
CANADA / JUDGMENT

Dowell v. Hamper

2019 BCSC 1266

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Supreme Court of British Columbia

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2019 BCSC 1266 Dowell v. Hamper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dowell v. Hamper,

2019 BCSC 1266

Date: 20190801

Docket: E54345

Registry: New Westminster

Between:

Paul Douglas Dowell

Claimant

And

Alison Gwyneth Hamper

Respondent

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for Claimant:

Lewis Spencer

Counsel for Respondent:

Mark G. Perry

Place and Dates of Hearing:

New Westminster, B.C.

June 12-13;

July 22-23, 2019

Place and Date of Judgment:

New Westminster, B.C.

August 1, 2019

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INTRODUCTION and OVERVIEW

- [1] The applicant father applies pursuant to s. 69(2) of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"), for an order prohibiting the respondent mother from relocating their nine-year-old daughter, Isabel Anne Dowell ("Issy"), from Burnaby to Nelson, British Columbia. He also seeks an order setting a parenting time schedule.
- [2] The father is 52 years of age. He is employed full time in Burnaby as an engineer with Corvus Energy Inc. earning approximately \$100,000 per annum inclusive of taxable benefits.

- [3] The mother is 47 years of age. She has a Masters degree in social work and was formerly employed in a direct care role at BC Children's Hospital in Vancouver. For the past four years she has been off work and is now receiving annual long-term disability insurance benefits of approximately \$40,000 following a motor vehicle-bicycle accident in September 2015 in which she sustained serious injury.
- [4] The mother recently accepted a job as a social work supervisor in Nelson, British Columbia, an 80% full-time position, which pays approximately \$58,000 per annum and permits some flexibility in hours. She proposes to relocate Issy to Nelson for the start of the school year in September 2019. The father opposes the proposed relocation.
- [5] These relocation disputes are among the most difficult family law cases the court is called upon to decide. The outcome invariably causes heartbreak for at least one of the parents, both of whom love their daughter dearly.
- [6] For the reasons that follow, I conclude the proposed move to Nelson is in Issy's best interest and the father's application for an order prohibiting same is dismissed.

LITIGATION HISTORY and INTERVENING EVENTS

- [7] The parties started living together in a marriage-like relationship on June 1, 2005 and were formally married on May 25, 2006. Issy was born on April 27, 2010 and is now nine years old. The mother also has an independent adult daughter from a previous marriage, who is now 25 years of age.
- [8] The parties separated for the first time in approximately February 2014. They reconciled in the February 2015 but then separated for the final time on November 8, 2016.
- [9] The mother says the final separation was triggered by her concern over ongoing and escalating physical altercations between the father and Issy culminating in an incident where the child was screaming, kicking, and hitting the father and the latter was engaging in aggressive physical restraint of the former. The child was throwing her bedroom belongings around the room, head banging, throwing and rolling her body on the floor and screaming uncontrollably.
- [10] In April 2017 the parties retained a psychologist, Dr. Sonya Vellet, to provide psychological support to the family. She carried out certain "attachment relationship screening" and "attachment-based intervention" (counselling) to the father in the ensuing months.
- [11] On Dr. Vellet's recommendation, the parties engaged in a "collaborative family law process" whereby each retained "parenting coaches" with a view to facilitating parenting arrangements and parenting time for the father by consent.

- [12] Dr. Vellet moved to Vancouver Island in late 2017 and was unable to provide any further individual therapy sessions for the child or joint sessions with the child and the father as had been planned. She recommended another counsellor, Ms. Nancy DeVries as her replacement.
- [13] The collaborative family law process was terminated and the present family law action was initiated by the father on December 1, 2017. The Notice of Family Claim seeks an order for divorce, an order for parenting arrangements and child support in respect of Issy, and an order in relation to family property and family debt.
- [14] The mother filed her Response to Family Claim on January 10, 2018 along with a Counterclaim of the same date. She contested the parenting arrangements sought by the father and included a claim for spousal support in addition to child support.
- [15] In January 2019 each party prepared and filed their respective Form 8 financial statement as required by the Supreme Court Family Rules.
- [16] On May 14, 2018 the parties attended a Judicial Case Conference pursuant to the Supreme Court Family Rules. Nothing substantive was resolved by consent at that conference, although an order was issued respecting the production and exchange of documents.
- [17] In May 2018 the father filed an application seeking, among other things:
- an order appointing a court-appointed expert to prepare an Assessment Report under s. 211 of the FLA;
 - an order declaring both parties to be the guardians of Issy and providing for shared parental responsibilities (including a provision that neither parent would exercise such responsibilities without agreement from the other parent);
 - an order formally providing for parenting time on the part of the father with Issy (starting with three days each week and increasing over the summer, ultimately leading to a week-on/week-off shared parenting arrangement as soon as the s. 211 assessment may recommend); and
 - an order appointing a parenting coordinator.
- [18] The order sought by the father in his application included a requirement that the s. 211 assessor make a determination "whether there is alienation of the child by either parent" and "whether either party has a medical condition that interferes with that party's ability to parent".
- [19] The application did not come before the court until October 12, 2018. By that time the father had filed three affidavits in support of the application and the mother had filed two affidavits.
- [20] The theme of the father's affidavits was that:

- Issy has suffered some form of emotional dysregulation throughout her life, manifested by emotional outbursts, hitting, and the like;
- the mother is debilitated by concussion and brain injury sustained in the September 2015 motor vehicle accident, lacks insight into the importance of shared parenting for Issy, and is unable to make reasonable decisions respecting parenting schedules; and
- the mother is engaging in behaviour designed to alienate Issy from her father and at every turn seeks to prevent meaningful parenting time for the father with Issy.

