

CANADA / JUDGMENT

C.C. v. S.P.R.

2022 BCSC 1503

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1503 C.C. v. S.P.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.C. v. S.P.R.,

2022 BCSC 1503

Date: 20220830

Docket: E61432

Registry: New Westminster

Between:

C.C.

Claimant

And

S.P.R.

Respondent

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

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Counsel for the Respondent:

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Place and Dates of Trial:

New Westminster, B.C.

May 2-6, 9-13, 16-18, and

June 17, 2022

Written Submissions from the Claimant Received:

June 6, 2022 and

June 21, 2022

Written Submissions from the Respondent Received:

June 13, 2022

Place and Date of Judgment:

New Westminster, B.C.

August 30, 2022

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I. INTRODUCTION

- [1] The parties raise several issues in this family law trial. The claimant seeks an order allowing her to relocate to Kamloops, British Columbia with the parties' now almost six-year-old child, S.R. S.R. currently resides in the Lower Mainland of British Columbia where the claimant and respondent exercise equal parenting time. The respondent opposes the relocation and says that it is not in his son's best interests to relocate to Kamloops.

- [2] The respondent seeks to set aside a prenuptial agreement the parties signed just prior to their wedding on the basis that he says he had no legal representation, did not understand the document's legal ramifications and signed it under duress.
- [3] The parties also seek a divorce order and raise the issues of spousal support, child support and s. 7 special or extraordinary child expenses.
- [4] Given that the commencement of the school year is imminent and the parties will want to know in advance of the school year the court's decision on relocation, I have decided to provide reasons regarding the relocation and divorce order in advance of my judgment on the other issues. Those issues remain under reserve.
- [5] I will grant the divorce order and have concluded that it is in S.R.'s best interest to remain in the Lower Mainland with his father, with the claimant to be granted regular parenting time on weekends and holidays. As described below, my conclusion that it is not in S.R.'s best interest to relocate to Kamloops is based primarily on three grounds: first, a concern that the claimant and her family will not support S.R.'s relationship with the respondent if the child relocates; second, there is greater stability for the child if he stays in the Lower Mainland where he now attends school; and, third, there is a risk the child's cultural heritage will be denied or at least not encouraged if he relocates.
- [6] Due to the age of the child involved in these proceedings, I refer to all parties only by their initials in the interests of privacy.

II. ISSUES

- [7] These reasons address only the following two issues:
- whether S.R.'s relocation to Kamloops to be in the primary care of the claimant is in S.R.'s best interest; and
 - whether the parties satisfy the prerequisites to obtain an order for divorce under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act].

III. FACTS

A. The Parties and Extended Family

- [8] The claimant is 39 years old and was raised in Kamloops where she has a large extended family. Prior to November 2020, the claimant had lived in the Lower Mainland for the previous 15 years. She obtained a Bachelor of Education from University of British Columbia (UBC) in 2006. She obtained her Master of Education from UBC in 2016 with a focus on early childhood education. The claimant has worked as a teacher of kindergarten to grade three with the North Vancouver School District from 2006 to 2020, except while she was on maternity leave or unpaid medical leave. She is currently on maternity leave and has guaranteed employment as a teacher with either the North Vancouver School District or the Kamloops School District as both are holding positions for her when her maternity leave

ends in September 2023.

- [9] The respondent is 36 years old and originally from Sri Lanka. He moved to Italy with his family when he was a teenager. He obtained a Bachelor of Science from the University of Plymouth, U.K. in 2010. He obtained an Master of Science in economics and finance in June 2017, from the Universita Ca' Foscari Venezia in Venice, Italy. He obtained a Bachelor of Education from UBC in 2019 and is currently employed as an elementary school teacher for the Burnaby School District.
- [10] The parties met on February 24, 2015, while taking a continuing education course at the University of British Columbia. Before marrying the respondent, the claimant was married to Mr. D. The claimant and Mr. D. married in 2008 and lived together at a townhome on Cassiar Street in Burnaby, British Columbia ("Cassiar Townhome").
- [11] The claimant and Mr. D. separated briefly in 2012, reunited and then separated again permanently in 2015. They entered into a separation agreement in May 2015. As part of the separation agreement, the claimant paid Mr. D. a lump sum of \$30,000 to remove him from title to the Cassiar Townhome. Mr. D. stopped living at the Cassiar Townhome in September 2015.
- [12] The claimant and Mr. D. divorced on November 14, 2015. The claimant and the respondent married ten days later on November 24, 2015, in a small wedding at the Cassiar Townhome. The claimant did not tell her parents she was getting married and appears to have kept it a secret from them for some time. The claimant became pregnant about a week after the parties married. S.R., the parties' only child, was born in September 2016.
- [13] S.R. is currently almost 6 years old and attended kindergarten at an elementary school in the Lower Mainland during the 2021-2022 school year. The respondent is a teacher at that school. While the actual diagnosis is unclear, S.R. has been diagnosed with either Attention Deficit Hyperactivity Disorder ("ADHD") or symptoms of ADHD. These symptoms mean S.R. has difficulty concentrating at school, becomes easily frustrated and has issues with emotional control and impulsivity. S.R. has a School Base Team to assist him. He is currently being monitored at the school and the School Base Team has developed interventions and an action plan for S.R. to assist him in developing better social, emotional and learning skills at school. It appears that over the course of the school year, S.R.'s behaviour has improved as his final School Base Report indicates that while S.R. should still be monitored, he no longer requires the same level of support as he did during the middle of the school year.
- [14] The claimant's parents, to whom I will refer to as S.R.'s maternal grandparents, are retired and live in Kamloops. They enjoy a good standard of living and own four properties in Kamloops, including a 98% share of the house in which the claimant currently resides. The home of S.R.'s maternal grandparents is very close to where the claimant lives and is spacious with ample green space, a tennis court and a swimming pool.

- [15] The parties made extensive use of S.R.'s maternal grandparents to assist with child care during S.R.'s early years while the parties worked and pursued their educational goals. From September 2018 to June 2019, S.R. spent the majority of his time in Kamloops with his maternal grandparents and the parties would drive to Kamloops every second weekend to see him in the summer, and less frequently in the winter, due to driving conditions. The parties would have S.R. in the Lower Mainland for longer periods during their school breaks and summer holidays. The reason that S.R. was with S.R.'s maternal grandparents in Kamloops was to allow the parties to work and attend classes and to reduce the parties' child care costs.
- [16] The respondent's parents, who I will refer to as S.R.'s paternal grandparents, are also both retired and live in Sri Lanka, but have connections to Italy where the respondent's father worked for many years and from where he now receives pension income. S.R.'s paternal grandfather speaks Sinhalese, some Italian and a modest amount of English. S.R.'s paternal grandmother speaks Sinhalese and has a very limited capacity in English.
- [17] S.R.'s paternal grandparents arrived in the Lower Mainland to live at the Cassiar Townhome in September 2019 and stayed until January 2020. During that time, they cared for S.R. while the parties worked. There were some discrepancies in the testimony regarding the reasons that S.R.'s paternal grandparents left Canada. Based on the evidence, I accept that it was based on a number of factors including S.R.'s paternal grandfather's need to travel to Italy to finalize details of his pension and also to return to Sri Lanka to arrange the sale of real estate in anticipation for a future longer term move to Canada. Further, I accept that there was rising conflict and tension between the parties at the Cassiar Townhome as the parties struggled with their marriage, which made the house an uncomfortable environment for all living there.
- [18] It is common ground that from as early as 2017, the parties had an acrimonious relationship that involved many arguments. While the parties admit that they argued with each other, sometimes in front of S.R., the extent and nature of those arguments and who was the cause is disputed with each party saying the other party was primarily the aggressor. Both parties called the police at different times, but the claimant more frequently called the police and victim services to report incidents of violence or threats of violence than did the respondent. None of the calls the parties made to the police resulted in arrests or charges.
- [19] The parties disagree as to the date of separation. The claimant says it was June 2019 and the respondent says it was September 2020. I do not need to resolve this disagreement for the relocation issue or whether a divorce should be granted.
- [20] On November 16, 2020, the claimant gave birth to a M., a child she had with Mr. F., an individual residing in California.

