
CANADA / JUDGMENT

D.T.S. v. S.P.M.

2022 BCSC 547

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2022 BCSC 547 D.T.S. v. S.P.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.T.S. v. S.P.M.,

2022 BCSC 547

Date: 20220405

Docket: E62923

Registry: New Westminster

Between:

D.T.S.

Appellant

And

S.P.M.

Respondent

Before: The Honourable Justice Francis

On appeal from: An order of the Provincial Court of British Columbia,
dated June 4, 2021 (File No. F166768).

Reasons for Judgment

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Place and Date of Trial/Hearing:

New Westminster, B.C.

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Place and Date of Judgment:

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April 5, 2022

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Introduction

- [1] This appeal from an order of the British Columbia Provincial Court concerns the relocation of a seven-year old child from Vancouver to Kelowna.
- [2] The appellant, D.T.S. (the "Father") and the respondent, S.P.M. (the "Mother") had a brief romantic relationship in 2013. The relationship had terminated by the time the child, S.M. ("S") was born in August 2014. S is the only child of either parent.
- [3] The Father has had parenting time with S since shortly after she was born, initially only an hour or two per week, but his parenting time expanded over the early years of S's life. From 2017 until April 2019, the parties shared parenting time equally. In early 2018, the Mother expressed to the Father that she wished to move to Kelowna with S. The Father opposed the relocation. The matter proceeded to a five-day trial in Provincial Court before the Honourable Judge Janzen in January 2019 (the "First Relocation Proceeding"). Judge Janzen released her reasons for judgment on April 23, 2019, denying the Mother's application to relocate to Kelowna with S (the "First Relocation Decision").
- [4] On June 20, 2020, the Mother brought a second proceeding for an order allowing her to relocate to Kelowna with S. Once again, the matter proceeded to a trial, this time before the Honourable Judge McQuillan (the "Second Relocation Proceeding"). In reasons for judgment pronounced June 4, 2021, Judge McQuillan allowed the Mother's application to relocate (the "Second Relocation Decision"). The Father appeals the Second Relocation Decision.
- [5] While the Father argues that the Mother wrongfully brought the same matter before the court twice, the Second Relocation Decision primarily turned on events that happened in the aftermath of the First Relocation Decision. Due to findings of family violence made by the Court shortly after the First Relocation Decision, the Father's parenting time was significantly curtailed. Meanwhile, the Mother began to spend more time in Kelowna with S. By March 2020 she had mostly relocated with S to Kelowna, in contravention of the First Relocation Decision. The trial judge was required to assess whether relocation was in the best interests of S in the face of two new developments in the family: the parents no longer had substantially equal parenting time; and the Mother's good faith was in question due to her actions in moving to Kelowna. Ultimately, the trial judge found that the Mother was acting in good faith, and that she had proposed reasonable and workable parenting arrangements for the Father to have parenting time with S. He considered the evidence and concluded that the relocation was in the best interests of S.
- [6] The Father submits that his various grounds of appeal can be distilled down to a single primary error, which is that the trial judge erred in applying s. 69(4) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which gave rise to a presumption of favour of the Mother that the proposed relocation was in the best interests of the child.

Trial Judgment

- [7] The Second Relocation Proceeding was heard over five days from April 19 - April 23, 2021. The Court heard the viva voce evidence of the Mother, the Mother's sister, the Mother's partner, the two parents of the Mother's partner, the Father, the Father's father, and two neighbours of the Father.
- [8] In the Second Relocation Proceeding, the trial judge was required to apply Part 4, Division 6 of the FLA:

Definition and application

65 (1) In this Division, "relocation" means a change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with

- (a) a guardian, or
 - (b) one or more other persons having a significant role in the child's life.
- (2) This Division applies if
- (a) a child's guardian plans to relocate himself or herself or the child, or both, and
 - (b) a written agreement or an order respecting parenting arrangements or contact with the child applies to the child.

Notice of relocation

66 (1) Subject to subsection (2), a child's guardian who plans to relocate himself or herself or a child, or both, must give to all other guardians and persons having contact with the child at least 60 days' written notice of

- (a) the date of the relocation, and
 - (b) the name of the proposed location.
- (2) The court may grant an exemption from all or part of the requirement to give notice under subsection (1) if satisfied that
- (a) notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child, or
 - (b) there is no ongoing relationship between the child and the other guardian or the person having contact with the child.
- (3) An application for an exemption under subsection (2) may be made in the absence of any other party.

Resolving issues arising from relocation

67 (1) If notice is required under section 66 [notice of relocation], after the notice is given and before the date of the relocation, the child's guardians and the persons having contact with the child must use their best efforts to cooperate with one another for the purpose of resolving any issues relating to the proposed relocation.

