
CANADA / JUDGMENT

A. v. A.

2003 BCSC 1593

COURT

Supreme Court of British Columbia

DECIDED

4 July 2003

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2003BCSC1593

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: A. v. A.

2003 BCSC 1593

Date: 20030704

Docket: E010822

Registry: Vancouver

Between:

M.F.J.A

Plaintiff

And

C.B.A., also known as

C.B.L.

Defendant

Before: The Honourable Mr. Justice Meiklem

Oral Reasons for Judgment

July 4, 2003

Counsel for the plaintiff:

J.A.W. Schuman

Counsel for the defendant:

S.H. Brady

Place of Trial:

Dawson Creek, BC

- [1] THE COURT: This trial is about the custody of J., born to the parties on [], 1998. At the time of J.'s birth, his father, Mr. A., was 53 years old and J.'s mother, Ms. L., was 23 years old. They had been living together as a couple since April, 1995, having started a romantic relationship within a short time of first meeting each other in 1994.
- [2] Mr. A. had immigrated to Canada from Austria in the mid-1980's and became the owner of a guide outfitter business and property in T.[], which is on the A.[] Highway, approximately 200 kilometres northwest of F.[].
- [3] Ms. L. was raised near Edmonton and came to be in T.[] at age 19 in 1994, after answering an advertisement for chambermaid and waitress help at the T.[] Lodge, a business nearby to Mr. A.'s home.
- [4] Mr. A. had been married and divorced in Europe, and was single when the parties met at Ms. L.'s workplace.
- [5] I will just summarize the relationship, marriage and break-up. The first two years of the party's cohabitation were very happy ones according to Mr. A. Ms. L. does not disagree, although in retrospect she describes habits and characteristics of Mr. A., and aspects of the relationship which she sees as causative of later discontent. She appears to have come to view herself as subservient and dominated as she moved into her twenties. Notwithstanding that Mr. A. did the majority of the meal preparation, and by his account, the community referred to her as "the P." because he treated her so well.
- [6] Mr. A. attributes the beginning of the changes in their harmonious relationship to the influence of a local female friend of Ms. L.'s, who introduced Ms. L. to the beliefs of Jehovah's Witnesses during 1997. Ms. L. gradually became more and more interested in bible study and the beliefs of Jehovah's Witnesses, and Mr. A. perceived that as a diversion from their way of life and a threat to their relationship. Conflicts arose, and Ms. L. took a much more assertive stand as time went on.
- [7] This was a significant shift in the power dynamics in their relationship. Ms. L. saw Mr. A. as jealous of the time she spent with girlfriends. On one occasion related by her, Mr. A. was going to burn some of her religious literature, and she told him if he did, he would be crossing a line. She said she had relinquished a lot of control over her life to him, and was not prepared to relinquish her pursuit of her religious studies.

- [8] By January, 1998 she was meeting regularly with her Jehovah Witness friend, L., in T.[] and Mr. A. continued to be upset. She decided to stop meeting L. regularly on the parties' return in March, 1998 from a European trip. The parties learned Ms. L. was pregnant shortly after returning from Europe. Ms. L. worked from March to August, 1998 as a flag person. J. was born [], 1998.
- [9] In early 1999, Ms. L. was stressed and did not feel secure in the relationship. She took one prescription of an antidepressant, but then she says "found a backbone" and resumed bible studies with L. She attended her first Jehovah Witness convention in August, 1999. Conflict continued with Mr. A., who accused her then of ruining the family. Sometimes she let him rant, as she said, and other times she rationalized that she was only using her own time and not taking away from his.
- [10] The parties went to Austria in November, 1999 and J. was baptized a Roman Catholic at that time with Ms. L.'s consent. She felt that was Mr. A.'s right. On their return in December, 1999 the parties discussed marriage. The subject had been discussed previously and Mr. A. said he would not marry her if she became a Jehovah's Witness, stating a concern that she would give his money to the church. Ms. L. wanted to be married. When she was asked why marriage, she testified that it was because the bible is clear that a man and a woman should be married if they are to have a family. The other clear motivating factor, which was more compelling, I think, was that she wanted to be baptized in the Jehovah Witness faith, and she could not be baptized if she was still living in sin. She had to be either married or separated.
- [11] Eventually the parties reached a compromise and Mr. A. agreed to get married if Ms. L. signed a pre-nuptial agreement. She went to F.[] to pick up forms and prepared an agreement. There is some conflict in their testimony as to the frantic dealings and the area of disagreement that ensued over the terms of the pre-nuptial agreement, but they were eventually married on February 10th, 2000, some two days after an agreement was signed. It is undisputed that at one point in the events, Ms. L. refused to return to their T.[] home until they were married.
- [12] There was a period of relative calm immediately after the wedding and Ms. L. was baptized the following month, with Mr. A. taking her to Grande Prairie for that purpose. She could then perform "service", that is to go door-knocking and promulgating her beliefs. She went to F.[] bi-weekly to attend Jehovah's Witness meetings, and to shop, and tried on those occasions to do one to one-and-a-half hours of service. On the other weekends fellow Jehovah's Witnesses would go to T.[] to do readings.

