

CANADA / JUDGMENT

A.A.S. v. A.C.G.

2024 BCSC 1954

COURT

Supreme Court of British Columbia

DECIDED

18 April 2024

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2024 BCSC 1954 A.A.S. v. A.C.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.A.S. v. A.C.G.,

2024 BCSC 1954

Date: 20240418

Docket: E51934

Registry: New Westminster

Between:

A.A.S.

Claimant

And

A.C.G.

Respondent

Before: Associate Judge Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

P. Schmidt

Counsel for the Respondent:

J. Gray

T. Sandhu, Articled Student

Place and Date of Hearing:

New Westminster, B.C.

April 16, 2024

Place and Date of Judgment:

New Westminster, B.C.

April 18, 2024

- [1] THE COURT: These are my oral reasons on an application by the claimant for an order permitting her to relocate the children's residence from [redacted] to [redacted], BC. The application was filed on March 18, 2024 and originally set for hearing on March 28, 2024. There was no court time available so the application was adjourned to April 3, 2024, and there was also no court time available on April 3, 2024, so the matter was adjourned to April 16th. I say that just to reiterate that there was no delay in bringing this application.
- [2] Given the nature of the application and the fact that the claimant has already moved, I advised the parties that I would give them a decision as quickly as possible.
- [3] These oral reasons have been edited for grammar and clarity, and to anonymize certain facts in order to protect the privacy of the parties' children. The substance and result have not changed.
- [4] Both parties are 40 years of age, and commenced cohabitation in 2013. They married later that year, and separated on February 15, 2016. They are the parents of one biological child, A., who is aged 9. They also have another child, B., who is aged 16. B. is the claimant's biological child from a prior relationship, and the respondent adopted B. in September 2013.
- [5] It is not disputed that the claimant has been the primary caregiver for the children throughout their lives, both before and after the parties' separation.
- [6] This action commenced in October 2016. The parties attended two Judicial Case Conferences before Master Keighley, which resulted in orders dated January 17 and March 30, 2017. The January order provides the respondent with parenting time every Tuesday for just over four hours pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The March order changes the day of the respondent's parenting time from Tuesday to Thursday, on an interim, without prejudice basis. Those two orders do not address guardianship or allocation of parental responsibilities, do not include any geographic restrictions on the children's residence, and allow the claimant to provide the respondent with one week's notice if the day of the week of the respondent's parenting time is to change.

- [7] To the parties' very great credit, they have not returned to court since 2017, until now. They have, by agreement, increased the respondent's parenting time to include not only one weekday but also one overnight every weekend, from Saturday to Sunday, with flexible start and end times.
- [8] Although the respondent says he would like to increase his parenting time to an equal shared parenting arrangement, he has not taken any steps in this regard. It is undisputed that the claimant has had the vast majority of the parenting time, being something in the range of 85 percent of the time. The respondent has not even had any significant periods of holiday parenting time. The claimant's evidence is that the respondent has not had longer than five consecutive nights with the children in his care since separation.
- [9] The claimant has also been the parent primarily responsible for decision-making for the children, including making decisions regarding the children's health and education. These two aspects of the children's lives are particularly significant due to their special needs.
- [10] B. is described as neurodiverse, having been diagnosed with ADHD, PTSD and learning disabilities. B. also has irritable bowel syndrome ("IBS") or colitis. In addition, B. is likely the victim of childhood sexual assault by a trusted adult in a daycare setting, and suffers from trauma and behavioural issues as a result. B. has an Individual Education Plan ("IEP") and receives extra supports at school. B.'s schooling has been a combination of distance learning, private school, part-time public school and full-time public school. B. is currently in Grade 11 and is on track to graduate.
- [11] A. is also described as neurodiverse, having ADHD and IBS. The claimant says that A. suffers from anxiety and is likely dyslexic. A. also has an IEP and receives extra supports at school.
- [12] The evidence is that the claimant has been a strong advocate for both of the children, and has been significantly involved in ensuring that they both receive appropriate supports for their learning, health care and psychological needs. She alone has made decisions as to their schooling, without much involvement from the respondent.
- [13] Until recently, the claimant and the children have lived in a townhouse in [redacted] that was owned by the claimant's brother, and for which the claimant paid below-market rent. That home has recently been sold, with the claimant being required to vacate at the end of March.
- [14] The parties started discussing the possibility of the claimant needing to move as early as the summer of 2023, when the claimant's brother first indicated his desire to sell the townhouse. The claimant told the respondent that when she needs to move, it would be out of the Lower Mainland for financial reasons. The respondent's reply was that he was open to leaving the Lower Mainland as he also could not afford to continue living here.