- (2) Nothing in subsection (1) prevents
 - (a) a guardian from making an application under section 69 [orders respecting relocation], or
 - (b) a person having contact with the child from making an application under section 59 [orders respecting contact] or 60 [changing, suspending or terminating orders respecting contact], as applicable, for the purpose of maintaining the relationship between the child and a person having contact with the child if relocation occurs.

Child may be relocated unless guardian objects

68 If a child's guardian gives notice under section 66 [notice of relocation] that the guardian plans to relocate the child, the relocation may occur on or after the date set out in the notice unless another guardian of the child, within 30 days after receiving the notice, files an application for an order to prohibit the relocation.

Orders respecting relocation

69 (1) In this section, "relocating guardian" means a guardian who plans to relocate a child.

- (2) On application by a guardian, a court may make an order permitting or prohibiting the relocation of a child by the relocating guardian.
- (3) Despite section 37 (1) [best interests of child], the court, in making an order under this section, must consider, in addition to the factors set out in section 37 (2), the factors set out in subsection (4) (a) of this section.
- (4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,
 - (a) the relocating guardian must satisfy the court that
 - (i) the proposed relocation is made in good faith, and
 - (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and
 - (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise.

- (5) If an application is made under this section and the relocating guardian and another guardian have substantially equal parenting time with the child, the relocating guardian must satisfy the court
 - (a) of the factors described in subsection (4) (a), and
 - (b) that the relocation is in the best interests of the child.
- (6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following:
 - (a) the reasons for the proposed relocation;
 - (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
 - (c) whether notice was given under section 66 [notice of relocation];
 - (d) any restrictions on relocation contained in a written agreement or an order.
- (7) In determining whether to make an order under this section, the court must not consider whether a guardian would still relocate if the child's relocation were not permitted.
- [9] On a relocation application, the court must apply one of two tests, set out in s. 69(4) and s. 69(5), depending on whether the guardians have substantially equal parenting time. In his reasons for judgment, the trial judge reviewed the various parenting time orders that had been made to date in order to determine whether there was substantially equal parenting time in this case.
- [10] By the time of the Second Relocation Decision, the Father's parenting time was limited to supervised visits for four hours every Sunday and alternating Mondays for two hours. Because the parenting time arrangements were no longer substantially equal as between the parents, the trial judge found that the applicable section was s. 69(4). Under s. 69(4), the Father had the burden of proving that the relocation was not in S's best interests, so long as the Mother satisfied the court that the proposed relocation was made in good faith and the Mother proposed reasonable and workable parenting arrangements for the Father.
- [11] On the question of good faith, the trial judge considered the Father's argument that the Second Relocation Proceeding was not brought in good faith because the Mother had already relocated to Kelowna. He disagreed that the Mother's actions precluded a finding of good faith, and he ultimately concluded that the good faith test had been met.

- [12] The trial judge considered the parenting arrangement proposed by the Mother and noted that her proposed arrangement would increase the Father's parenting time dramatically from what was currently in place and would eliminate the need for professional supervision. He found the parenting schedule proposed by the Mother to be both reasonable and workable.
- [13] Upon being satisfied that the relocation was made in good faith and that reasonable and workable parenting arrangements had been proposed, the trial judge went on to consider the best interest of S. He noted that pursuant to s. 69(4), the burden was on the Father to show that the relocation was not in the best interests of S.
- [14] The trial judge then considered the factors in s. 37(2) of the FLA. Of particular concern to the trial judge was family violence and what he found to be a "pattern of aggressive behaviour" on the part of the Father. He found this history to be "a relevant and ongoing consideration" in determining the best interests of S.
- [15] Ultimately, the trial judge held that the Father had failed to satisfy the burden of demonstrating that the move to Kelowna was not in S's best interests. Therefore, the trial judge allowed the relocation.

Standard of Review

- [16] This is an appeal pursuant to s. 233(1) of the FLA, from a final order of the Provincial Court in a family law matter. Under s. 233(3) of the FLA, the Court has the power to affirm, set aside, or vary the Provincial Court order.
- [17] As the Court of Appeal stated in *Kane v. Proffitt*, 2018 BCCA 106 at para. 42, the scope of appellate review in family matters is narrow:
- [42] The function of appellate review is not to re-try a case or to continue the trial at a different stage. Rather, its purpose is to examine the record below to determine if material or reversible error has been demonstrated, including an error of law, an error of principle, an error of fact, or a serious misapprehension of the evidence that could reasonably have affected the result and therefore warrants appellate intervention. See *Scott v. Scott*, 2006 BCCA 504; *Jens; R.E.Q. v. G.J.K.*, 2012 BCCA 146; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 832-833; and *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15.
- [18] Decisions relating to parenting time are inherently exercises in discretion: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 13. It is not open to an appellate court to re-weigh evidence or interfere with a decision of the court below on the basis that it would have "balanced the factors differently": *R.E.Q v. G.J.K.*, 2012 BCCA 146 at para. 33.
- [19] The standard of review for alleged legal errors, or alleged errors in principle, is correctness. The standard of review for alleged factual errors is palpable and overriding error. A palpable and overriding error is an error that is "both obvious on the record, and material to the outcome": *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 13. Deference to factual findings

"promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge": *Hickey v. Hickey*, [1999] 2 S.C.R. 518, [1999] S.C.J. No. 9 at para. 12.

Grounds of Appeal

[20] The Father alleges the following errors on the part of the trial judge:

- a) The trial judge erred in law by applying the incorrect test for calculating the relevant period of parenting time and consequently wrongly decided the case based on s. 69(4) of the FLA instead of s. 69(5).
- b) The trial judge failed to give due weight to certain material facts in applying s. 69(6) of the FLA.
- c) The trial judge incorrectly applied s. 37(2) of the FLA with respect to the best interests of the child and failed to give due weight to some material facts.
- d) The trial judge failed to dismiss the Respondent's relocation application on the basis that the same application had been brought in 2018 and dismissed by the Court.
- e) The trial judge failed to apply the law and ignored material facts in providing the Mother with default decision making.
- f) The trial judge failed to give due weight to some material facts, ignored some contradictory material facts and failed to apply the law or applied incorrect law in deciding the case.

[21] There is some overlap between the various grounds of appeal asserted by the Father and the appeal was not framed with specific reference to standard of review. In my view, it is more helpful to reframe the issues under appeal in the following way:

- a) Did the trial judge err in principle in allowing the respondent to bring the Second Relocation Proceeding after the First Relocation Proceeding was dismissed?
- b) Did the trial judge err in law in finding that a recent significant reduction in parenting time due to a protection order should be considered in determining whether parenting time was "substantially equal" and thus whether s. 69(4) or s. 69(5) of the FLA apply?
- c) Did the trial judge make a material error in concluding that the Mother was acting in good faith?
- d) Did the trial judge make a material error in assessing the best interests of S?
- e) Did the trial judge make a material error in determining that the Mother should have default decision making?

[22] I will deal with each of these issues separately below.

Issue 1: Did the trial judge err in principle in allowing the respondent to bring the Second Relocation Proceeding after the First Relocation Proceeding was dismissed?

[23] The Father submits that the Second Relocation Proceeding should never have been heard because "it was the same application that was dismissed in April 2019."

[24] The Father relies on *R.C. v. R.E.H.*, 2014 BCSC 2348 for the proposition that, where orders have already been made and the issue of relocation has already been decided, "the process begins with applications to vary the terms of existing custody orders and the party seeking a variation must first establish a material change of circumstances since the last order was made" (para. 60).

[25] Regrettably, the Father appears to have misconstrued the passage he cites from *R.C.* In *R.C.*, Justice Armstrong characterizes the analysis under the FLA on a relocation application as being "different from the traditional views set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, regarding the relocation of children." At para. 61, he states without equivocation that:

Under the FLA, there is no need to find a change in circumstances as a threshold issue before considering changes in the residence of guardians of children.

[26] Since there is no threshold requirement of a material change of circumstances under Part 4, Division 6 of the FLA, the trial judge was not required to find a change of circumstances since the First Relocation Decision before he could hear the Second Relocation Proceeding. However, his findings of fact were consistent with a change of circumstances in any event. He found that the landscape had changed considerably since the First Relocation Decision, primarily because of the Father's reduced parenting time as a consequence of family violence for which the trial judge found him to be responsible.

[27] I find it was appropriate for the trial judge to hear and determine the Second Relocation Proceeding under Part 4, Division 6 and he committed no error in doing so.

Issue 2: Did the judge err in the application of s. 69(4) of the FLA?

[28] Under the FLA, the appropriate analysis on a relocation application is dictated by whether the parents shared "substantially equal parenting time:" s. 69(4)-69(5). If the parents shared substantially equal parenting time, the parent proposing relocation carries the onus of proof. If the parents did not share substantially equal parenting time, the parent opposing relocation has the onus of proof.

[29] At the time of the First Relocation Proceeding, the Mother and the Father had substantially equal parenting time. As such, the trial judge in the First Relocation Decision applied s. 69(5) of the FLA and required the Mother to prove that the relocation was in the best interest of S. The Mother failed to discharge this burden and the relocation was disallowed.