B. The Claimant's Move to Kamloops and Aftermath

- [21] On November 21, 2020, the claimant, S.R. and her newborn daughter M., left the Cassiar Townhome and moved to Kamloops. There is some dispute as to the extent of the permission given by the respondent for the claimant to take S.R. to Kamloops and for what duration. However, it is clear that the respondent did not consent to S.R. relocating permanently to Kamloops.
- [22] The claimant did not return S.R. to the Lower Mainland, nor did she allow any contact between S.R. and his father at that time for a period of three months until the court ordered parenting time in response to an application brought by the respondent. I accept that the respondent made attempts to make contact with S.R. through the claimant and S.R.'s maternal grandfather and those calls and texts were either blocked or unanswered. S.R.'s maternal grandfather testified that he blocked the respondent's phone number at that time but could not recall for how long and thought it was only for a couple of days. S.R.'s maternal grandmother testified she did block the respondent's phone in late November 2020. Based on the evidence before me, which includes witnesses called by the respondent that testified to the respondent's sadness, loneliness and confusion during December 2020 as to why he was not able to have contact with his son, I find that the respondent made efforts to contact S.R. and to have parenting time with S.R. and those efforts were purposely thwarted by the claimant and her family.
- [23] The respondent eventually brought an application before Justice Walkem to have parenting time with S.R. It was only after Walkem J.'s order of March 3, 2021, that the respondent was able to have parenting time with S.R.
- [24] The claimant brought an application before Justice Norell for three interim orders: (1) relocation of S.R. to Kamloops; (2) having final say on S.R.'s parental responsibilities; and (3) child support. On July 23, 2021, Norell J. ordered that S.R. was to reside in the Lower Mainland; dismissed the claimant's application for final say on parental responsibilities; and, ordered the respondent to pay child support.
- [25] The respondent continued to reside at the Cassiar Townhome while the claimant and S.R. were in Kamloops until he moved out on January 10, 2021. He now lives in a one-bedroom apartment in the Lower Mainland.
- [26] The claimant had a second child with Mr. F. in May 2022. While Mr. F. provides some financial support for diapers and baby food, he does not pay child support. He resides in California, and is not involved in parenting or spending any significant time with the claimant's children.
- [27] The claimant currently resides in Kamloops in a six-bedroom house owned 98% by S.R.'s maternal grandparents, 1% by the claimant, and the other 1% by the claimant's nephew. As a result of Norell J.'s July 23, 2021, order she is exercising equal parenting time for S.R. in the Lower Mainland. Prior to the third child being born, I understood the evidence to be that

she left her daughter, M., in Kamloops when she was parenting S.R. I am unsure of the current arrangements she has with S.R. as she gave birth to her third child after she gave evidence at the trial, but before the trial concluded.

C. Voir Dire

- [28] On May 11, 2022, the court embarked on a voir dire regarding the admissibility of audio recordings the respondent secretly made of the claimant. On May 18, 2022, I ordered that three of the four tendered recordings could be admitted to the trial proper and I excluded the fourth recording. My reasons regarding the admissibility of the surreptitious recordings are indexed as C.C. v. S.P.R., 2022 BCSC 1057.
- [29] The recordings admitted at trial contain short snippets of angry outbursts by the claimant directed at the respondent. As I expressed in my voir dire reasons for judgment, while I had concerns admitting snippets of surreptitiously-made recordings because they can be taken out of context, the nature of the language and tone of these recordings, which contained hateful and aggressive statements made by the claimant towards the respondent in the presence of S.R., needed no further context to be understood: at para. 48.
- [30] I note that there were other recordings the respondent made of the claimant that were admitted, without challenge, at the trial. As I will discuss below, I put some limited weight on two of the recordings in which the claimant says negative comments about the respondent directly to S.R. I have relied on these recordings on the basis that they corroborate a pattern of the claimant and her family undermining S.R.'s relationship with his father.

IV. LAW AND ANALYSIS

A. Relocation

- [31] The most difficult issue for the court to resolve at this trial is whether it is in S.R.'s best interest to relocate to Kamloops to live primarily with his mother. Both parties agree that whether the court determines that S.R. should be in Kamloops or the Lower Mainland, S.R. should have regular parenting time with the other parent on weekends and holidays.
- i. Law
- [32] The parties submit that the relocation issue should be considered under s. 16 of the Divorce Act. I agree. Support for this approach is provided by Madam Justice Saunders in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20 [Hejzlar]:
- [20] The preferable basis for consideration of a child mobility issue is s. 16 of the Divorce Act where available, as the federal legislation is paramount (or where a custody order under s. 16 already exists, s. 17).

- [33] Recently, in *Barendregt v. Grebliunas*, 2022 SCC 22 [Barendregt], the Supreme Court reviewed the principles a court must consider when determining issues of a child's relocation. The Court acknowledged that the inquiry established in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 [Gordon] still applies to applications to relocate children but it has been refined by jurisprudence and statute. The Court recognized that the "crucial question is whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being" and reminded courts that the inquiry is highly fact-specific and discretionary: Barendregt at para. 152.
- [34] The Court summarized the factors a court must consider in determining whether to grant an order to relocate a child:
- [153] Our jurisprudence and statutes provide a rich foundation for such an inquiry: see, for example, s. 16 of the Divorce Act. A court shall consider all factors related to the circumstances of the child, which may include the child's views and preferences, the history of caregiving, any incidents of family violence, or a child's cultural, linguistic, religious and spiritual upbringing and heritage. A court shall also consider each parent's willingness to support the development and maintenance of the child's relationship with the other parent, and shall give effect to the principle that a child should have as much time with each parent, as is consistent with the best interests of the child. These examples are illustrative, not exhaustive. While some of these factors were specifically noted under *Gordon*, they have broad application to the best interests of the child.
- [154] However, traditional considerations bearing on the best interests of the child must be considered in the context of the unique challenges posed by relocation cases. In addition to the factors that a court will generally consider when determining the best interests of the child and any applicable notice requirements, a court should also consider:
- the reasons for the relocation;
 - the impact of the relocation on the child;
 - the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
 - the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
 - the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
 - whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

The court should not consider how the outcome of an application would affect either party's relocation plans -- for example, whether the person who intends to move with the child would relocate without the child or not relocate. These factors are drawn from s. 16.92(1) and (2) of the Divorce Act and largely reflect the evolution of the common law for over 25 years.

[35] There are many competing factors at play in this case and it is the court's task to determine the child's best interest "in the tangle of competing benefits and detriments posed by either outcome": Hejzlar at para. 33. As I will articulate below, there are three major factors that persuade me that it is not in S.R.'s best interest to relocate to Kamloops. First, I am concerned that should S.R. relocate to Kamloops there is a risk that the claimant and her family will not support and maintain S.R.'s relationship with his father. Second, I find that the risk that S.R.'s cultural and racial heritage will be denied if he relocates is not in his best interest. Third, given the past tumult in S.R.'s life, for the sake of stability and consistency, it is in his best interest to continue at the school he currently attends, where his father teaches and where he has a support team working with and monitoring his behavioural issues.

ii. Discussion

[36] As held by the Court at para. 152 of Barendregt, the relocation analysis is fact-driven and assesses whether relocation is in the best interests of the child having regard to the child's physical, emotional and psychological safety, security and well-being. Section 16 of the Divorce Act provides a non-exhaustive list of factors to guide the court in determining what is in the best interests of the child. I note that while the factors set out in s. 16(3) of the Divorce Act provide relevant considerations, given the fact-specific nature of the analysis, in any given case, certain factors may be of greater import than others. While I have found that the three factors of maintaining S.R.'s stability, relationship with his father, and cultural heritage are paramount in my analysis, I have addressed all the factors under sections 16(3) and 16.92 of the Divorce Act.

[37] Before I address the factors set out in sections 16(3) and 16.92 of the Divorce Act, I believe it is important that I comment on the s. 211 Report prepared by Dr. Ronald LaTorre. Dr. LaTorre's detailed report was helpful to me in coming to my conclusion.

The s. 211 Report

[38] Dr. LaTorre prepared a 108-page s. 211 report dated April 27, 2022 ("211 Report"). Dr. LaTorre also testified at trial as an expert witness qualified to give opinion evidence in the assessment of families and parents for the purpose of determining a parenting plan to recommend to the court. In preparing the 211 Report, he reviewed 163 documents, many that were lengthy affidavits with attachments. He testified that in his long career he has never had more documents to review in preparing a s. 211 report. He also conducted a total of 30 interviews of the parties and collateral witnesses.