[21] The theme of the mother's affidavits was that:

- the father has a history of mental illness, having seen several psychiatrists over the years and prescribed medication for major depressive disorder and anxiety disorder with features of paranoia--he has discontinued his medication and his self-professed mental fitness should not be accepted;
- the father lacks understanding of Issy's emotional and developmental needs and exercises poor judgment in his parenting decisions; and
- the father lacks parenting skills because of his own negative childhood experiences, has anger management problems, and is prone to physical violence, including excessively physical disciplinary interactions with Issy.

[22] The order granted by Mr. Justice Crawford of this Court on October 12, 2018 provided for:

- the appointment of a counsellor for Issy (Ms. Nancy DeVries, who had earlier been recommended by Dr. Vellet and who had been providing counselling services during 2018);
- the appointment of Mr. Robert Findlay as a parenting coordinator with ultimate decision-making authority respecting parenting responsibilities upon which the parties were unable to agree;
- the preparation of a s. 211 report by a psychologist respecting "the needs and best interests of the child and each party's ability to meet those needs and interests";
- a regime for paternal parenting time from October through the Christmas holiday 2018, including certain specified overnights, with the assistance of the parenting coordinator (Mr. Findlay) and the child's counsellor (Ms. DeVries) as necessary; and
- child support payable by the father to the mother in the amount of \$938 per month "on a without prejudice basis".

[23] I have not been provided with any Reasons for Judgment respecting the October 12, 2018 order. I am not privy to any findings of fact that may have animated the order. It is clear, however, that the order was intended only as an interim order and that the s. 211 report would help inform any future parenting determinations, whether by the court or the parenting coordinator.

[24] The parenting regime contemplated by the October 12, 2018 order expired at the end of December 2018. For various reasons, only one of the contemplated overnights occurred.

[25] In January 2019 the parties informally agreed to the present paternal parenting schedule as follows:

- Tuesday from after school until 7:45 p.m. on a weekly basis;
- Friday from after school until 7:45 p.m. on a weekly basis;
- Saturday from 11:00 a.m. after Issy's orchestra rehearsal until 7:00 p.m. on a bi-weekly basis; and
- Sunday from 9:00 a.m. until 5:00 p.m. on a bi-weekly basis.

This schedule contemplates paternal parenting time of approximately four hours twice a week and eight hours once a week on three separate days, i.e. a total of 12 hours a week.

[26] As indicated above, the mother was injured in September 2015 when her bicycle was struck by a motor vehicle. She attempted to return to full-time work as a social worker but was unable to do so and she has been receiving long-term disability insurance benefits since February 2017. She was involved in another motor vehicle accident in June 2018 when her stationary vehicle was rear-ended by another vehicle.

[27] The mother's injuries included chronic musculoskeletal pain, headaches, fatigue due to disordered sleep, and persistent, albeit fluctuating, symptoms of post-traumatic stress disorder. The duration of the mother's pain symptomology despite extensive treatment and the complicating role of psychological factors make it unlikely she will become pain free. It is probable she will have some degree of permanent disability affecting all aspects of her life. She is incapable of returning to her former employment as a front-line clinical social worker. However, her physicians hoped she may one day be able to return to appropriate, part-time work.

[28] In late January 2019, the mother became aware of a job posting for a social work position in Nelson, British Columbia. The position is 80% full time and involves a supervisory role instead of direct, front-line care. The job also offered flexibility in hours. The mother has extensive family residing in the Nelson area and she has visited Nelson many times over the years. She thought this job would be a perfect fit for her situation, inasmuch as it would accommodate her compromised health and would enable her to continue supporting Issy with her various activities and academics along with readily available support from her mother and other close family members in the Nelson area.

[29] The terms of the mother's employment with Nelson Community Services are set out in a letter dated February 7, 2019. The position began on July 3, 2019. It involves a probationary period of six months from the start date. Her remuneration is \$58,000 per annum. The benefits package includes four weeks annual vacation and an extended health care package.