[30] By the time of the Second Relocation Proceeding, the parenting time was much different.

- [31] On the same day that the First Relocation Decision was released, April 23, 2019, the Father was scheduled to begin his parenting time. During the exchange of S, a physical altercation occurred between the Father and the Mother's partner, R.B. The police attended and the Father was taken to the hospital for injuries he suffered in the fight. He was then arrested and charged with assault. Those charges were ultimately stayed.
- [32] On April 29, 2019, on a without notice basis, the Mother obtained a protection order prohibiting the Father from having any contact with her or S. The Father's parenting time with S was suspended until further order of the court. The Father applied to set aside the without notice orders and was successful in obtaining some parenting time with S. On June 25, 2019, the Honourable Judge Dion of the Provincial Court ordered some supervised parenting time for the Father. The order provided that if the Father did not "exhibit any further outbursts" he was at liberty to return to court to seek to have his visits unsupervised.
- [33] After the pronouncement of Judge Dion's June 25, 2019 order, there were issues between the parties about an appropriate supervisor and a schedule of parenting time. As a result, the Father did not have parenting time for six months between April 23, 2019 and November 2, 2019.
- [34] The parties appeared in Provincial Court again on October 28, 2019 and a further order was made that the Father was to have supervised parenting time on alternating weekends. On April 7, 2020, Judge Dion ordered that supervised visits should continue for a further six months, and that the Father would have parenting time once during the week in addition to alternating weekends. He was also ordered to undertake anger management courses. On November 4, 2020, supervised visits were again increased. Judge Dion set a schedule of four hours each Sunday and alternate Mondays for two hours. That schedule continued up until the time of the Second Relocation hearing.
- [35] In considering the application of s. 69 of the FLA, the trial judge held at para. 29:

The proper approach to determining whether or not there is "substantially equal parenting time" for the purposes of a relocation application, is to consider the parenting time which actually occurred during the 12 months preceding delivery of the notice of application.

- [36] In support of the proposition that "substantially equal parenting time" should be determined with reference to the actual parenting time in the preceding 12 months, the trial judge cited S.H. v. J.W., 2019 BCPC 308. In that decision, at para. 45, the Honourable Judge Gouge looked to the Federal Child Support Guidelines, SOR/97-175 [Guidelines] in interpreting the meaning of substantially equal parenting time:

- [45] Section 9 of the Federal Child Support Guidelines defines a shared-custody situation to be one in which each parent has parenting time for at least 40% of the time "over the course of a year". Taking that as a useful guide, I think it right to say that, in assessing "substantially equal parenting time" for the purpose of a relocation application, one ought to consider parenting time which actually occurred "on the ground" during the 12 months preceding delivery of the notice of relocation.
- [37] In the case under appeal, the trial judge found that the Father was limited to supervised parenting time every Sunday for four hours and every other Monday for two hours. He did not have substantially equal parenting time and therefore the relocation proceeding was to be determined under s. 69(4) of the FLA, not s. 69(5).
- [38] The Father argues that the trial judge erred in law by applying a test for substantially equal parenting time that did not account for the fact that the Father's deprivation of parenting time was involuntary. The Father submits that his parenting time was disrupted not by circumstances of his own making. He submits that the Mother "pre-meditated an altercation" on the day of the First Relocation Decision in which R.B. provoked the Father into a fight that led to criminal charges, protection orders, and the severe restriction of the Father's parenting time with S. The Father points out that the various restrictive parenting time orders made in 2019 and 2020 were all made under the shadow of criminal charges against him that were eventually stayed.
- [39] The trial judge was aware that the criminal charges against the Father had been stayed but nevertheless found that the restrictions on the Father's parenting time post-April 2019 were of the Father's own making. As such, he found that it was appropriate to look at actual parenting time exercised in the prior 12 months in determining whether the parties had "substantially equal parenting time."
- [40] I need not consider the Father's legal submission that "substantially equal parenting time" should not be determined with reference to actual parenting time in circumstances where a lack of parenting time for one party is involuntary and for reasons not of their own making. I do not need to consider this because in this case, the trial judge found that the Father's loss of parenting time was a consequence of his own actions.
- [41] The trial judge reviewed the evidence, including the viva voce evidence of the Mother, the Father and R.B. about the incident that led to the protection order. He preferred the evidence of the Mother and R.B. that the Father was the aggressor in the fight between the Father and R.B. He concluded that: "It is the conduct of the Father on April 23, 2019 that has led to the disruption of his previous equal parenting time."
- [42] The trial judge's finding that the Father was responsible for the restrictive parenting time that arose after April 29, 2019 is a finding of fact based on the trial judge's assessment of the Father's credibility and the evidence as a whole. The Father has pointed to no palpable and overriding error in this regard. Instead, he has asked me to re-weigh the relevant evidence and reach a different conclusion about whether the Father was the instigator in the April

2019 altercation and therefore the responsible party in his parenting time being taken away. To do so would be beyond the scope of appropriate appellate review in family law matters.

