CITATION: Clarke v. Denyes, 2025 ONSC 1894
COURT FILE NO.: FS-19-8589
DATE: 20250317

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Harry James Clarke	)	*Julie Stanchieri/David Rappaport*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
Melissa Joy Denyes	)	Self-represented
	)	
Respondent	)	
	)	
	)	**HEARD:** October 28 – November 5, and November 26, 2024

JUSTICE MATHEN

[1] The Applicant, James Clarke ("James"), and Respondent, Melissa Denyes ("Melissa"), have two much loved children H., age 11, and E., age 9. James and Melissa have had a protracted dispute since 2018. They have been unable to resolve issues about relocation; parenting; decision-making; child support; section 7 expenses; retroactive support; spousal support; post-separation adjustments; life insurance; and costs.

[2] This is a high-conflict matter. The parties attended approximately twenty Conferences and litigated at least four motions. They have attended five mediations. While this trial decision was under reserve, the parties had an emergency motion just before Christmas. Another motion was filed on February 3, 2025.

[3] The heart of this case is about parenting time and decision-making. H. has special needs. In 2017, he was diagnosed with autism, an intellectual disability and ADHD. James and Melissa disagree profoundly on his best course of treatment, education, general supports and, even, his diagnosis. They also disagree about their daughter, E.

[4] Melissa seeks to relocate with the children to Nova Scotia at some future time. The main issues of the trial, among other things, are whether Melissa's proposed relocation is in the children's best interests; which parenting schedule is in the children's best interests; and which

decision-making regime is in the children's best interests. Currently, the children reside primarily with Melissa and with James for three and a half hours on Tuesdays; alternate Thursdays overnight to Friday morning, and alternate weekends. This temporary parenting schedule, in place since 2023, results in James having 4 overnights out of every 14 days. James is seeking an equal time-sharing schedule. Both parents seek sole decision-making responsibility for the major decisions that impact the children.

BACKGROUND

History

[5] James and Melissa, who never married, cohabited from 2012 to 2018. Their children were born, respectively, in 2014 and 2016.

[6] In 2022, James married a woman named Holly. They do not have children of their own.

[7] James is a former commercial marine officer. He currently works for the Ports Toronto Outer Harbour Marina, 7 am – 3 pm, Mondays through Fridays, from March through December. When the Marina is closed every winter, he is laid off. In 2023, he earned approximately $58,000. James also has an inheritance from his father who passed away in 2023, but it is still in process.

[8] Melissa works at Intact Insurance ("Intact"). Her 2023 T1 indicates an income of $189,895.53.

[9] H. was diagnosed with autism in 2017. In addition to his parents and stepmother, H. gets support from the following professionals:

a. Bianca Bozelli, Board-Certified Behavioural Analyst ("BCBA")

b. Mary Bowden and Stephanie Weleschuk, speech therapists

c. Erin Arnott, an Orton Gillingham tutor who also does Applied Behaviour Analysis ("ABA") therapy

d. Seema Pietrocarlo, ABA therapist

e. Hartley Garfield, Pediatrician

f. Dr. Langburt, Neurologist

[10] E. presents as neurotypical and does not have any current diagnoses.

[11] Alleging that Melissa was denying him meaningful parenting time, James started this litigation in 2019. James first secured overnights with the children in June 2020.

[12] Under an interim order issued by Justice Kraft on July 5, 2023 ("July 2023 Order"), James currently enjoys parenting time:

a. Every Tuesday from 3:00 pm until 6:30 pm.

b. In Week One, Thursday from 3:00 pm to Friday drop off at school.

c. In Week Two, Thursday from 3:00 pm to Sunday at 4:00 pm.

[13] In November 2023, James won a motion to place H. in a special education class with partial integration at Secord Elementary School ("Secord"). H. moved to Secord from Pape Avenue Junior Public School ("Pape") the following January. The placement at Secord followed two recommendations of the Identification, Placement and Review Committee ("IPRC") of the Toronto District School Board ("TDSB").

[14] Melissa resisted this placement, a fact discussed at length in these reasons. As a result, James brought a further motion and, in March 2024, Justice Sharma granted James temporary sole decision-making authority with respect to, among other things, H.'s education ("Sharma Order").

[15] In 2023, Melissa secured $65,000 through the Ontario Autism Program ("OAP") to meet H.'s core clinical needs. It appears that she is the only person who can access this funding, which is reviewed annually.

[16] Citing Toronto's high cost of living, Melissa wishes to relocate to Windsor, Nova Scotia.

[17] Melissa took a leave of absence from her job to focus on this trial. She represented herself. She conducted cross-examinations of the witnesses in a professional manner, including adducing evidence to support her claims. Melissa's case in chief was less organized. She would start discussing one topic then shift to another one. She adduced plenty of evidence, but none about her financial claims. Her closing submissions relied on documents that she had not adduced into evidence. She stated that she did not understand that she needed to adduce things upon which she intended to rely for her own case, for example, her messages to James about section 7 expenses over the years. She thought she could merely upload them to Case Center. This statement is puzzling given that she did adduce copious evidence with respect to other witnesses. It is unclear why Melissa's case in chief was less organized than her cross-examination, as she was clearly competent to do both. She was given ample opportunity to present her case.

Issues to be Decided

[18] The trial raised the following issues:

a. Should Melissa be permitted to relocate with the children to Nova Scotia or elsewhere?

b. What parenting schedule is in the best interests of the children?

c. Who should make decisions for the children?

d. What, if any, child support is payable, and should income be imputed to either party?

e. How should section 7 expenses be shared?

f. Does either party owe retroactive child support or section 7 expenses?

g. Is either party entitled to spousal support? If so, in what quantum or amount and for how long/what duration?

h. Does either party owe any post-separation adjustments?

i. Should the Court include any additional terms to ensure compliance with this Order?

[19] During the trial, the parties agreed that each would take out life insurance, payable to the other in trust for the children, to secure their child support obligations as ordered by this Court.

[20] Both parties referred to prior CAS reports that they believe cast the other in a negative light. None of these reports were verified by CAS. No CAS workers were called to testify. There is no evidence of concerns regarding abuse or neglect by either party. I therefore find these allegations of little use and will not deal with them further.

[21] At several points during the trial, and again in her closing submissions, Melissa requested that the court consider "family violence" when determining the best interests of the children. James denies that he has ever been violent or abusive.

[22] In her form 35.1 affidavit sworn on April 10, 2019, Melissa stated "none" in response to the question of whether she was aware of violence or abuse that the court should consider under section 24(4) of the *Children's Law Reform Act*, R.S.O. 1990, c.C.12 ("*CLRA*"). However, on an updated form dated October 14, 2024, she listed the involvement of the CAS noted just above.

[23] At trial, Melissa did not describe any events that qualify as family violence under either the *Family Law Act* or *CLRA.* She acknowledges that she is not bringing a "formal claim for family violence, personal injury, or conspiracy tort [*sic*]".

[24] The court must always be alert to the possibility that family violence is or might be a factor. In this case, however, no evidence supports Melissa's somewhat vague allusions.

Party Positions

[25] James believes that the ongoing litigation is highly detrimental for both children. He views Melissa as unreasonable on parenting time and decision-making; resistant to accepting views that deviate from her own; and defiant of or indifferent to court orders.

[26] James does not want Melissa to relocate with the children outside of Toronto. He seeks equal parenting time on a 2-2-5-5 schedule and sole decision-making responsibility. He wants monthly set-off child support from Melissa on an ongoing basis, and an order setting Melissa's share of section 7 expenses at 70%. He wants retroactive section 7 expenses and post-separation adjustments. He wants to continue certain provisions in a prior court order issued by Justice Sharma. He seeks costs.

[27] James has provided exhaustive wording in relation to the above relief. He says the orders must be extremely specific and detailed to prevent Melissa from impeding or defying them.

[28] Melissa believes that James has used family resources to engage in litigation abuse. She believes that she best understands the children's needs. She refuses to increase James' parenting time. She argues that the current parenting schedule meets both children's needs, and a change would be harmful to H. She wants sole decision-making responsibility.

[29] Melissa seeks permission to relocate the children "to a less expensive jurisdiction". Based on an imputed income to James of $250,000 a year, she seeks retroactive and ongoing child and spousal support and section 7 expenses. She asks for an additional "$40,000 for H. for a period of 12 years starting May 1, 2025" to meet "special and extraordinary expenses." She also seeks post-separation adjustments.

[30] In her closing submissions, Melissa asked the Court to "supersede all prior orders, including costs awards against her." After the Court explained to her that prior costs awards can only be varied on appeal, and not through this trial, Melissa abandoned that argument. I will not address it further.

[31] James' counsel objected to some of Melissa's closing submissions on the basis that they introduced new evidence that had not been adduced at trial. Where necessary, I will deal with any evidentiary issues in Melissa's presentation.

Brief Conclusion

[32] Melissa's request for permission to relocate is dismissed. The parties shall have equal parenting time. It is in the children's best interests that James exercise sole decision-making. Table child support will reflect Melissa's 2023 income, and an imputed income to James though not at the level Melissa asked for. The parties will share equally in section 7 expenses. Melissa's claims for ongoing support and post-separation adjustments are dismissed. James' claims for retroactive section 7 expenses and post-separation adjustments are granted in part. I will add several provisions to my order to minimize the potential for further disruptive and expensive court proceedings.

CREDIBILITY AND WITNESSES

Overview

[33] Credibility is a primary vehicle for determining the truth of alleged facts. This can be a difficult task: *Konstan v. Berkovits*, 2023 ONSC 497, 2023 CarswellOnt 932. It is not an exact science: *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621.

[34] Traditional criteria used to assess witness evidence includes witness demeanour, inherent probability in the circumstances, and internal and external consistency: *Prodigy Graphics Group Inc. v. Fitz-Andrews*, 2000 CarswellOnt 1178, 96 A.C.W.S. (3d) 177 at para. 46 per Justice Cameron.

[35] Witness credibility is critical to the burden of proof. Where a party has the burden to discharge a legal onus, I must satisfy myself, on a balance of probabilities, of "the credibility and reliability of the evidence in order to be in a position to make the relevant findings of fact": *Konstan*, at para. 9.

[36] Credibility differs from reliability. Credibility has to do with whether someone is honest, while reliability concerns whether their testimony is accurate: *R. v. Sanichar*, 2013 SCC 4, [2013] 1 S.C.R. 54 at para. 19. One may find a witness generally credible yet doubt their reliability. Conversely, a witness who is not credible may still offer reliable testimony.

The parties

[37] I found James credible. He gave his testimony in a straightforward if occasionally excitable manner. He was somewhat argumentative with Melissa, but I find this was an emotional response to being cross-examined by his former spouse rather than an attempt to mislead the court. On a few questions, James was evasive. He resented Melissa's questions about his family's businesses and the details of his inheritance. At times, his answers seems deliberately obtuse. Through his counsel, James also produced detailed documentary support for many of his claims. While I do not accept all of his arguments, for the most part, I find his evidence to be reliable.

[38] I find Melissa less credible and reliable than James. I do not think that Melissa was deliberately dishonest, but her testimony suffered from two other flaws. First, Melissa did not adduce the necessary evidence or organize her case to support her claims. She made assertions that are not supported by the evidence. Second, when she made her presentation in chief and her closing submissions, Melissa did not maintain a consistent narrative and focus. She frequently delivered long, winding accounts and statements that were difficult to follow. Having said that, when she cross-examined witnesses, Melissa was controlled and professional.

Other witnesses

[39] In addition to the parties' evidence, the court heard from three witnesses: James' wife Holly Clarke, Dr. Michael Saini, and Mr. Stephen Cross.

