2024 and Agnes shall have parenting time during Easter in odd-numbered years beginning in 2025.

ii. Summer School Break - the parties shall each have up to three weeks of summer break with E. during her summer school break. Matt shall have first choice of summer vacation days in even numbered years commencing in 2024. He shall advise Agnes in writing by March 1st of his chosen weeks. Agnes shall advise Matt by March 15th of her chosen weeks. Agnes shall have first choice of summer vacation days in odd numbered years commencing in 2025. She shall advise Matt of her chosen weeks by March 1st. Matt shall advise Agnes of his chosen weeks by March 15th. The regular residency schedule shall apply for the remainder of the summer, other than these 6 weeks.

iii. Winter School Break/Christmas/New Years: Christmas - The parties shall have alternate having parenting time with E. for Christmas (defined as December 24 at 10:00 am until December 25 at 6:00 p.m. Agnes shall have E. during even-numbered years beginning is 2024 and Matt shall have E. during odd-numbered years beginning in 2023.

iv. New Year's Eve – E. shall alternate having New Year's Eve with one parent and New Year's day with the other parent. Agnes shall have New Year's Eve in even- numbered years commencing in 2024 and Matt shall have New Year's Day in odd -number years commencing in 2023. Drop off for New

Year's Day shall take place at 10:00 am and the regular schedule shall resume on January 2, 2024 at 9:00 am

v. With the exception of parenting time on Christmas and New Year's, as set out above, the regular schedule shall apply for the balance of E.'s Winter School Break, unless a parent wishes to travel with E. unless a parent wishes to travel with E.

vi. Thanksgiving - The parties shall alternate having Thanksgiving with E., with Matt having even-numbered years commencing in 2024 and Agnes having odd- numbered years commencing in 2025. The Thanksgiving break shall be from after school on the Friday before Thanksgiving weekend until Monday at 6:00 pm.

vii. Mother's Day/Father's Day – If E. is not already with Agnes on Mother's Day, she shall be in her care on Mother's Day from 9:00 am to 6:00 pm. If E. is not already with Matt on Father's Day, she shall be in his care on Father's Day from 9:00 am to 6:00 pm.

viii. Step-Parents/Half-Siblings/Maternal Grandmother – If E. is not already with Matt on Lidia's birthday or H.'s birthday, she shall be in his care on each of these days from 9:00 a.m. to 6:00 p.m. If E. is not already with Agnes on Irena's birthday and only if Irena is in Toronto, she shall be in her care on this day from 9:00 a.m. to 6:00 p.m.

Special Events, Celebrations, Etc.

k. If a change in the regular and/or holiday schedule is requested due to a special event, celebration or unforeseen circumstances (e.g. family celebration, work demand or emergency, etc.), a written request shall be provided to the other parent in order to permit that parent to make a reasonable effort to accommodate the request. Both parents recognize that the more notice given, the greater the likelihood that the other parent will not have made special plans that are difficult to forfeit. A response shall be provided within 48 hours of receiving the request. The request and change shall be confirmed in writing.

l. A parent shall not make plans for E. when she is scheduled to be with the other parent, without first having the written consent of the other parent. In addition, the parents shall canvas proposed and/or potential changes to the schedule first with the other parent and prior to mentioning anything to E. about a change and/or a social activity.

m. There shall be no make-up time for missed parenting time (regular or holiday time) unless both parents agree to this in advance and it is confirmed in writing.

Communication

n. Pursuant to s.16.1(4)(c) of the *Divorce Act*,

i. The parties shall communicate about E. by message on Our Family Wizard (and by text only where absolutely necessary). The messages shall not be read by E. The parties shall respond to each other messages within 12 hours. If a reply to a question or message or a request for a change requires more time than the agreed to response time, a message shall be sent advising the other parent that the requested information cannot reasonably be ascertained by then and advising when a respond can be expected.

ii. For anything of a truly time sensitive or urgent nature, the parties shall text and a response shall be provided as soon as the parent receives that communication. Thae parties shall check for text at least every few hours.

iii. In an effort to foster consistency, predictability, stability and continuity of care for E., the parties shall communicate regularly by OFW message regarding her routine, activities, experiences, and school. These messages shall not be forwarded or shown to E.

iv. All communications, written or otherwise, shall be cordial, brief and to the point about E. The parties shall refrain from including information that reflects personal and negative feelings, frustrations and opinions about the other parent, their motives, personality and behaviour. The parties shall refrain from disparaging and blaming the other parent, their spouse/partner or extended family members.

