
CANADA / JUDGMENT

Duggan v. White

2019 BCCA 200

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 200 Duggan v. White

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Duggan v. White,

2019 BCCA 200

Date: 20190606

Docket: CA45358

Between:

Angelica Duggan

Appellant

(Claimant)

And

Steven White

Respondent

(Respondent)

Corrected Judgment: The text of the judgment was corrected at paragraphs 54 and 65 on June 10, 2019.

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated
May 18, 2018 (Duggan v. White, Nelson Docket No. S20223).

Counsel for the Appellant:

J.E. Roos

Respondent appearing in person:

S. White

Place and Date of Hearing:

Vancouver, British Columbia

December 3, 2018

Place and Date of Judgment:

Vancouver, British Columbia

June 6, 2019

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Hunter

Summary:

The appeal engages s. 46 of the Family Law Act and the refusal of the trial court to allow a parent (mother) of a young child to move from the Interior of British Columbia to the Lower Mainland, for purposes of obtaining a university degree necessary for anticipated employment as a probation officer. The applicant parent, without educational qualifications, has had only low-paying employment. The respondent parent is well-paid in employment that is not portable. The parents separated shortly after the birth of the child. The applicant determined to obtain an education that would enhance her earning capacity. To that end she completed a diploma program at a local educational institution. The trial judge recognized a university degree was her next step towards her employment goals. The judge did not disagree that obtaining the university degree by distance education likely would take longer, would not allow for the joint program she planned to complete, and would jeopardize continuation of the financial assistance she had obtained. Nor did he suggest any unreasonableness or bad faith on the part of the applicant. The applicant parent appeals. Held: Appeal allowed and an order substituted allowing relocation. The trial judge asked himself whether personal attendance was necessary for the appellant to achieve a degree and concluded it was not. By this approach he appears to have assumed she would

forego personal University attendance in the event she was denied an order allowing the child to move, and so excluded consideration of the best interests of the child in respect of her proposal and the respondent's proposal. By this approach he allowed his view of how the appellant should obtain an education to become the proxy for resolving the best interests of the child, and wrongly measured her proposal by the concept of necessity. Further, the approach did not acknowledge, in the context of the best interests of the child, either the present disparity between the economic circumstances of the parents, or the uplift and strengthened safety net that achievement of the plan would provide for the family as a whole and the child in particular.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] This appeal concerns Ms. Duggan's failed application for an order allowing her to move with the parties' son, now five years old, from their usual place of residence in the West Kootenay region of British Columbia, to the Lower Mainland region. By the application, Ms. Duggan sought to complete a program of studies at Simon Fraser University directed to qualifying her for remunerative employment. The Supreme Court of British Columbia, without reasons, dismissed her appeal from the Provincial Court order dismissing her application. Ms. Duggan now appeals from the order of the Supreme Court of British Columbia.
- [2] The application in issue was made under s. 46 of the Family Law Act, S.B.C. 2011, c. 25. Ms. Duggan filed it along with an application for an order under s. 45 of the Act respecting parenting arrangements. The s. 46 relocation application was dismissed on November 27, 2017. A s. 45 order respecting parenting arrangements, establishing Ms. Duggan as primary caregiver, was made on December 20, 2017. Only the order of November 27, 2017 was appealed to the Supreme Court of British Columbia, and so the appeal before us is limited to issues arising from that order.
- [3] Ms. Duggan contends the appeal judge erred in failing to give effect to the following errors on the part of the trial judge:
 - 1. engaging the issues before him in a sequential two-step fashion, addressing as separate steps her relocation application and her parenting arrangement application;
 - 2. presumptively preferring the status quo; and
 - 3. unduly focusing on the necessity of the proposed relocation.
- [4] The appeal engages difficult problems faced by parties who have come together in a relatively brief relationship, resulting in a child beloved by both, at a time when preparation for employment and self-sufficiency of both parties was unfinished. It engages issues not uncommonly encountered in the vast and variable geography of British Columbia, where educational and employment opportunities are unevenly and sparsely scattered over large portions of the province.

- [5] The issues are framed by the Family Law Act provisions relating to the change of residence of a child. I will discuss this framework first before turning to the circumstances of the case, the Provincial Court judge's reasons for denying the application, and the grounds of appeal.

I. The Legal Framework

A. Statutory Provisions

- [6] As the parties never married, the Family Law Act governs the relocation issue that must be resolved. The relevant sections are contained in Part 4 - Care of and Time with Children. Division 1 of that Part is entitled "Best Interests of Child". In ss. 37 and 38, it sets the governing standard for all orders under Part 4. Section 37(1) requires the court to consider the best interests of the child only, when making an order respecting parenting arrangements or contact with a child.
- [7] Section 37(2) requires a court to consider all of the child's needs and circumstances when making an order, and particularizes certain factors that must be considered:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- [8] Section 37(3) further emphasizes the breadth of the concept of best interests of the child:

- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- [9] Although not in issue in this appeal, I note for completeness that s. 38 lists a number of factors that must be considered when addressing ss. 37(g) and (h).
- [10] The arrangements for care of a child are covered by Division 2 of Part 4. Section 39 provides that where the parents are separated, each parent is a guardian of the child, unless otherwise provided by agreement or court order.
- [11] Section 45 provides for initial applications concerning parenting responsibilities and parenting time, together referred to as "parenting arrangements".
- [12] Section 46 governs the relocation of a child's residence where, as here at the time of the application, there is neither a written agreement between the parties nor an order respecting parenting arrangements for the child, and an application is made (under s. 45) for an order respecting parenting arrangements. Section 46(2) adds to s. 37 by directing that, as part of its determination of the best interests of the child, a court must consider "the reasons for the change in the location of the child's residence" and must not consider "whether the guardian who is planning to move would do so without the child":

46 (1) This section applies if

- (c) the child's guardian plans to change the location of that child's residence and the change can reasonably be expected to have a significant impact on that child's relationship with another guardian.
- (2) To determine the parenting arrangements that would be in the best interests of the child in the circumstances set out in subsection (1) of this section, the court
- (a) must consider, in addition to the factors set out in section 37 (2) [best interests of child], the reasons for the change in the location of the child's residence, and
- (b) must not consider whether the guardian who is planning to move would do so without the child.

[Emphasis added.]

B. Jurisprudence

- [13] Aspects of family law as it was prior to enactment of the Family Law Act remain influential, although, of course, the statutory provisions govern. In *K.W. v. L.H.*, 2018 BCCA 204, released shortly after the order appealed, and therefore not available to either the trial judge or the appeal judge, this court addressed the mobility issues raised by s. 46. Mr. Justice Goepel, writing for the court, first observed that much of the jurisprudence concerning mobility cases has arisen under the Divorce Act, and although there are some differences in the

criteria to be considered, both statutes mandate that the decision must be made in the best interests of the child.

[14] Three areas were of particular concern in pre-Act jurisprudence and have been the subject of judicial comment in the context of the current legislation: the role of the reasons for the proposed relocation in the court's assessment of the proposal; the influence, if any, of the status quo on the court's determination; and the degree to which individual issues should determine an application respecting a change of residence. K.W. addressed each of these areas of concern and the first two have been addressed in other cases.

1. The Role of the Reasons for the Proposed Relocation

[15] In K.W., Justice Goepel noted that s. 46(2) requires the court to consider the reasons advanced for the change in the child's residence. He adopted the reasoning of *Stav v. Stav*, 2012 BCCA 154, explaining that the reasons for a move are a legitimate consideration in assessing a child's best interests:

[104] ... In *Gordon v. Goertz*, the Court held that the reasons for the custodial parent's move should only be considered in the exceptional case where it is relevant to that parent's ability to meet the needs of the child (at 61). Section 46(2) of the FLA however expressly requires the court to consider the reasons for the proposed move. As this Court explained in *Stav*, the reasons for the proposed move are legitimate considerations for the judge to weigh in determining whether the move is in the child's best interests:

[88] often the parent seeking to relocate will submit that doing so will enable him or her to obtain financial and/or family support that is unavailable in his or her present situation, and which will both directly and indirectly benefit the children. The other parent will argue that whatever benefit there is to the relocating parent in those situations is more than offset by the detriment to the children of being removed from their community and, more importantly, from regular contact with the other parent. In my view, these are legitimate considerations which may assist a judge in determining to what extent the move will operate in the children's best interests. It is simply one more factor to weigh in the balance. The trial judge considered these factors in this case and, in my view, she was right to do so.

[89] The question should not be whether the evidence of the reason for a proposed move is admissible, but how it relates to the children's best interests, if at all. Ulterior reasons for moving which are a thinly disguised attempt to thwart contact with the other parent are clearly relevant to whether a parent is acting in the children's best interests. Similarly, reasons for moving which benefit the person seeking to relocate can also be for the benefit of the children, but have to be weighed together with the other evidence to determine whether the move is in the children's best interests.

[90] The fact that a move is in the best interests of the parent seeking to relocate does not necessarily mean that it will be in the children's best interests. It is more likely to be so if the person seeking to move is the custodial parent with a healthy relationship with the children, than if the person seeking to move is an access parent who has had limited contact or involvement with the children. These are but two scenarios along a broad spectrum.

[Emphasis added.]

[16] The following additional passage from Stav demonstrates the care required in examining the reasons for the move:

[87] It appears that the majority in *Gordon v. Goertz* was concerned that examining the question of a parent's motive or reason for moving could result in the focus of the inquiry being redirected from the best interests of the child to whether or not the move was necessary. Allowing an investigation into the reasons for the move was also viewed as opening the door to unjustifiably restricting the mobility rights of custodial parents, who are most often women. In other words, allowing the reasons for the move to factor into the equation, had the potential for turning a mobility issue concerning the best interests of the children into a gender issue. The need for caution in this regard was well-articulated by Kirby J. of the High Court of Australia, speaking in dissent in *U. v. U.*, [2002] HCA 36, at paras. 141-42:

In *AMS* [(1999) 199 C.L.R. 160] reference was made to the fact that, in Australia, published statistics suggest that "overwhelmingly, women constitute the residence parent to whom, in the old nomenclature, 'custody' is granted. Of single parent families, the mother is reportedly the residence parent in approximately 84 per cent of cases. These figures led me in *AMS* to conclude:

"[I]n practical terms, court orders restraining movement of a custodial (or residence) parent ordinarily exert inhibitions on the freedom of movement of women, not men. Another feature of the Australian scene, not necessarily reflected to the same degree in other jurisdictions, is the very large proportion of the population born overseas, with family links to which a party to a marriage or relationship which has broken down may return with their child."

