

CANADA / JUDGMENT

E.S. v. G.D.S.

2023 BCSC 1537

COURT

Supreme Court of British Columbia

DECIDED

1 September 2023

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2023 BCSC 1537 E.S. v. G.D.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.S. v. G.D.S.,

2023 BCSC 1537

Date: 20230901

Docket: E170456

Registry: Victoria

Between:

E.S.

Claimant

And

G.D.S.

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

M. Norton

Counsel for the Respondent:

G. Smith

Place and Dates of Trial:

Victoria, B.C.

June 26-30 and

July 4-6, 2023

Place and Date of Judgment:

Victoria, B.C.

September 1, 2023

Introduction

- [1] In this family law proceeding the singular issue is the location in which the parties will continue to share the parenting of their four children.
- [2] So as to preserve their anonymity, I shall refer to the four children as AB, 15; CD, 13; EF, 11; and GH, 9 (collectively, the "Children"). Since 2016, save for a brief period in January/February 2017 when the respondent removed the children to Calgary, they have lived at various locations on Salt Spring Island ("Salt Spring").
- [3] The parties and the Children moved from Alberta to Salt Spring in the summer of 2016 to pursue the respondent's position with an oil start-up company, Icon Oil ("Icon"). The two principals of Icon were residents on Salt Spring but its oil-based focus was in Alberta and abroad. Other than being the personal residence of its two principals, it does not appear Icon maintained a presence on Salt Spring necessitating the respondent to have been physically present on Salt Spring.
- [4] Presumably, the parties considered the interests of the Children in deciding to move from Alberta to Salt Spring.
- [5] According to the evidence, both the parties' marriage and Icon's business were floundering when the move occurred.
- [6] The parties, for reasons I shall come to further in these reasons, separated in early January of 2017 following 'an incident' on or near New Year's Eve 2016. They agreed to counselling and to enter into mediation.
- [7] After a counselling session, but before mediation, the respondent removed the Children to Calgary and commenced litigation in the Alberta court system.
- [8] The claimant, upon learning of the Children's removal, commenced this litigation in BC.

The Litigation History

- [9] Following one counselling session in the later half of January, the respondent surreptitiously removed the Children to Alberta and obtained a without notice order alleging the claimant was suicidal and posed a danger to the Children. The order was to expire February 16, 2016. It provided for no contact by the mother.
- [10] When the claimant became aware of the order, she applied in BC for their return. A justice of this court ordered the children's return to Salt Spring on February 2, 2017. In mid February, the Alberta court ordered the children's return to British Columbia and that the respondent father have "generous access" to them.
- [11] A brief jurisdictional skirmish ensued. In late 2017, the Alberta court ordered all matters pertaining to the Children's parenting be determined in BC while it, the Alberta court, retained jurisdiction over financial matters including support.
- [12] In 2020, the parties were divorced by order of the Alberta court and the respondent was ordered to pay \$2,000 monthly as child support based on each of the parties having "an unknown/fluctuating guideline income".
- [13] The order further provided that neither party could apply to vary child support for 36 months but that the parties were to exchange income tax returns and notices of assessments each year by June 30 for so long as child support was payable.
- [14] In January 2018, following the Alberta ruling declining jurisdiction over the parenting issue, Justice Bracken pronounced an interim order granting the parties shared parenting with shared parental responsibilities and ordered the children reside on Salt Spring until further order of the Court (the "Bracken Order"). Justice Bracken also ordered the preparation of a s. 211 report.
- [15] That report was prepared by Dr. Anita Snell and delivered to the parties in July 2018 (the "Snell Report"). The essence of the recommendation was a continuation of the court ordered shared parenting regime based on a week on and week off rotation with equal sharing of school holidays. Dr. Snell also recommended that the Children remain on Salt Spring for a minimum of three years and that the respondent maintain a permanent residence on the island that was 'child centric'.
- [16] Dr. Snell recommended the claimant undergo a psychiatric assessment and undergo regular appointments for three years; this was based on allegations of suicidal ideation which, according to the respondent, was the underlying rationale for his removal of the Children to Alberta in January 2017. Further, Dr. Snell recommended the parties not denigrate the other in the presence of the Children.
- [17] Following delivery of the Snell Report to the parties, neither initiated steps to vary the Bracken Order. It has remained in force, unaltered, since its pronouncement.

- [18] Similarly, there appears to have been no steps taken in the Alberta litigation since the April 2020 order for divorce.
- [19] All remained static regarding the Children's parenting and support payments until the claimant filed a Notice of Application in April of 2022 seeking a Views of the Child report from Dr. Snell.
- [20] In her supporting affidavit, the claimant outlined a number of complaints about the respondent's parenting capacity as well as his failure to abide by the terms of the Bracken Order; specifically, the Thursday exchanges.
- [21] The respondent, it should be noted, did not follow Dr. Snell's recommendation concerning housing. He has not resided permanently on Salt Spring since the parties' separation. He resides in Calgary where, following the demise of Icon, he acts as CEO of another energy start up company, Proton. The claimant neither obtained a psychiatric assessment, as recommended, nor did she enter any form of therapy.
- [22] She has remained on Salt Spring but has never returned to any meaningful employment.
- [23] By virtue of the demands of his employment, the respondent has not always adhered to the scheduled Thursday exchanges. When he has not, the Children have remained in the care of the claimant. He has asked for make-up time from the claimant but such has been consistently denied.
- [24] At trial, the claimant denied, disingenuously in my mind, that her April 2022 application was a stepping stone to alter the shared parenting arrangement so as to lessen the respondent's time with the Children during the school year. De facto, she has parented the Children more than 50% of the time since the Bracken Order because of the respondent's uncertain schedule.
- [25] The respondent perceived the claimant's application as a pre-cursor to an application in the Alberta court to increase the amount of child support he was paying. Under the Alberta order, neither could apply to alter the child support for 36 months: April 2023.
- [26] The respondent, in response to the claimant's April 2022 application, sought a full s. 211 report. The claimant consented to the order providing the respondent funded it in the first instance.
- [27] Dr. Andrea Vodermaier was commissioned to prepare the report. She completed it in February 2023 and it was delivered to both parties (the "Vodermaier Report"). Dr. Vodermaier recommended the Children, along with the claimant, re-locate to Calgary. At the time of the report's delivery, the Children were with the respondent on Salt Spring.

- [28] Despite advice from Dr. Vodermaier not to share the report with the children, the respondent advised the Children they would be moving to Calgary as per the report's recommendation. The respondent sent an email to the claimant asking her, in effect, 'to make it easy on the Children'.
- [29] The Vodermaier Report's author and the respondent both presumed the claimant would, as per the recommendation of Dr. Vodermaier, move to Calgary so as to continue with the shared parenting arrangement.
- [30] The respondent did not follow any of the procedural steps regarding a relocation of the children under either the Family Law Act, S.B.C. 211, c. 25 or the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Instead, upon learning that the claimant did not agree to relocate with the children to Calgary, he set the matter for trial.
- [31] The claimant has complied with the 2020 Alberta court order for disclosure of financial records by June 30. The respondent has not.
- [32] To be clear, in the proceeding before me, neither party seeks to change the parenting time established in the Bracken Order.
- [33] The Vodermaier Report presumed the claimant will follow the recommendation concerning the Children's relocation and made no recommendation as to changes to the Bracken Order if she does not. Nor did Dr. Vodermaier consider changes to the respondent's parenting time if the application to relocate the Children was dismissed.
- [34] Only at trial did the respondent suggest changes to the parenting time that contemplated the claimant remaining on Salt Spring even if the Children were ordered to relocate to Calgary.
- [35] The claimant, in her testimony, offered her suggested changes to the existing parenting order if the relocation was denied and the respondent no longer wished or was financially able to commute to Salt Spring to exercise his parenting time.

The Background

- [36] Both parties were born, raised, and attended university in Alberta. All four of their children were born there. The claimant worked as a teacher until after the birth of CD, and since then has remained a stay at home parent.
- [37] The respondent is a geologist. Since the parties' marriage in December 2000, he's worked in a variety of positions; most recently as CEO of energy-based start-up companies Icon and Proton.

- [38] In or about 2016, the respondent became involved with Icon. As noted, the two principals resided on Salt Spring but the business was conducted from Alberta. The respondent was offered an attractive salary and the parties mutually agreed to move to the smaller community of Salt Spring. There is no suggestion the move to Salt Spring was required as a term of the respondent's acceptance of employment with Icon.
- [39] While not expressly referenced in the evidence of either party, I assume the parties considered the interests of the Children in moving to Salt Spring and contemplated the changes involved in moving from an urban (Calgary) to a more rural community (Salt Spring).
- [40] The parties rented accommodation for the whole family and the oldest two children were enrolled in school. The respondent travelled for work and the claimant stayed home looking after the Children.
- [41] The respondent testified that even as the parties decided to move, Icon's financial future was cloudy.
- [42] According to the respondent, a number of mental health issues arose for the claimant before and after the move to Salt Spring. He testified that events occurring during the fall of 2016 and later in the winter causing him to think the claimant was a danger to both herself and the Children.
- [43] While still in Calgary, following GH's birth, the claimant was diagnosed with postpartum depression and involuntarily admitted, briefly, to a psychiatric facility. When she was discharged, presumably as a testament to his faith in the claimant's capacity to parent following her return home, the respondent took no steps while the family was in Calgary to alter the parenting regime which, de facto, saw the claimant as the day in day out caregiver to the Children whose ages then ranged from an infant to 6 years old.
- [44] Following the move to the Salt Spring in summer 2016, that arrangement remained unchanged. In September 2016, a wellness check was conducted on the claimant by the RCMP following her posting a blog on Facebook which spoke to earlier struggles with her mental health.
- [45] The Facebook post, according to the claimant, was not "a cry for help" over current suicidal ideation but rather a sharing of her mental health journey online. It was intended as a positive message for those experiencing similar intrusive thoughts as she had previously experienced in Alberta. The post was subject to more than one interpretation and an unknown reader reported the matter to RCMP.
- [46] The wellness check was uneventful and nothing further came from it by way of treatment, either voluntary or involuntary.

