

CANADA / JUDGMENT

Arulsothynathan v. Ganeshalingam

2021 BCSC 946

COURT

Supreme Court of British Columbia

DECIDED

17 May 2021

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2021 BCSC 946 Arulsothynathan v. Ganeshalingam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Arulsothynathan v. Ganeshalingam,

2021 BCSC 946

Date: 20210517

Docket: E58938

Registry: New Westminster

Between:

Karthika Arulsothynathan

Claimant

And

Myint Ganeshalingam

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Claimant (via teleconference):

S. Sihota

Counsel for the Respondent (via teleconference):

G. Thomas

Place and Dates of Hearing:

Vancouver, B.C.

April 9 and 15, 2021

Place and Date of Judgment:

New Westminster, B.C.

May 17, 2021

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Introduction

- [1] This is an application to vary the parenting time the respondent father spends with his young son. The child is now four years old and lives with the claimant mother in Surrey, BC. A challenging aspect of this application is that the father wishes to have parenting time with his son in the United States at rental accommodation close to the border in either Blaine or Bellingham, Washington. He would like to have consecutive overnight visits with his son. The mother agrees that the father should have overnight parenting time with the child but disagrees that it should take place in the United States. She seeks to have the current system remain where the father comes to the Lower Mainland, quarantines for 14 days, and then sees the child for some day and overnight visits.

Background Information

- [2] The parties are originally from Toronto, Ontario and have known each other since 2000. They are both Canadian citizens. They married on March 22, 2015 and separated at some point between November 2017 and February 2018. The date of their separation is still disputed. A divorce was granted by the Pennsylvania Court on January 27, 2020. Both parties attended medical school in the Caribbean. After graduation the father entered a residency program in internal medicine in Atlantic City, New Jersey, beginning in June 2014. He completed it in 2017. The mother entered a residency program in Pennsylvania in Family Medicine, which she completed in 2018. When the child was born in April 2017, the respondent was living in New Jersey. As a result of the residency programs they only lived together for approximately three to four months in Bellefonte, Pennsylvania in the summer of 2017.
- [3] In September 2017, the father secured a position in Salem, Oregon, working as a doctor with a speciality in internal medicine. He currently works and resides in Oregon. His work schedule has been 7 days on and 7 days off. He anticipates keeping this schedule in place until October 2021. The father has been vaccinated.
- [4] After the father moved to Oregon, the mother remained in Pennsylvania to complete her residency. She invited her mother to live with her and assist with childcare.
- [5] The mother remained in Pennsylvania until December 2018, after which she temporarily relocated to Ontario. In June 2019 the mother moved to Surrey, BC to advance her career. The mother is a family doctor who is working in a medical clinic in Surrey, BC. Her mother lives with her and provides care and support for the child. The mother has also been vaccinated as a health care professional. I assume that the grandmother has also been vaccinated. There was no evidence on this point but vaccines have been available to individuals in the grandmother's age range for quite some time now.

Past Parenting Time of the Respondent

- [6] The respondent had limited parenting time with his son between September 2017, when he moved to Oregon, and June 2019. I will not canvass the details of those arrangements.
- [7] After the mother moved to BC in June 2019, the father commenced seeing the child from 9:30 a.m. to 7 p.m., Thursday to Tuesday, in alternate weeks.
- [8] Beginning in September 2019, the father's parenting time increased to having two overnight visits with the child in a hotel room. The claimant stayed in the next hotel room. This parenting time was interrupted in November and reduced to four day visits and no overnight visits. By December 2019, the father was seeing the child every alternate Thursday to Tuesday during the day and two overnight visits that the mother did not supervise. All of the parenting time was exercised in Surrey, BC.
- [9] In early 2020, the father continued to see the child for daytime parenting time every alternate Thursday to Tuesday. The mother would not agree to any overnights. She claims this was due to an incident that had occurred during one of the prior overnight visits. This schedule continued in January, February, and until March 13, 2020. As a result of the COVID-19 pandemic the father did not see the child until September 2020.
- [10] On September 1, 2020, the respondent applied and obtained an order from Master Caldwell, as he then was. Master Caldwell ordered a s. 211 report to be prepared by Dr. Michael Elterman, and ordered two daytime visits on September 23 and 24, 2020, and three overnight visits on September 25, 27, and 28, 2020. Before the visits could take place the father had to quarantine in BC for 14 days. The father took his vacation time in order to facilitate this parenting time. Master Caldwell further ordered that the father have FaceTime, Skype, or WhatsApp visits for up to 60 minutes on Mondays to Thursdays, and Sundays when the child was not with his father. The mother was to have one FaceTime visit for 45-60 minutes on each of September 25, 27, and 28, 2020.
- [11] The father states that the September 2020 parenting time was very successful and his son was comfortable and happy.
- [12] The father was scheduled for another vacation in December 2020 and sought to have the same day and night access, with some increased time. The father says that the mother sought to impose less parenting time, to limit overnight parenting time, and suggesting day access. As a result, the father brought a second application for parenting time.
- [13] This application was heard by Master Taylor on November 17, 2020. The father was awarded parenting time with his son, subject to the 14-day quarantine period in BC, in December 2020. He was awarded one day access and five overnight visits.
- [14] The father states that during the December 2020 parenting time the child slept well. The father continued with his routine and he spent the entire time with him.

