
CANADA / JUDGMENT

D.J.D. v. M.L.D.

2016 BCSC 1515

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1515 D.J.D. v. M.L.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.J.D. v. M.L.D.,

2016 BCSC 1515

Date: 20160818

Docket: E035172

Registry: New Westminster

Between:

D.J.D. also known as D.M.J.D.

Claimant

And

M.L.D.

Respondent

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for the Claimant:

J.K. Wahid

Counsel for the Respondent:

J.M. Stein

Place and Dates of Trial:

Vancouver, B.C.

June 13-17, 20-21, 23-24, 2016

Place and Date of Judgment:

New Westminster, B.C.

August 18, 2016

introduction

- [1] The central issue in this family law case is whether it is in the best interests of three girls, ages 8, 10, and 12, to relocate with their mother, Ms. M.D. to Bolton, Ontario, or remain in the Tri-Cities area where their father, Mr. D.D., resides.
- [2] In order to protect the privacy and well-being of the parties' children, I have used pseudonyms for the names of all involved. I order that the parties' initials be used in the style of cause.
- [3] The parties were divorced pursuant to the order of Mr. Justice Armstrong, pronounced on March 28, 2011 (the "Armstrong Order"). The Armstrong Order was a final consent order that addressed parenting issues, child support, and property issues. The pertinent parenting provisions called for joint custody and an alternating week shared parenting arrangement. The Armstrong Order included the following non-removal clause:
6. Neither party shall change the residence of the Children to a location outside of the Tri-Cities area or so close thereto, as not to interfere with the shared parenting plan.
- [4] The mother seeks a variation of the Armstrong Order, which would permit her to relocate with her daughters to Bolton, Ontario, a community that is in close proximity to the Toronto airport. The parties are entirely at odds as to whether it is in their daughters' best interests to relocate.
- [5] The matter initially proceeded by way of summary trial. On June 13, 2014, another judge of this court concluded that there had been no material change of circumstances. Since the threshold question had not been satisfied, he dismissed the mother's relocation application. The mother appealed and in reasons issued on May 5, 2015, the Court of Appeal set aside the decision and remitted the matter back to the trial court to consider the question of whether there was a material change in circumstances.
- [6] In these reasons for judgment, I will summarize the background facts, refer to the applicable legal principles, and set out my analysis of the issues on the merits. While I will not set out the evidence fully, I have reviewed and considered all of the evidence of the parties and the witnesses they called.

background

- [7] The parties were married on June 8, 2002.
- [8] The parties' eldest daughter, C., was born on July 1, 2004. H. was born on May 16, 2006, and K. was born on June 10, 2008 (the "Children").
- [9] The parties separated on November 7, 2009.
- [10] Commencing in January 2010, the parties alternated living in the family home in order that the Children could remain there without disruption. In June 2010, the mother moved into a townhouse owned by her parents in Coquitlam (the "Townhouse"). It is in close proximity to the Children's schools.
- [11] The mother pays her parents rent of \$1500 per month for the Townhouse. However the mother also has a tenant in the Townhouse who pays her \$500 per month. Notwithstanding the payment to her parents of \$85,000 with respect to the Townhouse in 2011 and 2012, the mother maintains that she has no beneficial interest in the Townhouse and that her parents intend to sell the Townhouse in the next few years. Therefore, she would no longer have access to it. On the totality of the evidence, I found her testimony on this point disingenuous. I have concluded that the mother tailored her testimony on this point to conform to what she perceived would be helpful to her case. Moreover and in any event, even if her parents were to sell the Townhouse, there is no evidence that she could not find alternate suitable rental accommodation in the Tri-Cities.
- [12] In November 2010, the matrimonial home was sold. The father purchased his current home and moved to Port Moody.
- [13] From November 2009 to June 2011, the parties exercised an alternate 3.5-day shared parenting arrangement of the Children, with the father caring for the Children from Friday to Tuesday and the mother caring for the Children from Tuesday to Friday. Since June 2011, they have alternated weeks. The Children enjoy a comfortable lifestyle in both of their parents' homes.
- [14] The mother is 39 years old and works as a flight attendant with Air Canada. In 2009, the mother became involved in a new relationship with Mr. A.D., who is a pilot with Air Canada. They married on July 20, 2013. Mr. A.D., who resides in Bolton, Ontario, has shared parenting of two boys, ages 13 and 14 from a previous marriage.
- [15] In 2011, the mother moved her employment base from Vancouver to Ontario. The mother has been commuting to B.C. two times per month to exercise her alternate weeks of parenting time with the Children. She and the Children reside in the Townhouse during her parenting time. When the Children are with their father, she travels back to Toronto. In order to accommodate her parenting schedule and work schedule, she compresses her full-time flying schedule into two weeks.

- [16] The mother asserts that the commute back and forth from Ontario to British Columbia is taking a toll on her and that her employment opportunities are better in Ontario. She wishes to move the Children to Bolton so she can live full-time with Mr. A.D. and regularize her life there.
- [17] The father is 48 years old and is employed as a middle-school teacher in Port Coquitlam. He has exercised equal parenting time of the Children since the parties' separation in 2009. His mother, with whom the Children have a close and loving relationship, assists him twice a week with caring for the Children.
- [18] The Children all attended the same elementary school until September 2015 when C., who was diagnosed with dyslexia in 2013, moved to a middle school to attend Grade 6.
- [19] For the most part, the parties communicate through text messages. I have reviewed the written communications between the parties. The tone of some of their communications is unfortunate. The father, who is unable to respond immediately to the mother's texts during school hours, recognizes that the parties need to improve their communication. He is receptive to improvement and suggested to the mother that they "talk kinder to each other" and that to be more amicable they should discuss matters "once in a while" either in person or on the phone.
- [20] Overall, I find some of the mother's communications with the father needlessly high-handed and confrontational. By way of illustration, she responded to the father's reasonable request for information on her travel schedule by telling him that it was none of his business. The mother did not inform the father that she had transferred her employment base to Toronto in 2011. He only learned of this in 2012, when the parties exchanged financial information. On occasion, the mother has provided the father with little advance notice of trips she is taking with the Children. She dismisses out of hand the father's concern about taking the Children out of school in order to accommodate her family vacations. The mother's palpable animosity towards the father is somewhat concerning.

Terms of the Armstrong Order

- [21] The Armstrong Order was very comprehensive with respect to parenting issues and provided as follows:
2. Joint Guardianship shall mean:
 - a. The parents are to be the joint guardians of the estate of the Children;
 - b. In the event of the death of either parent, the remaining parent will be the sole guardian of the person of the Children;
 - c. Each parent will have the obligation to advise the other parent of any matter of a significant nature affecting the Children;

