
CANADA / JUDGMENT

F.K.L. v. D.M.A.T.

2022 BCSC 2368

COURT

Supreme Court of British Columbia

DECIDED

31 August 2022

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2022 BCSC 2368 F.K.L. v. D.M.A.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

F.K.L. v. D.M.A.T.,

2022 BCSC 2368

Date: 20220831

Docket: E88897

Registry: Nanaimo

Between:

F.K.L.

Claimant

And

D.M.A.T.

Respondent

Before: The Honourable Justice Lamb

Oral Reasons for Ruling Re Application for Relocation of a Child

In Chambers

The Claimant appearing on her own behalf:

F.K.L.

Counsel for the Respondent:

M.G. Norton

Place and Date of Hearing:

Nanaimo, B.C.

August 24, 2022

Place and Date of Judgment:

Nanaimo, B.C.

August 31, 2022

- [1] THE COURT: The parties to this family law action are the parents of a seven-year-old daughter, A. Following a five-day trial in August 2020, Justice Gomery decided that then five-year-old A would reside primarily with her mother, the claimant, Ms. L, in Gold River, BC, when A started kindergarten in the fall of 2020. The respondent, Mr. T, who lived in Victoria, BC, at the time of trial, was given parenting time on weekends and during school vacations. In his reasons for judgment, Justice Gomery clearly stated that he would have ordered shared parenting if the parents had lived a reasonable distance apart.
- [2] Seven months after the trial decision, in March 2021, Mr. T relocated to Gold River in order to be closer to his daughter and to facilitate shared parenting. In April 2022, Justice Steeves ordered shared parenting that is organized around Mr. T's out-of-town employment.
- [3] Ms. L now seeks to relocate A from Gold River, BC, to Comox, BC, approximately an hour and a half to two hours away. Ms. L recently moved to Comox and took a job there.
- [4] Mr. T opposes the proposed relocation and filed a summary trial application pursuant to Rule 11-3 of the Supreme Court Family Rules for an order prohibiting Ms. L from relocating A. Ms. L filed her own application to allow the relocation, although without referring to Rule 11-3 specifically in her notice of motion. As she did at trial, Ms. L represented herself on these applications.
- [5] The parties have substantially equal parenting time, which means that s. 69(5) of the Family Law Act, S.B.C. 2011, c. 25 places the onus on Ms. L to establish that the proposed relocation is made in good faith, that there is a reasonable and workable arrangement to preserve the relationship between A and her father and his partner, and that the proposed relocation is in the best interest of the child. These are the issues I must decide in order to determine whether to allow Ms. L to relocate A to Comox.
- [6] In addition to the relocation cross-applications, Ms. L applies for an order for retroactive child support. In his order of September 2020, Justice Gomery imputed annual income of \$90,000 to Mr. T for the purposes of calculating child support. Mr. T has earned more than \$90,000 per year since September 2020, and Ms. L seeks a retroactive award for the difference between what he ought to have paid and what he did pay.

- [7] Finally, Ms. L also seeks the appointment of a specific parenting coordinator with the expense to be shared 75%-25%. Mr. T agrees that Joan Cotie should be appointed as parenting coordinator but says that the cost should be shared 50/50, consistent with Justice Gomery's order at trial.
- [8] I will first set out some background facts before addressing the relocation applications followed by the retroactive child support and parenting coordinator applications.

Background facts

- [9] Justice Gomery reviewed the background of the parties' relationship and significant events up to the date of trial in his reasons for judgment indexed at 2020 BCSC 1296 ("Reasons for Judgment"). I have reviewed and relied upon Justice Gomery's findings of fact for events and circumstances prior to trial. I will identify his findings of fact that are particularly significant to the issues I must decide.
- [10] As noted, Justice Gomery was tasked with deciding A's primary residence as she was about to start kindergarten in September 2020. For the 18 months or so leading up to trial, A resided with her mother and grandfather in Gold River, BC, approximately 60% of the time and with her father in Victoria, BC, approximately 40% of the time. This arrangement was not sustainable once A started school given that Victoria, BC, is a five-hour drive from Gold River.
- [11] Justice Gomery identified some problems with the parenting arrangement that was in place at the time of trial and in particular with transitions from Ms. L's parenting time to Mr. T's parenting time. A number of incidents led him to comment as follows as para. 67 of the Reasons for Judgment:
- [67] To summarize, there is substance to Mr. T's complaint that Ms. L has allowed her disdain for and dislike of Mr. T to override her ability to make good parenting decisions. In her own words, Ms. L feels contempt for Mr. T. She views herself as the primary parent and Mr. T as secondary. Prior to Master Vos' order, she set and enforced arbitrary boundaries, such as her requirement in February 2019, that Mr. T not leave Gold River during his parenting time. Since the implementation of shared parenting by court order, she has adopted a rigid and heavy-handed approach. She has repeatedly called the police for reasons that do not withstand scrutiny. A has not been well served by her mother's attitude and tactics towards her father.
- [12] Justice Gomery noted that Ms. L recognized the communication failures between the parties and she recognized that she and Mr. T needed to cooperate, but her challenge was to put into effect her intention to ensure a positive relationship between A and Mr. T.
- [13] After considering the evidence at trial and applying the law, Justice Gomery concluded that the parenting arrangement that would serve A's best interests and needs was to have her reside with her mother in Gold River while school was in session and to give Mr. T