- [15] The respondent brought his third application in BC for parenting time so that he could see his son during his March 2021 vacation time. The parties on this occasion were able to agree to a consent order on March 18, 2021, before Master Keighley. The father saw his son for two day visits and four overnight visits in late March 2021.

Proposed Parenting Time with the Respondent

- [16] The respondent is proposing the following parenting time schedule until October 2021 when his work schedule will change. He proposes that the parenting time take place at a rental accommodation with a five-star cleaning protocol that is located in Washington, somewhere close to the border. He sets out a proposed plan where he will complete his work week on Wednesday at 7 a.m. He will then rest and drive to the rental accommodation near the Washington/BC border. On Thursday he will pick up the child at the claimant's house between 9 and 9:30 a.m. He will drive to the rental accommodation with the child in Washington. He will return the child on Tuesday to the claimant's residence by 5 p.m.
- [17] In October 2021, he will be transferring to day shifts. Once that change occurs he will start his work week alternating Wednesdays at 7 a.m. and finish Tuesdays at 5 p.m. He would pick up the child at 9:30 a.m. on the Wednesday of his week off. He would then have parenting time until the following Tuesday at 5 p.m., when he would return the child to the mother.

Proposed Parenting Time by the Claimant

- [18] The claimant takes the position that until the COVID-19 pandemic has resolved, the respondent should exercise his parenting time in the same manner as he did in September 2020, December 2020, and in March 2021. In her schedule, the respondent would have five days of overnight visits and a day visit after he has completed the 14-day mandatory quarantine in BC. She further disputes that there should be such a drastic jump in the amount of parenting time and that the issue of shared parenting time should be a matter for the trial, which is anticipated to occur in 2022.
- [19] The claimant raised a concern that the border may close while the child is with the respondent in the United States. During the hearing, the claimant's counsel agreed that there was no real risk that the child could not be returned back to Canada should the border be closed for all travel.

Material Change/Status Quo

Position of the Parties

- [20] The claimant submits that generally the preservation of the status quo pending trial is considered to be in the best interests of the child unless there is a compelling reason to change the existing custodial situation: *Marsden v. Bercovitz*, 2013 BCSC 1246 at para. 7. The claimant submits that the status quo is the respondent exercising primarily daytime parenting with scattered overnights. The orders of Master Caldwell and Master Taylor

related only to vacation, with the regular parenting orders for FaceTime visits only. The claimant disputes that the s. 211 report should be considered a "material change of circumstances" to allow the interim parenting order to be varied: Marsden at para. 8.

- [21] The respondent submits that the three BC orders are not orders that can be varied. They were all time-based and provided for parenting time on specific days. As such, the test is not whether there was a material change in circumstances. Alternatively, he argues that there have been four significant changes, being: first, exemptions have been added to the Quarantine Act, S.C. 2005, c. 20 [QA] including cross-border parenting exemptions; second, the receipt of Dr. Elterman's s. 211 report; third, the recommendations of Dr. Elterman; and fourth, the respondent has had both vaccine injections.

Analysis

- [22] If the claimant's submission is accepted, that means the only parenting time order made in BC is to allow for the respondent to have some FaceTime visits. I note that the Pennsylvania Consent Order of March 21, 2019, provided for an agreed-upon custody schedule through December 2019 and it was anticipated that the parties would work amicably to coordinate the custodial schedule of their son thereafter. The only court orders obtained by either party relating to parenting time since that date are the BC orders, which permitted limited physical parenting time on scheduled days and FaceTime visits.
- [23] I am of the view there is no current interim order in place that allows for any ongoing physical parenting time between the respondent and his son. The onus has been on the respondent to apply each time he has secured some vacation time so that he can see his son in person. Preserving this status quo is not in the best interests of the child. It should be addressed so that the father and child can have a set schedule of visits. This will provide for a regularized routine for the son. The child will know when he will see his father and it will be on a set schedule moving forward as the parties await a trial date.

Applicable COVID Protocols and Assessment of Risk

- [24] Pursuant to s. 58 of the QA, the Governor in Council made an order titled Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations), 2021-0313 [OIC 50]. It was last updated on April 21, 2021. The current OIC 50 provides, under s. 4.3, that the requirement to quarantine does not apply to a person referred to in Table 1 of Schedule 2. Table 1 of Schedule 2 includes at items 20 to 22:

20 A dependent child who enters Canada under the terms of a written agreement or court order regarding custody, access or parenting.