- d. Each parent will have the obligation to discuss with the other parent any significant decisions which have to be made concerning the Children, including significant decisions concerning the health (except emergency decisions), education, religious instruction, and general welfare of the Children;
 - e. Each parent will have the obligation to discuss the foregoing issues with the other parent and each parent shall have the obligation to try to reach agreement on those major decisions;
 - f. Each parent will have the right, under s. 32 of the Family Relations Act, to seek a review of any decision which he or she considers contrary to the best interest of the Children; and
 - g. Each parent will have the right to obtain information concerning the Children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.
3. The parties have agreed to share time with the Children by mutual agreement and according to the Children's best interests. The parties have agreed to equal time sharing of the Children. The parties have agreed that the present schedule, being 3 ½ days to each party being Friday at 4:00pm to Tuesday morning at 8:00am with the Claimant and Tuesday morning at 8:00am to Friday at 4:00pm with the Respondent, will continue until June 30, 2011 at which point in time it will convert to a "week on/week off schedule" with the exchange to occur on Fridays after school.
4. The parties have agreed to the following parenting plan in relation to holidays:
- a. Spring Break: The parties shall share Spring Break equally. For 2011, and alternating years thereafter, the Claimant shall have the Children in his care for the 1st half and the Respondent shall have the Children in her care for the 2nd half. For 2012, and alternating years thereafter, the Claimant shall have the Children in his care for the 2nd half and the Respondent shall have the Children in her care for the 1st half.
 - b. Summer Vacation: Each party shall be entitled to one two-week period of uninterrupted summer holiday time with the Children. The Claimant will have first pick of vacation access in 2011 and the Respondent will have first pick in 2012, alternating each year thereafter. The parties shall provide notice of their vacation times by April 30 in each year. In order to ensure that no more than 2 weeks of consecutive time are spent with one parent, the parties agree to exchange their respective weeks with one another to provide for the holiday period as follows:

Usual Rotation: H, W, H, W, H, W*

Holiday Rotation: H, H, W, H, W, H* (Claimant's summer holiday)

H, W, W, H, W, H* (Respondent's summer holiday)

*the boldfaced, italicized items are the vacation weeks and "H" refers to the Claimant and "W" refers to the Respondent.

- c. Christmas Break (not including Christmas Eve Day, Christmas Day and Boxing Day): In 2011, and alternating years thereafter, the Claimant shall have the Children in his care for the 1st half of Christmas Break and the Respondent shall have the Children in her care for the 2nd half of Christmas Break. In 2012, and alternating years thereafter, the Respondent shall have the Children in her care for the 1st half of Christmas Break and the Claimant shall have the Children in his care for the 2nd half of Christmas Break.
- d. Christmas Eve Day, Christmas Day and Boxing Day: In 2011, and alternating years thereafter, the Claimant shall have the Children in his care from 3:00pm on Christmas Eve until 1:00pm on Christmas Day and the Respondent shall have the Children in her care from 1:00pm on Christmas Day until 1:00pm on Boxing Day. In 2012, and alternating years thereafter, the Respondent shall have the Children in her care from 3:00pm on Christmas Eve until 1:00pm on Christmas Day and the Claimant shall have the Children in his care from 1:00pm on Christmas Day until 1:00pm on Boxing Day.
- e. Easter: Easter Break shall be shared equally between the parties, with one party having the Friday and Saturday in 2011 and the other having the Sunday and Monday in 2011 and alternating in each year thereafter. The Respondent shall have the choice of whether she has the Friday and Saturday or the Sunday and Monday in 2011.
- f. Greek Orthodox Easter: The Children shall be in the Claimant's care from 5:00pm on the Saturday preceding Greek Orthodox Easter until Sunday at 9:00pm or overnight at the Respondent's option. If Greek Orthodox Easter falls on the Respondent's weekend, the time will be made up on the 1st weekend following Greek Orthodox Easter where the Children would otherwise be in the Claimant's care from 5:00pm the Saturday until Sunday at 9:00pm or overnight at the Claimant's option.
- 5. Each party shall be at liberty to attend the Children's social, recreational or academic activities regardless of which parent has care of the Children during that time and to have such other access as may be agreed upon by the parties.
- 6. Neither party shall change the residence of the Children to a location outside of the Tri-Cities area or so close thereto, as not to interfere with the shared parenting plan.
- 7. Each party shall refrain from any conduct that would estrange the Children from the other party, injure the opinion of the other party, or impair the natural development of the Children's love and respect for the other party and without limiting the generality of the foregoing, neither party shall make disparaging remarks to or in the presence of the Children regarding the other party.
- 8. Each of the parties shall, upon request, provide to the other a Consent Letter, authorizing the other party to travel with the Children and the party who is to provide the Consent Letter will not unreasonably withhold their consent. The party traveling with the Children shall

provide to the other party an itinerary including the method of travel, destination and contact numbers. Subject to agreement between the parties or further court order, the party at whose residence the Children are residing from time to time shall have possession of the Children's passports and each party shall ensure that the Children's passports are delivered to the other party when the Children change residence between the homes of the parties in accordance with the terms of these Minutes of Settlement.

9. Any organized activities for the Children shall take place within the Tri-Cities so as not to interfere with the shared parenting plan. Neither party shall make any arrangements to the contrary without written agreement between the parties or Court Order.

Relocation Plan

[22] On January 16, 2014, the mother sent a letter to the father, advising him of her desire to relocate the Children to Bolton, Ontario where her husband resides. She proposed the effective date of the move as September 1, 2014, and the following parenting arrangement:

1. Our current parenting arrangement of one week on one week off would remain in place until September 1, 2014. The children would then reside with me in the Township of Caledon, Ontario, Canada effective September 1, 2014. In connection with our current arrangement I would take my 2 week summer holiday the last 2 weeks of the summer to prepare the children for the change in residence.
2. You would have visitation with the children as per the following schedule effective September 1, 2014.
 - a) 1-2 week (approximate) school break at Christmas. Your access would commence on December 24 in odd years and on December 26 in even years and would end on the last day of the Christmas break.
 - b) 3 Day period at Ontario Family Day weekend, beginning in 2015.
 - c) 2 week period at spring break, which would consist of the 1 week Ontario school spring break plus 1 adjoining week.
 - d) 5 Day period at Greek Easter.
 - e) 5 weeks of the school summer holiday.
 - f) 5 day period at Thanksgiving.

Should this offer be acceptable then I would be willing assume responsibility for the cost of the Airline Travel expense for the children to facilitate the access as described above through the use of the travel privileges available through my, and my husband's employment.

I will also make available telephone, "skype" and "facetime" communication.

[23] In May 2014, she filed a Notice of Application seeking a variation of the Armstrong Order.

legal framework

- [24] In the seminal decision of *Gordon v. Goertz*, [1996] 2 S.C.R. 27 [Gordon], the Supreme Court of Canada sets out the legal framework for analyzing parental mobility applications brought under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [25] In *Gordon*, the custodial mother applied to move from Saskatchewan to Australia with their seven-year-old daughter, against the wishes of the father. The mother was granted permission by the trial judge and had relocated by the time the matter came before the Supreme Court of Canada. The trial judge's decision allowing the move was unanimously upheld by the Court, although the reasons were not unanimous and the parameters of access were modified.
- [26] Madam Justice McLachlin (as she then was), writing for the majority of the Court in *Gordon*, stated as follows:
- [9] The principles which govern an application for a variation of an order relating to custody and access are set out in the Divorce Act. The Act directs a two-stage inquiry. First, the party seeking variation must show a material change in the situation of the child. If this is done, the judge must enter into a consideration of the merits and make the order that best reflects the interests of the child in the new circumstances.
- [27] At paras. 49-50, McLachlin J. summarized the principles which inform the analysis of parental mobility applications under the Divorce Act:
- [49] The law can be summarized as follows:
1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
 6. The focus is on the best interests of the child, not the interests and rights of the parents.
 7. More particularly the judge should consider, *inter alia*:

- (a) the existing custody arrangement and relationship between the child and the custodial parent;
- (b) the existing access arrangement and the relationship between the child and the access parent;
- (c) the desirability of maximizing contact between the child and both parents;
- (d) the views of the child;
- (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
- (f) disruption to the child of a change in custody;
- (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[50] In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[Emphasis in original.]

