

CANADA / JUDGMENT

E.R.G. v. J.R.G.

2024 BCSC 789

COURT

Supreme Court of British Columbia

DECIDED

15 May 2024

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2024 BCSC 789 E.R.G. v. J.R.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.R.G. v. J.R.G.,

2024 BCSC 789

Date: 20240515

Docket: E212086

Registry: Vancouver

Between:

E.R.G.

Claimant

And

J.R.G.

Respondent

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for Claimant:

L.S. Allan

Counsel for Respondent:

F. Lamer

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 20-23, 26-29, 2024

March 4-5, 7, 2024

April 4-5, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 15, 2024

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Introduction

- [1] The parties began living together in Vancouver in 2015. They married in 2016, and have two young boys, ages six and four. The parties separated in June 2021. E.R.G. (the "Mother"), seeks to relocate with the children to Calgary where she has family. J.R.G. (the "Father") opposes the relocation.

- [2] An order bifurcating the issues in this family law action was made in February 2024. This trial is only to deal with the issues of relocation and parenting arrangements. The remaining issues including child support, spousal support and property division will be decided in a separate trial.

Procedural History

- [3] The Mother filed a notice of family claim on September 21, 2021.
- [4] The parties entered into a consent order on October 12, 2021 in relation to parenting arrangements (the "Consent Order"). The Consent Order provided that "until further agreement of the parties or Court order", the Mother will have three days with the children, then the Father will have two days, on a repeating basis, with the exchanges of the children occurring at 5:00 p.m.
- [5] A judicial case conference was held on January 12, 2022 ("JCC").
- [6] On March 7, 2022, the Mother applied for short leave to have her application to suspend the Father's parenting time and for a protection order heard on March 11, 2022. On March 9, 2022, the Father applied to change the parenting schedule to a 4-3 schedule, with the Mother having the children for four days and the Father having the children for three days, and for the appointment of an expert to prepare a s. 211 report.
- [7] On March 11, 2022, the parties agreed to a consent order before Associate Judge Vos (the "Vos Order"). The Vos Order provided inter alia that the parties not come within two metres of each other and that the Father attend counselling for anger management. Both parties' earlier applications were adjourned generally.
- [8] On March 18, 2022, the Mother applied to reduce the Father's parenting time to weekends.
- [9] On May 9, 2022, the Mother sought fines against the Father, and to set the Father's Guidelines income for purposes of setting child and spousal support.
- [10] On May 18, 2022, the Father applied to set Guidelines incomes for himself and the Mother.
- [11] On May 24, 2022, Dr. Robert Ley was appointed on consent of the parties to prepare a s. 211 report.
- [12] A three-day hearing was held in July 2022 before Justice Shergill. On July 22, 2022, Justice Shergill dismissed the application of the Mother to reduce the Father's parenting time and the Father's application to change to a 4-3 schedule, with liberty to reapply after completion of the s. 211 report. The parties were ordered to retain a parenting coordinator. The issue of the parties' Guidelines incomes was reserved.
- [13] On October 21, 2022, Justice Shergill rendered her decision setting, on an interim basis, the Father's Guidelines income at \$279,832 and the Mother's Guidelines income at \$174,251: *E.R.G. v. J.R.G.*, 2022 BCSC 1850.

- [14] On January 11, 2023, the Mother filed two applications. One application was for the Father to pay fines for breaches of the Consent Order and a finding of contempt. The other application was for an order quantifying the Father's support obligations, for retroactive support and for fines.
- [15] On January 30, 2023, Associate Judge Nielsen dismissed the Mother's application for fines and adjourned the contempt of court portion of the application. Associate Judge Nielsen made a conduct order, requiring the parties to have respectful communications.
- [16] On February 2, 2023, the Mother's application to quantify the Father's support obligations was heard by Justice Milman. On March 8, 2023, Justice Milman rendered his decision, setting on an interim basis the Father's child support payments at \$1,246 per month and spousal support at \$350 a month. Retroactive child support was set at \$17,444 and retroactive spousal support was set at \$4,900: *E.R.G. v. J.R.G.*, 2023 BCSC 341.
- [17] On August 22, 2023, Dr. Ley delivered his s. 211 report.
- [18] On October 3 and 4, 2023, the Mother's application to reduce the Father's parenting time and for a protection order was heard by Justice Branch. On October 24, 2023, Justice Branch rendered his decision, dismissing the Mother's application: *E.R.G. v. J.R.G.*, 2023 BCSC 2343.
- [19] On November 27, 2023, the Mother delivered to the Father a notice of relocation to Calgary.
- [20] On December 20, 2023, the parties agreed to a consent order that the children will not be relocated to Calgary without a court order.
- [21] On February 15, 2024, an order was granted that the trial be bifurcated, with the issues of relocation and parenting arrangement to be heard at this trial. The remaining issues are to be decided at a separate trial.

Legislative Framework

- [22] Both the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [DA] and the Family Law Act, S.B.C. 2011, c. 25 [FLA] contain provisions related to relocation of a child following the parents' separation. The Mother made her submissions pursuant to the DA, while the Father for the most part made his submissions following the structure of the FLA. The Mother argues due to the doctrine of paramountcy, the DA applies as it is federal legislation: *K.S.P. v. J.T.P.*, 2023 BCSC 1188 at para. 282. The Father argues as the statutes are not in conflict, the doctrine of paramountcy is not applicable and the Court ought to consider both statutes. Both parties agree in the circumstances of this case, the provisions under both DA and the FLA are substantially the same.
- [23] The relocation provisions are found in ss. 16, 16.9, 16.91, 16.92 and 16.93 of the DA. As the parties have substantially equal parenting time pursuant to the Consent Order, the onus is on the Mother to show the relocation is in the best interests of the children: s. 16.93(1), DA. The Court is to consider the reasons for the relocation; the impact of the relocation on the

child; the amount of time spent with the child by each parent; if proper notice had been provided; the existence of any order restricting the geographical area where the child may reside; the reasonableness of the relocating parent's proposal to vary the exercise of parenting time of the other parent; and whether each parent has complied with their parenting obligations: s. 16.92(1), DA. The relocation must be in the best interests of the child, having regard to the factors found in s. 16 of the DA.

- [24] Under the FLA, the relocation provisions applicable to these circumstances are found in ss. 66 and 69. In these circumstances where the parties have substantially equal parenting time pursuant to the Consent Order, the onus is on the Mother to show the relocation is in the best interests of the children: s. 69(5), FLA. The proposed relocation must be made in good faith, and reasonable arrangements must be made to preserve the child's relationship with the other parent: s. 69(4)(a), FLA. In determining whether the proposed relocation is in good faith, the court is to consider the reasons for the relocation, if it will enhance the quality of life of the child and the parent, if proper notice has been given, and if there are any restrictions on relocation in any prior order or agreement. The relocation must be in the best interests of the child, having regard to the factors found in s. 37 of the FLA.
- [25] In these circumstances, I find there is no conflict between the provisions of the DA and the FLA. The onus of proof under both statutes is on the Mother. The test for what is in the best interests of the children are similar in both statutes. The parties in their submissions have agreed the provisions are substantially the same in both statutes. In my view, the Court needs to be clear which statute it is applying. Justice Saunders in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20 stated it is preferable to proceed under the DA where it is available in cases involving relocation, as the federal legislation is paramount. In these circumstances, I will apply the provisions of the DA: see also *A.J.L. v. J.G.L.*, 2021 BCSC 2429 at paras. 33-36, *aff'd* 2022 BCCA 341; *C.C. v. S.P.R.*, 2022 BCSC 1503 at para. 32, *aff'd* 2023 BCCA 422.

Factual Background

- [26] Both parties testified, along with their mothers. Dr. Robert Ley, the author of a s. 211 report, was cross-examined by counsel for both parties. I make the following findings of fact.
- [27] The Mother is currently 38 years old. She was raised in Alberta. She met the Father in Calgary in November 2014 and they started dating. The Father was originally from Montreal, but had been working as a professional engineer in Calgary at the time for a number of years. Due to his work with a client in Vancouver, the Father decided to move to Vancouver. The Mother decided to join him. They moved to Vancouver in June 2015 and started living together. The Mother also has her own business, a social media marketing agency. The parties were married at a venue outside of Calgary in September 2016.