21 A driver of a conveyance who enters Canada to drop off or pick up a dependent child under the terms of a written agreement or court order regarding custody, access or parenting, if the driver leaves the conveyance while in Canada, if at all, only to escort the dependent child to or from the conveyance and they wore a mask while outside the conveyance.

22 A driver of a conveyance who enters Canada after dropping or picking up a dependent child under the terms of a written agreement or court order regarding custody, access or parenting, if the driver left the conveyance while outside Canada, if at all, only to escort the dependent child to or from the conveyance and they wore a mask while outside the conveyance

[25] I note that these provisions are identical to the ones referenced during the Hearing. At the time those provisions were ss. 6(t), (u), and (v) of PC 2021-0075, dated February 14, 2021.

[26] Under the current order, the respondent would be exempt from the 14-day mandatory quarantine if he crosses the United States/Canadian border for the sole purpose of attending to the claimant's home to pick-up the child without stopping anywhere, and driving back to Blaine or Bellingham, Washington, without making any stops. If the respondent exits the vehicle he is required to wear a non-medical mask at all times. The respondent states he will comply with the current COVID-19 protocol that is in place that allows for a parent to come across the border to pick up a child for parenting time.

[27] As noted, the father has received two doses of a COVID-19 vaccine.

[28] During the Hearing I requested that counsel provide clarification on whether the child would have to quarantine when he arrived in the United States and upon his return to Canada. The claimant raised a concern that upon the child's return from the United States he would be required to quarantine, and the impact on the claimant and the maternal grandmother would be substantial.

[29] I received a letter from Mr. Thomas, counsel for the respondent, dated April 19, 2021. The information provided sets out that since the child is a US citizen, and will be travelling by land, he is under no obligation to isolate or quarantine in Washington State. When the child returns from the United States to Canada he is also under no requirement to quarantine due to the exception in OIC 50.

[30] Counsel for the claimant was advised at the Hearing that she could dispute Mr. Thomas' position if she did not agree with it.

[31] On May 7, 2021, I received a letter from Ms. Sihota, counsel for the claimant, as a response to the April 19, 2021 letter from Mr. Thomas. On May 11, 2021, Mr. Thomas wrote, taking the position that what was provided in the May 7, 2021 letter was an inappropriate response and was not a proper reply. Mr. Thomas submits the letter and attached documents were additional significant comments which, if relied on, would be prejudicial to the respondent.

- [32] The claimant was granted leave to set out her position on whether she disputed the information regarding whether the child would have to quarantine in Washington or in Canada. From what I can discern, the claimant suggests that under the Washington State Department of Health, any persons who have recently been in countries where the new variant of the SARS-CoV-2 virus.501.Y.V. has been identified "should use the quarantine option". The submission is that Canada has been declared one of those countries. The information provided does not establish that the child is required to quarantine when he enters into Washington.
- [33] For the purposes of my reasons, I am operating under the understanding that the father and son are not required to quarantine in the United States or in Canada so long as the father complies with the cross-border protocol set out in the OIC 50.
- [34] I now want to address the issue of any additional risk to the child if he is taken across the border for parenting time with his father.
- [35] The claimant relies on the decision in *Onuoha v. Onuoha*, 2020 ONSC 1815, decided on March 24, 2020. Not referenced by counsel, in a later decision, indexed at 2020 ONSC 6849 and decided November 10, 2020, Justice Madsen granted the father's application to have the children returned to Nigeria. In that decision the court noted at para. 145: "Unlike in March of this year when this matter came before me for an "urgency" determination, global travel has resumed, albeit with precautions in place." At para. 147, Madsen J. notes that risk during travel can be managed and the father in the case had agreed to take all appropriate precautions for the children when they are in his care.
- [36] The claimant also relies on *Amirzada v. Alemy*, 2020 ONSC 1979, decided on March 31, 2020; *Hasan v. Hasan*, 2020 BCSC 862, decided June 9, 2020; *Luc v. Washington*, 2020 BCSC 1003, decided on July 3, 2020; and *B.T.K. v. J.N.S.*, 2020 NBQB 136, decided on July 27, 2020. Two of those decisions were decided in March 2020, just after the pandemic had been declared. The other three were decided in the summer of 2020. I note in *B.T.K.*, the Court raised a specific concern that after the father and his partner picked up the children, aged 8 and 9, he would have to travel by automobile for approximately 27 hours transiting the States of Maine, Massachusetts, New Hampshire, Vermont, New York, Pennsylvania, Ohio, Michigan, and Wisconsin. The trip would have required at least two and maybe three overnight stays in hotels: paras. 7-8. As the judge noted in *B.T.K.*, at that time judicial notice could be taken that there was no vaccine yet available: para. 21(iv). I further take judicial notice that all of those cases were decided before the beginning of the vaccine program in both the United States and Canada.
- [37] Those cases were also decided prior to the government bringing in revisions to allow for cross-border parenting arrangements. The exemption for cross-border parenting was put in place as of November 29, 2020. None of the cases cited consider the exemptions now permitted under the QA and OIC 50.