- [13] This continued to be a stressor to Mr. A., and they became suspicious of each other. She said he spoke of a secret plan involving J. one day being without a father and mother, and she surmised he might be planning a murder/suicide. Parenthetically, Mr. A. acknowledged at trial that he had said that he had a plan, and did not tell her what it was. His plan was to go as a family to Austria and if they could not reconcile their differences as a family, he would stay in Austria with J. and let her return to Canada alone.
- [14] Another stressor for Ms. L. was her perception that Ms. U.S., a German client of their business who became their personal friend, was becoming too close to Mr. A., and vice versa. In large part this arose because Ms. L.'s religious beliefs kept her out of many of the activities that were normal to Mr. A. and Ms. S., and which they pursued without her.
- [15] There was a significant confrontation in August, 2000, which is the month Ms. L. says the marriage crumbled. To fast forward without a detailed narrative, Ms. L. felt trapped and she planned and executed an escape to F.[] with J. on September 26th, 2000 while Mr. A. was in the field with clients.
- [16] Her plan did involve the assistance of her Jehovah's Witness friends from F.[], and some subterfuge on her part. Listing her reasons for leaving, she said there were three.
1. She felt strongly Mr. A. was having an affair.
 2. She was afraid of Mr. A. taking J. away.
 3. She was tired of giving in and losing herself.
- [17] Another parenthetical comment at this point: Ms. U.S. and Mr. A. became married in June, 2002. I do not take this as any confirmation that Ms. L.'s fears in August, 2000 were correct. In fact, I found the present Ms. S.A. to be sincere, and thoroughly believable in testifying that her relationship with Mr. A. was not romantic until April, 2001 when he was in Europe. I find that the former Ms. S. was also truthful in testifying that she loved both parties, and J., and wanted the parties to stay together as a family.
- [18] Ms. S.A. testified insightfully about an incident on the last day of her visit in January, 2000, the same visit where she went to town with Ms. L. to find legal forms to document the pre-nuptial agreement. Ms. L. had been speaking of wanting to stop sinning and to have a true family and marriage. An argument ensued and after dinner Ms. L. packed some belongings and proposed to leave with J. She stated that Jehovah was her greatest love, and she had to follow her new lifestyle. This naturally shocked and upset Mr. A., who retired to his bedroom crying a great deal. Ms. S. asked Ms. L. to go and comfort him; she refused, but allowed Ms. S. to do that. The following day, in saying goodbye to Ms. S. at the airport, Ms. L. promised her she would not leave Mr. A. while he was so upset, and would work to try to find a solution.

- [19] Returning to the eventual separation in September 2000, Mr. A. travelled to F.[] and was initially unsuccessful in trying to get Ms. L. to meet with him alone. After a week she and J. did meet him for lunch and continued to do so for a number of visits. Ms. L. refused his request that he be allowed to take J. home for a visit, but with the help of a mediator, the parties consented to an order in the Provincial Court dated December 4th, 2000, that provided for joint custody and guardianship, primary residency with Ms. L., and Mr. A. having access five days out of fifteen days.
- [20] Some words about the history of this proceeding. This proceeding was commenced March 1st, 2001. Both parties seek sole custody. On April 12th, 2001 Master Bolton ordered interim joint custody and guardianship, with interim residence with Ms. L., and ordered non-removal from the Province of British Columbia, except for vacation purposes with specific notice requirements. On June 5th, 2001 Master Doolan ordered a s. 57 declaration, and ordered that Dr. Posthuma, a forensic psychologist, investigate and prepare a s. 15 custody and access report, and ordered a specific one time ten day access period to each parent, with Ms. L. being permitted to take the child to Alberta. On November 5, 2001 a consent order provided for interim access on an equal basis, ten days on and ten days off. On November 27th, 2001 the parties signed an agreement settling property issues, with a payment of \$10,000.00 by Mr. A. to Ms. L. In January, 2002 the parties were divorced. On April 14th, 2003 the court ordered Dr. Posthuma to prepare an update report, and dismissed Ms. L.'s motion to have Dr. Fong prepare a s. 15 report, but abridged the time for delivery of an expert report by him to thirty days.
- [21] At trial, Ms. L. testified that she consented to the November 5th, 2001 order for alternating ten day access in part because she was intimidated by Dr. Posthuma's first report.
- [22] I will move on to talk about Dr. Posthuma's reports. Dr. Posthuma's first report is dated August 27th, 2001. The report and Dr. Posthuma's methodology were a significant issue at trial. Mr. Brady, for Ms. L., has made a motion and a concerted effort, based on alleged bias, to exclude it and the update report of June 4th, 2003 entirely, or to have them accorded no weight. This effort included calling Dr. Larry Fong, a highly qualified psychologist practicing in Calgary, as an expert to critique Dr. Posthuma's work.
- [23] The August 27th, 2001 report starts off with the observation that Mr. and Mrs. A. and J. were referred for a psychological assessment under s. 15. That observation does not accurately state the mandate, which was, and I quote, "to investigate and prepare a report with respect to custody and access of the infant child of the marriage, pursuant to s. 15 of the Family Relations Act". It is unclear to me, and no evidence was adduced to explain, how the investigation became limited to a psychological assessment.
- [24] Dr. Fong was critical about the structure of the report, and the investigative methodology, but his criticism really assumed that Dr. Posthuma pursued a direction to prepare a comprehensive custody and access report, which he says is how the direction used is normally understood.