- [30] After accepting the employment offer, the mother informed the father of her proposed relocation with Issy to Nelson. The father objected to the move. Through legal counsel, the mother then sent to the father's counsel formal written notification pursuant to s. 66 of the FLA of the mother's intention to relocate and setting out a "reasonable and workable parenting time arrangement between Isabel and [the father] to preserve their relationship".
- [31] In the meantime, Dr. Krywaniuk was retained by the parties to complete the s. 211 report ordered by the court. Between April 22, 2019 and May 21, 2019 he undertook almost 40 hours of interviews, assessments and home visits. He was also provided with copies of the affidavits filed in the litigation between the parties. His final report is dated June 6, 2019 and comprises some 68 pages. He ultimately recommends against any relocation to Nelson.

LEGAL PRINCIPLES RE RELOCATION OF A CHILD'S RESIDENCE

- [32] Disputes can and frequently do arise where one parent, usually the parent with whom the child primarily resides, wants to move to a new location with the child and the move is opposed by the other parent.
- [33] The first question to be decided in such relocation cases is whether the dispute is to be determined under the Divorce Act, R.S.C. 1995, c. 3 (2nd Supp.), or provincial legislation which, in British Columbia, is of course the FLA. Until very recently, the Divorce Act contained no provisions expressly governing relocation. The leading authority was *Gordon v. Goertz*, [1996] 2 S.C.R. 27, which established a highly discretionary "best interests of the child" test having regard to the child's needs and the ability of the respective parents to satisfy those needs. In some cases, the doctrine of paramountcy has been applied to determine mobility and custody issues under s. 16 of the Divorce Act, rather than under the FLA: *T.K. v. R.J.H.A.*, 2015 BCCA 8.
- [34] The Divorce Act has recently been significantly reformed by the enactment of Bill C-78 first introduced to parliament in May 2018. The statutory revisions have in large measure incorporated much of the terminology and many of the standards found in the FLA including parenting, a non-exhaustive list of criteria for determining the best interests of a child, addressing family violence, and establishing a new framework for dealing with relocation of a child. These provisions received Royal Assent on June 21, 2019 but are not yet in force.
- [35] The FLA deals differently with relocation depending on whether there is an existing written agreement or order respecting parenting arrangements for the child. If no such agreement or order exists and the child's guardian intends to change the location of that child's residence in a manner that will have a significant impact on that child's relationship with another guardian, s. 46 of the FLA applies.

[36] If, on the other hand, a written agreement or an order respecting parenting arrangements already exists, the proposed relocation is governed by Division 6, ss. 65-71 of the FLA. Both procedures involve a determination of the best interests of the child, which in turn triggers consideration of the factors set out in ss. 37 and 38 of the Act, however additional and different considerations are required by s. 46 and s. 69 of the FLA respectively.

[37] Both parties have advised the court that the mobility dispute in this particular case is not governed by the Divorce Act but rather is to be determined in accordance with s. 69 of the FLA. They also advised the court that because the father and the mother in this case do not have substantially equal parenting time with Issy, the criteria specified in s. 69(4) apply and that s. 69(5) of the Act is not applicable.

[38] Section 69 of the FLA provides:

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. [Bold and italics in original.]

[39] Section 69(4)(a) of the Act makes it mandatory for the relocating parent to satisfy the court:

1. the relocation is being made in good faith (see s-s (6) for the relevant factors); and
2. "reasonable and workable arrangements" to preserve the relationship between the child and the other parent have been proposed.

If these conditions are met, then s. 69(4)(b) mandates a conclusion that the relocation is in the best interests of the child unless the other parent proves otherwise. This shifting onus is a key component of any relocation dispute governed by s. 69 of the Act.

SECTION 211 REPORTS: PURPOSE AND CONTENT EXPECTATIONS

[40] One can easily understand why a judge tasked with deciding a child's future might wish to have the assistance of an impartial and unbiased court-appointed expert who will not only be familiar with current social science respecting child development, but who will also be able to make specific recommendations informed by testing, observations and interviews of all the persons involved. Section 211 of the FLA expressly authorizes the court to commission such an inquiry:

Orders respecting reports

211(1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:

- (a) the needs of a child in relation to a family law dispute;
 - (b) the views of a child in relation to a family law dispute;
 - (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.
- (2) A person appointed under subsection (1)

- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
- (b) unless each party consents, must not have had any previous connection with the parties.
- (3) An application under this section may be made without notice to any other person.
- (4) A person who carries out an assessment under this section must
 - (a) prepare a report respecting the results of the assessment,
 - (b) unless the court orders otherwise, give a copy of the report to each party, and
 - (c) give a copy of the report to the court.
- (5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section. [*Italics in original.*]

[41] In *Kwan v. Lai*, 2016 BCSC 1626, I summarized the context and purpose of a s. 211 report at para. 46:

I have commented elsewhere on the context and purpose of a Section 211 Report (see *Dimitijevich v. Pavlovich*, 2016 BCSC 1526) and there is no need to repeat those observations here. Suffice it to say:

- Section 211 of the Family Law Act permits the court to seek the assistance of an independent and impartial investigator and to call on that investigator to make recommendations based on the results of his/her investigation (*K.M.W. v. L.J.W.*, 2010 BCCA 572 at para. 50);
- The facts stated in the Section 211 Report are prima facie evidence of their truth (*supra*, para. 50);
- In performing this role, the court appointed expert functions as "the eyes and ears of the court" and is expected to be impartial, and unbiased, and to make objective recommendations rather than acting as an advocate for any party;
- Where the assessor is a registered professional with the College of Psychologists of British Columbia, he/she is expected to abide by the "code of conduct" promulgated by that college which imposes various requirements for undertaking assessments and formulating recommendations that are appropriately comprehensive, objective and balanced;
- There is no protocol or checklist that must be exactly followed in every case and the authors of Section 211 Reports are free to use their education, experience and expertise to conduct the assessments with an eye to assisting the courts in determining what is in the children's best interests (*L.C.T. v. R.K.*, 2015 BCSC 2378 at para. 419);

· Nevertheless, the court is not obliged to accept the opinions or recommendations of the Section 211 experts; the court does not abdicate its role as the ultimate decision-maker but will give such weight to the Section 211 experts' recommendations and opinions as is appropriate having regard to the circumstances of the case and the relevant evidence adduced (*Shapiro v. Simpson*, 2016 BCSC 2011 at paras. 102-103).

[42] I commented further on the Code of Conduct applicable to s. 211 reports in *Dimitrijevic v. Pavlovich*, 2016 BCSC 1526:

[30] For certain, it is common practice for the court to appoint a registered psychologist of the CPBC to conduct s. 211 assessments. Such psychologists are governed by a "Code of Conduct" promulgated by the CPBC which prescribes "behavioural norms and standards of professional conduct" for psychologists registered with the College. Article 11 of that Code regulates "assessment procedures" which, although general in nature, would apply to any assessment under s. 211 of the Family Law Act. Article 11.2 of the Code makes the psychologist performing any assessment,

... solely responsible for the assessment process, including the appropriate selection, application, interpretation, and use of assessment instruments

[31] The Code also requires that:

- the psychologist must gather assessment information in a manner that is appropriately comprehensive, objective and balanced;
- any testing must be conducted using scientific procedures and current professional knowledge;
- assessments, recommendations and reports must be based on findings appropriately substantiated; and
- the psychologist must be impartial and unbiased, make objective recommendations and not act as an advocate for any party.

[43] The court rightly expects that, in addition to complying with the assessment/ reporting standards prescribed by the College, any registered psychologist will also:

- read the background material provided by the court or counsel, including affidavits, prior assessments, medical or other expert reports respecting the parties or the children;
- be thoroughly conversant with current assessment standards and procedures, as well as up-to-date social science respecting parenting practices following separation and divorce that best promote and protect the child's long-term psychological and emotional well-being;
- produce a well-written, well-organized report with appropriate headings and subheadings supported by a detailed table of contents;

- in that report set out discrete, separate assessments for each assigned inquiry, i.e., the views of the child, the needs of the child in the context of parenting disruption arising from the family law dispute, and the ability/willingness of each parent to meet those needs; and
- make recommendations respecting the future parenting of the child supported by a detailed explanation why/how they promote/protect the best interests of the child, with reference to any appropriate current social science.

[44] In this particular case the October 12, 2018 order commissioning a s. 211 report required a professional evaluation of the child's "needs and best interests" and "each [parent's] ability to meet those needs and interests". By the time Dr. Krywaniuk was appointed to undertake the task, the mobility/relocation dispute between the parents had crystalized and it was the parties' and the court's expectation that Dr. Krywaniuk would also undertake an assessment and make recommendations respecting the child's best interests in that context.

THE RELOCATION APPLICATION: EVIDENCE AND PROCEDURE

[45] The father's application to prohibit the proposed relocation to Nelson came on before me in chambers on June 12, 2019. The application had been set for two days. By that time, the application record had expanded to comprise no less than 13 affidavits as well as Dr. Krywaniuk's s. 211 report dated June 6, 2019. The material included the various affidavits before the court at the time of the October 12, 2018 order.

[46] For the purposes of the June application, the additional evidence tendered on behalf of the mother included:

- affidavit of Cassandra Seafoot (mother's eldest daughter) sworn June 9 describing her observations of the father as a parent, various physical altercations between the father and Issy, certain statements made by Issy regarding the father, and pointing out errors and omissions in Dr. Krywaniuk's report;
- June 10, 2019 affidavit of Stephen Wiseman (the psychiatrist treating the mother for PTSD and depression) confirming diagnosis and treatment, the mother's ability to safely and responsibly parent her daughter, and commenting on the "narrow but real chance to return to work far sooner" than expected, in Nelson;
- June 7, 2019 affidavit of Philip Crewe (mother's boyfriend) commenting on observations of Issy, her interactions with the father, and interactions/exchanges between the parents;
- June 10, 2019 affidavit of Rebecca Irvine (legal assistant) attaching a four-page email statement from Issy's grandmother in Nelson describing interactions between the parents and with the child over various years, commenting on the parents' skill sets and abilities, and strongly supporting the proposed move to Nelson; and
- affidavit of Steve Makuch (a friend and former running partner of the mother) clarifying information said to have been inaccurately summarized by Dr. Krywaniuk in his report.

