
CANADA / JUDGMENT

Enns v. Mitchell

2021 BCSC 2213

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Supreme Court of British Columbia

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2021 BCSC 2213 Enns v. Mitchell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Enns v. Mitchell,

2021 BCSC 2213

Date: 20211115

Docket: E00832

Registry: Abbotsford

Between:

Jeffrey James Enns

Claimant

And

Nicole Melissa Mitchell

Respondent

Before: The Honourable Madam Justice Ahmad

Reasons for Judgment

Counsel for the Claimant:

K. Panton

The Respondent, appearing on her own behalf:

N. Mitchell

Place and Date of Hearing:

Abbotsford, B.C.

July 12 - 16, 2021

August 30, 31, 2021

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Place and Date of Judgment:

Abbotsford, B.C.

November 15, 2021

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I. Introduction

- [1] Nicole Mitchell and Jeffrey Enns were married in 2002 and divorced in 2017. They have four children together, ranging in age from 10 to 16 years old. The children reside primarily with Ms. Mitchell.
- [2] By written notice dated September 27, 2020, Ms. Mitchell, who is originally from Australia, advised Mr. Enns of her intention to relocate with the children to Australia.
- [3] Mr. Enns opposes the relocation. This is his application for an order prohibiting the relocation. Depending on the outcome of the relocation application, both parties seek orders relating to the payment of expenses, child support, and parenting time.

II. Background Facts

- [4] Mr. Enns was born in the Lower Mainland. His parents and two sisters, together with their families, reside in the Langley area.
- [5] Ms. Mitchell was born in Melbourne, Australia and lived there until she left to attend a missionary college in Minnesota where she met Mr. Enns. Her mother and sister still live within commuting distance of Melbourne.
- [6] The parties were married in Australia in 2002, but returned to Langley, where they lived for five years, during which time their two oldest children, J. and M., were born on May 4, 2005 and September 13, 2006, respectively.
- [7] In December 2007, the parties, with J. and M., moved to Australia. They lived there until July 2010 when they returned to live in Langley. Their third child, X., was born in Australia on August 6, 2008.
- [8] After returning to Langley, the parties had a fourth child, N., who was born on December 13, 2010. They have lived in Langley since then.
- [9] Although X. was the only one of the four children born in Australia, all are dual Canadian / Australian citizens.
- [10] In July 2013, Mr. Enns, with Ms. Mitchell's assistance, established the catering and café business that he continues to operate today. Although Ms. Mitchell worked intermittently during the children's early years, she was primarily a stay-at-home mother.
- [11] The parties separated in February 2016.
- [12] In September 2016, Ms. Mitchell commenced her studies to obtain a Bachelor of Arts in Religion with a major in Counselling Foundations at Summit Pacific College. She completed that degree, graduating cum laude in April 2021. While completing her degree, Ms. Mitchell worked part-time and she is currently employed as an intake coordinator at a counselling service provider.

- [13] The parties divorced on November 22, 2017. Prior to the divorce, they entered into a comprehensive separation agreement dated June 29, 2017 and filed with the court on September 12, 2017. The separation agreement was amended four times, in October 2017, February 2019, September 2019, and July 2020 in respect of parenting time and the payment of expenses.
- [14] Pursuant to the separation agreement, the parties have agreed to joint guardianship of the children and to share parenting responsibilities as set out in s. 41 of the Family Law Act ("FLA"). Ms. Mitchell continues to have primary care of the children, and Mr. Enns has parenting time Monday and Friday evenings and alternating weekends. The separation agreement also sets out detailed holiday parenting time: generally speaking, the parties alternate parenting time on the major holidays and Mr. Enns has increased parenting time during the children's summer break.
- [15] As noted, by written notice dated September 27, 2020, Ms. Mitchell advised Mr. Enns of her intention to relocate with the children to Australia.

III. Relocation

Legal Framework

- [16] Section 69(2) of the FLA permits the court to make an order permitting or prohibiting the relocation of a child.
- [17] As is the case in making other orders for parenting issues, the only consideration is the best interests of the child: FLA, s. 37(1).
- [18] In addition, pursuant to ss. 69(3) and 69(4)(a), in the case of a proposed relocation where the parties do not have substantially equal parenting time, the relocating guardian must satisfy the court that:
- (i) the proposed relocation is made in good faith, and
 - (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life
- [19] If the relocating guardian satisfies the court that those criteria are met, the relocation is presumed to be in the best interest of the children. However, the presumption is rebuttable. If the criteria are met, Mr. Enns can still succeed on his application to prohibit the relocation if he satisfies the court that the relocation is not in the best interest of the children: *C.L.P. v. D.R.P.*, 2017 BCSC 432 at paras 50, 51, 53.