- [25] In fairness to Dr. Posthuma, for some reason unknown to me, he does not seem to have embarked on anything of the sort. He testified at trial that he was looking at the quality of the relationship between J. and his parents, and possibly being able to assist the Court on the psychological makeup of the parents and the developmental needs for the child, with specific reference to the religious issues in the case.
- [26] The August 2001 report itself sets out that the assessment involved independent interviews of both parents, observations of them interacting with J. in their respective homes and psychological testing of both parents, and interviewing Ms. S. The psychological questionnaires used were six in number: a parent evaluation form, parenting stress inventory, Greenberg parenting history survey, child abuse potential inventory, parent child relationship inventory, and the Minnesota multiphasic personality inventory.
- [27] Dr. Posthuma also received letters of reference presented by Mr. A., and various letters presented by Ms. L. Her letters did not include any reference letters. Dr. Posthuma did not interview collateral sources of information as to the character or parenting skills of the parties. The only reference to the many letters of reference that he received on behalf of Mr. A. was on page 8 of his August, 2001 report, where he stated:

The validity scales of the MMPI-2 would indicate that Mr. A. was likely somewhat defensive in his response to the questionnaires. This is not surprising when the test is used in a custody dispute. The clinical scales of the MMPI-2 would indicate that he sees himself as someone who is optimistic and well adjusted. How accurately this portrays his personality is difficult to determine, although it is certainly consistent with how he presented during this assessment and with the letters of reference written on his behalf.

- [28] He then goes on to discuss that:

The validity scale of the PCRI is within acceptable limits. The clinical scales indicate that Mr. A. sees involvement with his son as the most important feature of his relationship. He also believes that limit setting is important in child raising. In addition, Mr. A. sees that he has much social support in parenting. That is, he has friends that he can call upon for advice in parenting issues. This is usually an important factor in making custodial decisions.

Here is the reference to the letters of reference:

The letters of reference from Mr. A.'s community would seem to support his perception.

- [29] Ms. L. was not invited to produce reference letters, nor was she aware until the report was prepared that Mr. A. had presented such letters. Another criticism of Dr. Posthuma's methods was that while Ms. L. was given an overnight period to complete the Greenberg parenting history survey, the survey, as with all the questionnaires, was read to Mr. A. and left with him for approximately two weeks. When returned, it was completed in the handwriting of a friend, who had copied Ms. S.'s words, which were originally the record of Mr. A.'s responses.

- [30] The criticisms of Dr. Posthuma's August, 2001 report and testing methodology, not all of which I have recalled here, have a degree of validity in my view. But in light of the limited scope of Dr. Posthuma's report, most of the shortcomings are not material, and do not affect the weight of the report as it relates to Dr. Posthuma's observations about the interactions of the parents with J..
- [31] The significant portion of the August, 2001 report dealing with that is page 3, and the first paragraph on page 4. With counsel's blessing, I would propose to insert that in the draft when I edit, but not read it to you now, you have both read that. Is that fine?

MR. BRADY: Yes My Lord.

MR. SCHUMAN: Yes.

[INSERTED PORTION OF QUOTED REPORT]

J. was not interviewed independently given his age. He was, however, observed interacting with his parents for two and a half-hours on both occasions. The observation with his mother took place in the home, as well as a visit to a park and to a family home of members of their religious community. The visit with the father took place in the family home, a walk to a nearby river and to the schoolhouse. As might be expected, J. behaved quite differently in these two settings. He was obviously comfortable and relaxed in the family home, where there was much more room and opportunity for him to play, than there was in his mother's small apartment. He was more animated with his father, initiated more activity and was more affectionate with his father than with his mother. While familiarity with the family home and community, probably accounted for a significant amount in this change in his behavior, it is considered that there were also significant differences in his parents' interaction with him that also accounted for differences. The father was much more energetic, creative, playful and affectionate with J., than was the mother. This is not to say that the mother was in any way particularly lacking in these qualities, but rather that the father was more demonstrative. This is acknowledged by the mother as a difference that pre-existed the end of the marital breakdown and qualities of J.'s father that she still admires and believes are important to J. Her major caveat is that she has been the significant caregiver for J. and is a more stable influence on J. than the father. Both of these points will be discussed later in this report.

Another understandable consequence of the above, is that when J. was in his father's presence he was less demanding of adult attention, and more content to play on his own. That is, he was less dependent on his father, than he was on his mother in her presence. In addition, when with his father he freely went to play with Ms. S. He probably sees her as a parental figure in his life. He accepts her limits and makes choices between her and his father for conversation and play activity.

