

CANADA / JUDGMENT

Den Duyf v. Den Duyf

2024 BCSC 2151

COURT

Supreme Court of British Columbia

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2024 BCSC 2151 Den Duyf v. Den Duyf

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Den Duyf v. Den Duyf,

2024 BCSC 2151

Date: 20241128

Docket: E240337

Registry: Vancouver

Between:

Nolan Kyle Den Duyf

Claimant

And

Hannah Minke Den Duyf

Respondent

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Claimant:

R. Kinghorn

Counsel for the Respondent:

N. Allen

Place and Date of Hearings:

Vancouver, B.C.

October 21-22 and 24, 2024

Place and Date of Judgment:

Vancouver, B.C.

November 28, 2024

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I. INTRODUCTION

- [1] These reasons for judgment address a number of applications in a family law case:
- a) A summary trial application by the respondent, Hannah Minke Den Duyf for a final order permitting a relocation of the parties' child from Pemberton to Salt Spring Island, and establishing a parenting schedule premised on that relocation.
 - b) An application by the claimant, Nolan Kyle Den Duyf to vary the current parenting schedule set out in a consent order and establish a shared 50/50 2-2-3 schedule.
 - c) An application by Ms. Den Duyf for an order of interim spousal support.
 - d) A cross-application by Mr. Den Duyf to be relieved of any obligation to pay interim spousal support on the basis of an inability to pay.
- [2] The four applications were argued together as a single lengthy chambers hearing. As will be seen, the issues and evidence overlap.

II. BACKGROUND

- [3] For the purposes of brevity and clarity, and without meaning any disrespect, I will refer to the parties and their parents by their first names. To protect her privacy, I will refer to the parties' child simply as "the Child".
- [4] Nolan and Hanna met in October 2019. They began living together on March 1, 2020, and married on September 10, 2022. They separated on December 6, 2023.
- [5] Nolan is currently 28 years old. He has lived in the Whistler - Pemberton area most of his life. He works as the head mechanic at Sabre Rentals, a business owned by his family. His parents, Linda and Dave, live next door to him in Pemberton.
- [6] Hanna is 38 years old. She moved to Pemberton in 2018. Before that, she lived in the Lower Mainland, and before that, on Vancouver Island. Her parents, Loraine and Julian, live on Salt Spring Island.
- [7] When she moved to Pemberton, Hanna was working full-time for Hootsuite, a social media platform. Shortly after she arrived in Pemberton, she began working part-time at a local brewery. Over time, she built her own home-based digital marketing business and worked less and less for Hootsuite.
- [8] In about June 2020, Nolan's parents, Dave and Linda, purchased a ten-acre farm property in Pemberton. Dave and Linda put Nolan on title as a joint tenant for estate planning purposes. Nolan and Hanna both worked on the farm property. Neither was paid for their labour.
- [9] In about September 2021, Hanna left her job at the brewery and scaled back her digital marketing business to focus her efforts on the farm.

- [10] On November 1, 2021, Nolan and Hanna purchased a lot in an upscale neighbourhood of Pemberton. By that time, Hanna was pregnant with their child. The plan was to build a family home on the property with a separate suite that could be rented out for income with which to offset the construction costs.
- [11] Nolan, Hanna and Nolan's parents entered into a memorandum of understanding pursuant to which Nolan's parents agreed to fund the purchase of the lot and the construction of the house, with the understanding that the costs would be tracked and tallied, and then converted into a mortgage when the house was complete.
- [12] The parties developed the property over the course of about two years. The main house, which was completed in September 2023, is 4,125 square feet. It includes four bedrooms, three and a half bathrooms, a child's playroom, a rec room and a double garage. The suite is 925 square feet. It has two bedrooms and one bathroom.
- [13] Nolan deposes that he borrowed \$3,102,000 from his parents to develop the property, of which \$362,000 was the price of the lot and the remainder construction costs. His father, Dave deposes that he intends to enforce the memorandum of understanding to be paid back the full \$3,102,000, plus interest.
- [14] The Child was born on December 1, 2021, by emergency c-section. Hanna was on bedrest for two weeks after the Child was born. Nolan took two weeks off work to care for Hanna and the child.
- [15] In March 2022, Sabre Rentals hired Hanna as the manager of their digital marketing. She did this work from home while caring for the Child.
- [16] The parties agree that Hanna was the Child's primary caregiver. They agree that Nolan was also actively involved in the Child's care, although they disagree on the extent of his involvement and responsibility.
- [17] Nolan had a demanding work schedule during the relationship. From January to June 2022, he worked at Sabre Rentals from 5:00 am to 2:00 pm, returned home and spent time with the Child, and then went to work on the farm from 8:00 pm until 10 or 11:00 pm at night. In June 2022, he changed his work schedule, such that he was at Sabre Rentals from 6:30 am to 5:30 pm, home between 6:00 pm and 8:00 pm, and then working on the farm until 10 or 11:00 pm.
- [18] It is difficult for young parents to find daycare in Pemberton. Demand for child care far exceeds supply. Hanna and Nolan registered the Child on daycare waiting lists before she was born. They still had not secured a spot for her in daycare when she was approaching her second birthday. In the fall of 2023, they put the Child in "nanny-share" with another family two days a week. Nanny-share provided some out-of-home care for the Child, but it was very expensive.