- [39] Dr. LaTorre's efforts in preparing the 211 Report and his observations and insights during his testimony were extremely useful to me on the issue of relocation. Section 211 reports have been described as the "eyes and ears of the court" in family law proceedings: *Shapiro v. Simpson*, 2016 BCSC 211 at para. 102. While the information is important and the conclusions valuable, I am not bound by Dr. LaTorre's findings. Courts have been clear that the court must not abdicate its role in favour of the assessor's recommendation. Ultimately, it is the court's role to carry out an independent assessment based on the evidence at trial, and come to a conclusion as to what is in the best interests of the child: *M.F.W. v. M.A.H.*, 2020 BCCA 284 at para. 22.
- [40] In coming to my conclusion that S.R. should not relocate to Kamloops, I have arrived at a different conclusion than that of Dr. LaTorre. Although, in my view, Dr. LaTorre was aware that in this case there was no obvious or definitive outcome that would better serve S.R.'s interests. Dr. LaTorre's ultimate conclusion was that "there may be an advantage, although slight, for [S.R.s] primary residence to be in Kamloops".
- [41] Dr. LaTorre's conclusion of the slight benefit to S.R. relocating to Kamloops appears based on three factors. First, that the claimant's extended family in Kamloops provided a positive environment for S.R. because S.R. had spent so much time in Kamloops before the parties separated and also that S.R. had close connections with his maternal grandparents and his half-sister, M. Second, Kamloops offered S.R. more living space and amenities, due to the larger house in which he lived with the claimant and also his maternal grandparents' house. Dr. LaTorre contrasted the larger spaces in Kamloops with the respondent's modest living accommodations in the Lower Mainland. Third, Dr. LaTorre was concerned that the respondent was stretched thin by his commitments. He was concerned that if the respondent pursued a doctorate he would not have time to adequately care for S.R. Dr. LaTorre noted that it was difficult for the respondent to meet him for an interview during the preparation of the 211 Report and attributed this to the respondent's lack of support to look after S.R. This concerned Dr. LaTorre as he viewed it as an indicator that the respondent did not have the same level of supports for S.R. as would the claimant in Kamloops.
- [42] While I respect Dr. LaTorre's conclusions, I find that the evidence at trial raised greater concerns for me that S.R.'s best interest would be better served by not relocating to Kamloops. One of those concerns is that the claimant and her family would not support S.R.'s relationship with the respondent. I note that this was a concern shared by Dr. LaTorre and he wrote that it was an important consideration needing to be addressed:
- If [S.R.] does relocate, and before such a relocation is granted, an important consideration would be [the claimant] providing a plan of how she intends to mitigate the potential harm that could occur to [S.R.'s] relationship with his father.
- [43] Based on the evidence before me from the witnesses at trial, I was not persuaded that the claimant or her family would support S.R.'s relationship with his father, which lack of support I view decidedly as not in S.R.'s best interest.

- [44] In respect of the respondent being "stretched thin", I have put little weight on Dr. LaTorre's conclusion that the respondent was too busy to schedule a meeting with Dr. LaTorre because the respondent had no supports and that the situation would worsen should the respondent pursue a doctorate. The evidence before me, of which Dr. LaTorre did not have the benefit when he prepared the 211 Report, was that the respondent has no imminent plans to pursue a doctorate and also appears to be gaining supports from his friends and family in the Lower Mainland. Further, Dr. LaTorre was sceptical as to whether the respondent's parents would come to Canada before the end of 2022 to assist the respondent with child care. My view of the evidence is that there is a strong likelihood that S.R.'s paternal grandparents have every intention of moving to Canada in the relatively near future, although the plans, at the time of trial, had not yet crystalized. In my view, these facts modify the assumptions upon which Dr. LaTorre's based his conclusion.
- [45] Finally, in respect of the consideration that S.R. would have more space and amenities in Kamloops, when cross-examined, Dr. LaTorre acknowledged that there is no correlation between a child having more space and more happiness, and that the literature supports only that a lack of space and privacy can lead to additional stress. He further clarified that for a child, ownership of green space is not relevant, and public parks and shared spaces can contribute to a sense of well-being in the same way as would a privately-owned yard.
- [46] As stated above, I am grateful for Dr. LaTorre's review and observations regarding the circumstances of this case. His testimony at court was illuminating and of great assistance to the court in better understanding the physical, emotional and psychological needs of S.R. and whether relocation to Kamloops will be in his best interests.
- [47] I will now turn to the factors the court must consider in relocation. As s. 16.92 of the Divorce Act requires that in determining the question of relocation the court must consider the best interests of the child, I will first address the factors set out in s. 16(3) of the Divorce Act, followed by an analysis of the additional factors provided under s. 16.92.

Factors Under s. 16(3) of the Divorce Act

- [48] Section 16(3) of the Divorce Act sets out a non-exhaustive list of factors for a court to consider when assessing the best interests of the child. While I will address each of the considerations provided under s. 16(3), I have ordered my analysis based on what I view to be each factors relative importance to determining whether relocation to Kamloops is in S.R.'s best interests. However, I note that I find that S.R.'s need for stability, the risk that the claimant and her family will not support the relationship between S.R. and his father if S.R. relocates, and the risk of a denial of S.R.'s cultural heritage are all important factors in my determination and their ordering should not be taken as the relative weight I have ascribed to each of those factors. In find that it is the cumulative effect of those factors which results in my determination that S.R.'s relocation to Kamloops is not in his best interest.

Needs of the Child - Section 16(3)(a)

[49] Section 16(3)(a) of the Divorce Act provides that the court must consider "the child's needs, given the child's age and stage of development, such as the child's need for stability".

[50] While I have come to a different conclusion regarding relocation than Dr. LaTorre, his comments on the importance of stability to S.R. resonate with me:

Children of a young age generally benefit from greater stability. Stability is even more important for children experiencing problems, difficulties or challenges in their lives. I accept that [S. R.] is experiencing problems based upon reports from the school if nothing else. I suspect that some of the problems relate to the instability that has occurred in his life as he was handed off to extended family to care for him at times during his earlier childhood. His problems also likely are associated with some instability introduced by his parents' continuing conflict. [S. R.] in my opinion, has a relatively high need for stability, that is, relative to other children the same age.

[51] S.R. is almost six years old and is entering grade one in September 2022. Last year he attended kindergarten in the Lower Mainland at the school where his father teaches. There is no doubt to me that S.R. is bonded with both parents although, as pointed out by Dr. LaTorre, S.R. has spent an unusual amount of time away from either parent because during the early years of his life he was in Kamloops with his maternal grandparents for extended periods of time. In the 211 Report, Dr. LaTorre commented on S.R.'s change in caregivers during his first five years of life and the impact the instability may be having on his behaviour:

Most striking in [S.R.'s] history is the change in caregivers he has experienced in his first 5 years of life. He has been shuttled between his parents in the lower mainland and his grandparents in Kamloops. He had other grandparents assume what appeared to be primary caretaking responsibilities in the lower [sic] Mainland. He was completely removed from his father for some months. The most recent reports I was provided from the school indicate he is not doing well and his behaviors, at the very least, are "challenging". They are not the "typical" behaviors of a child his age; I expect that not half or more of the boys his age have some rigging attached to their classroom seats to address their activity level. He is demonstrating behaviours that could be related to any number of life experiences but the role of disturbed attachment development cannot be ruled out.

[52] In my view, while S.R. is no doubt resilient given he has had to adapt to living in different locations for extended periods of time, his emotional needs would be best served by regular contact with each parent and the parents both residing in the same city. However, given how the parties have framed the matter as relocation, I must choose whether S.R.'s relocation to Kamloops or remaining in the Lower Mainland is in his best interest.

[53] In my view, there is greater stability to S.R. in remaining at his current school. The respondent is a teacher at the school and so is able to provide additional time and support to S.R. in and around the school setting. In respect of the evidence that S.R. has been

diagnosed with ADHD or as having some ADHD symptoms that are causing him challenges at school, I find that the fact that there is already a School Base Team and Action Plan in place for S.R. at the school provides additional stability to him in contrast to changing schools to Kamloops. I note that S.R.'s reports from the School Base Team show improvement from December 2021 to March 2022, which would appear to indicate that his supports at school are having a positive impact on his social and emotional well-being. In my view, disruption of this progress is not in S.R.'s best interest.

- [54] The respondent testified that the routine of school in the Lower Mainland was helpful to S.R.'s ADHD symptoms and that S.R. had a Learning Support Team working with him on social and emotional issues. The respondent further testified that when S.R. spent time in Kamloops without a routine it was not beneficial for S.R. In my view, S.R. already having a support team at the school where he currently attends favours a conclusion that he will have greater stability by not relocating. Further, while not a major factor against relocation, I note that, as set out in the 211 Report, the school that S.R. attends in the Lower Mainland is rated significantly higher by the Fraser Institute than the school that S.R. would attend in Kamloops, being ranked in the top 17% of schools, while the Kamloops school is ranked only in the top 37% of schools.
- [55] I find that there would be significant instability imposed on S.R. if he relocated to Kamloops. He would need to again change locations and schools. In making this conclusion, I am aware that S.R. attended pre-school in Kamloops at the school he would attend for grade one. However, I find that there is a difference between the ordered structure of kindergarten versus preschool - where his caregivers attended with him. S.R. has already had a life of instability and relocation in his first five years. He has attended a year of kindergarten in the Lower Mainland and has a support team from the school that appears to be achieving results to improve S.R.'s behavioural issues. In my view, it is not in S.R.'s best interest to be uprooted.

