

CANADA / JUDGMENT

A.J.M. v. C.J.M.

2023 BCSC 1000

COURT

Supreme Court of British Columbia

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2023 BCSC 1000 A.J.M. v. C.J.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.J.M. v. C.J.M.,

2023 BCSC 1000

Date: 20230612

Docket: E66097

Registry: New Westminster

Between:

A.J.M. aka A.J.C.

Claimant

And

C.J.M.

Respondent

Before: The Honourable Justice Kirchner

Reasons for Judgment

The Claimant, appearing on her own behalf:

A.J.M.

Counsel for the Respondent:

B.D. Easton

Counsel for the Application Respondent, Director of Child, Family and Community Development:

D.R. Tate

(May 31, 2023 only)

Place and Dates of Hearing:

New Westminster, B.C.

May 31

June 1-2, 2023

Place and Date of Judgment:

New Westminster, B.C.

June 12, 2023

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Introduction

- [1] The Claimant, A.J.M., applies for an order that the Respondent, C.J.M., be prohibited from relocating their 8-year-old child, C., from North Vancouver. Alternatively, she seeks an order that C.J.M. pay A.J.M. \$1,200 per month to allow her to travel to Duncan, B.C. to exercise parenting time with C.
- [2] In fact, C.J.M. has already relocated C. to Duncan. He did so in July 2022 without giving the required notice under the Family Law Act, S.B.C. 2011, c. 25, s. 66 ("FLA") or the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 16.9(1). A.J.M. did not learn of C.'s relocation until September 2022 when she was advised by C.'s former school principal in North Vancouver that he was no longer enrolled in the school. I therefore consider the primary relief she seeks to be an order that C.J.M. return C. to North Vancouver for non-compliance with either the FLA or the Divorce Act.
- [3] C.J.M. opposes both applications. He acknowledges that he failed to give the required notice under the FLA or, if applicable, the Divorce Act, but says that since A.J.M. is no longer a guardian of C., she has no standing to stop the relocation. The extent of her rights under the FLA is to seek a variation of a contact order for the purpose of maintaining her relationship with C. He argues since she could not have stopped the relocation, his failure to give the required notice is an irregularity that should not compel him to return C. to North Vancouver. He argues the court must consider only C.'s best interests and those interests favour him staying in Duncan.
- [4] At the outset of the hearing, C.J.M. applied for an adjournment of A.J.M.'s application pending the completion of a s. 211 report that was ordered in August 2022. I declined that application on the basis that I considered A.J.M.'s application to be seeking C.'s return to North Vancouver based on non-compliance with the notice requirement of the FLA and, if applicable, the Divorce Act. I acknowledged that the s. 211 report would be beneficial for a substantive relocation application as well as to determine an application by A.J.M. to restore her rights as a joint guardian to C. However, I viewed the present application as one seeking C.'s return based on non-compliance with the notice requirements and not a substantive application dealing with relocation. I therefore ordered that the application proceed on that basis.
- [5] Thus, these reasons for judgment deal with the question of whether C.J.M. must return C. to North Vancouver due to his non-compliance with the FLA or the Divorce Act. I am not dealing with a full relocation application and the substantive issues respecting a potential relocation to Duncan are to be left for another day.

- [6] To protect C.'s privacy, I have anonymized the names of the parties and any person whose full name could identify C. Since C. and C.J.M. share the same initials, I refer to the child as C. and the father as C.J.M.

Other Orders Sought

- [7] A.J.M.'s Notice of Application also seeks an order appointing her as a guardian of C. She and C.J.M. were named joint guardians in a 2019 consent order I will discuss in a moment but in a subsequent 2021 order, C.J.M. was named sole guardian. A.J.M. has been trying to restore her rights of joint guardianship since April 2022 but has not been able to have that issue determined. She confirmed at the outset of this hearing that she was not pursuing that relief at this time. It is expected to be the subject of a trial that has not yet been scheduled. A trial had been set for November 2022 but was adjourned at the trial management conference and has not been rescheduled. As I understand it, the parties are waiting for the completed s. 211 report as that will assist in resolving the guardianship question. I therefore adjourn that part of A.J.M.'s Notice of Application that seeks orders respecting guardianship.
- [8] A.J.M. also applied for an order for production of documents from the Director of Child, Family and Community Services. Counsel for the Director appeared at the outset of the hearing and took no position on that application as long as any order is in the form attached to the Director's Application Response. A.J.M. and C.J.M. agreed to that form so I made the order in the form proposed by the Director.

Background

- [9] The parties began living in a marriage-like relationship in February 2013 and were married in December 2013. C. was born in August 2014. The parties separated almost five years later on November 7, 2018. A.J.M. filed a Notice of Family Claim later that month. Proceedings were also brought in the Provincial Court and some six or more orders were made in those proceedings. The content of those orders is not before the court on application.

The JCC Order

- [10] On June 18, 2019, the parties attended a Judicial Case Conference ("JCC") before Master Elwood (as he then was). Both parties were represented by counsel. A comprehensive order (the "JCC Order") was made by consent apparently resolving all matters between the parties. The JCC order addressed the following points (which I summarize rather than quote):
- C. will reside primarily with C.J.M. who will be his primary caregiver.
 - A.J.M. was to have parenting time every second weekend from 7:30 p.m. on Friday to 7:00 p.m. on Sunday, although this was without prejudice and subject to a review at either party's request after one year.

- The parties were each named as guardians of C. and each could exercise all parental responsibilities. Any disputes over parenting responsibilities were to be resolved with the assistance of a Family Justice Counsellor.
 - A.J.M. was to pay C.J.M. \$393 per month in child support based on a Guideline income of \$41,707. She was to pay 27% of special and extraordinary expenses under s. 7 of the Child Support Guidelines.
 - The Provincial Court proceedings were consolidated with the Supreme Court proceeding and all existing Provincial Court orders were "vacated".
 - All other claims of the claimant in the Provincial Court actions and the Supreme Court action, apart from the claim for a divorce, were dismissed "as if heard on the merits".
- [11] The order for divorce was made on December 31, 2019. Since separation, and until July 2022, C. lived with C.J.M. at C.J.M.'s parents' home in North Vancouver and attended school in North Vancouver to the end of grade 2.