- [19] The Child also spent Wednesdays with Nolan's mother, Linda. This was convenient because Linda lived next door. Linda enjoys caring for the Child. She has expressed interest in providing care when the parties are working or otherwise unavailable. Unfortunately, inter-personal conflict has developed between Linda and Hanna.
- [20] When the parties separated on December 6, 2023, Nolan moved into the locked-off suite on the family property, while Hanna continued to live in the main house, where the Child had her own bedroom and a playroom.
- [21] Nolan continued to pay the expenses related to the family property, including mortgage payments to BlueShore of \$3,064 per month. Initially, Nolan did not pay any child support. He has not paid any spousal support.
- [22] The initial, informal parenting arrangements were that Nolan would have the Child on Tuesdays from 5:30 to 7:30 pm, and from 5:30 pm on Friday to 7:30 pm on Saturday. Nolan had proposed equal parenting time, but Hanna did not agree.
- [23] In February 2024, Nolan granted a mortgage on the family property to his parents in the amount of \$2,700,000. He did so without Hanna's knowledge or agreement. In his F8 financial statement, Nolan lists a second mortgage payment of \$2,166 to his parents as an expense. However, it is unclear whether he has ever made any payments to them.
- [24] Sabre Rentals terminated Hanna's employment in May 2024, leaving her with just one small client for her digital marketing business. Sabre Rentals also required Hanna to return a high-end company vehicle that she had been using for family purposes. Nolan purchased a used vehicle for Hanna and the Child to replace the company vehicle. The parties disagree on whether this used vehicle is serviceable or even drivable at this point.
- [25] Nolan commenced these proceedings on February 14, 2024. The next day, he delivered an application for an order establishing a shared parenting schedule. The parties were able to secure a timely judicial case conference ("JCC") on March 5, 2024. At the JCC, they entered into a consent order with the assistance of Associate Judge Bilawich (the "JCC Order"). The JCC Order included parenting time for Nolan as follows:
- a) Tuesday at 3:30 pm to Wednesday at 7:00 am, or with advance notice to Hanna, the option of dropping the child off at daycare on Wednesday; and
 - b) Friday at 5:30 pm to Sunday at 10:00 am.
- [26] The JCC Order also included the following orders:
- a) Neither party would remove the Child from the Pemberton area without the prior agreement of the other party or a court order;
 - b) A right of first refusal that, if either party was unavailable to be with the child in accordance with the parenting schedulable, they would provide the other party with the first option of caring for the child;

- c) If neither party was available to care for the child overnight, they would obtain the other's agreement on an alternate caregiver for the overnight care;
 - d) If short-term care was required (up to 3-4 hours), either party could arrange with an approved friend or family member to watch the child during that time; and
 - e) Nolan would pay child support and a portion of daycare expenses starting January 1, 2024, based on his income to be confirmed through an F8 financial statement.
- [27] At the time the parties entered into the JCC Order, the Child was still in nanny-share two or three days a week, at a cost of \$1,650 to \$1,800 per month. Nolan initially took the position that nanny-share expenses were not "daycare expenses" within the meaning of the JCC Order.
- [28] Nolan's initial child support obligation was \$891 per month. He made a lump sum payment for January and February 2024, but then stopped. He claimed he was unable to pay child support or a share of the nanny-share expenses unless Hanna contributed \$2,500 toward the expenses on the family home or moved out of the main house so that they could rent it out for additional income.
- [29] On May 23, 2024, Nolan delivered an application for an order granting him exclusive occupation of the family home or an order requiring Hanna to move into the suite and pay rent. The parties exchanged affidavits in which they both professed significant financial challenges post-separation.
- [30] On June 26, 2024, Hanna gave notice of her intention to relocate with the Child to Salt Spring Island. On June 27, she delivered an application seeking, amongst other relief, an order requiring Nolan to pay arrears of child support and daycare expenses. Nolan cross-applied for an order varying the parenting schedule.
- [31] On July 4, 2024, Associate Judge Robertson dismissed the application by Nolan for exclusive occupation of the family home, and declined to order that Hanna move into the suite.
- [32] On July 11, 2024, the parties entered into a consent order that resolved some of the outstanding issues (the "Consent Order"). The Consent Order included orders that:
- a) Nolan pay arrears of child support and daycare expenses;
 - b) Nolan use his best efforts to continue to pay the expenses on the family home;
 - c) On an interim, without prejudice, basis, the parties agreed that their Guideline were \$94,511 for Nolan, and \$10,800 for Hanna; and
 - d) Commencing July 1, 2024, Nolan would pay interim child support in the amount of \$899 per month.

[33] In August, 2024, the parties received word that the Child had been accepted into the Owls pre-kindergarten childcare program at the Nest Early Learning Centre in Pemberton. The Child began attending the Nest program three days a week--Monday, Wednesday and Friday, on September 1, 2024. The cost is \$680 per month.

[34] The parties have set a trial date of July 21, 2025.

III. ANALYSIS

A. Relocation

[35] Hanna seeks an order that the Child may relocate to Salt Spring Island, with the following parenting arrangements:

- a) the Child will reside primarily with Hanna on Salt Spring Island;
- b) Nolan will have parenting time on alternating weekends, from 5:30 pm on Friday to 10:00 am on Monday, with the exchanges to occur at the Tsawwassen ferry terminal;
- c) The parties will share spring break equally, with the transitions to occur on the middle Saturday at 10:00 am;
- d) Each party will be entitled to one 14-day block of vacation with the Child during the summer; otherwise, the regular parenting schedule will apply; and
- e) Nolan may have additional parenting time on Salt Spring Island.

[36] Hanna seeks this relief as a final judgment on a summary trial application under Rule 11-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009. In the alternative, she seeks an interim order on the same terms.

1. Summary Trial Application

[37] Rule 11-3(15)(a) provides that, on the hearing of a summary trial application, the court may grant judgment in favour of either party, either on an issue or generally, unless: (i) the court is unable to find the facts necessary to decide the issues; or (ii) it would be unjust to decide the issues on the application.

[38] In *Ghavim v. Jamali*, 2014 BCCA 21 at para. 32, the Court of Appeal sounded a note of caution with respect to determining family law claims by way of summary trial:

[32] Care must be taken, when summarily determining claims pursuant to the Rule, to recognize the preeminent objective of determining cases fairly on their merits. Because judgment on a summary trial will deprive the parties of a full trial, it is particularly important to observe the safeguards incorporated in the Rule, which are intended to ensure the proper attainment of justice.