[43] I decline to find that the trial judge erred when he found that the parties did not have substantially equal parenting time at the time of the Second Relocation Proceeding, and that therefore the matter fell to be determined under s. 69(4) of the FLA.

Issue 3: Did the trial judge make a material error in concluding that the Mother was acting in good faith?

[44] Under s. 69(5) of the FLA, where the parties do not have substantially equal parenting time, the relocating guardian must satisfy the court that the proposed relocation is made in good faith, and the relocating guardian must propose reasonable and workable arrangements to preserve the relationship between the child and the other guardian, as well as other persons who have a significant role in the child's life.

[45] Section 69(6) prescribes the factors that the court must consider in determining good faith:

- (a) the reasons for the proposed relocation;
- (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
- (c) whether notice was given under section 66 [notice of relocation];
- (d) any restrictions on relocation contained in a written agreement or an order.

[46] In *L.J.R. v. S.W.R.*, 2013 BCSC 1344 [L.J.R.], Justice Betton noted:

[71] Good faith is a subjectively held state of mind. Yet, some of the above characteristics are undoubtedly objective. I find that to the extent a factor listed in s. 69(6) is objective, a positive or negative finding suggests an inference that the relocating guardian either possessed or did not possess the required subjective good faith.

[47] The Father argues that the trial judge made a material error because the objective evidence in this case can only lead to the conclusion that the Mother did not possess the required subjective good faith.

[48] In his analysis of s. 69(6)(a), the trial judge considered the reasons advanced by the Mother for the relocation. While he found some of the reasons to be unpersuasive, he determined that some were compelling. He noted that the mother would be able to join R.B. in working at his mother's painting business if she moved to Kelowna. He noted the close bond that S has with R.B., who has already relocated to Kelowna, and the enduring nature of that bond. Generally, he accepted the proposition that the Mother could afford a better life in Kelowna than in the Lower Mainland.

- [49] With respect to s. 69(6)(b), the trial judge had to consider whether the proposed relocation was likely to enhance the general quality of life of S and, if applicable, the Mother, including increasing emotional well-being or financial or educational opportunities. He concluded that S's life would be enhanced by the move to Kelowna. S and the Mother would have greater financial security in Kelowna as a result of being able to purchase a home and they would benefit from advancements in R.B.'s career.
- [50] The Father submits that the trial judge failed to sufficiently account for the fact that, in the First Relocation Decision, the judge had found that the reasons for the move were not in S's best interests. He submits that the trial judge should not have interfered with this conclusion from the First Relocation Decision.
- [51] The Father's position in this regard suffers from two flaws. First, in concluding that the proposed relocation was in good faith, the trial judge was not required to show deference to an earlier decision of the court about good faith. As the trial judge noted, the landscape was different at the time of the Second Relocation Proceeding. It was appropriate for the trial judge to consider the reasons for the relocation in the context of the present circumstances of the parties.
- [52] Second, contrary to the submissions of the Father, the trial judge in the First Relocation Decision did not find that the reasons for the relocation were invalid or not in S's best interest for the purposes of determining good faith. In fact, the judge in the First Relocation Decision did not expressly engage in an analysis of good faith because the Father admitted at that trial that the good faith test was met. The judge in the First Relocation Decision did conclude that the relocation was not in the best interests of S at that time but there was no finding one way or another with respect to good faith. Therefore, it was open to the trial judge in the case under appeal to weigh the evidence before him as he saw fit in considering the prescribed factors under s. 69(6), without being bound by findings of fact made by the court in the earlier proceeding.
- [53] More persuasive is the Father's argument that the relocation was not made in good faith because the Mother took steps to move to Kelowna with S after her application for relocation was denied in the First Relocation Decision.
- [54] The trial judge found as a fact that the Mother "has already taken significant steps to re-start her life in Kelowna over the past two years, and in particular since the pandemic began" and he noted that "there are numerous indications in the evidence that the Mother has effectively moved to Kelowna." The trial judge was satisfied that, notwithstanding the First Relocation Decision which prohibited her from moving, the Mother had begun the process of relocating with S to Kelowna prior to commencing the Second Relocation Proceeding. The Father submits that the trial judge, having found these facts, was precluded from finding good faith. This is because the Mother's actions fall afoul ss. 69(6)(c) and (d): notice was not given in advance of the relocation, and the Mother was restricted from relocating by virtue of the First Relocation Decision.