[28] Under the Divorce Act, each relocation case must be determined in accordance with its facts without the application of any presumptions or burden of proof: *S.Z. v. D.Z.*, 2015 BCSC 2157 at para. 75 [S.Z.]. The only consideration in these disputes is the best interests of the child whose future is at stake: Gordon at para. 20. The "best interests" test endorsed by the Court in Gordon mandates a full and a sensitive inquiry: *McArthur v. Brown*, 2008 BCSC 1061 at para. 112 [McArthur]. The individualized inquiry must have regard to all the relevant circumstances relating to the particular child's needs and the ability of the parents to satisfy those needs: *McArthur* at para. 112; Gordon at para. 49. Ultimately, the Court must weigh all the negative repercussions on a child and the benefits to a child of a proposed relocation.

[29] The Court in Gordon also stated that the maximum contact principle set out in the Divorce Act is a mandatory consideration but not an absolute one. A proposed relocation will not necessarily be denied solely on the basis that it will have the effect of reducing a parent's parenting time with the child. As observed by the Court in *McArthur* at para. 117, the fact that there will be reduced parenting time for the non-moving parent to see his or her children is an obvious outcome of relocation in the vast majority of cases. The focus of the Court must be on the consequences to the child of the reduced parental interaction which would result from the proposed relocation.

- [30] The subsequent jurisprudence from our Court of Appeal has affirmed the rejection of any legal presumption in favour of the status quo and underscored that presumptions are inappropriate in parenting disputes, because they detract from the individual justice to which every child is entitled: *Nunweiler v. Nunweiler*, 2000 BCCA 300 at para. 30; *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 26 [Hejzlar].
- [31] I have reviewed all of the authorities the parties provided; those in which the relocation was ordered and those in which it was refused. Although the cases are instructive, I do not propose to review them in detail, as this is primarily a fact-driven analysis with each case turning on its own unique facts.

analysis

- (i) Has there been a material change in circumstances?
- [32] The mother asserts that the facts of this case clearly support a finding of a material change in circumstances.
- [33] The father counters with the submission that the mother has not discharged her onus to establish that there has been a material change of circumstances.

Legal Framework

- [34] Section 17(5) of the Divorce Act governs the variation of a final order:

17(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

- [35] The reasons for the majority in *Gordon* at paras. 10-16 direct that the parent applying for a variation in a custody order must first satisfy the threshold requirement of demonstrating a material change in the circumstances of the child. If the applicant is unable to meet this threshold requirement, the inquiry can go no further: *Litman v. Sherman*, 2008 ONCA 485 at para. 26. In order to meet the threshold requirement, the judge must be satisfied of:
- (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child;
 - (2) which materially affects the child; and
 - (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[36] In the Court of Appeal's earlier decision in this case, the Court clarified the proper approach to the judicial test for material change. After canvassing the pertinent authorities, the Court formulated the essential question as follows:

[24] The focus of the chambers judge was on whether Ms. D. knew or reasonably foresaw that she would marry Mr. A.D. and move to Ontario. This, however, is not the question to be asked. The questions are: was the proposed move of the children to Ontario a change in circumstances that was actually contemplated at the time the agreement was entered into, and if not, is it in the best interests of the children to move to Ontario?

[Emphasis added.]

Facts

[37] Following separation and the commencement of this legal proceeding in April 2010, the mother admits that the father had expressed concern to her about the possibility of the Children moving to Ontario.

[38] The father's counsel points to the email exchange between counsel in June 2010. On June 2, 2010, counsel for the mother wrote:

Lastly, you have indicated that [Mr. D.] is concerned with the possibility that my client may move the children to Ontario. I have canvassed this concern with [Ms. D.] and she confirms that she has no such plans. In fact, despite the fact that there are not such plans, as a sign of good faith and so as to put your client's concerns to rest, she will agree to an order being made preventing either party from changing the residence of the children to a location outside of the TriCities (Coquitlam, Port Coquitlam, Port Moody) area without the written consent of the other or court order

[39] This exchange led to the consent order dated June 22, 2010, which prohibited either party from changing the residency of the Children outside of the Tri-Cities. Counsel points out that the email was not in evidence at the summary trial or appeal.

[40] The father remained concerned about the potential of the Children moving to Ontario. In order to address his concern the parties agreed to include the non-removal clause in the Armstrong Order, referred to in para. 3 of these Reasons.

[41] As I stated earlier, the mother transferred her employment base to Toronto effective as of June 2011. The letter from Air Canada confirming the same is dated April 13, 2011, some 16 days after the Armstrong Order was pronounced. The mother provided no proof of the date when she made her request for the employment base transfer. The mother asserts that her seniority with Air Canada is higher at the Toronto base and this permits her to work full-time and meet the demands of the alternating week shared parenting schedule.

- [42] After the parties' separation in November 2009, the mother continued to spend time with Mr. A.D. I do not accept that in March 2011 their relationship was properly characterized as "casual". They were clearly intent on pursuing their relationship. In the previous year, they had already introduced their children to each other. A photograph with Mr. A.D. and the Children from 2010 is entitled "Our Blended Family".
- [43] Mr. A.D. was embroiled in an acrimonious divorce proceeding in 2011. From January 2010 until September 1, 2011, he resided with his parents. Mr. A.D. was divorced in January 2013, and the final order regarding custody of his children was pronounced in April 2013.
- [44] Mr. A.D. and the mother were engaged in February 2013 and married in July 2013.
- [45] The mother acknowledged that it was sometime in 2013 that she decided that she would pursue relocating the Children to Bolton, Ontario. As I referred to earlier, the first request she made of the father for relocation of the Children was in January 2014.

Discussion

- [46] I find that on March 28, 2011, the date the Armstrong Order was pronounced, the mother was clearly contemplating transferring her employment base to Toronto. I accept that she had legitimate career reasons for moving to Toronto and that the transfer would better facilitate her working full-time and implementing the alternating week parenting schedule. The transfer also permitted her to pursue her relationship with Mr. A.D. who, as I mentioned, was at the pertinent time embroiled in his own matrimonial dispute.
- [47] On the totality of the evidence, I find on balance that it was not the mother's intention in March 2011 to relocate the Children to Ontario. At the material time, she planned to maintain a stable and secure environment for her daughters in the Tri-Cities. She, in fact, did that for over two years before initiating these proceedings. From March 2011 until she made her request in January 2014, the mother has exercised her parenting time in the Tri-Cities, pursuant to the terms of the Armstrong Order. It was her subsequent marriage to Mr. A.D. that prompted her request for relocation.
- [48] The terms of the Armstrong Order are based on the assumption that the Children's residence with their mother would remain in sufficient proximity to their father to permit the alternating week shared parenting schedule. The mother's relocation to Bolton, Ontario, would significantly alter the father's parenting time with the Children as contemplated in the Armstrong Order. This is a change which materially affects the Children.
- [49] In the end, I am satisfied that the statutory threshold requirement of a material change in circumstances has been met in this case.

(ii) Is the proposed relocation in the Children's best interests?

- [50] I turn to consider the question that lies at the heart of this dispute: in all the circumstances, is it in the best interests of the Children to relocate to Bolton, Ontario, with their mother?

- [51] As an unfortunate result of the reality of their marital separation and divorce, these parents cannot agree what is in the best interests of their Children and it falls to this Court to make this very difficult decision. There is no question that in this case, both parents dearly love their daughters and one of them will be profoundly disappointed by the outcome of these proceedings.
- [52] It is crucial that only the Children's best interests inform my determination of whether the Armstrong Order should be varied.