- [47] The remaining affidavits are those sworn by the father (two) and the mother (one). As is unfortunately all too common in family law litigation, the affiants dispute the truth of the other party's assertions under oath and offer differing versions of the same events. The affidavits are filled with inadmissible argument and statements of opinion and accusation. The syntax is often formal and in some instances is clearly "legalese" (e.g. purporting to reserve rights to comment further. Affidavits drafted by lawyers often obscure the authentic voice of the affiants, and this case is no exception.
- [48] In his affidavit of June 4, 2019, the father expresses the belief that "the most significant thing that the mother and I can do as parents for our daughter is to ensure that she has a healthy and strong relationship with both parents". He says he "base[s] my belief" on a "position stated by the government of Canada on its website concerning shared parenting and on the social science studies that show that having both parents share custody of a child is best for the long-term emotional and psychological well-being of the child regardless of any incidents of family violence". He then attaches as an exhibit (technically inadmissible for the truth of their contents) extracts from the government website and two social science research papers authored by a U.S. academic.
- [49] The mother devotes five pages of her June 7, 2019 affidavit critiquing Dr. Krywaniuk's s. 211 report. She complains that Dr. Krywaniuk has simply accepted the father's (false) versions of events, some of which allegedly occurred before the father had even met the mother, and that he has inappropriately formed conclusions respecting her personality and behaviour, which are completely unfounded in fact. She says Dr. Krywaniuk's approach to this assessment has been unbalanced and unfair to her and that his conclusions respecting alienation are simply wrong.
- [50] The mother has issued personal injury litigation seeking damages for the injuries sustained in the two motor vehicle accidents. It became apparent at the June 12-13 hearing that she had not disclosed to the father the various medical-legal reports or other medical records collected as part of that litigation. As the nature and extent of any ongoing disabilities on the mother's part might inform the determination of parenting issues, I directed that disclosure of these medical reports be made.
- [51] Counsel for the mother also sought to have Dr. Krywaniuk attend the hearing for cross-examination. It turns out that Dr. Krywaniuk was in London, England until late June and that his report had seemingly been drafted, at least in part, "on the road" when he did not have his complete file with him.
- [52] I agreed that cross-examination of Dr. Krywaniuk was warranted in light of the many criticisms by the mother and her supporting affiants with respect to the accuracy of his reporting and two further days were secured to complete the hearing in that regard, on July 22-23, 2019. I also offered the parties the opportunity to cross-examine each other on their conflicting affidavit evidence but neither wished to do so. At the end of the day I gave directions prohibiting any relocation of the child to Nelson and directing a certain paternal

parenting regime all on an interim basis pending the conclusion of the hearing and my judgment in this case.

- [53] The hearing resumed as scheduled on July 22-23, 2019 at which time Dr. Krywaniuk was subjected to one and a half days of cross-examination. The court was also provided with two medical-legal reports respecting the injuries sustained by the mother in the motor vehicle accidents: a May 9, 2019 assessment by a physiatrist, Dr. Anton, and a July 8, 2019 report by the mother's psychiatrist, Dr. Wiseman.
- [54] I expressed concern to the parties about the conflicting and technically inadmissible affidavit evidence in this case, and the ability of the court to resolve credibility issues without the benefit of oral testimony followed by cross-examination. Both parties advised the court that this relocation decision was a matter of considerable urgency and one that they did not wish to be adjourned to a conventional trial. The court has rather reluctantly agreed to accommodate that request and the parties will have to live with any consequential frailties in any determination of fact or remedy.

DR. KRYWANIUK'S S. 211 REPORT

- [55] The body of Dr. Krywaniuk's report comprises 15 pages. He then attaches a 50-page appendix in which he summarizes his interviews of both parents and the child, reviews the psychological testing results for both parents, describes his visits to the home of both parents, and summarizes "collateral interviews" with 12 other persons including friends of each parent, the mother's psychiatrist, and Ms. DeVries who was the registered clinical counsellor working with Issy and the family in 2018 through to May 2019.
- [56] In his cover letter Dr. Krywaniuk stated he "was able to review a number of documents" which counsel had provided to him, and which were listed in the letter of instruction. He says, "I have reviewed but not summarized them in this report."
- [57] During cross-examination, however, Dr. Krywaniuk admitted that, while he had "scanned" the affidavits provided to him he "did not read them in detail". As the cross-examination proceeded, it became apparent he may not have read the affidavits at all and certainly he had not read any of the medical documentation pertaining to the parents, the April 4, 2018 report by Dr. Vellet (Exhibit A to the father's May 13, 2018 affidavit). Dr. Krywaniuk expressed the view that his report, prepared after extensive psychological testing of both parents, was "more complete and more current" than any report from Dr. Vellet in any event.
- [58] Pages 4 to 8 of Dr. Krywaniuk's report cites the mother's views respecting the father's poor parenting skills and lack of insight. The following half page summarizes the father's impression of the mother and, in particular, her lack of support for any interaction between him and Issy and her various steps to prevent this occurring.