Another difference between the two observation periods, was that in the mother's presence J. tended to set the pace and direction of activity to a much greater extent than when with his father or Ms. S. For example, in the playground activity, J. limited his interaction to wanting to be

pushed on a swing by his mother. This could be contrasted when J. was with his father when he was playing in a sand box and the father began to initiate an imaginary fishing experience, where both were pulling out prize fishes with their imaginary rods from the imaginary pond. This activity involved considerable interaction, playfulness and from the standpoint of child development, is seen as a much more valuable experience in terms of developing the cognitive skills of a child of this age, as well as forming close bonds with the parental figure. Bonding in turn is known to be the most significant factor in developing a sense of security in a young child, which safeguards later emotional and behavioral problems as an adolescent and young adult.

Finally, it might be helpful for the Court to appreciate the access exchange of J. with his parents. Only the exchange from his mother to his father was observed in this assessment. J. was brought by his mother to a grocery store, his father was at the checkout. His father did not notice J. and his mother for a few minutes. When he did, after a brief pause, J. ran to his father with much enthusiasm and into his arms, where he remained until he was put in the car. Prior to coming to the grocery store, J. was aware that he was about to see his father. He showed increasing eagerness for the pending exchange. He showed no distress and maintained his excitement and eagerness with his father until they departed. During his time with his father, where he was observed the following day, J. made no references to his mother.

[32] THE COURT: None of those observations are undermined by the valid criticisms as to testing methodology, or even as to the non-comprehensive nature of the report. I tend to agree with the thrust of Mr. Brady's submissions that the interview notes of Dr. Posthuma in noting Ms. L. to be quiet, on edge, and formal, and querying an overlay because of her church association, raise a concern. But in the context of all of the evidence, and considering that note did not itself get into the report, that view itself is not an issue. It does, however, impact to some degree the weight that I would accord Dr. Posthuma's assessment of Ms. L., relative to my own observations and the other evidence that I heard at trial.

[33] I will read this into the record. The conclusions and recommendations portion of Dr. Posthuma's August, 2001 report state the following:

Although both parents have raised religion as an issue affecting the marital breakdown, and concerns with regard to their son, it is not considered that religion is the primary consideration in this matter for deciding J.'s best interests. Rather, there appears to be considerable differences between the relative merits of both parents. While there are no particular weaknesses in the mother's ability to provide for her son, there are particular strengths in the father's ability. These mainly lie in his energy, his creative mind, especially as it comes to child raising, and his ability to stimulate the intellectual and emotional growth of his son. Thus, if the court is to decide as to who should be the primary custodial parent, this assessment would indicate that the father can provide J. more emotional and intellectual stimulation than appears apparent from the mother. Religion has been raised as a factor, and to some extent may require the court's attention. It is considered that the mother's view that J.'s religious preferences will become his own voluntary choice, is somewhat naïve if she is to be the primary custodial parent. That is, if J. continues to attend religious meetings and missionary outings, as he is already doing, this is bound to become

a formidable influence on his emotional and intellectual development, as it will be one of the most dominant influences on his life. Parenthetically, it should be pointed out that Mr. A. is not irreligious, but a member of the Roman Catholic faith, who has various religious icons around the family home. He is not, however, as involved with his church as is his wife.

With regards to the issue of whether Mrs. A. has made significant changes in her emotional state as a result of her religious involvement, it is considered that this is unlikely to be the case in terms of her basic personality structure. That is, it may be that her behaviour and emotional state is expressed differently in the context of her new-found belief system, but it is unlikely that this has created fundamental changes in her personality. Thus, the differences in parenting style observed is considered to reflect these basic personality variables, rather than being an artifact of more recent changes in religious beliefs.

[34] An issue has arisen as to whether Ms. L. by not being available, deliberately thwarted Dr. Posthuma's attempt to update his report as ordered, because she had been aggrieved by the first report.

[35] It seems clear to me on a review of Exhibit 34, exchange of correspondence between the two counsel here and Dr. Posthuma that she did deliberately avoid participating. It would seem she had nothing to lose by participating and everything to gain, but Mr. Schuman's submission is that this avoidance was part of a plan to replace her portion of Dr. Posthuma's update with evidence from her confidante, Ms. F., and Ms. F.'s fabricated observations of J.'s behaviour and utterances and his interactions with his mother.

[36] It is unfortunate that Ms. L. missed an opportunity to have Dr. Posthuma re-assess the interactions with each parent that led him to suggest that:

The father can provide J. more emotional and intellectual stimulation than appears apparent from the mother.

[37] I am, therefore, deprived of the benefit of that observer's updated comparison of these two parents, but I do have the benefit of Dr. Posthuma's observations of J. with his father and stepmother, and his report of interviewing J., as well as a comparison of J. at age four and a half to J. at age two and a half, which is very useful in assessing how he is coping with the separation of his parents and the existing shared access regime. I am mindful that the interview and observation of J. took place mainly at his father's home after the child had been with the father for about one month on a trip to Europe. His behaviour and interaction must be viewed in that light.

[38] Dr. Posthuma reports as follows on J., quoting at that juncture from the bottom of page 2 of the update report to halfway down page 4. Once again, I will assume that counsel do not want me to read that.