Dr. Posthuma's Report

- [53] I turn first to Dr. Posthuma's report. Dr. Posthuma is a psychologist with credentials in child custody matters. The parties jointly retained him to conduct an assessment and prepare a report pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25.
- [54] Dr. Posthuma initially met the father at his home and observed him with his daughters on December 14, 2015, for two hours. He conducted six hours of interviews and testing of the father on December 16, 2015. Dr. Posthuma interviewed each of the Children on December 21, 2015, after they were brought in by their father. He interviewed the Children again on January 4, 2016, after they were brought in by their mother. He recorded three and a half hours of time for each of the two sessions with the Children. His time sheets record 14 hours on January 5, 2016, for interviewing and testing the mother and Mr. A.D. He interviewed and conducted psychological testing of Mr. A.D.'s sons on January 7, 2016. Finally, he spent two hours at the mother's home on January 7, 2016. Dr. Posthuma acknowledged that the majority of time he spent with the family was for the psychological testing sessions.
- [55] Dr. Posthuma also interviewed various collateral witnesses. His instructions to the parties state that he prefers interviewing "objective professionals versus family and friends". He notes that evidence from friends and neighbours are better examined directly by the Court. At the mother's request, he interviewed a former neighbour of the parties, as well as the mother's family doctor, C.'s piano teacher and Ms. F., a therapist in Ontario who has worked with Mr. A.D.'s family. At the father's request, Dr. Posthuma interviewed the Children's pediatrician and C.'s teacher. While he had a brief discussion with the school principal, he did not speak to H.'s or K.'s teachers as requested by the father.
- [56] Dr. Posthuma issued his report on March 24, 2016. In his report, Dr. Posthuma delineated various risk factors involved in relocation applications, as well as factors that assist and protect the child from those risks. According to Dr. Posthuma, the factors he identified are based on pertinent social science research. Dr. Posthuma ultimately concluded that it would be in the best interests of C., H., and K. to live primarily with their mother in Bolton, Ontario.

[57] Counsel for the father argued that there are several difficulties with Dr. Posthuma's report. I agree. I have many concerns regarding the basis upon which Dr. Posthuma arrived at his recommendations.

[58] The principal underpinning to Dr. Posthuma's assessment is his clinical observation of the comparison of the Children's behaviour in each parent's home. As a result of his observations of the respective home visits, Dr. Posthuma concluded that the Children were more comfortable and relaxed with their mother than with their father.

[59] In my view, the two observation periods are not comparable:

- The observation period at the father's home was the first time the Children and the father had met Dr. Posthuma. It was a routine Monday afternoon, before the Christmas break. C. was completing her homework. The father was understandably very nervous, as were the Children, having not met Dr. Posthuma prior to the home observation. I accept the father's evidence regarding the home visit including his evidence that the Children were quieter than usual and that the interaction was somewhat awkward.

- In contrast, the observation period in the mother's home was on a Thursday evening, shortly after the Christmas school break. Mr. A.D., his two sons, and the Children's maternal grandmother were in attendance, as well as a dog and the tenant from downstairs. The family was engaged in playing a board game and then had dinner. This cannot fairly be described as a routine school evening.

- Significantly, the observation period at the mother's house was the fourth time the Children had met Dr. Posthuma, having attended two sessions at his office. It not surprising that the Children were more relaxed during this home visit than in the initial home visit .The mother had interacted with Dr. Posthuma on two previous occasions.

[60] At trial Dr. Posthuma acknowledged that clinical judgment is notoriously unreliable. He acknowledged, however, that he based his conclusion that the Children are motivated by guilt and compassion for their father upon the observations he made during the mother's home visit on January 7, 2016. On the preponderance of the evidence I am driven to the conclusion that Dr. Posthuma approached the interviews of the collateral witnesses seeking confirmation of his conclusion that the Children behaved differently with their mother than with their father. I note that Dr. Posthuma's interviews of the collateral witnesses proposed by the father are all considerably shorter than the interviews he conducted with the collateral witnesses proposed by the mother. He appeared to discount any evidence that did not accord with the determination he made on January 7, 2016.

[61] I turn first to consider his telephone interviews of the father's collateral witnesses.

[62] The Children's pediatrician, Dr. H., met with all members of the family in March 2016, including the mother and Mr. A.D. Dr. H. told Dr. Posthuma that the father places the best interests of the Children first and that the Children were all thriving in the Tri-Cities. She noted that each parent gave her the same behavioural description of the Children doing

well. She told Dr. Posthuma that the father is devoted to his daughters, as they are to him. According to Dr. H., the Children are happy and do well with their dad with whom they have a loving relationship. She stated that, in her view, it would not be good for the Children to move to Ontario.

- [63] C.'s teacher at her new school reported to Dr. Posthuma that C. was happy in the classroom and that she had made new friends. She was producing good work and no longer needed extra help with her dyslexia. The school principal at the other Children's school reported that both H. and K. were doing well and there were no concerns academically or with their behaviour.
- [64] After he had provided his list of collateral witnesses, the father, in a misguided concern over the potential negative impact of Mr. A.D.'s relationship with his ex-wife on his daughters, inquired of Dr. Posthuma as to whether speaking to K.D., Mr. A.D.'s ex-wife, would be helpful. Dr. Posthuma admits that he encouraged the father to provide his contact information to K.D. Dr. Posthuma spoke to her for 35 minutes, which is substantially longer than he spoke to any of Mr. D.'s collateral witnesses. After receiving an unsolicited email from K.D., Dr. Posthuma contacted counsel, who both indicated that K.D.'s views were not relevant to his assessment of the issues of what parenting arrangement was in the best interests of the Children. Dr. Posthuma nonetheless refers in his report to her extreme negativity towards her ex-husband. In all the circumstances, I reject Dr. Posthuma's assertion that the inclusion of Mr. A.D.'s ex-wife in the assessment demonstrates that the father's anger and hostility towards the mother is a strong motivator for him.
- [65] I turn to the mother's collateral witnesses. I indicate below which witnesses testified at trial.
- [66] I found Ms. F., the therapist who had worked with Mr. A.D.'s family in Ontario and who spoke to Dr. Posthuma, to be an unimpressive witness. She testified by video conference. By way of illustration, in her testimony she was critical of Mr. A.D.'s ex-wife, who had attended family therapy sessions with Ms. F. She wrote a letter in 2014 supporting the relocation, even though she had never met the Children or their father. Overall, her evidence is of little assistance.
- [67] Dr. A. is the mother's family physician. While the father has brought in the Children for appointments over the last two years, the Children have regularly attended her office with their mother for a longer period of time. Dr. A. noted that the father was warm and appropriate with his daughters. In responding to Dr. Posthuma's question, she confirmed the Children were more relaxed when they attended her office with their mother. In my view, this can be explained by the fact that they had been attending the family doctor regularly with their mother for a longer period of time than with their father.
- [68] Ms. W. (S.), a friend of the mother's and former neighbour of the family, testified at trial. Ms. W., who taught for a number of years at the same school as the father, acknowledged that the father is a good teacher and very well-liked by his students. On cross examination, she admitted that she had no personal knowledge of the father broadcasting unflattering

comments about the mother to the neighbours and prohibiting the Children from playing with the neighbourhood children if they were supportive of the mother. Nor did she ever observe the father showing the Children pictures of their mother and commenting on her breaking up the family. It was the mother who reported this to Ms. W.