- [55] I agree with the Father that, because the Mother moved to Kelowna before she gave notice of the Second Relocation Proceeding, she did not give 60 day's written notice of her relocation as she was required to do under s. 66. Further, her move to Kelowna was in direct contravention of the First Relocation Decision. This is no small matter as, by taking S to Kelowna in advance of obtaining an order permitting the move, the Mother created an uneven playing field. By the time of the Second Relocation Proceeding, the Mother had established a new status quo whereby S had already built a life in Kelowna, thereby increasing her chances of demonstrating that the relocation was in the best interests of S.
- [56] L.J.R. bears some similarities to this case. As in this case, by the time the matter came before the Court, "relocation ha[d] essentially already occurred." Justice Betton observed that "parties seeking to relocate cannot gain advantage by carrying out the relocation in advance of any prospective court approval" (para. 73). The fact that the relocating parent had done so was "a significant factor weighing against a finding of good faith" (para. 73).
- [57] The Mother's actions in this case are troubling to the Court. The appellant's counsel describes her actions as "seeking forgiveness rather than permission." This is an appropriate characterization. After being unsuccessful in the First Relocation Decision, the Mother ignored an order of the Court and moved anyway. I agree with the Appellant that such conduct is problematic and inconsistent with a finding of good faith.
- [58] At para. 42 of the reasons for judgment, the trial judge considered the impact of the Mother's move to Kelowna on the good faith analysis:
- [42] This has created an uneven playing field with the Father on this application given his very limited parenting time, which the Mother has taken advantage of. However, the Father is largely to blame for the limits to his parenting time, and resultant imbalances in this application. Moreover, the Mother has nonetheless maintained a residence in the lower mainland, despite it becoming increasingly secondary to the Kelowna residence. But most significantly, the analysis must occur through the lens of the criteria in s. 69 and the best interests of [S], rather than as a means of expressing disapproval of the Mother's actions.
- [59] The trial judge was aware of the Mother's failure to comply with the First Relocation Decision. However, in the passage cited above, he declined to find that her behaviour militated against a finding of good faith for three reasons: the Father was responsible for the limited parenting time that he had; the Mother continued to maintain a secondary residence in the Lower Mainland; and, most significantly, the good faith analysis must be undertaken with a focus on the best interests of the child rather than penalizing the bad behaviour of parents.
- [60] In my view, none of the factors cited by the trial judge justifying the Mother's behaviour in violating the First Relocation Decision have any bearing on the good faith analysis. The Father's culpability for his restricted parenting time has no bearing on the Mother's subjective good faith in relocating to Kelowna. Nor does the fact that the Mother retained a secondary residence in the Lower Mainland speak to good faith in circumstances in which

the trial judge found as a fact that the mother had created an uneven playing field by moving to Kelowna. Finally, the trial judge stated that good faith under s. 69(6) must be considered "through the lens of the criteria in s. 69 and the best interests rather than as a means of expressing disapproval of the Mother's actions". This is a flawed interpretation of the good faith analysis that s. 69(6) calls for.

- [61] The best interests of the child are a distinct consideration from the good faith of the parent. Section 69(3) mandates that despite s. 37(1) (which states that only the best interests of the child may be considered in making orders under Part 4), the court must consider the factors under s. 69(4)(a), which include the good faith of the relocating parent.
- [62] Good faith is a subjective state of mind: L.J.R. at para. 71; *Pepin v. McCormack*, 2014 BCSC 2230 at para. 69. The court's task under s. 69(6) is to consider the evidence and seek to determine the subjective state of mind of the relocating parent. As Betton J. noted in L.J.R., objective factors such as whether the proposed relocation will enhance the quality of life of the child, while obviously relevant to the best interests of the child, are, at this stage of the analysis, aimed at discerning the subject good faith of the relocating parent. Therefore, when the trial judge said that good faith must be determined with reference to the best interests of the child rather than as a means of expressing disapproval of the Mother's actions, he misconstrued the s. 69(6) analysis, which is not aimed at determining the best interests of the child, nor at expressing disapproval of a parent, but rather at determining whether the proposed relocation was subjectively made in good faith.
- [63] The trial judge erred in law by inserting the best interests of the child test into the analysis of whether a relocating parent is acting in good faith. In doing so, he misapplied the good faith test. This Court will not countenance unilateral action on a part of a relocating parent. The proper process for bringing a relocation application must be followed: L.J.R. at para. 73(d); *Vanrootselaar v. Jacobs*, 2015 BCSC 2544, at para. 7. The Mother's actions were not in good faith. To the extent that the trial judge found good faith on the part of the Mother in these circumstances, the trial judge made a material error.
- [64] If the criteria of good faith is not met, the court must still go on to consider whether the proposed relocation is in the child's best interests. Good faith and reasonable parenting arrangements must be established in order for a relocating guardian to benefit from the onus; establishment of these criteria does not circumvent an analysis by the court of the best interests of the child: *C.M.B. v. B.D.G.*, 2014 BCSC 780 at paras. 73-77.
- [65] Therefore, even if the trial judge had found that the Mother was not acting in good faith, it was still necessary for the Court to consider whether the proposed move was in the best interests of S.