- [59] I have carefully read all of the affidavits submitted in connection with this relocation application including all of the affidavits sworn by the parents. In my opinion, Dr. Krywaniuk has accurately captured each parent's perception/opinion about the other.
- [60] On page 9 of his report, Dr. Krywaniuk sets out his assessment that the two parents' "interpersonal dynamic" reflects their perception of the other individual as "the problem" and "provides at least some explanation as to why these two individuals have so much difficulty co-parenting". This too is reflected in the contents of their affidavits and is likely an accurate observation.
- [61] Dr. Krywaniuk's conclusions and recommendations are:
1. the child needs to have both parents solidly in her life ... although the parents have already had counselling, they need to re-focus on co-parenting rather than maintaining their conflict;
 2. Issy has a number of challenges that she will need to overcome in order to function well as an adult ... a psycho-educational assessment would be of benefit to her and would help both parents be on the same page with regard to her needs and how to best approach them;
 3. Issy will benefit from her relationship with both parents and a stronger relationship with her father will likely entail a bigger parenting role than he has had in the past;
 4. any sacrifices required to strengthen the relationship with both parents should be made by the parents rather than the child;
 5. any proposed relocation to Nelson should not occur until the relationship between Issy and her father is strengthened; and
 6. there are elements of alienation in play, particularly insofar as the proposed move to Nelson is concerned, which need to be addressed and overcome ... both parents will need to work diligently, likely with the assistance of an outside individual, to develop a much stronger co-parenting approach than is currently in place.
- [62] A central part of Dr. Krywaniuk's cross-examination was focused on his understanding (based on information coming from the father) that the mother had been sexually abused by her maternal grandfather and had a history of sexual promiscuity. On page 11 of his report, Dr. Krywaniuk notes that "women who are sexually abused in their earlier years often have difficulty in later relationships and develop a strong sense of mistrust in male figures ... they can pass on these attitudes through their parenting approaches and behaviour".
- [63] In cross-examination, counsel tried to get Dr. Krywaniuk to agree that this "finding" was central to his assessment of the mother, yet he made no effort to confirm with the mother whether or not the assertions made by the father were true. In her affidavit evidence, the mother makes it clear that these allegations are false.

- [64] Dr. Krywaniuk acknowledges that he did not specifically ask the mother about the father's assertions respecting sexual abuse or promiscuity. He pointed out, however, that he did ask her during the interview about any abuse or significant trauma while she was a child and, as noted in page 32 of his report, she said nothing had occurred.
- [65] Dr. Krywaniuk was also challenged on cross-examination that he had downplayed or minimized the presence of family violence in the relationship between the mother and the father. He denied that was his intent but said this "can largely be left behind" as the parties are no longer cohabiting and the potential for such behaviour is significantly reduced. In his opinion, "the focus should be on the future".
- [66] Dr. Krywaniuk acknowledged that there appears to be a long history of the child struggling in her relationship with her father in this case. He acknowledged that the child has appeared reluctant to extend parenting time with her father into overnight visits. He acknowledges that the child stated several times in her interview that she was uncomfortable with her father on some occasions. The overarching question here, he says, is why is this so?
- [67] Dr. Krywaniuk expressed the opinion that the child's incomplete or confused attachment with her father is fueled by a "lack of permission" from the mother. The mother distrusts the father's parenting skills, the child has picked up on this tension, and the result is an anxiety which has caused her to align herself with the mother.
- [68] Dr. Krywaniuk stated in cross-examination he believed there was "an alienating aspect to this move to Nelson", confirmed by the mother accepting the job, selling the matrimonial home, introducing the child to the new school in Nelson, and promising a guinea pig in the new home, all without the consent of the father and contrary to his wishes. He noted however that by now "the point of no return" has probably been reached and that if the relocation to Nelson did not materialize, this is "going to create another issue" for the child.
- [69] In Dr. Krywaniuk's view, "this family needs reunification" and "establishing a working relationship between the child and her father" is important to her long-term development. "Moving to Nelson won't do this."

ASSESSMENT and DETERMINATION

- [70] I start with the mandatory determination under s. 69(4)(a), namely, that the relocating parent, here the mother, satisfy the court:
1. the proposed relocation is made in good faith; and
 2. "reasonable and workable arrangements" to preserve the relationship between the child and the father have been proposed.

Good faith

[71] In determining whether the mother's proposed relocation has been made in good faith, s. 69(6) of the FLA make it mandatory for the court to consider:

1. the reasons for the proposed relocation;
2. whether it is likely to enhance the general quality of life of the child and, if applicable, the mother, including increasing well-being or financial or educational opportunities;
3. whether notice of relocation was given under s. 66 of the FLA; and
4. any restrictions on relocation contained in the written agreement or an order.