Holly Clarke

[40] Holly and James married on September 3, 2022. The two have known each other since childhood. Holly testified to her and James' relationship with the children and the difficulties she and James have had with Melissa.

[41] Holly is an executive with the social media company Meta, and the primary breadwinner in her marriage.

[42] As a witness, Holly was straightforward and clear. While she is negatively disposed to Melissa, she acknowledged that Melissa is "talented" and cares deeply for the children. Holly is distressed by the acrimony between the parties. I find her testimony both credible and reliable.

Dr. Michael Saini

[43] James introduced as a witness, Dr. Michael Saini, a Full Professor at the Factor-Inwentash Faculty of Social Work at the University of Toronto, and a clinician in private practice. Dr. Saini spoke of his experience preparing section 30 assessments and VOC reports, as well as past experiences as an expert witness. I am persuaded that he is an expert in high conflict separation, parenting plans for children, and children with special needs.

[44] Dr. Saini testified about a report he prepared between July 16-31, 2024. I refer to his evidence in the analysis of relocation, and parenting.

Stephen Cross

[45] On July 5, 2023, Justice Kraft ordered that Stephen Cross be appointed as a section 30 assessor.

[46] While both parties agreed to his appointment, in early 2024 Melissa objected to Mr. Cross' credentials on the basis that:

a. Mr. Cross had misrepresented himself as a "registered social worker" even though he had resigned from the Ontario College of Social Workers and Social Service Workers – *Mr. Cross testified that this was due to a failure to update his electronic signature and that his current cv does not show him as a current member.*

b. Mr. Cross is not a doctor – *Mr. Cross acknowledged this and said the confusion arose because Justice Kraft referred to him as "Dr." in her July 2023 order. Mr. Cross said he never represented himself as a psychologist.*

[47] At the trial, Melissa did not reiterate her challenge to Mr. Cross's credentials but cross-examined him on his recommendations and evidence.

[48] I accept Mr. Cross as an expert witness. I am not persuaded that he deliberately misrepresented his credentials. His section 30 report was admitted into evidence, and he spoke to it extensively. I refer to his testimony in relation to parenting and decision-making.

ANALYSIS

Introduction

[49] The facts as I find them are set out in the following analysis.

Issue One: Should Melissa be permitted to relocate with the children to Nova Scotia or elsewhere?

The Law

[50] Under the *CLRA*, a parent who has decision-making responsibility for a child and wishes to relocate with that child must, within 60 days, notify any other person with decision-making responsibility for the child of that intention. The notice shall be in writing, setting out the date of the expected relocation: *CLRA* s. 39.

[51] In determining whether to authorize a relocation, the court shall have regard to:

a. the reasons for the relocation;

b. the impact of the relocation on the child;

c. the amount of time spent with the child by each person who has parenting time or is an applicant for a parenting order with respect to the child, and the level of involvement in the child's life of each of those persons;

d. whether the person who intends to relocate the child has complied with any applicable notice requirement under section 39.3 and any applicable Act, regulation, order, family arbitration award and agreement;

e. the existence of an order, family arbitration award or agreement that specifies the geographic area in which the child is to reside;

f. the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of decision-making responsibility, parenting time or contact, taking into consideration, among other things, the location of the new residence and the travel expenses; and

g. whether each person who has decision-making responsibility or parenting time or is an applicant for a parenting order with respect to the child has complied with their obligations under any applicable Act, regulation, order, family arbitration award or agreement, and the likelihood of future compliance.

[52] If under an order or agreement a child spends "substantially equal time" in the care of each party, the party seeking to relocate must show that the relocation is in the best interests of the child. If a child spends a "vast majority" of time in the care of the party who intends to relocate, the party

opposing the relocation has the burden to show that relocation is not in the best interests of the child. In any other case, both parties have a burden to prove whether relocation is in the child's best interests.

The Evidence

[53] On April 21, 2021, Melissa served James a Notice of Relocation to Nova Scotia without a proposed date of relocation. At a subsequent motion, Melissa consented to an order that she would not move without a court order or agreement of the parties.

[54] In her testimony, Melissa states that she has no immediate plans to relocate to Nova Scotia. She wishes to do so eventually because:

a. She has bought a house in Windsor, N.S.;

b. Compared to Toronto, Windsor has a much lower cost of living;

c. Her best friend lives in Windsor;

d. Other family members live in Nova Scotia;

e. The location has suitable supports for both children including H.; and

f. She is confident she can work remotely at her current or a comparable position.

[55] Melissa did not address in any detail the impact of such a move on the children's relationship with their father. She said she would ensure generous visits with him in Ontario and that he was free to relocate to Nova Scotia, too. Melissa says that she suggested this option before she knew that James had a new partner.

[56] James and Holly gave detailed evidence of what they saw as the devastating effect of such a move, not just on their own relationship with the children, but on the children's broader social networks with extended family and friends.

[57] I have already mentioned Dr. Michael Saini, an expert witness who prepared a report between July 16-31, 2024. Dr. Saini spoke to the impacts of separation, relocation and "gatekeeping" in children, in particular, children with autism.

[58] Dr. Saini spoke about the general potential impact of separation and relocation in relation to children whose parents' relationship has broken down. He did not meet with the parties or the children. However, his testimony supports the direct evidence given by James and Holly.

Finding and Conclusion

[59] In this case, neither party bears the sole burden of proof. While Melissa has been the primary parent because of her refusal to grant James additional parenting time, she has not had the "vast majority of parenting time". While the parties have not had "substantially equal parenting", I find that each has the burden to adduce evidence on a potential relocation's effect on the best interests of the children.

[60] This issue is straightforward. Melissa does not have a firm date on which she wishes to relocate. Her submissions make clear that she is seeking advance authorization.

[61] I find that it would be premature to grant the order that she seeks. It is not in the children's best interests to give an open-ended relocation authorization.

[62] If Melissa had provided a firm date for her relocation, I still would not grant the requested order, because she has not provided sufficient information to assess the children's best interests. In particular, she has not addressed in detail the impact of such a move on either of the children. Melissa acknowledged throughout the trial that H. has had a specialized team working with him for many years including therapists and speech language pathologists. Yet she did not address the specific impact on H. of losing the support of these dedicated professionals who have formed important connections with him.

[63] James' detailed and pointed evidence of the devastating impact of a move was supported by Dr. Saini's testimony. Dr. Saini said that parenting plans should unfold in the "least disruptive manner" possible. While he acknowledged that children with autism can adjust to schedule changes, it is important to maintain their attachment with the non-resident parent. He emphasized the need to "ensure frequent contact and opportunities to have [the child's] attachment needs met." Any transition, including one due to relocation, should be "seamless". Otherwise, a child risks regressing and, even, developing "emotional anxiety."

[64] A parent relocating a child to a different jurisdiction profoundly changes a family dynamic. Indeed, where the other parent has played an active and important role in that child's life, it is hard to imagine a more momentous change. The process contemplated under section 39 of the *CLRA* therefore requires a close assessment of the child's needs and circumstances at the time of the proposed relocation. I find it inconsistent with the clear purpose of the *CLRA* for a relocation authorization to be issued in the absence of a known date for the relocation.

[65] Melissa's request for authorization is too unspecific to meet the notice requirements under the CLRA. Even if she had provided those details, I am satisfied that at the present time, relocation would not be in the current best interests of the children.

[66] I find it unnecessary to grant James' request for a specific order prohibiting Melissa from relocating to Nova Scotia. I will order that neither party is permitted to relocate outside of Toronto.

Issue Two: What should the parenting schedule be?

[67] The parties disagree profoundly on the parenting schedule. Currently, James has parenting time Tuesdays from 3:00 pm until 6:30 pm; alternate Thursday overnights; and alternate Thursdays to Sundays.

[68] James requests a 2-2-5-5 parenting schedule.

[69] Melissa does not agree. She cites concerns with difficult transitions for H., James' alleged alcohol abuse, and alleged neglect and injury to the children while they are in his care.

The Law

[70] Since the parties are not married, the applicable statute that governs parenting is the *CLRA*. The *CLRA* states that, in making a parenting order, the court "shall only take into account the best interests of the child" considering "all factors related to the circumstances of the child, and, in doing so, shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being": section 24.

[71] Factors relating to the circumstances of a child include:

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(b) the nature and strength of the child's relationship with each parent, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

(c) each parent's willingness to support the development and maintenance of the child's relationship with the other parent;

(d) the history of care of the child;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

(g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and co-operate, in particular with one another, on

matters affecting the child;

(j) any family violence and its impact on, among other things...the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, …and

(k) the appropriateness of making an order that would require persons in respect of whom the order would apply to co-operate on issues affecting the child; and any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child: 2020, c. 25, Sched. 1, s. 6.

[72] In determining what is in a child's best interests, the court "shall not take into consideration the past conduct of any person, unless the conduct is relevant to the exercise of the person's decision-making responsibility, parenting time or contact with respect to the child": section 24(5).

[73] The court "shall give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the child": section 24(6).

[74] When determining a parenting schedule, there is no presumption in favour of the status quo: *Gibbons v. Byrne*, 2024 ONSC 3898 (CanLII), at para 24, citing *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 SCR 27, at para 44.

The Evidence

James

[75] James testified that he is an extremely involved, eager parent. He spoke in detail about the children and his relationship with each of them. He said he has participated in their upbringing from birth whenever he was home and able to do so. At times he was the primary caregiver, including for H. between January and June 2015 when Melissa returned to work; and after E.'s birth. He also testified to being "instrumental" in training the parties' 18-year-old nanny.

[76] James involves the children in a lot of physical activity. He spearheads playing sports in all seasons and weather. James said physical activity helps H. to sleep and eat better. James and Holly frequently take the children to the Thousand Islands/Gananoque where they see their extended families and, in warmer months, engage in water sports.

[77] James has taken training courses for autism, including a two-day "autism intervenor course"; parent training with H.'s BCBA, Bianca Bozzelli; and workshops with the SOS, Sequential Oral Sensory, which focuses on eating strategies. He has volunteered with autism-focused organizations. Since H.'s diagnosis in 2017, James has participated in selecting the professional supports who work with H. James recognizes that H.'s care will require a "long-term view".

[78] James testified that Melissa engages in "unjustified restrictive gatekeeping" because she "fundamentally disrespects" his role as a parent. Dr. Saini explained that gatekeeping occurs when a parent closes the gate to contact, "not because of protective issues, but because … it's more about your needs than the needs of the child."

[79] James said an important benefit of a 2-2-5-5 schedule is that each parent can schedule activities for children on the same days of the week. It is more predictable than the current schedule.

[80] James denies having an alcohol abuse problem. He acknowledges driving with open alcohol on one occasion in 2017. He said it was a "big mistake" that he has not repeated.

[81] James denies that the children are at risk in his care. While they have occasionally suffered bumps, bruises, and other injuries, this is due to their robust physical activity and to just being kids.

Holly

[82] Holly met both children prior to her marriage to James. Since the parties' marriage, her relationship with each child has grown and deepened. She does not see herself as their mother, a role she cedes to Melissa.

[83] Holly helps with the children in various ways, including getting H. ready for school.

[84] Holly described conflict with Melissa including:

a. Melissa "screaming" at Holly, in front of H., demanding to know whether Holly was recording her.

b. Melissa making a scene during a school curriculum night because she objected to Holly's presence.

c. Multiple online confrontations including an incident where Melissa said that if Holly wanted her own children, she should not have had an abortion.

[85] As a result, Holly avoids Melissa as much as possible, leading her to miss some of the children's events, to the children's detriment and her great distress.

[86] Holly said she and James consume very moderate amounts of alcohol. They are not heavy drinkers.