- [38] In *C.C. v. J.B.*, 2021 ONSC 2891, decided on April 19, 2021, the Court made an order that the children come to Ottawa during the summer of 2021 for a period of three weeks, from Virginia, where they were living with their mother. The mother indicated she would accompany the children. The purpose was for the children to visit with their father and paternal grandparents in Ontario. The order was for a period of three weeks (if no quarantine was required) or a period of five weeks (if a quarantine was required). There was no evidence that a quarantine was required in Virginia, so the children and mother would not need to self-isolate on their return. The Court added at para. 50, "We also know that throughout this pandemic, the exercise of parenting time has always been considered an "essential service" in Ontario, allowing for international and inter-provincial travel for that purpose."
- [39] In my view, the impacts of the COVID-19 pandemic on appropriate parenting arrangements are best dealt with on a case-specific basis. There are simply too many facts that could impact how parenting arrangements can be safely continued during the pandemic. That is how I have approached this case. The question here is whether the proposed parenting arrangement can be done in a safe manner that minimizes the risk to the greatest possible extent and is consistent with the best interests of this child.
- [40] The claimant raises four COVID-19 concerns, being:
- a. Starting a cross-border parenting time schedule during the pandemic is not a safe option for the child;
 - b. The pandemic is in its third wave and the risks are increasing as will be the risks to the child;
 - c. Non-essential travel restrictions remain in place for B.C.; and
 - d. Public health orders have been judicially noticed in parenting applications.
- [41] I am not convinced that cross-border parenting is a less safe option than the in-Surrey parenting option. The father has agreed to wear a mask when he is outside of his vehicle. He will drive his son across the border to a clean facility in a city close to the border.
- [42] The father provided information on the current state of COVID-19 cases and hospitalizations in Washington State and in Surrey, BC as of mid-March 2021. He compared the number of active cases and hospitalizations in Whatcom County, where Blaine and Bellingham are located, to the same in South Fraser where Surrey is located. The numbers of both active cases and hospitalizations are much higher in South Fraser. Although the figures can change rapidly, I do accept that at present and in the past few weeks the number of COVID-19 cases in Washington State is far less than in Surrey, BC. Unfortunately, Surrey and the Fraser Health Authority have been struggling for weeks to get the current wave of COVID-19 under control.

- [43] In her reply submissions dated May 7, 2021, the claimant provides additional evidence to show where the respondent lives, in Clackamas County, and where he works, in Marion County, both in Oregon, are both listed as "Extreme Risk" with a risk of COVID-19 variants. She argues that this is important since the claimant lives with her immuno-compromised mother who is also a caretaker for the child. The respondent has not been able to respond to this allegation. I accept that the COVID-19 numbers are changing daily, but at this stage I am not convinced that these changes impact the risk of the child getting COVID-19 from his father. There is no suggestion at this time that the child will travel to Clackamas or Marion Counties in Oregon. The respondent has indicated that he is not likely to be in contact with symptomatic patients. If he is, then extra precautions are taken. He has been fully vaccinated.
- [44] The claimant sets out the following implications for the child. She states the United States Centers for Disease Control and Prevention require the child to get a viral test one to three days before his trip when he is leaving the US. This appears to reference air travel. She further states that while traveling, the child would need a mask over his nose and mouth. I see nothing that would require the child to wear a mask while in a private car. The references appear to require a mask when on public forms of transit, much the same as when one is travelling on public transit in the Lower Mainland.
- [45] The third requirement in counsel's reply submissions would not apply to the child since he is not an "air passenger". The requirement for a negative COVID-19 test only applies to air passengers.
- [46] I see no additional risk to the child in having parenting time with his father across the border. At this stage that is likely to pose less of a risk than the father having parenting time with his child in Surrey, BC. I see no heightened risk to the maternal grandmother with the father seeing the child in Blaine or Bellingham than in Surrey. The claimant raises the concern that if the child gets sick or is exposed to COVID-19 due to travel, the claimant would have to cross the border and quarantine upon her return, which would impact her work schedule and standing as a doctor. It is not clear to me that would be in the case. In any event, if the child gets COVID-19, whether in Washington or BC, then the claimant will have to self-isolate.
- [47] The father has been vaccinated and is well aware of the necessary protocols to maximize his son's safety as well as his own safety.
- [48] The claimant raised the issue of whether there is medical insurance for the child and the risk the parties will be responsible for a medical bill. The respondent advises that that he has been paying for medical insurance for the child since October 9, 2017.