The present is another such case.

The failure of a primary judge to give separate and full consideration to the true proposal of a mother, as designated primary carer and residence parent, to discharge her assigned responsibilities overseas, following her return to her family in India, therefore constitutes a serious injustice to the proper evaluation of that application. The burden of such injustices will ordinarily fall, as here, on the wife. It will be she, not the husband, who will usually be confined, in effect, in her personal movements, emotional environment, employment opportunities and chances of remarriage, repartnering and reparenting. Effectively, as here, it is she who will be controlled by court orders that require her to live, and make the most of her life, in physical proximity to the husband's whereabouts. In this way, inconvenience to the husband is minimised. But the effect on the wife may be profound.

[17] It is amply clear that a court must consider the reasons for the move: s. 46(2)(a). Moreover, as aptly described in *Stav* and reiterated in *K.W.*, the standard is the best interests of the child. I do not consider that the lens of "necessity" is the right one. There is nothing in the Act that requires a judge to put the reasons proffered through the strainer of necessity, and doing so can divert the judge from the proper focus on the child. Full consideration of the reasons, on the other hand, should meet at least the standards of reasonableness and good faith. The absence of either of those qualities may indicate a carelessness of the child's interests in maintaining and establishing relationships beyond those with the relocating parent, and call into question the benefits to the child invariably said to be available by the relocation. In contrast, the absence of necessity does not negate the wisdom of a plan.

2. The Influence of the Status Quo

[18] Prior to enactment of the Family Law Act, courts had spent much ink discussing what became known as the "double-bind" issue, including in the discussion of the four alternatives found in *S.S.L. v. J.W.W.*, 2010 BCCA 55. The issue engages the status quo approach frowned on for its short-cutting of the considerations of the best interests of the child. Madam Justice Smith explained in *Fotsch v. Begin*, 2015 BCCA 403, consistent with previous authority, that application of a presumption in favour of the status quo can lead to an incomplete analysis of the best interests of the child. It is for that reason the status quo approach is eschewed by the Act, and jurisprudence:

[80] It seems this submission is an attempt to raise the "double-bind" issue. The "double-bind" is flawed reasoning that adopts a status quo disposition as being in the best interests of the child by assuming that the relocating parent will not move if not permitted to do so with the child or the non-relocating parent will move if the relocation application is granted, thereby avoiding a comprehensive analysis of the factors relevant to determining what parenting arrangement is best for that child. This classic double-bind was described in *Spencer v. Spencer*, 2005 ABCA 262 at para. 18: "[i]f a judge mistakenly relies on a parent's willingness to stay behind 'for the sake of the children,' the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents." The concern with the "double-bind" and its potential for reliance on a factual assumption in determining the best interests of a child has been extended in the jurisprudence to both relocating and non-relocating parents. See *S.S.L.* at paras. 28-33; *Stav* at paras. 62-65; and *T.K. v. R.J.H.A.* [2015 BCCA 8] at paras. 58-67. Each of these decisions have underscored that a parent's response to the double-bind question (whether the relocating parent will stay if the application is denied or the non-relocating parent will move if the application is granted) must not be relied upon as factual assumption that then permits a presumptive disposition, either against or in favour of the proposed move, as being in the best interests of the child.

[19] In *K.W.*, Justice Goepel explained, in relation to s. 46(2) and the old approach:

[105] The FLA also mandates in s. 46(2)(b) that the court is not allowed to consider whether the guardian who is planning to move would do so without the child. This provision appears to be a legislative response to cases such as *S.S.L. v. J.W.W.*, 2010 BCCA 55, which have criticised the presumption that the status quo is in the best interests of the child because the relocating parent has stated that he or she would stay in the existing locale if their application was declined.

[106] A further complicating factor is that a court cannot dictate where a party must reside. While a court may prohibit a parent from relocating a child, or make a custody order that indirectly limits a parent's mobility, "a court cannot indenture an individual to a community": *Falvai* [2008 BCCA 503] at para. 40; *McIntosh v. Kaulbach*, 2014 BCCA 299 at para. 16.

[Emphasis added.]

[20] In my view, the language of s. 46(2) ("must not consider whether the guardian who is planning to move would do so without the child") is intended to simplify the analysis and avoid, at least in respect to the applicant, consideration of what hypothetical circumstances a party may feel pressured to advance. By use of the words "whether" and "would", the legislature has signalled that the court must not consider the hypothetical of the relocating parent moving apart from the child, as we know the court lacks authority to require a parent to remain in a community. Thus, by the means of s. 46(2), the court is directed to the application presented to the court, for comparison with the respondent's responsive plans as presented to the court.