[15] I pause to note that the respondent works in Richmond, and has been living for a number of years with his parents in their home in Abbotsford. His parenting time involves commuting between Abbotsford and [redacted].

[16] After the initial communications between the parties in June 2023, their next significant discussions about a move were in November 2023. The claimant had been visiting [redacted] and looking at homes there. The respondent sent an email to the claimant on November 27, 2023, which reads in part:

I don't want you to move the kids to [redacted]. I realize that this may happen anyway, but I don't want it. I have concerns about their needs being met in such a remote town. I have concerns about my parenting rights. I have concerns about jobs for both of us. There are so many issues that need to be addressed and this is all happening so fast.

I would like you to sign a temporary non-relocation agreement. This will give us a few extra months to figure this out and come up with a new parenting agreement.

I would like to seek mediation. Before either one of us leaves the area, we need a new agreement. We can save time and money by doing this with a mediator. They can help us navigate through this and create an agreement that's fair and legal. Even if you do go, at least I'll know that the children's needs are met, my parenting rights are protected and the agreement is fair, including child support.

[17] On January 12, 2024, the parties had a telephone conversation in which the claimant told the respondent that she had lined up schools and supports for the children in [redacted], and invited him to attend tours she had arranged. The respondent reiterated his position that he was opposed to a move to [redacted]. He has been consistent in this regard.

[18] The following day, on January 13, 2024, the claimant sent the respondent a nine-page email setting out her view of the benefits to the children of moving to [redacted]. She said that she plans to move when the townhouse sells, likely in March or April, and she sets out a proposal for the respondent's parenting time. It is this email that the claimant says was her formal written notice of relocation pursuant to s. 66 of the FLA.

[19] The respondent disagrees that the January 13th email constitutes a valid notice of relocation. He says that the parties were still in the discussion phase as evidenced by the concluding paragraph of that email where the claimant refers to mediation as an option and says, "I do hope we can continue to work this out between us".

[20] On March 1, 2024, the claimant sent another email to the respondent. In that email, she tells the respondent that the townhouse has finally sold and that they are moving to [redacted] on March 28, 2024. In this email the claimant also advises the respondent of the address of her new home and of the arrangements she has made for the children's schooling. She says that she will maintain the children's existing doctors and pharmacies, which I take to be in the Lower Mainland, and that there are walk-in clinics available in [redacted] for any urgent medical needs. The respondent considers this March 1st email to be the formal notice of

relocation.

[21] On March 8, 2024, respondent's counsel sent a formal notice of objection to relocation.

Legal Framework

[22] The first issue to be addressed is whether the claimant's move from [redacted] to [redacted] with the children is a relocation. Despite conceding in her notice of application that this is a relocation, claimant's counsel in oral submissions argued that it is not.

[23] Section 65 of the FLA defines relocation as:

a change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with

- (a) a guardian, or
- (b) one or more other persons having a significant role in the child's life.

[24] Section 2(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), defines relocation as:

a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility -- or who has a pending application for a parenting order -- that is likely to have a significant impact on the child's relationship with

- (a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or
- (b) a person who has contact with the child under a contact order;

[25] Under either statute, this is clearly a relocation. [Redacted] is roughly a four-hour drive from Abbotsford where the respondent resides, in good weather. In the winter months, the Coquihalla Highway is often impacted by snow and other adverse weather events which can make the drive much longer and at times impossible. A move to [redacted] would eliminate the weekday after-school parenting time that the respondent currently has. It would also limit his weekend parenting time and require considerable regular travel on the part of both parties and the children.

[26] Having determined that this is a relocation, I am satisfied that the applicable statute is the Divorce Act due to the doctrine of paramountcy. Support for this approach is provided by the Court of Appeal in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20, and confirmed in more recent decisions of this court such as *C.C. v. S.P.R.*, 2022 BCSC 1503 at para. 32 and *J.L.L. v. A.J.M.*, 2023 BCSC 1698 at para. 70.