- [49] It remains true that non-essential travel restrictions remain in place in British Columbia. However, a father seeing his child does not come within the ambit of non-essential. The current travel restrictions under the Emergency Program Act, R.S.B.C. 1996, c. 111, Ministerial Order No. 182/2021 (April 30, 2021), specifically state at para. 3(g) that exercising parental responsibilities, including spending parenting time with a minor child, is an "essential purpose".
- [50] I note the comments made by Justice Pazaratz in *Ribeiro v. Wright*, 2020 ONSC 1829 at para. 10, a case decided on March 24, 2020:

None of us know how long this crisis is going to last. In many respects we are going to have to put our lives "on hold" until COVID-19 is resolved. But children's lives - and vitally important family relationships - cannot be placed "on hold" indefinitely without risking serious emotional harm and upset. A blanket policy that children should never leave their primary residence - even to visit their other parent - is inconsistent with a comprehensive analysis of the best interest of the child. In troubling and disorienting times, children need the love, guidance and emotional support of both parents, now more than ever.

- [51] The understanding of the COVID-19 pandemic and the emergence of a number of approved vaccines has provided hope for parents, families, and the world that the "on hold" approach can now be eased, where appropriate and safe, to allow for a return to more normalcy. This child needs the physical contact with his father so he can have his father's love, guidance, and emotional support at this time and in the future.

The Section 211 Report of Dr. Elterman

- [52] The s. 211 report was ordered by Master Caldwell and is dated March 1, 2021 (the "s. 211 Report"). I note that Dr. Elterman is a psychologist with considerable expertise in child-related matters. Dr. Elterman interviewed the mother on October 14, 21, and 28, 2020, and January 6, 2021, for a total of five and a half hours. He interviewed the father on September 22, October 8, November 26 and 27, 2020, for five hours. Dr. Elterman observed the father and child on September 26, 2020, and the mother and child on December 19, 2020. Both parents underwent psychological testing.
- [53] In addition to the personal interviews, Dr. Elterman was given copies of various affidavits, video of the father and son, as well as some correspondence relating to cross-border parenting. He conducted eight phone interviews of collateral references--four from each party.
- [54] Dr. Elterman views the child as his client. His task is to recommend an arrangement that will provide the happiest and healthiest childhood possible.
- [55] The respondent relies on the recommendations in the s. 211 Report in support of his application for shared parenting time to be carried out in the United States. He submits the s. 211 Report absolves him of "any inappropriate behavior or conduct as alleged by the

claimant." A s. 211 report is a recommendation intended to assist the court but is not a binding determination of the matters reported on: *M.D.L. v. P.T.M.*, 2012 BCSC 75 at para. 10. I am not prepared to accept the respondent's submission that the s. 211 Report "absolves" the respondent. That will be a decision of the trial judge.

[56] The claimant expresses many concerns about the s. 211 Report. The more significant ones are:

- a. Dr. Elterman made several errors of facts and important information was omitted;
- b. Family violence was not addressed adequately;
- c. The report was one-sided, it did not include serious thoughts and concerns raised by the claimant, and the claimant was not heard;
- d. Dr. Elterman did not consider the impact of the proposed arrangement on the claimant's mother who is at very high risk for new and more potentially dangerous variants;
- e. Failure to address the best interests of the child;
- f. No analysis on the ability of the parties to co-parent with each other; and
- g. No other recommendations were made such as counselling.

[57] The claimant further asserts the recommendations should not be implemented on an interim basis and that she will be seeking a critique report. It is not for me to decide on the admissibility of any critique report but I am not convinced simply because a party says they are going to seek a critique report it should lessen the validity of the s. 211 report already obtained. There is case authority supporting that critique reports are generally not admissible, and cross-examination of the author of a s. 211 report is the preferred method for testing conclusions in that report: *Dimitrijevic v. Pavlovich*, 2016 BCSC 1529 at para. 25, and *A.R. v. A.V.R.*, 2016 BCSC 629 at paras. 5 and 6.

[58] For the purposes of my assessment, I have relied on the s. 211 Report to provide me with the insight that is not available to me. As noted in many cases, s. 211 reports can act as the "eyes and ears" of the Court and provide information that simply cannot be gleaned from affidavits or even viva voce evidence: *C.D.A. v. P.R.B.*, 2020 BCSC 1337 at para. 10, and *C.D.M. v. K.M.A.W.*, 2019 BCSC 608 at para. 32.