- [47] By the time of the relocation to Salt Spring, the relationship between the claimant and respondent was struggling. Each offered different reasons for the demise of their personal relationship but, in my view, those different explanations are of historical interest only as they stretch back almost seven years.
- [48] A precipitating incident leading to their split occurred either December 30 or 31, 2016, when the claimant (she says in an effort to gain the respondent's attention) self-harmed herself with broken pencil crayons in front of the respondent.
- [49] Once again, there were different views expressed as to the severity of the self-harm, but, according to the respondent it alerted him to the claimant's earlier mental health issues which, together with the blog she posted speaking of suicidal ideation, caused the respondent to be fearful of the claimant's mental health and its impact upon their children.
- [50] In early 2017, the parties were in the process of changing residences on Salt Spring. The original plan had been to move together but, following the incident in late 2016, the claimant and the Children moved to the new housing and the respondent remained in the former rental accommodation.
- [51] They made appointments for both counselling and mediation.
- [52] In January 2017, the parties attended a counsellor, Marcia Burton, and a mediation was set for later in the month. According to the respondent, the claimant expressed suicidal ideation during the counselling session. He deposed to such in various affidavits sworn in the BC and the Alberta proceedings.
- [53] In light of that, he called police who attended upon the claimant for a further wellness check in late January. The claimant had previously agreed the respondent could have the Children over the weekend so they were in his care when the January wellness check occurred.
- [54] He took the Children to Calgary where he was granted, without notice, an order granting him interim sole custody of the Children and a denial of access by the claimant. The order was to remain in force until February 15, 2017.
- [55] The claimant, upon learning of what had happened, filed proceedings in BC and, on February 2, 2017, she obtained a without notice order from Justice McNaughton requiring the children's return to BC into her interim care.
- [56] The children were returned to BC. On February 16, the Alberta court endorsed the Children's return to BC on a without prejudice basis and granted the claimant day to day care of the children but ordered "generous access" to the father.
- [57] The early days of the litigation and the surreptitious removal of the Children have no doubt coloured the views of all involved. The respondent continues to maintain the claimant is unfit as a parent; the claimant is untrusting of the respondent and suspect of his motives and manner of dealing with parenting issues. The Children, according to the Snell Report, were

negatively affected by their removal to Calgary and the period when they did not see their mother. The respondent described the claimant as "crazy" to the Children. CD described this period as the "worst thing that has ever happened to him".

- [58] Since their return to BC in February 2017, the Children and the claimant have resided on Salt Spring. The respondent re-established a permanent residence in Calgary and attends Salt Spring during the school year, as he is able, to parent the Children in ad hoc accommodation. Sometimes he can rent accommodation for an extended period. Other times, he rents an Airbnb.
- [59] Business endeavours sometimes preclude his precise compliance with the Bracken Order. When he has been unable to attend, the claimant retains them. Despite her self assertion that she is flexible, she has so far, now five-plus years later, declined to allow make-up time to the respondent when he misses some or all of his scheduled parenting time.
- [60] The respondent relates his non-attendance on Salt Spring to the press of business demands. Travel requirements and other business pressures associated with trying to keep a start-up venture afloat prevent his precise conformity with the provisions for exchange each Thursday on Salt Spring during the school year.
- [61] The respondent has re-partnered with Seta Afshordi and resides with her in a home she owns. The children, when in Calgary for summer or school vacations, reside there with both their father and his partner.
- [62] Each of the parties has extended family in the Calgary area.
- [63] The respondent argues a move to Calgary would solve the problem of his having to commute while, at the same time, provide opportunities for the claimant and the children that are unavailable to them on Salt Spring.
- [64] He notes that the current schedule requires him to travel each Thursday for exchanges and, even though the Children go to school Monday to Thursday, he is unable to accomplish much work wise given the demands associated with getting them to and from school, etc. He worries for the financial future of Proton because of his inability to work "full time" and says there are no employment opportunities for him on Salt Spring.
- [65] The claimant provided charts showing the actual time the Children are in her exclusive care and it is clear she has the Children in her care significantly more than the respondent while the Children attend school. The respondent does not contest her accounting of where the Children reside.
- [66] Since the parties' separation in early 2017 and after the legal proceedings instituted in both Alberta and BC defined the role of each jurisdiction, the respondent has, in effect, commuted from Calgary to Salt Spring to exercise his parenting time. He has not maintained a permanent residence on Salt Spring. His parenting time during school breaks is exercised in Alberta. He pays for the Children's transportation costs between Salt Spring and Calgary

in addition to the court ordered child support. The claimant has facilitated this aspect of the respondent's parenting time by transporting them to the airport.

- [67] The Bracken Order was pronounced without the aid of the s. 211 report. Following receipt of the Snell Report, neither party took steps to change the terms of the current order until the claimant's application brought in April 2022.
- [68] The Bracken Order designated Salt Spring as the children's residence until further court order and the Snell Report, knowing the respondent's permanent home was Calgary, recommended that residency remain in place for three years.
- [69] Despite his perception of the claimant as being "unfit" as a mother and Salt Spring being "drug-addled", the respondent did not seek to revisit the children's residency on Salt Spring Island upon the expiry of the recommended three-year term but rather waited until the claimant initiated an application that the respondent perceived as a threat to his parenting time with the Children and his pocketbook.
- [70] The delay is noteworthy because of the respondent's continued assertion that the claimant is unfit as a mother and that Salt Spring is an undesirable location for his children to grow up. Were such beliefs truly held, one might have expected action on the respondent's part at the conclusion of the three-year term recommended by Dr. Snell.
- [71] Nothing has changed in any significant manner since the Snell Report was delivered. The children, of course, are older. Two of them, EF and GH experience anxiety. EF apparently suffered from social anxiety in Alberta.
- [72] AB, despite accusations based on double hearsay of drug use and sexual experimentation, appears happy with his school and life generally on Salt Spring. When asked by Dr. Vodermaier his thoughts on moving to Calgary, he was opposed to such a move. AB, in conjunction with his expressed wish not to move, told Dr. Vodermaier he wished his dad had a permanent residence on Salt Spring.
- [73] CD, the second oldest, appears well grounded in the community and looking forward to entering high school on Salt Spring in the fall of 2023. CD was treated for anxiety through counselling but currently seems free of it. He has stopped attending counselling. He, too, when asked, expressed no interest in moving to Calgary.
- [74] There is no evidence leading me to a conclusion that any of the issues affecting the Children are as a result of their living on Salt Spring or the disproportionate amount of time spent in the care of the claimant.
- [75] The respondent explains that his work with Proton requires travel and meetings which cannot always be facilitated by Zoom calls or MS Teams, but that is hardly a new development. He testified he knew, even as the parties moved to Salt Spring in 2016, that the earlier venture, Icon, was failing.

- [76] Both businesses operated out of Calgary. Currently, Proton has offices in Calgary and a test field in Saskatchewan. It is a start up company reliant on capital infusions to maintain its financial viability.
- [77] The respondent's partner, Ms. Afshordi, works with him at Proton as second in command. She testified as to the difficulties created from a business standpoint when the respondent was on Salt Spring and the need, periodically, to not abide by the schedule in the Bracken Order.
- [78] The respondent's income, personal or household, is unknown. The claimant's income consists of child support paid by the respondent, child tax credits in respect of the Children and social assistance for herself as a single person. The total amounts to approximately \$60,000 annually.
- [79] The 36-month moratorium on variance to the \$2,000 monthly child support payment has expired and neither party, perhaps because of focus on this matter, has applied to revisit it.
- [80] The respondent complains the claimant is inflexible when it comes to re-arranging his parenting time to take into account the demands of his work. She argues consistency is needed and the children prefer the "set in stone" exchanges.
- [81] The claimant refuses to deal with Ms. Afshordi on parenting issues. When invited to try to deal with her on some parenting related issues via a detailed email sent by Ms. Afshordi, the claimant replied simply, "No".
- [82] One of the reasons the respondent argues a move to Calgary is in the best interests of the Children is based on the financial impact of commuting. Despite having not filed a Form 8, the respondent claims indebtedness to both his parents and Ms. Afshordi. He also claims the CRA is pursuing him in his capacity as a director of Icon for failure to remit withholding taxes.
- [83] None of those assertions were substantiated with supporting documents. His parents did not testify and Ms. Afshordi did not allude to any indebtedness as between them. Nothing was produced from CRA despite the outstanding order from Alberta.
- [84] The home the respondent resides in is owned by Ms. Afshordi and its unclear what contribution he makes to the expenses connected with its operation. Her residence is the proposed home for the respondent, herself, and the Children during his parenting time if the relocation were permitted.
- [85] I am satisfied the Children have a positive relationship with Ms. Afshordi. Her residence seems more than satisfactory to provide the children with a suitable home either for extended stays during school vacation or shared parenting if relocation is ordered.

- [86] The evidence satisfies me that the Children also have good relations with their maternal grandparents, aunts and uncles on both sides, and some of their cousins or the children of the respondent's cousins in Alberta. Conversely, it's clear the Children do not enjoy a good relationship with their paternal grandmother, C. S., who also resides in Calgary.
- [87] The claimant's sister, Brita Stone, and her husband, Jordan Long, testified as to the close relationship the two sisters enjoy. Ms. Stone has one daughter, Fury, who is younger than all of the Children.
- [88] Ms. Stone testified that she and her husband have purchased a home on Salt Spring and take occupation of it in July 2023. The home is intended as a residence for both Ms. Stone, her husband Jordan and their daughter but, as well, for the claimant and the Children.
- [89] Plans of the home they purchased together with the intended renovations satisfy me that the claimant and the Children will have satisfactory living arrangements in a blended family if the Children are not relocated.
- [90] I am also satisfied, despite the respondent's evidence to the contrary, both he and the claimant are good parents and each enjoys a loving relationship with all of the Children.
- [91] Dr. Vodermaier in her report, despite her criticisms of the claimant, concludes the current parenting arrangement is in the Children's best interests. Despite the evidence regarding the claimant's past mental health struggles, Dr. Vodermaier did not perceive the claimant as a risk to herself or the Children.
- [92] History, in my view, bears that out. While much has been made of the claimant's past postpartum depression and issues surrounding her mental health, there has been no incident or event since 2017 that raises concerns for the Children's welfare.
- [93] The respondent's lack of action following the effluxion of the three-year period of residency recommended by Dr. Snell speaks more loudly, in my view, than his protestations over her fitness, or lack thereof, as a parent and the "drug-addled" character of Salt Spring.