- [39] In this case, Hanna seeks final judgement on two issues (relocation, and parenting schedule), with other issues (family property, imputation of income, final orders of child and spousal support) to be decided following a conventional trial.
- [40] When the court is asked to decide some, but not all, of the issues in a case--sometimes referred to as "litigating in slices"--it is important to consider carefully whether trying the issues separately will contribute, in the end, to a just, speedy, and inexpensive determination on the merits. In some cases, a summary trial may promote a more efficient determination of the case overall; in other cases, summary trial of an issue comes with significant risks, including inconsistent findings, multiple appeals, delay, and confusion: *Kaler v. Kaler*, 2013 BCCA 57 at para. 23; *Coast Foundation v. Currie*, 2003 BCSC 1781 at paras. 13, 16-18.
- [41] Relocation cases present unique challenges. For judges, relocation issues are among the most difficult the courts are called upon to decide. For parents, they are even more difficult. No matter what decision is made, the child will not have the same contact with one of her parents: *Link v. Lenskyj*, 2022 BCCA 341 at para. 2.
- [42] Deciding relocation issues on a summary trial entails a number of risks. Chief among them is that a final order may be uninformed by evidence that would likely have emerged in a conventional trial. That being said, there is no presumptive rule that relocation issues can only be decided following a full-blown trial. "At the end of the day, the suitability of a matter for determination by way of summary trial is a case-specific inquiry": *Hellberg v. Netherclift*, 2017 BCCA 363 at paras. 100-102.
- [43] Justice Giaschi granted a relocation order on a summary trial in *L.K.M. v. T.G.T.*, 2024 BCSC 1675. In that case, an urgent need to resolve the relocation issue arose because the parties had sold their family home in Whistler, the father had moved to Kelowna and the mother had accepted new employment in Ontario. One way or the other, the child was going to relocate; the issue was whether she was going to move to Kelowna to live with her father, or Ontario to live with her mother: at para. 91. The application was urgent because the home in Whistler had been sold, and with the sale the mother and child no longer had a place to live: at paras. 61 and 90. In these circumstances, Justice Giaschi found that there would be significant prejudice and adverse consequences if the relocation issue was left for an eventual trial, while deciding the issue summarily would minimize the disruption in the child's life: at para. 64.
- [44] The facts in *L.K.M.* were hotly contested. The parties filed four volumes of affidavits. Their evidence conflicted on the extent of the father's involvement in the child's care, his capacity to parent the child and the parenting time he exercised after separation: at para. 69. The mother also made multiple allegations in her affidavits of verbal, physical and emotional violence by the father: at para. 76.

- [45] Despite these conflicts, Justice Giaschi was able to find the facts necessary to decide the relocation issue. The Court found corroboration for the father's position on his parenting abilities in the evidence of a number of collateral witnesses: at paras. 72-74. The Court was also able to reject all of the allegations by the mother of family violence, by assessing her evidence on the whole of the evidence: at paras. 77-79.
- [46] In the result, Justice Giaschi applied the best interest of the child factors, assessed the reasons for the move, considered the parties respective relocation plans, and decided to allow the mother to relocate to Ontario with the child: at para. 130.
- [47] This case lacks the urgency of L.K.M. While Hanna faces financial challenges in Pemberton, her housing situation is stable. She and the Child are currently living in a beautiful home where the Child has her own bedroom and a playroom. Nolan's application for exclusive occupation of the house has been dismissed; he cannot compel Hanna to leave her home.
- [48] I recognize that the situation is unsustainable in the long term. Nolan is having difficulty making the mortgage payments to BlueShore, let alone any payments to his parents. Hanna has no resources with which to acquire Nolan's interest in the property or even to contribute anything toward servicing the current debt. It seems inevitable that the parties will need to sell the property. If they do, they may not realize any equity after the debts are paid. However, there is no evidence of a threat of foreclosure proceedings before trial, whether from BlueShore or Nolan's parents.
- [49] In addition, the Child has now been accepted into professional daycare in Pemberton, which is more stable and more affordable than the nanny-share arrangements that were in place when Hanna gave notice of an intention to relocate.
- [50] The prejudice of leaving the relocation issue for the trial is primarily financial. Hanna has no savings and she currently has very little income in Pemberton. It is a stretch for her to buy groceries and pay for clothing, supplies and daycare for the Child. Nolan is now paying child support and a share of the daycare, but he is not paying any spousal support and he says he is unable to pay spousal support. In addition, Hanna does not have a reliable vehicle, which is a real issue in the Pemberton Valley, especially during the winter.
- [51] If and when Hanna moves to Salt Spring Island, she plans to live with her parents in a large house with attractive outdoor space. Her parents are willing and able to provide child care and help with Hanna's living expenses, at least in the short term while she rebuilds her digital marketing business.
- [52] There is also an undeniable emotional strain on Hanna under her current circumstances in Pemberton. She deposes that she has difficulty imagining a life for herself in Pemberton, where she feels isolated from her family and under surveillance by Nolan and his family.