[INSERTED PORTION OF QUOTED REPORT]

J. was interviewed alone, and was also observed in several settings over the one-day assessment. When I arrived at the family home in T.[], J. and his father were playing. This activity continued and led into J. and his father constructing a small outdoor portable swimming pool. This then led to a trip around the family property and concluded with a lunch that was attended by friends of J.'s father, J.S. and her partner, B. I then interviewed J. alone. J. then went with Ms. S. on an outing while I interviewed his father alone. I read the questionnaires both to J.'s father (subsequently to Ms. S.-A.), due to their limited understanding of written English. Upon J.'s return, I played with him alone while his father was preparing dinner. J. was joined by a neighbourhood friend, A., for dinner. I departed from the family home after dinner. Finally, J. was observed interacting with his father and stepmother at the Vancouver Airport, upon Ms. S.-A.'s arrival from Germany. Unfortunately, J.'s and his father's plane from F.[] broke down, and this involved a long detour through Alberta to the Vancouver Airport, resulting in their arrival just prior to Ms. S.-A.'s arrival after she cleared customs at 3:30 in the afternoon. Thus, I was present when she arrived at the designated meeting place.

Since my last report, J. has become a delightful, engaging child, who was quite forthcoming and articulate in my interviews with him. As indicated in my earlier report, I did not directly interview J. on that occasion, because of his age. J.'s relationship with his father and stepmother has matured and developed from my previous assessment. The type of imaginative and inquisitive play that characterized his father's interaction with him in the previous assessment, has matured into a relationship that is characterized by heuristic interactions, initiated by both of them. There also appears to be a spontaneous display of playful activity, initiated by J., with both his father and stepmother, which is also reciprocated by them. In other words, J. has incorporated many of his father's mannerisms. Of further significance was J.'s response to limit setting by both his father and stepmother. Playful activity of a child J.'s age, can often get out of hand and result in the child becoming hyperactive. In this instance, J. had had a long day with his father, traveling through various airports, and apparently without sleep. This normally would have led a child to be quite cranky and irritable, and/or overexcited. J. was well behaved throughout this, even though there were times at which, had his father or stepmother not acted appropriately, could very well have led to J. becoming overly irritable or hyperactive.

J. echoed his behaviour with his father and stepmother, in his comments on his family during my interviews with him. In the Parent Attachment Structured Interview, he expresses a greater degree of positive attachment feelings and a lesser amount of negative feelings with his father, than he does with his mother. With regards to the negative feelings, he does identify his mother as using physical force or punishment as a discipline method, and does not identify his father or stepmother as resorting to such procedures.

J. made it clear, both directly and indirectly, his desire to be in the primary care of his father. This preference, however, was not directly solicited from him. J. was encouraged to discuss the activities he shares with his parents. He was animated in describing his friends and activities in T.[]. He is disappointed when he cannot spend as much time as he would like with his father. The reverse appears to be true with his mother. Some of his discomfort with his mother appears to

have to do with religious observance. J. identifies himself as a believer in Jesus and not Jehovah. Mr. A. states that he doesn't discuss religion with J. He would like to be able to discuss various aspects about religion and biblical stories, but because the subject is so anxiety provoking for J., he avoids doing this. He illustrates J.'s discomfort, by an incident where J. broke down crying when two hunting guests said grace at a meal.

If J. were to remain in T.[] he would attend a two room school house, with classes in one room from kindergarten to grade 5, and another room from grades 6 to 12. Last year there were eleven students in the kindergarten to grade 5 classes. Kindergarten and grade 1 study together. According to H.L., who was interviewed privately, who is both a neighbour and a teacher's aide at the school, the school enjoys the highest scholastic aptitude test results in the district, and has almost one to one instruction. She states the children are very enthusiastic about the school and have a varied program. She indicates the children are encouraged to be cooperative and the school lacks the problems with bullying and drugs that characterize many of the other schools in the district.

J. has become somewhat bilingual, according to his father, and he did use some German expressions with both his father and stepmother during the observation period. Mr. A. foresees traveling to Europe with J. in the future, not only in assisting his education, but also in order to publicize his business with the European market.

His conclusions and recommendation section reads:

This assessment cannot update the Court on J.'s relationship with his mother, due to her lack of involvement in the assessment. In my previous report, I concluded that religion was not an issue with regards to custodial care and access arrangement, and at that time, there appeared to be a stronger relationship between J. and his father, than with his mother. Since that time, J.'s relationship with his father has matured and developed in ways that appear beneficial to his emotional and intellectual growth. J. also enjoys a close relationship with his stepmother. J. does identify some areas of concern in his relationship with his mother.

In spite of what has been stated above, to some extent religion is an issue in these proceedings. In my previous assessment, Ms. L. indicated that it would be up to J. to decide which religious direction he wishes to take. This assessment would indicate that J. has made a choice not to follow his mother's religious direction. He is, of course, still very young and with most religious persuasions would be considered too young to make a choice. Nevertheless, the strength of his feelings at this time, and the anxiety he feels over his mother's religious observance is very problematic. I would remain with the belief, however, that this is really a symptom of the relative merits in his attachment to his parents. In terms of J.'s future welfare, it is considered that the strength of his attachment to his father should be reflected in any custody and access arrangement.