3. The Correct Approach to Individual Factors

[21] The question here is whether specific issues such as the history of care of the child, the stability of the child, the opportunity for sharing parenting, the schedules that might be developed, the effects on stability of the proposal, and such, are discrete considerations under the Family Law Act.

[22] Justice Goepel addressed this issue in *K.W.* He referred to mobility cases decided under the Divorce Act wherein the mobility issues are resolved as part of a blended analysis. Drawing on that approach, Justice Goepel concluded that a blended analysis is required under the Family Law Act where a plan to relocate a child within the meaning of s. 46(1)(c) comes before the court together with an initial application to determine parenting arrangements. Significantly, he found it was an error to decide the relocation issue in advance of determining the appropriate parenting arrangements:

[111] What was required in determining parenting arrangements in the child's best interests was a blended, in the round analysis that balanced all relevant factors, including the Mother's proposed move with the child to a new community: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 46; *Hellberg v. Netherclift*, 2017 BCCA 363 at para. 72.

[23] I turn now to the circumstances of the case.

II. The Background

[24] I have taken the following from the reasons of the trial judge and from what I understand is undisputed evidence in the record.

[25] At the time of the application, Ms. Duggan was 30 years old. She was born in Vernon, British Columbia, and has some family in the Okanagan, but grew up in Langley in the Lower Mainland. She moved to the West Kootenay in 2008 when she was about 21 years old.

[26] At the time of the application, Mr. White was 31 years old. He was born and raised in the Lower Mainland.

[27] The parties met in late 2012 at Red Mountain ski resort in Rossland, British Columbia. Ms. Duggan worked as a house cleaner. Mr. White worked as a shuttle driver and a "liftee". They commenced cohabitation in May 2013. In about November of that year, they moved into a residence in the nearby community of Castlegar, purchased by Mr. White with the aid of an inheritance. Their child was born in March 2014.

[28] The parties' relationship did not run smoothly; they separated and reconciled numerous times before separating permanently in the fall of 2015.

[29] Ms. Duggan has always been the child's primary caregiver. After separation, the parties initially agreed that Mr. White would care for the child for one continuous 24-hour period a week. By the time of trial, his parenting responsibility had expanded by one or two half-days a week. He has desired more parenting time.

[30] Ms. Duggan returned to part-time employment as a house cleaner shortly after the child was born. She determined to improve her qualifications and enrolled as a student at Selkirk College, initially part-time and then full-time. While she attended school, she worked part-time as a cleaner, received social assistance, and availed herself of child care services provided at the College.

[31] Ms. Duggan completed a diploma program at the College in April 2016. As part of that program, she completed a practicum for a course entitled "Transformative Justice Practice". It included work at the Nelson Police Department Restorative Justice, an Adult Probation Officer course with the Justice Institute of British Columbia, and some further training and workshops. Ms. Duggan seeks to follow up her diploma with education that will qualify her for employment as a probation officer. This requires a bachelor's degree in social sciences. The Provincial Court judge found that Ms. Duggan had "reached the point in her studies where she must attend a university to secure the necessary degree for her career goal" and that achieving that goal would allow her "to support herself and [the child] and to provide broader opportunities for both in future."

- [32] Ms. Duggan applied for admission, and was accepted, into a criminology program at Simon Fraser University in the Lower Mainland. She hopes to complete a joint major - Criminology, and Gender, Sex and Women's Studies - and to participate in the University's Restorative Justice Centre. Ms. Duggan qualified for bursaries and scholarships for this program and had access to student loans. The monies available to her for her education through these sources are significant. Ms. Duggan testified that the Gender, Sex and Women's Studies program is not available online.
- [33] On June 7, 2016, Ms. Duggan applied to the Provincial Court of British Columbia for an order establishing parenting arrangements and for an order allowing her to relocate with the child to the Lower Mainland for the purposes of attending Simon Fraser University. By agreement of the parties, the judge heard the evidence for both applications and decided the relocation application first, so as to facilitate decisions respecting her education.
- [34] As to her reasons for attending Simon Fraser University in person rather than pursuing a degree by distance education, Ms. Duggan testified that not all courses required for a criminology degree would always be available online as required for her steady pursuit of the program, and the Gender, Sex and Women's studies program could not be completed online. She testified that any criminology degree will take longer to complete online and she questioned whether, as an online student, she could maintain the full-time program of studies required to retain her bursaries and scholarships. She explained that she had obtained subsidized housing in Langley, British Columbia, as well as full-time daycare at the University, which she planned on using, and that she could draw on the assistance of her mother, other family and friends in the Lower Mainland.
- [35] In the Provincial Court hearing, Ms. Duggan advanced a plan that would have allowed for continued parenting by Mr. White, but to a different schedule than was in place in Castlegar. She proposed that she and the child would travel to the West Kootenay or the Okanagan for visits. She also suggested parenting time by Mr. White in Langley, where members of his family live, and said she would agree to Mr. White having longer periods of parenting during holidays and university breaks.
- [36] By the time the s. 46 application was decided, Ms. Duggan had unilaterally moved to the Lower Mainland to avail herself of the University seat open to her.
- [37] In his reply to Ms. Duggan's application, Mr. White sought primary care of the child and proposed that the child would be cared for by friends and by a live-in nanny when he was not at home.
- [38] At the time of trial, Ms. Duggan's primary source of earned income was as a house cleaner. The trial judge found that "while living in the West Kootenay, [Ms. Duggan] has been unable to secure anything but relatively low paying jobs." Ms. Duggan's 2017 income up to the time of trial in September 2017 was approximately \$9,870. Her income in the three previous years was \$11,620, \$14,656, and \$17,678. Mr. White has paid the requisite child support.