- [53] The courts recognize the vital connection between a primary caregiver's emotional well-being and the best interests of the child. A move that can improve the parent's mental health can enrich their ability to cultivate a healthy, supportive and positive environment for their child: *Barendregt v. Grebliunas*, 2022 SCC 22, at para. 169.
- [54] The parties agree that Hanna was and remains the Child's primary caregiver. They agree that they are both good parents. There are no allegations of family violence. While there is conflicting evidence about whether Nolan has taken the Child to some inappropriate social activities, Hanna does not question his ability to care for the Child or his commitment to responsible parenting.
- [55] However, there is disagreement on the extent of Nolan's involvement in the Child's care during the relationship. Nolan deposes that, when he was at home, he was primarily responsible for the Child. He also deposes that he was the one who responded to the Child during the night. Hanna, on the other hand, deposes that she was always primarily responsible for the Child, while Nolan played with the Child and helped with dinner and bedtime.
- [56] There is also disagreement about Nolan's interest in his full parenting time after separation. Nolan deposes that he wants equal parenting time, and that he has arranged flexibility in his work schedule to accommodate shared parenting. Hanna, on the other hand, deposes that Nolan regularly changes, shortens or cancels his existing parenting time, and that, from her perspective, he sometimes prioritizes his social life over parenting responsibilities. Nolan disputes these allegations.
- [57] The presiding judge on a summary trial application must be able to resolve any material disputes in the evidence on the critical issues. A summary trial judge cannot "simply choose between one affidavit and another": *Cory v. Cory*, 2016 BCCA 409 at para. 10.
- [58] In my view, it would not be in the interests of justice to make a final decision by way of summary trial concerning a relocation to Salt Spring Island. A better, fuller picture of the Child's care, before and after separation, will emerge from the evidence at trial.
- [59] Moreover, Hanna's financial circumstances--a primary reason for the proposed relocation--are connected with the family property and excluded property issues that can only be decided at the trial.
- [60] Hanna claims a family property interest in the farm, and Nolan's interest in Sabre Rentals. These and other assets are held by the Den Duyf family trust, a discretionary trust in which Nolan is a beneficiary. Document disclosure around the trust arrangements and succession planning are still on-going.
- [61] Hanna also disputes the extent and validity of the claim by Nolan's parents to a security interest over \$2.7 million in the family home.

- [62] Lastly, Hanna seeks to impute income to Nolan based on his ability to draw additional income from the family businesses.
- [63] Resolution of these issues may have a bearing on Hanna's financial ability to live in Pemberton. The factual and legal issues involved appear to be reasonably complicated. The evidentiary record is not yet fully developed.
- [64] For these reasons, I decline to make a final decision on a relocation of the parties' child to Salt Spring Island by way of a summary trial. I turn, therefore, to the question of whether to allow the relocation on an interim basis.

2. Interim Relocation Application

- [65] For many of the same reasons the courts approach final relocation orders carefully on a summary trial basis, they are also reluctant to allow a relocation on an interim application. An interim order that has the effect of significantly reducing the non-moving parent's time with the child can be tantamount to a final order, with a lasting impact on the child's relationship with both parents: *Nolie v. Reece*, 2016 BCSC 2201 at para. 27.
- [66] That being said, relocation orders may be granted on an interim basis in appropriate cases: *P.D.B. v. L.D.A.*, 2021 BCSC 1984 at para. 46.
- [67] Hanna's submissions on relocation are based on the Family Law Act, S.B.C. 2011 c. 25 [FLA] in general and s. 69 of the FLA in particular. However, the parties are married, so s. 16.9 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] also applies.
- [68] The parties did not address paramountcy as between the DA and the FLA in their submissions. My view is that the doctrine of paramountcy applies so the relocation application should be considered under the DA rather than the FLA: *K.S.P. v. J.T.P.*, 2023 BCSC 1188 at para. 282.
- [69] Hanna relies on s. 69(4) of the FLA, which provides that, where the parties "do not have substantially equal parenting time", and the relocating parent satisfies the court that the proposed relocation is made in good faith and she has proposed reasonable and workable arrangements to preserve the relationship between the child and the non-relocating parent, the relocation must be considered to be in the best interests of the child unless the other parent satisfies the court otherwise.
- [70] Section 16.93 of the DA, on the other hand, creates three different scenarios. Section 16.93(1) applies when the child spends "substantially equal time" with each party, in which case the parent proposing the relocation has the burden of proving the relocation is in the best interests of the child. Section 16.93(2) applies when the child spends the "vast majority" of their time in the care of the parent proposing to relocate, in which case the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child. Section 16.93(3) applies to all other cases. It provides that:

- (3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.
- [71] In this case, the JCC Order provides that Hanna has the Child in her care approximately 67% of the time. This is more than "substantially equal", but less than the "vast majority of the time". Accordingly, s 16.93(3) of the DA provides that there is no evidentiary burden on one party or the other--both parents must demonstrate to the court why the proposed relocation is or is not in the best interests of the child.
- [72] However, there is little or no substantive difference between s. 16.9 of the DA and s. 69 of the FLA, especially on an interim application. Under either set of legislative provisions, the court's determination of whether a parent may relocate is driven by what is in the child's best interests.
- [73] In *Hefter v. Hefter*, 2016 BCSC 1504, Justice Smith held that s. 69(4) of the FLA does not create a presumption in favour of a relocating parent who has the majority of the parenting time: at para. 39. Instead, it directs which party bears the evidentiary burden. Once the matter has been put in issue, the duty of the court is to consider all of the evidence and all of the criteria to determine what is in the child's best interests. At most, "s. 69(4) mandates a decision in favour of a relocating parent who has the majority of the parenting time when considerations of the child's best interests are evenly balanced [citation omitted]": *Hefter* at para. 40.
- [74] On an interim application, the fundamental question is whether it is in the child's best interests to allow the relocation on an interim basis pending a full trial. If the child's best interests are evenly balanced on the interim application, the relocation issue is better left to trial.
- [75] For these reasons, I will focus on the best interests of the child considerations in s. 16(3) of the DA. As part of that analysis, I will consider Hanna's reasons for relocating and the parenting arrangements she proposes.