The 2021 Consent Order

- [12] On April 22, 2021, another consent order was made apparently on A.J.M.'s application by consent and without a hearing (the "2021 Order"). That order made C.J.M. the sole guardian of C. and gave him sole parenting responsibilities. A.J.M. was no longer required to pay child support or share in s. 7 expenses. However, A.J.M. was to have "parenting time with [C.] 40 days in a calendar year".
- [13] Unlike the JCC Order, A.J.M. did not have counsel when the 2021 Order was sought or made. It was clearly not drafted by a lawyer. There are many unusual and even concerning features of the 2021 Order, including these:
- The 2021 Order makes no reference to the JCC Order even though it clearly amounts to a variation of that order. That variation is substantial in that it removes A.J.M. as a joint guardian of C.
 - There is no evidence that the judge who signed the 2021 Order was made aware of the JCC Order. Nor is there evidence he was informed that A.J.M. was a guardian of C. or that the order he was asked to sign would deprive A.J.M. of her rights of guardianship under JCC Order.
 - Nowhere in the 2021 Order is C. identified by his full name. He is referred to in the order only by his first name. Nor is his birthdate set out.
 - The parties' respective incomes are not stated. One would expect to see some statement of income in an order dealing with child support, especially when the order terminates that obligation for one party.

· Although C.J.M. was to be C.'s sole guardian under the Order, A.J.M. was to have "parenting time". Under the FLA, only a guardian can have parenting time. Non-guardians can only have "contact" under s. 59 of the FLA but not parenting time. That is an inconsistency in the 2021 Order.

· The 2021 Order concludes with a paragraph stating, by consent: "This agreement is non-revocable." This kind of statement might be found in an agreement but is unusual for an order in a family law proceeding. To the extent it purports to foreclose variations of the order as might be permitted by the FLA or the Divorce Act, it is contrary to those statutes.

- [14] A.J.M. deposes she signed the 2021 Order at C.J.M.'s request because she was unable to meet her child support obligations:
8. On April 21, 2021, the Respondent asked me to sign the agreement around parenting, child support and guardianship. I was having difficulty during COVID paying for child support as I was not working, as the [sic] my sector was shut down. The Respondent said he would not go after me for child support if I sign over guardianship and primary parenting to him. I believed it might be better for our son if this happened because that would be less conflict for him to see.
- [15] There is no evidence that these circumstances were brought the attention of the judge who signed the 2021 Order.
- [16] C.J.M. does not respond to A.J.M.'s evidence about this consent order in his affidavit. His affidavit contains a general denial of "all allegations of fact" set out in A.J.M.'s affidavit. It then contains a paragraph-by-paragraph response to that affidavit but it is silent as to para. 8. C.J.M. states he was instructed by counsel to respond only to relevant portions of A.J.M.'s affidavit and the absence of a specific reply to an allegation is not to be taken as accepting the truth of that allegation. In my view, para. 8 of A.J.M.'s affidavit is relevant and without finding that C.J.M.'s silence is an admission, I accept A.J.M.'s evidence on this point as uncontested on this application.
- [17] In my view, if the judge who signed the 2021 Order had been told of the JCC Order and the fact he was being asked to vary an earlier order of the court, particularly one that had given A.J.M. guardianship rights, he probably would not have signed it. At the very least, he likely would have made inquiries of the parties as to why the variation was being sought. However, there is nothing on the face of the 2021 Order that would have alerted the judge to the fact that an earlier order dealing with guardianship had already been made. Nor was anything brought to his attention that might have suggested the existence of that earlier order. As noted, the application for the 2021 Order was made by consent and without a hearing so the judge did not have the benefit of hearing directly from the parties and there is no evidence of any substantive supporting materials that accompanied the consent order. On this basis, I conclude that the judge must have been led to understand, incorrectly, that this was the first and only order in the proceeding dealing with guardianship.

- [18] Furthermore, if the judge had been apprised of A.J.M.'s explanation for seeking the order - that she was unable to meet her child support obligations - he almost certainly would not have granted the order without further evidence, explanation, or submissions from the parties.
- [19] The 2021 Order is central to C.J.M.'s position on this application. He relies on his sole guardianship under that order to support his unilateral and without-notice relocation of C. to Duncan. However, the circumstances of that order and the fact the judge was not given full information about those circumstances give me considerable pause about the weight I should give to that order in considering C.J.M.'s position on this application.

The April 2022 Order

- [20] On April 13, 2022, A.J.M. applied to restore her guardianship of C. That application came before Justice A. Ross on June 3, 2022 who adjourned it to "on or about August 3, 2022". I understand this was because C.J.M. or his counsel were not available on June 3. However, Ross J. made a further order respecting "parenting time" so that A.J.M. would pick-up C. from school at 3:00 p.m. and drop him at C.J.M.'s home at 4:00 pm.

The August 2022 Order

- [21] A.J.M.'s guardianship application and an application by C.J.M. for the s. 211 report came before Justice Crerar on August 9, 2022. Both applications were addressed by consent. Evidently, the parties had come to an agreement that A.J.M.'s guardianship application should be heard by way of a trial and that a s. 211 report should be prepared for that purpose. Trial dates had been set for Chilliwack in November 2022. The August 9, 2022 consent order made by Crerar J. includes the following (which I summarize):
- Dr. Krywaniuk was to prepare a full s. 211 report with C.J.M. fronting the initial costs on a without prejudice basis;
 - Ross J.'s order for parenting time was varied giving it more specificity;
 - C.J.M. was required to make reasonable efforts to facilitate and encourage an increase in parenting time appropriate to C.'s development and preferences pending trial;
 - C.'s elementary school in North Vancouver was authorized and instructed to provide any and all information about C. as A.J.M. might request and C.J.M. was to cooperate, authorize and facilitate any such request;
 - The parties were to make best efforts to obtain counselling for C.;
 - The parties were to communicate with each other only by email or text message, except for emergencies in which case they could contact one another by phone. (I note this same order is found in the JCC Order.).