Willingness to Support the Child's Relationship with the Other Spouse - Section 16(3)(c)

- [56] Section 16(3)(c) of the Divorce Act directs the court to consider "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse". It is this factor of the analysis that evokes my greatest concern and therefore provides the strongest foundation for my opinion that it is in S.R.'s best interest not to relocate to Kamloops. The evidence before me warrants concern that the claimant and her extended family will not adequately support S.R.'s relationship with his father if S.R. relocates to Kamloops.
- [57] The claimant's past behaviour in preventing S.R. from having contact with the respondent for several months is a starting point for that concern. On November 21, 2020, the claimant removed S.R. from the Lower Mainland and kept him, without authorization, in Kamloops for over three months, not allowing any contact between S.R. and her father. Contact

between S.R. and the respondent was only restored by a court order. While perhaps motivated by her view of what was best for S.R., the actions of the claimant are troubling and made worse by preventing not only physical visits but also preventing telephone calls and video calls between S.R. and the respondent. Maximum contact and a close bond with both parents are in the best interests of the child and the claimant's actions to prevent contact shows a lack of judgment and disregard for S.R.'s best interests.

- [58] Also of great concern is that the claimant's family also participated in preventing S.R. from having contact with the respondent. Specifically, on a November 28, 2020, call between the claimant and S.R., S.R.'s maternal grandfather would not allow the respondent to speak with S.R. on his phone. On another occasion in the days prior to the November 28, 2020 call, in calls and a series of text messages, the grandfather advised the respondent that he would not communicate with the respondent - which effectively meant that the respondent would be prevented from having contact with S.R. - until the respondent paid a parking ticket the respondent received while using the grandfather's vehicle. In my view, using contact between S.R. and his father to leverage payment of a parking ticket demonstrates a failure to recognize that contact between a child and a parent is, except for rare circumstances, in the best interest of the child.
- [59] Another particularly worrying aspect of the evidence before me was that in support of previous court applications, S.R.'s maternal grandfather swore in an affidavit that he observed repeated instances of violence by the respondent toward S.R. and the claimant. In his interview with Dr. LaTorre, and confirmed in cross-examination, he admitted that the only incident of violence he saw by the respondent was toward S.R. during a play fight between S.R. and his father. S.R.'s maternal grandfather swore in another affidavit that the respondent was an inattentive father because the grandfather observed the respondent on his phone not watching S.R. and during that time, S.R. climbed on furniture and fell, striking his head and requiring stitches. However, S.R.'s maternal grandfather admitted to Dr. LaTorre, and confirmed in cross-examination, that he was upstairs sleeping when that event occurred and so did not observe the incident.
- [60] Making sworn allegations of the respondent's negligent parenting or violence toward his son or spouse that is at best misleading and at worst untruthful, is problematic and leaves me with the impression the affidavit was sworn to gain a litigation advantage. Making such serious allegations against the respondent has the potential to drive a wedge between the respondent and his son, and certainly does not evince a willingness to support the child's relationship with his father. In my view, this demonstrates a lack of judgment by the claimant and her extended family by prioritizing the claimant's interests to win a court application above the long-term best interests of S.R. by exaggerating or misstating evidence that has the potential to damage S.R.'s relationship with his father.

- [61] One reason I have spent some time focused on the behaviour of the claimant's family in my analysis of the likelihood that the claimant will support S.R.'s relationship with his father is because the claimant argues that having her family in Kamloops to care for S.R. is one of, if not the primary, benefit of relocating S.R. to Kamloops. While I do not doubt that there are many positive benefits to S.R. spending time with his maternal grandparents, in my opinion, it cannot be at the expense of the S.R.'s long-term relationship with his father.
- [62] In *Bailey v. Bailey*, 2018 BCSC 1419 [Bailey], the court held that while relocation would offer certain advantages to the children - such as lower housing costs - it did not outweigh the severe disruption to the children's relationship with their father: at paras 80 and 88. I also note that in *Bailey*, the court commented on the ability and importance for the children to maintain contact with their maternal grandparents even without relocating to where the maternal grandparents resided:
- [85] If Ms. Bailey's parents move to Lake Country as they plan, they will not have the same kind of in person access to their grandchildren that they have now. However, they can visit the children in the Lower Mainland as often as they like, and Ms. Bailey can take the children to Lake Country as often as she likes, during the times she has the children. They can go on weekends and holidays and enjoy the rural lifestyle afforded by the property. Mrs. Grant and Ms. Bailey testified about the strong relationship between Mrs. Grant and Braden. They both testified that many of their conversations happen over FaceTime or the telephone and, as such, will not be interrupted by the distance between them.
- [63] While the claimant and S.R.'s maternal grandparents likely feel that S.R. being in Kamloops is in S.R.'s best interest, an important consideration is that they demonstrate judgment and put the child's interests ahead of their own. This generally means being respectful of the parent, who the child loves. In *J.B.D.K. v. T.A.B.*, 2017 BCSC 1186, Justice Watchuk described the importance of fostering positive relationships for children:
- [178] Even if all tensions dissolve at the conclusion of the trial, no witness except M's father and his mother expressed any concern or understanding that the behaviour affects M negatively. It is a conundrum that the mother's family, who is spoken of so highly by so many, can be oblivious to something so obvious as the fact that when you treat badly the people that a loved one loves, the loved one, M, also suffers. One cannot profess to truly care for a child if they do not respect the people whom the child loves.
- [64] I echo Watchuk J.'s concerns that the affidavit evidence and testimony provided by the claimant and her family coupled with their refusal to allow contact between S.R. and the respondent for three months paints a picture of a family that is not supportive or respectful of S.R.'s relationship with the respondent. My concern is that if S.R. relocates to Kamloops, irreparable damage would be done to his relationship with his father.
- [65] My concern about the lack of support for S.R.'s relationship with his father is corroborated by some of the content on the surreptitious recordings in which the claimant made derogatory statements about the respondent to directly to S.R. Two recorded comments, in

recordings admitted into evidence on the consent of the claimant, are concerning. In the first, the claimant said to S.R., "Why don't you want to come down. Because he's not a nice daddy. Because he's very selfish and sick in the head." In the second, the claimant said to S.R., "Okay, [S.R.], because if the cops come here, you'll never see daddy again." To which S.R. responds, "Why?". The claimant then says, "Because they're going to take him away." While I recognize the frailties of the selective uncontextualized nature of surreptitious recordings and am aware they were recorded during a stressful time before the parties separated, after listening to these recordings and hearing the tone in which the words were spoken, I give some limited weight to the recordings as evidence that the claimant has made negative statements about the respondent directly to S.R., thus demonstrating an attempt to undermine the relationship between S.R. and his father.

- [66] I have also considered whether the respondent would promote a positive view of the claimant and claimant's family to S.R., if S.R. remained in the Lower Mainland. At trial, the respondent generally testified objectively and favourably of the claimant and her family, although he focused on what he perceived as the claimant's anger issues and outbursts and clearly harboured resentment over the fact that he was prevented from having contact with S.R. for several months in late 2020 and early 2021. I find that the respondent minimized his participation in the arguments between the parties and am not suggesting he was blameless in the conflict between the parties. However, in terms of the tenor of his testimony, he genuinely appeared to be supportive of S.R.'s relationship with the claimant.
- [67] Likewise, S.R.'s paternal grandparents spoke of the generosity shown to them by S.R.'s maternal grandparents when they visited Kamloops. S.R.'s paternal grandparents appeared to be positive people who did not wish to speak ill of others. Based on their testimony, I would not expect them to speak poorly of the claimant or her family or be unsupportive of the relationship between S.R. and the claimant or S.R. and his extended maternal family.
- [68] I note that in the trial decision in *Barendregt v. Grebliunas*, 2019 BCSC 2192, one of the primary factors for Mr. Justice A. Saunders in deciding that the children should be relocated was which parent was more likely to promote a positive attitude towards the other parent, as stated at para. 42:

First, I find it more likely that Ms. Barendregt will work to promote in the children a positive attitude toward their father, than the converse. This factor weighs strongly in favour of the children's best interests being promoted through Ms. Barendregt having primary residence.

- [69] Based on my view of the evidence, the respondent has demonstrated that he is more able or willing to be supportive of the claimant's relationship with S.R. than will the claimant towards the respondent's relationship with S.R. I have serious concerns that should S.R. relocate to Kamloops, his relationship with his father would not be adequately supported by the claimant.