[27] The applicable sections of the Divorce Act are ss. 16.9 through 16.94:

16.9 (1) A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify, at least 60 days before the expected date of the proposed relocation and in the form prescribed by the regulations, any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention.

Content of notice

- (2) The notice must set out
 - (a) the expected date of the relocation;
 - (b) the address of the new place of residence and contact information of the person or child, as the case may be;
 - (c) a proposal as to how parenting time, decision-making responsibility or contact, as the case may be, could be exercised; and
 - (d) any other information prescribed by the regulations.

Exception

- (3) Despite subsections (1) and (2), the court may, on application, provide that the requirements in those subsections, or in the regulations made for the purposes of those subsections, do not apply or may modify them, including where there is a risk of family violence.

Application without notice

- (4) An application referred to in subsection (3) may be made without notice to any other party.

Relocation authorized

- (1) A person who has given notice under section 16.9 and who intends to relocate a child may do so as of the date referred to in the notice if
 - (a) the relocation is authorized by a court; or
 - (b) the following conditions are satisfied:
 - (i) the person with parenting time or decision-making responsibility in respect of the child who has received a notice under subsection 16.9(1) does not object to the relocation within 30 days after the day on which the notice is received, by setting out their objection in
 - (A) a form prescribed by the regulations, or
 - (B) an application made under subsection 16.1(1) or paragraph 17(1)(b), and
 - (ii) there is no order prohibiting the relocation.

Content of form

- (2) The form must set out
 - (a) a statement that the person objects to the proposed relocation;
 - (b) the reasons for the objection;
 - (c) the person's views on the proposal for the exercise of parenting time, decision-making responsibility or contact, as the case may be, that is set out in the notice referred to in subsection 16.9(1); and
 - (d) any other information prescribed by the regulations.

Best interests of child -- additional factors to be considered

16.92 (1) In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,

- (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 a pending application for a parenting order 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 complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
- (e) the existence of an order, arbitral 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 parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
- (g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

Factor not to be considered

- (2) In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

Burden of proof -- person who intends to relocate child

16.93 (1) If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

Burden of proof -- person who objects to relocation

(2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

Burden of proof -- other cases

(3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

Power of court -- interim order

16.94 A court may decide not to apply subsections 16.93(1) and (2) if the order referred to in those subsections is an interim order.

[28] With respect to the notice required by s. 16.9, the claimant acknowledges that she did not use the prescribed form of notice provided for in the Divorce Act. However, she says that she complied with the substance and spirit of the Divorce Act requirements by providing the information required to be included in the prescribed form.

[29] In *E.S. v. G.D.S.*, 2023 BCSC 1537, the moving parent failed to comply procedurally with the Divorce Act notice requirements. Nonetheless, this court proceeded to undertake the statutory analysis as if notice had been given rather than deciding the matter on technical grounds.

[30] It bears mentioning that if the claimant had complied with the Divorce Act requirement and used the mandated form, there would be no dispute about the date the notice was given. The respondent would have clearly understood which of the claimant's communications was intended to be formal notice of an intent to relocate.

[31] Having carefully read the claimant's January 13, 2024 email, I agree with the respondent that it is not a clear notice of relocation as required by s. 16.9. It is more in the nature of the claimant endeavouring to persuade the respondent to see the benefits of [redacted]. As described by counsel, it was still part of the "discussion phase". It does not precisely identify the expected date of relocation or the address of the new place of residence. Rather, it is an invitation to further discussion or mediation.