The Relocation to Duncan

- [22] Significantly, about a month before the August 9, 2022 consent order was made, C.J.M. relocated C. to Duncan. He began to rent an apartment in Duncan in mid-July 2022 but does not explain why. He says on August 17, 2022, about a month after he started renting the apartment, he received a job offer as a heavy-duty mechanic which he "could not refuse". He said he talked to C. (who was not yet 8) about staying in Duncan and going to school there and then decided to stay.
- [23] C.J.M. swore affidavits on July 26, 2022 and August 5, 2022 in relation to the applications that were to be heard on August 9, 2022. Neither affidavit mentioned the move or potential move to Duncan, even though it had already happened. In his August 5, 2022 affidavit, C.J.M. states "[C.] and I live with my parents". In fact, he was already living in the rented apartment in Duncan. C.J.M. maintains he had not decided at this point whether he was going to stay in Duncan but I find this evidence difficult to reconcile with the fact he had rented an apartment there. His counsel points out that the rental agreement does not stipulate any rental period, suggesting that if C.J.M. decided not to stay, he may have been able to give up the apartment and return to North Vancouver in time for the start of school. I do not find this explanation persuasive.
- [24] C.J.M. did not give A.J.M. any notice that he was planning or considering moving to Duncan with C. In fact, I find that he concealed the move from her. A.J.M. only learned of the relocation when she contacted C.'s North Vancouver school on September 21, 2022 with a copy of the August 9, 2022 consent order seeking copies of C.'s school records. She was told by the school principal that C. was no longer enrolled in that school. She tried to contact C.J.M. and his parents but did not hear back from them for 10 days. During that time she did not know where C. was, other than the school principal's advice that his records had been transferred to a school in Duncan.
- [25] C.J.M. concedes that he did not give A.J.M. notice of the relocation as required by the FLA or, to the extent it applies, the Divorce Act.

Applications to Prevent Relocation

- [26] On September 29, 2022, A.J.M. filed an application for an order prohibiting C.J.M. from relocating C. from North Vancouver. She was granted short leave for that application and it came on for hearing on October 4, 2022. Justice Gibb-Carsley adjourned that application because C.J.M.'s counsel was not available.
- [27] The application was rescheduled for October 24, 2022 but in the meantime the parties reached an agreement to adjourn the application and have the relocation issue determined at the trial of the guardianship issue that was set for November 2022. On October 24, 2022 Justice Riley made a consent order that includes the following (which I summarize rather than quote):

- A.J.M.'s application to prohibit relocation was referred to the trial list to be dealt with in conjunction with the guardianship issue scheduled for trial in November 2022;
- The consent order of August 5, 2022 was varied to accommodate A.J.M.'s parenting time every second weekend with C.J.M. bringing C. over from Vancouver Island on the ferry and the exchange of C. to take place at the Tsawwassen ferry terminal;
- The consent order was also varied to particularize how counselling for C. and A.J.M. was to be effected. I will say more about this later.

- [28] On October 31, 2022, the parties attended a Trial Management Conference ("TMC") in advance of the November 2022 trial. There is no record before me of what transpired at that TMC but the clerk's notes indicate that the TMC judge "vacated" the November trial dates. I take this to be an adjournment of the trial. The parties advise me that the TMC judge suggested it was necessary for A.J.M. to commence a new proceeding but, apart from speculating that this might have had something to do with para. 12 of the JCC Order (which dismissed all of A.J.M.'s claims not otherwise addressed in the JCC Order as if determined on their merits), there is no explanation for why a new proceeding would be necessary to deal with A.J.M.'s guardianship application. The clerk's notes also indicate that A.J.M. would set down the relocation issue for a two-day hearing.
- [29] I am not convinced a fresh proceeding was required to determine A.J.M.'s guardianship application. As I pointed out to the parties during the hearing, if the court was without jurisdiction to hear A.J.M.'s guardianship application in the existing proceeding, then it would also have been without jurisdiction to make the 2021 Order removing A.J.M.'s rights of guardianship.
- [30] Regardless, the November trial dates were adjourned and A.J.M. commenced the present family claim. She refiled her application to prohibit the relocation in the new proceeding and that is the application now before me.

Applicable Law

- [31] Both the FLA and the Divorce Act contain comprehensive provisions governing the relocation of a child. I do not propose to determine on this application which of those two Acts apply to this case. The JCC Order does not specify whether the orders it makes are under the FLA or the Divorce Act, although the language it uses is more consistent with the FLA. On the other hand, the proceeding included a claim for divorce, and one was granted on December 31, 2019, so arguably the provisions respecting parenting and decision-making authority in the JCC Order could have been made under the Divorce Act.
- [32] Under both Acts, however, A.J.M. was entitled to receive 60 days notice of the proposed relocation and there is no dispute that C.J.M. did not comply with this obligation.

The FLA Provisions on Relocation

Guardianship, Parenting, and Contact

- [33] Section 40 of the FLA provides that only a guardian may have parental responsibilities and parenting time with respect to a child. Since the 2021 Order makes C.J.M. the sole guardian of C., only he has parental responsibilities and parenting time with respect to C., but A.J.M. has been seeking restore her guardianship since April 2022.
- [34] Section 42(1) of the FLA provides that parenting time is the time that a child is with a guardian, as allocated under an agreement or order. As noted earlier, the 2021 Order gives A.J.M. "parenting time" and this is inconsistent with C.J.M. being the sole guardian. A.J.M. cannot have parenting time under s. 42(1) if she is not a guardian. Rather, she could only have "contact" with C. under an agreement or an order made under s. 58 of the FLA.