substantial parenting time on weekends and during the school holidays. Justice Gomery ordered that Mr. T would have parenting time on long weekends and one additional weekend each month of his choosing while school was in session. If school was not in session, Mr. T would have two-thirds of the parenting time.

- [14] After the trial decision was pronounced, Mr. T returned to his job working for Imperial Oil in Kearl Lake, Alberta, which requires him to be on site or travelling back and forth approximately 17 days per month. Mr. T had testified at trial that he did not intend to return to that job. However, when Justice Gomery decided that A would reside primarily and go to school in Gold River, Mr. T went back to work for Imperial Oil in order to save enough money to move from Victoria to Gold River, which he did.
- [15] In February 2021, Mr. T purchased his current home in Gold River, and he moved there by the end of March 2021 with his common-law spouse, Ms. I, so that he would be available to parent A on a regular basis. Mr. T's home in Gold River is located a five-minute walk away and on the same street as the home where Ms. L lived with her father until her recent move to Comox.
- [16] When Mr. T moved to Gold River in early 2021, the parties negotiated a change to the parenting schedule so that Mr. T would have nine overnights with A during the 13 overnights per month that he was home in Gold River. The revised parenting schedule was not formalized and not always followed.
- [17] On March 11, 2022, Mr. T filed a notice of application seeking a shared parenting schedule and other orders. On March 30, 2022, Ms. L filed a notice of application seeking an order that she be permitted to relocate A to the Comox Valley and other orders. On April 27, 2022, Justice Steeves granted the order for shared parenting and adjourned generally the claimant's relocation application. In particular, Justice Steeves ordered that Mr. T would have two weeks of parenting time, save and except for one overnight with Ms. L, followed by two weeks of uninterrupted parenting time for Ms. L. Justice Steeves ordered an adjustment to the holiday schedule that Justice Gomery had ordered at trial. Justice Steeves' order established the existing parenting arrangement.
- [18] Ms. L gave written notice to Mr. T on June 29, 2022, that she intended to relocate A on September 1, 2022, to Comox, BC. Mr. T accepts that this notice meets the requirements of s. 66 of the Family Law Act in respect of relocating A. However, neither party addressed the fact that s. 66 of the Family Law Act requires the child's guardian who plans to relocate herself or a child or both must give all other guardians at least 60 days' written notice of the date of relocation and proposed location. Ms. L apparently moved with her father to Comox on August 10, 2022, prior to the hearing of this application and less than 60 days after notice was given. As in *Scruton v. Wilson*, 2020 BCSC 1850, Ms. L's:

... *fait accompli* limits the Court's options, but does not change the analytical framework, which remains centred on the [child's] best interests.

[19] In response to Ms. L's notice of intended relocation, Mr. T filed a notice of application on July 20, 2022, seeking an order prohibiting the relocation. Ms. L brought her own application on August 3, 2022, to allow the relocation and for other orders. The applications came on for hearing before me on August 24, 2022. There was obviously some urgency given the pending first day of school.

[20] Although neither party addressed it explicitly, their cross-applications indicate that the parties implicitly agree that the proposed relocation of A to Comox, BC, is appropriately decided by way of summary trial. I recognize judicial commentary to the effect that it may be preferable to have conventional or a hybrid trial to decide relocation cases: *A.P. v. J.C.*, 2018 BCSC 1381, at para. 38. However, in this case, as in *A.P.* at para. 39:

... the need for a prompt decision outweighs the advantages and general desirability of a conventional trial.

[21] Further, I am satisfied that I am able to find the necessary facts to decide the relocation applications based on the affidavit evidence filed, which leads me to conclude that the applications are suitable for resolution by way of summary trial.

The relocation applications

[22] Turning first to the relocation applications, I will set out the legislative framework before I address any specific issues I must consider.