Issues

- [94] As noted, there is a singular issue to be determined: do the best interests of the Children, collectively, warrant a move to Calgary?
- [95] Assuming the answer is affirmative, the current parenting regime would remain the same and the claimant could either (a) move to Calgary or (b) apply for an alternate parenting arrangement which would allow for maximum contact between herself and the children while she remained on Salt Spring.

- [96] Assuming the answer to the requested relocation is negative, the respondent either carries on with what he has described as an untenable and financially unsustainable parenting regime as per the Bracken Order or applies for a variation of the existing order to recognize the impracticality of the current order given his residence in Calgary.

Position of the Parties

- [97] The respondent, relying strongly on Dr. Vodermaier's recommendation, seeks a change in the Children's residency to Calgary arguing their educational, social and emotional needs will be better met in a metropolitan centre near extended family.
- [98] He also points to the financial "benefits" that will follow. Absent the expense of travel and accommodation on Salt Spring, he will be better able to devote energy to his start up venture and any resultant prosperity will accrue to the benefit of the Children by way of savings for their higher education.
- [99] The claimant seeks to maintain the status quo of the Children's residence arguing, in the main, they are happy and well adjusted on Salt Spring. They are integrated into the Salt Spring community and all of their needs, be they educational, social, or medical are being met and can be met as they mature while still living in a quiet small community.
- [100] She proffered options to change the parenting schedule to recognize the financial strain of bi-weekly commuting by the respondent.

The Parties Plans

- [101] Currently, the children are all enrolled to return to schools on Salt Spring; AB and CD in the high school and EF and GH returning to elementary classes.
- [102] The respondent, despite arguing the necessity of the move, has done little by way of concrete investigation into many of the matters which he argues militate in favour of the move.
- [103] Other than vague details of schools the children might attend if the move is authorized, there is nothing by which I can measure the availability of programs which might have particular interest to a particular child that compels me to the conclusion the proposed move offers the benefits, educationally, socially and medically, that both Dr. Vodermaier and the respondent suggest I infer from the fact Calgary is a major metropolitan area and Salt Spring is a small island community.
- [104] Currently, the Children's special needs are met by travel to Victoria.

- [105] Two of the children have mental health issues that require attention. GH was recently diagnosed with social anxiety and she is a "picky eater". Dr. Vodermaier fears this is a precursor to an eating disorder, which will require a nutritionist. GH missed significant time at school as a result of her social anxiety. EF, too, suffers from anxiety. He had long-COVID and missed significant time at school. Nonetheless, despite their absences, both are progressing in school at an age appropriate level.
- [106] CD received counselling on Salt Spring from counselor Luis Aurajo, but appears to have reached a stage where such is no longer needed. He is described as a self-starter who taught himself piano and has an interest in computers. Academically, he is doing well. He likes order in his life. He told Dr. Vodermaier he is not in favour of a move to Calgary.
- [107] AB had a relationship with another youth, Nico, which caused tension between the respondent and AB because of the respondent's disapproval and apparent dislike of Nico. There was also a rumour, but no direct evidence, of drug use. That relationship ended. AB enjoys his part time job at a local grocery store. He is an avid body builder and has a workout regime that is encouraged and supported by the respondent. He likes his school and does well in his course work.
- [108] He, too, told Dr. Vodermaier he did not want to move to Calgary but, rather, wished his father would establish a permanent residence on Salt Spring.
- [109] None of the children have undergone psychoeducational testing to determine, as suggested by Dr. Vodermaier, if they are gifted and in need of more stimulation than is available in the local Salt Spring educational system.
- [110] The respondent argues a move to Calgary will enhance the Children's opportunities for educational success and greater access to any health facilities (mental or physical) that may be required.
- [111] GH has a small jaw and might require some medical remediation to accommodate her lower teeth. She currently has a dentist in Victoria. GH is also receiving treatment both on Salt Spring and in Victoria for her anxiety. EF has a counsellor on Salt Spring with whom he works to assist with his anxiety.
- [112] The respondent argues the move will facilitate closer connection to the respondent's extended family. He has cousins with children of similar age to the Children and they have happily interacted during visits to Calgary.
- [113] More importantly, it would seem from the evidence, he considers the current parenting financially unsustainable for himself. Dr. Vodermaier supports this as a reason for the proposed relocation.

- [114] The respondent is in compliance with the order he pay \$2,000 a month but has not provided reliable information as to his income (including stock options/bonuses) despite a court order requiring him to do so and a written request prior to the trial's commencement. He apparently has not filed tax returns.
- [115] He testified he works very long hours when in Calgary jeopardizing both his relationship with Ms. Afshordi and his health. He has gained 40 pounds and suffered a stroke since separation.
- [116] According to the respondent, he has spent over \$250,000 to maintain the parenting regime. He conceded he is not always able to strictly abide by the schedule in the Bracken Order owing to work demands. When he cannot comply, the claimant assumes his parenting time but has never provided make-up parenting time despite his requests.
- [117] Ms. Afshordi is well liked by the Children. Her income was not disclosed.

The Purpose of the Section 211 Report

- [118] There are two s. 211 reports in evidence; both were ordered at the Court's behest.
- [119] The respondent essentially argues the Snell Report has been overtaken by the more current Vodermaier Report. He argues the startlingly different opinions offered by each on matters of importance can be reconciled simply by the passage of time.
- [120] The claimant argues the report of Dr. Vodermaier is deeply flawed and that it displays a bias from the onset toward urban living while improperly focusing on financial issues affecting the respondent at the expense of the Children's needs.
- [121] Further, the claimant argues the Vodermaier Report improperly considered material submitted to her by the respondent including emails from others not part of the collateral interview process and omitted important information concerning the older children's wishes.
- [122] In *Kwan v. Lai*, 2016 BCSC 1626 at para. 46, Justice Kent made the following observations regarding s. 211 reports:
- In performing this role, the court appointed expert functions as the "the eyes and ears of the court" and is expected to be impartial, and unbiased, and to make objective recommendations rather than acting as an advocate for any party;
 - Where the assessor is a registered professional with the College of Psychologists of British Columbia, he/she is expected to abide by the "code of conduct" promulgated by that college which imposes various requirements for undertaking assessments and formulating recommendations that are appropriately comprehensive, objective and balanced;

- There is no protocol or checklist that must be exactly followed in every case and the authors of Section 211 reports are free to use their education, experience and expertise to conduct the assessments with an eye to assisting the courts in determining what is in the children's best interests (*L.C.T. v. R.K.*, 2015 BCSC 2378 at para. 419);
- Nevertheless, the court is not obliged to accept the opinions or recommendations of the Section 211 experts; the court does not abdicate its role as the ultimate decision-maker but will give such weight to the Section 211 experts' recommendations and opinions as is appropriate having regard to the circumstances of the case and the relevant evidence adduced (*Shapiro v. Simpson*, 2016 BCSC 2011 at paras. 102-103).

[123] Ultimately, the Court, not the assessor, determines the best interests of the child(ren). In *A.P. v. J.C.*, 2018 BCSC 1381 at paras. 118 and 119, Justice Verhoeven stated:

[118] The s. 211 author may provide an opinion, but it is for the court to decide the matters at issue: *Johnson v. Skillen*, 2009 BCSC 209, at para. 8; *I.J.G.P.G. v. K.M.*, 2016 BCSC 1072, at para. 100; *A.L. v. L.W.*, 2017 BCSC 964, at para. 8. The court must not abdicate its role in favour of the recommendations made: *King v. Borserio*, 2018 BCCA 308, at para. 76. Regardless of the information that goes to the report writer, the court ultimately has the discretion to review the background information presented in the report, carry out an independent assessment based on the evidence at trial, and come to a different conclusion as to the best interests of the child: *K.B. v. J.B.*, 2015 BCSC 704, at para. 10, citing *T.C. v. S.C.*, 2013 BCPC 217, at paras. 143-144; *Plant v. Kempton*, 2011 BCCA 171, at para. 11.

[124] The respondent argues in favour of accepting, *carte blanche*, the opinion of Dr. Vodermaier given its currency and, he says, insight into the needs of the Children and the inadequacy of their current living situation to address those needs.

[125] The claimant argues the report of Dr. Vodermaier should be afforded no weight given what he argues are displays of bias, procedural unfairness, omission of relevant information from the interviews about the children's views and an overall misinterpretation of much of the evidence she received.

The Section 211 Reports

[126] The two reports, for the most part, are opposites in terms of their recommendations and conclusions as to the best interests of the Children.

[127] Dr. Snell was not required by either party to attend for cross examination.

[128] Admittedly the Snell Report is dated and relies more heavily on matters now of historical interest; specifically, the events leading to the parties' separation in 2017, the claimant's mental health issues following the birth of GH, the events of late 2016 and early 2017, and, finally, the removal of the Children from BC without permission or knowledge of the claimant.

- [129] While all of those matters retain some importance in the current analysis, their importance to the result diminishes with time.
- [130] Dr. Snell recommended the joint parenting arrangement ordered by Justice Bracken carry on with the children remaining on Salt Spring for a minimum of three years. It was written in July 2018.
- [131] Her credentials and her expertise were unquestioned concerning the admission of her report, and the underlying facts on which she formed her opinion were not tested on cross examination and, as such, prima facie proof of their truth.
- [132] One of Dr. Snell's conclusions was that the respondent was less than forthright with her on issues of significance.
- [133] An example of such is the statement by Dr. Snell that she spoke to the counsellor to whom, according to the respondent, the claimant expressed suicidal ideation. The counsellor, Ms. Burton, did not recall any such statement and, in effect, because of the brevity of the meeting, which Ms. Burton described as for intake purposes, she said such did not happen.
- [134] According to Dr. Snell, Ms. Burton "did not feel alarm about [E.S.]'s welfare in terms of suicidal ideation" and, had she, she would have been professionally obligated to report same to authorities. Nonetheless, according to Dr. Snell, Ms. Burton reported the respondent demanded she "sign something".
- [135] The respondent also swore in an affidavit that "I did not initiate the April 2017 MFSD [sic] investigation. Dr. Anita Snell initiated the investigation believing that our children were in imminent danger from their mother [E.S.]".
- [136] Dr. Snell responded by noting her contact with the MCFD was as a result of a number of alarming statements made by the respondent concerning the claimant's behaviour which required Dr. Snell, legally and professionally, to contact the Ministry. Dr. Snell makes clear she had no direct knowledge of the allegations. Dr. Snell reported the subsequent investigation by MCFD found no concerns in respect of any of the allegations.
- [137] Another instance of concern noted by Dr. Snell was the respondent's statement to her that he had spoken to the school counsellor, Julia Smith, about EF and questioned her competency. When pressed as to the substance of the conversation, he offered no details informing his opinion as to her competency.
- [138] When fact checked with Julia Smith, Ms. Smith told Dr. Snell she had no contact with the respondent other than casually bumping into him when he was on Salt Spring with AB.
- [139] There are a number of other commentaries in the report casting doubt on the reliability of the respondent as an historian. Dr. Snell had no similar concerns with the claimant.