- [28] Their first child, Z., was born in December 2017. Their second child, K. was born 15 months later, in March 2019. The parties initially had a nanny part-time after Z. was born. After K. was born, the parties hired a full-time nanny.
- [29] The Mother testified her relationship with the Father began to deteriorate after the births of the children. She testified she was the one primarily responsible for the children when the nanny was not working. The Mother was breast-feeding for a period of time. She arranged and transported the children to all their medical appointments. The Mother testified in addition to the childcare, she bought the groceries and did all the cooking and cleaning for the family. Her evidence is the Father worked long hours during the week. In the evenings and weekends, she testified he was attending networking events or playing golf. He also travelled for work.
- [30] The Father disputes that he was not involved with childcare. He testified his office was close to their home, and he came home to assist whenever possible. He testified he went out to work events after the children went to bed at 7:00 p.m. As for the golf games, he testified he had applied to join Shaughnessy golf club before the parties knew about the first pregnancy, and both of them agreed for business development purposes, they should become members. I note both parties are business owners.
- [31] The Father disputes the characterization of the Mother as the "primary care giver", as that term is used in the caselaw. He argues there is a difference between a primary care giver who does not work outside the home and is solely dedicated to the care of the children, and a parent with outside employment who looks after the children with the assistance of a nanny. Setting aside whether she is the "primary care giver", I accept the Mother's evidence that she was more involved in childcare than the Father before separation. The Mother worked from home, and arranged her work schedule so as to be able to help the nanny if needed. If the Mother had to go to her office outside the home, she took one of the children with her. In the evenings and weekends, the Mother continued to perform the bulk of the domestic chores. The Father was working outside the home and did not have the same availability. However, I accept the Father's evidence that before separation, he spent time with the children when he could.
- [32] The parties separated on June 15, 2021, when the Father moved out of the family home. The Father has since purchased a residence in the east side of Vancouver. The Mother continues to live in the same rental apartment in Vancouver near Granville Street and West 7th Avenue.
- [33] Initially, the parties could not agree on a parenting schedule. The Mother testified that the Father did not want a consistent schedule, but wished to have a flexible schedule that changed week to week, depending on his other commitments. Eventually, by July 2021, the parties agreed on a 3-2 schedule--i.e., the children will be with their Mother for three days, and then the Father for two days, repeating this pattern. This schedule was the subject of a Consent Order dated October 12, 2021, setting out this 3-2 parenting arrangement subject to the agreement of the parties to vary it. However, significant conflict continued. Both parties

have consistently sought more parenting time. The Mother sought to have five weekdays and the Father be given the weekends. The Father sought equal parenting time, and in the interim, a 4-3 schedule where the Mother would have the children for four days and the Father for three days. Since separation to now, the parties have for the most part complied with the parenting arrangement in the Consent Order.

- [34] The parties disputed many aspects of each other's evidence. Each side brought up grievances against the other with the aim to paint the other as unreasonable and less able to carry out parental responsibilities. I will set out the details of the main areas of contention.

Credibility and Reliability

- [35] Both parties attack the credibility of the other. The Mother argues the Father provided self-serving evidence, and was evasive and non-responsive during cross-examination. She argues he ought not be believed as he provided inconsistent evidence when it suited him. I will discuss a few examples.
- [36] The Mother cites the inconsistent evidence provided by the Father as to an incident involving the car seat on the February 27, 2022 (the "Car Seat Incident"), where there was disagreement between the parties about the proper use of a car seat in the Father's vehicle. The Father contacted the Mother's arm when she tried to reach behind the car seat to ensure it was installed properly. In written communications with Dr. Ley, the Father described the incident as an "accidental touching", and during his interview with Dr. Ley, the Father said he had "knocked her forearm away". During the trial, the Father described the motion as a wave of his hand, as he testified he knocked the Mother's hand away when he "waved like the Queen of England". The Mother argues the Father was evasive when questioned about the incident during his cross-examination. He had stated previously the touching was accidental and at other times, he had said it was intentional. During his cross-examination, he became angry and would not answer the question of whether it was accidental or intentional.
- [37] A second example provided by the Mother was the Father's evidence about whether he had his own stroller. The Father had testified about not having the essentials for childcare when the parties separated, including a stroller. During cross-examination, the Father was questioned about text exchanges with the Mother in September 2021, when the parties were discussing if the children should be looked after by the nanny at the Mother's residence or the Father's residence. The Mother had sent a text message that her proposal for the nanny to work at her residence was to avoid having to transport a stroller between the residences. When questioned about this, the Mother alleges the Father changed his evidence and testified he did have his own stroller in September 2021. The Mother argues this is another example of the Father providing inconsistent evidence, changing his story when it suited him.

- [38] Dr. Ley reported in his s. 211 report that the Father had told him that he was in favour of French immersion education for his children. However, during cross-examination, the Father did not agree he had discussed with the Mother the children attending French immersion school. The Mother argues this is highly unlikely, given that there was no reason for Dr. Ley to write that statement in his report if the Father did not in fact say so. The Mother argues this is an example of the Father opposing facts which do not support his position. The Mother argues the Father, even when confronted during his cross-examination with evidence of his abusive communications, would not admit any wrongdoing.
- [39] The Father's position is it is the Mother who should not be believed. The Father argues the Mother has provided inconsistent evidence at trial, in affidavits and in discovery with respect to various issues. These various issues include the timing of when the Mother first considered involving the Ministry of Child and Family Development ("MCFD"). The Father points to an earlier affidavit from the Mother where she deposed discussing with her lawyer about involving MCFD at the time of separation. However, at trial, the Mother testified she was not aware of any safety concerns for her children until some time after separation. The other examples of inconsistent evidence relate to her injuries from the Car Seat Incident. The Father argues the Mother did not suffer any injuries from the Car Seat Incident, but sought medical assistance for the sole purpose of creating a record to show the Father has been violent toward her in front of the children. The Father argues the recordings of the children made by the Mother, where the children are heard making disclosures of physical violence from the Father and their paternal grandmother, were coached by the Mother. The Father argues the Court ought not to accept the Mother's evidence unless it is consistent with the Father's evidence.
- [40] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

- [41] With respect to the credibility of the Father, in my view, the bulk of the Mother's complaints relate more to the Father's personality traits than dishonesty. The Mother views the Father as difficult and unkind. There is evidence to support that the Father has been a difficult co-parent, and has been far from pleasant to the Mother. However, in my view, there is no evidence that the Father has provided false evidence to advance his position. I acknowledge there were some occasions where the Father has provided inconsistent evidence, as discussed above. However, the inconsistencies--relating to the Car Seat Incident, the stroller and French immersion education--were minor details that did not change the narrative to his favour. In my view, whether the Father intentionally or accidentally knocked the Mother's arm away is not crucial to the determination of what occurred during the Car Seat Incident. What was important about that incident is the degree of force that was used, which I will discuss later when I make findings about what occurred. With respect to the evidence on the stroller, it is a minor detail. In any event, it has not been shown there was an inconsistency, as the parties separated in June 2021 and he testified he owned a stroller in September 2021. With respect to the issue of whether the Father had initially agreed he favoured French immersion education for the children, in my view, what was important was the Father's conduct after he became aware of the Mother's wish to enroll the older child in a French program. I will discuss this further later, but I find the inconsistency about whether the Father initially favoured French education is a minor detail in that narrative.
- [42] Overall, there is no evidence that the Father has provided inconsistent evidence in a prior affidavit or during discovery. While some of the positions taken by the Father in the various parenting challenges faced by the parties were stubborn and not conducive to collaboration, that is not a reflection on his credibility.
- [43] With respect to the credibility of the Mother, while I do not find the Mother has provided false evidence, there is a degree of exaggeration to her claims of physical violence. That is, while I am willing to accept that she genuinely has concerns about the safety of her children, I find that the level of concern is not as great as she claims. I find the Mother exaggerated her physical injuries from the Car Seat Incident in an earlier affidavit, when she deposed she was unable to move her wrist completely for two days after the incident. This was in contrast to the medical report made by the emergency room physician the next day, where the physician recorded the Mother had full range of motion. At trial, the Mother explained this discrepancy as she had difficulty moving her wrist before she was examined by the doctor, but when the doctor moved it for her it was fine. She then came up with a different explanation as to why she had agreed at discovery that she did not have any difficulty moving her wrist. She testified at trial that at discovery when she answered questions about the range of motion of her wrist, that she believed she was simply confirming what was written in the medical report. She testified she was not at her examination for discovery confirming the truth of that statement, that she had no difficulty moving her wrist.