[20] On the other hand, if one or both of the ss. 69(4)(a)(i) and (ii) criteria are not met, the court must consider whether the proposed relocation is in the children's best interest. If so, the relocation may be permitted: C.L.P. at para. 51, citing C.M.B. v. B.D.G., 2014 BCSC 780 at para. 78.

Discussion and Analysis

1. Is the Proposed Relocation Made in Good Faith?

[21] Section 69(6) of the FLA provides:

(6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following:

- (a) the reasons for the proposed relocation;
- (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
- (c) whether notice was given under section 66 [notice of relocation];
- (d) any restrictions on relocation contained in a written agreement or an order.

[22] Ms. Mitchell provided Mr. Enns with written notice of the proposed relocation by email dated September 27, 2020. As such, my analysis of whether the proposed relocation is made in good faith will be limited to a consideration of the factors set out in s. 69(6)(a), (b) and (d).

a. The Reasons for the Proposed Relocation (s. 69(6)(a))

[23] In the relocation notice, Ms. Mitchell cited two reasons for the proposed relocation: (a) to allow her to continue her education to obtain a Masters of Counselling; and (b) to provide the children with the "opportunity to discover, experience and learn about [her] Australian heritage and have easier access to [the] Australian family".

[24] Regarding the first, Ms. Mitchell concedes that she would be able to complete a counselling Master's degree in the Lower Mainland. However, she would prefer to complete her education in Australia because there is a wider range of available counselling sub-specialties and, as an Australian citizen, her post-secondary education would be subsidized by the government.

[25] Of the educational options that satisfy her preferences in the Lower Mainland, only one offers diverse sub-specialties, but at a cost of \$45,000 to \$50,000 for tuition alone. Although the other option offers specialties other than the traditional counselling program, it is more limited in its focus.

- [26] By contrast, based on her research, several institutions in Australia offer the diverse sub-specialty options that she seeks. She names the University of the Sunshine Coast or the University of Queensland as her preferences.
- [27] Moreover, not only would the Australian government subsidized education cost a fraction of the tuition in the Lower Mainland, it is only repayable after she graduates and when she is earning an income of at least \$65,000. The government assisted post-secondary education also would provide her with non-repayable financial assistance of \$1,300 to \$1,500 per month.
- [28] In addition to meeting her education goals, Ms. Mitchell anticipates that her relocation to Australia will provide the children with the "opportunity to discover, experience and learn about [her] Australian heritage and have easier access to [her] Australian family".
- [29] Both Ms. Mitchell and her sister gave evidence of Ms. Mitchell's close relationship with both her mother and sister, which they have been able to maintain despite the current distance between them. Both are of the view that the relocation to Australia would enable them to enhance that relationship and would allow the children the opportunity to forge a similar relationship with their Australian cousins.
- [30] I am satisfied that, on their face, Ms. Mitchell's stated reasons for wanting to relocate to Australia are credible.
- b. Is the proposed relocation likely to enhance the general quality of life of the child or the of the relocating guardian (s. 69(6)(b))
- [31] As a starting point, there is no evidence to suggest the children's needs, including their educational, social, medical, and emotional needs, are not being met in British Columbia.
- [32] Except for a short period when the parties resided in Australia, the children have lived in Langley for most of their lives. They attend school, participate in extra-curricular activities, attend church, and have friends in the Langley area. J., the parties' eldest son, has a girlfriend in Langley.
- [33] Ms. Mitchell, too, has strong and supportive friendships in Langley, particularly within her church community. Replicating those friendships and finding a new support group may be difficult, especially for the older teens and Ms. Mitchell, whose friendships have been forged over 20 years.
- [34] In addition, Mr. Enns' parents, sisters, and his siblings' children live in the area. Although the children do not have daily, or perhaps even regular monthly contact, they do enjoy a relationship with their extended paternal family. At a minimum, they celebrate birthdays and holidays together.
- [35] The proposed relocation is intended, in part, to allow the children the same opportunity with Ms. Mitchell's family. However, neither her mother nor her sister live in close proximity to specific area where Ms. Mitchell intends to relocate. Travel between their

residences will require a 3 to 4 days' drive or a two and a half hour flight plus additional travel time. I accept that residing in Australia will give Ms. Mitchell and the children easier and more frequent access to Ms. Mitchell's family. However, given the distance, that access may be more limited than Ms. Mitchell anticipates.