Relocation

- [35] Section 41(b) of the FLA provides that parental responsibilities, which can only be exercised by a guardian, include "making decisions respecting where a child will reside". Thus, C.J.M. argues, he had the right to decide where C. will reside. However, I find the move to Duncan constitutes a relocation under the FLA and despite C.J.M.'s guardianship, he still had to comply with the notice requirements of the FLA.

- [36] A "relocation" under the FLA means:

a change in the location of the residence of the child or the 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 persons having a significant role in the child's life.

- [37] There can be no doubt that A.J.M. has a significant role in C.'s life. Even if she is not a guardian, she is his mother and exercises what the parties have described as "parenting time". There is considerable dispute on the evidence as to the extent that A.J.M. actually exercises her parenting time and that is not a dispute I can resolve on affidavit evidence. However, A.J.M. clearly has a significant role in C.'s life and I consider C.J.M.'s move to Duncan with C. to meet the definition of relocation under the FLA.
- [38] Under s. 66(1) of the FLA, a guardian who plans to relocate a child must give notice to all other guardians "and persons having contact with the child" at least 60 days prior to the planned relocation. This plainly includes A.J.M. who at least has contact with C.
- [39] Section 67(1) provides that once notice is given under s. 66, the guardian and persons having contact with the child "must use their best efforts to cooperate with one another for the purpose of resolving any issues relating to the proposed relocation." Obviously, that was not done here and there was no opportunity to do so since C.J.M. failed to give the required notice and concealed the move from A.J.M.

- [40] Section 67(2) provides that nothing in s. 67(1) prevents a guardian from making an application under s. 69 for an order permitting the relocation. Nor does it prevent a person having contact with the child from making an application under s. 59 (orders respecting contact) or s. 60 (changing, suspending or terminating orders respecting contact) "for the purpose of maintaining the relationship between the child and a person having contact with the child if relocation occurs."
- [41] Section 68 provides that the guardian giving notice under s. 66 may relocate with the child unless another guardian, within 30 days of receiving the notice, applies for an order to prohibit the relocation. It is only a guardian, and not a person having just contact, who may apply to prohibit the relocation.
- [42] Section 69 provides that a guardian may apply to the court for an order permitting or prohibiting the relocation of the child by the relocating guardian. At this point, A.J.M. has made an application under s. 69 but, as noted, she has no standing to do so because the 2021 Order rescinded her rights of guardianship. C.J.M. has not made an application to authorize the relocation, presumably in reliance on his right as sole guardian under the 2021 Order and s. 41(b) of the FLA to make decisions as to where C. will live.
- [43] The significant consequences of the 2021 Order and my misgivings about the circumstances in which it was made are brought into focus by these provisions of the FLA. Because of that order, C.J.M. could relocate C. to Duncan and A.J.M., despite being C.'s mother and having what the parties call "parenting time", may have no standing to oppose that relocation.
- [44] Of course there are circumstances where it is entirely appropriate that a parent not be the guardian of the child and where a non-guardian parent should not be able to stop a relocation. In this case, however, the circumstances under which A.J.M. lost her rights of guardianship are so murky that the court is left to question why she is not a guardian and why she is potentially left with no ability to at least ask a court to stop the relocation.

The Divorce Act Provisions on Relocation

Parenting and Decision-Making Responsibility

- [45] The Divorce Act does not use the term guardian. Section 16.1 provides that a court may make an order for the exercise of parenting time or decision-making responsibility in respect of a child of the marriage. C. is a child of the marriage with the parties being his parents.
- [46] Section 16.1(4) provides that the court may allocate parenting time and decision-making responsibility to either or both spouses. Parenting time is defined as the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), which includes either or both spouses.

[47] Decision-making responsibility means the responsibility for making significant decisions about a child's well-being including in respect of health, education, culture, language, religion and spirituality, and significant extracurricular activities.

Relocation

[48] "Relocation" under the Divorce Act is defined as follows:

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

[49] Under the Divorce Act definition, C.J.M.'s move with C. to Duncan constitutes a relocation under either para. (a) or (b). A.J.M. has parenting time and has an extant application for a parenting order in respect of C. At a minimum, she also has contact with C.

[50] Section 16.9(1) provides that a person who has parenting time or decision-making responsibility in respect of the child and who intends to undertake a relocation of the child must give 60 days notice of the expected relocation to any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of the child. Notably, whether A.J.M. has parenting time or contact, she is entitled to notice under this section.

[51] Section 16.91(1) provides that a person having given notice of an intention to relocate may do so if the relocation is authorized by the court or if the person with parenting time or decision-making responsibility in respect of the child has not objected to the relocation within 30 days after the day on which notice was received. As with the FLA, s. 16.91(1) does not permit a person having only contact with the child to object to the relocation. However, under the 2021 Order and subsequent orders, A.J.M. is said to have "parenting time" with C. and thus she would have standing under this section to oppose the relocation. If the relocation is opposed, an application must be brought seeking an order from the court authorizing the relocation.

Analysis

[52] The central issue on this application is whether I should order C.J.M. to return C. to North Vancouver due to his failure to comply with the notice requirements of the FLA and, if applicable, the Divorce Act. I am not dealing with the substantive issue of whether the relocation itself should be permitted or prohibited.