- [44] With respect, I find the Mother's explanations difficult to accept. I do not accept that at discovery, the Mother believed she was simply confirming what was written in the medical report. I find that the Mother at discovery was confirming the truth and accuracy of what was written in the medical report--that she had full range of motion in her left wrist. There is no evidence to support the Mother's testimony that during discovery, she was simply confirming what was written in the medical report, and not confirming the truth of what was written. The evidence is the Mother is a communications specialist who is capable of drafting court applications and affidavits. She understood what she was being asked during her examination for discovery.
- [45] I find the Mother has exaggerated her injuries for the purpose of painting the Father in a negative light. I will approach her evidence with respect to allegations of violence toward her and the children with caution.

The Major Issues Between the Parties

- [46] The parties testified to many issues between them after separation, arguing the other parent is less able to attend to the best interests of the children. I will focus on the main issues and events that shape their views of each other: their communications, disclosures of physical violence from the children, the Car Seat Incident, French immersion education and the trip to Jamaica.

Communications Between the Parties

- [47] Communications between the parties have been testy. The Mother produced three years of text messages between the parties, from May 2021 to February 2024, to prove her point. She argues she was receiving a high volume of abusive, profane, offensive and insulting messages from the Father, meant to belittle and gaslight her. She made a report to the Vancouver Police Department in November 2021, complaining of harassment. She argues the messages, taken individually and as a whole, were threatening to her and constitute family violence.
- [48] The Mother referred the Court to many text messages. The messages from the Father include swear words, name calling, middle finger emojis, insults, derogatory insinuations about the Mother's family being "white privilege" and sarcastic comments. Often, instead of calling the Mother "Erin", the Father would call her "Karen", which I am advised is a reference to a pop culture insult to white women.
- [49] The Mother also points to inappropriate comments in the children's presence. She testified the Father has called her "pathetic" in front of the children, that he stuck up his middle finger during an exchange, commented that her tattoo was ugly and asked if the children agreed, and swore at her during an exchange while he was holding one of the children in his arms. She testified that he has also referred to her vehicle as a "gas guzzler" in front of the children, who are aware the Father drives a Tesla.

- [50] The Mother argues the Father's inappropriate communications have made it impossible to co-parent. She cites the Father's resistance to confirm details of drop-offs and pickups, the Father's non-response to her requests to trade days or to attend a school function during the Father's parenting time, the threats made by the Father to their nanny to fire her, threats to expose the children to the litigation and not including her in the Father's communications with the children's school. The Mother argues the Father has already completed anger counselling sessions as directed by the Vos Order and yet his communication style remains the same.
- [51] The impropriety of the communications has been the subject of two prior orders: the Vos Order of March 2022 and an order made by Associate Judge Nielsen in January 2023 (the "Nielsen Order"). The Vos Order required the Father to attend anger management counselling and included conduct terms which restrained the parties from being in close proximity. The Nielsen Order provided terms for respectful communications.
- [52] The Mother relies on the findings of Dr. Ley. Dr. Ley in his s. 211 report found "a persistent pattern of family violence, in verbal and psychological forms, by Julio directed at Erin in the form of his e-mail and text communications to her as well as in person, occasionally". Dr. Ley described the messages as "angry, hostile, passive-aggressive, rude, profane, disparaging, accusatory, critical, denunciatory, grandiose, arrogant and very immature". He found that the communications satisfy the definition of verbal or psychological abuse, and that they were "among the nastiest" that he has seen in his 35 years plus of practice.
- [53] The Mother argues characterizing the Father's communications as juvenile taunts downplay their effect and impact on her mental health. She argues the communications constitute psychological abuse that has continued for two and a half years. She takes the position the Father has not improved in his communications, even after completion of anger management classes, and that the evidence does not support much hope that he will be able to regulate his behaviour. She argues he continues to view himself as being the victim of her provocation and points to the Father's insistence at trial that he has done nothing wrong. The Mother argues the children are harmed by the Father's psychological abuse of her.
- [54] The Father argues while the messages were juvenile and regrettable, and ought not to have been sent, they were during a period of high tension immediately following separation. He argues for the most part since early 2023, he has not communicated inappropriately. Further, he points to insulting and profane messages sent by the Mother, and argues she was egging him on. The Father referred to text messages from the Mother where she called him names and insults.
- [55] I find the Father has sent many inappropriate messages to the Mother. While she has also sent a few inappropriate messages, the Father sent a lot more. However, I agree with the Father the quantity and quality have improved. There have not been as many nasty messages since the Nielsen Order in January 2023. While the Mother argues the tone of the communications has not improved, I note the examples she provided of recent

inappropriate communications involve sarcasm and accusations. For example, she refers to the Father's sarcastic use of "my love" and "be better love" towards her. He also texted "I hope the kids never find out the bullshit you did to me, this will ruin your relationship with them. Court is public that means every lie you say will be recorded and kids one day will read it", which can fairly be described as an accusation that the Mother has been lying. While these comments are unnecessary and unkind, I find they are juvenile and immature. This description is not intended to diminish the psychological impact of a persistent stream of taunting. However, I find the severity of the negative comments on the lesser end of the scale. The evidence is the Mother throughout the marriage and after separation remained capable of taking action that she believed was required. She drafted and brought her own court applications to protect her and the children's interests. I agree with the Mother the comments are a persistent stream of negativity toward her, but I do not find the comments reach the level of a torrent of abuse.

- [56] The Mother argues the Father intended his messages as threats. She argues the Father in the messages threatened that MCFD would become involved in their family and threatened to reduce family property. However, while I would characterize the Father's messages as inappropriate, I do not find them threatening. Looked at in the totality of the parties' relationship, I do not find the messages contained any threats. The messages were off-the-cuff juvenile insults. Any references made by the Father to MCFD were vague. Further, as the financial issues are not before the Court, there is no way to determine if the Father's disposal of family assets was for legitimate reasons.
- [57] I agree Dr. Ley's description of the communications is for the most part accurate. I note, however, that Dr. Ley did not have before him the whole of the communications between the parties as he only reviewed messages forwarded by the Mother.
- [58] I also agree the communications qualify as family violence, within the meaning of that term in the DA. However, I find the level of family violence exemplified by the communications to be minimal.

Alleged Disclosures of Physical Abuse from the Children

- [59] The Mother testified that the children have made numerous disclosures to her of physical violence from the Father and their paternal grandmother. The Father and the paternal grandmother denied any physical violence.
- [60] The Mother testified the first disclosure to her by her children was on October 10, 2021. K., who was two years old at the time, told her that the Father "whacks us in the bum when we are silly". As this incident was said to have occurred while the children were playing, the Mother testified she did not put much weight on it. She received a second disclosure on January 13, 2022. This time, Z. said the Father "smacks us in the bum" when he is angry. Other disclosures include the paternal grandmother hitting the children on the bum, in the face or teeth, with Z. showing a punching motion on his own face.