[87] Holly is willing to have a facilitated conversation with Melissa to try and reduce the conflict.

Melissa

[88] Melissa's stated objections to increased parenting time for James are his alleged alcohol abuse; H.'s difficulty with transitions; and her suspicions about James neglecting the children when they are in his care.

[89] In response to James' request to admit, Melissa refused to admit the following facts:

a. James is a good father;

b. James is a loving and caring parent;

c. James has been an active parent in the children's lives;

d. Holly has been involved in the children's lives;

e. Holly is a positive role model for the children; and

f. Holly acts in the children's best interests

[90] Asked why she rejects equal parenting, Melissa said she wants the weekends to remain the same as they are now. She said that "Christmas holiday time includes therapy time", which makes it "difficult to add in the therapy piece." She confirmed that the children should reside with her over the holidays "most of the time".

[91] Melissa first raised concerns about James' drinking in July 2019. As a result, James agreed to use a RAMP (Remote Alcohol Monitoring Program) device called Soberlink. He used this device between July 3, 2019, and September 22, 2020. Melissa paid for the device until she cancelled it, whereupon James stopped using it.

[92] At trial, Melissa discussed the 2017 incident when James drove with open alcohol and admitted drinking from it. The children were not in the car.

[93] Melissa continued to raise issues about James' alcohol use. She finds it suspicious that James denies having an alcohol problem.

[94] Melissa cites a number of injuries to the children while in James' care. These include H. scraping his buttocks and E. injuring her elbow. Melissa objected to a lack of candour and communication around the incidents, as well as the incidents themselves.

Stephen Cross

[95] Stephen Cross provided a section 30 assessment of the children's best interests with respect to parenting and decision-making. His evidence regarding decision-making is covered later in these reasons.

[96] Mr. Cross met with James, Melissa, Holly, and the children as follows:

a. James on thirteen occasions between August 16, 2023, and July 8, 2024

b. Melissa on ten occasions between August 18, 2023, and April 18, 2024

c. Both children at each parent's home on one occasion each in October 2023

d. Private interviews with E., with H. present, in Mr. Cross' office on two occasions in November, 2023 (H. is non-verbal and cannot be interviewed)

e. Holly Clarke on one occasion in November 2023

f. Mr. Cross also interviewed some of H.'s health and therapeutic support workers, the children's former nanny, H.'s current principal, Melissa's mother, and James' sister.

[97] Mr. Cross made the following observations:

a. On home visits to each parent, the children were happy and relaxed.

b. Melissa's desire to move to Nova Scotia shows that she does not value "the children's relationship with [James and Holly]."

c. Melissa has difficulty accepting Holly's role in the children's lives. It is "unfortunate" that Melissa was not told of their marriage directly, learning about it through court documents.

d. The children require "clear, consistent parenting and no further exposure to conflict."

e. There were "no examples of compromise between Melissa and James during the assessment."

f. The parents were unable to agree on a parenting schedule over Christmas.

[98] Mr. Cross recommends an equal and shared parenting schedule, while following a split week (2-2-5-5) rotation. This would ensure each parent "two uninterrupted weekends a month with H. and E.". Mr. Cross makes further recommendations for how to treat long weekends, Christmas, March break, summer break, Halloween, birthdays, Mother's/Father's Days and other scheduling irregularities – all based on shared and equal parenting.

Findings and conclusion

[99] The analysis below focuses on section 24(3)(a), (b), (c), (d), (g), (h) and (i) of the CLRA.

[100] Both parents are close to both children. Mr. Cross observed a warm relationship between the children and James, Melissa and Holly.

[101] I find that both parents are able to meet both children's needs. James does not dispute that Melissa is a devoted and extremely capable mother. While Melissa did not extend the same grace to him, I am persuaded that James and Holly provide exceptional care to H. and E. I am further persuaded that Melissa, James and Holly all understand the children's respective needs and stages of development.

[102] I am not persuaded that James abuses alcohol. He acknowledges that in 2017 he foolishly drove a short distance with an open can of beer. I am persuaded that this was an outlier event. As a condition of his parenting time, in 2019 James agreed to testing before and after visits. I find that he took at least 486 tests with about 15 missed and three that were non-compliant. I am persuaded that the non-compliant tests do not indicate an alcohol abuse problem. They reflect residual alcohol in James' blood stream from the night before, and not the day of, a visit.

[103] Melissa's allegations of neglect are baseless. I am not persuaded that James has neglected the children when they are in his care. I accept James' explanations of the children's occasional injuries as bumps and scrapes as the product of a normal and active childhood.

[104] Melissa has not always exercised good judgment in navigating her relationship with James and Holly. I will return to this point when discussing decision-making. I do not find these lapses affect her ability to care for both children. Given that James seeks equal shared parenting time, he does not doubt her ability either.

[105] Neither parent poses a risk to the children.

[106] I am not persuaded that the transitions required from a change to the parenting schedule would harm H. There will be an adjustment, but it is more than outweighed by H. benefitting from more time with his father.

[107] James is committed to supporting the children's relationship with their mother. Melissa is less willing to support the children's relationship with their father and, especially, Holly. Melissa has engaged in problematic gatekeeping, depriving James and Holly of parenting time that is in the children's best interests. This is particularly acute during holidays and over the summer.

[108] Although they often disagree on how a care plan should unfold – a point addressed later in these reasons – both parents are committed to the children's care.

[109] I do not find that James' current meagre parenting schedule creates a status quo entitled to any weight. In fact, the current arrangement is detrimental to the children's best interests as it deprives them of the full benefit of James' and Holly's love and care.

[110] I am persuaded that shared and equal parenting is in the children's best interests. I find on a balance of probabilities that having the same days per week with each parent will promote predictability of particular benefit to H.

[111] Therefore, consistent with Mr. Cross' recommendations, I will order a 2-2-5-5 schedule. The schedule will be shared in all aspects including holiday and summer schedules.

Issue Three: Who should make decisions for the children?

[112] Both parties wish to exercise sole-decision-making responsibility for the children in all respects.

The Law

[113] A child's parents are equally entitled to decision-making responsibility: s.20(1) of the *CLRA*.

[114] The court must ensure that any decision-making regime supports the best interests of the child. "Section 24 of the *CLRA* endorses a child-centered approach in determining parenting orders": *Mougoui v. Sekkat*, 2025 ONSC 303 at para. 21 citing *Young v Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at pp. 62-63, per L'Heureux-Dubé J.; *Knapp v Knapp*, 2021 ONCA 305, at para. 34.

[115] Children with special needs require decision-making plans that take in account "the extent of the parties' involvement in addressing those needs and their willingness to consider reasonable recommendations from knowledgeable and experienced professionals": *Duclos v. Davis*, 2018 ONSC 6088 (S.C.J.), at para. 36(d); *Keown v. Procee*, 2014 ONSC 7314 (S.C.J.), at paras. 20-25; S*.A.P. v. D.M.P*, 2020 ABQB 811 (Q.B.), at paras. 20-22.

[116] Though neither party has asked for it, the following principles would determine whether to make an order for joint parenting:

a. There must be evidence of historical communication between the parents and appropriate communication between them;

b. Joint decision-making cannot be ordered in the hope that it will improve their communication;

c. The fitness of both parents does not mandate joint parenting;

d. The fact that one parent professes an inability to communicate does not preclude an order for joint decision-making responsibility;

e. No matter how detailed the custody order there will always be gaps and unexpected situations, and when they arise, they must be able to be addressed on an ongoing basis; and

f. The younger the child, the more important parental communication is.

Kaplanis v Kaplanis, 2005 CanLII 1625 (ON CA).

Party Positions

[117] After separation, Melissa had *de facto* decision-making for the children until March 2024 when Justice Sharma awarded James sole decision-making for H. on education, transportation to and from school, safety precautions while at school or during transport, and professional supports who assist H. while at school or after school. Justice Sharma's findings, along with findings of other judges of this court, are considered below.

[118] James asks for sole decision-making because, among other things:

a. Melissa has "a history of thwarting or outright violating court orders respecting the children's educational and medical decisions" and

b. Melissa refuses "to follow any professional recommendations that do not align with her views".

[119] Melissa argues that James "left the family home and the children have lived primarily with her their entire lives." She regards as misguided all of the decisions, made by health and educational professionals, and even other judges of this court, which contradict her conclusions.

[120] Melissa testified "I believe it is best for me to make the decisions." When asked by the court "Why do so many people have different views from you about what is best for H.?", she disagreed with the premise of the question. With respect to the TDSB (discussed immediately below), she says it "has never been invested in H.", and that "there was a mistake and a big urgent shift [in H.'s education] was made based on a misunderstanding."

[121] To analyze decision-making, I find it helpful to deal with the following issues for each child: school placement for H., and therapy for E. These issues, over which parties have been at odds for years, provide the necessary lens to examine which arrangement will best meet the children's needs. I will include one additional issue that exemplifies the parties' troubling dynamic: the administration of H.'s medication known as Vyvanse.

H.'s school placement

[122] H. was in a regular classroom at Pape until January 2024. After conducting a psychoeducational assessment in 2021, Dr. Tricia Williams found that H. should be in a special education class. Two bodies of the Toronto District School Board ("TDSB") who formed the Identification, Placement and Review Committee ("IPRC") concurred.

[123] In 2022, the IPRC determined that H. was "Exceptional" in respect of "Mild Intellectual Disorder and Autism." The Committee recommended placement in a Special Education Class with Partial Integration.

[124] Melissa has been fighting this placement ever since. At trial, she disputed the IPRC's stated reasons for it. She acknowledged that she has never wanted H. in a mild intellectual disability ISP program. In response to a specific question from the court, she did say that she wants H. in school.

[125] Because Pape could not offer the recommended placement, the TDSB found a spot in Leslieville Junior Public School ("Leslieville") for 2022. The TDSB offered both parents an explanation for this placement, including an illustrative chart showing the teacher-student ratio and levels of specialized staff.

[126] James was eager to accept this offer. Melissa was not. So, H. was not moved in time for the fall of 2023.

[127] The parties were offered another IPRC review. After Melissa refused to authorize the necessary documents, James brought a motion to dispense with her consent. The motion was withdrawn when Justice Kraft found that Melissa consented to participate in the IPRC meeting. However, at trial, Melissa said that she had not consented.

[128] At the second IPRC review on November 14, 2023, H. was again determined to be exceptional. Melissa places tremendous emphasis on the fact that the order of the exceptionalities was switched, i.e., autism was listed first. Melissa also points out that the recommendation form stated that H. should attend a "Regular Class with Withdrawal Assistance" which is a significant departure from the 2022 recommendation.

[129] For the following reasons, I am persuaded that the mention of a "Regular Classroom" placement was a clerical error by the IPRC:

a. The immediately following sentence says: "Reasons for Placement in a Special Education Class."

b. On the second page of the Decision Form, the IPRC's recommendation is described as for a "special education class with partial integration in Grade 4."

c. The Permission for Special Education Program Form includes:

    i. "The Special Education Department has recommended that H. Clarke attend the Special Education Program noted below."

    ii. Placement: Special Education Class with Partial Integration;

    iii. Name of Program: SP (Mild Intellectual Disability);

    iv. Start Date: November 30, 2023;

    v. Location: Secord Elementary School.

[130] It is most unfortunate that the second IPRC report contains the above error, as it only fueled Melissa's suspicions. Indeed, at trial, Melissa reiterated her belief that the IPRC has recommended that H. be in a regular class with withdrawal assistance. However, the evidence is clear beyond a balance of probabilities that the IPRC consistently recommended that H. be placed in a special education class with partial integration.