- [140] Dr. Snell did express concern about the claimant's mental health history and recommended that the claimant acquire the professional services of a psychiatrist to undergo a thorough psychiatric assessment and attend appointments on a regular basis for at least three years and attend psychotherapy for at least six sessions.
- [141] Neither occurred.
- [142] The thrust of the recommendations by Dr. Snell were that the parents share both parental responsibilities and parenting time and that the respondent establish a permanent residence on Salt Spring so as to exercise is parenting time. The latter has not been done and, the respondent, for reasons he has explained, has been unable to participate fully in the 50-50 shared parenting regime.
- [143] The claimant explains her non-compliance with the recommendation regarding psychiatric assessment because her family doctor thought it was unwarranted. I have no confidence that the claimant provided a full history of her mental health history to the family doctor but, nonetheless, on the testing done by Dr. Snell, there appeared no concerns either with the results or the validity of the test results. Importantly, in my view, there have been no incidents of mental health issues that have impacted the claimant's capacity to parent during the intervening time between the Snell Report and the Vodermaier Report.
- [144] While Dr. Vodermaier's professional qualifications were not challenged, it is noted by the claimant's counsel that the report presented by her was the first s. 211 report she had prepared and it was prepared under the supervision of and in consultation with Dr. Nicole Aube.
- [145] Dr. Vodermaier's opinion is almost the polar opposite of the opinion of Dr. Snell, save both ultimately recommend shared parental responsibilities and co-parenting of the Children on a week on/week off basis.
- [146] In assessing the two oldest children's expressed view that they would like to spend more time with the claimant than the respondent, Dr. Snell allowed such could be attributable to subtle pressure from the claimant, as was opined by Dr. Vodermaier, who also noted:

It is also necessary to remember that [E.S.] has been a "stay at home mom" since the eldest child, [AB], was born. She has been the children's primary caregiver and the children, by all appearances, are strongly bonded with her and she with them. It is painful to imagine the hurt, confusion and longing the children felt when their father abruptly and unilaterally moved them to Calgary in January 2017 and provided the children no opportunity to say good bye to their mother. We do not know what in fact, [G.D.S.] may have told the children at the time in terms of explanation; we do know [CD] told his counsellor, Julia Smith, "even though dad said mon was too crazy when he took them away, Mom is taking better care of them than Dad."

[147] Dr. Vodermaier did not look beyond her original view that the Children had simply aligned with their mother because of her "sadness" when they went to see their father. As such, Dr. Vodermaier seemingly discounted or ignored the Children's expressed views.

[148] Dr. Vodermaier's credentials, although not challenged during the voir dire as to her qualifications, are challenged as to the weight her opinion ought to be afforded given the flaws identified by the claimant in her approach to the relocation issue.

[149] She recommended that the Children all move to Calgary while maintaining the same parenting regime. Her report presumes, without ever having seemingly considered the matter, the claimant would follow the children to Calgary so as to continue co-parenting. The report made no alternate recommendation as to varying the current week on/week off parenting schedule.

[150] The thrust of Dr. Vodermaier's recommendations are summarized by her as follows:

Consequently, regardless of some mild to moderate concerns, both parents were able to provide me with enough information as a guarantor of their parenting abilities and their attachment to their children. As noted, and given the information gathered for this assessment it is clear that both parents have the basic abilities to parent and to provide the appropriate level of care to the children.

Although [E.S.] questioned some of [G.D.S.]'s parenting abilities, I have no reason to believe that he is not a competent parent.

Therefore, with the essential conclusion that both parents have the appropriate skills and great resources to offer those children, I recommend that both parents equally share their guardianship. I also recommend that [G.D.S.] and [E.S.] share equally the parenting responsibilities pertaining to the children's health, education, extracurricular activities and practice of Religion.

In terms of parenting time, it is very clear that it would be beneficial for the children to spent half of their parenting time with their mother and half of their parenting time with their father. I, therefore, recommend to maintain the 50/50 custody model. Schedule of one week with one parent and one week with the other parent given the age of the younger children, should prevail.

[Emphasis added.]

[151] The report makes no mention of the respondent's view, one apparently not shared by Dr. Vodermaier, that the claimant is "unfit" as a mother. Nor does she seemingly endorse the respondent's view that Salt Spring is a "drug-addled" community.

[152] Despite the report's variety of criticisms of the claimant's parenting, notably her sadness and alleged interference in the children's ability to freely express their views, Dr. Vodermaier opined the current parenting model best suits the Children's needs. The only suggested change is that the co-parenting ought to occur in Calgary; not on Salt Spring.

- [153] Dr. Vodermaier expanded her recommendation by suggesting it would be better for the children to relocate to Calgary "by mid July 2023" so as to allow the Children to complete the school year on Salt Spring and the claimant to consider employment options and prepare to find accommodation in Calgary.
- [154] When the report was given to the parties, the respondent contacted the claimant telling her "to make it easy on the kids" and told the Children they were moving. Despite the advice from Dr. Vodermaier the report was not to be discussed with the Children. The two younger children were apparently reduced to tears.
- [155] While respondent's counsel concedes there are 'some issues' with Dr. Vodermaier's report and its methodology, he argues the recommendation regarding relocation is well-founded on proven facts.
- [156] The claimant argues that little weight should be attached to Dr. Vodermaier's report as it lacked procedural fairness and demonstrates bias from the onset about the doctor's preference for children growing up in urban as opposed to rural areas. She notes, and I agree, that the Vodermaier Report omits relevant evidence.
- [157] Examples of the latter are contained in the interview notes of AB. In her interview with AB, Dr. Vodermaier noted he did not want to leave the island but, instead, expressed his wish that his father would find a permanent residence on Salt Spring so that visits would be more regularized.
- [158] The latter "wish" was expressed in the report but there is no reference in the body of the report to the overarching statement by AB, then 14, that he did not wish to move off of Salt Spring to go live in Calgary. The thrust of the interview is that he is happy with life on Salt Spring, loves both parents, and wishes his dad had a permanent home on Salt Spring.
- [159] Even when acknowledging CD's stated wish to remain on the island, Dr. Vodermaier attributes that to subtle pressure from the claimant that she opines led to all of the Children to "align themselves" with their mother's needs rather than expressing genuine feelings of satisfaction with their living arrangements over the past almost seven years.
- [160] Unlike Dr. Snell, Dr. Vodermaier did not consider alternate reasons for the Children's stated views (either expressly or through the reaction of the two youngest).
- [161] Having regard to the totality of the evidence, including the teachers interviewed and the collaterals, I do not agree that the evidence shows the Children, but for "alignment" with their mother would prefer to move to Calgary.
- [162] The two youngest, when told by the respondent they would be moving, apparently burst into tears and called the claimant. In my view, such a spontaneous reaction militates against Dr. Vodermaier's explanation of alignment or enmeshment.

- [163] I also agree with counsel for the claimant that the statement by Dr. Vodermaier, near the beginning of her report: "I wish for all children to continue growing up in a larger community with more options and resources" indicates a bias towards large urban communities without regard to the benefits of smaller more compact community such as Salt Spring.
- [164] While both communities undoubtedly present different opportunities for the Children, there is no objective standard by which one can conclude, as Dr. Vodermaier seemingly does, that a large urban centre is inherently superior to a smaller community such as Salt Spring.
- [165] Another indication of what amounts to a subtle, but real bias, is when Dr. Vodermaier made notes of her conversations with both the claimant and the respondent. She referred to the claimant as "[E.S.]" on its own a neutral and proper term. She referred to the respondent as "the father".
- [166] Despite the report of Dr. Snell, which Dr. Vodermaier said she read in full, Dr. Vodermaier places no emphasis on the events in January/February 2017 when the Children were removed from their mother to live in Calgary. CD reportedly referred to this as "the worst event of his life". In assessing the relative strengths and weaknesses of both parents, no mention was made of what seemed to be a serious miscalculation on the part of the father. Further, Dr. Vodermaier does not mention the respondent's disparaging remarks to the Children about the claimant's mental health.
- [167] The body of the Snell Report challenges many of the remarks made by the respondent either to her or found in his affidavits as to the circumstances surrounding his departure. Dr. Vodermaier seems to accept the respondent's narrative without reservation.
- [168] Further the impact of Dr. Vodermaier's report is weakened by what I conclude are misstatements, or misconstruing certain statements, made to her by collaterals or by teachers she interviewed.
- [169] Dr. Vodermaier was critical of the claimant for providing two collaterals because they resided on Salt Spring. Two was the limit for collateral witnesses.
- [170] I am at a loss to understand how Dr. Vodermaier would find it odd both collaterals nominated by the claimant are persons who knew her and the Children on Salt Spring for the past six years as opposed to someone in Calgary with limited or no contact with the Children or the claimant for many years.
- [171] When interviewing the claimant's collaterals, notably Geo Merrow, the interview apparently consisted of three questions: "Asked her thoughts on of [E.S.]" "Asked about her parenting" and "Asked about any concerns".