- [61] In total, the Mother testified the children have since 2021 made approximately 21 disclosures to her of physical violence from the Father and the paternal grandmother.
- [62] The Mother filed an application on March 7, 2022, on short leave for a protection order. The protection order was not pursued before Associate Judge Vos, but the parties on March 11, 2022 consented to a few terms limiting their contact and for the Father to engage in counselling.
- [63] Dr. Ley in his s. 211 report found it was most probable that the children were spanked by the Father, and that the children perceived this to have been done in anger. However, Dr. Ley could not say the spanking occurred once or more than once. He did not find the paternal grandmother engaged in any physical discipline of the children.
- [64] The Mother made recordings of a few of the disclosures. The recordings are short. Some of them are audio only and some contain both video and audio. The children are recorded saying a few sentences, including that their Father and their paternal grandmother hit them.
- [65] The Father testified about one incident when the children were playing near the top of the staircase in his home. The Father was concerned about the children falling down the stairs. He testified he spoke to the children sternly, warning them not to play there again. To drive the point home, he told them he would spank them if he caught them playing at the stairs again, and he used his hand to demonstrate hitting the buttocks of one of the children. Other than this incident, the Father testified that he often engaged in physical play with the boys, where they would "play fight". He testified both boys really enjoyed the physical play.
- [66] With respect to the recordings of the children making disclosures, I find they are too unreliable to place any weight on them. The recordings are short, and no context is provided. The children are young. They are six and four years old currently, making them less than five years old at the time of the recordings. The recordings are short snippets of words from young children. Dr. Ley in his report noted the children made inconsistent statements to him when asked if their father or paternal grandmother had hit them. In my view, the Court cannot place much weight on the recordings from the children.
- [67] Other than the alleged disclosures by the children to the Mother, there is no other evidence that the Father or the paternal grandmother has engaged in any physical abuse of the children. I agree with Dr. Ley that the most that can be said is the Father has engaged in spanking of the children. I find that this occurred at least once, as the Father has testified to, when he found the boys playing at the top of the stairs. I accept the Father's evidence that this was not done in anger, but to discipline and ensure the children know not to engage in playing near the stairs again. There is evidence of the Father engaging in play fights with the children, which Dr. Ley has also observed. It is possible the children are referring to these play fighting incidents when they made disclosures to their Mother.

- [68] I agree with the Father that the Mother was not genuinely in fear of her children being physically abused by the Father. The evidence is the Mother is capable of drafting court materials and making applications to the court, with or without counsel. If the Mother had a genuine fear, I find she would have brought an appropriate application. The fact that the Mother never pursued a protection order is further evidence there is no concern of physical violence. Further, I place reliance on Dr. Ley's findings, which are at most equivocal on the issue of whether the Father has engaged in spanking the children. Dr. Ley had the opportunity to interview the children and to observe them in the company of their Father. Dr. Ley found both children to have been securely attached to both parents and their paternal grandmother. He saw no evidence that the children were in fear of the Father.
- [69] I find it has not been proven that the children have been physically abused by the Father or their paternal grandmother.

Car Seat Incident

- [70] The parties had a disagreement over a car seat in the Father's vehicle. On February 2, 2022, the Mother testified that she observed the Father using a booster seat for their older child. She was of the view that a booster seat was not appropriate, as Z. was four years old and 35 lbs, which required him to be buckled into an infant car seat with a five-point harness. She testified the Father ignored her when she tried to point this out. The Mother called the police non-emergency line, to ask officers to explain to the Father the rules about car seats.
- [71] At the next exchange on February 7, 2022, the Mother noticed the Father was still using a booster seat. The Father ignored the Mother when she tried to explain to him that it was not safe. She advised him she would call the police again, which she did after he left.
- [72] On February 22, 2022, when the Father came to pick up the children, he had a car seat in his vehicle. However, the Mother noticed the car seat was not installed properly into the vehicle. The Father told the Mother to leave. She testified he installed the car seat properly before driving away.
- [73] On February 27, 2022, the parties were buckling the children into the Father's vehicle. The Mother wanted to check to ensure the car seat was installed properly. The Mother testified the Father used his arm and fist to whack her arm away. In the process, the Mother's arm hit the edge of the cupholder and she testified she was hurt. The Father testified he only very gently lifted his arm, like a wave to the Queen of England, to get her arm away.
- [74] The Mother went to the emergency department of the hospital the next day for medical attention. She also reported the assault to the police. The Mother visited her family doctor in follow-up appointments. She testified to having pain in her elbow and shoulder tenderness after the incident.

- [75] The Mother has a recording of the incident. She testified she occasionally recorded exchanges for her own safety, due to the level of aggression between the parties. The phone was in her pocket. The video shows the Father in the back seat buckling a child in the car seat. The parties exchange words about the car seat being properly installed. At the time when the Father hit the Mother's arm, there is no video, only audio. There are some shuffling sounds, then the Mother says "ow". The Mother is heard walking away. No voices were raised in the audio.
- [76] On the basis of the evidence, I find this was not a hard hit of the Mother's arm. The only injury outlined in the medical report from the following day was a forearm contusion. Upon examination, the physician noted no swelling, no redness, and mild tenderness in the left forearm, with the Mother having a full range of motion. There is no evidence the Mother was prescribed any sort of pain killer or medication, other than Tylenol and ice. She did not testify to taking any pain medications. The audio recording does not accord with a hard hit. There is no sound from when the Mother's arm hit the cupholder. When the Mother said "ow", it was said very calmly, inconsistent with the Mother suffering a hard impact. I find this was a mild hit.

French Immersion School

- [77] The parties disagreed on registering their oldest child, Z., in L'Ecole Bilingue, a French school in Vancouver, for grade one. In late May 2023, the Mother sent a choice school application form to L'Ecole Bilingue to see if there were any spots open for September 2023 enrollment. The Mother testified that she had discussed with the Father before separation their joint wish for their children to go to a French immersion school. The Mother had a French immersion education, and the Father also spoke French as he is originally from Montreal. As the Mother was aware the French immersion program had limited enrollment which is allotted by lottery, she believed it was prudent to check if there was a spot available before she approached the Father to discuss this, as there would be no need to discuss if there were no spots. She received a response on June 1, 2023 that there was one spot available but that she had to reply by June 5, 2023 if she wanted the spot.
- [78] The Mother forwarded the email to the Father, asking for his approval. The Father was upset that the Mother applied to L'Ecole Bilingue before discussing it with him. He refused to discuss it.
- [79] The Mother filed a short leave application, seeking a court order that Z. be enrolled in L'Ecole Bilingue. I understand this application was adjourned on consent. The Mother agreed to seek more time from the school to make the decision. The school extended the deadline to June 29, 2023. The Father advised he will respond to the Mother by noon on June 28, 2023, as he wanted to do research on the school.

[80] On June 28, 2023, at 12:26 p.m., the Mother sent an email asking for his response. The Father replied he will respond by the end of the day. At 9:39 p.m., the Mother emailed again asking for his response. At 11:41 p.m., the Father emailed the Mother, setting out his reasons why he did not agree with L'Ecole Bilingue. At 11:45 p.m., the Father emailed L'Ecole Bilingue, turning down the spot.

Trip to Jamaica 2023

[81] The Father emailed the Mother on March 10, 2023, advising he wished to take the children to Jamaica from June 30, 2023 to July 15, 2023. The Mother agreed to trade days. She testified she was excited for her children to travel. She packed beach clothes for the children and talked to them about visiting Jamaica. During the two weeks, she sent text messages to the Father asking for a Facetime call with the children, but he did not respond. However, the Father did send her a few emails about financial matters.

[82] She found out when the children returned to her home that they did not in fact go to Jamaica, but stayed in Vancouver. The Father testified that his travel plans changed as he was spending too much money on this litigation. He had decided that he was no longer travelling to Jamaica, but he testified he did not feel he needed to update the Mother. His view was the two weeks were his parenting time, and how he spent them with the children was not the Mother's concern.