[131] When Melissa again refused to consent to the placement, this time at Secord, James brought an urgent motion. On November 29, 2023, Justice Kraft allowed James to enroll H. at Secord ("Kraft order") without Melissa's consent. In her decision, Justice Kraft stated:

> [Melissa] has made excellent efforts to support H. by providing tutoring two hours, four days a week, and ABA therapy two hours daily, five days a week. However, those therapies are being given to H. at a cost of him being in the classroom for most of the day. A specialized classroom placement has been offered to H., a benefit to which H. is entitled, and not to be able to participate in. A structured small classroom designed specifically to provide H. and other students with wraparound supports could benefit H. socially, academically, and psychologically. There is no reason to delay this opportunity for H. and for him to lose this chance because of parental conflict. Further, the supports of the tutor, ABA therapy, and speech therapy can continue for H. even if he was in a specialized classroom at Secord.

[132] Melissa appealed Justice Kraft's order. That is her right. However, she also:

a. requested to delay H,'s start date at Secord until after March break;

b. told H.'s supports to maintain their original support schedule even though that would only have H. in his classroom for about 40 minutes per day;

c. tried to appeal the IPRC decision long after the relevant period had passed;

d. refused to facilitate a visit for H. to Secord over the 2023 Christmas break; and

e. brought a 14B motion on September 19, 2024, trying to vary Justice Kraft's order

[133] In response to what he viewed as Melissa's "conflicting instructions" that "created chaos and confusion", James brought another motion before Justice Sharma. His Honour awarded James sole decision-making responsibility for H. with respect to "decisions around his education, his transportation to and from school, safety precautions for H. at school or while being transported to school, and professional supports who assist H. while at school and after school".

[134] Justice Sharma also found as a fact that Melissa was advocating "for a support model at Secord that would sacrifice [H.'s] basic academic curriculum"; and that Melissa was "thwarting the spirit and intention of [the Kraft order]." As a result, his order included the following provision:

> Ms. Denyes shall not interfere or advocate for an outcome, with any school administrators/educators or third-party professional supports, that is inconsistent with a decision made by Mr. Clarke. Ms. Denyes shall not seek to place these individuals/entities in a position of conflict with respect decisions made by Mr. Clarke. Ms. Denyes shall abide by decisions made by Mr. Clarke in areas where Mr. Clarke has temporary decision-making while H is in her care.

[135] As I understand it, Melissa objects to H.'s placement at Secord because it complicates his support schedule while barely increasing his engagement with other students. In her view, it has not benefitted him.

[136] During his testimony, James became emotional when refuting Melissa's view, telling her: "If you haven't seen H's transformation from being at Secord, you aren't seeing the same child that I am."

[137] There was a frightening incident where H. briefly exited Secord school property. On the day in question, he was returned safely. Additional measures were taken to prevent this from happening again. It has not. I am not persuaded that this incident is an indictment of H.'s current placement. Rather, it shows the general challenges in ensuring H.'s safety.

[138] At trial, Melissa confirmed that, if it was up to her, she would pull H. out of Secord. He would spend his last year at Pape and then move to grade 7-8 in her district in "an autism classroom."

[139] In his section 30 assessment, Mr. Cross wrote that Melissa "appears to have rejected that H.'s needs are being well met in his current school and she appears intent on the negatives." Mr. Cross recommended that decision-making authority be divided, with Melissa being responsible for medical and mental and emotional care, and James responsible for "education and recreational programming".

[140] In his testimony, Mr. Cross said Melissa "showed very little accountability for her role in any of the conflict." Mr. Cross had asked her: "Do you not see that you are driving this conflict?" Melissa said: "No".

[141] Mr. Cross said that, after Justice Sharma granted James sole decision-making over education, James has made good decisions.

[142] Under cross-examination, Mr. Cross said:

a. When he recommended that Melissa have decision-making over H.'s support network, he did not anticipate or intend that she would try to pull H. out of school in order to abide by a support schedule she had designed.

b. At the time of his report, he was unaware that Melissa had disallowed H.'s ABA therapy between September 2020 and Spring 2023; and if he had, that "very likely" would have made a difference to his recommendation.

c. James "genuinely values Melissa's involvement in the children's lives";

d. Generally speaking, but particularly where their child has special needs, parents should give due regard to the opinion of third-party professionals.

[143] I am persuaded that Melissa's refusal of the school placement in 2023 directly harmed H.'s ability to learn in a manner that is unrecoverable. It has also illustrated a damaging aspect of this litigation – Melissa's refusal or inability to abide by court orders.

E.'s therapy

[144] Melissa wants E. to be assessed for autism. James does not. James believes that E. would benefit from therapy. Melissa disagrees.

[145] On a balance of probabilities, I am persuaded by the following evidence that E. would benefit from therapy:

a. E. started attending H's sessions with his occupational therapist, Paula Aquilla. Ms. Aquilla noted E.'s possible anxiety and struggles to self soothe as far as back as September 29, 2022, and observed that E. showed fear around things she historically loved to do like skiing and rock climbing.

b. E. also had sessions with Melissa's' neighbour, Erin Arnott who is an Orton Gillingham trained tutor. Ms. Arnott wrote to the parties on January 14, 2024, after reviewing a report showing that E. greatly struggled with flexible thinking. In her own work with E., she explained:

> "E. finds corrections to her mistakes to be very painful. E. has demonstrated some very powerful emotional reactions during tutoring; the most common reaction is to become very quiet and unresponsive for the remainder of the session. Less frequently, E. will speak in a babyish voice and hold her pencil in a fist grip to complete her work. E. will often compare her abilities to those of her peers, and she will demonstrate negative self-talk; for example, I'm not smart."

[146] Melissa did not think E. required therapy, only a language assessment.

[147] I am persuaded that Melissa thought that any therapy for E. should wait until the conclusion of this trial. At trial Melissa appeared to dispute this but did not rebut the evidence that supports it which includes her own emails as well as a statement to this effect by Justice Kraft in her July 2023 endorsement.

[148] In that endorsement, Justice Kraft ordered E. to immediately meet with a psychologist. I am satisfied that, when James attempted to contact different professionals, Melissa made them aware of the section 30 assessment and the fact that the case involved a family law dispute. I cannot discount the possibility that Melissa deliberately sabotaged these attempts, because she knew or suspected that many psychologists would not enter into a case involving litigation. In any event, James was unable to find willing therapist.

[149] I am further persuaded that, during his discussions with the parties, Mr. Cross became aware of the situation and mentioned a possible psychologist named Dr. Jean Szkiba-Day. On January 4, 2024, Dr. Szkiba-Day indicated her willingness to provide E. therapeutic services.

[150] Melissa and Dr. Szkiba-Day had a series of exchanges. I am persuaded that Melissa resisted Dr. Szkiba-Day's involvement, leading Dr. Szkiba-Day to close the file.

[151] I am also persuaded that in her discussions with Dr. Szkiba-Day, Melissa stated that E. required an assessment before starting therapy. This was inconsistent with the Kraft order that E. begin therapy right away.

[152] In March 2024, Justice Sharma awarded James the ability to select a psychologist, who would then make the decision about whether E. required an assessment. As a result, E. saw Dr. Shuster at the Possibilities Clinic four times between May and August 2024.

[153] There is no evidence that Dr. Shuster recommended an autism assessment for E. On September 26, 2024, Dr. Shuster's office communicated the following:

> At this time, it is unclear how E. is benefiting from therapy. Should E. and her family wish to continue, I would recommend another block of 4 sessions with parents alternating appointments to continue to work on emotion regulation.
>
> If Dr. Shuster's statement is sufficient for the order, and if both parents agree, I can help find more appointments for E. to continue Therapy.

[154] It is not clear why Dr. Shuster appeared non-committal to continued therapy. James testified that he wanted to speak to her, but Melissa refused. Melissa did not contest this statement. As a result, the doctor's precise views are unknown.

[155] At trial, Mr. Cross said he was "astounded" that E. only had four sessions with Dr. Shuster. When asked about Melissa's purported reason that therapy should wait until after trial, Mr. Cross said that in his view this would not be in E.'s best interests, especially given the delay in getting this matter to trial.

<u>The Vyvanse Problem</u>

[156] H. has a prescription, issued by his neurologist, for a medication called Vyvanse. He takes 20 mg per day. Melissa historically has filled this prescription, which she submits as an expense under her health plan.

[157] James testified that Vyvanse has become a "control problem" because Melissa determines how much to give him. He has had to ask repeatedly for her to share it with him at a suitable time. It currently happens during their Tuesday drop offs. James would like each party to get a monthly allotment.

[158] Under cross-examination, Melissa denied that she fails to give James a sufficient amount of Vyvanse. She acknowledges that sometimes James has to come to her home to retrieve them but only when he "forgets". She believes that a weekly schedule "makes the most sense". She does not agree to an order that alternates who may pick up the prescription. She objects to James receiving larger amounts, stating that the medication "works best in small amounts", is a "controlled substance", and expires within 45 days.

Findings and Conclusion

[159] I am persuaded that Melissa has obstructed necessary decisions in the children's best interests, for reasons that she had difficulty explaining at trial.

[160] I acknowledge that Melissa is devoted to her children and is, in many respects, a responsible, loving and good mother.

[161] I acknowledge that the section 30 assessment recommends that decision-making be divided between the parents, with James making decisions on education and Melissa making decisions about health and other aspects of well-being.

[162] With great respect to Mr. Cross, I am not persuaded that divided decision-making is in these children's best interests. First, I find that, notwithstanding her devotion to the children, Melissa is unable or unwilling to accept information that does not accord with her preconceived notions of what is best for them. Second, I find that divided decision-making would only ensure that the parties would frequently return to court.

Melissa's lack of insight does not promote the children's best interests

[163] The evidence shows on a balance of probabilities that Melissa is either unwilling or unable to cooperate with James. The Vyvanse problem is a perfect illustration. Melissa uses Vyvanse to control James' parenting. She presumes that she is the only person competent to manage this prescription. The doling out of pills to James comes across as paternalistic, even high-handed. It speaks to Melissa's lack of regard for him as a parent and responsible adult.

[164] The disputes over H.'s school placement and E.'s therapy confirm that Melissa is unable to maintain perspective when she and James disagree on something, or indeed when anyone has a different view from hers. Justice Sharma found her attitude "shocking". In his testimony, Mr.

Cross was taken aback by her position as well. I appreciate that Melissa's reactions stem, in part, from the sense that she is a target of litigation abuse. However, I cannot overlook the risk, to the children's well-being, of her lack of insight.

[165] Mr. Cross testified that, had he been privy to all the information that came to light during this trial, he may well have come to a different conclusion over split decision-making. This is partially why, although I find Mr. Cross's report helpful in many respects, I have determined that a different arrangement for decision-making is in the children's interests.

Melissa's attitude to this dispute including to court orders

[166] Melissa has a troubling attitude towards this litigation and court orders. It prompted Justice Sharma to make the somewhat unusual order that, once James has made any decision with respect to H.'s schooling, Melissa cannot "advocate" for a different outcome. I find that this provision recognized the fact that Melissa sends many, many emails to professionals when she disagrees with them. Under cross-examination by Melissa, Mr. Cross said he received hundreds of emails from her, sometimes dozens per day. The principal at H.'s school also objected to the number and tone of Melissa's communications.

[167] Melissa tends to file written motions when they are not appropriate. She filed three in the fall of 2024 alone: September 20, September 26, and October 10. This was after a trial date was set for October. James was receiving notice of written motions during the trial itself. Melissa said she had not appreciated that she would have to withdraw them.

