
CANADA / JUDGMENT

A.L.L. v. S.D.L.

2012 BCSC 843

COURT

Supreme Court of British Columbia

DECIDED

7 June 2012

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2012 BCSC 843 A.L.L. v. S.D.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.L.L. v. S.D.L.,

2012 BCSC 843

Date: 20120607

Docket: E101016

Registry: Vancouver

Between:

A.L.L.

Plaintiff

And

S.D.L.

Defendant

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

Counsel for the Plaintiff:

John C. Fiddes

Counsel for the Defendant:

Paul J. Reimer

Place and Date of Trial:

Vancouver, B.C.

March 12-16, 2012

April 13, 2012

Place and Date of Judgment:

Vancouver, B.C.

June 7, 2012

Introduction

- [1] This trial concerns questions of primary residence, custody, and guardianship of the two young boys of the parties' marriage, D.L and T.L, who are now six and three years old. The financial issues, including the equal division of the proceeds of the sale of the matrimonial home, are less complicated.

Issues

- [2] Both counsel proposed forms of order concerning the question of primary residence, access, and guardianship; including how the parents may decide issues concerning the health, welfare, schooling, religious upbringing and time to be spent with each parent.
- [3] The father, apart from seeking a divorce, seeks an order for joint custody and joint guardianship. With respect to guardianship he seeks the right, if the parties are unable to agree after discussion, to decide issues of schooling, religious instruction and daycare. In terms of health, counselling, and general welfare, he would defer to the mother in the event of disagreement.
- [4] In terms of where the boys will reside, the father proposes that the older child reside with him from Sunday until Wednesday morning (in accordance with the current interim arrangement), and that the same arrangement be in place for the younger child. He suggests that in September 2014, approximately two and one-half years from now, the children live one week at each parent's residence on an alternating basis.
- [5] He also proposes an arrangement for sharing summer and other holidays between the parents.
- [6] The mother proposes that there be joint custody with the primary residence of the children with her, and that the father have access on alternating weekends from Friday after school until the commencement of school on Monday. In terms of guardianship, she proposes that there should be a joint guardianship order requiring the parties to discuss important issues of health, education and religious instruction. She further proposes that in the event that disagreement arises between the parents with respect to major decisions including medical

care, dental care, daycare, preschool education, religious instruction, and counselling, she have the right to make such decisions.

- [7] Thereafter, she also proposes various arrangements for summer and holiday access.
- [8] The key issues related to the children are:
 - (a) What order should be made for the primary residence of the children and the access arrangement for each of the parents?
 - (b) What guardianship order should be made for resolving disagreements between the parents with respect to health, medical care, dental care, education and schooling, religious instruction, and counselling?
- [9] The other issues, which are less difficult, involve particularization of the access arrangements for both parents during the children's school and summer vacations.
- [10] The financial issues were not the focus of the trial. The mother has a pension which the parties acknowledge should be divided according to the Rutherford formula. In terms of the division of family assets and child support, although there is no dispute about the equal division of the proceeds of the sale of the family home, there is some question about the amount of the mother's income and father's income for child support purposes, and whether some income should be attributed to her. There is also some question about whether certain loans were family debts, but in argument that became a non-issue.
- [11] The mother seeks child support but the father argues that neither party should pay the other child support. He says that once the parties have "regenerated their efforts" to earn income, and the younger child has entered kindergarten in 2014, the issue of child maintenance can be reviewed in greater detail.
- [12] The largest of the extraordinary expenses, according to the mother, are her anticipated daycare expenses range from \$725 for T.L.
- [13] The costs of the proposed daycare for the children for the father, including before and after school care for the older boy, total \$1,065 per month. The father says that there will be additional fees for elementary school, baseball, soccer, hockey, and skating for the younger boy totalling between \$2,850 and \$3,115 per year; whereas the mother anticipates that amount to be about \$2,200.

Principles to Determine Issues Concerning Children

- [14] Questions of custody, guardianship and access to the children are to be determined according to the best interests of the children.
- [15] The Divorce Act, R.S.C. 1985, c. 3, provides in s. 16(8): "the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child." Sections 16(9) and (10) of the Divorce Act also state that the past conduct of any person is not relevant unless the

conduct is relevant to the ability of that person to act as a parent of a child, and that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child.

- [16] Under the Family Relations Act, R.S.B.C. 1996, c. 128, the court is required to give paramount consideration to the best interests of the child and the statute sets out factors that should be taken into consideration. Section 24(1) reads:
- (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:
 - (a) the health and emotional well being of the child including any special needs for care and treatment;
 - (b) if appropriate, the views of the child;
 - (c) the love, affection and similar ties that exist between the child and other persons;
 - (d) education and training for the child;
 - (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.
- [17] Presumptions on custody, access, and guardianship do not apply with respect to the analysis of what is in the best interests of the child or children (*Robinson v. Filyk*, 1996 BCCA 733. Each case is to be determined on its own particular facts. The primary issue, of course, relates to the interests of the children, not the interests of the parents.
- [18] As counsel pointed out, although there is often an interim arrangement or an interim order before trial, there is no presumption that favours the status quo or interim arrangement. The question remains, what is in the best interests of the children: see *Roebuck v. Roebuck* (1983), 148 D.L.R. (3d) 131 (ABCA).
- [19] Before discussing the issues, let me provide some background to the questions concerning the children. After deciding the issues involving the children, I will turn to the financial issues.

Background

- [20] A.L.L., the mother, is 44 years old, born May, 1968. S.D.L., the father, is 40, born May, 1972. They met through an introduction by A.L.L.'s mother, a customer of S.D.L. when he was working in the automotive field. They married in September, 2004. At the time, they were in the 30s. The couple had two boys, D.L. born February, 2006 and T.L. born January, 2009. They are now, respectively, six and three years of age.