The Unilateral Relocation and Failure to Give Notice

- [53] Counsel for C.J.M. argues that the failure to give notice of the relocation is an irregularity that should not result in an order for C's return. He points to the fact that A.J.M. has no standing to challenge the relocation as a non-guardian and that both the FLA and the Divorce Act contemplate that relocations may occur even where there is non-compliance with the notice provisions of either Act. Counsel points to s. 69(1) of the FLA and s. 16.92(1)(d) of the Divorce Act, each of which says, essentially, that in deciding whether a parent may be permitted to relocate a child, the court may consider as a factor whether the relocating parent has complied with the notice requirements. Counsel argues this is recognition that the failure to give notice does not automatically result in an order for the return of the child.
- [54] In *B.M.W.G. v. J.W.G.*, 2022 BCSC 1346 I commented on the significance of the notice requirement of the Divorce Act and its interplay with s. 16.92(1)(d). Those comments apply with equal force to the FLA:
- [38] The requirement of notice under s. 16.9 of the Divorce Act is a crucial part of the scheme for relocations under that Act. It provides the other parent with notice of a potential relocation and time to respond to that proposal. It also prevents the potentially relocating parent from changing the status quo of the child's residency before a court has the opportunity to consider whether relocation is in the child's best interests. As Justice Francis observed in *D.T.S. v. S.P.M.*, 2022 BCSC 547 at paras. 55-56 [D.T.S.], establishing a new status quo increases the relocating parent's chances of demonstrating the relocation is in the child's best interests.
- [54] Ultimately, as this court has held, the notice requirement is a fundamental element of the relocation scheme under the Divorce Act but an innocent failure to comply with it should not, in the circumstances of this case, override a substantive consideration of what is in VWG's best interests: K.P. at para. 126. In *D.T.S.*, Francis J. found that even where a parent's relocation of a child without notice was done without good faith (which is not the case here), this should not circumvent the court's analysis of what is in the child's best interests.
- [55] Further, s. 16.92(1)(d) of the Divorce Act directs the court to consider as part of the best interests analysis in a relocation whether the person who intends to relocate the child has complied with the notice requirement under s. 16.9. This indicates that, while the notice requirement is mandatory, Parliament anticipated there would be circumstances where a party might fail to comply with it. This does not bring an end to the court's consideration of the relocation but rather requires the court to consider the effect of non-compliance on the child's best interests.
- [Emphasis added]
- [55] Both *B.M.W.G.* and *D.T.S.* were dealing with substantive relocation applications, which is not the case here. Further, in *B.M.W.G.* the without-notice relocation was done with the acquiescence of the other parent, which also is not the case here.

- [56] C.J.M. also argues that the only question for the court, regardless of how the relocation was effected, is what is in C.'s best interests. In that respect, the present application has some parallels with *Roman-Manarovici v. Manarovici*, 2022 BCSC 1159. There, Justice Kent dealt with an application to return the parties' children to Alberta after the mother unilaterally and without notice relocated them to British Columbia. The father sought an order for the children's return and the mother argued they should be allowed to stay in British Columbia because that is what is in their best interests. She argued this was the sole issue for the court to consider pursuant to s. 37(1) of the FLA and s. 16(1) of the Divorce Act. Justice Kent disagreed. He described the mother's position as asking the court to retroactively rule on the merits of a relocation application that was never made. He said at para. 11:
- [11] But there is another fundamental principle that must also be considered: the unilateral removal to another province by one parent of children formerly co-parented by both parents in a different province amounts to child abduction. Absent consent by both parents, both the FLA and the newly amended Divorce Act now require formal notice and a court hearing before any such relocation is permitted. Except perhaps in extraordinary circumstances, such as urgently removing the children to safety from ongoing family violence or the like, the Court is rightly reluctant to endorse unilateral self-help relocation remedies such as the one which has occurred in this case.

[Emphasis added]

- [57] There are key differences between *Roman-Manarovici* and the present case, including that A.J.M. is not a guardian (at least under the 2021 Order) and this is not a case of an inter-provincial relocation that seeks to deprive the court in the child's home province of jurisdiction.
- [58] However, I find there are many troubling aspects of C.J.M.'s unilateral and even secretive relocation of C. to Duncan that carry the same sting of a self-help relocation that troubled Kent J. in *Roman-Manarovici*.
- [59] First, regardless of the effect of the 2021 Order, A.J.M. is C.'s mother. Moreover, she is a mother who was exercising what both parents described in several consent orders as "parenting time". While there is significant dispute of the full extent to which A.J.M. was exercising that time - a dispute I cannot resolve on the affidavit evidence before me - it is not in dispute that A.J.M. is C.'s mother and was exercising some parenting time with him.
- [60] Second, as I have said, I have much difficulty with the 2021 Order itself. A.J.M.'s unchallenged evidence is that she signed it at C.J.M.'s request in the face of being unable to meet her child support obligations. I have significant misgivings as to whether A.J.M., who was not represented by counsel when the order was made, understood what she was giving up when she signed that order. As I have said earlier, it appears the judge was not made aware of the effect of the order he was asked to make due to the non-disclosure of the JCC Order and other circumstances that led to the 2021 Order.

- [61] Beyond expressing my misgivings, I make no specific findings about the circumstances leading to the 2021 Order and whether it was properly sought. That is something that must be addressed with a full evidentiary record and probably at a trial dealing with the guardianship issue. It is significant, though, that within a year of agreeing to the 2021 Order, A.J.M. applied to restore her right as joint guardian of C. For the purposes of this application, I view the circumstances surrounding the 2021 Order with considerable suspicion and find it troubling one of C.'s parents who is expressly made a guardian under the JCC Order could so quickly and summarily lose her status as a guardian and her right to oppose the relocation of her child.
- [62] Third, I find the circumstances in which C.J.M. relocated C. to Duncan very troubling. His evidence that he had not decided on whether to relocate permanently until after he received his job offer on August 17, 2022 is questionable in view of the fact he rented an apartment a month earlier. Again, I make no finding of fact in this respect as that will need to be addressed at a trial, but on the face of his affidavit I find his explanation unconvincing.
- [63] Whether the relocation technically occurred in mid-July or late August, it is clear that C.J.M. made the move with no intention of notifying, consulting with, or even advising A.J.M. who, despite the 2021 Order, is still C.'s mother and was exercising parenting time under a consent order. The fact that A.J.M. had to learn of the relocation from C.'s former school principal underscores the secrecy with which C.J.M. effected it. Thus, even if C.J.M. was truly unaware of the notice requirements of the FLA and Divorce Act as he claims, he still concealed the move to Duncan from A.J.M. and the evidence on this application leads me to conclude that was deliberate.
- [64] I also find it significant and concerning that the relocation happened just months before a scheduled trial date that was to address A.J.M.'s application to restore her guardianship.
- [65] Lastly, there is the fundamental point that regardless of A.J.M.'s status in relation to C., C.J.M. made this relocation without complying with the mandatory notice requirements of either the FLA or the Divorce Act. As I said in B.M.W.G., the notice requirement is a fundamental element of the statutory scheme and the court expects parents to comply with those statutory requirements. At a minimum, C.J.M.'s lack of notice deprived A.J.M. of her right under s. 67(1) of the FLA to have C.J.M. use "best efforts to cooperate" with her "for the purposes of resolving any issues relating to the proposed relocation." A.J.M. was entitled to that process whether or not she was a guardian.
- [66] In my view, all of these circumstances militate strongly in favour of an order that C.J.M. return C. to North Vancouver without delay. This is a case where C.J.M. has undertaken a self-help remedy while concealing his actions from C.'s mother. He did so at a time where she was actively pursuing an application to restore her status as C.'s guardian following what I view to be a questionable consent order taking away those rights. That conduct is not something the Court is able to condone by permitting C.J.M.'s unilateral and without-notice relocation of C. to continue.