[168] Then, after the trial was concluded and the decision was under reserve, Melissa brought another urgent motion requesting the following:

a. Sole decision-making over H. to Melissa, such order to "supersede" three prior orders of this court;

b. A finding that James owes H. a "personal injury award of $35,000", payable to Melissa; and

c. Leave to bring a motion regarding section 7 expenses.

Motion filed on February 3, 2025

[169] In fairness, James also brought a motion for emergency relief when the parties could not agree on the Christmas schedule. On December 19, 2024, I heard that motion and largely granted James his requests.

[170] This "assembly line" of motions is a problem. Written motions under Rule 14B are intended for matters that are "simple, procedural or uncomplicated". Melissa does not respect this limitation.

[171] Melissa's attitude is troubling in and of itself. It is also contrary to the children's best interests. It keeps the parties locked in a storm of conflict. It drains resources that could be used to meet the children's needs. And it risks alienating caregivers and important supports.

[172] There is no guarantee that an order for sole decision-making will encourage Melissa to develop insight into her actions and find more productive ways to interact with James. But I fear that granting her any decision-making authority would confirm, to her, that her approach to the parties' dispute is acceptable. It is not.

[173] This is a difficult issue. Melissa is devoted to her children. But, having regard to all of the evidence, I find that it is in the children's best interests is for James to exercise sole decision-making. He shall consult with Melissa before making any major decisions but will have the final say. I am persuaded that James will follow this direction in good faith.

Issue Four: What, if any, child support is payable?

[174] James requests that Melissa pay him $1314 in monthly set-off child support on an ongoing basis.

[175] Based on her request for primary parenting, Melissa requests child support of $3277 per month based on an imputed annual income to James of $250,000.

The Law

[176] Under section 31 of the *Family Law Act*, every parent has an obligation to support their children to the extent that they are able to do so.

[177] As the parties are not married, child support is determined according to the Ontario *Child Support Guidelines*, O. Reg. 391/97 ("Guidelines").

Party positions and findings of fact

Melissa's income

[178] James asks that Melissa's income be set at $189,895.53: the total of her 2023 employment income, and an additional dividend. James asks this court to disallow a loss of $9,802.21 related to Melissa's Nova Scotia property. He says this loss stems from Melissa's "poor decision" to hold on to property in the hope that it will appreciate over time.

[179] Melissa is currently on a voluntary unpaid leave of absence. She took the leave in order to prepare for and represent herself at this trial, and not for a health-related reason. The court therefore does not consider her current income to reflect her true position.

[180] Melissa's work plans were not entirely clear during the trial, but the court is satisfied that she does intend to return to work in some capacity. I note that in her most recent financial statement

dated October 7, 2024, Melissa indicates her current income at "zero" but states that when she is working, she earns approximately $12,500 per month.

[181] The court does not agree with James that Melissa should be deprived of claiming an income loss in respect of the Nova Scotia property. There is evidence that Melissa intends for the property to generate income, and that, at present, it has sustained a loss. The court is not persuaded that Melissa deliberately purchased this property to artificially depress her income.

[182] Accordingly, Melissa's income will be her 2023 employment earnings minus the property loss: $180,093.32.

[183] Based on the shared parenting schedule Melissa owes $2438 monthly child support.

James' Income

[184] James has two bachelor's degrees. He currently works for Ports Toronto for nine months of the year. In 2023, he earned additional money by helping a friend with snow removal from movie sets.

[185] In 2023, James earned $58,065.94.

[186] James testified that Melissa's inflexibility around parenting post-separation forced him to quit a higher paying job he had secured with Bombardier operating Go Trains which required shift work. James had so little time with the children he felt could not afford to maintain the job in the face of Melissa's attitude.

[187] Prior to a consent order entered into in 2019, James was paying child support based on income of $82,149. That amount was never adjusted. James therefore calculates that he has overpaid child support by $28,355 as follows:

a. 2019: ($1,353-$1,242) x 12 = Underpayment of $1,332

b. 2020: ($1,242-$1,027) x 12 – Overpayment of $2,580

c. 2021: ($1,242-$434) x 12 – Overpayment of $9,696

d. 2022: ($1,242-$721) x 12 – Overpayment of $6,252

e. 2023: ($1,242-$885) x 12 – Overpayment of $4,284

f. 2024 (based on Mr. Clarke's projected income of $41,447.16): ($1,242-$617) x 11 – Overpayment of $6,875

[188] James is not seeking reimbursement for this overpayment.

[189] Although James believes he will only earn $41,447.16 in 2024, his closing submissions say: "[T]o avoid any argument that he is underemployed, …[James] is willing to continue to be imputed with an income of $82,149 for the purposes of paying ongoing child support and section 7 expenses even though he consistently earns less on an annual basis." [emphasis added]

[190] Melissa wants James' income imputed to $250,000 per year. Section 19(1)(a) of the Guidelines allows the court to impute income to a payor in certain circumstances, including if a parent has failed to provide income information when under a legal obligation to do so (s. 19(1)(f)). Imputing income is one method by which the court gives effect to the joint and ongoing obligation of parents to support their children: *Drygala v. Pauli,* 2002 CanLII 41868 (ONCA, at para. 32. However, s.19 of the Guidelines is not an invitation to the court to arbitrarily select an amount as imputed income. There must be a rational basis underlying the selection of any such figure. The amount selected as an exercise of the court's discretion must be grounded in the evidence: *Drygala,* at para. 44.

[191] It is settled law that, should a court find that a party has failed to provide full financial disclosure relating to their income, the court is entitled to draw an adverse inference and to impute income to them: *Szitas v. Szitas*, 2012 ONSC 1548; *Woofenden v. Woofenden*, 2018 ONSC 4583.

[192] Melissa's arguments to support the court imputing James with an income of $250,000 a year, which came out in James' cross-examination, rest on the following premises:

a. James will come into a sizeable inheritance from his father's estate;

b. Along with his sister and their respective children, James is a beneficiary of the Clarke Family Trust which is worth $500,000.

[193] Melissa did not explain how these funds affect James' current income for the purposes of determining child support. While it is likely that in future years James will have additional income from these sources, Melissa has not established that James draws income from them now. I am not persuaded that James has failed to disclose financial information.

[194] Accordingly, I find that Melissa has not met her burden to show that James should be imputed an income of $250,000 per year.

[195] Now I must consider whether it is appropriate to set James' income to what he earned in 2018.

[196] James is university educated and highly qualified. He has had no difficulties finding employment.

[197] James anticipates that he will actually earn $42,000 a year in 2024. That is half of what he made six years ago. He did not speak of efforts to improve his income.

[198] James' wife, Holly, earns over $500,000 per year. They have no children of their own. James lives in a house that Holly owns. He claims, and she confirms, that he borrowed almost $500,000 from her to fund this litigation. I am persuaded that James' living situation eases some of the financial pressure he might otherwise face.

[199] I acknowledge that James is very focused on the children's needs. I accept that he is gearing up for the increased responsibilities and time that will come with equal parenting.

[200] Still, James expects Melissa to retain her standard of employment while making no discernible efforts to improve his own.

[201] James acknowledges that it is appropriate to impute income to him. James selected an amount he earned six years ago. He has provided no evidence of a plan to improve his job situation.

[202] When imputing income, the court must not do so arbitrarily: *Drygala.* In this case, while I am not entirely persuaded that James' suggested income reflects his income-earning potential, Melissa did not provide any basis for imputing another income to him. However, given that James selected an amount he earned over 6 years ago, I find it reasonable to adjust it to account for cost-of-living increases that likely would have been factored into a full-time salary. I find that it is both reasonable and equitable to adjust the suggested income of 82,149 by 3% per year. That increases James' annual income to approximately $100,000, and that is the amount that shall be imputed to him.

[203] As a result, James would owe Melissa $1471 a month in table child support.

[204] Therefore, Melissa shall pay James $967 in monthly set-off child support on an ongoing basis.

Issue Five: How should section 7 expenses be shared?

[205] James seeks an order that the parties share in section 7 expenses – including childcare, education and therapy – proportionate to their incomes. On James' calculations, the share is 70% for Melissa and 30% for James.

[206] Melissa requests that section 7 expenses be shared on an equal basis with James paying a set amount of $1250 per month on an ongoing basis. She does not object to the categories of section 7 expenses but adds to it an amount for respite care.

[207] Melissa asks that James provide $40,000 for H. for a period of 12 years beginning May 1, 2025, which funds shall be administered by her for H's extraordinary expenses. As she did not explain how such a fund would qualify as a section 7 expense, I will not consider it further.

<u>The Law</u>

[208] Section 7 of the Ontario *Child Support Guidelines* O. Reg. 391-97 provides:

> (1) In an order for the support of a child, the court may, on the request of either parent or spouse or of an applicant under section 33 of the Act, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents or spouses and those of the child and to the spending pattern of the parents or spouses in respect of the child during cohabitation:
>
> a. childcare expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
> b. that portion of the medical and dental insurance premiums attributable to the child;
> c. health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy, prescription drugs, hearing aids, glasses and contact lenses;
> d. extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
> e. expenses for post-secondary education; and
> f. extraordinary expenses for extracurricular activities.

[209] The *Guideline*s define as "extraordinary" (a) those expenses that "exceed those that the parent or spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that parent's or spouse's income and the amount that the parent or spouse would receive under the applicable table"; or (b) expenses the court considers extraordinary taking into account the amount of the expense in relation to income, the nature and number of educational programs and extracurricular activities, and special needs and talents, overall cost, and other similar factors that the court considers relevant.

[210] The guiding principle for section 7 expenses is that parents should share in expenses in proportion to their respective incomes. O. Reg. 391/97, s.7(2).

[211] Where a parent exercises access for not less than 40 percent of the time, the amount of the order for the support of the child is to be determined by taking into account: the table amount of child support; any increased costs of shared custody arrangements; and "the conditions, means, needs and other circumstances of each parent: O.Reg.391/97, s.9.

[212] The specific language of section 9 of the *Guidelines* mandates "flexibility and fairness to ensure that the economic reality and particular circumstances of each family are properly accounted for": *E.D. v. J.S.*, 2020 ONSC 1474 (CanLII), at para 188, citing *Contino v. Leonelli-Contino*, 2005 SCC 63 (CanLII), [2005] 3 SCR. 217, at para 33.

Findings

[213] I make the following findings about the parties' "means, needs and circumstances":

a. James is married to a high-income earner: Holly. He and Holly own their own home. Holly states that eventually she will have to assume responsibility for her mother's care. Allowing for this, there is no evidence before the court that such a responsibility will impose economic hardship on Holly; and, certainly, no evidence of current hardship. James and Holly also want to renovate their home. While this is an understandable wish, I find it irrelevant to determining their relative means, needs and circumstances.

b. Melissa does not own her own home in Toronto. She has a property in Nova Scotia. James invites the court to paint this as a foolhardy decision – one that may have prevented her from owning property in Toronto. The court declines to make that finding.

c. Melissa will no longer receive child support from James and will be responsible for a monthly set-off to him.

d. As a result of James being imputed $100,000 in annual income, a strictly proportionate share of section 7 expenses would be 65% for Melissa and 35% for James.

e. Both James and Holly were clear in their testimony that they consider the children to be a vital part of their family. James has the benefit of Holly's substantial income. Melissa currently earns more than James does, but her means and financial circumstances are not superior to his.

f. I find that, taking into account both parties' means, needs and circumstances, a just proportion of section 7 expenses is equal sharing, or 50%, on an ongoing basis.

The question of respite care

[214] Melissa requests an amount for respite care. In a prior endorsement, Justice Kraft suggested that respite care may be an eligible section 7 expense depending on the circumstances.

[215] While Melissa did not provide any caselaw to support her position, I am prepared to accept as a matter of principle that respite care for a parent who has extraordinary care responsibilities may count as a section 7 expense, likely as an incident of childcare.