- [39] The evidence adduced described the wage rate for a probation officer as between about \$25 and \$40 an hour or, based on a full-time work year of approximately 2,000 hours, approximately \$50,000 to \$80,000 per year. Ms. Duggan advanced a plan wherein she would apply for positions in the Lower Mainland, Okanagan, and Kootenay upon completion of her education, but she recognized that employment opportunities in Kootenay were restricted in number.
- [40] Mr. White has fared better financially than has Ms. Duggan. He, too, had low earnings in the early years of the parties' relationship; over a span of three years, he earned \$10,000, \$12,000, and \$27,000. In March 2017, Mr. White obtained employment with a major employer in its sulphide bleaching plant. His income is expected to be about \$74,780 annually and he has a good benefit package. He has some opportunity for advancement. Plainly, Mr. White's employment is not portable.

III. The Trial Judgment

- [41] The trial took place over three days on August 21 and 22, and September 27, 2017. The parties agreed that the issues before the court would be dealt with in two stages: first the relocation issue and then the appropriate parenting arrangements. On this understanding, the judge made the relocation order on November 27, 2017, and the order respecting parenting arrangements on December 20, 2017. The parenting arrangements order is made on the premise that Ms. Duggan will reside in West Kootenay and provides that Mr. White, who works four days on, four days off, shall have parenting time beginning at 9:00 a.m. on his second day off through to 5:00 p.m. on his fourth day off (that is, 56 hours every eight days) and Ms. Duggan shall have parenting time for the balance (that is 136 hours every eight days).
- [42] The trial judge approached his task on the relocation application by observing correctly that s. 46 of the Family Law Act governed, and that the factors set out in s. 37(2) of the Act applied. He recognized that he was required to consider both the best interests of the child and the reasons advanced by the applicant for changing the child's residence, and he acknowledged that he was required to disregard "whether the guardian who is planning to move would do so without the child."
- [43] He said as to the reasons for the proposed move:
- [8] There is no issue that Ms. Duggan's educational and career aspirations are commendable. It is an open question, however, whether it is truly necessary or in [the child's] best interests to move to the Lower Mainland in order for Ms. Duggan to pursue these aspirations. I will, therefore, return to the reasons for the proposed change in [the child's] residence later in this decision.

[Emphasis added.]

- [44] The trial judge addressed Mr. White's recently improved financial prospects and the fact he had acquired a residence in Castlegar. He then said:
- [16] It is not realistic to expect that Mr. White would move to the Lower Mainland if an order were made permitting [the child's] change of residence. This is part of the crux in this case. [The child's] relationship with Mr. White could reasonably be expected to be impacted by the change because Mr. White, owing to the distance and his shift schedule, would be unable to exercise parenting time with the same regularity that he does now. Even the parenting time schedule for 2018 proposed by Ms. Duggan, for example, describes two-week gaps in between Mr. White's parenting times. This is in contrast to the two or three parenting time blocks per week that have been established over the past year in the West Kootenay.
- [17] Further, in order to exercise parenting time in the Lower Mainland, Mr. White would have to find some sort of suitable accommodation there. His brother's home in Langley is not a viable option. The availability of Mr. White's parents' home in the Okanagan, while possibly cutting down on the amount of driving necessary to facilitate parenting time, is still a considerable distance from both Nelson and the Lower Mainland.
- [18] At three-and-a-half, [the child] is at an age where more frequent parenting time than that permitted by the proposed change in residence is required to maintain and further his relationship with his father. Skype or telephone contact cannot make up the difference this change would make.
- [Emphasis added.]
- [45] As to the proposed quality of life of the child in the Lower Mainland, the trial judge found that the need for the child to rise early for travel to the SFU daycare was "less than ideal" and compared this to the somewhat lesser travel required for the child in the West Kootenay. He referred, as better options, to activities outside of daycare that will be available in the West Kootenay region. He then said concerning the issue of stability for the child:
- [22] In my view, Ms. Duggan may have underestimated [the child's] need for stability when putting in place her plans for furthering her education.
- [24] Ms. Duggan has been [the child's] primary caregiver since birth. Until the start of this trial, he had on only one or two occasions spent consecutive nights away from her. In submissions made on Ms. Duggan's behalf, it was argued that it is reasonable to accept that at this point in time [the child] has the strongest relationship with Ms. Duggan. If by strongest relationship it is meant that [the child] is more emotionally attached to Ms. Duggan than to Mr. White, I agree that this is likely the case. Any dramatic and sudden change to Ms. Duggan's role in [the child's] life could therefore be expected to have adverse effects on [the child's] well-being.