- [172] There were no questions about the Children themselves who live next door to Ms. Merrow. Dr. Vodermaier defended her approach by noting the questions were open ended and the interviewee was free to add information thought to be relevant.
- [173] In contrast, one of the respondent's collaterals interviewed by Dr. Vodermaier, Jared Bourne, focused on an event reported, but not witnessed by Mr. Bourne, wherein the claimant apparently made comments to his then fiancée in 2008. Mr. Bourne was not present for the conversation but relayed what the claimant purportedly said to his fiancée (for whom, on the evidence before me, English was not her first language).
- [174] Dr. Vodermaier then reported his comments that Mr. Bourne, who admittedly had not seen the claimant or seen the Children on Salt Spring "for years" that he was "concerned they are very isolated, it is a very small community, the mother of the children is awful".
- [175] Mr. Bourne went on to explain and Dr. Vodermaier reported: "I have not spoken to [E.S.] for years, much of it is from what [G.D.S.] and his mother mentioned to me. They are probably not in the best household. She did not steal the kids but almost."
- [176] The latter statement presumably stems from an assumption that the claimant orchestrated the move to Salt Spring and manipulated the choice of courts. Both assumptions are patently false and ignores the removal of the children from BC to Calgary without authority and the subsequent decision of the Alberta court to decline jurisdiction over the parenting issue.
- [177] Dr. Vodermaier proceeded to characterize the purported conversation, without having given the claimant the opportunity to respond as:
- [E.S.]'s interaction with Marili disrupted the friendship between [G.D.S.] and Mr. Bourne. [E.S.]'s communication with Marili also demonstrates [E.S.]'s thoughts and how these shape her interaction with others in a dysfunctional manner.
- [178] With respect, the conversation with Mr. Bourne about his second-hand knowledge of what was purportedly said to his fiancé 15 years ago hardly gives Dr. Vodermaier a legitimate foundation for the quoted passage above.
- [179] Another concerning matter in the Vodermaier Report is her penchant for receiving, outside the interview process, emails from the respondent containing email threads from others detailing events purported to have occurred. Those emails were never provided to the claimant and some of the events described were never raised with the claimant when she was interviewed.
- [180] This despite a clause in Dr. Vodermaier's engagement letter stating "all correspondence with Dr. Vodermaier will need to be send [sic] to the other party". Dr. Vodermaier seemed surprised when it was suggested during examination by claimant's counsel that it was incumbent upon her; not the party communicating with her, to ensure that such communications were shared.

- [181] One of the respondent's unshared emails sent prior to the conclusion of the report noted "one thing is for sure; if the report does not strongly recommend sending the kids to Calgary, it is unlikely that a judge will order it".
- [182] At page 62 of the report, Dr. Vodermaier dutifully wrote "I strongly recommend for [E.S.] and the children to relocate to Calgary by mid-July 2023". While Dr. Vodermaier denied any connection between her wording and the respondent's email, her choice of words makes that hard to accept.
- [183] The claimant only came to learn of the large volume of email between the respondent and Dr. Vodermaier after the report was prepared and the file contents were provided to both parties' counsel.
- [184] The email sent by the respondent included a thread of email exchanges with his mother from 2017, where Ms. S. sets out in detail her long list of concerns about the claimant's qualities, or lack thereof, as a parent. Ms. S. neither testified at trial nor was she a collateral interviewed by Dr. Vodermaier.
- [185] Further, without any foundation for opining such, in my view, Dr. Vodermaier described some of the "independent" witnesses she interviewed, teachers and persons not nominated by either of the parties as "evasive" on the basis that "people have to live with each other after the assessment".
- [186] One such example of what she found to be "evasive" was Marie Mullen who advised Dr. Vodermaier that she was not involved in the hiring process of teachers so could not comment either on applications made by the claimant or her potential employability. Dr. Vodermaier did not explain how Ms. Mullen's answer, a professed lack of knowledge on the subject matter of the question posed, could be characterized as "evasive".
- [187] I accept Ms. Mullen's evidence that she honestly answered the question posed and was neither "evasive" nor was she aligned with the claimant because they are members of the same community.
- [188] Ms. Mullen, further testified as to inaccuracies and omissions in the Vodermaier Report noting that she reported that the Children were neatly dressed although "they did not have a lot of money". While, the full answer was not reported, Dr. Vodermaier noted the family did not have a lot of money then later made an observation one of the children had a hole in their sweater; the implication being some negative parenting by the claimant.
- [189] Dr. Vodermaier reported Ms. Mullen as saying "[E.S.] told the principal she was suicidal" back in early 2017 before the respondent removed the Children to Alberta. Ms. Mullen testified it was the respondent, not the claimant, who relayed the information. He also told her that the claimant had been hospitalized for suicidal thoughts when they were in Calgary. Noting the Snell Report on the same topic, I accept Ms. Mullens's evidence as being accurate to who it was who told her the claimant was suicidal.

- [190] When shown a picture drawn by GH of her family, which included her siblings, her mom, and the family dog, obviously all with smiles on their faces, Dr. Vodermaier was reluctant to acknowledge the smiles connoted GH's interpretation of a happy family, but only allowed "maybe" they were smiling. The picture not only depicts the family smiling but as well their dog's tail wagging.
- [191] Further, when she spoke to one of the school teachers, the teacher inquired as to the manner in which the Children were to be interviewed which Dr. Vodermaier immediately assumed, and then reported, that this was a result of intrusion by the claimant into the interviewing process. The witness denied any contact from the claimant but rather was concerned about the manner in which the Children would be engaged in the interview process.
- [192] There are other examples of the Dr. Vodermaier 'editing' or giving a partial rendition of what was reported. The examples given are sufficient to cast doubt on the accuracy of her conclusions as to whether an interviewee, including the Children, was being forthright or whether their answer was guided by an improper allegiance to the claimant or the community in which they live.
- [193] A factor that seemed to weigh heavily on Dr. Vodermaier's ultimate opinion about the desirability of relocation of the entire family was the financial strain of commuting caused by the respondent's residency in Calgary and his operating the business from there.
- [194] In part, I conclude, this was informed by one of the respondent's email to Dr. Vodermaier indicating he suspected the request by the claimant for a Views of the Child report was to curtail his 50/50 parenting time in an effort to then apply in Alberta for more child support.
- [195] The report focuses on the financial unfairness imposed upon the respondent by the current parenting regime requiring him to travel and the impact on his work as well as the claimant's failure to obtain employment to, presumably, alleviate some of the respondent's financial burden.
- [196] While accepting the obvious; the current regime financially impacts the respondent, Dr. Vodermaier, like the claimant and the Court, was wholly unaware of the respondent's financial circumstances. No inquiries were made. The respondent's suggestion as to the claimant's underlying financial motive were never put to her by Dr. Vodermaier or counsel.
- [197] Any financial unfairness occasioned by the claimant's failure to return to work and reduce the financial stress on the respondent can be addressed in the Alberta litigation given the expiry of the moratorium on variation of the existing support order.
- [198] Dr. Vodermaier, despite being generally unaware of what programs were available to the children on Salt Spring Island, again without investigation, presumed that the unnamed schools to which the respondent proposes the children attend would offer far more academic opportunities and participation in sports.

- [199] She gave no consideration to online learning outside of the Salt Spring curriculum which might enhance, if such were needed, the Children's learning experience.
- [200] With the exception of AB, none of the children expressed much interest in team sports or physical activity but Dr. Vodermaier seemingly considered this as an important factor. She expressed the fear they spent too much time in front of a screen.
- [201] Given the parenting regime and the time the Children spend with the respondent, the criticism, if true, applies to both parents.
- [202] The other major underlying premise supporting Dr. Vodermaier's opinion that a move to Calgary is in the Children's best interest is contingent upon the premise larger cities offer superior access to services. Neither, Dr. Vodermaier nor the respondent made any inquiries as to the availability of services or the waiting lists for same in Calgary such that I can conclude access to a particular service required by one or more of the Children will be enhanced.
- [203] The inconvenience of seeing specialists in Victoria, which requires ferry travel, is noted but hardly gives rise to the idea that the services these children might need are unavailable to them by virtue of location.
- [204] Dr. Vodermaier discounted the resources available to the children in Victoria noting that it was inconvenient to transport them from Salt Spring to Victoria. The report minimized the children's activities in Salt Spring although it is clear AB has an active workout regime, works in the community grocery store, and has a circle of friends. According to the claimant, whose evidence I accept, the children swim regularly which is both for exercise and socialization.
- [205] When contacted by the claimant subsequent to the interviews of all of the Children to ask whether or not the Children would be interviewed again, Dr. Vodermaier included in her report "one can assume that [E.S.] hoped to be able to reinforce her message to the children, perhaps even coax them for a future interview".
- [206] I agree with the claimant's counsel there is simply no evidence to substantiate those conclusions.
- [207] I further agree with the claimant that Dr. Vodermaier strayed outside her area of expertise when she comments on matters of nutrition with respect to GH's admittedly limited eating pattern, opining that might evolve into an eating disorder although she had no basis on which to substantiate that and admits not to have the qualifications to do so. GH's eating habits are curious but there is no identifiable effect by way of her growth or development as a result. Further, Dr. Vodermaier opines on educational assessments and the Children's "gifted abilities" when no testing has been done. While it is acknowledged they are bright children, there is no evidence to substantiate her conclusion that they belong in gifted programs or that the Salt Spring schools are not meeting their educational needs. I note again the availability of remote learning resources.