- [36] In addition to social needs, both J. and M. require additional support; M. for issues related to autism and attention deficit hyperactivity disorder and J. for anxiety. Those needs are being addressed and managed in B.C. Even accepting that low-cost resources may be available in Australia, it is not a given that the children will be able to establish the same comfort level and connections that they have with their current counsellors and aides in B.C.
- [37] Mr. Enns also argues that Ms. Mitchell has not taken the necessary steps to address the practical aspects related to the proposed move. He cites, for example, the fact that she has not lined up housing or secured employment and does not have the funds to finance the move. He also notes that notwithstanding that the primary reason for the move is to continue her education, Ms. Mitchell has not even applied, yet alone been accepted, to any Australian university. If she is not accepted to her first choice, she will have to move to a city other than the one she now contemplates.
- [38] Mr. Enns argues that Ms. Mitchell's failure to address these fundamental issues is an indication that the proposed relocation is not made in good faith. Ms. Mitchell, on the other hand, says she is reluctant to make definitive plans or invest in the relocation, either emotionally or financially, until she knows if the court will approve it. In my view, that reluctance is understandable. However, the failure to make definitive plans, including by at least securing a position at one of the universities, adds to the uncertainty of the proposed move.
- [39] None of the above is intended to cast doubt on Ms. Mitchell's ability to achieve her goals or otherwise make the best of a relocation to Australia. To the contrary, she presented as a capable, articulate, and determined individual.
- [40] However, under this factor, I must consider whether the proposed relocation is "likely" to enhance the general quality of life of the children. Notwithstanding Ms. Mitchell's aptitudes, for the reasons I have set out above, I cannot conclude that will be the case. Whether the relocation would enhance the children's quality of life is, at best, uncertain.
- c. Restriction on relocation contained in a written agreement (s. 69(6)(d))
- [41] The parties' separation agreement does not include any restrictions on relocation. However, it does set out that Mr. Enns is to have parenting time on a regular basis, including holidays. It will be impossible to maintain that parenting time if the relocation is allowed.
- d. Conclusion on the "Good Faith" requirement

- [42] I am satisfied that Ms. Mitchell's reasons for the proposed relocation are credible. Her desire to continue her education to forge a stimulating and satisfying career for herself and to be able to provide for the children financially is laudable. However, for the reasons I have set out above, I am not satisfied that the proposed relocation has been made in good faith, as that term is defined in s. 69(6) of the FLA.
2. Have Reasonable and Workable Arrangements Been Made?
- [43] The second criteria to consider in assessing a proposed relocation is whether reasonable and workable arrangements have been made to preserve relationships.
- [44] In this regard, Ms. Mitchell has proposed annual three to four-week visits during the children's summer break (Christmas break in Canada) or during the children's winter break (June / July in Canada). She proposes that those annual visits be supplemented with weekly video calls, allowing Mr. Enns to keep up with the children's lives on a more regular basis.
- [45] In my view, neither of those proposed arrangements are reasonable or workable.
- [46] First, based on the family's trip to Australia in 2015, Mr. Enns estimated that the cost of a round trip flight to Australia was approximately \$1,500 to \$2,000 per person. Ms. Mitchell's sister, Andrea Stiglich's estimate was almost double that amount. That cost would quadruple to have the children travel from Australia to B.C. Mr. Enns would also incur further costs for accommodation, meals, and incidental expenses.
- [47] Ms. Mitchell suggests that the parties could use the \$14,000 that they will not have to pay for the children's Langley school tuition to cover those costs. Although somewhat compelling on its face, this suggestion ignores the other uses to which these monies could be put, including for the cost of establishing herself and the children in Australia and for otherwise meeting the children's needs, especially at a time when her income earning prospects are not certain.
- [48] Cost is not the only barrier. As a caterer, Mr. Enns' busiest times of the year are during the same periods of time that are most convenient for the children to have an extended visit. I do not understand Mr. Enns to suggest that he would not do what he could to accommodate the timing of the proposed in-person visits. However, given the realities of his job, the maximum time he would have during the children's long breaks would be 10 days.
- [49] The proposal of weekly video calls, while an obvious solution to allowing Mr. Enns and the children time together, is also flawed.
- [50] The first hurdle is the 17 to 19-hour time difference between Australia and British Columbia, which makes it difficult, but not impossible, to coordinate calls. In fact, Ms. Stiglich gave evidence from Australia by way of video, and was able to do so at 7am her time, at the beginning of her work day. However, that was not without accommodation to ensure that she would not have to give evidence in the middle of the night (although she was willing to do so). I say that not as a criticism, but simply to highlight the practical difficulties of "live"

communication between British Columbia and Australia.

- [51] In any event, coordinating calls over two days with Ms. Stiglich who has flexibility in her schedule, is not an adequate proxy by which to assess the workability of the proposed regular video calls between the children and Mr. Enns. It is significantly less certain whether four young people would have the same motivation, especially during the school year when 7am calls would likely interrupt their time for sleep or the time required to get ready for school.
- [52] More significantly, I share Mr. Enns' concern that video calls do not serve as an adequate replacement for in-person parenting time.
- [53] In my view, Ms. Mitchell has grossly underestimated the difficult reality of maintaining a relationship, let alone a parental relationship, by way of video calls.
- [54] Finally, the relocation would also affect the children's relationship with Mr. Enns' extended family. Given the age and health of Mr. Enns' parents and the costs associated with the trip, the children's paternal grandparents, aunts, uncles, and cousins would likely be unable to travel to Australia to see the children.
- [55] If the relocation is permitted, the relationship between the children and their paternal grandparents, aunts, uncles, and cousins will be reduced to telephone or video communication alone. It will fundamentally change the nature of those established relationships which revolve primarily around meals and family celebrations.
- [56] I do not accept that Ms. Mitchell has proposed reasonable and workable arrangements to preserve the children's relationships with Mr. Enns or the extended paternal family.
- [57] Having concluded that the proposed relocation does not meet the criteria set out in s. 69(4) (a)(i) and (ii), I cannot presume that relocating the children to Australia is in their best interests. Rather, I must further consider this issue in light of the factors set out in s. 37(2) of the FLA.