[25] In light of this reality, how then can Ms. Duggan's justifiable need to further her education, and thus her own as well as [the child's] long-term opportunities, be reconciled with [the child's] need to maintain and build on the equally important relationship with his father? In my view, the answer to this question arises out of a close examination of the evidence concerning the need for Ms. Duggan to relocate to the Lower Mainland in order to obtain the degree she needs to pursue her career goal.

[Emphasis added.]

[46] Having concluded that the issue boiled down to the "need" of Ms. Duggan to relocate for educational purposes, the trial judge noted Ms. Duggan's testimony that four negative consequences would result from denying her the ability to relocate to attend Simon Fraser University: first, completion of her degree would take longer; second, an online program would jeopardize the bursaries and student loans available to her; third, she would not have face-to-face instruction; and fourth, she would not be able to complete the joint major aspect of her program because online study was not offered in Gender, Sex and Women's studies. The trial judge then concluded:

[29] While these concerns about online rather than face-to-face study on campus are valid, they do not establish that Ms. Duggan would be unable to complete her goal of completing a degree by that route. Indeed, the evidence shows that Ms. Duggan had, prior to the start of this trial, already enrolled in online courses in anticipation of having to attend SFU in that way. I must conclude that while the online route may end up taking longer and being more difficult financially, it was not strictly necessary for Ms. Duggan to move to the Lower Mainland to pursue her degree and ultimate career goal of becoming a probation officer. Rather, this was Ms. Duggan's preference and choice.

[30] The cost of this choice, if [the child] is permitted to move, is a significant disruption in [the child's] life, most particularly in the parenting time available with his father. This comes at an age where frequent and consistent parenting time is most important to strengthen and develop that relationship.

[31] Thus, when one considers the evidence more closely, it seems Ms. Duggan did and does have the option of pursuing her career goal in a way that would not, at this sensitive time in [the child's] life, unduly disrupt [the child's] relationship with her or Mr. White.

[32] In summary and conclusion, the order that is in the best interests of a child is the one that protects to the greatest extent possible the child's physical, psychological, and emotional safety, security, and wellbeing. In coming to a conclusion in this case, I have considered, in addition to the reasons for the proposed change to [the child's] residence, [the child's] health and emotional wellbeing, the nature and strength of his relationships with significant persons in his life, his history of care, his need for stability, the abilities of Ms. Duggan and Mr. White to exercise parental responsibilities, and all of the remaining factors set out in s. 37 of the Family Law Act.

[Emphasis added.]

[47] In the result, the trial judge held that it was not in the child's best interests to change his place of residence from West Kootenay.

IV. The Appeal to the Supreme Court of British Columbia

[48] The appeal judge accepted the reasons of the trial judge and dismissed the appeal without reasons for judgment.

V. Discussion

[49] The failure of a court to provide reasons for judgment may sometimes open the door to setting aside the order appealed and remitting the matter to the court that made the order, for redetermination. In the present case, however, our task of determining whether the appeal judge was correct in finding no error of principle warranting appellate interference would put us back to considering the reasons of the trial judge in any event, and remitting the matter to the appeal court would be unsatisfactory for the parties, who have fully addressed us on this appeal. In my view, we are in as good a position as required to consider whether errors on the part of the trial judge are established as alleged.

[50] In considering whether the trial judge made the errors of law alleged, we must be guided by the limitations inherent to our role of appellate court. These limitations, as they apply in the mobility context, were summarized by Madam Justice Newbury in *R.E.Q. v. G.J.K.*, 2012 BCCA 146:

[33] The most important matter, of course, is the children's residence. The Supreme Court of Canada has said that the standard of review is a high one, i.e., that in family cases as elsewhere, an appellate court may not interfere with the exercise of discretion of a trial judge in the absence of a material error (including a "significant misapprehension of the evidence", the trial judge's having "gone wrong in principle or [his] final award [being] ... clearly wrong"): see *Moge v. Moge* [1992] 3 S.C.R. 813, at 832; and *R.M.S. v. F.P.C.S.* 2011 BCCA 53, at para. 43, citing *Hickey v. Hickey* [1999] 2 S.C.R. 518 at para. 12 and *Van de Perre v. Edwards* 2001 SCC 60, [2001] 2 S.C.R. 1014 at paras. 14-5. In the latter case the Court wrote:

... Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. [At para. 13.]

Thus the authorities make it clear that it is not for an appellate court to re-weigh the evidence or to interfere on the basis that the appellate court would give more weight than the trial judge did to one factor or another – or, in the words of the Court in Hickey, that it would have "balanced the factors differently."

[51] In this case, the correctness of the principles applied by the trial judge is a question of law to be reviewed on a standard of correctness. To the extent the appeal engages the trial judge's exercise of discretion, we must apply the deferential standard.

1. Ground of Appeal 1: The Two-Step Process

[52] As her first challenge to the order, Ms. Duggan complains that the judge erred in determining the relocation issue separately from the parenting arrangements generally. The second and third grounds of appeal focus on particular complaints as to the approach taken by the trial judge, and arise apart from the trial judge's bifurcation of the case before him.