- [39] Many of Dr. Posthuma's observations as to the attachment of J. and his father, and his father's strong points as a parent, are corroborated by Mr. A.'s witnesses. Ms. L.'s witnesses paint an equally compelling picture of the bond between J. and his mother, and her strong points as a parent. They also negate any characterization of her as unduly quiet, or formal, or depressed, or for that matter, as under motivated to achieve and provide for the child.
- [40] Although there is obviously the bias inherent in being a friend, confidante, and fellow Jehovah Witness, I found K.F. to be a compelling witness generally in describing Ms. L. as warm, friendly, approachable, even-tempered and consistent. This witness, the mother of three herself and a registered child care provider with a diploma in social work and years of experience, noting that she always sees Ms. L. and J. at the transition points in and out of day care, characterized Ms. L. as firm, but loving and patient, utilizing humour and affection. She said that Ms. L. has a good knack of having J. comply without getting into a power struggle, or having to order him, even though Ms. F. describes J. as having a strong personality and wanting to make his own way. She also said that she has seen Ms. L. set out her expectations to J. about developing a caring for other people. She has also observed that Ms. L. is supportive of J.'s relationship with his father and other significant people.
- [41] While I have confidence that I can rely on Ms. F.'s observations, and the testimony summarized here, I stop short of sharing her implied anxieties and interpretations arising from listening to J.'s song about no one taking his Dad away, and his reticence to discuss his trip to Europe with his father. While I do not accept the argument that she was party to a conspiracy to fabricate evidence and commit perjury, I think by the time of her note taking, she did begin to see what she was looking for in some of her interpretations.
- [42] Moving away from the evidence relating to parenting capacity, emotional well-being and attachment for a moment, I will record my finding that both parents are roughly equally able to provide the necessities of life in terms of food, clothing and housing. While Ms. L. was on social assistance in 2002, having prioritized the care of J. over advancing her education or working, she has now completed an applied business technology course with the highest grade point average on campus. She intends to work and is apparently certain to find work in F.[].
- [43] Each party has concerns over the relative educational opportunities in the community of the other. Mr. A. and the witnesses from T.[] sing the praises of a low student/teacher ratio in a two room school with nineteen students in twelve grades, and the absence of bullying and drugs. The T.[] School raises the district average in scholastic achievement, and has more computers per student than any other school in the district. School activities take advantage of the proximity to outdoor recreation and there are field trips into the larger community of F.[], which is in the same school district. There were no songs of praise for the schools in F.[], but the defendant argues that there is a greater range of community facilities generally available there, and she is concerned that T.[] graduates do not branch out. She feels that a larger class of same age children will better foster social skill development in J. when he is younger.

- [44] Turning to the concerns expressed by the parties as to the parenting capacity of the other, or the difficulties they foresee with primary custody going to the other, I noted that Mr. A.'s concerns were with Ms. L.'s discipline methods, which have, at least until recently perhaps, included corporal punishment or spanking. He is concerned that the contrasting practices cause emotional conflict in J. He also believes that J. should not be accompanying his mother on service, that is, door knocking, and he is concerned that the child is stressed or anxious as a result of his mother's religious fervour.
- [45] I tend to agree with the view that taking a child as young as two on door-to-door missionary service is ostensibly exploitive, and more in the best interests of the church than of the child. I do not see it as necessarily harmful, but it has that potential. The fear apparently is a rejection scenario, but the evidence from the defendant's witnesses suggest this is very rare. I am sure that the presence of a young child makes it even rarer. The most valid criticism is that, quite simply, there are a myriad of activities that could be shared with the child that would be more beneficial to the child. We would not be approving of the vacuum cleaner salesman cited by way of analogy at trial who had his two year old son or four year old son in tow.
- [46] Having said that, Ms. L. considers the missionary service important as part of her exercise of her religious observance, and the alternatives for the one to two hours each week would all involve leaving J. with someone else. I also find there is some merit to her argument that he is developing social skills while spending this time with her.
- [47] I am not confident that Dr. Posthuma's assessment that J. has made a choice not to follow his mother's religious direction is correct. In any event, I suspect that J.'s career as "chief door knocker" will come to an end once he starts grade school. In short, I do not consider this concern of Mr. A.'s a significant factor in determining parenting capacity.
- [48] As to the stated concern over contrasting discipline methods creating emotional conflict, the only support for Mr. A.'s hypothesis is Dr. Posthuma's observation that J. does identify his mother as using physical punishment, combined with his vague comment, that might be referring to this, in saying:

J. does identify some areas of concern in his relationship with his mother.

- [49] This does not persuade me that Ms. L.'s use of physical punishment is the cause of emotional conflict. Further, while there is evidence that Ms. L. struck J. lightly on one occasion while they were living with Mr. A., her evidence that the extent of her physical discipline is a "light attention-getting tap" is uncontradicted. It is a rare case where discipline methods are perfectly synchronized in separated families, and I do not find evidence of significantly different practices that concerns me, particularly taking into account my impression that J. is an intelligent child, well bonded to both parents, who is probably able to rationalize minor conflicts and adapt.