- [69] In all the circumstances, I have accorded no weight to Ms. W.'s reporting of the father's behaviour after the breakup of the marriage. In any case, the last interaction she observed between the father and the Children was in 2010, when the father moved out of the neighbourhood. Ms. W.'s interests were clearly aligned with those of the mother and I found her testimony lacked sufficient objectivity to be of much assistance.
- [70] Dr. Posthuma refers to the post-separation events reported by Ms. W. as supporting his assertion that the father bears significant frustration and anger towards the mother. I do not see it that way.
- [71] The circumstances of the parties' separation were very difficult for all, but particularly for the father. The Children were one, three and five years old at the time of separation. The father, understandably, was very hurt and angry with the circumstances of the separation. The father may well have acted injudiciously for the initial year or so after the separation. However, after his marital breakdown, he took appropriate steps to address this, including professional counselling. I find that, for the most part, the father has substantially resolved his anger and has moved forward in a manner he reasonably believes reflects the best interests of the Children. I also note that although the father told Dr. Posthuma that he has little residual anger towards the mother, and his assertion was consistent with Dr. Posthuma's pertinent testing, Dr. Posthuma concluded otherwise.
- [72] C.'s piano teacher, Ms. M., also testified. Again, I did not find her to be an objective witness. The mother brought C. to bi-weekly piano lessons, starting in the fall of 2013. The father contacted Ms. M. in the spring of 2014 and arranged to bring C. to her lessons once a week during his parenting time commencing in the fall of 2014. He never missed a lesson and was always on time. He bought C. an electric piano so she could practice at his home. In approximately April 2015, and after consultation with the mother, Ms. M. requested that C. attend every second week with her mother, with the result that the father no longer brought C. to her piano lessons. According to Ms. M., this was due to her own scheduling issues.
- [73] Initially the father was opposed to the lessons, and he could have handled the matter more tactfully. However once he appreciated that C. was enjoying piano he took appropriate steps to support her. I accept his explanation for not attending the piano recitals. Ms. M. also related to the Court that C. was more reserved and not as well-prepared when her father brought her to her lessons in 2014/2015. There may be a number of factors that explain this. She also testified that C. was not prepared for her recital in 2016. On the evidence I am not persuaded that C.'s lack of preparation for the 2016 recital is fairly attributable to any of her father's conduct. Overall, I am not persuaded that the matter of C.'s piano lessons is particularly significant in the context of the evidence as a whole.

- [74] In addition to concluding that the Children were more comfortable and relaxed with their mother than their father, Dr. Posthuma concludes that the Children "feel obliged to protect their father and reflect his wishes in the current dispute." He acknowledged that he based this conclusion on his judgment of his observation of the Children and their father at the home visit. The facts as I find them do not support such a conclusion. On the totality of the evidence, I prefer the evidence of the witnesses who observed the father having a different type of interaction with his daughters than that described by Dr. Posthuma in his report. Mr. S., Mr. P., Mr. A., Ms. E., and Ms. A., each had more regular contact with the Children and their father than the collateral witnesses described above. I will return to their evidence in the next section of these reasons.
- [75] I also note that during her interview C. told Dr. Posthuma that she likes lots of things about her dad and that he "makes me laugh in lots of ways when we eat meals, play games." In my view, these comments reflect a relationship that is inconsistent with the conclusion Dr. Posthuma drew based on his home visit observations.
- [76] I turn next to the views of the Children. In order to mitigate any issue of bias, Dr. Posthuma interviewed them twice, once after their father brought them in and then again after their mother brought them in a few weeks later. Each of the Children, in both of their individual interviews with Dr. Posthuma, expressed that they did not want to move to Toronto and that they would prefer to see both parents equally. The transcribed notes of Dr. Posthuma's interviews with the Children do not support a finding that their stories were scripted.
- [77] C. stated in both interviews that she has many good friends in B.C. (and only one in Toronto) and described her extracurricular activities. She also stated that she was doing well in school and likes her teachers. She told Dr. Posthuma that her paternal grandmother comes to their house every Monday and Thursday to help out. She also visits with her paternal aunt and cousins, whom she likes, at least once a month. They live in Bellingham, Washington. Her maternal grandmother lives in Hong Kong but often visits the Lower Mainland in the summer. She likes Vancouver more than Toronto. She would prefer living in the Lower Mainland to Toronto because "both sides of the family are here".
- [78] H. described her skating activities, her circle of friends, and what she does when she spends time with her friends. She told Dr. Posthuma that she likes her friends where she is, that she has no friends in Toronto and that she does not want to move to Toronto. She described her paternal grandmother cooking Greek food for her, which she likes.
- [79] K. described her friends and stated that she "loves" her present school. She described the people she sees when she is with her mother as well as her paternal extended family who she stated she sees often.

- [80] Dr. Posthuma expressed the view that the Children fear asserting themselves with their father. Again, I do not see it that way. The father and his sister were raised by a single working mother with the assistance of their maternal grandmother. The preponderance of the evidence supports a finding that the father recognizes the importance of supporting and nurturing the individuality of each of his daughters and that he is a committed father who is striving to raise strong, confident, and independent daughters.
- [81] In his report, Dr. Posthuma states that the mother reported that C. has problems with anxiety and that both parents see H. as having social anxiety problems. However, in their testimony at trial, both parents stated that none of the Children have any issues with anxiety. When confronted with this at trial, Dr. Posthuma maintained that, given the conflict between the parties, "there must be anxiety" in the Children. Notably, however, in his report, he concludes that the Children have made a "fairly good adjustment" to their parents' divorce.
- [82] Another significant concern is that, in reaching his conclusions, Dr. Posthuma did not engage in any analysis of other pertinent factors, such as the Children leaving their friends and extended family, including their paternal grandmother and aunt and cousins who they see regularly and with whom they have a close and loving relationship, changing schools, and leaving their extracurricular activities. He does not address whether this would increase the risk of the Children developing emotional problems.
- [83] Finally, I turn to Dr. Posthuma's methodology. Dr. Elterman, who testified at trial, provided a critique report to the Court regarding the use and interpretation of Dr. Posthuma's psychological test results in his assessment. Dr. Posthuma admits that he uses several psychological tests that are not used by any other psychologist in B.C. in child custody evaluations. He acknowledged that several of these tests are frequently used in neuropsychological assessments to assess brain functioning. While Dr. Posthuma has written about the use of these tests in child custody evaluations in a chapter of a book published in 2016, the use of these tests in child custody evaluations has not been generally accepted by the professional community. I prefer Dr. Elterman's testimony that the use of these tests for child custody evaluations has not been subject to peer review and has not been empirically validated. In the end, I place little weight on Dr. Posthuma's interpretation of the psychological test results outlined in his report.
- [84] For completeness, if I am incorrect about the validity of Dr. Posthuma's interpretation of the psychological testing, I note that it would not change my overall conclusions on the weight to be accorded to Dr. Posthuma's report.
- [85] In summary, for the reasons outlined above, I cannot accord much weight to Dr. Posthuma's recommendations.

Gordon v. Goertz Factors

- [86] I turn next to consider the application of the factors set out in Gordon.