[59] The views in the s. 211 Report are just one part of the picture that I must try and assemble to ensure that any decision I make is in the best interests of this child. I recognize that the claimant has a number of concerns with respect to the s. 211 Report. Ultimately it is for the trial judge to decide if those concerns have merit and how much weight to place on the s. 211 Report. I rely on the s. 211 Report for Dr. Elterman's observations of the parents and child interacting. I also rely on Dr. Elterman's views on the parents' parenting abilities, and for nothing more. I turn now to a consideration of the best interests test.

Best Interests of the Child Test

[60] The best interests of the child are paramount over all other considerations when making an order for parenting arrangements and contact time.

[61] With respect to the best interests of the child, s. 37 of the Family Law Act, R.S.B.C. 2011, c. 25 [FLA], provides:

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

[62] The recent amendments to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] also require that when determining the best interests of the child, the Court must prioritize the safety, security, and well-being of the child above all other considerations: s. 16(2). Section 16(3) sets out the factors to be considered:

- (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
 - (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
 - (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
 - (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
 - (d) the history of care of the child;
 - (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
 - (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
 - (g) any plans for the child's care;
 - (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
 - (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
 - (j) any family violence and its impact on, among other things,
 - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
 - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
 - (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

- [63] Section 37(2) of the FLA and s. 16(3) of the DA mandates that in determining the best interests of a child, certain specific factors must be considered. There is a great deal of overlap and I have broken them into the following factors listed below. I have not included factors relating to the child's cultural heritage or any civil or criminal proceedings since these are not relevant.
- [64] The parties made submissions under the factors in both the DA and FLA. I have considered all their submissions under both Acts and organized them under the headings below. For clarity, I will make this order under the FLA, but I am satisfied that the outcome would be the same under the DA.

The Child's Health, Emotional Well-being, and Needs including the Need for Stability

- [65] The child is a healthy four year old. No evidence suggests otherwise. He requires constant care and attention from caregivers. There is no evidence of either party neglecting the child's health and emotional well-being. The mother has raised issues in the past with the some aspects of the care provided by the father but none from the last three parenting visits. Dr. Elterman reports that both parents are able to provide for the child's physical and emotional needs. In particular he noted that the "attachment [between father and son] was strong and familiar." I am convinced that both parents will provide for this child's health, emotional well-being, and needs.
- [66] The proposed parenting plan allows for the child to spend time with his father at a rental accommodation in Washington State. I accept it would be preferable for the child to spend parenting time at his father's home, but currently what the father proposes is the best option. This option reduces the amount of time the child is in a car and maximizes the parenting time, as opposed to driving time, between father and son. I am not convinced that allowing the child to spend time with his father in a rental accommodation will be detrimental to his need for stability. Unfortunately, given the pandemic, the reality is that the father's parenting time must be spent in either a hotel or rental accommodation in Surrey or in a town in Washington State. I do not see any significant difference.
- [67] I have already specifically addressed the issue of the impact of the COVID-19 pandemic and whether there is any added risk to the child in spending the parenting time with the father in the United States. I have found there is no additional risk.

The Child's Views

- [68] The child just turned four. He is still too young to express any views except through his interactions with his parents. Dr. Elterman noted that during the play sessions with the father and son, "[the child] was relaxed, comfortable and trusting He seemed secure with [his father]." Dr. Elterman noted the child being affectionate with his mother. He notes that: "There was very little to distinguish between how [the child] was when he was observed with

either of the two parents." He concludes that "[the child] seemed equally comfortable, relaxed and familiar with both of them."

Relationships between the Child and Significant Persons in his Life, Nature and Strength of his Relationships

- [69] The two most significant people in this child's life should be his parents. I accept that his maternal grandmother has been very involved in the care of this child from a young age. She also plays a significant role in his life. The current circumstances deprive the child of a close physical relationship with his father. I do not accept that a normal relationship can be maintained when the father is required to take his vacation time, spend 14 days in quarantine, and then see his son for a limited period of time. So far in 2021 this has resulted in the father spending a total of six days physically present with his son. The father should be commended for his determination to maintain a relationship with his son during these challenging times.
- [70] In *Young v. Young*, [1993] 4 S.C.R. 3, the Supreme Court of Canada stated that maximum contact with each parent is preferred as long as it is in the best interests of the child. Maximum contact gives the child the opportunity to know both parents and benefit from a relationship with each.
- [71] Maximum contact between this child and his father requires that the father be given the opportunity to spend time with his son in-person on a regular basis. The screen time he has been provided is no substitute for being in physical contact.
- [72] I accept that the child has a close relationship with his mother. She has been in his life since birth. I also recognize the degree of effort she has made to look after her son while at the same time completing her residency. I note she has been able to do so since the child's grandmother cares for him when the mother works. A great deal of recognition should be given to the maternal grandmother for putting her life on hold since her grandson has been born. She has been a constant in his life.