Telephone Calls between E. and the Parents

o. Pursuant to s.16.1(4)(c) of the *Divorce Act*,

i. Agnes shall provide E. with a cellphone and arrange for a cellphone service plan, at her sole cost, to be delivered to Matt's counsel's office for E.'s sole use.

ii. E. may call either parent whenever she wishes and the parties shall permit her to have unmonitored access to the parent she wishes to call, with the understanding that a call may need to occur at time other than mealtimes or bedtime.

iii. The resident parent shall facilitate a call between E. and the other parent at least once per day, between 6:30 and 6:45 p.m.

iv. The parties shall encourage E. to feel comfortable calling the other parent and shall afford her privacy to do so.

v. E. shall not be used to relay messages between the parents.

vi. The parties shall not communicate about issues or other non-emergency arrangements when E. is present or nearby.

vii. Discussions between the parents occurring in the presence of E. or within hearing range of E. shall be kept courteous and professional.

viii. The parties shall not question E. about the other parent's personal life and activities.

E.'s Belongings

p. Pursuant to s.16.1(4)(d) of the *Divorce Act*,

i. to minimize what E. must travel with, both parents shall have sufficient clothing for E. and these shall not travel back and forth.

ii. E.'s belongings belong to her. Within reason, she shall have the option of taking preferred clothing, equipment, books, computer programs, games, toys, etc. back and forth as she wishes. E. shall be encouraged to assume responsibility for these items by remembering to bring and return them as she desires or requires.

Travel

q. Without E.

i. Pursuant to s.16.1(4)(d) of the *Divorce Act*, if either parent plans a vacation without E., that parent shall give the other parent a telephone number where he/she can be reached in case of emergency or if E. wishes to contact the travelling parent.

r. With E.

i. Pursuant to s.16.1(4)(d) of the *Divorce Act*, if either parent plans a vacation with E., such parent must provide the other parent with a detailed itinerary at least 21 days prior to departure, including dates of departure and return, transportation particulars, accommodation information, including the address and telephone number where E. can be reached by the other parent.

ii. Pursuant to s.16.1(4)(d) of the *Divorce Act*, E. may travel within Canada for vacation purposes with either parent, which travel will not require the consent of the other party. However, the parents must adhere to the terms of the preceding paragraph.

iii. Pursuant to s.16.1(4)(d) of the *Divorce Act*, E. may travel outside of Canada for vacation purposes with either parent, which travel will require the consent of the other party. The consent shall not be unreasonably withheld. The non-travelling parent shall execute whatever documentation is

presented to him or her to provide the requisite consent to any travel outside of Canada. Such documentation, must be accompanied with the detailed itinerary as provided in paragraph i above. Such documentation is to be prepared and provided at the travelling parent's expense 21 days before the intended trip.

iv. If Matt plants to travel with E. to Poland and/or a country that is a non-signatory to the *Hague Convention on the Civil Aspects of International Child Abduction*, and E. is not returned to Canada on the return date set out in his itinerary, for any reason inside his control (not including for example a change to a parent's flight made by the airline carrier, or a delay in her fight by the airline carrier because of bad weather), the following default Order shall be made:

    1. E.'s primary residence shall be changed such that she resides primarily with Agnes;

    2. Agnes shall be granted sole decision-making responsibility for E.

    3. E.'s habitual residence shall be declared to be Ontario;

    4. Matt shall pay to Agnes $20,000 in costs.

v. If Agnes plans to travel with E. to Poland and/or a country that is a non-signatory to the *Hague Convention on the Civil Aspects of International Child Abduction*, and E. is not returned to Canada on the return date set out in her itinerary, for any reason inside his control (not including for example a change to a parent's flight made by the airline carrier, or a delay in her fight by the airline carrier because of bad weather), the following default Order shall be made:

    1. E.'s primary residence shall be with Matt;

    2. Matt shall be granted sole decision-making responsibility for E.

    3. E.'s habitual residence shall be declared to be Ontario;

    4. Agnes shall pay to Matt $20,000 in costs.

vi. If either parent breaches any term(s) of r(iv) and(v) of this order in terms of travelling with E. to Poland and/or to a country that is a non-signatory to the *Hague Convention on the Civil Aspects of International Child Abduction* the breaching parent shall pay the other parent any losses associated with the travel and all costs incurred by the non-breaching parent to enforce this order.

vii. Pursuant to s.16.1(4)(d) of the *Divorce Act*, a parent travelling with E. outside of Ontario shall ensure that there is adequate health insurance

coverage in pace for the duration of the trip. The non-travelling parent shall be provided evidence that such coverage is in place 14 days before the departure date. The travel consent shall not be subject to release to the travelling parent in the absence of such evidence being provided that adequate health insurance overage is in in place.

viii. Pursuant to s.16.1(4)(d) of the *Divorce Act*, each parent shall designate a contact person of his or her choice should the other parent not be able to be contacted in case of emergency.