- [21] The mother obtained a Bachelor of Science and Psychology degree in the early 1990s, then attended Capilano College and obtained a graphics design diploma.
- [22] The father completed his Grade 13 education in Ontario and moved to British Columbia, where he has worked in the automotive field. He was an assistant manager at various locations of the automotive company, particularly in outlets having financial difficulties.
- [23] After D.L. was born in February 2006, his mother did not return to her work until January 2007; the father took time off from his work then until April 2007. D.L. went to daycare full-time in May 2007. The father returned to full-time work in June 2007.
- [24] In 2007 the parties used the proceeds from the sale of a "fixer upper" home that they had purchased in 2005 to purchase their family home.
- [25] In January 2009, T.L. was born.
- [26] In January 2009, S.D.L. purchased an auto service business in Richmond; a business which he continues to operate.
- [27] The parties separated briefly in 2009, and then reconciled. After T.L.'s birth, D.L. went to daycare, located close to A.L.L.'s residence, one day each week to retain a spot for the future.
- [28] In November 2009, the mother approached the father about taking an extended leave of absence, which she did, starting January 2010. However, later that month, the parties separated. The father moved into a room in the garage (referred to by the parties as the coach house) of the family home at the back of the property. In March 2010, the father moved to his new residence in False Creek, where he currently lives.
- [29] After the sale of the family home in April 2010, the mother moved with the children to a basement suite in her mother's house, where she presently resides.
- [30] Early on after the separation, there were particular difficulties during access visits by the father. During access visits on March 21 and March 23, 2010, when the father attended to pick up the boys, there were disagreements that resulted in the attendance of the police.
- [31] On June 8, 2010, at a judicial case conference before Master Baker, it was ordered by consent of the parties that the father would pick up the boys at 9:00 a.m. on Sunday, and return T.L. to the mother at 6:30 p.m. that day, and keep D.L. and then drop him off at daycare on Monday, then pick up T.L. from the daycare on Tuesday and have both of the children overnight on Tuesday. The mother would have the children Wednesday morning and parent them the remainder of the week until Sunday morning.
- [32] Generally, that arrangement has remained in place until today.
- [33] The father agreed to pay child support on a "Guidelines income" of \$50,000 on a "without prejudice" basis.

- [34] The mother returned to work part-time on January 16, 2011, and now works Mondays, Tuesdays and Thursdays, which is the work presently available from her employer.
- [35] The older boy was at daycare near his mother's residence full-time between May 2007 and January 2009 and then one or two days per week when he was with his father from January 2009 to August 2010.
- [36] I now outline the more recent daycare and school arrangements because this has been a difficult issue for the parties to resolve after separation and for the future.
- [37] While with his father, D.L. was at a daycare in the False Creek area on Monday's and Tuesday's from September 2010 to October 16, 2010 when it closed for renovations. When this daycare closed in October, the father did not have a daycare arrangement so he stayed at home with D.L. every Monday and Tuesday, and on Tuesdays, until 2011, he and D.L. would go to the mother's home and pick up T.L. He cared for both children at his residence through to Wednesday morning.
- [38] D.L. has now started kindergarten. He has had no daycare after September 1, 2011, but between May 2011 and August 2011 he was at a daycare in the False Creek area on Monday's and Tuesday's, and at a daycare in his mother's area on Thursdays when she was working.
- [39] Since January 2011, T.L. has attended daycare Monday and Tuesday until noon, and on Thursday.
- [40] Since September 2011, D.L. has attended kindergarten in a school of his mother's choosing which is close to her residence, and where he is dropped off on Monday mornings by his father.
- [41] As is apparent, the daycare arrangements, with the use of two daycares, have become complicated as the parties have attempted to arrange for the care of their children following the breakdown of their marriage.

Dr. Elterman's Section 15 Report

- [42] When the parties attended before Master Scarth in February 2011, the mother sought an order for a s. 15 report as well as other relief. Master Scarth declined the application for greater parenting time by the father and declined the mother's application for primary parenting and a s. 15 report; the resulting order was for an early trial commencing March 16, 2011. However, because the mother's counsel was not available, the trial was adjourned. Accordingly, the mother renewed her request for a s. 15 report which request, at that time, was not opposed, and the Court ordered that a s. 15 report be prepared. Dr. Elterman conducted the investigation and prepared the report.
- [43] Dr. Elterman is a clinical and forensic psychologist who prepared the report. He is a very experienced expert in preparing such reports. In this report, he makes recommendations for the custody, access and guardianship arrangements between parents. Dr. Elterman

interviewed each parent, both of whom completed psychological testing. He also interviewed the older child and observed the children with their parents in their respective homes. He read the pleadings and affidavits, and contacted three collateral references from each side.

[44] Dr. Elterman was cross-examined briefly at trial. Although, there was some cross-examination about his findings, his underlying findings, with two exceptions, were not seriously challenged either by cross-examination or through other evidence.

[45] Dr. Elterman summarized the mother's position on the best arrangement for the children this way:

[The mother] says her strengths as a parent are that she is understanding, a good teacher and reads to them. She restricts their TV and gives them a lot of attention. She has expectations and tries to be consistent. Her weaknesses as a parent are that she could be more patient and try to keep cool. She also doesn't take enough time for herself.

Asked what she feels is the best arrangement for the children, [the mother] says that [T.L.] would need to transition into a 50-50 arrangement. She feels that currently it should be alternate weekends with [S.D.L.] plus during the week. She says that over time she is willing to proceed to a 50-50 arrangement. In terms of joint custody and joint guardianship, she says that there does need to be a mechanism if there is an impasse between them. Currently they don't agree on which school [D.L.] will attend and there are 2 sets of dentists and currently 2 daycares.

[The mother] feels that the advantages of the children being primarily with her would be as follows: (1) She says that she has a network of friends and families in the neighbourhood. She says that she can go down the street and they have friends and join other families for dinner. (2) She considers herself a stable person and is currently in her mother's basement suite. (I note that her Affidavits suggest that she might or could move). (3) She says that she plans to stay in the same neighbourhood. (4) She feels that she is a good parent and teaches them to be caring individuals who can think for themselves. (5) She encourages them to have a good relationship with their father.