3. Best Interests of the Child - Relocation

- [76] Section 16(3) of the DA enumerates 11 factors to consider in assessing a child's best interest, including in a proposed relocation. Section 16.92(1) enumerates an additional seven factors specific to relocation applications. All of these factors inform an overarching question of the child's physical, emotional and psychological safety, security, and well-being.
- [77] Not all of the factors in s. 16(3) of the DA are relevant to the analysis in this case. Specifically: the Child is too young for her views and preferences to be given weight (s. 16(3)(e)); cultural, linguistic, religious and spiritual upbringing and heritage are not relevant (s. 16(3)(f)); and there are no issues of family violence of any kind or other court proceedings relevant to the Child's safety, security and well-being (s. 16(3)(j) and (k)). I need not consider these factors. I will consider the remaining factors by subject matter relating to the relocation, rather than as an enumerated list.

a) Reasons for the Proposed Move

- [78] As discussed, the primary reasons for the proposed move are Hanna's financial circumstances and her emotional well-being.
- [79] It is in the Child's best interests for her primary caregiver to be able to provide for her, both financially and emotionally. Courts have frequently recognized that a child's best interests are advanced by a well-functioning and happy parent: Barendregt at para. 169; B.M.W.G. v. J.W.G., 2022 BCSC 1346 at paras. 117-119.
- [80] Beyond the obvious, however - no rent if she lives with her parents, and no daycare expenses if her parents care for the Child--the financial advantages to Hanna of living on Salt Spring Island are unclear.
- [81] Hanna says that she expects to have much greater opportunity to grow her digital marketing business on Salt Spring Island as compared to Pemberton. However, her work experience and her skill set are well-suited to remote work, which can be done from Pemberton just as easily as from Salt Spring Island.
- [82] When she first arrived in Pemberton, Hanna worked remotely for Vancouver based Hootsuite. Following the separation, she was offered another position by Hootsuite. She was unable to accept the offer because she did not have reliable and full-time care for the Child at the time, not because she was living in Pemberton.
- [83] All of the full-time employment opportunities Hanna has identified in her affidavits appear to be companies located in major urban centres, for whom she would work remotely. The local businesses with whom Hanna has spoken on Salt Spring Island would be prospective clients for her home-based business, not full-time employers. While Hanna says she has been unable to find new clients in Pemberton, it would surprise me if Salt Spring Island has more potential clients than the Pemberton area, especially if Hanna expanded her search to Whistler and Squamish. Salt Spring Island has a small, largely seasonal, economy, while the Sea-to-Sky corridor is a major year-round hub for the outdoor, tourism and hospitality industries.
- [84] The primary advantage to Hanna of moving to Salt Spring Island in terms of her employment prospects is the availability of her parents to provide childcare while she works remotely from their home. She also deposes that daycare is more readily available and less expensive on Salt Spring Island than it is in Pemberton.
- [85] These advantages are less pronounced now that the Child has been accepted into professional daycare in Pemberton three days per week, and Nolan says he is able to provide childcare on the weekdays that the Child is not in daycare. (I will return to Nolan's application to vary the parenting schedule below.)

[86] This is not to minimize Hanna's evidence that she would benefit psychologically from a move to Salt Spring Island and her parents' emotional support. This is an important consideration in the analysis of the Child's best interests.

[87] I also accept Hanna's evidence that the cost of living in Pemberton is high. However, there is no evidence before me that the cost of living on Salt Spring Island is any lower. Moreover, cost of living is, in my view, a neutral factor on this interim application. Hanna would be able to live rent free at her parents' home on Salt Spring Island until the case comes to trial; however, she is also currently able to live "rent free" in the former family home in Pemberton.

b) The History of the Child's Care and the Relationships in Her Life

[88] Hanna is the Child's primary caregiver. As stated, there is some dispute in the evidence over the extent of Nolan's involvement in the Child's care. However, the parties agree that Nolan is a good father, that he was involved in the Child's care during the relationship (to the extent his work schedule allowed), and that the Child enjoys spending time with him on the current parenting schedule. In short, the Child has formed a healthy bond with her father.

[89] The Child has also formed a good relationship with Nolan's family, and in particular his mother, Linda. During the relationship, the Child spent many Wednesdays with Linda. Since the separation, the Child regularly attends Friday night dinners with Nolan's family. Linda also provides back-up care during Nolan's parenting time. While Hanna objects to Linda caring for the Child during Nolan's parenting time, she acknowledges that her objection is based on how Linda has acted toward her (Hanna) since the separation, and not any concern with Linda's ability to care for the Child.

[90] Although she is too young to have formed deep friendships, the Child has a circle of young friends with who she spends time in Pemberton, including the children at her daycare and the community centre. As Hanna acknowledges, Pemberton is home to many young families with children and countless outdoor activities.

[91] If she moves to Salt Spring Island, the Child would lose many of these connections to Pemberton, but she would have more opportunity to develop her relationship with Hanna's parents. She would also be able to spend time with Hanna's sister and brother-in-law, and their two young children, when they visit Hanna's parents, which they do several times a year for one to four weeks.

[92] Hanna also says that the Child has friends on Salt Spring Island who live next door to her parents. It seems unlikely that the Child has formed meaningful friendships with the neighbours' children on Salt Spring Island yet. However, given her young age, she would likely make friends quickly.

- [93] Since Hanna is her primary caregiver, I am confident that the Child would transition easily in her care, from a circle of loving family and friends in Pemberton, to a circle of equally loving family and friends on Salt Spring Island.
- [94] The most significant change to the Child's relationships with her caregivers if she moves to Salt Spring Island would be the reduction in meaningful regular parenting time with Nolan, and the effect that would have on her relationship with him.
- c) Proposed Parenting Arrangements
- [95] As stated, Hanna proposes the following arrangements:
- a) Nolan will have parenting time on alternating weekends, from Friday evening to Monday morning, with the exchanges to occur at the Tsawwassen ferry terminal;
 - b) The parties will share Spring break equally, with the transitions to occur on the middle Saturday morning;
 - c) Each party will be entitled to one 14-day block of vacation with the Child during the summer; otherwise, the regular parenting schedule will apply; and
 - d) Nolan may have additional parenting time on Salt Spring Island.
- [96] The drive to and from Pemberton and the Tsawwassen ferry terminal is neither short nor easy, especially during the winter months. The traffic on the Sea-to-Sky Highway and the Lions Gate Bridge is notoriously heavy, especially on either end of a weekend. I take judicial notice that the drive time is between four and five hours each way.
- [97] To arrive at the Tsawwassen ferry terminal to pick up the Child at 5:30 pm on Friday, Nolan would need to leave Pemberton shortly after noon. He would not arrive home with the Child until approximately 10:30 pm at night.
- [98] To drop the Child off at the Tsawwassen ferry terminal at 10:00 am on Monday, Nolan would need to leave Pemberton with the Child at 5:00 am in the morning. He would not return home until 3:00 pm in the afternoon.
- [99] The result, in practical terms, is that, during the regular parenting schedule, the Child would spend just one day in Pemberton every other week, and two days every other week travelling to and from Tsawwassen. Time in a moving vehicle is not meaningful parenting time with a three-year-old child. Nor would it be fun for the Child to spend such long hours in a car seat. And this does not include the time on the ferry with her mother.
- [100] Given the practical difficulties with weekend parenting time in these circumstances, especially during the winter, there is a risk that Nolan would stop seeing the Child on a regular basis, and settle for one week during spring break and the 14-day block during the summer.