3. Best Interest of the Children

- [58] In determining the best interest of the child, the FLA mandates the court consider the factors set out in s. 37(2). They are:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;

- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- [59] Given the related nature of some of the factors, I do not propose to address each of those factors individually.

The children's health and emotional well-being and need for stability (ss. 37(a) and (e))

- [60] As set out above, there is no evidence to suggest that the children's needs, including their medical and emotional needs, are not being met in British Columbia. To the contrary, both of the children with added needs are doing well and their health and emotional issues are being addressed and managed.
- [61] Chris Rensch has been J.'s counsellor for approximately five and a half years and has witnessed his growth over that time. He has observed J. mature from a timid 11-year old who was disconnected from his feelings and had low self-esteem to a more mature individual who is able to express his wishes and needs in an appropriate way.
- [62] M. is also doing well and has a system in place to support his needs. That support includes a loyal friend and an education assistant and teachers who ably address his needs through the implementation of an individualized education plan. Although M.'s physical needs have not yet been fully addressed, Ms. Mitchell has considered various options for physiotherapy.
- [63] In my view, removing J. and M. from the supports that they have in place carries with it the risk of undoing the positive strides they have both achieved. That risk is not insignificant, especially when the interruption to the children's stability is added to the equation.
- [64] Although there was no expert medical evidence before me, I anticipate that all of the children, and J. and M. in particular, would benefit from stability. Put another way, I anticipate that the instability that would result from a relocation to Australia could negatively impact both J. and M., and perhaps all of the children. Indeed, Ms. Mitchell was critical of Mr. Enns for planning a surprise birthday party for J. expressly because of what she assessed as J.'s inability to handle surprises or change. She did not explain how a move

to Australia, a significantly more drastic change, would be less impactful on him.

[65] This factor strongly militates against the proposed relocation.

The children's views, unless it would be inappropriate to consider them (s. 37(b))

[66] Ms. Mitchell is of the view that, of the four children, as a sixteen and a half year old teenager soon to be going into post-secondary education, the proposed relocation is the "biggest deal" for J. For those reasons, as well as the potential impact on his well-being, I am of the view that it is appropriate to consider J.'s views.

[67] Section 202 of the FLA allows the court, having regard to the best interests of a child, to admit hearsay evidence it considers reliable of a child who is absent.

[68] In this case, J.'s views were provided through three main witnesses: Ms. Mitchell, Mr. Enns, and Mr. Rensch.

[69] Given the impact the relocation would have on J., Ms. Mitchell has had many conversations with him about the proposed move. As a result of those discussions, she conceded that he "does not know entirely how he feels" and that he was "unsure about Australia". However, he is less equivocal when the prospect of moving to Australia is compared with the prospect of moving in full time with Mr. Enns. Given the choice of staying in B.C. with his father or moving to Australia with his mother, he would choose Australia.

[70] The equivocal view was echoed by Mr. Rensch who quoted J. as saying "I do not want to super go" to Australia but that he would prefer a move to Australia with his mother over having to stay with his father 100% of the time. However, on cross-examination, Mr. Rensch clarified that J. said that he wanted to continue to work on his relationship with Mr. Enns and wanted to spend time with him to do so.

[71] Mr. Enns did not directly ask J. about his views on the move. However, he testified that when he asked about the prospect of staying in B.C., if Ms. Mitchell moved to Australia, J. replied that he thought it would be "OK" and that the children just wanted certainty.

[72] On the basis of the evidence before me, it is relatively clear that J. has strong views with respect to living with Mr. Enns on a full-time basis - he does not want to do so. I am also satisfied that, notwithstanding that view, J. wants to work on his relationship with Mr. Enns and acknowledges that he has to spend time with him to do so.

[73] However, J.'s views on parenting time with Mr. Enns is not what I have to consider on this analysis. Rather, the issue that is immediately relevant to this analysis is his view on the proposed relocation. On that issue, he is uncertain.