[46] The father's position as to why custody arrangements should be as he proposes was summarized by Dr. Elterman this way:

He feels his strengths as a parent are that he is calm and provides for them. He supports them emotionally and spiritually. He tries to lead them to be better people. In terms of weaknesses, he says that he can push them too hard and he needs to allow them more down-time and not so much on the go. He also feels that he could communicate better with their mom, for example, he should let her have something she is asking for and not fight over everything. He says that he should think more about what is important and what is not important.

He feels the best arrangement is that he have sole custody because [the mother's] way of making decisions has been poor. Asked for an example, he says that she wanted him out of the house and the children need a mother and a father. He says that she kept the children away from him too

easily. She wanted him to have 2 hour visits and the police said to stay away till they go to Court and he did because it was too hard on the children. She did not deny him access for 3 weeks and he chose to stay away but that was because she wanted access to be 2 hours at a time. He says that [the mother] wants to put the children in school in the Hastings area but says that she will move when she can afford to. He says she won't stay in the area if she can move. He feels that spiritually the children are healthier with him. He grew up in a family and has stability and an extended family who are involved with the children.

[The father] says that he is in favour of a 50-50 time arrangement. He doesn't agree that they need to work gradually towards this. He feels that [T.L.] is so at home with him and with [D.L.] and so accustomed to the home environment that it would not be a major adjustment for him. [The father] proposes that they have a 4-plus-3 and 3-plus-4 arrangement. Asked whether [the mother] would ever have a Sunday, he says that she wouldn't and says that he doesn't think she should ever have a Sunday. When asked why, he says that it is the only religion in their lives when he takes the children to church. He says that if she was willing to take them to Sunday School they could work on sharing Sundays, but for him "it is a big thing".

[The father] says that he would also like to have sole guardianship. Asked to explain, he says that the children will lose their religion and education if his wife has decision-making. He feels that with [the mother] making decisions his role will be minimized.

[47] Dr. Elterman made the following observations about the parents in his report:

[S.D.L.] presents as a friendly, outgoing man who could be rigid in his thinking at times. In speaking to collateral references, I noted that there is some corroboration to my observation that he can be rigid about what he wants and has difficulty seeing the big picture or diverting his attention from his goals. I note that when asked about his weaknesses as a parent, he identifies that he should let [A.L.L.] have some of the things that she is asking for and not fight with her over everything. He also feels that at times he should think about what is important and unimportant which is a different way of saying that he can be rigid.

[S.D.L.] sees himself as a good parent and the collaterals that I spoke to also say, that he is dedicated and engaged as a parent. This was certainly my observation of him with the children. He feels that the best arrangement is that he have sole custody and sole guardianship. In speaking to him about the reasons why he desires sole custody, the examples that he gives are not, frankly, persuasive about why this is necessary. He identifies disagreements with A.L.L. about what she felt was best for the children rather than saying that his own rigidity to compromise has also been a problem. In speaking about sole guardianship, he even more so, is unrealistic in his examples by saying that the children would lose their religion and their education if their mother is making the decisions. I did not find any significant foundation to his claim that the children's best interest would be served by his having sole custody and sole guardianship.

[A.L.L.] presented as a modest, alert woman although she was nervous and sometimes self-effacing. The psychological testing suggests that both parents have difficulties around self-esteem but I suspect that [S.D.L.] overcompensates where she tends to under-compensate for this. I note that [A.L.L.] tends to be more practical and flexible in her thinking about solutions to the problems for the children which is a characteristic corroborated by her counsellor.

[A.L.L.] feels that [T.L.] needs to transition into a 50-50 arrangement over time. She would prefer that it be alternate weekends with [S.D.L.] plus time during the week. While she does not have strong feelings about joint custody, she says there does need to be a mechanism should there be [a] disagreement or impasse between the two parents. [A.L.L.] perceives that she is a good parent and [S.D.L.] takes no exception to her parenting and collaterals say that she does well with the children. She encourages them to have a good relationship with their father which I do not doubt is true. With regard to the children being on the same schedule, [S.D.L.] feels that [T.L.] with [D.L.], is very comfortable at his home and that with the 2 brothers together, that [T.L.] is able to spend more than a day away. In this regard, I think that given that [T.L.] and [D.L.] are a unit and [T.L.] does spend considerable time with [S.D.L.] and appears to enjoy it, I don't see that he is going to have a problem with spending additional time at [S.D.L.].

[A.L.L.] says that her concerns about [S.D.L.] having custody are that he would make decisions that would punish her and that he would take the children from her which would not be in the children's interests. She feels that he would be competitive in his parenting and want [D.L.] to be more loyal to himself. She feels that his ego and emotions get in the way of good decision-making and again I note that [S.D.L.] does say that he should remind himself not to dispute everything with her. [A.L.L.] feels that she should get first refusal when [S.D.L.] is working and that he should offer the children to her rather than to his mother and sister. On this matter, I agree with [A.L.L.] and both parents need to have a first refusal agreement where, if they are going to be away overnight, that they would offer the children to the other parent or that, for example, if [A.L.L.] is off work for the day, that she would have the possibility of spending time with [T.L.] rather than having him in daycare.

[48] Dr. Elterman made the following recommendations:

My recommendation in this case is that the parents share joint guardianship. I would also recommend that they have joint custody. Where there is a disagreement, I would recommend that [A.L.L.] have the deciding vote. I recommend this because I perceive that she is supportive of the children's relationship with their father, she tends to be the more practical and flexible parent in decision-making. Having said this, I would recommend that the children attend a school and daycare in the False Creek area. I recommend this because I perceive that where [S.D.L.] seems more settled where he is, [A.L.L.] is more likely to relocate and the children would then need to change schools. I also think that the school is likely to be a better school with more opportunities socially and academically. Thus despite the fact that I think that [A.L.L.] be given the deciding vote should there [be] a disagreement between the two parents, I do think that for now, [D.L.] and later [T.L.], should begin school in the False Creek area and attend a daycare also in the False Creek area. On the other issue of the selection of doctors and dentist for the children, I would

leave this for the parents to try to agree on and if unable to agree, then [A.L.L.] would select one professional for both children.