[72] Here, notice of relocation was provided to the father and there exists no written agreement or order placing any restrictions on relocation (other than the interim order I issued prohibiting relocation of the child until the Reasons for Judgment in this case).

[73] I am satisfied that the mother's stated reasons for the proposed relocation are both genuine and well-founded and that the move is not motivated simply for the purpose of reducing the father's parenting time with Issy.

[74] First, I wish to make it clear that I accept the mother's affidavit evidence respecting the frequent physical and emotional conflict between Issy and her father, a phenomenon that has occurred for several years and which evidently continues to occur. This behaviour, i.e. physically attacking and hitting her father from time to time along with other "tantrum" conduct, is disturbing and its continuation cannot possibly be in the child's emotional and psychological long-term interests. Each parent blames the other, but the simple fact of the matter is that the current parenting regime is not working very well, as reflected by Issy's continued refusal to have overnight visits with her father. The move to Nelson is an opportunity to recalibrate the relationship between Issy and her father, hopefully for the better in the long term.

[75] Both parties have agreed to the sale of the family home, a transaction that is set to close in mid-August 2019. The mother and Issy are required to find a new home and I accept the mother's testimony that the cost of housing in the Nelson area is substantially less than in Burnaby or greater Vancouver.

[76] I also accept the testimony of the mother and the grandmother regarding extended family in the Nelson area and the ready availability of significant physical and emotional support from family members for the child and the mother in Nelson. In contrast, there was little or no evidence tendered by the father regarding available support from his side of the family.

[77] As well, the mother has encountered significant medical and financial challenges as a consequence of the September 2015 bicycle accident. She endures pain that has been diagnosed as likely being permanent, which has prevented her return to her former occupation as a "front line" social worker, and which has significantly limited employment

opportunity generally. The mother and her physicians are likely correct that the part-time job in Nelson may be "the perfect opportunity" or a "real chance" to return to the workplace in a flexible, supervisory position that will not only improve her financial position but which can only have a positive effect upon the mother's self-esteem and emotional well-being. This, in turn, can only have a positive effect upon Issy in the long term.

- [78] Without doubt, Issy's relocation to Nelson will necessarily disrupt her present life in the short term. She will have to change schools, make new friends, and join a new hockey team. The frequency of physical visits with her father, who is also one of the co-coaches of her hockey team in Burnaby, will be reduced. All of this involves significant change in the short term, as it does for any child in a relocation situation. However, these challenges can be overcome if both parents (and family members in the new location) lend positive support. New friends will be found. New sports teams and other recreational activities are available in the new community. The new school is perfectly satisfactory, albeit without a French immersion program.
- [79] As indicated above, I am satisfied that the mother's proposed relocation of Issy to Nelson is made in good faith.

Ongoing relationship with father

- [80] The next question is whether the mother has proposed "reasonable and workable arrangements to preserve the relationship between the child and her father". In that regard, the mother proposes an order that the father have parenting time with Issy as follows:
- a. once every other month during the child's school year, the father will travel to Nelson (and invited to stay with Issy's grandparents if he wishes) for a long weekend (Thursday to Sunday) of parenting time with Issy;
 - b. in addition, in the alternate month during the school year, the mother and Issy will travel to Burnaby in order to facilitate parenting time on a long weekend (Thursday to Sunday) between the father and Issy;
 - c. the father will have face time or Skype communication with Issy on a regular weekly basis;
 - d. during Christmas, spring break and summer school holidays, the father will have longer periods of parenting time with Issy; and
 - e. the father's parenting time will eventually include overnights with the father, as agreed between the parties based on input from Issy, and with the assistance of the parties' parenting coordinator.

- [81] Obviously, this is a significant change to the current paternal parenting regime whereby the father has a total of 12 hours of parenting time with Issy each week, albeit with no overnights at the moment. The parties have not worked out the details of any new parenting regime because, quite understandably, the father has been reluctant to be seen as in any way approving any move to Nelson.
- [82] The mother's proposed revised paternal parenting regime is thus vague and lacking specific detail. This is not fatal, however, as the parties can work things out with the assistance of the parenting coordinator or, if disagreement persists, apply to court for further directions and determinations. The point is that the mother is proposing ongoing visitation between father and daughter to preserve a relationship between the two.
- [83] Any significant geographical relocation necessarily means that the frequency of physical parenting time between a child and any non-relocating parent will be reduced, often significantly so. Such reduction in and of itself does not render any proposed new parenting regime unreasonable. To the contrary, the new constraints provide the context for determining what is reasonable. In this case, I consider the revised paternal parenting regime proposed by the mother to be reasonable in the circumstances.
- [84] The current relationship between Issy and her father includes significant features of what the parties and others euphemistically call "dysregulation"--wild outbursts by Issy and episodes of physical attacks and, on occasion, physical restraint. It remains to be seen whether this will continue or whether a decrease in the number of physical visits will see things improve as Issy continues to mature. Ms. DeVries and Dr. Krywaniuk recommend that Issy undergo a psycho-educational assessment by a qualified expert in that field. Both believe this would provide her parents with better insight into Issy's issues and how to best support her development and growth. In my opinion, this is a wise recommendation both parents should endorse.
- [85] The mother has satisfied the court that the proposed relocation meets the criteria specified in s. 69(4)(a) of the FLA and, in accordance with s. 69(4)(b) that relocation is *prima facie* in the best interests of the child. The onus therefore shifts to the father to satisfy the court otherwise.