Issue 4: Did the trial judge make a material error in assessing the best interests of S?

- [66] The trial judge reviewed each of the prescribed factors listed under s. 37(2) of the FLA. He determined that there were no present serious concerns about S's emotional health or well-being. He considered a Hear the Child report in which S's views were expressed. He noted S's close bond to both parents and her connections to friends in both Vancouver and the Lower Mainland. He considered the fact that, for the last two years, the Father's parenting time had been significantly restricted as a result of court orders, such that the Mother had been S's primary caregiver. He found that, notwithstanding the Mother's role in contravening the First Relocation Decision, S's need for stability would be promoted by allowing her to live in Kelowna where she has now been since early 2020. He considered the ability of each parent to exercise his or her responsibilities and concluded that the Mother "has generally exercised her responsibilities towards [S] well," although he was critical of the Mother's failure to encourage the Father's role in S's life. With respect to the Father, the trial judge pointed to a number of instances of the Father acting out in a way that demonstrated "very poor judgment and a lack of impulse control." He concluded that these instances showed "a deficit in the Father's ability to appropriately exercise his responsibilities in relation to [S] in this particular area."
- [67] Finally, the trial judge considered family violence. He found as a fact that the Father was the instigator in the family violence that occurred on April 23, 2019. He considered all the evidence of family violence, including the fact that the Father has now taken anger management courses. He concluded that "the Father still has some way to go in ensuring that his anger towards the Mother and [R.B.] does not give rise to further incidents of family violence." He concluded his discussion of family violence by stating: "In sum, the history of family violence remains a relevant and ongoing consideration in assessing [S]'s best interest."
- [68] The Father raises the following concerns about the trial judge's analysis of the best interests of the child:
- a) The trial judge erred when he said the child was too young to have her views be considered, but then took them into account when he noted that S now considers Kelowna to be her home.
 - b) The trial judge failed to take into account the findings of fact made by the judge in the First Relocation Decision and made findings of fact that were inconsistent with the findings of the judge in the First Relocation Decision.
- [69] With respect to the first issue, I do not find that the judge erred in his analysis of the evidence of the child. It was appropriate to place little weight on a six-year old child's expressed preference to live in Kelowna. It was also appropriate to find that S's life would not be disrupted by a move to Kelowna since she already considers herself to live there. The latter finding did not entail a consideration of S's preferences as expressed in the Hear the Child Report. It was a reasonable conclusion to draw from the circumstances in which S lives and her age and stage of development.

- [70] With respect to the second issue, the Father argues that the trial judge "should have taken Judge Janzen's findings into consideration when making his own findings of fact." Essentially, the Father argues that the trial judge ought to have deferred to the findings of fact made by the judge on the first application.
- [71] The trial judge was required to make determinations of fact on the basis of the evidence presented to him at a five-day trial. The Father asks this Court to prefer inferences of fact drawn by the judge in the First Relocation Decision, after a different trial.
- [72] As stated in Kane at para. 42, "[t]he function of appellate review is not to re-try a case or to continue the trial at a different stage". It is not for an appeal court to substitute its view of the evidence for that of the trial judge.
- [73] The Father has pointed to no palpable and overriding error in any of the facts found by the trial judge. Instead he asks this Court to re-weigh the evidence and reach different inferences more consistent with those found in the First Relocation Decision. Such an approach would be beyond the bounds of what an appellate court is entitled to do. All of the factual findings made by the trial judge were open to him to make on the evidence and therefore I would not interfere with them.

Issue 5: Did the trial judge make a material error in finding that the Mother should have default decision making?