C.'s Best Interests

[67] What, then, of C.'s best interests?

[68] In my view, C.'s best interest require that he be returned to North Vancouver pending a proper process for considering whether his relocation to Duncan is in his best interests and having regard to A.J.M.'s pending application to restore her status as a guardian. I make this difficult decision knowing that C. has spent almost a year in Duncan, has settled in the community with friends and activities, and has attended a full year of school where he is doing well. Despite these pulls to keep C. in Duncan, there are other factors that militate more strongly in favour of returning him to North Vancouver pending a proper relocation process.

[69] The most significant issue of concern is the growing estrangement between C. and A.J.M. The evidence is clear and overwhelming that C. frequently refuses to go with A.J.M. for her parenting time and this has grown worse since the move to Duncan. C.J.M. acknowledges the need and importance for reunification counselling between C. and A.J.M. but, as I discuss below, he is unwilling to make the necessary effort to facilitate that counselling using a virtual platform across the Strait of Georgia.

[70] A.J.M. suggests C.'s refusal to go with her on her parenting time stems from C.J.M. and his parents disparaging her to C. or at least making no effort to encourage the relationship. C.J.M. denies this and says A.J.M.'s lack of commitment to C. and her parenting time, which he says she exercises sporadically, has caused the estrangement and C.'s refusal to go with her on her parenting time.

[71] I cannot determine on this application the reason for C.'s resistance to parenting time with A.J.M. However, I can find on the evidence that C.J.M. is not making reasonable efforts to encourage a relationship between C. and A.J.M. and this has been especially problematic since the move to Duncan.

[72] C.J.M.'s attitude towards facilitating the reunification counselling between A.J.M. and C. provides a clear illustration of this problem. Pursuant to Riley J.'s October 24, 2022 consent order, counselling sessions between C. and A.J.M. are to occur at least weekly by Zoom. That platform, rather than in-person sessions, is necessary because of the relocation. The October 24, 2022 consent order is very specific about when the counselling is to be scheduled and how it is to be facilitated:

the Claimant and [C.] are to participate in counselling to be arranged through the Claimant's EAP program or some other program arranged by the Claimant, via zoom or any other internet platform, at least once per week, on Tuesday or Thursday evening, commencing at 6:00 p.m. The Claimant is to notify the Respondent of the counselling sessions at least 7 days in advance and the Respondent is to facilitate [C.]'s participation in counselling.

[Emphasis added]

[73] Consistent with this order, A.J.M. arranged counselling with Moving Forward Family Services (MFFS). She scheduled sessions in 2022 for November 12, 18, 22, 29 and December 6 and in 2023 on January 3, 10, 19 and February 7. Most of these were on Tuesdays or Thursdays at 6:00 p.m. in accordance with the consent order. A.J.M. provided C.J.M. with at least seven days' notice for each session and the counselling service emailed the Zoom link to C.J.M. in advance of each session. Despite this, C. has attended only two of these sessions.

[74] C.J.M. blames A.J.M., the counselling service, and, to some degree, C. himself for the non-attendance.

[75] First, C.J.M. says A.J.M. "chose a counselling company that involved several counsellors to be conducting counselling with [C.]." He goes on to say that neither he nor C. were given any type of introduction, intake session, orientation, or information about the counselling to explain the process". However, in an email dated March 31, 2023, which was sent to both A.J.M. and C.J.M., one of the counsellors wrote:

MFFS Invite link was sent to [A.J.M.'s email address] and [C.J.M.'s email address] prior to sessions. Counsellor reached out by email in Nov/Dec 2022 to the father to introduce herself and inquire into a session with both parents.

This did not occur.

Sessions ran weekly from November 2022 to March 2023. Child attended November 29 and December 6/22.

Sessions continued in anticipation of improved attendance and honouring court mandate.

[76] Thus, to the extent C.J.M. was entitled to have an introductory session (and I note the order provides that he is to facilitate counselling, not participate in it), he was offered that opportunity but evidently failed to respond.

[77] As to the change in counsellor, A.J.M. explained the reason in a text message to C.J.M. on November 22, 2022. She said the new counsellor who had just taken over was to be the permanent one as the previous counsellor was only for four sessions on an EPA program.

[78] Second, C.J.M. asserts that A.J.M. schedules counselling sessions without inquiring about C.'s or C.J.M.'s schedule. He says he works full-time five days a week and C. has a busy weekday schedule with school, homework, dinner, and extracurricular activities such as martial arts and swimming. However, A.J.M. has scheduled all of the counselling sessions in accordance with the times specified in the October 24, 2022 consent order. To the extent C.'s activities or C.J.M.'s work schedule is interfering with those counselling sessions, that is the fault of C.J.M. who is well aware (or ought to be) of the terms of the court order. His evidence also suggests that he is preferring things like C.'s extracurricular activities and time with friends over maintaining a relationship with A.J.M. That is not in C.'s best interests.