[216] However, given that parenting responsibilities are to be shared equally, Melissa has not persuaded me of the need for respite care beyond the time when the children are in the care of their father.

[217] Melissa's request for an ongoing section 7 expense related to respite care is therefore dismissed without prejudice.

Conclusion

[218] I acknowledge the presumptive rule that parties share in section 7 expenses proportionate to their incomes. However, under section 9 the court may depart from that rule where parties have equal parenting and the court believes that a different method of sharing is appropriate.

[219] Given the needs, means and circumstances of the parties outlined just above, I find that it is appropriate to depart from the presumptive rule and order the parties to share equally in section 7 expenses on an ongoing basis. Any government funding, such as the OAP, will be applied to section 7 expenses first.

Issue Six: Does either party owe retroactive child support or section 7 expenses?

[220] Melissa requests retroactive child support in the amount of $196,000; and retroactive section 7 expenses in the amount of $49,647.97.

[221] As noted at the outset of these reasons, Melissa did not speak to any evidence regarding section 7 expenses in her case in chief. However, as discussed below, the court does have some evidence of Melissa's contribution to section 7 expenses.

Child Support

[222] James did not make a claim for retroactive child support.

[223] Melissa's retroactive child support claim is based on her request that the court impute $250,000 of income to James to the date of separation. In Issue Four, above, I rejected that request. Melissa has no other argument for retroactive child support, for example, that James failed to pay table support consistent with his income.

[224] Melissa's claim for retroactive child support is dismissed.

Section 7 expenses

[225] James introduced into evidence detailed charts respecting the amounts he paid for the children's section 7 expenses in each of 2019, 2022, 2023 and 2024. He included "his understanding of Ms. Denyes' positions regarding her contributions towards section 7 expenses even though [she] presented no evidence at trial respecting her contributions."

[226] James sent the charts to Melissa on October 4, 2024, well in advance of the trial start date of October 28. Melissa declined to provide her position on them.

[227] Notably, James only seeks a 50% share in all retroactive section 7 expenses.

[228] Neither party provided evidence for retroactive section 7 expenses for 2018, 2020 and 2021. I will therefore not consider any retroactive payments for those years.

[229] James' calculations are as follows:

a. For 2019, Melissa owes James $14,510;

b. For 2022, James owes Melissa $1,437.06;

c. For 2023, Melissa owes James $2,264.45; and

d. For 2024, James owes Melissa $3,205.66.

[230] In sum, James says he is owed $12,131.73.

[231] I have reviewed the charts prepared by James. With one exception, I am satisfied on a balance of probabilities that they accurately reflect the parties' share of section 7 contributions. While Melissa gave testimony concerning her perspective on past section 7 expenses, she did not adduce any supporting evidence. I am persuaded that James has fairly accounted for Melissa's contributions.

[232] The exception to my finding relates to the contributions to H.'s section 7 expenses made by James' father, Harry Clarke Sr., in 2019. James acknowledges that "some" of his payments for H. were sourced from his father but states that those amounts were personal gifts from his father to him. In addition, the contributions from Mr. Clarke Sr. arose after he formally advised the parties he was no longer paying for H.'s professional supports. As such, James says, he was "personally responsible for these payments and he is entitled to be reimbursed from [Melissa]."

[233] I am not persuaded by this argument. Section 7 expenses are paid by each parent and, by default, are shared according to "income". The structure of section 7 expenses assumes that it is the parents who pay for them. James referred to no statutory provisions, regulations or caselaw for the proposition that a parent can be reimbursed for monies that they received from someone else to put towards section 7 expenses.

[234] The evidence shows that Harry Clarke Sr. supported the parties financially throughout their relationship. He contributed generously over a number of years to H.'s support in particular. While these may have been gifts and not loans, they were clearly intended for H.'s benefit. I am not persuaded that Harry Clarke Sr.'s transfers to James in 2019 would have been in ignorance of the use of those funds. To the contrary, I find it likely that Harry Clarke Sr. intended for those funds to support a dearly loved grandchild. The question is not whether James was personally responsible for the payments in a legal sense, but whether, today, they are owing to him as retroactive section 7 expenses. In all the circumstances, I am not persuaded that Melissa should reimburse James for monies received from his father that continued an established pattern of supporting the children's needs.

[235] I am unable to determine precisely how much money Harry Clarke Sr. paid to James in 2019, and I recognize that not all of that would necessarily have been intended for H. However, based on all the evidence, I am satisfied that it is reasonable to discount the amounts owed by Melissa in 2019 by 25%. This means that the amount owing for 2019 is $10,882.50, not $14,510.

[236] Factoring that into James' calculations, Melissa owes retroactive section 7 expenses of $8,504.23.

Issue Seven: Is either party entitled to spousal support? If so, in what quantum or amount and for how long/what duration?

[237] Melissa amended her pleading in August, 2024, to include a claim for spousal support retroactive to the date of separation. This is six years after the parties separated.

[238] Melissa's claim appears to be based on her allegation that James is hiding income. She seeks spousal support calculated on an imputed income to him of $250,000.

[239] In Issue Four, I declined to impute such an amount to James. I did impute an income of $100,000. However, that is less than Melissa's 2023 employment income.

[240] Melissa did not fully explain the basis on which she is entitled to spousal support, but I gather it is both needs-based and compensatory. For the following reasons, however, neither of these claims is supportable:

a. Throughout their relationship, Melissa has always earned more than James.

b. There is no evidence of sacrifices she made during the relationship in order to promote James' ability to earn an income.

c. Melissa's career advanced during the relationship. She says she gave up her "dream job" to have children. However, she earned more money in the new position. There is no evidence that she suffered financially.

d. Melissa has voluntarily taken several leaves of absence from her position. She cannot rely on those voluntary leaves to justify an award for spousal support.

e. While Melissa did have significant responsibilities caring for the children, especially H., this is in large part because she refused to grant James more parenting. It would be unjust for her to rely on this fact to justify spousal support now.

f. There is little evidence that Melissa's lifestyle has suffered in comparison to the lifestyle the parties enjoyed during the relationship. If her lifestyle has suffered, I am persuaded that it is due to the cessation of monetary gifts from James' father, Harry Clarke Sr., as opposed to an economic disadvantage arising from the breakdown of

the parties' relationship. Melissa cannot rely on an expectation that such gifts would continue or would be replaced with funds from James.

[241] I therefore dismiss Melissa's claim for spousal support because I do not find that she has established entitlement.

Issue Eight: Does either party owe any post-separation adjustments?

[242] James seeks post-separation adjustments in the amount of $178,993.69 consisting of:

a. $44,266.72 representing half of the full mortgage he paid between January 2018 and November 2019 for the parties' joint property located at 80 Condor;

b. $36,300 representing half of the amounts he contributed to the parties' joint chequing account ending in #6166 that Melissa used "to either make payments to H.'s professional supports and the children's other expenses, for personal use, or for reasons unknown";

c. $57,500 (based on an approximate midpoint value for rent of $5,750) for occupation rent for the period between February 2018 and September 2019 when Melissa had exclusive use of the home located at 80 Condor;

d. $40,926.97 for outstanding costs awards.

[243] Melissa requests post-separation adjustments of $75,837.11. The majority of her claims were not supported by material admitted as evidence. However, I will consider her claims for an GST/HST credit of $16,080 that James received post-separation. James strongly disputes including this as he testified that the amount was used for joint expenses including a driveway and deck on 80 Condor.

<u>The Law</u>

[244] The following factors apply to a claim for occupation rent:

a. the timing of the non-resident spouse's claim for occupation rent;

b. the circumstances under which the non-resident spouse left the home;

c. the duration of the exclusive occupancy;

d. whether the non-occupying spouse moved for the sale of the home;

e. the inability of the non-resident spouse to realize on their equity in the property;

f. any financial hardship experienced by the non-resident spouse as a result of being deprived of their equity in the property;

g. any reasonable credits to be set off against occupation rent for expenses associated with the home;

h. the conduct of both spouses, including any failure to pay support;

i. whether children resided with the occupying spouse and, if so, whether the non-occupying spouse paid child support;

j. whether the occupying spouse has increased or decreased the selling value of the property; and

k. any other competing financial claims in the litigation.

[245] The Ontario Court of Appeal has held that while an order for occupation rent should be reasonable, it need not be exceptional: *Non Chhom v. Green*, 2023 ONCA 692 (CanLII), at para 9. Such an award remains discretionary: para 11.

Findings and Conclusion

[246] James' evidence that he paid for the mortgage on 80 Condor post-separation is undisputed. He is owed this amount. Neither party adduced evidence of other expenses like utilities and property taxes.

[247] James' evidence with respect to the monies he deposited into the joint account acknowledges that at least some of these funds were used for the children's expenses prior to the time that the parties executed a temporary agreement for child support. In addition, relying on my earlier finding, a significant proportion of these funds came from his father. James admitted that his father was supporting him to a significant degree during this period. In the circumstances, I am not persuaded on a balance of probabilities that James is entitled to be reimbursed for this amount. However, given the sparse evidence of how the parties contributed to joint and household expenses post-separation, Melissa's claim for half the GST/HST home builder rebate is also dismissed.

[248] With respect to occupation rent, James points to the following factors:

a. He formally made a claim for occupation rent in his Application issued on March 11, 2019;

b. Melissa asked him to leave the home;

c. She lived in the home from January 19, 2018, to October 1, 2019;

d. James brought a motion for sale of the home in August 2019, which was ultimately dismissed;

e. James asked Melissa to contribute to the mortgage after she moved out, but she said that she could not afford to do so;

f. When Melissa failed to contribute, James was "forced to ask his father for financial assistance rather than suffer financial hardship"; [emphasis added]

g. Following separation, prior to commencing child support payments on October 1, 2019, James paid significant expenses for the benefit of Melissa including the entire mortgage on 80 Condor; and

h. Melissa could have rented out one floor of the house.

[249] I have considered James' arguments. For the following reasons, I conclude that an award for occupation rent is not appropriate:

a. While James did not speak to this, I find that the overriding consideration is the children's best interests. Especially given H.'s needs, it would not have been in the children's best interests to have to leave 80 Condor during the relevant period;

b. James did not notify Melissa of his claim for occupation rent until 14 months after separation;

c. The evidence is inconclusive about how James left the home. I am not persuaded that Melissa asked him to leave. I find it just as likely that James wanted to leave;

d. James testified that the parties had a quasi-nesting arrangement for at least a short time following separation, so he was not excluded from the home;

e. James' own evidence is that his father helped him out with gifts, not loans, so that James would not suffer any financial hardship;

f. James' motion for partition and sale was dismissed, in part, because of the motions judge's concern for the children's well-being;

g. Because I have already determined that James is owed reimbursement for half of the mortgage payments, that should not be "double-counted" as a factor here;

h. I am persuaded by Melissa's evidence that it was impractical to rent out one floor of 80 Condor and I find, further, that introducing a tenant to the household would not have been in the children's best interests.

[250] James' request for occupation rent is dismissed.

[251] James asks for Melissa's current costs orders to be included as a "post-separation adjustment". Melissa's cost obligations are independent of this trial although, as explained below, I find them relevant in considering whether any additional orders are necessary. I decline to include them as a post-separation adjustment.

[252] In conclusion, Melissa owes James $44,266.82.

Issue Eight: Should the Court include any additional terms to ensure compliance with this Order?

[253] James urges the court to include additional orders to ensure Melissa's compliance with this trial decision and order.