- [208] Dr. Vodermaier additionally offered opinions on dentistry or orthodontics in respect of GH without any basis for concluding that the work she thought might be needed was more readily available in Calgary than in Victoria.
- [209] Finally, although not a medical doctor Dr. Vodermaier not only defended the respondent's decision to provide Ivermectin, a medication not approved in Canada for the treatment of COVID, to EF, but also forwarded articles gleaned from the Internet to the teacher who inquired as to whether such was proper. She also assumed, wrongly I find, the claimant was behind the teacher's inquiry.
- [210] In short, no evidence was offered suggesting the Children would have superior access to any needed service in Calgary than in Victoria or Salt Spring.
- [211] With respect, it is hard not to conclude that Dr. Vodermaier at some point ceased observing matters objectively and neutrally and became an advocate for urban living, economic relief for the respondent whose financial position she made no inquiries about, and a disregard for the Children's stated wishes. or their reaction when told they were moving.
- [212] In my view Dr. Vodermaier lost sight that the move to Salt Spring was consensual after, presumably, consideration of its impact on the Children. Some of the issues affecting the Children arose after the move, but some, notably CD and EF's social anxiety, preceded the move.
- [213] Finally, I note Dr. Snell administered two psychological screening tests to both parties: the Personality Assessment Inventory ("PAI") and the Minnesota Multiphasic Personality Inventory ("MMPI-2"). The claimant had "normal" results. Dr. Snell acknowledged that psychiatric issues could not be solely ruled out based on the "normal" results but Dr. Snell also relied on personal observation and collaterals in forming the opinion she did.
- [214] The claimant's test results, marked independently, indicated the claimant was "open and cooperative" and the test results were likely a "good indication of her present level of personality functioning."
- [215] Under "Diagnostic & Treatment Considerations" the results indicated "None provided".
- [216] According to the Snell Report, the respondent's test results on the MMPI-2, the test not administered by Dr. Vodermaier, the respondent, albeit described as falling within normal parameters, fit the following description:

Individuals with this MMPI-2 clinical profile are not admitting to many psychological symptoms or problems .However, he reported some personality characteristics, such as oversensitivity. Mistrust, and suspiciousness that may make him vulnerable to developing psychological symptoms under stress.

- [217] Under "Diagnostic and Treatment Considerations" the report reads:

individuals with MMPI-2 clinical profiles similar to this pattern are admitting few psychological problems. If the client is being considered for treatment, his relatively low level of distress and wariness about treatment may need to be discussed with him before treatment can proceed effectively.

[218] The results of the PAI testing administered by Dr. Vodermaier stand in stark contrast to Dr. Snell's report.

[219] Dr. Vodermaier would not share the raw testing with counsel because of copyright issues.

[220] Dr. Snell allowed as how participants in s. 211 reports often paint themselves in a "somewhat positive light" given the intense scrutiny they are undergoing. Dr. Vodermaier made no such concession. She expressed concern over the claimant's describing herself as single as opposed to the legally correct term, "divorced".

[221] Dr. Snell gave detailed reasons for her conclusion that the respondent had made untruthful statements, in particular his assertion the claimant expressed suicidal ideation to the counsellor in January 2017 and that Dr. Snell had initiated the investigation conducted into the claimant's parenting in 2018. The latter, while technically true, was as a result of Dr. Snell's professional obligation to report to MCFD things the respondent had told her.

[222] Despite all of the criticism of the claimant, her alleged evasiveness, her intrusion into the process by allegedly contacting teachers or behind the scenes conversations with the Children, the sadness she displays causing the Children, according to Dr. Vodermaier, to align themselves with her, the recommendation goes no further than the "family should move to Calgary" and make use of a parenting coordinator.

[223] Given what I consider frailties in both the approach taken through the interviewing process and the apparent predisposition to urban living, I afford the recommendations in the Vodermaier Report little weight.

The Statutory Regime

[224] Each of the Family Law Act and the Divorce Act contain specific provisions respecting relocation applications.

[225] In this proceeding, the parties' original pleadings referred only to the FLA. The divorce was granted in Alberta.

[226] The parties jointly submit I should apply the Divorce Act provisions to the facts before me.

[227] Despite misgivings, given the existence of divorce proceedings in Alberta, I granted leave to each party to amend the Notice of Family Claim and Counterclaim to plead the Divorce Act.

[228] Given my conclusion the result of would be the same regardless of the legislation applied, I see no prejudice to either the parties or the process to continue in this fashion applying, as it were, the most up to date legislative provisions respecting relocation.

The Legislation

[229] Sections 16.9 to 16.96 of the Divorce Act deal specifically with "relocations" of a child, which are defined in s. 2(1). The relevant portions include:

Notice

16.9 (1) A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify, at least 60 days before the expected date of the proposed relocation and in the form prescribed by the regulations, any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention.

Content of notice

- (2) The notice must set out
 - (a) the expected date of the relocation;
 - (b) the address of the new place of residence and contact information of the person or child, as the case may be;
 - (c) a proposal as to how parenting time, decision-making responsibility or contact, as the case may be, could be exercised; and
 - (d) any other information prescribed by the regulations.

Relocation authorized

16.91 (1) A person who has given notice under section 16.9 who intends to relocate a child may do so as of the date referred to in the notice if

- (a) the relocation is authorized by a court; or
- (b) the following conditions are satisfied:
 - (i) the person with parenting time or decision-making responsibility in respect of the child who has received a notice under subsection 16.9(1) does not object to the relocation within 30 days after the day on which the notice is received, by setting out their objection in
 - (A) a form prescribed by the regulations, or
 - (B) an application made under subsection 16.1(1) or paragraph 17(1)(b), and
 - (ii) there is no order prohibiting the relocation.

Content of form

- (2) The form must set out
 - (a) a statement that the person objects to the proposed relocation;

- (b) the reasons for the objection;
- (c) the person's views on the proposal for the exercise of parenting time, decision-making responsibility or contact, as the case may be, that is set out in the notice referred to in subsection 16.9(1) and
- (d) any other information prescribed by the regulations.

[230] Section 16.92(1) of the Divorce Act provides factors that must be considered in determining whether a proposed relocation is in the best interests of the child, and s. 16.92(2) provides a factor that must not be considered in this analysis:

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.

[231] In addition to the factors in s. 16.92, the Court must also consider the general considerations listed in s. 16(3):

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.

[232] The burden of proof is referenced in s. 16.93 of the Divorce Act, and is summarized by Justice Gomery in *M.J.V. v. J.R.*, 2022 BCSC 1068:

[29] Section 16.93 allocates the burden of proof on a relocation application in three cases:

- a) The burden to establish that the proposed relocation is in the best interests of the child is on the proponent of the relocation "[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" (sub-s. (1));
- b) The burden to establish that the proposed relocation is not in the best interest of the child is on the opponent of the relocation "[if] the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child" (sub-s. (2)); and
- c) In any other case, the parties of the proceeding have the burden of proving whether the relocation is in the best interests of the child (sub-s. (3)). That is, both proponent and opponent have the burden of proving their respective assertions.

Compliance with Statutory Notice Requirements and Burden of Proof

- [233] The respondent failed to comply procedurally with the requirements for notice. His communication to the claimant, following receipt by each of the Vodermaier Report, was to treat the move recommended in the s. 211 report as a *fait accompli*. He notified the Children of the move then emailed the claimant requesting she make it easy on the kids; presumably to offer no resistance.
- [234] He never inquired as to whether she, too, would move as per the recommendation, so as to continue the shared parenting arrangement nor did he propose an alternate parenting arrangement if she declined. Only at trial did he suggest a different parenting regime from that in the Bracken Order in the event the claimant did not move with the children to Calgary.
- [235] Instead, upon learning her resistance to the recommended move, he scheduled this trial.
- [236] Given the respondent's failure to abide by the requirements set out in ss. 16.9(2) and 16.91(1), the claimant, not surprisingly, did comply with s. 16.92(2).
- [237] Counsel for the claimant does not suggest the matter of the relocation be decided on "technical" grounds. He does suggest that the burden of proof lies upon the respondent to show the proposed move is in the best interests of the Children based on the fact the "parties have substantially complied with an order providing the children spend substantially equal time with the children": Divorce Act, s. 16.93(1).
- [238] Counsel for the respondent notes I can choose not to apply the onus provision given the Bracken Order is interim.

[239] In the circumstances; the longevity of the Bracken Order, its continuation following the release of the Snell Report (a tacit acceptance by each of the recommendations therein) and the fact the relocation initiative was reactive to the claimant's April 2022 application, I conclude the respondent does bear the onus of proof in establishing the move is in the Children's best interest.

Application of the Statutory Criteria to the Proposed Move

- [240] In *Joseph v. Washington*, 2021 BCSC 2014 at para 93, sets out that the only consideration on relocation, under both the Family Law Act and the Divorce Act, are the best interests of the children involved: see also *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 152.
- [241] Pursuant to s. 16(2) of the Divorce Act, the primary consideration when determining the best interests of the children are "the child's physical emotional and psychological safety, security and well-being": *K.C.M. v. S.J.S.*, 2023 BCSC 435 at para. 59.
- [242] Before determining whether the proposed relocation is in the best interests of a child or children, I must turn to and consider the factors listed in ss. 16(3) and 16.92(1) of the Divorce Act: *C.C. v. S.P.R.*, 2022 BCSC 1503.
- [243] I have earlier described, in a summary fashion, the situation of each of the Children. They are different in age, interests and capabilities such that a blanket description of them is of little help.
- [244] AB, the oldest, is now 15 years of age. He, like his siblings, has undergone some counselling and received help for issues that have arisen in his life. He underwent a period of time when he was estranged from the respondent when the respondent did not see eye to eye with associating with Nico. That is at an end. AB sees his involvement with Nico as a regrettable mistake.
- [245] There is a suggestion in the Vodermaier Report of drug involvement by AB during his association with Nico but such, in my view, stems from inadmissible hearsay evidence, from students to parents to the school principal. Dr. Vodermaier never put the matter to AB to receive a response.
- [246] However, it is apparent from the totality of the evidence, and here I consider the teachers' evidence, the evidence of the claimant and the absence of evidence from the respondent to the contrary, that AB has established a group of friends, he has a job that he likes and a routine on the island. He described his school experience to Dr. Vodermaier as "pretty great" he likes school and at least some of his teachers.
- [247] Importantly, and inexplicably absent from the report of Dr. Vodermaier, AB expressed a preference to stay on the island while at the same time stating his wish was that his father would find a permanent residence on Salt Spring.