Legislative framework

[23] Because there is a parenting order in place, division 6 and in particular s. 69 of the Family Law Act apply. Section 69(3) requires the court to consider the best interests of the child and the factors set out in s. 69(4)(a), which include an onus on the relocating party to satisfy the court that:

- a) the proposed relocation is made in good faith; and
- b) she has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardian and other persons who have a significant role in the child's life.

[24] Because the parties have substantially equal parenting time, the evidentiary burden is on the relocating parent -- in this case Ms. L -- to satisfy the court that relocation is in the best interests of the child: Family Law Act, s. 69(5).

- [25] As with any order respecting parenting arrangements, I must determine what order is in A's best interests, protecting to the greatest extent possible her physical, psychological, and emotional safety, security, and wellbeing. I must consider the various considerations listed in s. 37(2) of the Family Law Act. Pursuant to s. 37(4), I must take conduct into account only if it substantially affects the factors set out in s. 37(2) and only to the extent that it affects that factor.
- [26] In order to determine whether a proposed relocation is made in good faith, the court must consider all relevant factors, including:
- a) the reasons for the proposed relocation; and
 - 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 wellbeing or financial or education opportunities: Family Law Act, s. 69(6).
- [27] In deciding whether to allow the relocation, I must not consider whether a guardian would still relocate if the child's relocation is not permitted: Family Law Act, s. 69(7).
- [28] I will first consider whether the proposed relocation is made in good faith and whether there is a reasonable and workable parenting time proposal before reviewing the factors that help determine the best interests of the child in this case, keeping in mind that "a finding that the relocation parent has not acted in good faith does not necessarily mean the proposed relocation is not in the best interests of the child": A.J.D. v. E.A.E., 2013 BCSC 2160 at para. 37.
- [29] Given that Ms. L has already moved to Comox and said that she will continue to reside in Comox regardless of the outcome of the applications with respect to relocating A, it is important to recall that my jurisdiction is restricted to deciding whether to authorize A's relocation. I have no jurisdiction to compel Ms. L to reside in Gold River or anywhere else.

Good faith

- [30] Ms. L insists that for years she has contemplated a move to the Comox Valley to improve her career opportunities and to expand A's school and extracurricular opportunities. Mr. T argues that the timing of the proposed move is suspicious. Further, he says that Ms. L has provided little to no evidence of enhanced career opportunities, that any school opportunities can be addressed in other ways, and that extracurricular activities remain available in Gold River. When it comes to A's general quality of life, Mr. T says any opportunities that Comox might offer A come at too great an expense when measured against the impact on her relationship with her father.

- [31] Good faith is a subjectively held state of mind: *L.J.R. v. S.W.R.*, 2013 BCSC 1344, at para. 71. That said, some of the good-faith factors listed in s. 69(6) may be assessed objectively, and to the extent a good faith factor is objectively established, the court may infer that the relocating guardian possessed the required subjective good faith. The converse also applies. Significantly for this case, the factors listed in s. 69(6) of the Family Law Act are not exhaustive.
- [32] Justice Kent defined "good faith" this way in *Pepin v. McCormack*, 2014 BCSC 2230, at para. 69:
- [69] Good faith is a subjectively held state of mind. It involves an assessment of whether the reasons asserted by [the moving parent] for the proposed relocation are the real reasons for the move. If so, and if the court determines on an objective basis that relocation will likely enhance [the child's] general quality of life, then the decision to relocate will normally be found to have been made in good faith.
- [33] I will review the s. 69(6) factors relevant in this case as well as other circumstances that are relevant to deciding whether the proposed move is made in good faith.
- [34] The first good faith factor is the reason for the proposed relocation: Family Law Act, s. 69(6) (a). Ms. L identifies opportunities to advance her career, childcare difficulties associated with her employment in Gold River, and enhanced schooling and extracurricular opportunities for A as the reasons for the proposed relocation. I will consider these in turn.
- [35] Prior to her recent move to Comox, Ms. L worked as a paramedic with BC Ambulance in Gold River. From November 2020 to April 2022, Ms. L took courses to obtain the next level paramedic licence, which qualifies her to work for any ambulance station in British Columbia. Ms. L deposes that working in a larger urban centre will allow her to use her new skills and will provide greater opportunity for career advancement or possibly educational mentorship into an advanced care paramedic program. Although Ms. L provides few details about potential career advancement, I accept that her move to Comox is motivated in part by her hope to advance her career.
- [36] In terms of childcare challenges, Ms. L's posting as a paramedic in Gold River required her to work three days on/three days off, which meant that she was on call for 72 hours straight. Ms. L deposed that this 72-hour rotation had "caused several issues for childcare arrangements" for her, and the position was not one that she could "sustainably maintain long term." Ms. L says she frequently had to sleep over at a friend's house or try to find someone to sleep at her house in the event she is called out in the middle of the night. Ms. L expects that the friend who frequently helped her with overnight childcare will be moving away from Gold River within the next six to nine months. However, there is no affidavit evidence from that friend filed on this application.