- [32] In my view, the claimant provided adequate although informal notice on March 1, 2024, and the respondent provided a proper notice of objection a week later on March 8, 2024.
- [33] Once a valid notice of objection is received, the court must then undertake an analysis of the best interests of the children, bearing in mind the factors set out in ss. 16 and 16.92.
- [34] One of the difficulties this court faces is that this application is being brought in chambers on limited affidavit evidence at an interim stage without the ability to conduct a fulsome analysis of all of the best interest factors:
- [121] While it did not involve an interim application for relocation, the court of appeal's decision in *Hellberg v. Netherclift*, 2017 BCCA 363 is instructive. It addresses the importance of the court having a fully rounded evidentiary record when addressing a child's best interests. That case involved an appeal from a summary trial decision where the chambers judge had allowed the respondent to relocate the parties' child from BC to the United Kingdom so she could pursue more lucrative employment. At the initial hearing, the parties had agreed the matter was suitable for disposition by summary trial. They lacked the financial resources necessary for a traditional trial and desired a prompt resolution. At para. 72, the court of appeal commented on the importance of a fully-rounded analysis of the child's best interests:

72 The importance of considering the best interests of the child "in the round" can be traced to this Court's judgment in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 per Saunders J.A. at para. 46. Although the expression was used in a particular context in *Hejzlar*, it is one of general application and simply means that consideration of the child's best interests requires a fully-rounded analysis that takes into account all relevant factors.

(*K.H.D. V. O.O.M.*, 2022 BCSC 1525)

- [35] With respect to the challenges of determining a relocation application at an interim stage, I wholeheartedly adopt Justice Fleming's analysis in *Nolie v. Reece*, 2016 BCSC 2201, at paras. 25 to 36, and I will quote extensively from it as there are many similarities to the case at bar:
- [25] There is a great deal of conflict in the evidence before me that relates to the factors that bear on the analysis of the children's best interest and each party has suggested the other is not credible. There are also significant gaps in the evidence regarding the children.
- [26] I appreciate the parties have not had a great deal of time to prepare some of their materials. Understandably perhaps, the evidence focuses to a large extent on the proposed move and Ms. Reece's plan, its benefits from her perspective, and its weaknesses from Mr. Nolie's.
- [27] Relocation is, as Master Scarth said in *D.R.K v. S.G.G.*, 2013 BCSC 2107, one of the most serious decisions the court is asked to make. It can have a lifelong impact on a child and his or her relationship with a non-moving parent. When granted at the interim stage, it can be tantamount to a final order.

[28] The authorities indicate that courts are reluctant to consider relocation applications at the interim stage particularly where the move would significantly reduce the non-moving parent's time with the child.

[29] In D.R.K., Master Scarth granted the father's application to prevent the mother from relocating their three-year-old child from Pitt Meadows to the Okanagan. The mother who was the child's primary caregiver had notified the father of her intention to move the child to Vernon. She argued the application was urgent because of her precarious financial and employment position. Master Scarth concluded that urgency had not been established and the issue of relocation should be addressed at a trial along with the issue of custody.

[32] In S.L.S. v. J.A.S., 2013 BCSC 1775, Mr. Justice Rogers refused to grant the mother's interim application to relocate the parties' nine-year-old child from Peachland to Pitt Meadows because the mother's new partner had a job that required him to move. The parties had shared parenting time equally up to that point by agreement. The court dismisses the mother's application based on an analysis of s. 69(4) and the child's best interest, but also expressed concern about deciding the issue on an interim application.

[33] At paragraph 31, he said in part as follows:

I will start this discussion with a cautionary note. These are interim applications. They are based on affidavit evidence. The parties have not yet conducted examinations for discovery. Neither the parties nor their supporting affiants have been subject to cross-examination before the court. C's views, whatever they may be, are not known other than through the party's clearly self-serving hearsay attestations. The court does not have the benefit of a report pursuant to s. 211 of the Act. Much about this case has not, therefore, been fully elucidated. Under such circumstances, the court should proceed cautiously. The court should be careful about making an interim order that endorses a parenting regime that is significantly different than one that served the child well for some time after the parties' separation. That is not to say that the status quo should be slavishly preserved - it is only to say that the trial judge will likely be in a much better position than a chambers judge to fully assess all of the factors that will influence a decision about where C's best interests lie.

[34] I entirely agree with these comments. In this case, it is clear the proposed relocation would significantly reduce the frequency with which the children are in the care of Mr. Nolie.

[35] In my view, the claimant's proposal should be considered at a trial where more fulsome evidence can be presented. Testimony can be tested by cross-examination and the trial judge can properly assess the creditability and reliability of the witnesses' evidence.