The Nature and Strength of the Child's Relationships - Section 16(3)(b)

- [70] Section 16(3)(b) of the Divorce Act requires the court to consider 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".
- [71] Based on the testimony at trial, I have no doubt that both parties deeply love S.R. and that he has strong bonds with each of his parents. It is unfortunate that S.R.'s parents are planning to reside in different cities because, as I stated above, in my view, it would be in S.R.'s best interest if the parties exercised shared parenting in the same city. However, that is not an option presented to the court by the parties.
- [72] The claimant argues that S.R.'s bonds with his extended family in Kamloops is an important factor that support relocating him to Kamloops. She says S.R. has a deep bond with his extended family in Kamloops that includes his maternal grandparents, uncles, aunts and cousins. Further, she stresses the importance of the close bond between S.R. and his half-sister M.
- [73] In respect of S.R.'s bond with M., I accept the evidence at trial that S.R. has a close and meaningful connection with his sibling. It was clear from the evidence from the claimant, S.R.'s maternal grandparents and videos, that S.R. has deep affection for M. However, I note that while keeping siblings together is a factor when deciding parenting arrangements, it is not determinative: *Poole v. Poole*, 1999 BCCA 203 at para. 31 [Poole]. In the circumstances of this case, I must balance all of the factors to determine what is in S.R.'s best interest. I have concluded avoiding the risk of permanent damage to the relationship between S.R. and his father outweighs the connection S.R. has with his sibling. Further, in my view, providing regular contact between S.R. and his siblings in Kamloops on weekends and holidays and through video calling may be sufficient to maintain and develop the connection.
- [74] I also accept the evidence that S.R. and his maternal grandparents share a deep and close bond. The grandparents' love and care for S.R. was evident to me at trial. The maternal grandparents have spent a significant amount of time caring for S.R. They were S.R.'s primary caregivers for almost a year from the fall of 2018 to the end of summer in 2019, while the parties remained in the Lower Mainland working and pursuing their education. During that time, the parties would only visit S.R. every other weekend and on holidays. The maternal grandparents also provided care to S.R. for additional extended periods of weeks and months over the first five years of S.R.'s life. It was also clear to me that they continue to play an active and important role in playing with and providing care for S.R. in Kamloops. As examples, S.R.'s maternal grandparents described how they garden with S.R. and spend hours with him on the tennis court while S.R. played with toy vehicles. Their love for S.R. is not in doubt. I took from the evidence that, in addition to nurturing S.R., the grandparents play a vital support role to the claimant by providing her with child care. This free child care in Kamloops is likely especially important to the claimant given she is undoubtedly very busy raising two other children under the age of three as a single parent.

- [75] I find that the bond between S.R. and his maternal grandparents is important to S.R.'s well-being. Indeed, they have played an important role in raising him as they were his primary caregivers for extended periods of time. However, given the risks that the claimant and maternal grandparents will not support the relationship between S.R. and his father, the risk of damaging the bond between S.R. and his father is too significant to have S.R. relocate to Kamloops. I believe that the important connection between S.R. and his maternal grandparents can be sufficiently maintained through weekend and holiday visits. Further, the maternal grandparents are well-positioned to travel to the Lower Mainland to see S.R. given they have both time and resources.
- [76] S.R. also spent time with his paternal grandparents when they were visiting from Sri Lanka and living with the family at the Cassiar Townhome from September 2019 to January 2020. Both of S.R.'s paternal grandparents testified at the trial remotely via video link: the grandfather from Italy and the grandmother from Sri Lanka.
- [77] I accept that S.R.'s paternal grandparents feel a deep connection to S.R. and look forward to spending more time with him when they carry out their plan to return to Canada later this year on their "grandparents" visa. While the details of S.R.'s paternal grandparents coming to Canada have not been finalized and the claimant argues that they are too vague for the court to rely upon, I am satisfied that the plans are more than speculative and that there is a high likelihood that they will reside in the Lower Mainland with the respondent and S.R. in the relatively near future.
- [78] I base my conclusion of a high likelihood that the paternal grandparents will come to Canada on the fact they have now settled the grandfather's pension issues in Italy and sold real estate holdings in Sri Lanka in preparation for the move. I note that while the amount S.R.'s paternal grandparents received from selling their Sri Lankan real estate is modest by Canadian real estate standards, being approximately \$14,000, liquidating the Sri Lankan real assets is indicative of their intention to move to Canada. The evidence is that they obtained "grandparent" or "super" visas which allow S.R.'s paternal grandfather to travel to and from Canada until October 10, 2027, and S.R.'s paternal grandmother to travel to Canada until December 11, 2027. Finally, I accept as credible their testimony that although the details of the plans to move have not yet been crystalized, their intent is to move to the Lower Mainland and live with the respondent.
- [79] While S.R. was only 3 years old when his paternal grandparents lived with him in Canada and there are communication issues related to language barriers because S.R. does not speak Sinhalese, I accept that there is a bond between S.R. and his paternal grandparents. In my view, if S.R. remains in the Lower Mainland he will have the opportunity to develop his relationship with his paternal grandparents, which will, in turn, provide him a better connection to his Sri Lankan cultural heritage.

- [80] The respondent also has relatives living in the Lower Mainland. In particular, he has a cousin with whom he has been friends with since childhood. The cousin, Mr. P., testified at trial and stated that he and the respondent grew up in the same village in Sri Lanka. Mr. P. has a son, L., who is roughly the same age as S.R. Mr. P. testified that L. and S.R. are best friends and that the families spend time together approximately every other weekend. Video and photo evidence was presented that showed S.R., L., Mr. P. and his family and the respondent spending time together in the Lower Mainland. I conclude from this evidence that S.R. has bonds and connections to extended family in the Lower Mainland, and while perhaps not as extensive as the claimant's extended family in Kamloops, I find that the circumstances are relatively comparable.
- [81] Parental relationships, absent special circumstances, are to be prioritized over the relationships between the child and other individuals. Section 16(6) of the Divorce Act concerns the maximum contact with a parent, not extended family members. In *K.P. v. S.K.*, 2021 BCSC 1426, Justice Kirchner noted that while relocation in that case would benefit the children by allowing them to live closer to a rich extended family network, the bonds between the child and extended family should not be prioritized at the expense of an opportunity of the child to bond with a parent:
- [121] S.K. argues that no amount of extended family can replace the children's connection with their father. I agree. The significantly diminished opportunity for regular direct contact and parenting time will negatively impact the children and their opportunity to develop bonds with S.K. at their relatively young age. I must also consider the maximum contact principle set out in s. 16(6) of the Divorce Act. I find that while S.K.'s relationship with his children during the marriage was not free of difficulties, he has made a serious effort with the parenting time he has had to work on that relationship and build a bond with his children.
- [82] S.R. is fortunate to have solid and loving connections with both sets of his grandparents and extended family. I find that although there is currently a stronger bond between S.R. and his Kamloops extended family than he has with extended family in the Lower Mainland, this factor is not determinative nor does it alter my view that, in the totality of circumstances, S.R.'s best interests are better protected if he does not relocate to Kamloops. In making my decision, I have, in effect, prioritized S.R.'s relationship with his father over the relationship with S.R.'s extended family in Kamloops.

Cultural, Linguistic and Spiritual Upbringing - Section 16(3)(f)

- [83] I have serious concerns that if S.R. is relocated to Kamloops, the claimant and her family may deny, or at least, not support, S.R.'s Sri Lankan cultural heritage. My concern is based upon testimony at trial that suggested a denial of S.R.'s heritage coupled with my overarching conclusion that the claimant and her extended family will not support S.R.'s relationship with his father should S.R. relocate to Kamloops.

- [84] S.R.'s maternal grandfather testified regarding S.R. that "yeah, of course he's white; you can see him as you want to see him." Dr. LaTorre further reported that S.R.'s maternal grandfather told him in their interview that S.R. was one of only two white children at his school in the Lower Mainland - a comment that was demonstrated as false by Dr. LaTorre's investigation into the school demographics. While I have no doubt of the love and care that S.R.'s maternal grandfather feels towards S.R., the evidence demonstrates a realistic possibility that S.R.'s Sri Lankan heritage will be denied or minimized should S.R. relocate to Kamloops. In my view, having a primary residence in the Lower Mainland with the respondent and likely with S.R.'s paternal grandparents, if and when they move from Sri Lanka to the Lower Mainland, will provide S.R. with an opportunity to maintain the connection to the Sri Lankan aspect of his identity.
- [85] As a small example that shows a concern that the claimant will deny S.R.'s heritage, I note that the respondent testified that the claimant did not like when he and his parents watched Sinhalese language videos at the Cassiar Townhome and did not like the Sinhalese language spoken at the Townhome. He testified that the claimant made noises mockingly imitating the Sinhalese language to the respondent. The claimant testified she was not frustrated at S.R.'s paternal grandparents not speaking English in the house, but that S.R. was because he could not communicate with them. Where this parties' evidence is in conflict on this point, I prefer the testimony of the respondent.
- [86] I note that while supporting S.R.'s connection with his cultural heritage may not be an issue for him now, identity, race and heritage may be an issue for him as he ages. The court's decision on whether to relocate must be made while considering S.R.'s immediate best interests as well as future impacts of the relocation. The Supreme Court in *Barendregt* explains that a court making a decision on relocation must ensure that the decision accounts for both the present and future circumstances of the child:
- [8] The forward-looking nature of relocation cases requires judges to craft a disposition at a fixed point in time that is both sensitive to that child's present circumstances and can withstand the test of time and adversity.
- [87] At trial, Dr. LaTorre testified of potential negative impacts if S.R.'s heritage is repressed. He testified that if a person involved in raising a biracial child were to deny the child's identity it could be psychologically harmful to the child. He stated it is important for the person raising the child to acknowledge the child's background.
- [88] The respondent argues that he is better equipped to help S.R. navigate racial issues that may arise and assist S.R. in forming an identity as a biracial person. One example is that the respondent testified that he takes S.R. to a Buddhist temple once a week. Another is his parental grandmother testified that when she cared for S.R., she sang him folk songs in Sinhalese and was teaching him the language.