Nature and strength of the relationships between the child and significant persons in the child's life / history of care / ability of parent to exercise his or her responsibilities (ss. 37(c), (d) and (f))

- [74] As the primary caregiver for the children, both before and after the separation, Ms. Mitchell has been responsible for most aspects of the children's daily needs and care, including education, health, and general well-being. She is the comforter and confidante for each of the children and they rely on her for emotional support. All of the children, and J. in particular, turn to her for support and guidance.
- [75] Simply put, there is no question of Ms. Mitchell's ability or dedication to exercise all of her parenting responsibilities. She has done so well, both before and after the parties' separation. Mr. Enns concedes that is the case. I have no doubt that will also be the case if the relocation is permitted.
- [76] As Ms. Mitchell concedes, all of the children love their father. However, as Mr. Enns readily admits, they do not share the same bond with him as they do with their mother. The relationship between J. and Mr. Enns, in particular, is a difficult one.
- [77] Notwithstanding that difficulty, Mr. Rensch reported that J. wants to work on the relationship. So does Mr. Enns, who is in counselling for that purpose. It is Mr. Rensch's view, and common sense dictates, that to accomplish that shared goal, they have to spend time together. The proposed relocation will undoubtedly frustrate any progress they have made in repairing their relationship. It will also deprive Mr. Enns of the ability to parent any of the children.
- [78] It is also important for all of the children to maintain a relationship with their paternal grandparents and the other extended members of Mr. Enns' family.

Impact of alleged family violence (ss. 37(2)(g) and (h))

- [79] Ms. Mitchell has alleged that Mr. Enns was verbally abusive to her, starting shortly after they started the catering business in 2013 and continuing throughout the marriage. In support of that allegation, Ms. Mitchell referred to a series of email and text exchanges, many of which were written in 2018 or earlier, in and around the time of their separation, and some of which were written more recently.
- [80] I have reviewed all of those emails and texts messages and I have considered Ms. Mitchell's oral evidence of the ways in which she alleges that Mr. Enns was verbally abusive and belittling. I accept that there is some evidence that he used inappropriate language at times. For example, in an email dated August 12, 2017 from Ms. Mitchell to Mr. Enns she asks him to consider co-parenting counselling stating "[t]he name calling needs to stop and although you may feel frustrated at times we need to find ways to dialogue in a constructive and healthy manner. I was hopeful the separation agreement would have eliminated the unkindness but it hasn't. Recently you called me a B* on more than two occasions and today a 'douchebag'".

- [81] Other examples appear to be borne out of frustration and manifest themselves by way of sarcasm. For example, when told that Ms. Mitchell had allowed the children to watch a movie during her parenting time, Mr. Enns replied, "[m]ust be nice to keep paying to rent movies to keep them entertained". Ms. Mitchell cited that exchange of an example of Mr. Enns' verbal abuse.
- [82] Other text exchanges did involve name calling. For example, in the midst of a heated text exchange in November 2016, Mr. Enns replied to one of Ms. Mitchell's texts with "Ridiculous Nicole!!!!!!!!!" and follows up with "Your [sic] ridiculous" and "And pathetic."
- [83] Ms. Mitchell also alleges that Mr. Enns has been physically violent with J. She cites an incident in 2016 as the main example of that physical violence, where Mr. Enns pulled J's fingers back, causing significant swelling and bruising. Mr. Enns acknowledges the incident and says that it occurred when he was trying to restrain J. from poking him with a pen.
- [84] The manner in which Mr. Enns has communicated with Ms. Mitchell and handled some of his interactions with J. is not perfect. To his credit, Mr. Enns acknowledges that he has made mistakes, both in his interactions with Ms. Mitchell and as a parent, particularly with respect to J.
- [85] However, I do not accept that those mistakes, including the incidents described above, fall within the definition of family violence as set out in the FLA.
- [86] Moreover, I make the same observation with respect to this allegation as I did with J's views. The issue of the alleged family violence is relevant to parenting time with Mr. Enns and not what I am to consider on this analysis. The issue that is immediately relevant to this analysis is the impact of any family violence on the proposed relocation. In this case, given that there is no family violence alleged against Ms. Mitchell, it has no impact on the analysis.

Conclusion on Best Interest of the Children

- [87] I accept that there may be benefits of the proposed relocation, including giving Ms. Mitchell the tools to establish a more financially rewarding career to provide for the children and allowing the children increased time with their Australian family. However, those benefits are significantly outweighed by the benefits of the children remaining in in B.C. Those benefits include retaining their established support structure, including the professional support and the support they receive from their established connections at school and church, as well as from Mr. Enns and his extended family. I am also guided by the commitment and strides that both J. and Mr. Enns have made to improve their relationship.
- [88] In my view, the proposed relocation is not in the best interest of the children.

Conclusion on Relocation

- [89] As set out above, while I do not question Ms. Mitchell's intentions in proposing the relocation, I cannot conclude that the proposed relocation was made in good faith, as defined in s. 69(6) of the FLA. Ms. Mitchell has also failed to make appropriate arrangements to preserve the children's relationship with Mr. Enns and his extended family. I also conclude that the relocation is not in the best interest of the children.
- [90] Pursuant to s. 69(2) of the FLA, I prohibit the proposed relocation.