Supporting the Child's Relationship with the Other Spouse

- [73] A positive relationship between both parents provides stability for the child. The respondent asserts that the claimant has wrongfully limited his parenting time with the child so as to impede his ability to parent. The claimant disputes this and claims that she has only ever acted in the best interests of the child. I accept that in the past the respondent's parenting time with his son has been restricted. It is very damaging to a child when parents actively battle against one another, particularly as the child matures and has a better grasp of the conflict that exists. I am confident that both parents understand the importance of working together and being positive role models for their son.

History of Childcare and Plans for the Child's Care

- [74] During the last four years, the mother and the maternal grandmother have been most involved in caring for the child. I accept that they have been the primary caregivers of the child since birth. During this period, the father continuously made efforts to maintain a relationship with his son and to care for him. The son is now at an age that he can be cared for by both his parents and both are capable care-givers.
- [75] I have already canvassed the plan suggested by the respondent. During his parenting time he will only rent an Airbnb with a five star cleaning protocol. He will arrive at the rental accommodation the night before he picks up the child with food and the child's toys and clothes. In the future he is considering purchasing his own place so the child will not have to go to an Airbnb and the respondent would be responsible for cleaning.

Ability and Willingness of Guardians to Care, Meet the Needs of the Child, Exercise Parenting Responsibilities and Cooperate

- [76] Both parents appear capable of exercising their parental obligations. I accept that neither parent has any physical, psychological, or other limitations which would raise a concern for the child's health, safety, well-being, and development. I have no concerns with either parent's ability to carry out their parenting responsibilities. I again quote from Dr. Elterman: "Both parents are highly committed to the task of parenting him and put a high priority on their role as his parents."
- [77] These parents have had difficulty cooperating with each other in the past. However, I am convinced this will improve once a schedule is put in place. They were able to negotiate the last parenting time in March 2021. They also both have the assistance of very experienced and capable counsel to guide them.

Impact of Family Violence

- [78] Section 37(2)(g) of the FLA specifically requires the court to consider family violence when considering the best interests of the child. An assessment of family violence is set out in s. 38:

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;

- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

[79] Section 16(4) of the DA outlines the factors relating to family violence and states:

- (4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:
 - (a) the nature, seriousness and frequency of the family violence and when it occurred;
 - (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
 - (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
 - (d) the physical, emotional and psychological harm or risk of harm to the child;
 - (e) any compromise to the safety of the child or other family member;
 - (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
 - (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
 - (h) any other relevant factor.

[80] The claimant says she was a victim of emotional and psychological abuse in the details of which were outlined in her Complaint for Custody previously filed in the State of Pennsylvania on April 4, 2018. She claims the respondent is unpredictable and has had "unreasonable fits of rage", and the child has been exposed to psychological harm while in the father's care. She give an example when she was present at an overnight visit and she heard the father tell the child that if he asked for his mother, who was in the next room, he would crash all of the child's toys. The father denies that he ever threatened to crash the child's toys. He further denies that he has an uncontrollable temper or that he has raged at the claimant in front of his son.

- [81] I do wish to comment on one aspect of the respondent's submissions. He submits that the claimant sought to reconcile with him throughout 2018 and into 2020, despite her allegations that he was somehow dangerous. Counsel for the respondent sought to attack the claimant's credibility by relying on this. Counsel suggested that the fact she wanted to reconcile meant that her protestations were not factual and were only being used to limit his parenting time.
- [82] The suggestion that the claimant's desire to reconcile makes any past allegations of violence untrue or insignificant plays into a stereotypical thinking that an individual who has been subject to violence will avoid the perpetrator. Such a submission is based on stereotypical assumptions of how persons react to family abuse and violence and should play no role in the assessment of credibility of any individual by the court.
- [83] I am not prepared to find on the evidence before me that the father poses any risk to his son. It appears that in the past the father did send some inappropriate text messages, is alleged to have used vulgar words in the son's presence, and there were other issues during the relationship. However, the claimant concedes that she does not consider that the father is a danger to his son. She is concerned with the indirect violence directed towards her. She would like for him to undergo some counselling or parenting courses.
- [84] I did watch the two video clips that the claimant provided of the father with his son. I am not convinced that the videos support that the father is "mistreating" the child. I do agree that in the first video there are much better ways to teach a baby on how to get to sleep and to soothe a baby of this age. I do not view that the second video of the father attempting to teach the baby to keep his hands from his mouth supports that the baby is in anyway upset or in "mental anguish" as alleged by the claimant.
- [85] The claimant raises issue respecting the alleged violence the respondent suffered while growing up with his father and the respondent's denials of this past. I am not prepared to find that this father should be restricted in his parenting time with his son because of allegations regarding how he was raised. I am only concerned with whether or not there is any evidence that the father would be a danger of any kind to his son. I have found that he is not.