OHIP Card

s. E.'s OHIP card shall be held by Agnes and she shall provide Matt with a copy of her health card so that it is readily available in the event of an emergency.

Passport, Social Insurance Card and Birth Certificate

t. The parties shall be responsible for making passport applications for E. and shall ensure that E. has a passport. Both parties shall share equally in the costs of the passport application. Matt shall be responsible for keeping the passport and shall provide it to Agnes for the purposes of travel as set out above. If the passport is lost, the parent responsible for losing the passport shall be responsible for any costs associated with obtaining a replacement passport.

u. Matt shall also be responsible for keeping E.'s birth certificate and social insurance card and shall provide it to Agnes upon the mother's request and whenever necessary. If the card is lost, the parent responsible for losing the card shall be responsible for any costs associated with obtaining a replacement card.

Name Change

v. E.'s name shall not be changed unless both parents agree in writing.

Right of First Refusal

w. If a parent who is scheduled to have E. in his or her care and control is unable to care for E. for a period of forty-eight (48) hours or more, the other parent will be given the opportunity to care for E.. If the notified parent cannot care for E., the

notifying parent will make appropriate childcare arrangements at his or her own expense.

Child Support

x. Pursuant to s.15.1(a) of the *Divorce Act*, starting on January 1, 2024 and on the first day of each following month, Agnes shall pay Matt set-off child support for E. in the sum of $114 a month, calculated as follows:

    i. Matt shall pay Agnes table child support in the sum of $392 a month, based on his income of $42,900;

    ii. Agnes shall pay Matt table child support in the sum of $506 a month, based on her income of $54,867.

y. The parties shall contribute to E.'s special or extraordinary expenses on the basis of Agnes paying 56% and Matt paying 44% of such expenses. Each party shall be consulted in advance before a special or extraordinary expense is incurred and both parties shall agree in advance to the expense before the expense is incurred.

z. Neither party shall incur any special or extraordinary expenses for which a contribution is sought from the other party without prior consultation and consent of the other party, such consent not to be unreasonably withheld. In considering proposed special or extraordinary expenses both parties will consult with any recommending professional as to the necessity and medical or therapeutic benefit to E. of any proposed activity or service.

aa. In addition to the ongoing child support referred to subparagraph x. above, Agnes shall pay to Matt retroactive table child support for E. in the amount of $12,136 up to and including December 31, 2023. Agnes shall pay this amount to Matt by way of 36 monthly installments of $337.11 payable on the first day of each month commencing January 1, 2024, until the arrears are satisfied.

Health and Medical Insurance

bb. The parents shall each maintain E. as beneficiary on all health and medical, dental and drug coverage or plans of insurance available to him/her through his/her employment for so long as E. remains a child of the marriage. They shall share particulars of the available coverage for E. and coordinate use of the same to ensure maximum reimbursement from the coverage providers.

cc. The father and the mother shall reimburse the other for all amounts recovered by each for expenses incurred by the other for E. with fourteen (14) days of receipt of the reimbursement.

dd. Any health, medical, dental and drug expenses incurred by either parent not covered by either party's health insurance plans shall be shared equally between the parties.

Annual Exchange of Income Information

ee. On or before May 1st of each year, commencing May 1, 2024, each party shall provide to the other a copy of their Income Tax Return as filed for the immediate preceding year. Each party shall provide a copy of their Notice of Assessment/Re-Assessment within ten (10) days of receipt of same from the CRA. On June 1st of each year, commencing on June 1, 2024, the parties shall adjust each party's contribution to the children's special or extraordinary expenses, if necessary, based on each party's income in the immediate preceding year.

ff. The parties shall review the child support arrangements on or before June 1st of each year, commencing in 2024.

gg. Agnes' claim for spousal support from Matt is dismissed.

hh. Unless the support order is withdrawn from the Family Responsibility Office, it shall be enforced by the Director and amounts owing under the order shall be paid to the Director, who shall pay them to the person to whom they are owed. A support deduction order will be issued.

ii. Agnes and Matt shall provide to the other party and the Director of the Family Responsibility Office notification of any change in his/her address or employment, including full particulars about the change, within ten (10) days of the change taking place.

jj. If the parties cannot agree on costs, they shall each submit written costs submissions of no more than 3 pages, not including Offers to Settle or a Bill of Costs within ten days of the release of this Endorsement. Within 7 days of being served with the other party's costs submissions, each party shall serve and file responding costs submissions of no more than 1 page.

Released: December 21, 2023

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M. Kraft, J.

CITATION: Predotka v. Dudek, 2023 ONSC 7025
COURT FILE NO.: FS 16-21024
DATE: 20231221

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Mateusz Predotka

Applicant

– and –

Agnieszka Dudek

Respondent

REASONS FOR DECISION

M. Kraft, J.

Released: December 21, 2023