[79] Next, C.J.M. seeks to explain his failure to facilitate C.'s attendance at counselling sessions because of the volume of email he receives and the fact that A.J.M. provides notice of the sessions by text message rather than telephone. He states in his affidavit that he has communicated regularly with A.J.M. that it would be helpful to facilitate the sessions if she would call in advance to speak with C. but asserts she has never made that "effort". He states the matter more bluntly in his text messages to A.J.M., including these:

a) November 22, 2022

Send me the link that day. I get 1000 emails a week. I may have to set up a separate email just for this [counselling].

b) January 3, 2023:

Why didn't you call prior to the meeting and let me know. Also my phone is always on. My counsellors call me if I am not on video by the time of the meeting. Just in case there is a problem. You have never done that or verified prior to a meeting. Maybe you should call if there is an issue like everyone else does.

Beside that it has been extremely busy with holidays. So I apologize I forgot. But in the future please make the effort to call if we are late. Thanks.

c) January 10, 2023:

I am sorry. Raising an 8 year old and dealing with all the things that go with that are busy. I asked you/the counsellor to call me the day before. We never heard anything for [sic] you or them. My counsellors know this and they usually give me a heads up by phone as I requested. I am sure you can do the same. If you want to speak with [C.] then call. Like everyone else does. But we do not do email [sic] or text. Cannot hear the phone. It is not the city. I do not stair [sic] at my phone waiting for text messages. And [C.] is so busy with friends and schoolmates that without a call we forget. Sorry bout [sic] that but life here does not have electronic devices and emails as a priority. I already let you know this. So please give us a heads up. By phone. Thanks. Also you can call any time but we never hear from you at all. We have not got a call from you in monthes [sic]. I have explained this multiple times.

[80] I note that just two months before the first of these exchanges - on September 16, 2022 - C.J.M. had directed A.J.M. in a text message not to speak to him and instead "send me text or email as instructed."

[81] In fact, there were two court orders place - the JCC Order and the October 24, 2022 consent order - that ordered the parties not to communicate with one another by telephone and only by text or email absent an emergency. Thus, insisting that A.J.M. call C.J.M. to remind him of the counselling sessions would put A.J.M. in breach of the court order.

[82] When this was put to her counsel at the hearing, it was suggested that A.J.M. could call C. directly, but it is not the responsibility of an eight-year-old to arrange for his own counselling. That is C.J.M.'s job as the parent having primary care of C. It is also an

obligation expressly imposed on C.J.M. under the October 24, 2022 court order: "the Respondent is to facilitate [C.]'s participation in counselling". It is C.J.M.'s responsibility to organize himself and C. to ensure C.'s attendance at the counselling sessions in accordance with the court order. He is the adult. As A.J.M. stated in one text message to him, "I do not need to correspond with an 8 year old child about court ordered counselling. I notified you already."

- [83] C.J.M. should be perfectly capable of keeping track of regularly scheduled, court-ordered counselling sessions for which he has been given at least seven days notice. It should not be necessary for his former spouse or the counsellor to remind him each time. His lackadaisical approach to these sessions evinces a serious want of commitment not only the counselling sessions themselves but also to promoting a healthy relationship between A.J.M. and C. On my view the evidence, those sessions are essential to restoring or developing that relationship.
- [84] C.J.M.'s lack of commitment to facilitating the counselling also substantially undermines the credibility of his assertions that he tries to promote a relationship between A.J.M. and C. and that he tries to persuade C. that he should go with A.J.M. during her parenting time when C. is resisting.
- [85] Next C.J.M. claims the different internet platforms are a problem for the counselling. He says in his affidavit:

the various counselors have used different types of platforms for their counselling sessions and it has not been consistent. They have used platforms such as MS Teams, Zoom, and Whatsapp. [C.] and I do not use those types of platforms regularly in communicating with others as we are used to just speaking on the telephone.

- [86] However, the October 24, 2022 consent order states the counselling sessions are to be "via zoom or any other internet platform" [emphasis added]. C.J.M. agreed to this term. His disparaging of those platforms now is a poor excuse for his failure to comply with the order and facilitate C.'s attendance at the sessions.
- [87] Finally, C.J.M. suggests C. himself is unwilling to attend counselling sessions through Zoom or similar platforms and this a factor in his failure to attend. He states that C. "has expressed that he does not feel comfortable talking to counselors he does not know over the internet" and C.J.M. cannot force him to sit on a virtual counselling session if he refuses. If all that is true, it underscores that in-person sessions are needed for effective reunification counselling between A.J.M. and C. and that cannot readily be accommodated with C. living on Vancouver Island. This indicates a return to North Vancouver is necessary to make these sessions effective and is in C.'s best interests.

[88] In addition to his lack of commitment C.'s counselling with A.J.M., C.J.M. has also demonstrated, at least in the past, that he is not above discussing the court proceedings with C. which has caused C. to become afraid of A.J.M. In a text exchange with A.J.M. on May 8, 2022, C.J.M. wrote:

Once I get home I will have [C.] call you. You need to hear what he has to say. He is terrified of you rite [sic] now and is scared to visit you. Your recent application to the court has him scared confused and he does not want to see you because of what he might do.

[Emphasis added]

[89] The "recent court application" would have been A.J.M.'s application to restore her guardianship rights. A.J.M. responded as follows:

Court issues are between adults. So i [sic] do not understand why getting a 7 year old involved with adult court business. It is unwise of you to put him in the middle.

I would advise you to stop speaking to [C.] about it as it is damaging to his mental health.

It is not in the childs [sic] best interest to be discussing on going [sic] court applications.

C.J.M. replied to this as follows:

You are damaging his mental health. Again! And he absolutely needs to know.