[89] The Supreme Court of Canada in *Van de Perre v. Edwards*, 2001 SCC 60 [Van de Perre], considered issues of race and custody. While not a relocation case, the analysis regarding the importance of considering a child's cultural heritage is applicable. The Court held:

40 Race can be a factor in determining the best interests of the child because it is connected to the culture, identity and emotional well-being of the child. New Brunswick, for example, has adopted legislation prescribing mandatory consideration of "cultural and religious heritage" for all custody determinations (Family Services Act, S.N.B. 1980, c. F-2.2, ss. 1 and 129(2)). British Columbia has included similar language in its provisions regarding adoption, but not in those found in the Family Relations Act applicable in this case (Adoption Act, R.S.B.C. 1996, c. 5, s. 3). The adoption and custody contexts may differ because the adopted child will generally cease to have contact with the biological parent while custody will generally favour contact with both parents. Nevertheless, it is generally understood that biracial children should be encouraged to positively identify with both racial heritages. This suggests the possibility of a biracial identity (i.e. "forming an identity that incorporates multiple racial heritages", see Pollack, *supra*, at p. 619). It is important that the custodial parent recognize the child's need of cultural identity and foster its development accordingly. I would therefore agree that evidence regarding the so-called "cultural dilemma" of biracial children (i.e. the conflict that arises from belonging to two races where one may be dominant for one reason or another) is relevant and should always be accepted. But the significance of evidence relating to race in any given custody case must be carefully considered by the trial judge. Although general public information is useful, it appears to be often contradictory (T. L. Perry, "The Transracial Adoption Controversy: An Analysis of Discourse and Subordination" (1993-94), 21 N.Y.U. Rev. L. & Soc. Change 33, at p. 59), and may not be sufficient to inform the judge about the current status of race relations in a particular community or the ability of either applicant to deal with these issues.

[90] In considering which parenting arrangement scenario will be in S.R.'s best interest with regard to protecting and promoting his biracial identity and cultural heritage, I acknowledge that while it is a relevant factor, it is not determinative and must be considered in the context of the over-arching question of the child's best interest. The significance of this factor must be weighed against all relevant factors: *T.K. v. R.J.H.A.*, 2013 BCSC 2112 at para. 54; *Van de Perre* at para. 38. However, the concern of S.R.'s maternal grandfather's lack of acknowledgement of S.R.'s cultural heritage and biracial identity is heightened because of the reliance the claimant places on the benefits of having her parents being so involved in S.R.'s caregiving should he reside in Kamloops as well as my concern that if S.R. relocates to Kamloops the relationship between S.R. and his father, and thus his immediate connection to his Sri Lankan heritage, would be threatened. In my view, considering these factors together favours denying the claimant's application to relocate S.R. to Kamloops.

History of the Child's Care - Section 16(3)(d)

- [91] Section 16(3)(d) of the Divorce Act requires the court to consider the history of the child's care. The evidence in this case is that the parties have, for the most part, taken an equal role in caring for S.R. As referenced above, there were extended periods of time when the primary care of S.R. was performed by his maternal grandparents in Kamloops. There was also a period of four months when S.R.'s paternal grandparents resided with the family at the Cassiar Townhome and provided care to S.R. Since Norell J.'s July 23, 2021 order, while S.R. has resided primarily in the Lower Mainland and attended kindergarten in the Lower Mainland, the parents have exercised equal parenting.
- [92] In my view, both parents have provided relatively equal care to S.R. when S.R. was not being cared for by extended family. As such, the result of any decision on relocation - either having S.R. relocate to Kamloops or having him stay in the Lower Mainland - means a significant change for the parenting arrangements given the claimant has moved to Kamloops and indicated she cannot continue with an equal sharing of parenting time if S.R. remains in the Lower Mainland. There is no doubt that the change from having equal parenting time to having a non-equal sharing of parenting time will be an adjustment for S.R., but in this case, in either scenario - relocating S.R. to Kamloops or S.R. remaining in the Lower Mainland - the impact on S.R. will be comparable, and so, does not influence my conclusion.

Views of the Child - Section 16(3)(e)

- [93] Section 16(3)(e) of the Divorce Act provides that the court should consider the views and preferences of the child, giving due weight to the child's age and maturity, unless they cannot be ascertained.
- [94] The claimant and S.R.'s maternal grandfather testified that when S.R. had to return to the Lower Mainland from Kamloops he would be upset at having to leave Kamloops and the company of his half-sister, M. I accept the evidence that S.R. would express sadness about leaving Kamloops to return to the Lower Mainland, but find that it is within the range of emotions for a child of his age when he was required to move between households and leave those he loves. While this is a factor in my consideration that favours S.R. relocating to Kamloops, giving due weight to S.R.'s age and maturity, I do not find it sufficient to outweigh my concerns that lead me to conclude that considering the constellation of factors, S.R.'s best interests are better served if he does not relocate to Kamloops.
- [95] Dr. LaTorre interviewed S.R. in the course of preparing the 211 Report. His conclusion on S.R.'s views was that S.R. showed a preference to live in Kamloops. The reasons articulated by S.R. to be in Kamloops to Dr. LaTorre were that he had a lot of family in Kamloops, had a larger house, and liked that at school in Kamloops, the parents attended classes with the children.

[96] While I accept that S.R. has expressed a preference to live in Kamloops, in my view, he is not at an age where his views should be given significant weight. As stated by Dr. LaTorre in the 211 Report:

I also consider that a child's voice is to be considered but is not, alone, necessarily determinative. A 5 year old child is not cognitively, socially, emotionally, or otherwise prepared to be solely determining their life trajectory.

[97] As further explained by Dr. LaTorre, while there is a deep connection between S.R. and his extended family in Kamloops, the basis for S.R.'s other reasons for wanting to stay in Kamloops, such as going to the elementary school, is based on S.R.'s comparison of Kamloops's pre-school, where parents attended with the children, to the more rigid kindergarten format at school in the Lower Mainland.

[98] In respect of the housing situation, while the respondent currently lives in a modest apartment, his stated intention, once S.R.'s paternal grandparents arrive in Canada, is to rent a larger home in the Lower Mainland, thus mitigating the impact of S.R.'s preference for the larger Kamloops home. As such, while I acknowledge S.R.'s stated preference to be in Kamloops, it appears to be largely based on reasons that may be transitory or not based on a fair comparison of the circumstances. I also note, as discussed above, Dr. LaTorre's testimony that there is no causal link between a child having more space and that child's well-being.

[99] Given S.R.'s young age and the additional conclusion of Dr. LaTorre that both parents have attempted to influence S.R.'s decision about where to live, I find that S.R.'s views when assessed against the totality of evidence are insufficient to warrant his relocation to Kamloops.

Plans for the Child's Care - Section 16(3)(g)

[100] The parties did not present specific plans for S.R.'s child care, but it appears that the claimant's view is that she plans to return to work in September 2023, once her current maternity leave finishes. She stresses that one of the primary benefits of residing in Kamloops is the assistance of extended family to provide child care. I accept that she expects that S.R.'s maternal grandparents, will play an important role in supporting the claimant by providing child care for S.R. This additional support will likely be required as the claimant plans to eventually return to work and will have two children under the age of four in addition to S.R. at that time. In my view, while the claimant may have more support resources available to her than the respondent, she may also have more commitments than the respondent.