On the question of the children's residential arrangement, I would recommend that the parents continue with the current arrangement of Sunday morning at 9:30 a.m. until before school on Wednesday or before daycare on Wednesday. I would recommend that both boys be on the same schedule, and given that [D.L.] would be in daycare on Monday and Tuesday and be with [A.L.L.] on Wednesday and Friday, that he would be quite capable developmentally of handling this arrangement. He seems to have a close relationship with [S.D.L.], he and [D.L.] are close as brothers and [T.L.] is quite adjusted now to [S.D.L.]'s home environment. I would recommend that only when [T.L.] starts kindergarten, would they then add an additional half-day to [S.D.L.] making it 50-50. For now adding a half day on a Saturday to [S.D.L.] would not give [A.L.L.] enough time on the weekends with the children if they were gone every second Saturday. When [T.L.] enters kindergarten I would recommend that the parents simply go to a week-on week-off schedule where they transfer on Sunday at 6pm. I would also reiterate my recommendation that where one of the parents has to go away overnight on a business trip or on vacation, that they would provide the other parent with first refusal before allowing the children to stay with a family or friend. For now and until such time as [T.L.] enters kindergarten, I would recommend that through the summer and Christmas Break, that they continue with the above recommended division of time.

Discussion

- [49] The key issues are the residential arrangement for the boys and the terms of the guardianship order; particularly how decisions will be made as to where the children will attend school and daycare.
- [50] The determination of the nature of the order that should be made that is in the best interests of the children invariably involves a myriad of considerations, as it does in this case. These considerations include the factors that I have described in the early section on the legal principles. They include the health and emotional wellbeing of the children, the love and affection and ties with the parents and others, the education and training of the children, and the capacity of the parties to exercise their rights and duties.
- [51] In this case, the considerations specifically include the parenting abilities of the parties and the plans of the parties to parent the children. The determination of the order that is in the best interests of the children also requires a consideration of the attitudes of the parties, their cooperation or lack thereof, and the flexibility of the parties or the ability of the parties to put aside their own personal interests and views for the good of their children. This case also involves a consideration of the insight of the parties into the best interests of the children, the physical location which is in the best interests of the children, the arrangement that will enhance the two boys being together, and the neighbourhood or community that is best for the boys. Finally, the case also involves a consideration of the parenting plan that will be stable and least disruptive to these young children.

- [52] First, from my consideration of the evidence as a whole and from my review of the s. 15 report, there is no doubt that each of these parents is a loving and caring parent, deeply devoted to their boys. If either had the full-time care and control of their sons, the boys would be well nurtured and taken care of. Not surprisingly, it is my view that it is in the best interests of the children to see as much of both parents as is reasonably possible over the long run.
- [53] It is clear that each of the parents has a close relationship with the children and both wish to actively fulfill their roles as parents in the lives of their sons. Although the nature of the relationship each parent has with their children is different, those relationships are both very good, and the children have a strong bond to each of their parents.
- [54] I find that there is some rigidity on the part of both parents. That is clear from the evidence, including the report of Dr. Elterman. I think that the father is somewhat more rigid in his thinking and his decision-making about what is in the children's best interests and, as is apparent from the report of Dr. Elterman, the father recognizes this as a shortcoming. If the father is required to cast the deciding vote in terms of a decision affecting the children, I think there is greater prospect that, although he would not consciously make a decision that would be to their detriment, he would be influenced in making a decision by what he saw to be preferable to his interest. Although it was disputed by counsel for the father, I also think the evidence shows that the father is less likely to be cooperative in making decisions that affect the boys' interests than is the mother. I think that the mother is more flexible in terms of making decisions that will be in the interests of the children, and I accept that she is serious about the boys having a good relationship with their father.
- [55] One aspect of determining the children's best interests and the nature of the order to be made is which parent is more likely to accommodate access by the other parent and, accordingly, what arrangement will result in maximum contact with both parents. It is clear to me that the parents are going to have to make greater effort to accommodate each other and to be more flexible for any access arrangement to succeed. Nevertheless, apart from some initial access difficulties which the parties had, I think that the arrangement has worked reasonably well in the past year, and I expect that once a settled arrangement is in place it will work sufficiently well in the future.
- [56] One significant aspect of this dispute is whether there should be an equal (or relatively equal) division between the parents of the time with the boys, or whether, as the mother suggests, there should be a transition period before that possible result. On the whole, the question appears to be whether the relatively equal parenting should take place now (as the father proposes) or should likely come about in the future. As time goes on, the circumstances that support shared parenting will no doubt be enhanced as the younger boy becomes older and is more comfortable regularly being in two homes.
- [57] Another significant issue is where the boys should go to school and the amount of time spent at, or the location of, daycare for the boys.

- [58] The mother's plan is that the children be regularly with her and attend school and daycare in the area in which she lives and that the father have them on alternate weekends. She suggests that to the extent that daycare is needed for the younger boy, he attend daycare in her area.
- [59] The father's plan is that the children's time with each parent, be divided relatively equally and that they go to school and daycare, including before and after school daycare, in the False Creek area where he lives. This he says, will allow the boys to essentially be together. Unless such an arrangement is made for before and after school daycare, the father says that he cannot attend to his business and care for the children as he plans. This is because the travelling time to the daycare and school proposed by the mother makes it impracticable for him to care for the boys and discharge his responsibilities at work; particularly given the circumstances of his business.
- [60] Let me for a moment discuss the specifics of the proposals of the mother and the father.
- [61] The mother's plan, she says, allows her to put in a 24-hour work week, much from home, and allows her to provide after-school care and to walk the children to and from school. Her plan, she says, has the advantages of assistance from her mother (the boys' grandmother), an apparently good community that the boys are familiar with and where they have friends, continued employment for the mother, and continuation of the older boy's French immersion education which is just underway. A.L.L. says her proposal is more realistic not only because she has a shorter, largely home-based work week and is able to provide before and after-school care, but that additionally, there will be markedly reduced extraordinary expenses for child care costs if her plan is implemented. She says that the father will have expensive daycare costs and will leave the boy's care to others given that he will start early and come home late from work.
- [62] A.L.L. suggests her mother's support and the existing network of activities and friends will provide continuity, stability and predictability for the boys. She says that S.D.L.'s proposal shows no sense of community, at least not compared to the area in which she lives, and the respondent's business is floundering, requires infusions of capital from his family and (although he is optimistic) there is a serious risk that S.D.L. will become a salaried employee after a period of unemployment if his business fails. Her position is that it may well prove impossible for him to continue to pay the rent, which amounts to a high percentage of his income, to live in the False Creek area where he wishes to send the boys to school and preschool.
- [63] The father's plan, he says, has each parent with the children regularly which contact is in the children's best interests and keeps the boys together as much as possible. The father's plan requires full-time daycare before and after school on the days that he has the boys because he is at work. He argues that he is otherwise unable to accommodate his work and his proposed parenting schedule which permits him to see the children regularly. S.D.L. says that the older son is not doing well at his present school, which he suggests imposes a