[53] Ms. Duggan is correct that the relocation issue should not have been decided independently from the overall question of the parenting arrangements: K.W. However, the parties invited the trial judge to proceed in the two-step fashion he did and the order made on parenting arrangements is not appealed. While it is open to us to determine the appeal based on this error, it is also open to us, on my view of the other two grounds of appeal, to resolve the appeal based on them. In my view, this latter course is preferable in this case. Accordingly, I will move directly to those issues.

2. Ground of Appeal 2: Treatment of the Status Quo

[54] Ms. Duggan contends that the trial judge erred in principle by giving preference to the status quo. She says that the trial judge considered only the effect of the proposed move on the relationship between the child and his father, and failed to consider the potential effect of the proposed alternative – primary residence with the father - on the relationship between the child and herself. In doing so, she says, the judge assumed she would not move if the trial judge denied the relocation application. In her words, this is a "status quo" preference error.

[55] Mr. White contends that the trial judge applied the correct analysis in that he demonstrably abstained from considering whether Ms. Duggan would move without the child if her mobility application was denied. He says there was ample evidence before the trial judge that he has developed a strong, loving bond with the child, holds a well-paying job, and could better provide for the child in West Kootenay than if he were to live in Langley, given the adjustments that such a move would entail.

- [56] On this ground of appeal and the third ground discussed below, Mr. White refers to cases, largely from the trial level, wherein a court has denied a parent the ability to move with a young child in order to take advantage of a job offer, or to be closer to family support. He observes, correctly, that a parent's interest does not equate to the child's best interests and says the disruption to a child on a relocation application outweighs the benefits of a happier mother with a potentially higher income.
- [57] In my view, Ms. Duggan's complaint has merit. The trial judge, by focusing his attention on the short-term impact of the move on the child's relationship with his father, failed to incorporate his own conclusion that "any dramatic and sudden change to Ms. Duggan's role in [the child's] life could therefore be expected to have adverse effects on [the child's] well being", and failed to reflect that Ms. Duggan has been the primary caregiver.
- [58] This error is most clearly demonstrated in the trial judge's two statements: in his statement that whether Mr. White would move to the Lower Mainland is "part of the crux of the case" and his rhetorical question of "whether it is truly necessary or in [the child's] best interests to move to the Lower Mainland in order for [Ms. Duggan] to pursue these aspirations." By these statements, the judge appears to have considered that the options before him included an order based on the assumption Ms. Duggan would not move without the child. In this, I consider the judge strayed from the alternatives presented by the parties and involved himself in the very reasoning that s. 46(2) is intended to avoid. He effectively excluded the question as to whether it was in the child's best interests to live with the mother in the arrangement she presented to the court or with the father in the arrangement he presented to the court.
- [59] Although the judge put much weight on the age of the child, I observe that the application of this status quo approach is not confined to young children said to need "stability" to strengthen relationships within the family. The criteria of stability and advancement of relationship almost always favours the status quo - for example, in the case of a school-aged child who is absorbing guidance from the non-primary caregiver. Section 46(1)(c), however, is intended to allow for change, as it is engaged only in circumstances where an application "can reasonably be expected to have a significant impact on that child's relationship with another guardian". By expressly contemplating orders that will have a significant impact upon the parental relationship, I consider the Act demonstrates that it is not positioned either for or against change; there is no presumption in respect to change apparent in the operative statutory provision.

3. Ground of Appeal 3: Reliance upon the Necessity for the Move

- [60] Ms. Duggan contends that the trial judge erred in principle in discussing the reasons for the proposed change of residence of the child in terms of the "necessity" of the move for educational purposes. She says that the trial judge's approach shortchanged the analysis of "reasons for the change" by placing an onus on her to establish that it was necessary for her to move to the Lower Mainland to improve herself. The result, she says, was the trial judge's

failure to adequately consider the potential long-term benefits of her plans to provide for her son, even as the judge praised Mr. White for making significant efforts to improve his own ability to provide for the child.