IV. Parenting Time

- [91] In determining an order for relocation, s. 69(7) of the FLA precludes the court from considering whether a guardian would still relocate if the child's relocation is not permitted. Indeed, Ms. Mitchell did not advise the court whether it is her intention to move if the children's relocation is prohibited.
- [92] I have considered the issues relating to parenting time and child support in two scenarios: (a) Ms. Mitchell remains in B.C.; and (b) Ms. Mitchell moves to Australia without the children.

Scenario #1: Ms. Mitchell remains in B.C.

- [93] If Ms. Mitchell remains in B.C., I am satisfied that the parenting time that the parties have agreed to in the separation agreement remains appropriate. Neither of the parties have indicated otherwise.

Scenario #2: Ms. Mitchell moves to Australia without the children

- [94] If Ms. Mitchell relocates to Australia without the children, Mr. Enns seeks an order varying the separation agreement to grant him primary residence of the children. Ms. Mitchell has not addressed parenting arrangements under this scenario.
- [95] Having heard no alternative arrangements from Ms. Mitchell and given Mr. Enns' status as a guardian with parenting time and shared parenting responsibilities, I agree that it is appropriate that the children reside primarily with him if Ms. Mitchell moves to Australia.
- [96] In reaching that conclusion, I have considered the best interests of the children. In particular, I am mindful of the concerns that Ms. Mitchell has raised, including J.'s views, her allegations of family violence, and her concerns regarding Mr. Enns' ability to care for the children.

- [97] My analysis on the parenting issue is informed by the same analysis that I conducted in respect of the relocation. In particular, I am satisfied that, among other things, it is appropriate for the children to maintain the relationship with Mr. Enns and his family. While I appreciate that residing full time with Mr. Enns is not J.'s preference, Ms. Mitchell did not provide an alternative if Ms. Mitchell moves to Australia.
- [98] Ms. Mitchell questions Mr. Enns' ability to care for the children. She notes, among other things, that Mr. Enns did not attend various school or medical appointments for the children and was not aware of the specifics of Matthew's physical issues.
- [99] Despite those examples, I do not accept that Mr. Enns is not able to care for the children. Rather, I am satisfied that the fact that Mr. Enns currently does not have primary care of the children is a significant factor in the issues that Ms. Mitchell has raised.
- [100] In the circumstances, in the event that Ms. Mitchell moves to Australia, I order as follows:
- a) The separation agreement is amended as follows:
 - i. Section 4.2 will be deleted and replaced with the following: "Commencing on the date of Ms. Mitchell's move to Australia, the Children's primary residence is with Mr. Enns";
 - ii. Section 4.3 will be deleted and replaced with the following: "Ms. Mitchell will be given liberal and generous parenting time with the Children in accordance with a schedule agreed upon by the parties in writing."; and
 - iii. Sections 4.5(e) and (g) will be deleted and replaced with the following: "Ms. Mitchell's parenting time shall include the following:
 - 1. In even numbered years, two consecutive weeks in Canada or Australia between December and January, to coincide with the children's school break; and
 - 2. On an annual basis, three consecutive weeks in Canada or Australia during Summer Vacation. Ms. Mitchell will advise Mr. Enns by June 20 of each year of her preferred time period. In making plans, each party will take into account the Children's camp and other scheduled activities";
 - b) Mr. Enns will ensure that the children are to have regular contact with Ms. Mitchell by video call at least once per week, on a schedule that is agreed to by the parties in writing;
 - c) All costs for any travel by Ms. Mitchell or the children to facilitate parenting time, including regular parenting time and holiday parenting time, will be borne solely by Ms. Mitchell.
- [101] If the parties are unable to agree to a schedule contemplated by the above paragraph, they are at liberty to make arrangements through Scheduling to address the matter before me.

V. Child Support

[102] My analysis of child support is also made in light of the conclusion reached on the relocation application. Again, I have addressed this issue in two possible scenarios: (a) Ms. Mitchell remains in B.C.; and (b) Ms. Mitchell moves to Australia without the children.

Scenario #1: Ms. Mitchell remains in B.C.

[103] Both parties agree that if Ms. Mitchell remains in B.C., Mr. Enns should continue to pay child support in accordance with the Federal Child Support Guidelines, SOR/97-175 ("the Guidelines") and as provided for in the separation agreement.

[104] Based on his 2019 income of \$ 95,316.46 Mr. Enns paid child support of approximately \$2,100 per month from July 1, 2020 until July 2021.

[105] For reasons Mr. Enns attributes to the COVID-19 pandemic, his income in 2020 was significantly lower at \$54,086. Based on that income, the amount of child support payable was reduced to \$1,356 per month, effective July 1, 2021. He did not reduce the amount of child support paid for the period in 2020 to July 2021 in which his income was reduced due to the COVID-19 pandemic and he is not seeking to adjust the child support payable during that time.