further stressor - French Immersion - on top of the difficulty coping with his parents' separation. S.D.L. says that the preschool for the younger boy that he proposes is a better facility, and he points out that under the mother's proposal, the children will be in different after-school daycares. He says that the suggestion by the mother of a transition is merely a way of opposing the access he seeks; the boys should be together and have been shown to do well together in his care. He suggests that the mother, contrary to her stated view, is actively thwarting access by him. S.D.L. says that if his proposal is implemented, then the only driving day for A.L.L. is Thursday, and given that her circumstances are more flexible than his because she works part-time and from her home, he says that his proposal is more workable. The evidence shows that the driving time between the parents' residences and the proposed schools is less than twenty minutes, but I believe the father's plan underestimates the amount of travelling the mother will have to do if his plan is implemented.

[64] The father's lawyer says that his client's plan satisfies the relevant factors under s. 24(1) of the Family Relations Act when the best interests of the children are considered according to their needs and circumstances. He submits that the children are healthy and emotionally well in the care of each parent but the concern is that the older child at Hastings Elementary has exhibited a history of aggression. S.D.L.'s plan, he says, will allow him sufficient meaningful time with the children to engender a close relationship with both boys and, as much as reasonably possible, allow the boys to remain together both with regard to time with parents and time outside of the classroom or daycare. His plan will not result in the boys being separated before and after school but A.L.L.'s plan, he says, requires S.D.L. scurrying about, taking the children from his home to the Hastings area, a trip of about 17 minutes, and then a 24 minute drive to his work in Richmond.

[65] Mr. Reimer puts it this way in his written argument:

Given D.L.'s very evident difficulties at his current school, his familiarity (and T.L.'s) and success at [daycare], the close proximity of [elementary school], its comparatively better scholastic achievements, its proximity to S.D.L.'s residence, the offerings the False Creek neighbourhood provides to the children, the non-requirement of "French Immersion" at [the elementary school] and the extent to which attendance at [daycare] facilitates S.D.L.'s access, and keeps the children together as a sibling unit when not in school, the parenting regimen as proposed by Dr. Elterman, and the schooling/preschool arrangements as proposed both by S.D.L. and recommended by Dr. Elterman, are the preferred solution.

[66] There is merit, in my view, to each of the proposals. It has not been an easy decision for me to decide on the order that will be in the children's best interests. I think that in the long term a shared parenting arrangement would be best for the children.

[67] As I noted earlier, the bond between these boys and each of the parents is strong, and it is in the boys' interest to have significant time with each parent.

[68] I turn to the section 15 report. I have received Dr. Elterman's recommendation as to the appropriate order that I should make. His recommendation is worthy of serious consideration because it is structured, it keeps the boys together (as does the mother's proposal generally), it provides both parents with some weekend time with the boys, it provides for Sundays with the father who believes that religious training is important, and it provides a basis for resolving conflicts in the decision-making process on issues concerning the children.

[69] In *W. (K.M.) v. W. (L.J.)*, 2010 BCCA 572, the Court of Appeal said this about s. 15 reports (at para. 50):

To aid the court and counsel in their respective tasks, in British Columbia, counsel and the court are permitted to seek the assistance of an independent and impartial investigator and to call on that investigator to make recommendations based on the results of that investigation: Family Relations Act, s. 15. The facts stated in the investigator's report are prima facie evidence of their truth: *B. v. B.*, 2004 BCSC 72 at para. 36; *Goudie v. Goudie*, [1993] B.C.J. No. 1049 (S.C.) [Q.L.] at paras. 33-4; *Hamilton v. Hamilton* (1983), 50 B.C.L.R. 104 at 109 (Prov. Ct.).

[70] Mr. Fiddes argued that Dr. Elterman's recommendation should be given little, if any, weight. There were, he argued, two essential errors with Dr. Elterman's report which related to his recommendation as to where the boys should go to school and the time they should spend at their father's residence. First, Dr. Elterman opined that the False Creek school is likely to be better academically, and a school with more social and academic opportunities. Mr. Fiddes argued that opinion was beyond Dr. Elterman's expertise and the scope of his report, and was an opinion made without proper notice. Second, Dr. Elterman's recommendation regarding which school the boys should attend was premised on the incorrect assumption that the mother seemed more likely to move and, therefore, that the boys would likely have to be relocated in any event if they were initially with their mother and at school in her area.

[71] I think that there is some merit to each of Mr. Fiddes' points and I find that they affect the weight I should attach to the recommendations in Dr. Elterman's report. I had the advantage of hearing evidence and cross-examination of the parties that Dr. Elterman did not have the benefit of. Dr. Elterman, I find, was incorrect in concluding that the mother is more likely to move than S.D.L. I find that she does not have the intention of moving from her current neighbourhood where the older boy is attending school; the evidence does not support Dr. Elterman's conclusion on this point. The neighbourhood that A.L.L. lives in has the advantage of her mother, who is able to provide assistance, living there. The community also appears to be a good community for the boys.