[254] The primary objective of the *Family Law Rules* is to deal with cases justly: Rule 2(3). This includes ensuring that the process is fair to all parties and "giving appropriate court resources to the case while taking account of the need to give resources to other cases": *ibid.* The court may make procedural orders to promote the primary objective: Rule 1(7.2). The court also has broad discretion to make orders to deal with a party's failure to obey an order: Rule 1(8).

[255] As I have stated in these reasons, Melissa has a problematic attitude towards litigation. She does not regard court orders as something to be complied with without delay. For example, she is in breach of a number of outstanding cost awards.

[256] In addition, she engages in a style of communication that people find overwhelming. Stephen Cross testified that Melissa sent him hundreds of emails, sometimes dozens per day. She has included H.'s supports in disagreements between her and James, putting them in an awkward position.

[257] Although Melissa is not entirely to blame, I find that she does bear much of the responsibility for the extraordinary time this case has taken. While the case involves a child with special needs, that does not justify the astonishing effort and resources it has taken to get the parties to this point.

[258] Therefore, I find it appropriate to make the following additional orders:

a. Melissa shall not interfere with or advocate for an outcome, with any school administrators/educators or third-party professional supports, that is inconsistent with a decision made by James and Melissa shall not seek to place these individuals/entities in a position of conflict with respect to decisions made by James.

b. Melissa shall not be entitled to further relief from this court until she satisfies all outstanding costs awards, including any that might be awarded as a result of this trial.

c. After Melissa satisfies all outstanding costs awards, she may not file any applications for relief in relation to this decision without first posting security for costs in the

amount of $10,000. I find this necessary given Melissa's chronic refusal to pay costs awards.

d. A case management judge shall be assigned to deal with any future applications for relief by either party, and no further motions for relief shall be filed without their leave. This case is complex. It involves dozens of motions, a lengthy trial decision and thousands of pages of evidence. A case management judge will help prevent confusion or inconsistency in future applications.

[259] For clarity, I note that James included some additional language to his requested order that I have rejected. For example, he asked that the parties be ordered to not "scold" each other. I decline to make such an order. I have opted instead for a general non-denigration order and a direction that the parties shall keep their communications brief, professional and civil.

[260] James asks for a declaration that Melissa has no interest in his pension or any of his other assets, including the Clarke Family Trust. Melissa did not address this in her submissions. However, James adduced evidence that satisfies me on a balance of probabilities that such an order is warranted. Adding this provision will, hopefully, avoid future litigation on this issue.

[261] James also seeks leave "to bring a motion for sanctions of contempt and other sanctions under Rule 1(8) of the *Family Law Rules*". While a person is free to bring a motion for contempt at any time, it is a remedy of last resort. Accordingly, I decline to make an order specifically in relation to contempt. Additional motions to enforce the terms of this order shall be at the discretion of the case management judge.

ORDER

[262] In conclusion, I make the following order:

Decision-Making Responsibility and Parenting Time

[263] The Applicant, Harry James Clarke ("James"), shall have sole decision-making responsibility for the children, namely H. born February 16, 2014, and E., born August 10, 2016 (collectively the "children") after consultation with the Respondent, Melissa Joy Denyes ("Melissa"). For clarity, James' sole decision-making responsibility for the children shall include the ability to make decisions for the children without Melissa's consent after consulting with her.

[264] Melissa shall not change H.'s school back to Pape Avenue Junior Public School.

[265] If possible, James shall be in control of the funding through the Ontario Autism Program including submitting receipts for reimbursement and claiming reimbursement for applicable expenses covered under the Program. If that is not possible, Melissa shall allow James access to view the portal by sharing log-in credentials, but she shall be responsible for submitting receipts and sharing details of reimbursement with James.

[266] During the period in which the children are in the care of a parent, that parent shall make day-to-day decisions for the children, which include when to give over-the-counter medicines, attendance at a physician for minor illness, etc. and such issues as those pertaining to nutrition, discipline, routine, staying home from school due to illness or emergency medical decisions, (minor injuries, allergies, clinic visits etc.) during the time they are with that parent.

[267] The resident parent shall keep the other parent fully informed of any minor illnesses, emergencies, treatments, medications administered or prescribed while the children are in his/her care within 24 hours and/or before the next transition to the other parent, whichever comes first. The parents may obtain additional information directly from the physician.

[268] In a health emergency, the parent with care of the children at that time shall make the treatment decision, on the advice of medical personnel. If a parent makes an emergency health decision, the parent who has made the decision shall immediately contact the other parent.

[269] If a child is admitted to a hospital, both parents may attend. The parents shall supply each other with copies of all medical and/or professional reports they have pertaining to the child within 24 hours of receipt. The parents may also request any relevant records/information from the child's physician directly.

[270] The children shall reside with the parties over the holidays pursuant to the following equal and alternating schedule:

Family Day Weekend

a. Family Day long weekend shall begin on Thursday after school or otherwise at 3:00 p.m. and continue until drop-off at school on Tuesday morning or otherwise at 9:00 a.m. The children shall be resident with Melissa for all Family Day Weekends in even-numbered years and with James on odd-numbered years.

***Other Long Weekends (Victoria Day, Canada Day, August Civic, Labour Day*)**

b. The children shall remain in the care of the parent with whom they would be residing according to the regular schedule over the long weekend until Tuesday drop-off at school or otherwise at 9:00 a.m. except that the Summer Vacation schedule below will take precedence over Canada Day and August Civic.

School March Break

c. The children shall reside with James over March break in odd-numbered years and with Melissa in even-numbered years from Friday at the end of school or otherwise at 3:00 p.m. until Monday drop-off at school or otherwise at 9:00 a.m. after the break. The parent with care of the children for March break may travel with the children, assuming that the other parent has been advised of the travel plans at least 14 days in advance.

Easter Weekend

d. The children shall reside with Melissa on Easter weekend in odd-numbered years and with James in even-numbered years, from their leaving school on the Thursday before the Easter weekend or otherwise at 3:00 p.m. until Monday drop-off at school or otherwise at 9:00 a.m.

Mother's Day

e. If the children are not otherwise with Melissa on this weekend, the children shall reside with Melissa on Mother's Day weekend, from Saturday at 6:00 p.m. until Monday drop-off at school or otherwise at 9:00 a.m.

Father's Day

f. If the children are not otherwise with James on this weekend, the children shall reside with James on Father's Day weekend, from Saturday at 6:00 p.m. until Monday drop-off at school or otherwise at 9:00 a.m.

Summer Vacation

g. Each party shall have one week of uninterrupted parenting time in July and one week in August (“exclusive weeks”). James shall have his first choice of exclusive weeks in odd-numbered years, and Melissa shall have her first choice of exclusive weeks in even-numbered years. The party with the first choice shall advise the other in writing by April 1 annually. The party with the second choice shall advise the other in writing by April 15 annually. The balance of the summer school break shall follow the regular schedule. If a party with first choice does not advise the other by April 1, the other parent shall exercise first choice, and will retain their normally scheduled first choice in the immediately following year.

h. The parties shall exchange preferences for where the children should attend summer camp by January 30 each year and James shall have final decision-making authority respecting their attendance after taking into consideration Melissa’s preferences.

Thanksgiving Weekend

i. The children shall reside with James in even-numbered years and with Melissa in odd-numbered years, from their leaving school on the Friday before Thanksgiving or otherwise at 3:00 p.m. until Tuesday drop-off at school or otherwise at 9:00 a.m. following Thanksgiving.

Halloween

j. Halloween shall follow the regular schedule.

k. The parent who takes the children trick or treating shall be responsible for the costume.

Christmas Break and New Year's Eve

l. In odd-numbered years, the children shall reside with Melissa for the first part of the Christmas Break and shall reside with James for the last part of the Christmas Break. In even-numbered years, this schedule shall be reversed. Exchanges shall occur at noon on the day that is the midpoint of the Christmas Break.

m. In priority to the immediately preceding paragraph, the parties shall equally share the Christmas Holiday such that in even-numbered years, the children shall reside with James from noon on December 24 to noon on December 25 and with Melissa from noon on December 25 to December 26. In odd-numbered years, the schedule shall be reversed.

n. New Year's Eve shall follow the Christmas Break schedule.

Snow Days, PA Days, and Other School Closures

o. The resident parent for a given day shall be responsible for the care of the children whose school is closed that day for a professional activity, a snow day, and any other day when the school closure is otherwise than on account of a long weekend.

Parents' Birthdays

p. Parents' birthdays shall follow the regular schedule.

Three Weekend Rule

q. In the event that the holiday schedule permits one party to have three weekends in a row, the third weekend shall automatically go to the other party. In all other respects, the regular and holiday schedule shall remain unchanged such that, when this paragraph is involved, each party shall have two consecutive weekends.

[271] Commencing the first Monday following the release of the Final Order, the children shall reside equally with James and Melissa according to a 2-2-5-5 schedule with exchanges upon drop off at school or otherwise at 9:00 a.m. where the children reside with Melissa every Monday and Tuesday and with James every Wednesday and Thursday and with each parent on alternate weekends.

[272] Melissa shall not interfere with or advocate for an outcome, with any school administrators/educators or third-party professional supports, that is inconsistent with a decision

made by James and Melissa shall not seek to place these individuals/entities in a position of conflict with respect decisions made by James.

[273] Melissa shall abide by decisions made by James.

Parenting Terms

Non-Denigration

[274] Neither parent shall denigrate or be critical of the other parent either overtly or covertly, in any communication with the children or with others when the children are present or nearby, regardless of whether or not it appears the children can hear the comments. The parents shall advise others to maintain the same standard and to refrain from criticizing the other parent in front of H. and E.

[275] Both parents shall advise others including friends, relatives, and extended families, to maintain the same standard, refraining from criticizing or disparaging the other parent to or in front of the children.

[276] The parents shall make every effort to protect the children from their anger and/or frustration regarding the other parent, with the understanding that the children may find this stressful, and that parental conflict compromises her overall adjustment and well-being.

[277] The parents shall not discuss with the children, or with another person in the presence of the children, present or past legal proceedings, issues or conflicts between the parents related to the present or past legal proceedings, including property issues, other financial issues or parenting (decision-making or parenting time).

Communication

[278] The parties shall share information with each other on a regular basis about the children's welfare, including their education and schoolwork, medical needs, health and dental care, counselling, extra-curricular activities and other important issues. This shall include sharing copies of all communications with any of the children’s professionals.

[279] Each party shall copy the other parent on all communications to third parties relating to the children.

[280] The parties shall only communicate through Custody X Change, except for time-sensitive or urgent issues, and their communications shall be solely with respect to issues concerning the children.

[281] All communication shall be professional, civil, and as brief as possible.

[282] The information exchanged between the parties shall be restricted to the children's health, welfare, pertinent child-related information (e.g., medical information, extracurricular activities, routines, the need to consult on any of these), requests for a temporary change to the parenting time schedule, notice that a parent is unavailable to care for the children, and other parenting issues.

[283] Neither parent shall denigrate, name-call, or disparage the other parent in any communication.

[284] Custody X Change messages shall be checked and responded to within 24 hours. If a reply to a request cannot follow by then, a message shall be sent advising that the requested information cannot reasonably be ascertained by then.

[285] The parents shall ensure that the children will not be privy to any of their written communication.

[286] The parties may both ask for and be given information directly from the children's teachers, other school officials, health care providers (including both doctors and dentists), and any other person or institution involved with the children. Each parent shall sign all necessary consents for the other parent to receive such information.

[287] Absent a true emergency, the parties shall not initiate a communication to the other party more than once per day.

[288] For true emergencies or time-sensitive, urgent, or day-to-day matters requiring a speedier response than within 24 hours, texts messages can be exchanged between the parties, and they shall be answered as soon as the communication is viewed.