S. 211 Report

[83] Dr. Ley interviewed the Mother on September 10, October 11, November 24, and December 14, 2022, for a total of seven and one-quarter hours. He interviewed the Father on October 1, 15, and 20, 2022, for a total of eight hours. Dr. Ley interviewed the children on February 10 and 23, 2023. He conducted home visits on March 24, 2023 to the Father's residence and March 31, 2023 to the Mother's residence. His s. 211 report was completed on August 22, 2023.

[84] The s. 211 report was ordered to assess the needs of the children; the views of the children; the ability and willingness of the parties to satisfy the needs of the children; recommendations for parenting schedule; and recommendations on guardianship responsibilities. He was not asked to provide an opinion on relocation.

[85] Findings or recommendations made in a s. 211 report are not binding on the Court, and the Court should not abdicate its role in favour of the recommendations made: *M.F.W. v. M.A.H.*, 2020 BCCA 284 at para. 22. The s. 211 expert report writer acts as the "eyes and ears" of the Court, in observing the parties, the children and their relationships: *Goudie v. Goudie*, [1993] B.C.J. No. 1049, 1993 CanLII 1073 (B.C.S.C.) at para. 33.

[86] Justice Branch accurately summarized the findings of Dr. Ley in his ruling, indexed at 2023 BCSC 2343:

[14] A s. 211 report prepared by Dr. Ley was subsequently received on August 22, 2023. In that report, the following relevant observations and recommendations were made:

- a) Dr. Ley says that both children have "warm, emotionally and physically affectionate as well as enjoyable relationships with each parent" and describes the respondent "as a parent who is strongly oriented toward facilitating and supporting his children's independence and confidence."
- b) Dr. Ley did not see or find any indications that either child is unduly anxious, fearful, or avoidant of either parent and his/her homes and care.
- c) In relation to the children's relationship with their paternal grandmother, Dr. Ley found that the children were warm and welcoming towards her and were highly interactive with her.
- d) Dr. Ley described the respondent's conduct towards the claimant as immature, egocentric, and among the nastiest he had seen in 35 years of practice, and that the respondent's communications with the claimant had been "psychologically violent and psychologically harmful", demonstrating a persistent pattern of family violence and that the respondent "fails to understand the indirect but definitely negative impact that such communications and mistreatment may have on his children. Quite simply children are harmed, directly or indirectly, one parent psychologically harms the other."
- e) In terms of the corporal punishment allegations, Dr. Ley stated:

In my interviews with the children, although they showed some inconsistencies in their accounts, I found [Z. and K.]'s disclosures to me of being spanked by [J.R.G.], as well as their demonstrations of the nature of this spanking, to be quite credible and compelling. That said, I have no idea whether [Z. or K.] have been spanked once or 100 times or not at all, consistent with [J.R.G.'s] denial of spanking them.

It is my opinion that [J.R.G.] most probably has spanked them, and of concern is the children's perception and account that he has done so in anger.

Regardless of the accuracy of my viewpoint that [J.R.G.] has most probably spanked the children, the more important finding is that I have seen numerous signs of a solid, secure attachment and strong emotional bond between [J.R.G.] and the children []

I do not see any indications that the children are tense, anxious, or fearful in [J.R.G.'s] presence, care and home []

Returning to the issue of spanking, if [J.R.G.] has spanked the children or continues to spank them, he should absolutely desist from this practice. Spanking is illegal in most Western European countries, but is still permitted by law in North America. However, most parenting experts are strongly opposed to spanking []

It is my opinion that it is most unlikely that [J.R.G.] has hit or struck the children in any other way, apart from spanking.

- f) Dr. Ley described the claimant's conduct in discussing financial and parenting matters with the children as inappropriate and harmful.
- g) Notwithstanding these comments about each party, Dr. Ley did not recommend a change in the shared parenting responsibilities. He stated: "In my opinion, as parents, it would best for their children as well as for [the parties'] relationship, if they equally shared guardianship and decision-making regarding [the children]."
- h) In terms of parenting time, Dr. Ley essentially recommended retaining the current 60/40 split, but with longer periods of time between transitions. He proposed a 5-2, 7-0, 0-7, 5-2 schedule. Over this four-week parenting cycle then, Dr. Ley proposed that the children would spend 17 total days with the claimant, and 11 days with the respondent (or about 40%). He highlighted various benefits of this plan, including having fewer transitions between high conflict parents than in the repeating 3/2 arrangement.

Factors to be Considered on an Application for a Relocation

[87] Under the DA, the court is to consider the best interests of the child pursuant to s. 16(3) in deciding whether to authorize a relocation, as well as the additional factors under s. 16.92. The court is not to consider whether the relocating parent will relocate if the children are not authorized to move: s. 16.92(2), DA. As the parties have substantially equal parenting time, the onus is on the Mother to prove that the relocation is in the best interests of the children: s. 16.93(1), DA.

Best interests of child

16 (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

Primary consideration

- (2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Factors to be considered

- (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
 - (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
 - (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

- (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
- (d) the history of care of the child;
- (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child's care;
- (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) any family violence and its impact on, among other things,
- (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
- (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
- (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Factors relating to family violence

- (4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:
 - (a) the nature, seriousness and frequency of the family violence and when it occurred;
 - (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
 - (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
 - (d) the physical, emotional and psychological harm or risk of harm to the child;
 - (e) any compromise to the safety of the child or other family member;
 - (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;

- (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
- (h) any other relevant factor.

Best interests of child -- additional factors to be considered

16.92 (1) In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,

- (a) the reasons for the relocation;
- (b) the impact of the relocation on the child;
- (c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
- (d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
- (e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
- (f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
- (g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

Factor not to be considered

- (2) In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

Burden of proof -- person who intends to relocate child

16.93 (1) If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

[88] In determining if relocation ought to be authorized, I will consider each of the factors under s. 16, as well as the additional factors under s. 16.92. I have not considered whether the Mother would move to Calgary if the children are not authorized to relocate.

Needs of the Child: s. 16(3)(a)

[89] The Court, in determining the best interest of the child is to consider the child's needs, given the child's age and stage of development, such as the child's need for stability.

[90] The children are currently six and four years old. Z. is going to start grade two in September 2024, and K. will be starting kindergarten. The Mother argues the children's needs and stability will be enhanced in Calgary, as they will have the support of the maternal grandparents and their uncle. The maternal grandparents are retired, and they have offered the Mother and the children rent-free accommodations for as long as they need along with free childcare. The evidence is the maternal grandparents live in a detached home, next to a bicycle path, in a neighbourhood that is close to schools and other amenities. Their uncle also lives in Calgary, a short drive away.

[91] The Mother argues she is better suited to providing a stable routine for the children. After separation, the Father initially resisted a set parenting schedule and sought a flexible schedule to be set week by week depending on his golf games or other commitments. She argues the Father did not recognize the importance of the nanny in the children's lives. Because he fired their nanny, the children lost someone who took an active role in their lives for three years. If the children are not relocated to Calgary, their contact with their Mother will be diminished, and they will lose the stability of her emotional support.

[92] The Father argues relocating the children to Calgary will decrease their stability. The Father relies on Dr. Ley's finding, that the children are securely attached to each parent. Moving the children to Calgary will destabilize their attachment to the Father. Further, the Father argues the Mother is not better suited to providing stability, as she has refused to adopt a 4-3 parenting schedule, which will decrease the number of transitions for the children with minimal impact on her parenting time.

[93] In my view, this factor favours the children remaining in Vancouver. The children are established here, with Z. having already attended his school for two years. Z. is friends with all his classmates. K. is slated to start kindergarten at the same school, and K. is already familiar with the school having been to his brother's drop-offs and pickups. The evidence is the Father owns a home and his mother has moved to Vancouver from Montreal to assist

him with childcare. While initially after separation the Father wanted a flexible schedule for childcare, the evidence is since July 2021, the parties have complied with the 3-2 schedule. I find both parties are able and willing to provide stability for the children; however, as the children have lived here their whole lives and one is already enrolled in school, I find staying in Vancouver will provide them with the most stability.