- [87] In determining the best parenting arrangements, the authorities mandate that in its assessment, the Court must consider not only the time spent by each parent with a child, but also the role each parent plays in the child's life and each parent's contribution as a caregiver: *S.S.L. v. J.W.W.*, 2010 BCCA 55 at para. 32 [S.S.L.]. The amount of time a parent spends with a child is not to be given undue emphasis.
- (i) The existing arrangement and the relationship between the Children and their mother and the Children and their father
- [88] It is uncontroversial that the girls have a strong bond and loving relationship with their mother. She is, by all accounts, a very good mother. However, I am unable to accept that she can fairly be characterized as the girls' primary caregiver, assessed by either time spent or in substance. On the totality of the evidence I find that the parties co-parent substantially equally; each parent contributes equally to the Children as care-givers. To be clear, I reject the mother's assertion that she "attends to her parental duties and to the general and specific needs of her children at a significantly higher level of interest and consistency than does the father": *Murphy v. Murphy*, 2002 YKSC 6 at para. 30.
- [89] I recognize that the mother, particularly since 2011, has primarily been responsible for arranging medical and dental appointments and the girls' organized activities. She has also volunteered in the classroom. However, in my view, this is more a reflection of the parties' respective work schedules. Unlike the father who works during the week, the mother is not working during her weeks of parenting time in Vancouver.
- [90] The father, who is a well-regarded middle-school educator, also has a strong bond and loving relationship with the Children. He, too, is a very good , involved and committed parent. He has played an equally significant and essential role in the Children's lives. The father described his daily and weekend routine with the Children. It is very clear the Children are the focus of his life. I accept the father's testimony regarding the spontaneous play and activities the girls engage in at his home. He too is sensitive to the emotional needs of the Children. He is diligent about the Children's academic matters, which he considers a priority. The father has a large backyard and his home is adjacent to a green belt and a park. The Children and their father are very physically active in their leisure time. He takes the Children to scheduled and non-scheduled activities and the family enjoys many recreational activities, including camping, hiking, and swimming at various public beaches. He has taken the Children skiing. He regularly takes the Children to his family gatherings and to church on Sundays. He attends all the teacher's conferences at the Children's schools and takes the Children to medical appointments as required.
- [91] Mr. S., the father's neighbour, described the father as an excellent father to the Children. He has observed the Children and their father playing catch, playing on the zip line that their father constructed in the backyard, and riding bikes in the back lane. He also described much laughter and the Children and the father having fun and engaging in free play together.

- [92] Mr. P., a firefighter with two daughters of similar ages to the Children, described his observations over the past two years at the Sunday gatherings the Children regularly attend at his home. The Children engage in free play and are loving and physically affectionate with their father. He described the father as patient.
- [93] Mr. A., a childhood friend of the father, is a Grade 8 teacher in Abbotsford. He and his wife are H.'s godparents. Over the Children's lifetime, he has consistently seen them with their father three times a year at family gatherings. He described the father as affectionate with, and attentive to, the Children and that he is fun-loving and playful with them. He is also sensitive to the special needs of Mr. A.'s son. Mr. A. acknowledged that, based on his past observations, the mother is also a good parent.
- [94] Ms. E., the father's sister, lives in Bellingham, Washington, with her husband and three children. She has two daughters, ages 18 and 16, and a son who is 11. The Children see her family one to two times per month; the two families and the paternal grandmother celebrate all six children's birthdays together, as well as holiday celebrations including Christmas, Easter, New Years, and Thanksgiving. She persuasively described the encouraging, playful, fun, and vibrant environment the father promotes for the Children and the loving and affectionate bond between the Children and their father.
- [95] I found Ms. A., the Children's paternal grandmother, to be a very credible witness who provided clear and compelling testimony. As I mentioned, she assists the father with the Children's care twice a week during the school year. She described the father playing with the Children and the genuine love and affection she has observed in the father's home. I also note that the recent interactions between Ms. A. and the mother have been gracious and respectful.
- [96] I accept the evidence of each of these witnesses across the board.
- [97] I also note that the maternal grandmother, who clearly bears a degree of animosity towards the father, acknowledged in cross examination that he is a "great father". In addition, Ms. G., another witness called on behalf of the mother, admitted in cross examination that the father was a good father, and that he was caring and loving with his children.
- [98] Both parties in this case raised concerns about, and criticisms of, the other. Each party testified about one or more of the Children reporting unflattering parental behaviour on the part of the other. While there likely is some accuracy to that evidence, I find nothing of consequence turns on it.
- [99] Few parents, including good ones, emerge from the intrusive and critical scrutiny of the judicial microscope as being a perfect parent: McArthur at para. 2. The case at hand is no exception. As courts have repeatedly noted, in family litigation the conduct of both parties is frequently "less than optimal": Gatien v. Avini, 2015 BCCA 383 at paras. 57-58, referencing LeClair v. Mibrella Inc., 2011 BCSC 533.

- [100] I turn to address the concerns raised by the mother. I note at the outset that the parenting abilities of the father did not appear to be an issue from the time of separation until 2013 when the mother determined that she wanted the Children to relocate to Bolton, Ontario.
- [101] I find on the preponderance of the probabilities that the father likely does not make disparaging comments about the mother to the Children and that in the parties limited interactions he has not sought to intimidate either her, her friends or her family members. He appreciates the mother's important role.
- [102] I have not overlooked the fact that the father, at trial, admitted to having failed to report an increase of \$250 per month in rental income in his tax return for 2014 and 2015. I accept that the father, who is under some financial pressure, applied these funds towards expenses for the Children. However, there can be no doubt that he should have reported that income for tax and child support purposes. He has now rectified the matter. Neither this matter nor the fact that the father is sometimes days late in making his child support payments is a reflection on his parenting abilities. I do not consider that these matters inform or are relevant to the material issues before me.
- [103] The mother was aware that the father took the Children to church on Sundays after their separation. The father should have discussed with the mother earlier than he did that he was taking the Children to a church of a different denomination. The mother expressed concern about this, but acknowledged that the Children appear to be content to attend church with their father. In order to address any concerns, and although she has not done so to date, the father had suggested in 2014 that the mother attend the choir service at the church when the Children were singing.
- [104] There is a difference in the parties' parenting emphasis and parenting style. The primary focus of the mother's criticism was the father's attitude with respect to the Children's extracurricular activities and the payment of the costs associated with these activities. It is clear that the Children are all active and involved in various organized activities. Their schedule is full. In the spring of 2016, C. took piano and voice lessons, played in the school band, and played softball. H. is very involved in competitive figure skating and synchronized skating, and K. in various types of dancing, as well as swimming lessons.
- [105] The parties' approach to the importance of these scheduled activities is different. As noted by the Court in S.Z. at para. 110, "sports and other recreational activities should complement a child's life rather than dictate the circumstances of that life." The father considers that there is value to the Children not always being engaged in one scheduled activity or another. The father, whose finances are strained, has expressed concern about the cost of the activities. It is a legitimate and pragmatic concern. The financial issues, in turn, have exacerbated the difficulties in the communication between the parties. To this end, the parties agreed to a consent order in October 2013 regarding the Children's activities and the costs of those activities. Although the father was concerned that the Children were overtaxed, he committed to taking each of the Children to their respective

activities. The father has supported the Children's activities and attended their competitions and recitals. The mother acknowledged in cross examination that for the past two years, the father has faithfully fulfilled his commitment and she currently has no concern with respect to the father attending to the extracurricular needs of the Children.

[106] In my view the broad range of unscheduled extracurricular activities the Children engage in with their father is equally important to their well-being as their scheduled extracurricular activities.

[107] In the past, there was some disagreement between the parties with respect to how to address C.'s learning challenges. It is uncontroversial that C. is happy in the classroom and doing sufficiently well at school that she achieved a place on the honour roll. She receives full educational support at her father's home, as do all the Children. His approach is different than the mother's, but I am not persuaded that it is any less valuable.

[108] In the final analysis, the Children have benefited from the differences in the parties' respective parenting styles.