Is the *prima facie* case rebutted?

- [86] In this case, the mother has always been the primary caregiver for the child. The continuation of that status and the stability it provides to Issy is a key consideration militating in favour of the proposed relocation.
- [87] While they were living together, yelling, disagreements and arguments between the parents increased in frequency and intensity, often in the presence of the child. The father was particularly prone to outbursts of physical anger. All of this amounts to "family violence" as that term is defined in the FLA. I accept the mother's version of these events and although these incidents have become less frequent as a result of the physical separation of the

parties, family violence remains a factor in determining the best interests of the child that militates in favour of the mother's proposed relocation with Issy to Nelson.

- [88] The father relies heavily upon on the report of Dr. Krywaniuk and, in particular, his conclusions respecting both alienation by the mother and the need to address and overcome those effects before any move to Nelson is entertained.
- [89] There are, however, several significant flaws in Dr. Krywaniuk's report that, with the greatest of respect, result in his recommendations attracting much less weight than what might otherwise have been the case.
- [90] First, it is disturbing that Dr. Krywaniuk did not review the parties' affidavit evidence in detail. It is of particular concern that he failed to read the reports of Dr. Vellet and Ms. DeVries, as well as the medical information available regarding the father's serious mental health issues in the past. He seems to have accepted that the father underwent some sort of "epiphany" of self-realisation that has allowed him to overcome previously existing challenges in parenting skills. He is either unaware of or ignores Dr. Vellet's assessment that the father is very much the product of "disrupted attachment" with his own parents, and that he has "challenges" with emotional regulation, sensitive responsiveness, and understanding his daughter's developmental needs.
- [91] Second, Dr. Krywaniuk seems to have accepted a false premise that the mother had been sexually abused by her maternal grandfather and hence was prone to "difficulty in relationships" and a "strong sense of mistrust in male figures", all of which is being passed on to the child. This factually incorrect premise combines with the failure to review the affidavit evidence respecting the husband's conduct to undermine any conclusion respecting alienation.
- [92] In *Williamson v. Williamson*, 2016 BCCA 87, our Court of Appeal has emphasized that:
- alienation is a serious allegation and its existence and root caused must be proved by appropriate expert evidence;
 - such expert evidence is also required respecting alternative remedies appropriate in any individual case as being in the best interests of the child, in the short and the long term; and
 - draconian orders such as transferring custody from the alienating parent to the rejected parent must not be made without careful consideration whether the long-term benefits will actually outweigh any short-term emotional trauma to the child.
- [93] Dr. Krywaniuk's "diagnosis" of alienation by the mother is not supported by references to factual incidents evidencing same. He refers to no social science, current or otherwise, on alienation and estrangement and he used both terms in his report and oral evidence even though they are completely different concepts with different causes.

- [94] Dr. Krywaniuk says there should be an increase in the father's parenting time with Issy, which means the mother should either remain in Burnaby or "accept a reversal in the current parenting arrangements". He recommends "assistance of an outside individual" but provides no information or assessment of the efficacy of any such remedies, their cost and availability, and no assessment of any long-term benefits and whether they would outweigh the emotional trauma that might be caused to the child.
- [95] For these reasons I cannot accept Dr. Krywaniuk's report as the basis for being "otherwise satisfied", pursuant to s. 69(4)(b) of the FLA, that the proposed relocation to Nelson is not in the best interests of the child.
- [96] I wish to make it clear that I intend no condemnation of the father's parenting skills. He has clearly made an effort with counsellors and is attempting to improve. He has many positive attributes to offer his daughter. Dr. Krywaniuk was obviously impressed during the home visit with Issy.
- [97] The fact of the matter, however, is that Issy is a challenging child. Her counselling with Ms. DeVries has been discontinued at the latter's suggestion. Episodes of "dysregulation" continue. She now very much wants to move to Nelson. I am not satisfied that any move to Nelson would not be in her best interest.

CONCLUSION and SUMMARY

- [98] For the reasons stated above, I dismiss the father's application for an order prohibiting the mother's proposed relocation to Nelson with Issy.
- [99] The court is prepared to make an order setting out in detail a regime for the father's parenting time with the child. The court generally endorses the approach proposed by the mother although it is prepared to grant an order that will increase the father's physical parenting time with the child beyond the once-a-month long weekend if it is practical and convenient. The court invites the parties to discuss and hopefully resolve by consent the details of any such parenting regime, failing which the parties are granted liberty to make further specific submissions on this aspect of the case and a formal order will follow.

"KENT J."

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