[90] The issue came up again in an exchange on May 28, 2022 when, after speaking with C. on the phone, A.J.M. wrote to C.J.M. asking him again to stop talking to C. about the current court matters. C.J.M. responded as follows:

Why do you not tell him the truth. How bout [sic] answer his questions. And it's [sic] absolutely has to do with him and how he feels. What kind of person ignores what there [sic] kid feels and says.

I'll talk to [C.] about all situations that involve him. He has a rite [sic] to know. He is not an item. He is a person. So treat him like one. And show so [sic] respect to another human being.

[91] C. is a person and human being but he is also eight years old (seven at the time of these exchanges). He is clearly too young to understand the complicated court matters in which his parents are bitterly entangled. While these text exchanges predate the relocation to Duncan as well as subsequent court orders enjoining the parties from discussing court matters with C., it is apparent that C.J.M. has discussed the court proceedings with C. in the past and that has resulted in C. becoming frightened of A.J.M. This undoubtedly has contributed to the estrangement between C. and A.J.M. and C.'s frequent refusal to go with A.J.M. during her parenting times.

- [92] The evidence also indicates that the exchanges at the Tsawwassen ferry terminal are not working. C. invariably refuses to go with A.J.M. at these exchanges. One factor that is likely contributing to the problem is that C.J.M.'s parents attend these exchanges and C. insists on going home with them rather than A.J.M. This is understandable since C. and C.J.M. lived at C.J.M.'s parents' before relocating to Duncan.
- [93] C.J.M. claims it is necessary that his parents attend these exchanges in case C. refuses to go with A.J.M. He says he frequently has weekend commitments in Duncan and must go back to Vancouver Island on the same ferry that he and C. took to Tsawwassen. If his parents were not present at the exchange and C. refused to go with A.J.M., C. would be left, as C.J.M. put it, "to run away by himself". If anything, this demonstrates that exchanges at the Tsawwassen ferry terminal are not working and this militates in favour of C.'s return to North Vancouver.
- [94] Dealing generally with the best interests factors under s. 37(2) of the FLA and s. 16(3) of the Divorce Act, I accept that C. is well settled in Duncan and doing well in school where he has made friends. He is involved in extracurricular activities and happy in Duncan. However, the evidence does not suggest he was not doing well in North Vancouver, apart from C.J.M.'s assertion that he had difficulty making friends at school. Relocating back to North Vancouver will undoubtedly be unsettling for C. but in my view that is necessary to best promote a relationship with A.J.M., at least pending a proper resolution of the guardianship question and a relocation process that follows the proper procedure. I consider repairing the estranged relationship between C. and A.J.M. is in C.'s best interest. Were it otherwise, C.J.M., as guardian, would not have consented to orders giving A.J.M. parenting time and reunification counselling. The importance of this factor outweighs the pull of Duncan.
- [95] I note also that C.'s paternal grandparents are in North Vancouver and he has a very strong relationship with them. He is familiar with North Vancouver and attended school there to the end of grade 2. The disruption of removing him from Duncan is diminished to a large extent by the fact he will be returning to a place that is familiar to him.
- [96] With respect to the history of C.'s care and the ability of the parents to carry out parental responsibilities, I accept that C.J.M. has been primarily responsible for C.'s care at least since separation. C.J.M. also carries all financial responsibility for raising C. since A.J.M. was relieved of paying child support by the 2021 Order.
- [97] However, C.J.M.'s lack of commitment to promoting a relationship between A.J.M. and C. strongly favours returning C. to the Lower Mainland where there will be better opportunity for him to rebuild that relationship while A.J.M.'s guardianship application and the relocation issues are properly considered. C.J.M. has a full-time job in Duncan with a strong letter of endorsement from his employer. He states he was unemployed in Vancouver from June 2022 (i.e. a month, more or less, before he moved to Duncan) and his employment was "very limited, part-time, and sporadic" since the pandemic. These are very general assertions. There is no evidence of his employment history or of a lack of job opportunities

in the Lower Mainland. It seems probable that a heavy duty mechanic who comes with high praise from his current employer should be able to find work in the Lower Mainland.

- [98] There are disputed family violence allegations on both sides that cannot be resolved on the affidavit evidence before me.. Again, that is a matter that I expect will need to be addressed through trial. However, for the moment, I find these allegations are largely dated and are not a factor in this interim decision that C. should be returned to North Vancouver.

Conclusion

- [99] For these reasons, in addition to finding that the court should not condone C.J.M.'s unilateral and secretive relocation of C. to Duncan, I find it is in C.'s best interests that he be returned to the Lower Mainland where he will be better able to foster or rebuild his estranged relationship with his mother. This is not to say that relocation to Duncan is rejected but rather that C.J.M. must follow the proper procedures under either the FLA or the Divorce Act (whichever the court might find to be applicable), including the notice requirements, in seeking that relocation.
- [100] It is also my view that A.J.M.'s guardianship application should be substantively considered in conjunction with the relocation issue. I have earlier expressed my misgivings about the circumstances that led to the 2021 Order. I am also concerned that A.J.M.'s guardianship application has been unduly delayed. As noted earlier, a trial date was scheduled for November 2022 but that was adjourned apparently out of some concern that a fresh proceeding had to be commenced. I am not convinced that was necessary but, unfortunately, it seems to have further delayed A.J.M.'s guardianship application. It is in C.'s best interests that all of these matters proceed without delay and at the earliest opportunity.
- [101] This is a very difficult case. An eight-year-old child has been resettled in Duncan only now to be returned to his previous home, at least pending a proper process to consider the proposed relocation. This is not an order the court makes lightly but it is made out of necessity having regard to the circumstances in which the relocation occurred, C.'s best interests, and the need to reverse the growing estrangement between C. and A.J.M.
- [102] I therefore order that C.J.M. return C. to North Vancouver by no later than July 31, 2023. This will permit C. to finish out his school year in Duncan and provide ample time for C.J.M. to facilitate C.'s return to North Vancouver.

"Kirchner J."

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