[289] During the regular parenting time schedule, the children may contact each parent whenever they wish.

[290] The non-resident parent may initiate up to one daily telephone or video call to H. and E. at a consistent, predictable, and mutually agreeable time where such contact should not exceed 10 to 15 minutes in length unless otherwise agreed by the parents. The parties shall agree to this time, in writing, within fourteen days of this Order. If, for any reason, H. or E. is not available to receive the parent's telephone/webcam call at that time, then the resident parent shall be responsible for ensuring that they return the call as soon as practically possible.

[291] H. and E. shall be ensured of privacy during telephone or video contact with either parent.

Exchanges

[292] Significant changes in the drop-off and return times shall be communicated to the other parent as soon as these changes become known to the parent having to make them.

[293] The children may take personal items (for example, clothing, toys, sports equipment, cell phone, regardless of which parent purchased these items), between the parties' homes and the parties shall not restrict the children's ability to take these items between their homes.

[294] If a child is sick, the transition from one party's care to the other party's care is to proceed according to the schedule unless he or she is too sick to travel between the parties' homes according to his or her doctor in writing.

[295] The parties shall each have toiletries, clothing, pajamas, and as many belongings as possible for the children in their homes and these items shall not travel back and forth.

[296] Both parents shall be responsible for major purchases for both children as it relates to clothing, winter boots, and sporting equipment. Each parent may choose to supplement the basic needs of the children by making gifts of clothing or other items to the children; any such gifts will become the property of the children, who may take them back and forth or leave them where the child chooses. Both parents will ensure that outdoor clothing and sports equipment travels back and forth.

Extra-Curricular Activities

[297] Each party may schedule either child for an extra-curricular activity which occurs only on his/her time but may not sign up either child for an activity which occurs on the other parent's time without his/her advance written consent.

[298] James and Melissa will inform each other of the extra-curricular activities which occur on his/her time.

[299] Neither parent shall be required to pay for extra-curricular activities unless he or she has agreed to contribute to the expense in advance in writing where consent shall not be unreasonably withheld.

Important Documents

[300] James shall be responsible for renewing passports for both H. and E.

[301] James shall keep the passports issued in the children's names, their Social Insurance Number cards, and birth certificates at his home, and these documents will be made available to Melissa as needed. Melissa shall return the documents to James as soon as possible after use.

[302] James shall apply for Nexus cards for both children, which shall be kept in his possession, unless requested from Melissa.

[303] The children's passports, Nexus cards, and written consent for travel beyond Canadian borders should be made available to both parents upon request with one week's written notice.

[304] Both parents shall have notarized copies of all of the important documents.

Travel

[305] Neither parent shall remove the children from the Greater Toronto Area without informing the other parent.

[306] If either party wishes to travel outside of Canada with the children, the party may travel outside of Canada with the children to a country that is a signatory to the Hague Convention on Civil Aspects of Child Abduction ("Hague Convention"), with the written consent of the other party, which consent shall not be unreasonably withheld. The travelling party shall provide the other party with a travel consent authorizing the children to travel, for the other party to execute and have notarized no less than one week after written notice of the intention to travel and location of travel has been provided. The travelling party shall be responsible for the payment of the notarization. The travel consent shall not be unreasonably withheld.

[307] Neither parent shall travel with the children to a country that is not a signatory to the Hague Convention unless the other parent consents. The information requirements in paragraph 306, above, apply.

[308] The parties shall take into consideration travel restrictions and warnings when choosing locations of travel and while at the destination.

[309] If either party plans a vacation with the children, that party shall give the other a detailed itinerary at least 14 days before it begins, including the name of any flight carrier and flight times (if applicable), accommodation (including address and telephone numbers), and details as to how to contact the children during the trip.

[310] If either party plans a vacation without the children, that party shall give the other a telephone number where he or she can be reached in case of emergency or if the children wish to contact that party.

Appointments

[311] Both parties shall be entitled to attend all appointments for the children or one of them with medical health professionals.

[312] The parties shall alternate responsibility for taking the children to appointments with medical health professionals. The party taking the child or children to an appointment shall schedule the appointment.

Other Parenting Terms

[313] Residency time shall only be altered if both parties agree.

[314] The parents shall make all practical efforts to ensure H. and E.'s attendance at any or all structured activities or special occasions involving peers, and/or extended family. While it is understood that this may not always be feasible, when possible the parent shall schedule these events when they know the children will be with them.

[315] In the event of the death of one parent, the other parent shall care for the children and shall ensure that the children have continued relations with the relatives and extended family of the deceased parent. For clarity, in the event of James' death Melissa shall not interfere with or prevent the children having continued relations with Holly.

[316] Neither party shall permit or provide the children with medication without notice to the other parent unless in the case of over-the-counter medication which shall be administered at each parent's discretion during his/her parenting time. In such a case, that parent shall report this information promptly to the other parent and so he/she is aware of the medications taken.

[317] For clarity, either parent may possess a monthly supply of Vyvanse or other controlled drug that has been prescribed to either child.

[318] Where the children are exchanged between the parents during a holiday, the parties shall mutually determine an appropriate exchange location convenient for both parties.

[319] It is in the children's best interests to spend time with the other parent rather than with a third party. Accordingly, if a party with whom the children are scheduled to be according to the schedule above or their spouse cannot care for the children for a period of 8 hours or more, that party shall notify the other party and give the other party the opportunity to do so. If the other party cannot care for the children, the party with whom the children are scheduled to be according to the schedule above shall be solely and financially responsible for making alternate childcare arrangements.

[320] For clarity, the above paragraph does not apply to either party leaving their children with their grandparents or with Holly Clarke, or for childcare arrangements made during travel with the children.

[321] If special occasions (such as family weddings), extracurricular activities, excursions or other opportunities become available to the children, or to either party, the parties shall use best efforts to accommodate the children's attendance within reason. However, the final decision rests with the parent who has parenting time.

[322] The parents shall exert their best efforts to work cooperatively and to make parenting arrangements with H. and E.'s best interests at heart.

[323] The parents shall respect each other's privacy, and as such refrain from engaging H. and E. in any discussion or questioning about the other parent's personal life or activities. The parents shall refrain from any form of interference, direct or indirect, into the life, activities, or routines of the other parent and this includes recording the children with the other parent.

[324] In the event H. or E. complains to the resident parent about the other parent, they shall be encouraged to talk directly to the other parent about the concerns. The parents recognize that children frequently express to parents what they believe they wish to hear about the other parent.

[325] Both parents shall ensure that they have safety locks and passwords on their phones and computers so that the children do not have access to adult information.

[326] Holly Clarke, and other alternate caregivers as may be mutually agreed by the parties, may transport H. and/or E. to and from school, to Melissa's residence, or to events or activities.

[327] Both parents shall be listed on all school/sports forms regardless of who fills them out. In addition, both parents and their current respective spouses shall be listed as emergency contacts on all forms. Both parents and their families may attend school functions, including: open houses, curriculum night, plays, concerts, assemblies, fund raisers, etc., regardless of the residential schedule. The parents shall remain cordial during these occasions and not discuss child-related arrangements and issues.

Child Support

[328] Melissa’s request to impute income of $250,000 to James is dismissed.

[329] Melissa shall pay ongoing table child support to James for the children of $2438 per month based on her partial 2023 income of $180,093.32. James shall pay ongoing table child support to Melissa for the children of $1471 per month based on an imputed income of $100,000.

[330] Melissa shall pay 50% and James shall pay 50% of the children’s agreed upon special and extraordinary expenses, including the cost of childcare, education, and therapy in an amount to be determined where consent to expenses shall not be unreasonably withheld.

[331] Each party will each take out life insurance, payable to the other in trust for the children, to secure their child support obligations. They shall provide to each other proof of such insurance within 60 days of this Order. They shall maintain such insurance for so long as they are liable to pay child support.

[332] Melissa shall maintain the children on her health benefit plan available through her employer.

[333] James shall include the children on any health benefit plan that is or becomes available to him.

[334] Within sixty days of this order, Melissa shall reimburse James for section 7 expenses incurred from the date of separation to the date of trial in the amount of $8,504.23.

[335] Before the seventh day of every month, the parties shall provide each other with a list of section 7 expenses incurred over the previous month with supporting documentation evidencing

payment made as well as a full reporting of the funding that has been granted to either party to cover any such expenses such as government funding or insurance and including a total balance outstanding.

[336] There shall be reasonable limits on the amount of section 7 expenses that can be spent per child per month.

[337] 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.

[338] Each party shall provide each other and the Director of the Family Responsibility Office notification of any change in address or employment, including full particulars about the change, within ten (10) days of the change taking place.

[339] For as long as child support is to be paid, James and Melissa shall provide updated income disclosure to the other each year within 30 days of the anniversary of this order in accordance with section 24.1 of the *Child Support Guidelines*.

Spousal support

[340] Melissa's claim for ongoing spousal support is dismissed.

Property and Post-Separation Claims

[341] Within 90 days of this Order, Melissa shall pay James $44,266.72 in post-separation adjustments comprising her 50% of the mortgage payments Mr. Clarke made respecting 80 Condor Avenue.

[342] Melissa's claim for post-separation adjustments is dismissed.

[343] It is declared that Melissa has no interest in James' pension or any of his other assets, including the Clarke Family Trust.

Relocation

[344] Melissa's claim for a temporary or final Order permitting her to relocate outside of the Greater Toronto Area is dismissed.

[345] Neither parent shall relocate with the children outside the City of Toronto.

[346] If either parent intends to relocate, he/she shall provide the other with 90 days' notice, in writing, of this intention. They will additionally provide the new address, telephone number and date of move.

[347] For the purposes of the *Hague Convention on Child Abduction,* the children's habitual residence shall remain Toronto, Ontario, and this shall only be changed through explicit court order or the explicit agreement of both parties.

[348] If either party proposes to change their residence within the City of Toronto, at least 60 days before the move, they shall provide the other parent with the new address, telephone number and the date of the move, and the relocating parent shall be responsible for transporting the children to and from their current school and shall not attempt to relocate the children's school. If either party intends to relocate, they shall provide the other with 60 days' notice, in writing, of this intention before the move along with the new address, the date of the move, and new telephone number, if any. If James and Melissa cannot agree on the move or any changes to the parenting schedule related to the move, the issue shall be determined by the court.

Other

[349] Melissa shall pay all outstanding costs awards within 60 days of this order, plus interest.

[350] Melissa shall not be entitled to further judicial relief in relation to the parties until she satisfies all outstanding costs awards, including any that might be awarded as a result of this trial.

[351] After Melissa satisfies all outstanding costs awards, she may not file any applications for relief in relation to the terms set out in this Order without first posting security for costs in the amount of $10,000.

[352] A case management judge – Justice Diamond, if he is available – shall be assigned to deal with any future applications by either party. No further motions may be brought without leave of the case management judge.

[353] Should the parties not be able to agree upon costs, the parties shall submit written argument of no more than 5 pages each, together with their bills of costs and any offers to settle, within 45 days of this Order. The Applicant may submit a reply of no more than 3 pages within 14 days of receipt of the Respondent's submissions.

[354] Either party may submit for my signature a draft order that reflects the provisions of this order.

[355] This order bears interest at the post-judgment interest rate set out in the *Courts of Justice Act* per year effective from the date of this order. A payment in default bears interest only from the date of default.

Justice Mathen

Released: March 17, 2025

CITATION: Clarke v. Denyes, 2025 ONSC 1894
COURT FILE NO.: FS-19-8589
DATE: 20250317

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Harry James Clarke

Applicant

– and –

Melissa Joy Denyes

Respondent

REASONS FOR DECISION

Mathen J.

Released: March 17, 2025