- [248] AB has a strong relationship with each of his parents although he wishes each would be kinder in their remarks about the other.
- [249] His history of care, owing to circumstances described earlier, has been predominantly with the claimant; not the respondent.
- [250] Both parents have viable plans for AB's care whether remaining on Salt Spring Island or moving to Calgary. It is unfortunate that the plan involving the claimant's sister and brother-in-law moving to Salt Spring and sharing a home with the claimant and Children was not made known to Dr. Vodermaier. What effect it might have had ultimately on her opinion is unknown but I view it as a positive factor in terms of strengthening the claimant's connection with her family and to the community.
- [251] To the extent there is validity in Dr. Vodermaier's opinion that the claimant's "sadness" impacts the Children, these new arrangements will likely provide the claimant with additional support and facilitate her re-entry into the work force.
- [252] The claimant, to her credit, testified she would consider the reported effect of her "sadness" on the children and try to deal with it.
- [253] As to CD, he too has received counselling while on Salt Spring. He feels he is no longer in need of counselling. He is doing well in academics. He is described as liking order and structure in his life, and that is apparently being fulfilled under the current arrangement.
- [254] He is a self starter and likes to learn on his own. He taught himself to play piano and is interested in building computers. CD, too, made known he does not favour a move to Calgary. At 13, his views are entitled to consideration despite the opinion of Dr. Vodermaier that his opinion is as a result of alignment/enmeshment with his mother; not free choice.
- [255] EF is described as having many friends. He wants to be in the middle of things and appears to be doing well at school despite having had long-COVID and having had substantial days missed at school. That seems to, of late, improving and he is reconnecting with friends. EF too has issues with anxiety, a trait it seems common to both the Children and the parties to some extent. He is receiving treatment for his anxiety.
- [256] When told of the impending move to Calgary by the respondent, apparently both EF and GH broke into tears, spontaneously demonstrating their upset at moving from Salt Spring. Both are younger and their wishes, while not entitled to the same deference afforded the views of their older brothers, are nonetheless to be acknowledged as a factor in the overall consideration of their best interests.
- [257] GH has been diagnosed with social anxiety disorder. It, like EF's long-COVID has posed a challenge to her school attendance. She is currently receiving treatment through the Gulf Island Child and Adolescent Psychiatry Program on Salt Spring and attends counselling.

- [258] An individualized education plan has been recommended so as to deal with the symptoms of social anxiety and apprehension of being in settings involving many people. Apart from easier access, perhaps, to medical attention for both her anxiety disorder, possible dental work and a speculative notion that she requires some nutritional oversight, a move to Calgary with its urban setting, new faces and, presumably, faster pace may well further disadvantage GH as opposed to benefitting her.
- [259] There is no issue that all the Children have strong relationships with both their mother and father. They also, from all reports, get along well with each other although displaying, unsurprisingly, some sibling rivalry.
- [260] Beyond their mother and father, the children have a strong relationship with their maternal grandparents. The same cannot be said to be true about their paternal grandmother.
- [261] Both reports, those of Dr. Snell and Dr. Vodermaier, raised concerns about the Children's feeling about their paternal grandmother. A move to Calgary would undoubtedly increase contact between the Children and some extended family that will positively impact them, they will also no doubt have more contact with their paternal grandmother; something they all, regrettably, see as a negative.
- [262] All the Children have strong relationships with their Aunt Brita and Uncle Jordan and their young cousin, Fury, who, if the move is not approved, will all soon live together. That move, will also likely facilitate more time with their maternal grandparents given the fact their maternal grandparents will be able to enjoy visits with both their daughters and all of their grandchildren in the same location.
- [263] As to consideration of the factors enumerated in the Divorce Act, I will refer to them briefly in order:

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

- [264] While the needs of each of the Children are different, given their different ages, all are relatively stable within the community and seem anchored to Salt Spring by a combination of the friendships they have formed in the community, their school, and interests they pursue within the Salt Spring community.
- [265] AB sees his life positively. He says "school is pretty great". He works out regularly and takes pride in his physical fitness. He has a job he likes.
- [266] CD described the upheaval in 2017 as the worst time of his life. He has had counselling but he feels it is now unnecessary. He does well at school. He stated a preference for order and likes to "have a plan". He is a self-starter who has a fascination with learning and creating on his own. He is going to go to high school in September and is looking forward to going to the same school as his older brother. Given no plan exists for Calgary enrolment, it is not clear whether he would attend the same school as AB if relocation is allowed.

- [267] EF was described by teachers as having lots of friends and is well liked. He had long-COVID which affected his attendance but has managed to stay current with his educational plans. He, like his sister, has issues with anxiety and is getting help with that problem.
- [268] GH presents as the child most requiring some special attention. She has been diagnosed with social anxiety which presents challenges for her attendance at school. She is a picky eater but apparently not undersized for her age. She is shy. She attends counselling on the island and has connected, via the claimant, with a psychiatrist. She is in the process of having an Individualized Education Plan formed to deal with some of the issues surrounding her anxiety.
- [269] I cannot imagine, excluding for a moment the unknown of whether there are better services available for GH in Calgary, how a move to a new community would be positive for her social anxiety.
- [270] I agree with the claimant that, overall, this factor weighs against relocation.

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

- [271] As agreed by all, the Children are closely connected to one another. They have strong relationships with each parent.
- [272] While each no doubt love their grandparents, both authors make note of tension between the paternal grandmother and the Children. A move to Calgary would likely increase the interaction between the Children and their paternal grandmother. The children uniformly express unease in their relationship with their paternal grandmother.
- [273] I accept the children have a close relationship with cousins/children of cousins in Calgary but offset that against the impending joining of the household of the claimant and her sister, brother in law and niece.
- [274] This factor is, in my view, neutral.

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

- [275] The claimant, despite assertions to the contrary, has not been flexible in trying to accommodate the respondent by altering the period of parenting time from that set out in the Bracken Order. I also accept she speaks negatively of the respondent in front of the children as per the Vodermaier Report.
- [276] She has accommodated the respondent by assisting with travel to get the Children to the airport to visit him in Calgary.
- [277] Offset against that is the respondent's characterization of the claimant as an unfit mother and one who has alienated the Children from him. There is no foundation for either in the evidence. He also speaks negatively about the claimant according to AB.

[278] He described his parenting time as a "reprieve for the children" which, I find, is an unsustainable conclusion in the face of the evidence of the children's positive relationship with each parent.

[279] Again, a neutral factor. Each of the parties, in my view, would gain by taking, even this late in the day, a parenting after separation course to better understand how their behaviour, as it relates to the other of them, impacts their children.

16(3)(d): History of Care of the Child

[280] The children grew up with the claimant being the primary caregiver and stay at home parent. Nothing changed with the move to Salt Spring.

[281] The respondent travelled as necessary and, despite stated concerns about the Children's safety at various times both before and after the move, entrusted the care of the Children to her.

[282] Since separation, the parties have shared the parenting schedule to the extent the respondent has been able to 'commute' to Salt Spring. I accept his missed parenting time is not a result of disinterest but rather the demands of his job.

[283] Nonetheless, the Children remain in the care of the claimant more than in the care of the respondent.

[284] There is nothing in the evidence that suggests they are anything other than well-loved and well looked after in her care. She, not the respondent has been the person accessing resources for the Children and taking them to appointments on Vancouver Island as required.

[285] Given there is no guarantee the claimant would move to Calgary were relocation ordered, the history of the Children's care militates in favour of the status quo.

[286] I agree with Dr. Vodermaier, to an extent, that the claimant has shown inflexibility towards the respondent when work requirements cause him to seek alteration to the Bracken Order. Good parenting requires flexibility and the ability to work with the other parent as it is the children's interests, not the parents' interest that are being served. I agree the claimant, despite her protestations to the contrary, is inflexible and do not accept that the only reason for her insistence on compliance with the order is that the children's needs are being met by such.

[287] That being said, she has demonstrated flexibility by driving the children to make sure they get on planes to go to Calgary and, unlike the respondent, is prepared to characterize him as a fit parent able to look after the Children and whom the Children love.

[288] I agree with the claimant's counsel that should be contrasted with the respondent's testimony that he considers the claimant an unfit parent; one who is attempting to alienate his children from him and, implicitly still a danger to herself and potentially the Children

despite the seven-year time passage between events in 2016 and now. I agree with counsel for the claimant that his characterization of the Children's time with him as a "reprieve" speaks to the manner in which he sees the Children's time with their mother as being a negative event for them.

[289] I conclude that the claimant has had more responsibility for the Children's care over the years including post-separation such weighs against relocation.

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

[290] I have already noted the views of AB and CD that they wish to remain on Salt Spring. I reject the notion expressed by Dr. Vodermaier that this is because of "enmeshment" or in sympathy to their mother's separation. Although AB was 14 when he expressed his views, he is 15 now and there is no indication those views have changed given I heard evidence in July 2023.

[291] As noted in *S.M.S. v. S.M.U.*, 2021 BCSC 933:

[33] The child is almost 16 years of age. The views of a child of that age are to be given significant weight. As noted by the British Columbia Court of Appeal in *O'Connell v. McIndoe*, 1998 CarswellBC 2223:

13 In order for custody orders relating to children in their teens to be practical, they must reasonably conform with the wishes of the child. See *Shapiro v. Shapiro* (1973), 33 D.L.R. (3d) 764 (B.C.C.A.) and *Alexander v. Alexander* (1988), 15 R.F.L. (3d) 363 (B.C.C.A.).

...

15 This decision will be profoundly disappointing to the mother. It may appear to her that the father has triumphed in his program to alienate her sons from her and that a 13-year-old is allowed to make decisions about his own life which are not in his best interests. It must be recognized, however, that the damage to the relationship with her sons, however it has been caused, cannot be repaired, and indeed will probably be exacerbated, by forcing teenagers to act against their will.

[34] See also *L.(D.N.) v. S.(C.N.)*, 2014 BCSC 1417 at para. 69; *B.J.G. v. D.L.G.*, 2010 YKSC 44 at paras. 23-24; *D.A.F. v. R.D.F.*, 2017 BCSC 873 at para. 34.

[292] CD, while younger, expressed the same view.

[293] EF and GH, because of their age, were not asked by Dr. Vodermaier. There is however evidence that both were upset when told they were moving to Calgary.

[294] The views of the two older boys are entitled to some deference. The proposed move could adversely impact the respondent's relationship with both older boys. The two younger children clearly reacted unfavourably to the proposed move. I do not accept the views of Dr. Vodermaier that the express views of AB and CD, coupled with the reaction of the two youngest, are to be dismissed as unduly influenced by the claimant. The views of the

Children, either express (AB and CD) or implied (EF and GH), militate against the proposed relocation.

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

[295] This factor is not applicable.

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

[296] As to plans for the Children's care, the claimant laid out the historical evolution of the Children's time in and on Salt Spring noting their activities, their circle of friends, their past living arrangements and, importantly, the future arrangements involving her sister, brother-in-law and niece.