- [61] I consider this ground of appeal, too, has merit. It appears to me that the trial judge, having asked whether there was a need for Ms. Duggan to relocate to the Lower Mainland for her educational purposes, wrongly addressed the external issue of necessity to question the correctness of her judgment as to how to best provide for herself and the child, and thereby erred in his evaluation of the reasons for the proposed matter. The question of her judgment as to how Ms. Duggan should obtain an education thereby became the proxy for resolving the best interests of the child, even though no substantial criticism was made of the reasons she advanced for attending University classes in person. By directing his attention to whether online education, in time, would provide an adequate education to enable Ms. Duggan to obtain better employment opportunities, the trial judge intruded into Ms. Duggan's self-determination that the quickest, most cost effective, most learning-effective, and broadest education would be achieved by in-person attendance at the University.
- [62] Section 46(2)(a) opens the door to a trial judge to consider the reason for the proposed change in the location of the child's residence, as I have discussed above. I see nothing in the Act, however, that extends this consideration to a licence to a judge to manage the mode or content of a party's educational program, absent some aspect that demonstrates bad faith or unreasonableness that may be relevant to an assessment of the child's best interests. By his approach, the trial judge encountered the very danger described by Justice Prowse in *Stav*: that inquiring into the motives and necessity of the proposed move may distract a court from its principal focus, being the best interests of the child.
- [63] A further worry raised by the trial judge's approach to the "need" to attend the University in person - a result the judge accepted was likely to hinder Ms. Duggan's pursuit of her legitimate educational goals - is that it may keep her in a situation of comparative under-employment for a longer period of time. Thus, while Mr. White will be able to secure his income-earning ability with the acquisition of seniority, Ms. Duggan will remain in a low-income situation, not yet working in a position that likely will provide her financial security. It is difficult to see, absent evidence particular to the case, how the prolongation of such unequal circumstances can be in the best interests of the child, as he grows to understand the relative placement of his parents in his family structure.
- [64] The observations of Justice Kirby, adopted by Justice Prowse in *Stav*, are apposite. It is the mother of the child who, by the court order, is confined in all the ways noted by Justice Kirby, and is required to live where her financial independence, and accordingly ability to provide opportunity for the child, is constrained.
- [65] I would observe that although this case concerns the living arrangements of a child and not spousal support, the stance of family law in Canada has long been to promote the economic self-sufficiency of each party within a reasonable time: e.g., *Divorce Act*, s. 15.2(6)(d). That

stance recognizes the general advantages of individual financial independence in the family context, including the stronger safety net for the child to protect against the unexpected, consistent with the best interests of children caught in the breakdown of family relationships. This consideration, too, goes into the round.

- [66] The Family Law Act directs a court to consider "the best interests of the child", "the child's psychological and emotional safety, security and well-being," and "all of the child's needs and circumstances". It seems to me that a full understanding of these phrases provides room for considering the concepts of equal opportunity, review of the present disparity between the economic circumstances of the parents, and recognition of the potential prolongation of that disparity consequent on the decision made by the judge on the application before him. Such considerations surely inform, to borrow a phrase from Justice L'Heureux-Dubé, "the conditions which are most conducive to the flourishing of the child": *Young v. Young*, [1993] 4 S.C.R. 3 at 65 (dissenting in the result), quoted favourably in *Manitoba (Director of Child and Family Services) v. C.(A.)*, 2009 SCC 30 at para. 88. I consider that in narrowing his review to the "necessity" of the move, the judge fell into error in failing to give a large consideration of the best interests of the child.

VI. CONCLUSION

- [67] I accept that the trial judge said he considered "all of the s. 37 factors". In my view, however, his approach of focusing on the benefits of the status quo, in failing to consider Ms. Duggan's proposal against Mr. White's proposal, and in focusing on the need for Ms. Duggan to attend University in person, reflects a fundamental misapprehension of the court's task.
- [68] Relocation cases present a difficult straddle. I return to my observations at the beginning of these reasons. Opportunities for employment and education are not spread evenly throughout the province. For this reason, it is not unusual for parties in family disputes to have to adapt to changes that require relocation, and to find ways to maintain and foster relationships across boundaries. In my view, just as parties must adapt, courts must allow for adaptation in parenting situations, and be assiduous in seeking to avoid results that artificially keep one of the parents down. The best interests of the child is a large concept - one which, in my view, can be quite capable of providing, with a generous stance, an opportunity for one of the parents to lift himself, or herself, closer to the level of the more advantaged parent. It is important in the pursuit of this approach that alternative ways to foster strong relationships between the child and each parent be explored fully, so as not to close the door on a parent to a sensible plan that in the longer sense will strengthen the family, even in its separated circumstance.
- [69] I conclude that the order appealed must be set aside. The question then is whether we should allow the application. The judge said, "any dramatic and sudden change to Ms. Duggan's role in [the child's] life could therefore be expected to have adverse effects on [the child's] wellbeing" and in that statement has recognized the value of the stability of the child residing with his mother (s. 37(2)(c) and (e)). He recognized as well that Ms. Duggan has

always been the primary caregiver (s. 37(2)(d)). The judge found Ms. Duggan was at a stage of education that required University enrollment. He also recognized the stability provided by the father's steady relationship. Omitting the judge's discussion of necessity and his implicit assumption that Ms. Duggan would forego her request in the event the child could not be moved, these conclusions, in my respectful view, lead to a conclusion the application should be allowed.

[70] I would allow the appeal, set aside the order of the Supreme Court of British Columbia, and substitute for it an order allowing the appeal of the order of the Provincial Court of British Columbia dated November 27, 2017, by setting it aside and substituting for the Provincial Court order an order consistent with paragraph 2 of Ms. Duggan's application dated April 20, 2017. This will require adjustment to the parenting arrangements set out in the Provincial Court order of December 20, 2017, and so, ancillary to this order, I would set aside the order of the Provincial Court of British Columbia dated December 20, 2017, and remit the details of Mr. White's parenting arrangements to the trial court in the event the parties do not agree as to the time and places for such to occur.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Hunter"

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