The Nature and Strength of the Child's Relationships: s. 16(3)(b)

- [94] The Court is to assess the nature and strength of the child's relationship with each parent, siblings, grandparents and any other person who plays an important role in the child's life.
- [95] Dr. Ley found that the children are strongly bonded to both parents. Based on the evidence, I agree with that assessment. It is evident from both parents' testimony that each of them is emotionally attached to both children, as the children are to them. The evidence shows each parent enjoy tremendously the time they spend with the children, and when they are apart from the children, they are dearly missed.
- [96] Dr. Ley also found the children enjoy a good relationship with their paternal grandmother. She has moved to Vancouver from Montreal after the Father's separation. She lives in the basement of the Father's residence and assists him in childcare. The paternal grandmother testified, and I found her to be a very fair witness. She showed no animosity toward the Mother in the circumstances, and readily agreed that the Mother is very loving towards the children. I accept Ms. Robillard's evidence that the children have a good relationship with her.
- [97] Dr. Ley did not have an opportunity to observe the children with their maternal grandparents. The Mother testified to the good relationships between the children and her parents. She takes them to visit Calgary often, and they have travelled on holidays together to Hawaii. Her parents came to Vancouver when they were born, and then after separation, they lived in Vancouver for one year from August 2021 to September 2022 to assist the Mother. I find the children also enjoy a good relationship with their maternal grandparents, who love them very much.
- [98] In my view, the evidence is the children enjoy strong and close relationships with both parents and grandparents on both sides. I place no weight on the Mother's evidence that the children have expressed to her they wish to spend more time with her and less time with their Father, as these statements from young children are unreliable. The Father has also provided evidence that the children make the same kind of statements to him. With respect to this factor, I do not find it favours or disfavors relocation. This factor is neutral.

Willingness to Support the Child's Relationship with the Other Parent: s. 16(3)(c)

- [99] The Mother argues the evidence shows she is willing to support the children's relationship with the Father. She has facilitated Facetime calls with the Father when she was away with the children on holidays, while the Father has not done the same. She cites the Jamaica trip

in July 2023 and Christmas 2022 as examples of when she was denied calls with the children. She argues the failure of the Father to advise her that he was no longer taking the children to Jamaica is another example of the Father not willing to update her on crucial issues with respect to the children. The Mother's position is the Father is so antagonistic towards her he is not able to put his feelings aside to foster a relationship between her and the children.

- [100] The Father's position is the Mother will do all she can to diminish his relationship to the children. He cites as evidence the different attempts the Mother has made since separation to reduce his parenting time. After the parties entered into the consent order in October 2021 for the 3-2 schedule, the Mother has brought a number of applications to reduce his parenting time to weekends only. The Father has consistently held his position there ought to be equal parenting time for both parties.
- [101] In my view, the Mother will not fully support the children's relationship with the Father. She has consistently sought to reduce the Father's parenting time, even though he has less time than she has. This was based on her view that the Father was physically abusing the children. I find the fact that the Mother did not pursue a protection order shows she did not consider there was much risk of the Father physically harming the children. Notwithstanding, the Mother continued to use different justifications to reduce the Father's parenting time. She later claimed the Father was violent towards her, and in turn, she feared for the safety of the children. As stated above, I do not find the Father or the paternal grandmother have hit the children, and I do not find the Father was physically violent toward the Mother. In my view, for the Mother to continually seek to reduce the Father's parenting time on the basis of flimsy grounds is not evidence that she will support the children's relationship to the Father.
- [102] I accept that immediately after separation the Father expressed his wish the children reside for the most part with the Mother. However, by June 19, 2021, the Father was seeking equal parenting time. The Mother argues that was a result of legal advice, inferring that the Father was taking that position to reduce his child support obligations. However, the Father has complied with the parenting schedule.
- [103] The Father has consistently taken the position the parties should have equal parenting time. There is no evidence the Father has filed applications to reduce the Mother's parenting time.
- [104] I acknowledge the evidence that the Father has at times refused to facilitate Facetime calls with the Mother when the children were in his care. I also find troubling the Father's conduct with respect to the Jamaica trip by not informing the Mother that the trip was cancelled. In my view, that should not have occurred. The children were given confusing messages about whether they were travelling to Jamaica for vacation. The Father's evidence that as it was his parenting time, he did not need to advise the Mother what he intended to do for the two-week period, is troubling, as it shows he did not put the best interests of his children ahead of his negative feelings toward the Mother.

[105] However, there is no evidence the Father has tried to reduce the Mother's parenting time. I find overall, the Father is more likely to promote the children's relationship with the Mother. The evidence is the Mother has consistently tried to diminish the Father's parenting time, bringing multiple court applications to do so on the basis of the same allegations.

[106] In my view, the Father is more able and willing to facilitate the children's parenting time with the Mother.

History of the Child's Care: s. 16(3)(d)

[107] The Mother argues she was the primary care giver since the children were born. She had flexible hours working from home, and remained close by to assist the nanny. She testified the Father was away for long hours during the workday, and in the evenings and weekends had networking events and golf games. However, the Father argues the parties had the assistance of a nanny part-time starting when Z. was about five months old. After the birth of K., the parties had a full-time nanny. The Father argues the parties both worked full time and neither one took on the role of a primary care giver. It may be that the Mother did more childcare than the Father before separation, but the Father argues since separation he has consistently asked for equal parenting time.

[108] Both parties have had substantially the same parenting time since separation. For the last almost three years, the children have had regular parenting time with both parties. The last three years are likely the only period of time the children will remember, as they are currently six and four years old. The children are familiar with both parents. This factor does not favour or disfavour relocation. I find it is neutral.

Views of the Child: s. 16(3)(e)

[109] The children are too young to solicit their views. While the Mother argues the children have requested to spend more time with her, I place little weight on these statements, as the evidence suggests the children have also expressed to their Father they do not want to leave him. In my view, this factor is neutral.

Cultural, Linguistic and Spiritual Upbringing: s. 16(3)(f)

[110] The Mother argues she is dedicated to maintaining the children's cultural and linguistic background. The Father speaks French and Spanish, and the Mother speaks French. The Mother tried to enroll Z. in a French immersion school but was not able to due to the Father's resistance. The Mother has researched schools in Calgary where the children can learn Spanish or French.

[111] The Father testified that in his view, it is most important for the children to speak, read and write in English. He points to the children living in Vancouver, where there is no need to speak French. He testified he is more concerned with Z.'s progress in reading and writing in

English, as his teacher had indicated Z. is weak in those areas. To assist Z., the Father has enrolled him in Kumon, a tutoring service. The Father expressed that if the children are interested, he and his mother can speak to them in French. He testified that so far, his children have shown no interest.

- [112] I do not find relocation to Calgary will enhance the children's cultural and linguistic upbringing. The cultural and linguistic education--Spanish and French language training--that the Mother wishes for the children can also be imparted through the children spending time with the Father and their paternal grandmother. They are the Spanish and French speakers. I find this factor is neutral.

Plans for the Child's Care: s. 16(3)(g)

- [113] The Mother argues she has proposed a detailed plan for the children's care in Calgary. They can live with her parents, who will provide free childcare. The Mother has identified neighbourhoods where she may be able to purchase a residence which are close to her parents' house, schools, recreation centres and medical clinics. She plans to move with the children by July 1, 2024, to allow sufficient time to get settled before the start of the school year.
- [114] The Father owns a residence in east Vancouver, and his mother lives with him in the basement. His mother is available to look after the children when the Father is working. His mother has been taking both children to school and preschool when they are in his care. Starting in September, both boys will be attending the same school.
- [115] This factor favours the children remaining in Vancouver. While the Mother has a detailed plan, the children are already settled in Vancouver and have established routines.