[106] Ms. Mitchell argues that his stated income of \$54,086 for 2020 is understated. She says that child support should be based on an amount that reflects a more accurate assessment of his income.

[107] Ms. Mitchell's concerns regarding the stated income for 2020 is based on several factors: (a) Mr. Enns did not provide her with a breakdown of his business expenses, in particular payroll, presumably to allow her to assess the reasonableness of those expenses; (b) she was of the view that Mr. Enns may have been paid in cash for jobs; (c) a statement of income that he provided in January 2021 was lower than the financial statement that he filed in June 2021; and (d) he received COVID-19 related financial assistance from the government in 2020.

[108] I am not satisfied that any of those concerns warrant imputing an income to Mr. Enns for 2020 other than his stated income of \$54,086.

[109] First, Ms. Mitchell does not provide any evidence on which to base her suggestion that the business expenses, including payroll, were misstated. In any event, it is notable that Ms. Mitchell does not appear to dispute the total amount of the payroll expense claimed, only that the breakdown was not provided.

- [110] Second, like payroll, other than her speculation, she did not provide any evidence to suggest that Mr. Enns failed to report cash income. She made no such allegation in the five years that the parties have exchanged financial information. It is unclear why she alleges that is the case in 2020. Without any substantive evidence on which to base these allegations, I am unable to conclude that Mr. Enns' income was other than what was reported.
- [111] Mr. Enns explained that the discrepancy in his stated income in January 2021 and June 2021 was due, in part, to the fact that the January statement was only an estimate of income which was difficult to predict. He also explained that the June 2021 income was higher than anticipated as the result of receiving COVID-19 related payments from the government. I am satisfied that the discrepancy in those statements of income was due to the uncertainty of running a business during the pandemic, and is not indicative of improper reporting of income.
- [112] Finally, having reviewed both Mr. Enns' personal and business financial statements, I am satisfied that the government assistance payments are included in his declaration of income for 2020.
- [113] I find that Mr. Enns' 2020 income for the purposes of calculating child support is \$54,086. In the event that Ms. Mitchell does not move to Australia, child support shall be calculated on that income for the period commencing July 1, 2021, and Mr. Enns shall continue paying that amount, subject to adjustments for variations in income under the Guidelines, mutual agreement between the parties, or variation by court order.
- [114] The parties shall share special and extraordinary expenses in accordance with the provisions of the separation agreement.

Scenario #2: Ms. Mitchell moves to Australia without the children

- [115] Section 150(1) of the FLA provides that child support is payable in accordance with the Guidelines. Under s. 3 of the Guidelines, the parent who is the primary caregiver to the children is entitled to child support from the other parent in the amount set out in the applicable table annexed to the Guidelines.
- [116] Pursuant to s. 16 of the Guidelines, a spouse's income is determined using the total income in that spouse's T1 General Form as may be adjusted in accordance with Schedule 3.
- [117] If Ms. Mitchell relocates to Australia, I have ordered that the children will primarily reside with Mr. Enns and, as such, he will bear the majority of the expenses associated with the children's day-to-day care. In those circumstances, Mr. Enns' child support payments to Ms. Mitchell will cease and he will be entitled to child support from Ms. Mitchell.
- [118] As reported on her form F8 financial statement dated June 14, 2021, Ms. Mitchell's income is \$32,067. Based on that income, child support payable to Mr. Enns for 4 children is \$831 per month. She shall pay that amount commencing at the end of her first full month after she

moves to Australia and shall continue paying that amount until the first of the four children is no longer a child of the marriage within the meaning of the FLA, at which time an appropriate adjustment is to be made to reflect the number of children who remain children of the marriage.

[119] The order for child support is subject to adjustments for variations in income under the Guidelines, mutual agreement between the parties, or variation by court order.

[120] In addition, the parties shall share special and extraordinary expenses in accordance with the provisions of the separation agreement.

2016 child support

[121] Regardless of the status of the relocation application, Ms. Mitchell has sought retroactive child support for 2016, which she says was paid on an estimate of income that was below Mr. Enns' actual income for the year. Although that claim was not made in the counterclaim, Mr. Enns had the opportunity to consider and has responded to it.

[122] As noted, in June 2017, the parties entered into a comprehensive separation agreement which included terms with respect to child support. Both parties had independent legal advice. Ms. Mitchell's counsel drafted the agreement.

[123] Prior to executing the separation agreement, the parties exchanged text messages in which Ms. Mitchell inquires of Mr. Enns: "When you got your taxes complete was your income correct around \$55,000". Mr. Enns replies, among other things, "if you change my income to the actual [sic] which was higher it's going to screw me even more". He does not disclose his actual income amount to her in that exchange.