- [50] I also note that while Ms. L. exhibits a certain rigidity in her beliefs consistent with ranking high on rigidity on the psychological testing, she has shown an inclination to learn and to change her views over time in respect of certain aspects impinging on child care.
- [51] Ms. L. is concerned that Mr. A. drinks too much alcohol, which may constitute a driving safety risk. She is concerned that he is not fostering J.'s relationship with her sufficiently, and that he diminishes anything she does with the child. She is concerned that there is a poisonous environment in T.[] toward her, and that this will affect her relationship with J. She is concerned about unsafe storage of firearms and ammunition.
- [52] On the latter topic, I do not recall any confrontation of Mr. A. on this, but I have every confidence that Mr. A., considering his occupation, is not careless about firearm safety. I do not find her concerns about a poisonous atmosphere alienating J., or that Mr. A. does not foster J.'s relationship with her, to be valid. The former comes, presumably, from the petition and reference letters submitted in support of Mr. A., and perhaps the sense of isolation she felt prior to and upon her leaving T.[]. The strong rallying around Mr. A. in his situation was quite understandable, and it is quite a stretch to conclude that once the Court has determined this custody dispute, these same caring people would undermine J.'s well-being by alienating him from his mother.
- [53] Mr. A. does regularly drink alcohol. He says two or three beer per day. I think he is probably minimizing his use, but even at that it is probably above average. However there is evidence that he does not alter his moods or behaviour by drinking alcohol. While there is a basis for some caution with his alcohol consumption, it has not been an issue to date in respect of his exercise of access and I do not consider it a major determinative factor in this case.
- [54] Ms. L. said that she is seeking sole custody on the basis that she can provide a more stable financial future for J., suggesting that because of his age Mr. A. will become less able to provide as J. approaches graduation. Stated last, but perhaps of greater significance to her, is her fear that with sole custody Mr. A. will be able to relocate in Europe and she will lose contact with her son. Founding that fear is her observation that he has already sold one of his properties and his entire family is in Europe.
- [55] I note that this fear is not irrational in light of his previously stated plan, and the fact that Ms. S.A., although she has arranged to be in Canada seven months of the year, remains employed in Germany as a psychiatric nurse and plans to look after her parents in their old age. She is 41 years of age herself.
- [56] Ms. L. opposes joint custody and the continuation of split residency because of the parties' inability to communicate. She says she feels intimidated by Mr. A. and is afraid that will continue. Ms. L. also opposes it because it will provide Mr. A., as I understood her thought here, with too much influence over J., considering that she wants J. to become a "man of God".

- [57] Mr. A. opposes shared residency because it would not remove J.'s apparent anxiety that Mr. A. attributes to Ms. L.'s religious practices, and because it would be disruptive, particularly to his schooling.
- [58] As to the schooling issue, I heard evidence from S.L., a grade ten student at T.[], who was one of Mr. A.'s witnesses, as to the merits of that school. She was an impressive young woman and for a number of years she was in fact starting the school year in T.[], relocating to Lillooet in November for four months, and then returning to T.[] to finish the year. I think the evidence may have been that some of her siblings did the same thing. Both she and her mother, who works as a substitute teacher, said that that worked fine.
- [59] As to Ms. L.'s statement of inability to communicate, there was no evidence of specific difficulties encountered by the parties during the past two and a half years that they have been joint custodians and guardians of their son, who seems to be thriving very well in the circumstances. By all the evidence, he is a well-behaved, high achieving child, variously described as delightful, engaging, forthcoming, articulate, imaginative, and affectionate. In this case, where the parties live 200 kilometres apart, and there is no daily interaction required with each other, there is not a lot of communication necessary.
- [60] As to her feelings of intimidation, I am dubious. She still appears to me to have the fortitude she mustered when she left Mr. A., and she seems amply fortified by her supportive friends and church congregation.
- [61] This action invokes both the Divorce Act and the Family Relations Act. Where this is so, and where there is no conflict in the legislation, I should consider the provisions of both Acts as to the relevant considerations on custody and access which are, of course, set out in s. 16 of the former and s. 24 of the latter. Both, of course, give paramountcy to the best interests of the child. Section 16(10) of the Divorce Act in part states that:
- . . . the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child . . .
- [62] The evidence in this case persuades me that the best interests of J. are satisfied by an order specifying joint custody and joint guardianship, with alternating principal residency. I have considered the ramifications of the different religious beliefs, as well as logistical factors, in designing a very specific set of provisions which I will hand out for convenience in a moment. Adding up the exact days may not result in perfect equality of time, but it is roughly equal and there are compensating factors which should become apparent.
- [63] My underlying rationale for this disposition, which I realize is not the first choice of either parent, is that, in my view, it will provide the child with the best upbringing available to him in the circumstances. He will have, as they say, the best of both worlds. The change of schools in mid-year is the principal, if not the only, negative aspect and in my opinion, considering his apparent high level of intellectual development, it is something he will take in stride. Certainly at his current age, and for the next few years, it is a less disruptive factor

than diminishing the influence in his life of one parent or the other, where in my view both parents have a strong bond to him and both those bonds are crucial to his emotional well-being.