- [74] The Father argues that the trial judge erred in giving the Mother default decision making under s. 41 of the FLA in the event the parties are unable to agree on the discharge of their parental responsibilities. The Father argues that this was an error because the Mother has demonstrated a lack of ability to co-parent and this should have been given more weight by the trial judge.
- [75] The determination of the allocation of parenting responsibilities is precisely the kind of decision with which an appellate court should avoid interfering. The Father has pointed to no legal error or error in principle by the trial judge. He simply argues that he should have weighed the evidence differently. This is not a sound basis on which to interfere with the trial judge's decision.

Conclusion

- [76] Section 233(3) of the FLA sets out what this Court may do after hearing an appeal from the Provincial Court:
- a) confirm or set aside the order of the Provincial Court;
 - b) make any order that the Provincial court could have made; or
 - c) direct the Provincial Court to conduct a new hearing.

- [77] I have found that the trial judge erred in finding that the proposed relocation was made in good faith. Where a relocating parent is unable to satisfy the court that a proposed relocation is made in good faith, the court must go on to consider the best interests of the child.
- [78] It is important not to overstate the impact of the shifting onus under these sections. The Father referred in his argument to the presumption that arises under s. 69(4) and the impact of that presumption being spent as a result of the Mother not establishing good faith. In his submission, if the criteria under s. 69(4)(a) were not met, the Mother would not benefit from a presumption that the relocation was in S's best interest and "we do not know what decision Judge McQuillan would have made if he applied the correct legal test." I do not agree.
- [79] This issue was discussed by Justice Saunders in *LeMasurier v. Parsons*, 2017 BCSC 1536, referring to the decision of Justice N. Smith in *Hefter v. Hefter*, 2016 BCSC 1504:
- [17] In *Hefter*, N. Smith J. did in fact undertake a thorough s. 37 analysis. This analysis, however, was preceded by a section in his judgment in which he summarized the interplay between sections 69 (4) and (5):
- [37] Counsel for the claimant argues that another significant difference [between the FLA and the common law] relates to the rights of a custodial parent. In *Gordon [v. Goertz]*, [1996] 2 S.C.R. 27, the court said that although the custodial parent's views are entitled to great respect, the inquiry does not begin with a legal presumption in his or her favour. Counsel for the claimant argues that s. 69(4) creates just such a presumption and indicates a clear direction from the legislature that primary care parents acting in good faith should be permitted to relocate with their children.
- [38] In creating that presumption, counsel argues, the legislature must have understood that any move would disrupt or change a child's relationship with the other parent and that such disruption, in and of itself, is not sufficient to rebut the presumption.
- [39] I am not persuaded that the effect of s. 69(4) goes that far. When ss. 69(4) and 69(5) are read together, it is apparent that they create alternative evidentiary burdens. Where s. 69(5) applies, the parent wishing to move must present evidence to show that the move is in the child's best interests. Where s. 69(4) applies, it is the party opposing the move who must present evidence that the move is not in the child's best interests.
- [40] But once the matter has been put in issue, the duty of the court is to consider all of the evidence and all the criteria in s. 37(2) to determine what is in the child's best interests. It could not have been the legislature's intention to bar decisions that would otherwise be in the child's best interests and nothing in s. 69(4) requires or permits greater or lesser weight to be given to any of the factors in s. 37(2). At most, in my view, s. 69(4) mandates a decision in favour of a relocating parent who has the majority of parenting time when considerations of the child's best interests are evenly balanced (see *N.W. v. L.V.*, 2015 BCSC 976 at para. 43).

[Emphasis added.]

[18] Under this analysis, therefore, s. 69(4) cannot be properly understood to create a presumption, or to institute a lower standard of proof. It is simply a matter of who bears the evidentiary burden. I agree with the observation of N. Smith J. that the most that can be said is that in the limited case of the child's best interests being evenly balanced between relocation and the status quo, relocation will be preferred.

[Emphasis in original.]

[80] I agree with Saunders J. and N. Smith J. that the shifting burden only comes into play in limited cases in which the evidence is evenly balanced. The child's best interest must remain at the forefront of the analysis and if the evidence of the child's best interests clearly points one way or another, the onus of proof is not engaged.

[81] In this case, the trial judge undertook a comprehensive analysis of the child's best interests which was appropriately well-rounded and child-centered. The evidence with respect to S's best interests very clearly pointed in the direction of allowing the relocation. I cannot find that the evidence was in equipoise such that a different allocation of the burden would have changed the outcome of the trial.

[82] In any event, it is open to this Court to make its own determination of the best interests of the child rather than remit the decision to the trial court. If it is necessary for this Court to evaluate the best interests of S, I find that it was well established on the evidence before the trial judge that the best interests of S were served by allowing the relocation.

[83] As such, the appeal is dismissed.

Costs

[84] As the successful party, the Mother should have her costs of this appeal.

"Francis J."

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