[124] Within days of the text exchange, the parties entered into the separation agreement in which Mr. Enns estimated his income for 2016 to be \$55,000. Child support for 2017 was paid based on that estimate. The parties agreed to adjust child support payable based on the exchange of income information to occur on or before June 1st, commencing in 2018.

[125] Section 1.8 of the separation agreement contemplates the following:

[Ms. Mitchell] and [Mr. Enns] recognize that full disclosure is essential to the conclusion of this Agreement. The parties have been fully advised as to their entitlement to discovery and other legal means by which either party may obtain further information with respect to the other's property and financial affairs. Both parties have had the opportunity to do so, but chose not to do so. [Ms. Mitchell] and [Mr. Enns] agree that all necessary information and requested financial disclosure, including tax and account information, has been exchanged to their mutual benefit.

[126] Ms. Mitchell submits that she has only recently learned that Mr. Enns' 2016 income was in excess of \$55,000. She argues that child support for 2016 should be based on actual income.

- [127] Mr. Enns does not deny that his actual earning for 2016 were more than the \$55,000 estimate. However, he argues that, having drafted the separation agreement and having had counsel at the time, Ms. Mitchell should not be entitled to resile from its terms.
- [128] The specific amount of Mr. Enns' 2016 income was not before the court.
- [129] In *Miglin v. Miglin*, 2003 SCC 24, the Supreme Court of Canada recognized the importance of encouraging spouses to resolve their own affairs outside of the courtroom, and the complementary importance of having the court defer to that resolution, stating at para. 4:
- [4] we believe that a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the Divorce Act as a whole should receive considerable weight
- [130] However, it is also clear that less deference should be given to provisions of a separation agreement which address child support, as opposed to those dealing with spousal support or property related issues: *D.B.S. v. S.R.G.*, 2006 SCC 37, at para. 48; *Kopp v. Kopp*, 2012 BCCA 140, citing *S.(L.) v. P.(E.)*, 1999 BCCA 393 at para. 58.
- [131] For the reasons articulated in *D.B.S.* and *Kopp*, the courts, in varying circumstances, have declined to be bound by child support amounts or to estimates of income agreed to by parties in a separation agreement. Examples of such cases include *L.L v. T.H.*, 2019 BCPC 86, *R.C. v. P.V.*, 2021 BCPC 48 and *Reid v. Reid*, 2017 BCCA 73.
- [132] While each of those cases turned on their facts, in each, rather than deferring to the terms of the separation agreement, the courts assessed the claim for retroactive support by reference to the factors set out in *D.B.S.* Those factors are: whether there was a reasonable excuse for not having sought support earlier; the conduct of the payor parent; the circumstances of the child; and any hardship that would be caused by a retroactive award.
- [133] In this case, at the time she executed the separation agreement, Ms. Mitchell was aware that \$55,000 was an estimate of Mr. Enns' income. Given the text exchange prior to signing the separation agreement, she was aware that it was a low estimate. I accept that Ms. Mitchell may have only recently learned the exact amount of Mr. Enns' 2016 income. However, I do not accept that she only recently learned that \$55,000 did not accurately reflect his 2016 income.
- [134] Despite the timing of that knowledge, Ms. Mitchell, through counsel, prepared and executed the separation agreement. More significant to this analysis, Ms. Mitchell did not take any steps to claim retroactive support for 2016 until four years later during the trial of this action. She has never made a formal claim for that support in pleadings.
- [135] In my view, there is no reasonable excuse for the delay in making the claim for retroactive support. As noted in *D.B.S.*, it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent: *D.B.S.* at para. 123.

- [136] Regarding the second D.B.S. factor, under the separation agreement, Mr. Enns had no obligation to provide his 2016 financial information to Ms. Mitchell. He was required to provide his financial information for 2017 and subsequent years. He did so and paid child support in each of the subsequent years based on that information. In my view, even acknowledging the obligation to pay support on the basis of income, the absence of a contractual obligation to provide his 2016 financial information, together with the June 2017 text exchange, preclude me from attributing a significant amount of blameworthiness to Mr. Enns for his failure to provide Ms. Mitchell with the specific 2016 information.
- [137] The third, and important, D.B.S. factor is whether the children suffered financially because of any failure to pay child support based on actual income. There is no suggestion that was the case.
- [138] Finally, Mr. Enns did not claim that he would suffer hardship if a retroactive award is made. However, I note that his income continues to be negatively impacted by the COVID-19 pandemic. I also note that notwithstanding that negative impact on his income in 2020, he did not seek to reduce the child support payable for that period, but instead continued to pay support on the basis of his significantly greater earnings in 2019.
- [139] Keeping in mind the "holistic" approach endorsed in D.B.S., it is inappropriate to award retroactive child support for 2016 in the circumstances of this case.

VI. Costs

- [140] Mr. Enns has succeeded on all issues raised. He is entitled to costs.

"Ahmad, J."

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