Analysis

- [86] I have concluded it is in the best interest of this child to have, as far as can be achieved, a shared parenting regime with his parents. This will require, until the current COVID-19 pandemic is resolved, that the father have his parenting time in a rental accommodation. Hopefully, in the future once the travel restrictions have changed, the child can spend time at his father's home in Oregon.

- [87] I see no added risk to the child in crossing the border based on the current COVID-19 situation in Washington State. The evidence does not support any heightened risk to the child if he spends parenting time with his father in Washington State. I have every confidence in the father that he will follow all necessary protocols on both sides of the border to ensure the safety of his son.
- [88] The parents will have to make some further adaptations to the parenting time in September 2021. At that time, the parents anticipate sending the child to preschool. I note that Dr. Elterman recognized that there should be a reassessment in the fall of 2021 to see how the change has worked for the child.
- [89] The parenting schedule proposed by the respondent should be immediately put in place. There is no reason to deny the father parenting time with his son.
- [90] I further accept that the father should have more time with the child during his vacation from June 30, 2021, to July 20, 2021. I have done some slight adjustments to the schedule he has requested which is reflected in the orders granted.
- [91] It is difficult to figure out what the schedule should be like once the child goes to preschool or when the father's work hours change. I am not prepared to make the exact order sought by the respondent. He is seeking to pick up the child on a Wednesday morning. According to the evidence, Wednesday is the only day of the week that the mother has with her child. In addition, the order sought would have the child removed from preschool for 10 days of each month. I am not convinced that is in the best interests of the child. I am hopeful that these parents, with the assistance of their capable counsel, can work out a system that works for both of them and the child when September arrives if the child is in preschool.
- [92] The respondent seeks the appointment of a parenting coordinator. I am not convinced that a parenting coordinator will achieve a resolution respecting the issues that these parents face as their son matures and starts his schooling. I am hopeful that they can reach a consensus, as indicated above, but if not, the parties will need to have a court resolve the issue. It may be that a parenting coordinator could be of assistance in the future and as such liberty is granted for either party to apply for one.
- [93] The parties are at liberty to return before me to address any issues respecting the cross-border parenting time, although I am not seizing myself with any aspect of this proceeding.

Conclusion

- [94] The following orders are made:
1. The parties are to have joint guardianship and joint parenting responsibility under the Family Law Act.
 2. This order is in respect to [insert child's full legal name and date of birth] (the "Child").

3. Beginning on Thursday, May 20, 2021, the respondent's parenting time shall consist of five consecutive days/nights with the respondent picking up the Child from the claimant's house at 9:30 a.m. on Thursday and returning the Child five days later to the claimant on Tuesday at 5 p.m. This parenting schedule is to be repeated on alternating weeks subject to further agreement of the parties or court order.
 4. When the Child is in the care of the respondent he will arrange to have the Child use FaceTime, Skype, or WhatsApp visits so that the Child can say goodnight to his mother and/or maternal grandmother on a daily basis. The length of the virtual visits should be in the range of 15 to 30 minutes, depending on the needs of the Child.
 5. When the Child is in the care of the claimant she will arrange to have the Child use FaceTime, Skype, or WhatsApp visits so that the Child can say goodnight to his father on a daily basis. The length of virtual visits should be in the range of 15 to 30 minutes, depending on the needs of the Child.
 6. The respondent is entitled to have vacation parenting time with the Child during his vacation from work between June 30, 2021, and July 20, 2021 as follows:
 - a. The respondent will pick up the Child at 9:30 a.m. on Thursday, July 1, 2021, at 9:30 a.m. at the claimant's house and will return the Child on Tuesday, July 6, 2021, at 5 p.m. to the claimant.
 - b. The respondent will pick up the Child at 9:30 a.m. on Friday, July 9, 2021, at the claimant's house and will return the Child on Sunday, July 18, 2021, at 5 p.m.
 7. The parenting time in this order is made pursuant to the Quarantine Act, S.C. 2005, c. 20 and the exceptions set out under the Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations), PC Number: 2021-0313, such that the respondent who resides in Oregon, U.S.A. will be able to cross the Canada-U.S.A. border, pick up the Child, and return to the U.S.A. to exercise his regular parenting time at a location in Blaine or Bellingham, Washington that has a five-star cleanliness rating.
 8. An updated s. 211 report will be prepared by Dr. Elterman to be commenced in September 2021.
 9. The respondent's application for a parenting coordinator is dismissed with liberty to reapply.
- [95] The claimant will pay the costs of this application to the respondent.
- [96] I anticipate that there will be some urgency in having the order signed and filed. If counsel requests that the order be signed on a rush basis by me I can have it digitally signed on Tuesday, May 18 or Wednesday, May 19, 2021, to ensure the parenting time commences on May 20, 2021.

"Forth J."

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Prepared on 25 October 2026 · Esheria