[109] On the totality of the evidence, overall I find each of the parties to be a loving and capable parent; they are each clearly committed to the Children. They each have strong parenting skills. Crucially, each party acknowledged that the other was a loving and affectionate parent. This is reflected in the equal parenting arrangement that they have carried out by agreement since separation.

(ii) The views of the Children

[110] The expressed views of the Children are not determinative but rather provide "context in which to understand better the whole of the evidence that must be weighed": S.Z. at para. 103 referencing *Rupertus v. Rupertus*, 2012 BCCA 426 at para. 13.

[111] As I discussed above, each of the Children told Dr. Posthuma that they did not wish to move to Toronto.

[112] The views that the Children conveyed to Dr. Posthuma are consistent with what they related to their paternal grandmother, Ms. A.

[113] The father had asked Ms. A. not to speak to the Children about the court proceedings. Ms. A. related to the Court that on a school day, in May 2016, when she was on an outing with H. and K., K. began crying. Her grandmother asked her what was wrong and she told her that "mom told us that they're going to court and that man has given such a good report for her. And when I heard that, I left, and I went to my room, I just started crying, YiaYia, I don't want to go to that Toronto." After school on the same day of the incident with K., Ms. A. spoke to C. in her room. She asked C. to be honest with her about whether she wanted to go to Toronto. According to her grandmother, C. jumped off her chair and said that she did not want to move to Toronto. Ms. A. testified that the happiness of the Children was more important to her than anything in the world if the Children had indicated to her that they

wanted to move she would have tried to persuade her son to let them move with their mother. I believe her.

[114] Ms. A. also related to the Court another discussion she had had with C. in 2014, when C. had told her grandmother that she did not want to move to Toronto.

(iii) The mother's reasons for moving

[115] Gordon expressly forbids the Court to take into account a parent's reasons for moving, except in exceptional circumstances or where it is relevant to the parent's ability to meet the needs of the child.

[116] The Court of Appeal observed in *T.K. v. R.J.H.A.*, 2015 BCCA 8 at para. 50 [T.K.], that restricted consideration of "the custodial parent's reason for moving", only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child, has proven to be challenging in the application. The Court in *T.K.* concluded that in cases where there is an order for shared parenting and parents are acting as "joint custodial parents", the reasons for one of the joint custodial parents wanting to move, effectively terminating the arrangement that had been agreed to have been in the best interests of the children, would be very relevant: at para. 53.

[117] The Court in *T.K.* summarized its analysis as follows:

[54] In summary, there may be many legitimate and worthy personal reasons for a parent wanting to relocate or a parent wanting to remain in the children's existing community, that are entitled to be respected. However, those reasons may also be relevant to the question of whether the proposed move meets the children's needs and/or the parent's ability to provide for those needs and therefore may be a necessary consideration with the other relevant evidence to determining the custodial arrangement that is in the best interests of the children.

[118] The courts have repeatedly recognized that the economic prospects, financial security, career fulfillment, and emotional well-being of a parent are legitimate considerations in the assessment of the best interests of a child: *S.S.L.* at para. 33; *D.S.B. v. D.A.C.*, 2005 BCSC 913 at para. 66; *McArthur* at para. 153. The potential positive effect on a child resulting from being cared for by a well-functioning, productive, and happy parent is a valid consideration in assessing the best interests of a child.

[119] In this case, the mother's primary reason for relocation is her marriage to Mr. A.D. She believes she could provide a more supportive and stimulating environment for her stepsons, as well as her daughters, if they were to live primarily in Bolton. This proceeding is anchored in the mother's assertion that her current lifestyle of a condensed flying schedule, parenting in Vancouver and being separated from her husband and stepchildren is no longer sustainable. I accept that she has found her current schedule stressful and very physically and mentally demanding. This state of affairs is no doubt straining her marriage. The mother has been on medical/stress leave since March 2016. Although her schedule was

a contributing factor, the primary reason for her leave is the stress attributable to this litigation.

[120] The mother also hopes that her financial circumstances will improve if she moves the Children to Bolton, in which case she would be managing only one household. She described the possibility of working "mini-blocks" which would entail half of the requirements of her current work schedule. She hopes to retire in the next two years and become a full-time homemaker.

(iv) Disruption to the Children consequent on the removal from family, schools, and the community they have come to know

[121] The Children have spent their entire lives in the Tri-Cities. It is uncontroversial that all three Children are doing well at their present schools and in their community. They each have very full lives with activities they are enjoying. They each have a circle of friends. The totality of the evidence supports a finding that these are happy and well-adjusted children.

[122] The Children have the good fortune of having significant and loving relationships with both their paternal and maternal grandmothers.

[123] Their paternal grandmother and her husband live in the Kitsilano neighbourhood in Vancouver. As I stated earlier, she has a lifelong, special and close bond with the Children, and assists with their care twice a week. The Children often have Sunday dinner at her home in Vancouver. She takes them on various outings. The evidence also establishes that the Children have a close and loving relationship with their paternal aunt and cousins, with whom they celebrate birthdays and special occasions. These celebrations are often at the grandmother's home.

[124] These important relationships would be significantly altered by the proposed move: *Hanna v. Hanna*, 2001 BCSC 1619; *T.L.L. v. C.R.L.*, 2011 BCSC 675 at para 62.

[125] Additionally, the Children's maternal grandparents, who reside in Hong Kong, have a summer place in Birch Bay, Washington and the Children visit them in the summer. Their grandmother, who has a loving relationship with the Children, travels to Vancouver frequently. There was no evidence that she would be regularly travelling to Ontario to visit the Children. The mother's brother lives in Florida and her sister, who lives in the Lower Mainland, is not particularly close with the Children.

[126] The father is not close to his relatives who reside in Hamilton and Montreal, and the Children have never met them.

[127] The mother testified that based upon her inquiries she has determined that there are suitable schools for the Children in Bolton and that the Children can carry on their extracurricular activities there. Mr. A.D. is supportive of the Children's extracurricular activities. Over time it is likely that the Children would eventually establish new routines and new friendships in Bolton. While I accept that Mr. A.D.'s parents and his sister's family

would be welcoming of the Children, I cannot accept this is a proxy for the life-long relationships and attachments to their paternal relatives that I have described above.

[128] Overall, I find this factor favours the Children remaining in British Columbia.

(v) The desirability of maximizing contact between the Children and both parents

[129] The assessment of a child's best interests in a mobility application necessarily engages the "maximum contact" principle. It has been observed that proximity of parental homes will usually be in the best interests of children with two good parents: S.S.L. at para. 25. However, the authorities are clear that the maximum contact principle is not absolute and must yield to the overall best interests of the child, assessed within the context of the practical reality of the parents' circumstances and lives, one aspect of which may involve relocation: Gordon at para. 46.

[130] In the context of a mobility application, it is fundamental that the court be clear about the scenarios that it is to assess and compare: McArthur at para. 127. The appellate authorities caution that there are to be no presumptions. The existing residential arrangement must not be presumed to be the default location or the preferred option. That said, the Court must consider the parenting arrangements that exist at the time of the application in its evaluation of how the decision to move or not move would advance the best interests of a child: S.S.L. at para. 19; C.M.B. v. B.D.G., 2014 BCSC 780 at para. 104.

[131] In S.S.L., the Court of Appeal outlined four alternate scenarios to assess the best interests of the child. The Court's observations in Walker v. Maxwell, 2014 BCSC 2357 at para. 61, aff'd 2015 BCCA 282, are apt in this case:

At the end of the day, whether or not one undertakes an "all possible options" analysis to help weigh and assess the available evidence or whether one chooses to exclude irrational or unrealistic scenarios from the analysis, what is ultimately required is a fresh inquiry into the needs of the child and how, in the circumstances of this particular case, Emma's health, psychological and emotional well-being can be protected and promoted to the greatest extent possible.