[101] This reduction in regular time with her father would come at a formative age for the Child. Nine months (or more) until the trial is a significant amount of time at age three. If the relocation was reversed by the trial judge, there would be a further disruption in the Child's life, including a loss of her Salt Spring Island circle and a sudden reintroduction to her Pemberton circle.

4. Conclusion on Interim Relocation

[102] I find that it is not in the Child's best interests to allow an interim relocation to Salt Spring Island. The disadvantages of an interim move outweigh the advantages.

B. Interim Parenting Schedule

[103] Nolan applies to vary the parenting schedule in the JCC Order, which currently provides him with the following parenting time:

- a) Tuesday at 3:30 pm to Wednesday at 7:00 am; and
- b) Friday at 5:30 pm to Sunday at 10:00 am.

[104] Nolan proposes the following 2-2-3 50/50 shared parenting schedule:

- a) Sunday at 6:00 pm to Tuesday at 6:00 pm;
- b) Tuesday at 6:00 pm to Thursday at 6:00 pm; and
- c) Thursday at 6:00 pm to Sunday at 6:00 pm.

[105] The schedule that Nolan proposes would provide the parties with alternating weekends with the Child in their care. It would also alternate the weeks during which the Child would be in their care on the weekdays she is not in daycare (Tuesdays and Thursdays). In addition, Nolan deposes that he can take Tuesday or Thursday, or both, off during the weeks that the Child is in Hanna's care if Hanna requires additional childcare.

[106] Nolan says he is hopeful that the parties will agree on reasonable childcare alternatives when required. In particular, he is hopeful that Hanna will agree they may use Linda as a back-up caregiver. He seeks an additional variation of the JCC Order as follows (underlining is the changed content):

If short-term care is required during a party's parenting time (up to 4 hours), either party may arrange with an approved friend or family member (which includes Linda Den Duyf, the child's paternal grandmother) to watch the child during that time, without the need to notify the other party of same.

[107] Hanna opposes a variation of the JCC Order. She argues that Nolan must demonstrate a material change in circumstances, which she submits he has not done.

[108] Further, Hanna argues that, if Nolan is able to cross the threshold of a material change in circumstances, the primary considerations concerning the Child's best interests are the history of her care and her need for security, both of which weigh against a 50/50 shared parenting schedule.

1. Material Change in Circumstances

[109] Section 17(5) of the DA requires that, before it makes a variation order in respect of parenting time, the court must satisfy itself that there has been a change in circumstances.

[110] Section 17(5) does not distinguish between orders that are made following an application based on a judicial determination of the child's best interests, and consent orders. Once parenting orders are made, whether by litigation or agreement between the parties, they are not lightly varied. A material change in circumstances is required: *K.S.L. v. S.A.L.*, 2021 BCSC 902, at para. 21.

[111] An unsuccessful relocation application is not, in itself, a material change in circumstances: *DA*, s. 17(5.3).

[112] A passage in time and the resulting change in a child's needs may be a material change in circumstances. In general, however, such a change occurs over years and not months: see, for example, *Villeneuve v. Fielding*, 2015 BCSC 1788. Nonetheless, time is a relative concept, and the eight months in this case since the JCC is not an insignificant amount of time in the life of a three-year-old child.

[113] The most significant change since the JCC is the Child's enrolment in professional daycare on September 1, 2024. At the time of the JCC, the Child was in nanny-share. The nanny-share was expensive and dependent on the availability of the nanny. It cost between \$1,650 and \$1,800 per month, which the parties struggled to pay, especially when Nolan failed to contribute his share.

[114] As stated, Hanna could not accept the job offer from Hootsuite because she still had the Child in her care three workdays per week. She deposed: "Until I can find reliable, full-time care for her, I will not be able to take on full-time work."

[115] The Owls program at the Nest is more reliable and less expensive. The Nest offers a structured program with a reliable schedule from 8:45 am to 2:45 pm. The Child attends Monday, Wednesday and Friday. The cost is \$680 per month. My understanding is that Nolan is currently paying 60% of this cost.

[116] The Child's enrolment in daycare is a material change because it allows the parties to consider alternative parenting arrangements that fully serve the Child's best interests as she approaches her third birthday, and Hanna plans a return to work.