- [101] I accept that the respondent does not have the same level of support from extended family as the claimant, at least until his parents return to the Lower Mainland from Sri Lanka. Even then, the claimant has her parents, aunts, cousins and nephews in Kamloops as part of her family network. However, the respondent has friends, coworkers and at least one cousin who testified that they can assist the respondent if he needs additional help with S.R.
- [102] Dr. LaTorre expressed his view that the respondent was "stretched thin" and had time for only his work and care giving for S.R. Dr. LaTorre recommended that the respondent should have more supports for giving care to S.R. such as other caregivers. I note however, that one of Dr. LaTorre's assumptions, based on his interview of the respondent in preparing his 211 Report, was that it was likely that the respondent would continue his education and pursue a doctorate. At trial, the respondent testified that while he had a "long term" goal of obtaining a Ph.D., it was a hypothetical and he did not envisage returning to school in the near future. He testified that his priority was S.R., not continuing his studies. As such, I conclude that one of the grounds of concerns noted by Dr. LaTorre is lessened.
- [103] I am of the view that, despite Dr. LaTorre's concerns, while the respondent is busy, he will be able to manage S.R.'s care for the additional time that will result by him being the primary caregiver to S.R. Further, I note that given S.R. currently attends the school where the respondent teaches, the respondent has the ability to take S.R. to school and, as the evidence suggested, have S.R. play at the school if the respondent is required to work late or attend meetings after school.
- [104] Given the above, I find that both the respondent and the claimant have capacity to adequately support and care for S.R. and this factor does not advance the claimant's argument for relocating S.R. to Kamloops.

Ability and Willingness to Care for and Meet the Needs of the Child - Section 16(3)(h)

- [105] Section 16(3)(h) of the Divorce Act asks the court to consider the ability and willingness of each parent to care for and meet the needs of the child.
- [106] For the reasons stated above in respect of the parties' abilities and plans to care for S.R., I conclude that both parties have the ability and willingness to care for the physical needs of S.R. However, as I have discussed at length in this judgment, taken cumulatively, the consideration of the factors leads me to the conclusion that S.R.'s needs will be better met if he does not relocate to Kamloops.

Ability and Willingness to Communicate - Section 16(3)(i)

- [107] Section 16(3)(i) of the Divorce Act requires the court to consider the ability and willingness of each parent to communicate and cooperate with one another on matters affecting the child.

[108] It appears that, given the passage of time since they lived together, the parties are better and more willing to communicate. That said, there remain significant trust issues and anger between the parties. It is my hope that given the passage of time, the parties will be able to work together to improve communication as it relates to S.R. In my view, the order regarding relocation may provide some certainty to the parties to move forward in parenting S.R. and develop effective ways to communicate regarding important decisions in S.R.'s life.

Family Violence - Section 16(3)(j)

[109] The evidence supports that there has been no violence or allegations of violence between the parties since they began living apart at the end of November 2020. A large portion of the trial before me concerned the parties' testimony of past conflicts and grievances between them. In my view, while the testimony provides some context to the difficulties in the relationships, it is not of assistance to determining what is in S.R.'s best interest in respect of relocation because it is in the past. I am guided in this conclusion by subsection 16(9) of the Divorce Act which provides that in making parenting time orders, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

[110] Both parties acknowledge they had a volatile relationship with frequent aggressive verbal arguments. There is conflicting evidence as to who was the aggressor and who was the victim of assaults. Each party says that at least on one occasion the other party was physically abusive towards them. The surreptitious recordings contain small samples of arguments that contain venomous statements. While the recordings capture only the claimant's anger, I accept that both parties used abusive language towards each other and did so, at times, while S.R. was present.

[111] While it is clear that there was verbal abuse and arguments between the parties, at least sometimes in the presence of S.R., the evidence demonstrated that since the parties have not been living in the same space since November 2020, there have been no physical altercations. Importantly and relevant to my decision on relocation, I find there was no credible evidence of any violence toward S.R. by either parent, although both parents acknowledged that they had arguments and used profanity in the presence of S.R. Further, both parties support the other party having shared parenting time with S.R. This is not consistent with a party fearing that there would be any physical danger to S.R. from the other parent. As noted by Norell J. at para. 48 of her July 23, 2021 reasons:

As noted previously, counsel for the claimant states that if the respondent were to move to Kamloops, the claimant would agree to equal shared parenting time, which is not consistent with any real concern regarding violence to [S.R.].

[112] The evidence supports that the parties' conflict has reduced with the passage of time and since they stopped cohabitating. As such, the issue of family violence is not a factor for me in my relocation decision.

Any Civil or Criminal Proceedings - Section 16(3)(k)

[113] In this case, there are no civil or criminal proceedings or court orders that impact upon S.R.'s best interests.

Additional Best Interests Factors - Section 16.92(1)

[114] Section 16.92(1) of the Divorce Act provides that when deciding whether to authorize a relocation of a child, the court must, in order to determine what is in the best interests of the child, take into consideration the following factors in addition to those set out in s. 16(3) of the Divorce Act:

- (a) the reasons for the relocation;
- (b) the impact of the relocation on the child;
- (c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
- (d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
- (e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
- (f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
- (g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

[115] I will now address each of the factors set out in s. 16.92 of the Divorce Act.

Reasons for the Relocation

[116] In considering the reasons for relocation, I am aware that I must not consider whether either parent would stay or relocate depending on the relocation decision. Such a consideration would put the parent in a "double bind" situation as the parent would be

required to either say he or she would not relocate, thus diminishing the argument for relocation, or say he or she would relocate without the child, thus evincing a lesser concern for the child: Barendregt at paras. 137-138. However, the legislative reforms to the Divorce Act require the court to consider the reasons for the relocation to the extent that it impacts the best interests of the child.

- [117] There are two primary reasons the claimant wishes to relocate. First, she argues that she, and therefore S.R., will have a higher standard of living in Kamloops as compared to the Lower Mainland because in Kamloops, her housing is largely, if not entirely, subsidized by her parents; there is generally a lower cost of living than in the Lower Mainland; and she has access to free child care through her extended family. Second, S.R. has access to a close and caring family network. I have addressed my concerns regarding the risk of the claimant and her family not supporting S.R.'s relationship with his father above and so will address the claimant's argument of an enhanced standard of living in Kamloops.
- [118] Although currently on maternity leave until September 2023, the claimant has secured a job as a teacher with the Kamloops School District once her leave ends. She also has a guaranteed teaching position with the District of North Vancouver. The claimant says that it would be unaffordable for her to live in the Lower Mainland with three children.
- [119] I accept that financially, the claimant would have a better standard of living in Kamloops due to her parents' generosity. However, while financial well being is important, I find that after a certain point, financial excess does not enhance the best interests of the children. The claimant still has guaranteed well-paying employment as a teacher earning approximately \$97,000 in the Lower Mainland. (I note, she expects to earn approximately \$94,000 in Kamloops). Further, there is no reason to think that her parents would not continue to subsidize her lifestyle if she lived in the Lower Mainland as it appears they have done so even when she lived at the Cassiar Townhome.
- [120] In my view, while it is likely that the claimant would have more wealth should she move to Kamloops, there would not be a marked difference between S.R.'s quality of life if the claimant remained in the Lower Mainland. I note that the claimant decided not to seek child support from Mr. F. for her two youngest children other than an amount for food and diapers. To my thinking, this somewhat dilutes her argument that the Lower Mainland is unaffordable to her on the basis that she has three children, if she is not seeking amounts to which she may be entitled from the father of her two youngest children.
- [121] Accordingly, the claimant's argument that a reason for her relocation would be to have greater financial resources at her disposal does not trump my concerns that relocating S.R. to Kamloops is not in his best interest.

Impact of the Relocation on the Child

[122] I have addressed the issue of the impacts of relocation on S.R. in my analysis of the factors under s. 16(3) of the Divorce Act. To those considerations I add a comment regarding Dr. LaTorre's evidence at trial. He concluded that given S.R. spent so much time away from both parents when he was cared for by his maternal grandparents in Kamloops when he was younger, he was well-equipped, more than would be expected of a child of his age, to not see either parent for extended periods of time. I conclude from Dr. LaTorre's observation that the impact of the relocation decision on S.R. may be less profound on him given he has had lengthy times away from both his parents already in his life.

[123] The second observation I make is that the driving distance between Kamloops and the Lower Mainland is approximately 3.5 hours. As such, while the distance is too great to commute on a daily basis, in the relative scheme of geographical distances in Canada or the world, it is not excessively onerous. As such, there is the potential for additional contact between S.R. and his Kamloops family in the Lower Mainland if agreed to by the parties. In my view, the distance has the potential to lessen some of the impact of the parties' decision not to live in the same city.

The Amount of Time Spent with the Child by Each Parent

[124] As discussed above, the parties currently exercise equal parenting time in the Lower Mainland. I have determined that when S.R. was not in the care of his maternal grandparents in Kamloops, and the three-month period of time that the claimant wrongly denied parenting time to the respondent starting in late November 2020, the parties have exercised relatively equal parenting time and parenting responsibilities with S.R. As such, this consideration does not assist in determining the issue of relocation.