[297] She laid out in her evidence the involvement of professionals with each of the Children and acknowledged that access to some professionals is more time-consuming and problematic than it might be were the professional merely a bus ride away down the street.

[298] That said, other than noting the residence at which he proposes his partner, himself and the Children reside, there is precious little detail in the respondent's plan for the Children's move.

[299] None are enrolled in school nor could he name the schools that they would go to other than tentatively.

[300] The respondent has made no inquiries as to the availability of specialists in the area required by each or any of the Children or made arrangements to get them on the waiting lists to see those specialists. He seemingly made no inquiries as to what specialized education plan might be available for GH given her recent diagnosis of social anxiety. Up until his testimony he had given no thought to what alternate parenting arrangements might be put in place were the Children to relocate but the claimant remain on Salt Spring.

[301] Currently, the Children have a family doctor, a family dentist, each of CD and GH have counsellors with whom they are familiar and seemingly comfortable.

[302] All have friends in the community and activities in which they participate both on and off the island.

[303] All of them are doing well at school although I note again with some concern the amount of missed school. The claimant said that the Children missed more school pro rata when they were with the respondent than with her. That was demonstrably untrue when an analysis of the time spent with her compared to the times they were absent was drawn to her attention.

[304] I do note from those documents, particularly those provided by the school, that the claimant always notified the school of the children's absences and provided an explanation. It is not apparent the respondent did the same thing.

[305] This factor weighs against relocation.

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

[306] I have no doubts about the ability of each party to care for and meet the needs of each of the Children.

[307] That said, each can do better. The claimant says she has taken to heart some of the criticisms levied by Dr. Vodermaier, particularly the Children's shared belief that she is sad. Hopefully, she will take some action this time.

[308] Earlier, she did not comply with a recommendation by Dr. Snell to obtain a psychiatric assessment but says instead her family doctor told her it was not necessary. There is little information for me as to what steps she is taking to ensure her mental health at present. However, there is little in the report of Dr. Vodermaier or concerns expressed anywhere in the evidence that gives me any concern for her ability to look after the Children.

[309] This factor is neutral.

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

[310] Neither party has shone in their level of communication or cooperation. The claimant suggests that the parties communicate through "Our Family Wizard" to keep one another up to date on developments in the Children's lives.

[311] Both parties have made medical decisions without consulting the other. The claimant has undertaken steps regarding medical treatment for GH and informed the respondent only after the fact. The respondent provided Ivermectin, an unapproved treatment for COVID, to EF and did not inform the claimant.

[312] It is clear neither seems to have gotten over their grievances leading to the termination of their marriage.

[313] The respondent does little better in this regard than the claimant and it is recommended that the parties implement a communication system like Our Family Wizard so as to maintain a level of communication.

[314] This factor is neutral.

16(3)(j) Family Violence and 16(3)(k) Other Civil or Criminal Proceedings

[315] These factors are not applicable.

16.92(1)(a): The Reasons for Relocation

- [316] The reason for the relocation seems, in large measure, founded on the financial burden of maintaining two residences placed upon the respondent. While there is a broad assertion that 'big is better' in terms of services for the Children, nothing concrete was led in evidence, which caused me to conclude above that is an urban setting bias maintained by both the respondent and Dr. Vodermaier.
- [317] To this, I note several things. The respondent has produced no financial information which persuades me the continued parenting regime is a financial burden that cannot be addressed by adjustments to support payments. He has not produced income tax returns or a Form 8 financial disclosure despite an affirmative order from the court in Alberta to produce the former. Counsel requested the latter and provided a Form 8 in the trial record. The respondent declined to do so.
- [318] It was apparent to the respondent from early on after the parties arrived in Salt Spring that Icon was unsustainable and the history of shared parenting with him living in Calgary has been ongoing since the Bracken Order was made.
- [319] There is nothing new in the situation by way of the respondent being required to reside in Calgary. The situation is unchanged since the Bracken Order and production of the Snell Report.
- [320] The respondent states the current arrangement impacts him financially and the financial viability of his enterprise, Proton, such that, perforce, the best interests of the children are a move to Calgary.
- [321] He adds to this by saying he believes the claimant is an unfit mother who needs to be overseen; something he cannot do from Calgary.
- [322] If the proposed relocation were ordered, the claimant's position is unknown.
- [323] In C.C., Justice Gibb-Carsley noted:
- [116] In considering the reasons for relocation, I am aware that I must not consider whether either parent would stay or relocate depending on the relocation decision. Such a consideration would put the parent in a "double bind" situation as the parent would be required to either say he or she would not relocate, thus diminishing the argument for relocation, or say he or she would relocate without the child, thus evincing a lesser concern for the child: Barendregt at paras. 137-138. However, the legislative reforms to the Divorce Act require the court to consider the reasons for the relocation to the extent that it impacts the best interests of the child.
- [324] In my view the stated reasons for the relocation of the Children (as the respondent is not a relocating party) are primarily to serve the respondent's needs and the suggested advantages to the Children, the broader spectrum of services and opportunities offered in Calgary, are secondary to his desire to save the time and expense of travel to Salt Spring.

- [325] As to the impact of the proposed relocation of the Children, I note that they have happily resided on Salt Spring for almost seven years. It is unknown whether if relocated, their mother, to whom they are closely attached, would move with them thus reducing her involvement significantly.
- [326] The proposed move is from a known situation where the children, all things considered, are successfully achieving academic and social goals to a place, Calgary, where the outcome is unknown.
- [327] At the very best, in the short term, such a move would be destabilizing, separating the Children from their friends, possibly their mother and creating new stressors, particularly for GH trying to integrate herself into the new community.
- [328] The major underlying reason, financial distress, does not in my view warrant the change sought. The respondent concedes his partner maintains the Calgary residence. While travel and accommodation are no doubt expensive, such speaks to financial relief in the Alberta courts; not moving the Children.
- [329] The factor weighs against relocation.

16.92(1)(b): The Impact of the Relocation on the Child

- [330] There are four different children to consider and the effect of relocation upon each may and likely would be different.
- [331] For GH, the move to a new community might well exacerbate her existing social anxiety. On the other hand, it is possible that better and more accessible treatment might be available. Each are unknowns. GH, is likely, at least in the short term, to be negatively affected by the change in her environment. This would be exacerbated if the move were authorized but the claimant did not move to Calgary.
- [332] AB and CD have both expressed views that they do not wish to move from Salt Spring. Despite the view of Dr. Vodermaier that their views are skewed because of alignment with their mother, as well as the assumption made that relocation will involve the whole family, I accept the views of the two oldest as reflecting considered opinions as to the merits of the move from their perspective (not the respondent's) and conclude the proposed move would negatively impact them.
- [333] EF's views, at 11 and a half, are entitled to some deference albeit not the same as his older brothers. EF is more like GH in terms of his ongoing need for some medical oversight for anxiety. His situation at school has been complicated by his long-COVID.
- [334] This factor weighs against relocation.

16.92(1)(c): The Amount of Time Spent with the Child by Each Parent

[335] As noted above, the majority of the Children's time, despite the Bracken Order, has been with the claimant. The claimant, while not demonstrating a willingness to re-arrange time around the respondent's schedule, has never actively interfered with his parenting time.

[336] While I do not mean to assign blame to the respondent for this factor, it militates against relocation given the claimant's willingness and/or ability to move is unknown.

16.92(1)(d): Compliance with Notice Requirements

[337] As earlier noted, the respondent, did not comply with any of the notice requirements under ss. 16.9(2) and 16.91(1) of the Divorce Act or the applicable provincial legislation. Nor, I note, has he complied with the court order for the production of financial information flowing from the Alberta court.

[338] I treat this as a neutral factor because the claimant, properly wishes the matter determined on its merits not technicalities. The claimant became aware in February of the proposed move as recommended by Dr. Vodermaier and "forgives" any procedural defects that follow.

16.92(1)(e): Geographic Area Restrictions

[339] The interim order specifies Salt Spring as the residence of the Children, but such was only intended to last until the matter of residency could be heard on its merits. Five plus years has elapsed since the order was made. The recommendation of three years residency on Salt Spring made by Dr. Snell has expired.

[340] This is a neutral factor that does not affect the outcome.

16.92(1)(f): Reasonableness of the Relocation Proposal

[341] When presented with the move as a fait accompli rather than a topic for discussion, the respondent made no proposal respecting relocation expense, financial consideration, or any variation to the parenting schedule until his testimony at trial. In his testimony, he offered the claimant short term accommodation in a suite in his parents' home (this despite the apparent enmity between his mother and the claimant).

[342] The claimant offered up options to the respondent to alleviate some of his financial concerns, or some of them, while allowing for him to maintain a significant presence in their lives.

[343] This factor, too, militates against the proposed relocation.

16.92(1)(g): Compliance with Orders and Obligations

[344] Both parties have in the main complied with the order of Justice Bracken save I find both, albeit perhaps more so the claimant than the respondent, continue to speak negatively about the other parent in the presence of the children.

- [345] If nothing else emerges from the time spent in this trial, it should be that the Children are conflicted by these remarks and the damage that is being done is not to the other party or even the relationship between a child and the other party, but rather to the child who hears the remarks.
- [346] The respondent has not complied with disclosure requirements under the Alberta order. Such may or may not have a deleterious effect upon the Children as regards the level of support he pays. This, however, is for the Alberta courts to determine.
- [347] Each of the parties, to some extent, has failed to comply with court orders. The combined effect is that this factor is neutral.

Conclusion

- [348] After a consideration of the enumerated factors referenced above, I conclude not only has the respondent failed to discharge his burden but that on balance the best interest of the children favour their proposed living arrangement with their aunt, uncle and cousin in the newly acquired property on Salt Spring.
- [349] Given I have not been asked to determine any other issues connected to the parties' parenting, I will leave to the parties to decide, and hopefully agree, on any other orders that might flow from these reasons.
- [350] If issues arise as to parenting that they cannot resolve, the parties, or either of them, may apply before me via Supreme Court Scheduling.
- [351] It follows that the claimant is entitled to the costs of trial.

"Harvey J."

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Prepared on 29 October 2026 · Esheria