2. Best Interests of the Child

- [117] Nolan argues that maximum contact with each parent is preferred so long as it is in the best interests of the child. He relies on s. 16(6) of the DA:
- (6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.
- [118] In Barendregt, the Supreme Court of Canada cautioned against continued use of the so-called "maximum contact principle". The Court found that Parliament has recast the principle as "parenting time consistent with best interests of child." There is no presumption that parenting time is shared equally. Instead, each case must involve a child-centric inquiry into how much parenting time with each spouse is in the best interests of the specific child: Barendregt at paras. 133-135.
- [119] The JCC Order in this case reflects the status quo and, for that reason, preserving its terms promotes stability for the Child. Hanna has been the Child's primary caregiver her entire life. Hanna is the more experienced parent. She cared for the Child through the challenges of a colicky baby and an emotional toddler. She manages the Child's childcare, extracurriculars, playdates and medical appointments. For these reasons, continuity with Hanna also promotes the Child's well-being.
- [120] Nolan is a good parent. He has formed a healthy bond with the Child. However, he has limited experience meeting the Child's day-to-day needs on his own.
- [121] In my view, it would not be in the Child's best interests to implement a 50/50 shared parenting schedule at this time. Moving directly to a shared parenting schedule would be too much of a change for the Child.
- [122] However, I do find that an increase in Nolan's parenting time would be in the best interests of the Child. More time with Nolan while the Child is awake would help foster and maintain her relationship with her father as she develops, which happens quickly at this age.
- [123] An increase in Nolan's parenting time on days that the Child is not in daycare would also provide Hanna with additional time to work on her digital marketing business, which would, in turn, promote the Child's best interests.
- [124] To be clear, the purpose of increasing Nolan's parenting time is to foster the bond between the Child and her father. This purpose would be frustrated if Nolan is unable to spend his parenting time with the Child, or routinely puts her in the care of third parties, including his mother. In this regard, I am relying on Nolan's evidence that he has flexibility in his work schedule to increase his parenting time during the work week. If Nolan's work demands interfere with his parenting time, he must follow the terms of the JCC Order, which include offering Hanna the right of first refusal.
- [125] I would not vary the JCC Order to eliminate the requirement that the parties notify one another when they ask an approved friend or family member to watch the Child. Nor would I vary the order to deem Nolan's mother an approved family member. The parties agreed on

the notice and approval requirements just eight months ago. I would not eliminate these requirements simply to reduce the inconvenience or disagreement over certain caregivers. I expect that, with time, the parties will learn to work together to find mutually acceptable, practical solutions to their childcare needs. However, for the time being, Nolan must observe the consultation requirements in the JCC Order, particularly when his parenting time increases.

[126] For these reasons, I would vary the JCC Order to increase Nolan's parenting as set out below, but otherwise leave the terms of that order in place.

3. Conclusion on Interim Parenting Schedule

[127] Counsel did not have instructions at the hearing to speak to a compromise schedule as between the JCC Order and Nolan's proposed 2-2-3 parenting schedule.

[128] What follows is a proposed 60/40 parenting schedule which the parties may alter by agreement. The parties may also seek further directions from the Court to achieve a practical and workable interim schedule.

[129] In my view, it would be beneficial to provide Nolan with parenting time on alternating Tuesdays and Thursdays, when the Child is not in daycare, so that Hanna may have more time to work during the week. It would also be beneficial to provide the parties with alternating weekends, so that Hanna may plan trips to Salt Spring Island with the Child.

[130] Accordingly, I propose the following two-week rotation:

- a) Week one: Nolan will have parenting time from 3:30 pm on Monday to 7:00 am on Wednesday; and
- b) Week two: Nolan will have parenting time from 3:30 pm on Wednesday to 6:00 pm on Sunday.

[131] This parenting schedule may trigger a consideration of s. 9 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. Section 9 provides:

Shared parenting time

9 If each spouse exercises not less than 40% of parenting time with a child the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

- [132] Section 9 of the Guidelines does not automatically result in a set-off in the amount of child support the parent with the higher income must pay. The court may depart from a full set-off or adjust the amount if it is appropriate in light of the factors to be considered under ss. 9(b) and (c): *Barnard v. Barnard*, 2016 BCSC 1710 at para. 16-18, citing *Contino v. Leonelli-Contino*, 2005 SCC 63.
- [133] A determination that the payor spouse meets the 40% threshold may therefore be followed by a consideration of the continuing ability of the recipient spouse to meet the needs of the child. The court can modify the set-off amount where, considering the financial realities of the parties, it would lead to a significant variation in the standard of living experienced by the child: *Barnard* at para. 18.
- [134] Counsel did not make submissions on s. 9 of the Guidelines. My preliminary view is that a set-off is not appropriate considering the financial realities of the parties in this case. I do not anticipate that the modest increase in Nolan's parenting time will result in any material increase in his expenses attributable to caring for the Child. Conversely, I anticipate that a decrease in child support would have a significant negative effect on Hanna's ability to meet the Child's needs.
- [135] The parties will have leave to appear before me if they wish to make submissions on the application of s. 9 of the Guidelines.

C. Interim Spousal Support

- [136] On applications for interim spousal support, the primary considerations are the applicant's needs and the respondent's ability to pay. The court does not embark on an in-depth analysis of the parties' circumstances which is best left for trial. Rather, it seeks to achieve "rough justice". *Robles v. Kuhn*, 2009 BCSC 1163 at paras. 12(1) and (2).
- [137] For the purposes of this application, Nolan acknowledges that Hanna is, *prima facie*, entitled to spousal support. The issues are:
- a) Hanna's needs: Nolan argues that Hanna is living "rent free" and could be earning additional income; and
 - b) Nolan's means: Nolan argues that he has no ability to pay spousal support, while Hanna seeks to impute additional income to him.
1. Hanna's Needs
- [138] Hanna's needs are compelling. As stated, she has no savings and very little income at this time. Her needs are mitigated by the Consent Order that requires Nolan to pay all of the expenses on the family property. Nonetheless, even without rent or a mortgage payment each month, her cost of living is expensive. Her standard of living is reduced from the lifestyle the parties enjoyed during the relationship.

- [139] I would not impute additional income to Hanna at this time. In his notice of application, Nolan sought to impute income to her of \$37,616.62. This was based on the income that Hanna pleaded in her response to family claim. That amount included the income from Sabre Rentals, which has since terminated her employment. Her income is now much less.
- [140] Nolan argues that Hanna could be earning \$60,000 to \$100,00 per year. Hanna may eventually be able to earn an income in this range if she finds full-time employment for a company like Hootsuite. Childcare responsibilities have limited her ability to take on full-time work. Her availability for work improved when the Child started daycare in September. It should improve further with the new parenting schedule under which Nolan will have the Child in his care on alternating Tuesdays and Thursdays. However, it will take time for Hanna to find full-time employment or rebuild her digital marketing business.
- [141] The time may come when the court will impute additional income to Hanna. She is required to earn what she is capable of earning. If she is unable to find sufficient work in digital marketing, she may need to take a job in another sector to supplement her income.
- [142] However, that time has not yet come. On an interim application such as this, the objective of self sufficiency is of less significance than it might be following a trial: Robles at para. 12(5). I am satisfied that Hanna is currently not deliberately underemployed.