Ability and Willingness to Care for and Meet the Needs of the Child: s. 16(3)(h)

- [116] The Mother argues she is more able and willing to care for the children. She points to the times where the Father has dropped off the children to her care early when they have been sick. While she has always accommodated the Father with respect to trading days, she argues he has not reciprocated. When she reached out to the Father to take the children when she was sick one time with food poisoning, or when she wanted to run a marathon, the Father did not respond to her requests.
- [117] The Mother argues the Father does not always use up all his parenting time, asking to drop the children off early. The Mother argues this shows the Father is not really interested in parenting. However, there is evidence that the Father has also asked to pick up the children earlier at times, for example, to drive up to Whistler in daylight instead of darkness. Overall, I do not get the impression the Father is disinterested in parenting.

[118] In my view, while the evidence is the Mother has been more involved in the children's schooling and medical appointments, the Father has shown he is able and willing to do so. For example, the Father insisted on attending the child's specialist appointment when there was concern about a heart murmur; he has recently enrolled the children in some extra-curricular programs; and he speaks to Z.'s teacher to get updates on his progress at school. In my view, both parents are able and willing to meet the needs of the children. This factor is neutral.

Ability and Willingness to Communicate: s. 16(3)(i)

[119] This is a major source of irritation for the Mother. While she has regularly updated the Father about the children's school, health and dental matters, she argues the Father does not do the same. He fails to update her when one of the children has a fever, does not attend school or when he receives information from the school. She argues while she has taken the children to activities that the Father has enrolled them in, the Father does not always take the children to activities that she has chosen, such as karate. When the Mother raised the subject of signing up the boys for a soccer program, the Father responded that he would research other soccer options. Her evidence is he never provided any other options. When he asked the Mother if she agreed with a swimming program he had chosen, he would not respond to her questions about times and location, which she believed she needed to know before making a commitment to take the children. Registering each son at their current school has caused a mini-drama each time; for Z., the Father had to research a different school first even though he had already agreed to register Z. at Henry Hudson school, which was reflected in the JCC order. For K., the Father was offended when the Mother sent in the application form to Henry Hudson without consulting him first.

[120] The Mother argues the Father is difficult, hostile and passive aggressive towards her, and he will sacrifice their best interests to spite her. She cites as an example the Father's opposition to L'Ecole Bilingue. The Mother argues his opposition was unreasonable, as L'Ecole Bilingue is on par with the current school in terms of both being "middle of the pack", and in addition, is located mid-point between both parties' residences. She views the Father's opposition as being driven by his desire to not do what she wants. In the result, she is of the view Z. lost out on an opportunity to learn another language.

[121] The Father takes the position that he is entitled to disagree with the Mother on parenting issues, and that mere disagreement is not hostility. He views the Mother as making unilateral decisions for the children, without seeking his input, and then imposing the decisions on him.

[122] In my view, this factor favours the Mother. The Mother has shown more willingness to communicate. She has communicated with the Father more respectfully. Put simply, the Father is difficult. He should try to communicate in a collaborative manner which respects both parties' views. While his reasons for rejecting L'Ecole Bilingue may have been well-founded, it would have been better for the parties to have fully discussed the issue before the door was firmly shut.

Family Violence: s. 16(3)(j)

[123] The DA defines "family violence" to include conduct by a family member that constitutes a pattern of coercive and controlling behaviour including harassment, stalking, and psychological abuse: s. 2(1), DA. Abusive communications such as use of derogatory and demeaning comments, name-calling, gaslighting, and manipulation can be family violence, particularly in the presence of children: K.W. v. L.H., 2018 BCCA 204 at paras. 122-123, leave to appeal to SCC ref'd, 38253 (22 November 2018); K.S.P. at para. 402.

[124] The Mother argues there are three forms of family violence perpetrated by the Father: the physical assault on her during the Car Seat Incident; the physical abuse of the children by the Father and the paternal grandmother; and the pattern of abusive communications.

[125] With respect to the Car Seat Incident, I find there was at most a minor assault on the Mother. I find while the action of the Father in moving the Mother's arm was intentional, there was not much force used by the Father and it did not result in injury to the Mother. As such, I do not find this incident was family violence.

[126] With respect to the allegations that the Father and paternal grandmother engaged in hitting the children, I find this has not been made out on the evidence. As such, I do not find there has been any family violence directed towards the children.

[127] With respect to the abusive communications, I find this constitutes family violence. The communications from the Father are of such a nature that they can be characterized as a pattern of coercive or controlling behaviour, which can include harassment or psychological abuse. The Court is to consider the impact of the family violence on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child and the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child: s. 16(3)(j)(i) and (ii), DA. The factors the Court are to assess in considering the impact of the family violence are set out in s.16(4) of the DA.

Nature, seriousness, frequency of the family violence and when it occurred:

[128] I consider the fact that the communications, while they can be characterized as psychologically abusive, are for the most part, juvenile profanity-laced taunts. The evidence is the barrage of offensive communications occurred immediately after separation, and have since decreased substantially.

Whether there is a pattern of coercive and controlling behaviour in relation to a family member

[129] I find the nature of the Father's offensive communications is a pattern of coercive and controlling behaviour. However, in my view, the coercion and control in the Father's communications is at a very low level. The communications were in the vein of reactionary insults hurled toward the Mother, with no evidence of any planning or deliberation.

Whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence

[130] The communications are not directed to the children, and there is little evidence the Father disparages the Mother in the presence of the children. While the Mother testified about an incident of the Father asking the children to agree her tattoo is ugly, or another incident of calling her vehicle a gas guzzler, these are again of the same ilk--juvenile taunts that do not diminish her parenting abilities. The evidence of the Father using a profanity directed at the Mother, while holding a child in his arms, is concerning, as the child is exposed to the Father's aggression towards the Mother. There is evidence this has occurred once or twice.

The physical, emotional and psychological harm or risk of harm to the child

[131] I find there is no evidence of any harm caused to the children. With respect to risk of harm, I find the risk is low. The Father has so far been able to refrain from offensive language directed to the Mother in the presence of the children other than a few isolated incidents. The period immediately following separation to the date of trial is likely the most volatile. I expect as time passes and the parties settle their family litigation by consent or otherwise, the risk will decrease.

Any compromise to the safety of the child or other family member

[132] I find there is no evidence of the safety of the children being at risk from the toxic communications.

Whether the family violence causes the child or other family member to fear for their own safety or for that of another person

[133] I find there is no evidence the toxic communications have caused the children or the Mother to fear for their safety.

Any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child

[134] The Father has completed anger counselling. He has taken steps to improve his communications. While the Mother is of the view the Father has not improved his communication style, I find there is evidence of some improvement.

Conclusion on family violence

[135] Overall, I do not find the Father is not able and willing to meet the needs of the children. With respect to the impact of the family violence on the appropriateness of making an order that would require the Father and the Mother to cooperate, I do not find the family violence is of such a nature that it would be inappropriate to have the parents work together. In my view, the conduct orders already in place addresses the inappropriate communications, and the Father's communications have improved since the orders.

[136] I find the impact of the family violence to be minimal on the ability and willingness of the Father to meet the needs of the children. I find it is appropriate to have the parents cooperate.

Any Civil or Criminal Proceedings: s.16(3)(k)

[137] This factor is not applicable.

Additional Best Interests Factors: s. 16.92(1)

Reasons for the relocation

[138] The Mother testified her reasons for relocating to Calgary are for family support and cost-savings. Her parents and brother reside in Calgary, and she is very close to them. Her parents have offered her free accommodation and childcare for as long as she needs. She estimates she is currently paying in Vancouver approximately \$6,000 a month for rent and childcare. Her parents' home in Calgary is 2500 square feet, with a renovated basement containing a home office for her. In Vancouver, she shares a bedroom with the children in her apartment. Her au pair lives in the apartment, and sometimes she also takes in an international student for extra income.

[139] The Mother testified she had been contemplating a relocation for some time, but her plans did not solidify until October 2023, when she visited her family in Calgary for Thanksgiving. When her parents left Vancouver after moving here for one year to help her, she realized how difficult it was to be a single parent without support. She testified that during her visit to Calgary in October 2023, she started discussing with her parents the logistics of a move. She researched neighbourhoods, schools, medical professionals, extracurricular programs, commuting time, housing prices and flight costs from Vancouver to Calgary.