Geographic Area Restrictions

[125] There is no order, arbitral award, or agreement that specifies the geographic area in which S.R. is to reside.

Reasonableness of the Proposal to Vary Parenting Time

[126] Section 16.92(1)(f) of the Divorce Act requires the court to consider the "reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses" as they impact on the best interests of the child.

[127] Other than the issue of travel expenses, I have addressed these factors in this decision. In respect of the reasonableness of travel expenses, both parties proposed that exchanges of S.R. at the changing of parenting time would be made at a mid-point between Kamloops and the Lower Mainland and that the parties bear their own costs of that travel. I find that

reasonable. As such, I would order that S.R. be exchanged between the parties at a location to be agreed upon, approximately equidistant between Kamloops and the Lower Mainland and each party should bear the costs of that travel.

Compliance with Notice Requirements, Orders and Obligations

[128] As discussed at length in these reasons, the claimant did not comply with the Family Law Act, S.B.C. 2011, C. 25 [FLA] when she took S.R. to Kamloops in November 2020 and denied the respondent any form of access to his son for several months. While it appears that the claimant has complied with the current interim parenting order of Norell J., as is clear from these reasons, the claimant's actions of removing S.R. to Kamloops without notice and without permission was a significant concern for me. To be clear, my concern is not simply due to the claimant's non-compliance with family law legislation, but primarily because it demonstrates her lack of appreciation that unilaterally severing S.R.'s contact with his father is not in S.R.'s best interest.

Consideration of the Four Scenarios

[129] My reasons have almost exclusively focused upon two scenarios for relocation: S.R. staying in the Lower Mainland and residing primarily with his father; and, S.R. relocating to Kamloops and residing primarily with his mother. Given the circumstances of this case, in which the claimant has already moved to Kamloops, I do not find it would be useful to the parties to provide an analysis of whether it is in S.R.'s best interest that both parents live in the same city, whether it be the Lower Mainland or Kamloops. My view, which accords with Dr. LaTorre's conclusion, is that it would be in S.R.'s best interest if both parents lived in the same city and exercised equally shared parenting time. However, the parties have not presented living in the same city as an option. I cannot compel either party to move and s. 16.92(2) of the Divorce Act prohibits me from considering whether the claimant would continue to remain in Kamloops without S.R. or move back to the Lower Mainland should I refuse to order the relocation of S.R. Should the parties' living arrangements change in the future such that they reside in the same city, they may appear before the court to apply to vary the parenting time order, if they are unable to agree to a new arrangement.

[130] Each party proposed parenting time arrangements for the parent with whom S.R. was not primarily residing. Both proposals were similar in that they request that the parent who does not have primary residence of S.R. would have parenting time on every second weekend and share school and summer holidays equally. These proposals generally accord with Dr. LaTorre's testimony that for a child the age of S.R., parental bonding is better achieved through balanced time on summer holidays between parents as opposed to having one parent have an extended amount of parenting time during summer.

[131] Before providing a summary of the parenting time order, I will briefly address holiday and weekend parenting time as well as contact between the off-duty parent and S.R.

Holiday and Weekend Parenting Time

[132] It is important that regular contact be maintained as best as possible between the claimant and S.R. In my view this can be accomplished through regular visits on weekends and holidays. She shall have every second weekend with S.R. and in the case that the weekend includes a statutory holiday, she shall have the additional school holiday day with S.R.

Telephone and Video Calls

[133] The respondent shall facilitate the claimant having telephone or video access to S.R., for a duration of up to 15 minutes, through Skype, FaceTime or a similar video application two weekday evenings and one weekend evening every week. During the summer and holiday parenting time, the on-duty parent shall facilitate video access between S.R. and the off-duty parent for a duration of up to 15 minutes two times a week.

Summary of Parenting Time Order

[134] For clarity, I have provided a summary of the order regarding parenting time arrangements:

- a) the claimant's application to relocate S.R. to Kamloops is dismissed;
- b) unless ordered by the court or on written agreement of the parties, effective no later than August 30, 2022, the respondent will have primary residence of S.R., in the Lower Mainland;
- c) unless ordered by the court or on written agreement of the parties, the claimant will have parenting time with S.R. each year, in Kamloops or elsewhere in British Columbia at her discretion, as follows:
 - i. Every second weekend commencing at 6:00 p.m. on Friday until Sunday at 6:00 p.m. If the weekend contains a statutory holiday on the Monday immediately following the weekend, the claimant will have parenting time until that Monday at 6:00 p.m. If the that weekend contains a statutory holiday on the Friday immediately preceding the weekend, the claimant will have parenting commencing on Thursday before the holiday Friday at 6:00 p.m.;
 - ii. Over four weeks of her choosing during the months of July and August, with written notification to the claimant of the weeks she chooses no later than June 1st each year;
 - iii. Assuming Christmas vacation of two weeks' duration, one week each year, beginning in December 2022, with the first week of vacation, and alternating thereafter;
 - iv. Assuming spring break of two weeks' duration, one week each year, beginning in March 2023, with the first week of vacation, and alternating thereafter; and, if spring break is of one-week duration only, the whole of spring break in 2023, and in alternating years thereafter;

- v. One long weekend during each calendar year, in addition to the statutory holiday weekends that fall on her regularly scheduled parenting time weekends, with written notification to the respondent of the long weekend she chooses at least 45 days in advance; and
- vi. Special occasions, holidays and birthdays as agreed to in writing between the parties.
- d) The respondent will facilitate the claimant having telephone or video access with S.R., for a duration of up to 15 minutes, through Skype, FaceTime or similar applications two weekday evenings and one weekend evening per week while the respondent exercises his parenting time;
- e) The claimant will facilitate the respondent having telephone or video access with S.R., for a duration of up to 15 minutes through Skype, FaceTime or similar applications one weekend evening while the claimant exercises her weekend parenting time;
- f) During the summer and school breaks, the on-duty parent will facilitate the off-duty parent with telephone or video access with S.R., for a duration of up to 15 minutes, through Skype, FaceTime or similar applications two weekday evenings and one weekend evening per week;
- g) Unless otherwise agreed to in writing by the parties, the parties shall bear their own costs for transportation of S.R. for parenting time exchanges to a location to be agreed to by the parties that is approximately equidistant between the claimant's home in Kamloops and the respondent's home in the Lower Mainland; and
- h) The parties have leave to apply to the court in the event they are unable to agree on the details of the terms of this order or if their living arrangements change such that the parties ultimately reside in the same city.

Guardianship

- [135] The parties will continue to share joint guardianship of S.R. and share the parental responsibilities set out in s. 41 of the FLA with the following modifications and to the extent that the parental responsibilities are not in conflict with this order:
- a) The responsibility under s. 41(a) of the FLA is modified such that the power and responsibility for making day-to-day decisions affecting the child, and having day-to-day care, control, and supervision of the child, shall rest with the parent in whose care the child is in at the material time; and
 - b) The responsibility under s. 41(d) of the FLA is modified such that the respondent will have the final decision for where the child will go to school.

B. Divorce Order

- [136] The parties seek an order of divorce. Sections 8 through 12 of the Divorce Act set out the requirements that must be satisfied for the court to grant a divorce. I conclude that those conditions are satisfied based on the following evidence presented at trial:

- a) the parties married on November 24, 2015, in British Columbia;
- b) the parties have been living separate and apart for at least one year since at least November 22, 2020;
- c) there is no collusion in relation to the application for divorce and the parties are not seeking the divorce for any improper purpose or on false evidence;
- d) there is no chance that the parties will reconcile; and
- e) there are reasonable arrangements made for S.R. based on the current arrangements and the application currently before the court. While I have not made my decision regarding the child support or spousal support issues raised by the parties at trial, I am satisfied that the evidence supports that in the spectrum of potential outcomes of my decision, there will be reasonable arrangements made for S.R. such that I can issue an order for divorce.

[137] Based on the foregoing, I am satisfied that the requirements of the Divorce Act have been met. Pursuant to s. 12(1) of the Divorce Act, and the divorce will take effect the 31st day after the issuance of this order.

V. COSTS

[138] I defer my decision on costs until the disposition of the remaining issues raised at trial.

VI. CONCLUSION

[139] From the evidence adduced at trial, it was clear to me that the claimant, the respondent and S.R.'s extended family love and care deeply for S.R. It is my hope that, going forward, all those in S.R.'s life will work together in a cooperative manner to develop and progress in their separate, yet connected, lives and while doing so will make thoughtful decisions based on what is in S.R.'s best interest.

[140] I wish to express my thanks to counsel for both parties for their able and effective work in presenting the case to the court.

"Gibb-Carsley J."

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