2. Nolan's Means

- [143] In the Consent Order, the parties agreed on an interim, without prejudice, basis that Nolan's Guideline income is \$94,511 per year. This reflects the total income he declared in his Form F8 financial statement sworn July 30, 2024.
- [144] Nolan's expenses are currently very high relative to his income. As stated, he is required by the Consent Order to make best efforts to pay the expenses related to the family property. I accept the following monthly expenses from his F8 financial statement as necessary to maintain the property, including the main home in which Hanna and the Child reside:

BlueShore mortgage: \$3,064

Property taxes: \$356

Property insurance: \$678

Security system monitoring: \$29

Dyking fees (required by the District) \$35

TOTAL: \$4,161

- [145] This amount does not include any mortgage payments to his parents.

- [146] Nolan's fixed expenses total \$5,468 per month, made up of the property expenses (\$4,161), child support (\$899), and his share of the daycare expenses (\$408). This total does not include any day-to-day living expenses or discretionary spending. These are mandatory expenses that Nolan cannot reduce.
- [147] Nolan takes home an average net income after taxes of \$4,645 per month. It is readily apparent that his fixed expenses completely exhaust his disposable income.
- [148] Hanna argues that additional income should be imputed to Nolan. She argues that he must have access to more money to have sustained the parties' lifestyle during the relationship. She notes that the expenses listed in his F8 financial statement exceed his income. She calculates that his annual expenses, excluding child support and any mortgage payments to his parents, total approximately \$100,000 per year, which would require a before tax, gross income of \$132,789.
- [149] In addition, Hanna relies on evidence that Nolan accessed a joint account and a term deposit to withdraw family property of approximately \$63,000 following the separation. From these funds, Nolan paid approximately \$21,000 toward the BlueShore mortgage, and approximately \$10,000 toward other property expenses. He used the remaining balance of approximately \$33,000 for legal fees and personal expenses.
- [150] I would not impute additional income to Nolan on this application. There is no evidence that he is underemployed. All indications are that he works hard and earns what he is capable of earning to support his family. He is not a shareholder, director or officer in the family business, so s. 18(1) of the Guidelines does not apply and does not authorize the inclusion of any of the income of the company in his income for support purposes.
- [151] Nolan does not receive distributions from the discretionary family trust (with the exception of a dividend in 2023 that he used to pay expenses related to the construction of the family home). His father, the trustee, deposes that there are no plans to make any distributions to Nolan in the near future.
- [152] Further, there is no evidence that Nolan can live with his family and rent out the suite in which he is currently living, so as to supplement his income. If he moved out of the suite, Nolan would need to rent accommodations in Pemberton, which would likely offset the net rental income from the suite.
- [153] As Hanna points out, Nolan's expenses exceed his employment income. He may have used family funds to pay for some of those expenses following the separation. However, those funds appear to be exhausted. He may be borrowing money from his parents to cover some of his expenses. However, there is no evidence that he has access to additional sources of income with which to pay support. If he was ordered to pay spousal support, he would likely either need to go further into debt or else default on the BlueShore mortgage.

[154] I am not prepared to impute additional income to Nolan simply on the basis that the expenses listed in his F8 financial statement exceed his declared income. An imputation of additional income to him will require more evidence than what is available to me on this interim application.

3. Conclusion on Interim Spousal Support

[155] But for the property expenses he is paying, I would order Nolan to pay interim spousal support of \$1,153 per month, which is the mid point of the range recommended by the Guidelines based on the parties' incomes in the Consent Order. Unfortunately, after paying the property expenses, Nolan has no ability to pay any amount spousal support.

[156] It is in the interests of both parties and their child that Nolan continue to pay the property expenses, as well as child support and his share of the daycare expenses. Not only does this provide Hanna and the Child with a place to live, it also maintains a valuable family asset.

[157] The difficult reality is that both parties are currently "house poor". One solution might be for Hanna and the Child to move into the suite. This would allow the parties to rent out the main house and share the net income by way of spousal support. However, Nolan is not in a position to demand that Hanna leave her home. Unless and until the parties reach an agreement, or sell the property, the property expenses will continue to exhaust Nolan's disposable income.

[158] In my view, the appropriate order in these difficult circumstances is to declare that Hanna is entitled to interim spousal support, but set the amount of spousal support at zero, on an interim basis, subject to review if there is a change in the parties' financial circumstances or their living arrangements.

IV. CONCLUSION

[159] The application for a final or interim order permitting a relocation of the Child from Pemberton to Salt Spring Island is dismissed.

[160] Paragraph 5 of the JCC Order is varied to provide the following parenting time for Nolan on a two-week rotation:

- a) Week one: Nolan will have parenting time with the Child from 3:30 pm on Monday to 7:00 am on Wednesday; and
- b) Week two: Nolan will have parenting time with the Child from 3:30 pm on Wednesday to 6:00 pm on Sunday.

[161] The parties may alter this schedule by agreement, so long as they maintain a roughly 60/40 division of parenting time.

[162] The parties may request an appearance at 9:00 am to seek further directions with respect to the parenting schedule or the application of s. 9 of the Guidelines.

[163] Hanna is entitled to interim spousal support.

[164] On an interim basis, the amount of spousal support is set at zero, subject to review if there is a change in the parties' financial circumstances or their living arrangements.

[165] There will be no order of costs on these applications. The parties both put forward good faith positions that required determinations from the Court. In these circumstances, it is appropriate that the parties bear their own costs: Hansen v. Mantei-Hansen, 2013 BCSC 876 at para. 143.

"Elwood J."

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