[72] In short, I do not think that it is more likely that the mother will move and require that the children relocate their school. In fact, I think that it is probably more likely that the father will have to move because the rent he is paying is high and if his business fails or falters he may find it reasonable to move to a less expensive dwelling in another area.

- [73] Let me deal with the other important assumption or conclusion which concerns whether the schooling and social prospects are better for the boys in the False Creek area, than the area where their mother lives. Dr. Elterman's view in this respect is entitled to some weight given his experience over the course of 30 years attending different schools while preparing these types of reports. Dr. Elterman, it appears, had visited the False Creek school in the last year and the elementary school where the older boy goes in the last four years.
- [74] While I do not think it was outside the scope of Dr. Elterman's report or expertise to comment on the quality of the schools that the older boy might attend because he has visited numerous schools in the course of the long time that he has prepared reports, I think that specific reliance on the results of the Fraser Institute reports should be given little weight. Apparently the school that the older boy is attending ranked far lower than the False Creek school that his father proposes and it had a significantly greater number of children in grade 4 and grade 7 falling "below expectations" in skills such as reading, writing, math and numeracy. That study by the Fraser Institute was not attached to the report, the author and the details were not disclosed, and there was little ability for counsel to challenge Dr. Elterman on the report's assumptions and conclusions during cross-examination.
- [75] Nevertheless, this was only one aspect of Dr. Elterman's rating of the possible educational opportunities at the different locations and his opinion and recommendation is still entitled to weight.
- [76] On this point, I find that the above discussed two reasons advanced for allowing the father to select the school and have the children attend daycare in the False Creek area, the possibility of the mother moving and the increased social and academic standing of the school that the father proposes, are factors to which I attach less weight than Dr. Elterman. However, the comments on the quality of the school and social opportunity for the older boy in False Creek are entitled to some weight, as is the overall recommendation of Dr. Elterman, given that the balance of his report is generally consistent with the facts as I have found them.
- [77] In terms of the different communities, the evidence shows that the connections the children have, particularly, I think, D.L., with his friends in the community where his mother lives, appear quite strong. That was not seriously challenged. The evidence is that the community in which the mother lives is a good one for the boys. There was not much in the evidence of the nature of the relationships that the boys have in the community where the father resides.
- [78] Credibility of the parties was an issue at trial. However, I did not find that resolving that question on various factual issues to be of much significance to the question of what order was in the best interests of the children. Even though there were issues concerning the credibility of the parties, the evidence supported my view and Dr. Elterman's, and the view largely held by both parties, that the parties were caring and loving parents.

- [79] Many issues giving rise to questions of credibility in this case tended to focus on aspects of the parties' marriage, their separation, their social lives, and some early difficulties on access visits which, taken in the context of a collapsing marriage, were not of great significance in connection with the issues concerning the children that I am dealing with in this judgment.
- [80] Each party, in their testimony, tried to paint themselves in a better light than the other; something that is understandable and perhaps too commonplace in this type of litigation. Overall, however, I found both parties to be generally credible witnesses.
- [81] Let me describe briefly some of the issues, discussed at some length in argument, where the credibility of the parties was an issue. They include: the circumstances surrounding how the parties dealt with something I will call the "Las Vegas call girl" business cards which were found by A.L.L. when she was cleaning up in the coach house the day before her in-laws were arriving; the circumstances surrounding the financing of their first home purchase and possible income tax ramifications; the respondent's criminal record as a young man, his pardon and the manner in which he answered questions about it from Dr. Elterman and on discovery; the time that A.L.L. took to wean her younger son and whether it was delayed to block or impair the father's access; comments allegedly made by S.D.L. about beating a man in the U.S. and his father paying a bribe so he could avoid prosecution; whether S.D.L. or A.L.L. have ongoing alcohol or drug problems that affect their ability to fully care for the children; whether the trial separation in January 2010 was really that, as professed by A.L.L., or a permanent separation; whether A.L.L. took steps to make the access arrangement that she wanted inevitable; whether S.D.L. contributed significantly to household tasks or not; S.D.L.'s driving record and practices; and, the reason S.D.L. did not take the younger boy with him to the coach house after the separation.
- [82] I find that I need not discuss all of these issues, but will make certain findings. In January 2010, when S.D.L.'s parents were about to come for a visit for T.L.'s birthday, A.L.L. found pictures of Las Vegas prostitutes and condoms in the coach house. It was unclear who placed them there - it might have been one of S.D.L.'s friends - but A.L.L. did not remove them but called her husband at work and told him that the items were there. S.D.L. had the opportunity to remove them before his parents arrived but he did not. This event simply showed that both parties were angry and behaving irrationally at a time when their relationship was collapsing. Both S.D.L. and A.L.L. could have removed the cards before his parents arrived to stay at the coach house. The failure of either to remove them probably indicates little more than the relationship was dissolving and they were heading on a collision course.

- [83] Early in the separation, there were difficulties surrounding access that resulted in the police being called. Like the controversy involving the business cards from Las Vegas, the difficulty surrounding some early access visits revealed little more than profound difficulty in communicating and resolving simple but emotionally charged issues at the time of the breakdown of the marriage.
- [84] The parties acquired a property using funds from their RRSPs but it was done in contravention of the income tax rules. Counsel for the father suggested that the evidence of A.L.L. showed that she tailored her evidence about events to suit her interests, while counsel for the mother said that S.D.L. did not own up to the fact that he was not following the tax rules. Both parties knew that they were not following the rules when it came to taking money out of their RRSPs for the purchase of this particular real estate. Although there was some merit to the submissions of both counsel the resolution of this issue did not add much to assist me in determining the proper order to be made in this case.
- [85] There was evidence at trial concerning S.D.L.'s relatively minor criminal record as a young man; for which criminal record he has received a pardon. A.L.L. knew of his background; there is no suggestion it affects his ability to care for his children.
- [86] A.L.L. and her mother testified about being told by S.D.L. that he had assaulted a man in the United States and his father had paid a bribe to avoid prosecution. Although S.D.L. denied telling this to A.L.L., or at least that he did not recall doing so, I expect that he did tell her this. However, the evidence of S.D.L.'s criminal record does not show him to be of poor character in a manner relevant to the childcare issues in this case, and the story of an alleged assault in the U.S. was simply a tall tale that he did not expect his wife and mother-in-law to believe; and in fact was something that they did not believe. S.D.L. is the author of a published novel and I expect enjoys telling stories. He was not hiding anything from his wife with his answers about his criminal record. However, although he says that he believed he was able to deny having a criminal record given his pardon, his denial to Dr. Elterman that he was ever convicted of a criminal offence was probably less than frank and an answer was made to make him look a little better in Dr. Elterman's eyes. The evidence about the pardon, the assault and the real estate transaction were only attempts by each party to paint the other party in a poor light or perhaps to make themselves look better, but in my assessment had little relevance in this case to the question of either party's parenting or the best interests of their children.
- [87] A.L.L. testified about concerns she had with S.D.L.'s care while driving the children. S.D.L. testified about A.L.L.'s marijuana use, particularly earlier in the marriage. I am not persuaded that either of the parties has a drug or alcohol problem at the present time that would affect their parenting abilities. I did not find it shown that the father would drive carelessly when transporting the children in his vehicle.