- [64] Most of the concerns that the parties have about the other becoming the sole custodian and of parenting in the diminished role of an access parent, are ameliorated by that disposition.
- [65] The order that I propose to make I will have an open mind about the details of, if counsel have submissions they want to make to me today. I will read it into the record, but I have got copies here for the clients as well.
- [66] This is the order that I propose. The parties shall share joint guardianship, and joint custody, of J.M.A. born [], 1998. Primary residency shall alternate between the parents on the following schedule:
- (a) the plaintiff shall provide the primary residence from 4:00 P.M. on January 31st each year till 4:00 P.M. on the first Saturday or Sunday, whichever of these first occurs, of August of each year, and shall pick J. up in F.[] at the start of that period;
 - (b) the defendant shall provide the primary residence from 4:00 P.M. on the first Saturday or Sunday, whichever of these first occurs, of August each year to 4:00 P.M. on January 31st each year, and shall pick J. up in T.[] at the start of that period;
 - (c) the parent not providing the primary residence shall have access every second weekend during the respective residency periods, from 6:00 P.M. Friday to 4:00 P.M. Sunday. The child will be picked up on Friday by the parent exercising access, and on Sunday by the primary residency parent at the respective homes of each of the parties.
 - (d) this general access schedule will be subject to the following specific exceptions:
 - (i) the schedule will be interrupted without adjusting the general pattern, so that the parties exercise access during the Christmas and spring school breaks as follows: the plaintiff shall have access every year from the commencement of the Christmas holiday to 4:00 P.M. on December 26th, and shall pick J. up in F.[]; and the defendant shall pick J. up in T.[]. The alternating access weekends in January will be determined by reference to which day of the week January 31st falls on, so that J. is with the defendant on the last weekend prior to January 31st.
 - (ii) the plaintiff shall have access on the Easter weekend every year, from 4:00 P.M. Thursday to 4:00 P.M. Easter Monday. Except in the event that the school spring break coincides with Easter weekend, the defendant shall have access on the spring break in every year from 6:00 P.M. Friday to 4:00 P.M. on the last Sunday of the break.

- (e) Provided that there is no conflict or interference with paragraph (c) above, the plaintiff may elect to designate one access weekend in April or May that would otherwise be the defendant's access weekend, as pre-empted for the purpose of allowing J. to travel to Europe with the plaintiff, provided that the plaintiff provides not less than sixty days notice to the defendant of such election pursuant to the next paragraph.
- (f) Neither the plaintiff nor the defendant shall remove J. from the Province of British Columbia, or Canada, except for vacation purposes. In the event that either the plaintiff or the defendant wishes to take the child outside the Province of British Columbia, or Canada, for a vacation, that party shall give the other party notice of his or her intention in writing. In the event the proposed destination is within Canada but outside the Province of British Columbia, a minimum of thirty days must be given before the planned departure date. If the proposed destination is outside of Canada but within North America, a minimum of forty-five days must be given before the planned departure from the Province of British Columbia or Canada. If the proposed destination is outside of North America, a minimum of sixty days notice must be given before the planned departure from the Province of British Columbia or Canada. The notice shall specify the proposed date of departure, the proposed date of return, the proposed destination, and contact telephone numbers in the proposed destination. In the event that the other party objects to the removal of the child from the Province of British Columbia for the vacation specified, that party may apply to the court for an order prohibiting the removal of the child from the Province of British Columbia or Canada.
- [67] The following provisions apply to guardianship. The parents are to be the joint guardians of the estate of the child. In the event of the death of either parent, the remaining parent will be the sole guardian of the person of the child. The primary residence parent, who has the primary responsibility for the day to day care of the child, will have the obligation to advise the other parent of any matter of a significant nature affecting the child. The primary residence parent will have the obligation to discuss with the other parent any significant decisions which have to be made concerning the child, including significant decisions concerning health (except emergency decisions), education, and general welfare of the child. Mr. Schuman's familiarity with the Master Joyce model might cause him to see that I have deleted religious aspects from that paragraph.
- [68] The parent who does not have primary residence will have the obligation to discuss the foregoing issues with the primary residence parent, and each parent shall have the obligation to try to reach an agreement on those major decisions.

- [69] In the event that the parents cannot reach an agreement with respect to any major decision, despite their best efforts, the primary residency parent shall have the right to make such a decision provided that in the event of failure to reach an agreement on consenting to the child receiving blood, where on competent medical advice alternative measures are not likely to be as effective and the child's survival is threatened, Mr. A. shall have the right to make such a decision.
- [70] The non-primary resident parent shall have the right under s. 32 of the Family Relations Act to seek a review of any decision which that parent considers contrary to the best interests of the child. Each parent shall have the right to obtain information concerning the child directly from third parties, including teachers, counsellors, medical professions and third party caregivers.

(DISCUSSION BETWEEN THE COURT AND COUNSEL RE COSTS)

MR. SCHUMAN: My Lord, I am pleased to report that there is nothing controversial and that both parties understand what you have directed. We agree that the parties will each bear their own costs, and it looks like they are going to look to me, and I will have to do my best to deal with the hearing fees. I am assigned.

THE COURT: All right, well I wish everybody the best of luck and it was nice working with you gentlemen.

MR. SCHUMAN: Thank you My Lord.

MR. BRADY: Thank you.

"I.C. Meiklem, J."

The Honourable Mr. Justice I.C. Meiklem

October 16, 2003

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