[132] In this case, counsel endorsed the four-scenario approach. I address each of the potential scenarios outlined in S.S.L. in turn. I note at the outset that the mother provided no evidence about what she would do if her application were refused. It is well-established that in a mobility application the Court cannot order where a particular parent must reside.

[133] If the mother and the father both relocated to Bolton, the shared parenting regime in the Armstrong Order could be continued. The father testified that it would not be feasible for him to relocate to Bolton because of career considerations. He is also reluctant to leave his family. I find his stated reasons to be valid. In submissions, neither party advanced the father moving to Bolton as a viable option and I need not consider that option any further.

- [134] My inquiry into the girls' best interests must include consideration of the preservation of the status quo, with both parents residing in the Tri-Cities. Consideration of the current parenting arrangement is relevant to address how moving the Children may or may not be in their best interests. The clear benefit would be that this scenario would permit the parties to continue implementing the equal parenting regime. However, as I stated earlier, the evidence supports a finding that the commute to Vancouver is exacting a physical and emotional toll on the mother and straining her marriage. Mr. A.D. indicated that his transferring to Vancouver was untenable because of his career considerations and because he was not prepared to relinquish his equal parenting arrangement in Bolton.
- [135] The third scenario would be the girls remaining in the Lower Mainland and living with their father on a full-time basis and their mother relocating to Bolton, Ontario. The father testified that in that case, he is prepared to assume primary care of the Children. He described his parenting plan as essentially carrying on his current parenting schedule full-time. He would make adjustments as necessary to his schedule and he would arrange for some extra assistance.
- [136] The Children would have continued contact with their paternal grandmother and other extended family. Their education and extra-curricular activities would continue uninterrupted.
- [137] The obvious negative consequences would be the reduction of the Children's parenting time with their mother with whom they have a strong bond. Because of Mr. A.D.'s and the mother's employment with Air Canada, the mother has the benefit of travel privileges which would permit her to fly to Vancouver to see the Children at a nominal cost. The mother also has a flexible work schedule. I am satisfied that the mother would make every effort to maximize her parenting time so that the important bond between herself and the Children would be preserved. The father says he would be flexible and co-operative in facilitating the mother's parenting time with the Children if he has primary residence. I accept that this is true. The father in the past has accommodated the mother's requests for alterations based on her schedule.
- [138] The final scenario for consideration is the Children moving to Bolton with their mother and spending holidays with their father. The mother would have an opportunity to live full-time with her husband in Bolton. They enjoy a comfortable lifestyle there and they would attempt to coordinate their schedules to minimize the need for any child care. Although Mr. A.D.'s current home is inadequate to house five children, he testified that he would take steps to renovate his home in order to accommodate the Children. Mr. A.D. is a capable and committed step-parent and the Children have a good relationship with him and his sons. However, there is some degree of uncertainty with respect to how the day-to-day dynamics of the blended family would develop. In the past, the time the families have spent together has been primarily holiday time, which is different than the reality of everyday routines.

- [139] The obvious negative consequence of the relocation of the Children would be the reduction of the girls' parenting time with their father, with whom they have an equally strong bond. In contrast to the mother travelling to British Columbia, it will be expensive for the father to travel to Ontario to see the Children with any regularity. He would have to secure suitable accommodation when he visited. There would also be a significant disruption to the Children consequent on their removal from their school, their extended family, and activities in the community that they have come to know.
- [140] The Children would be able to enjoy the benefit of their mother's travel privileges for flights from Toronto to Vancouver and from Toronto to Vancouver. I see this as a neutral factor in the analysis.

disposition

- [141] In determining the Children's best interests, the Court's task is to take an objective view of the options, having regard to the "tangle of competing benefits and detriments" associated with a proposed relocation: Hejzlar at para. 23. The Court must weigh a multitude of relevant factors in the best interest analysis: T.K. at para. 73.
- [142] In the final analysis, because mobility cases inevitably involve some degree of uncertainty of what might happen in the future, "[t]he judicial assessment of the best interests of a child amounts to an educated prediction" rather than the application of any proven truths: McArthur at para. 161; Orring v. Orring, 2006 BCCA 523 at para. 55.
- [143] As set out above, I have considered what I anticipate will be the Children's circumstances if they move and their circumstances if they remain in the Tri-Cities with their father. The Children and their mother and the Children and their father each love each other dearly. Whether the Children remain in the Tri-Cities or move to Bolton, their principal residence will be with a capable and loving parent and they will have increased contact with that parent and reduced contact with the other. There will be a disruption to the Children in transitioning from a shared primary residence to a sole primary residence. As I stated, the mother has a flexible work schedule and airline travel privileges that would facilitate her travel to Vancouver to see the Children. If the Children remain in the Tri-Cities they would likely have more contact with their mother there than they would have with their father in Bolton, if they move. The children are well-established in the Tri-Cities. If the Children move to Bolton, they will suffer a significant disruption because of the removal from their extended family, schools, and activities in the community they have come to know. I have considered the mother's happiness and well-being in the assessment but I have concluded that this factor, while significant, does not outweigh the negative repercussions to the Children associated with the proposed relocation. I have concluded that the equally close relationship the Children have with their father, his ability to continue to provide them with a stable and secure home and routine, and the disruption that would result from the move, support the Children remaining in the Tri-Cities.

[144] In summary, on the totality of the evidence, and in balancing the competing benefits and detriments in play, I conclude that the Children's best interests are better served if they remain in the Tri-Cities. The mother's application for an order that the Children be permitted to relocate to Bolton, Ontario is dismissed.

[145] If the mother determines that she will discontinue commuting to B.C. to exercise the equal parenting regime, paragraphs 3 and 4 of the Divorce Order are varied, such that the father will have primary residence of the Children with the mother to have the following annual parenting time:

- (i) Six weeks of the summer holiday, in two three-week blocks, or three two-week blocks;
- (ii) Christmas holidays from December 24 in even years and December 26 in odd years until the end of the B.C. school break;
- (iii) One week of the B.C. spring break;
- (iv) Four weekends as follows:
 - (a) Thanksgiving long weekend (five days);
 - (b) B.C. Family Day long weekend (three days);
 - (c) Victoria Day long weekend (three days);
 - (d) One additional weekend per month in B.C. from September to June, provided that the mother gives 30 days' notice to the father of her intention to visit.
- (v) Any other time as agreed to in writing between the parties.
- (vi) In order to facilitate the summer access set out in para (i), the mother will provide to the father the weeks she would like to see the Children by April 1 of each year;
- (vii) In addition, the Children have unrestricted use of telephone ,skype, and facetime access with their mother;
- (viii) Pursuant to the Federal Child Support Guidelines, commencing on September 1, 2016, the mother shall pay child support based on her income.

[146] The parties have liberty to apply to the Court to alter the schedule of parenting time that I have set out above.

[147] In order to ensure that the Children continue to thrive and to flourish, these parties need to improve their communication with each other. They must do so in order that they can cooperate in making appropriate choices that reflect the Children's best interests and promote their overall well-being. To this end, the parties have liberty to apply for the appointment of a parenting coordinator.

[148] Finally there is the matter of costs. The parties have leave to address the issue of costs following the release of these Reasons. The parties should estimate the length of time required to address the issue of costs and contact Supreme Court Scheduling to schedule a hearing.

"The Honourable Madam Justice Dardi"

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