- [88] Although S.D.L. cares deeply for his children, I think that he can be inflexible. I saw a number of examples of this but it is, at worst, a modest failing of a person who, like A.L.L., is deeply concerned for the well-being of their children.

Conclusions

- [89] In attempting to determine a custody, access and guardianship order that is in the best interests of these young children, I have in mind the principles that I have described above and these conclusions that I have reached.
- [90] Both parties are loving and committed parents who I find will take very good care and nurture their children well while in their custody.
- [91] Both children have a close bond to each of their parents and to each other, and I think it is in the best interests of these children for the Court to try to craft an order that will not only maximize contact for the boys with their parents, but with each other as well.
- [92] These boys are very young and any parenting arrangement or arrangements will be in place for a very long time. It is not, in this case, possible to formulate an order that is not inconvenient to the parents. I expect that the parents will work towards a shared parenting regime, which I think that they both see is in the boys' best interests in the long run.
- [93] I agree that over the longer run it is in the boys' interests that they be cared for in a shared parenting regime. That will involve some changes over time to the order that I make as circumstances will invariably change slightly. I am mindful of the need to try to formulate an order that will not result in unnecessary litigation when the parenting arrangement must change over time.
- [94] I also think that as clear an arrangement as possible will be of assistance to the parties. However, I expect that the significant difficulties between the parents that occurred shortly after they separated when emotions were raw will have subsided.
- [95] Both parties, to some degree, have exhibited a lack of flexibility in making arrangements for the care of their children when it involved interaction on their part, but I think there is less inflexibility and a more cooperative approach on A.L.L.'s part, at least insofar as arrangements concerning the interests of the children are concerned. I find that to some degree S.D.L. may allow his personal obligations and circumstances to have greater prominence than the best interests of his children, but I do not think he would ever consciously take steps to their detriment. S.D.L. is motivated, quite properly, by a desire to spend sufficient time at work to ensure that his business is successful and he is able to provide income for his dependants, but that reality operates to limit his flexibility in terms of child care.
- [96] In determining the order to make, I need to be mindful of how realistic each party's proposal (or any other arrangement) is likely to be able to be implemented over the longer run and I must be concerned with the possible consequences of any plan not working out.

A.L.L. proposes primarily that the children be with her and, on alternate weekends, with their father. Although A.L.L.'s proposal is, in my view, more realistic in terms of being successfully implemented, the shortcoming of it is that it does not provide as much contact between the father and his sons as S.D.L.'s proposal does.

- [97] I find that there are distinct advantages to the proposal advanced by A.L.L. as to where they will go to school and reside, at least initially. First, the boys will go to school and regularly be in a community in which they appear to have friends and familiar activities. The mother has more flexibility in her work, and will be able to regularly take the children to school and to daycare and to provide earlier after-school care than S.D.L. will be able to. At the present time, the mother has greater flexibility and will be able to take care of the children whereas the father, as he states, must rely on full-time daycare because of his business obligations. The father's plan, in large part, is attempting to arrange daycare that will maximize his contact with his children and his time at his work while he is trying to save his business. This would result in long days with the children in daycare and school in order to accomplish his plan.
- [98] The mother also presently has the assistance of her mother when needed for support. Moreover, the cost to the family in terms of daycare costs appears to be less under the mother's proposal, which is a modest factor to consider when the family as a whole is short of money.
- [99] I understand that the older boy is having some difficulty at the present time at his school but I am not persuaded, on the evidence before me, that it is any more than a reaction to the litigation that his parents are going through. The oldest boy thinks that the amount of time with each parent now is about right, but given the very young age of that boy, I think such a view should receive modest weight.
- [100] On all of the evidence, I think that it is more likely that a plan like the mother's plan is more feasible and presently in the children's best interests than is the father's plan. It appears that there is less flexibility in the type of arrangement that will work for the father. The mother, in my view, is less likely to move residences and if the father moves for financial or other reasons, there will more likely be disruption for the children in perhaps having to change schools or their residence with the father. Any change to where the children live and the community in which they reside will be disruptive to the children and is a factor to consider in their best interests.
- [101] I am not required to choose the plan of one party or the other, but I am required to make an order that appears to be in the best interests of the children.

- [102] I have taken into account Dr. Elterman's recommendation and his report with the qualifications as to the weight to which I attach to certain aspects of it as I have described above. I disagree with his assumption that the mother is more likely to move, and I place less weight than he did on the significance of his conclusion regarding the location that has better social and educational values for the children. These were important considerations regarding his overall recommendation.
- [103] I am persuaded by a consideration of all of the evidence that the mother should have the deciding vote in the case of a deadlock after consultation on important issues concerning the children (with the exception of religious instruction as I will discuss below). I think that in the circumstances the suggestion that the father decide where the boys go to school could be problematic. I think it could be a continuing source of friction between the parties if the father decided or was required to move.
- [104] On the whole, I think that the mother's proposal is generally preferable as being in the children's best interests, but I have decided that I should craft an order that provides the father with additional time with his children and will in a reasonably short time lead to a shared parenting arrangement.
- [105] The order I make is as follows.