[140] The Mother argues the current amount of child support and spousal support she is receiving is not sufficient to meet the needs of herself and the children. She has a debt of approximately \$140,000, and she believes she will not be able to save up enough money to ever purchase a house in Vancouver. If she relocates to Calgary, she will be able to save money due to free accommodation and childcare. She argues this will enhance the quality of life for the children.

- [141] The Mother initially had counsel, then became self-represented in July 2022. When she decided to relocate, she retained counsel in November 2023. She provided the Father notice of the relocation in November 2023. She consented in December 2023 to an interim order to not relocate the children without a court order.
- [142] The Father disputes the Mother's stated reasons for relocation. He argues it is another attempt to reduce the Father's parenting time. The evidence that the Mother wishes to live in Calgary is contrary to statements she made to Dr. Ley, who noted in his s. 211 report that the Mother told him she "loved the West Coast" and "never liked residing in Calgary". The Father argues the Mother never contemplated relocating to Calgary with the children until she lost another round in court in trying to reduce his parenting time. The visit to Calgary in October 2023 came after the court appearance before Justice Branch, and though Justice Branch did not issue his reasons until October 24, 2023, the Father argues it was clear during the hearing that the Mother's application to reduce his parenting time was going to be dismissed. The Father argues the evidence is clear that the Mother had not been contemplating relocation to Calgary for a long time, and only came up with the idea as a last-ditch attempt to reduce his parenting time. He argues the reasons for her relocation are not genuine.
- [143] In my view, I agree with the Father. Based on the totality of the evidence, I do not accept the Mother's testimony that she had been genuinely considering relocation for a long time, and solidified her decision during her visit in October 2023. I say this based on the following reasons. Dr. Ley testified the Mother told him that she "never liked residing in Calgary" during one of the interviews. He wrote that phrase in quotation marks in his report. He was not challenged on this evidence by the Mother. Dr. Ley is an objective witness and I have no reason not to accept his evidence in this regard.
- [144] Further, if the Mother had been considering relocation to Calgary for a period of time, it is likely she would have mentioned this to Dr. Ley. Dr. Ley paid a home visit to her in March 2023 to observe the children in her care. Dr. Ley was hired for the sole purpose of preparing a s. 211 report with recommendations on each party's parenting time. In my view, it is highly unlikely the Mother would keep this very relevant fact from Dr. Ley. It makes no sense the parties would spend money to commission a report that does not address recommendations for a relocation, if it had been a possibility. If Dr. Ley had been in support of the Mother relocating to Calgary with the children, that would have been very useful to her application. Conversely, if Dr. Ley was not in favour of the relocation, it would have been helpful for the Mother to have known.
- [145] If the reason for the relocation is for family support, the Mother's parents had left Vancouver in September 2022. The Mother knew at least by September 2022 that her parents were no longer residing close by to assist, and that she would need to relocate if she wanted their help. There is no evidence that from September 2022 to October 2023, the Mother took any steps to look into relocation. During that time period, the Mother travelled to Hawaii twice with her children and her parents, and visited Calgary with her children.

There is no explanation as to why in October 2023, and not any earlier time, the Mother decided to solidify her decision to relocate to Calgary.

- [146] I reject the Mother's evidence about the reasons she wishes to relocate to Calgary. I find relocation was not considered by her for a long time. In my view, while it is likely true the Mother wishes to relocate for family support and cost-savings, the predominant reason is to reduce the Father's parenting time. While the Mother argues there is no requirement pursuant to the DA that the relocation be done in good faith, the DA does contain a requirement that the reasons for the relocation be considered by the Court in assessing the best interests of the children.
- [147] With respect to the financial reasons for the relocation, this is not a situation where the Mother is not able to work in Vancouver or can obtain a higher paying job in Calgary. As she testified, her business is almost completely online, and she can maintain her business remotely. That is, her income is the same whether she works from Vancouver or Calgary. As for her argument that she will struggle financially more in Vancouver than in Calgary, it is difficult to assess the strength of that argument as the financial issues between the parties are not before the Court at this time. I agree with the Father that it is possible for the Mother to move to a different neighbourhood in Vancouver to try to save costs. Further, the children will both be attending elementary school in September 2024, which may save childcare costs. I acknowledge the offer of free accommodation and childcare in Calgary, but in my view, the Court ought not to put too much weight on that without knowing the complete financial picture between the parties.
- [148] I find the Mother has not presented any bona fide reasons for the relocation of the children.

Impact of the relocation on the child

- [149] The children are settled in their lives in Vancouver. They will both be attending the same elementary school in September 2024. Z. has friends at the school from his two years there. The Mother argues both children are social and will have no issues making friends in Calgary. Further, in Calgary, the children will have the support of their maternal grandparents and uncle with whom they are very close. However, in Calgary, their time with the Father will be severely impacted due to distance. The Father will not be able to take part in their day to day activities, such as helping with homework.
- [150] I accept that the children are young and will likely be able to adjust to living in Calgary. However, they will lose regular contact with their Father and this may affect the strength of that relationship.

The amount of time spent with the child by each parent

- [151] Currently the children spend 60% of their time with the Mother and 40% with the Father. The parties since separation in the last three years have substantially equal parenting time.

[152] If the children relocate to Calgary, the parenting time with the Father will be reduced significantly.

Geographic area restrictions

[153] This factor is not relevant.

Reasonableness of the proposal to vary parenting time

[154] The Mother has proposed the Father have parenting time on long weekends, one month for summer break, and one week at Christmas and all of spring break. The Mother has proposed that travel costs should be shared, though she testified she is willing to pay the full cost. The Mother proposes the Father can have Facetime calls three times a week.

[155] I find the proposal to be very lacking in details. There was no evidence as to how the Father is to exercise his parenting time. For example, is the plan that the Father will fly to Calgary, pick up the children and return with them to Vancouver for his parenting time? Will the Mother come to Vancouver to pick them up and escort them back to Calgary? Or is the plan for the Father to exercise his parenting time in Calgary? If so, is the Father responsible for hotel costs? How will the travel affect the children considering their ages? In my view, the Mother's proposal is not well thought out.

Compliance with notice requirements, orders and obligations

[156] Section 16.9 of the DA sets out the notice requirements for a relocation. The Mother provided her notice by email on November 27, 2023. This was followed by a letter from her counsel. It was provided 60 days before the proposed relocation, being July 1, 2024. The address of the new place of residence was not provided; however, the new location is given as Calgary. No proposal for how parenting time and decision-making responsibility could be exercised was provided. Details were not provided until the Mother testified at trial.

Conclusion

[157] Balancing the factors, in my view, the best interests of the children are better served by remaining with the Father in Vancouver. The children have a stable home with the Father and their paternal grandmother. The older child has already been enrolled in school for two years and the younger child is slated to start kindergarten at the same school in September. The Court is concerned that if the children are relocated with the Mother to Calgary, the Mother will not foster a relationship between the children and the Father. The Mother argues that the Father did not present any evidence on how he would facilitate a relationship with the Mother should relocation not be allowed, showing that the Father is less likely to facilitate a relationship between the Mother and the children. However, on the basis of the totality of the evidence, the Court is more concerned that the Mother would diminish the children's relationship with the Father if the children are permitted to relocate to Calgary. There is no evidence that the Father has sought at any time to reduce the

Mother's parenting time. While the Mother argues the Father's position of equal parenting time will not be feasible after her move to Calgary, she has not presented an alternative proposal for parenting arrangements should the relocation not be allowed.

[158] I find on the basis of the totality of the evidence, the Mother has not shown that relocation to Calgary is in the best interests of the children. As such, I dismiss her application for relocation.

[159] Neither party made any detailed submissions on parenting arrangements if the relocation was not allowed. The parties ought to contact the registry within 30 days of this ruling to schedule a one-day appearance to make submissions on parenting arrangements.

"Chan, J."

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Prepared on 29 October 2026 · Esheria