[36] Although Ms. Reece is anxious to move the children and I sympathize with her emotional distress over the loss of her relationship with Mr. Nolie, as well as her desire to return to what I accept would be a highly supportive environment for her and the children, I do not regard it as in the children's best interest to make such a critically important decision based on the record before me.

- [36] In the case at bar, there are a number of conflicts in the evidence as to the extent and nature of the respondent's parenting role over the years. There is no order or agreement with respect to allocation of parental responsibilities, although the claimant appears to have been the de facto decision-maker in many respects. There are some credibility issues noted by both parties.
- [37] Most concerning, in my view, is that there is no independent evidence of the children's views and preferences. At age 16, B. certainly deserves to have a voice in such a significant decision. A. too, who will be 10 in August, also has the right to have her views known before such an important decision is made for her.
- [38] I recognize the reality that the claimant has been forced to move due to the sale of her rented home. She has chosen, somewhat prematurely, to purchase a home in [redacted], without first obtaining the consent of the respondent or a court order allowing the relocation. She wants to move out of the Lower Mainland to lower her cost of living and to attain what she views is a better lifestyle for herself and the children. Those are both understandable reasons.
- [39] The rationale for the choice of [redacted] as a location to move to is less clear. Neither party has any family connection to [redacted]. The only connection that the claimant seems to have is that she has vacationed in [redacted] a number of times and likes the community. A. has apparently made a friend there during those vacation times.
- [40] The claimant works remotely, so she has the flexibility to work from anywhere. The respondent does not have that same flexibility and such a move necessarily impacts his time with the children. He is also the children's parent and has the right to be concerned that this move may not be in their best interests. He has some legitimate concerns about whether [redacted] is a location that is best suited to these children's needs, including their health and educational needs.
- [41] The court's only concern is the best interests of B. and A. The Divorce Act requires this court to consider all factors related to the circumstances of these children, including those listed in ss. 16(3) and 16.92 of the Divorce Act. The affidavit evidence currently before the court simply does not allow me to fully consider all of the required factors. This is a significant decision with long-lasting impacts and ought not be decided at this interim stage with insufficient evidence.
- [42] Accordingly, claimant's notice of application filed March 18, 2024 is dismissed. The children's residence is not to be relocated outside the Lower Mainland or Fraser Valley areas of British Columbia without the prior written consent of both parties or further court order.

- [43] If the claimant wishes to pursue her relocation application, this matter is to be set for trial at the earliest mutually available date. I understand from Supreme Court Scheduling that there are trial dates available for trials of up to five days later this year, although not in New Westminster. Should it be required in order to secure an earlier trial date, I grant leave to the parties to have the trial heard in Vancouver, Abbotsford, or Chilliwack.
- [44] If this matter is set for trial, I strongly encourage the parties to jointly retain an assessor to conduct a Views of the Child Report pursuant to Section 211(1)(b) of the FLA with respect to both children. Such a report will be of considerable assistance to the trial judge.
- [45] As the successful party on this application, the respondent is entitled to his costs in the cause.
- [46] That concludes my reasons. Madam Clerk will give you your materials back. Thank you, counsel.
- [47] CNSL P. SCHMIDT: Just one point just to clarify.
- [48] THE COURT: Yes.
- [49] CNSL P. SCHMIDT: I understand the application is dismissed.
- [50] THE COURT: Yes.
- [51] CNSL P. SCHMIDT: There's obviously no comments on that. And are you also making an order that the children not be relocated outside the Lower Mainland and my concern with that is that there's no --
- [52] THE COURT: Outside the Lower Mainland or Fraser Valley without further court order or written agreement between the parties. They're going to have to sort out what's going to happen between now and a trial date. I'm hopeful that they can do that by agreement. If not, there may be need for further application.
- [53] CNSL P. SCHMIDT: And I totally get that. I just -- there was no application before you for such an order, so I'm just concerned about the jurisdiction -- obviously of the jurisdiction to dismiss the application, but I'm just concerned about going too far to make that order.
- [54] THE COURT: It's part and parcel of the dismissal of the application to relocate. If you disagree, you can --
- [55] CNSL P. SCHMIDT: Yes.
- [56] THE COURT: -- appeal me.
- [57] CNSL P. SCHMIDT: Yes, okay. Thank you.
- [58] THE COURT: Thank you.

"Associate Judge Hughes"

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