Custody & Guardianship

- [106] In terms of guardianship and custody, I hold that there should be joint guardianship and joint custody. In terms of decision making, the parties will be required to consult with each other before important decisions are made, and A.L.L. will have the deciding vote in the case of disagreement. I make this order in part because I find that A.L.L. appreciates the importance of consultation before reaching a decision on the important questions covered by this order. This decision-making power in the event that the parents cannot reach an agreement will extend to decisions including schooling, medical care, dental care, daycare and counselling. The exception that I make is in connection with religious instruction which is an area where S.D.L. has a particular interest and concern, and is an area where A.L.L. has deferred to S.D.L.'s judgment.

Access

- [107] Over time, I think that it will be in the interests of the children that there should be a form of shared parenting. The mother sees that as something that the parties will work towards whereas the father, as I have tried to express, sees that as something that they should be doing at the present time. One difficulty is that unless I make an order along the lines that the father suggests, with after and preschool daycare for the children, he is unable to have the children with him and to perform his work. Although it is in the best interests of the children to craft an order along the lines of that proposed by the mother, I am not satisfied that the father has sufficient access under her proposal, even in the short run.

- [108] My order is that the father have alternate weekend access from Friday night to Monday morning when he can take the children to their daycare or school. I also order that he have on one other weekend access on one other Sunday each month from Sunday at 9:00 am until Monday morning. I also direct that he have access one evening each week from 5:00 pm until the next morning. The parties should select the day that is most appropriate but in the event they are unable to agree, I fix access at each Wednesday evening. The mother will on that weekly evening deliver the children to the father's residence. I also direct that the father have other additional reasonable access as may be agreed between the parties.
- [109] I think that in the next two years or so, as the parties approach a shared parenting arrangement, the father should have additional reasonable access to the children including time for participation with them in sporting activities, something that is a particular interest of his.
- [110] It is my intention that the order should provide that by the time the youngest child is in kindergarten, which I understand will be in September 2014, there will be a shared arrangement with the children living at each home approximately 50 percent of the time, on an alternate week basis. I have sufficient information at this stage to conclude that making this order for a time in the future is in the best interests of the children. As this date approaches, if either party is of the view that such an arrangement is not in the best interests of the children, they may make an application within 90 days of its commencement to vary that order.

Summer, Holiday, & Christmas Access

- [111] I did not see dramatic differences between the parties' positions on this issue. The parties will each have two non-consecutive vacation weeks during the school summer vacation and may speak to that if counsel are unable to settle the particulars of the order. In terms of Christmas and other holidays, there was not a great difference between the parties and I will settle them in the form proposed by the claimant.

Financial Issues

- [112] The family assets essentially are made up of the proceeds from the sale of the former matrimonial home, which sum is held in trust. There is no dispute that those proceeds, in the approximate amount of \$177,000, should be divided equally.
- [113] A.L.L. has a pension and although this was overlooked in her financial statement, it should be divided between the parties in accordance with the Rutherford formula.
- [114] A.L.L., in Mr. Fiddes' submission, makes no claim to an interest in the holding company owning S.D.L.'s business; as such, no order need be made.
- [115] There appears to be no dispute that each party is entitled to keep the chattels in their respective possession, and the motor vehicles that they may presently have.

- [116] Although A.L.L. acknowledged that part of S.D.L.'s tax debt was a family debt, S.D.L. sought no contribution in that respect. That appears to have been at most an issue of \$1,000 or \$1,500.
- [117] As I understood the submissions of counsel, there was a question of loans made by the parties' parents to their respective children for the acquisition of real estate. A.L.L. says that her mother advanced her \$20,000. S.D.L. said that if the \$20,000 had been provided by A.L.L.'s mother as a loan, it would have been returned at the time of the sale of the initial property. Mr. Reimer said that S.D.L.'s parents also contributed to the parties' purchase of the home and other assets in the sum of about \$26,000 and that while S.D.L. feels morally obligated to repay, he seeks no obligation on the part of A.L.L. to assist in that repayment. I am not satisfied that any of the advances referred to in this paragraph are in fact family debts.
- [118] Accordingly, I am satisfied that there are no family debts that must be paid from the sale proceeds currently held in trust.

Child Support and Extraordinary Expenses

- [119] I now turn to the issue of the parties' incomes for the purposes of calculating child support, and the allowable extraordinary expenses for the children, past and future.
- [120] In terms of the parties' incomes, I find that presently, A.L.L. has an annual income of \$38,000 from the three days per week she presently works. I do not think on the evidence it is appropriate to impute greater income than that as the evidence suggests this is the work that is available to her at this time.
- [121] S.D.L. proposes his income be determined at \$40,000 per year. He took out dividends from his business in 2010 which, for tax purposes, was grossed up to \$50,000. Historically, his income has been greater (between 2006-2008 it was in the range of \$53,000-\$67,400).
- [122] I expect S.D.L.'s income might be quite different and higher in a year's time, but given the fact that his business has yet to turn a profit, I fix his income for child support purposes at \$40,000, and order child support on that basis. I direct that each party provide their income tax returns to the other no later than May 15 of each year. Given my expectation that S.D.L.'s income will change, I order that the question of the quantum of child support be reviewed in 12 months.
- [123] In terms of extraordinary expenses, the largest one anticipated is preschool and daycare costs. Mr. Reimer suggested that the anticipated extraordinary expenses would total between \$2,850-\$3,115 per year, depending on the activities undertaken by the oldest boy, and whether they include baseball, soccer, hockey, and skating. I direct that the parties discuss and agree upon the extraordinary expenses and the costs be divided in accordance with the incomes as I have found them.

[124] The parties will have liberty to address the question of costs but my present inclination is that each side should bear their own costs and the cost of the s. 15 report should be divided equally.

"Sigurdson J."

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Prepared on 29 October 2026 · Esheria