- [37] As noted, Ms. L's home in Gold River was a five-minute walk away from the home where Mr. T and his common-law spouse live. I accept that Mr. T and Ms. I were willing and able to assist with childcare whenever required, but Ms. L preferred to request assistance from her friends or her father before turning to Mr. T and Ms. I. Further, it appears that Ms. L did not tell Mr. T that she had overnight childcare challenges before she applied to relocate A.
- [38] When Ms. L lived with her father in Gold River, Mr. L assisted with childcare. Although he was a key witness at trial, Mr. L did not provide an affidavit on these applications. Ms. L deposed in her most recent affidavit that her father would be relocating to Comox on August 12, 2022, and that he will "continue to be available to provide childcare for A as he has for the past five years."
- [39] Although Mr. L is identified as co-tenant on Ms. L's residential lease in Comox, it is not clear when and how often he will be available to assist with childcare after the move. As of April 2022, Mr. L worked a three days on/three days off schedule with BC Ambulance in Gold River that overlapped with Mr. L's work shifts there, and he worked in Tahsis, BC, on average two days per week. Mr. L appeared to be working a shift at the Gold River ambulance station as recently as July 31, 2022. There is no evidence that Mr. L has sold or rented his home in Gold River. In short, it is not clear on the evidence that Mr. L will be available to take care of A in Comox whenever Ms. L is working.
- [40] Ms. L said that having more options to work different shift patterns in Comox "would enable [her] to work a schedule more conducive to A's schedule and limit the need for childcare." However, I am not satisfied on the available evidence that moving to Comox would limit the need for childcare or would necessarily resolve any childcare issues Ms. L might currently face unless she is able to avoid overnight shifts entirely (which is not established on the evidence) or unless her father intends to be available whenever Ms. L is working (which is not established on the evidence).
- [41] Ms. L provided her shift schedule for August 2022 to illustrate the variety of shifts available in Comox. Based on the schedule provided, Ms. L worked some 24-hour on-call shifts, some 12-hour daytime shifts, and some 12-hour night shifts in August. Ms. L worked most of these shifts while Mr. T exercised his parenting time with A. Although her first month in Comox offered a different pattern of shifts, Ms. L would still require childcare for A based on her August work schedule.
- [42] Based on the available evidence, it is not clear how a relocation to Comox and away from two people who could assist with childcare would reduce or eliminate any childcare challenges Ms. L faced as a result of her Gold River posting.
- [43] The third reason for the proposed relocation is to offer A more educational and extracurricular activities opportunities. I find objectively on the evidence that there are more extracurricular activities with greater opportunity to engage in competitive activities available in Comox as compared to Gold River.

- [44] On the other hand, I am not sure that the available evidence objectively establishes that Comox is better than Gold River for A's education now and in the near future. The Fraser Institute rankings are not persuasive for the reasons identified in *E.P. v. B.P.*, 2022 BCSC 882. Further, I am not convinced that A's reported interest and affinity for languages necessarily favours a move to Comox. Although Ms. L's earlier affidavit suggested that A was to attend at French immersion school in Comox, based on her current rental accommodation, A is registered to attend a school that does not offer French immersion. In short, the evidence does not objectively establish that A's educational needs are better served in Comox rather than in Gold River.
- [45] The second good faith factor identified in s. 69(6) is whether the proposed relocation is likely to enhance the general quality of life of the child and the relocating parent, including increasing the emotional well-being or financial or educational opportunities. While the child's general quality of life has an impact on her best interests, the focus at this stage of the analysis is aimed at discerning the subjective good faith of the parent, *D.T.S. v. S.P.M.*, 2022 BCSC 547, at para. 62.
- [46] Starting with A's general quality of life, I accept that Ms. L subjectively believes that A's life will be enhanced by having more opportunities for extracurricular activities. A excels at physical activities, and she would benefit from having access to opportunities to join teams and learn new skills.
- [47] As for Ms. L's general quality of life, I am satisfied on the evidence that moving to Comox would give her an opportunity to practice more complicated paramedic skills that potentially would advance her career within BC Ambulance. Although the change in venue may result in a pay increase, the evidence before me does not establish that will necessarily happen. The position she accepted in Comox is a lateral transfer from the position she held in Gold River, which means a part-time position in which her monthly availability is confirmed at approximately 50 to 60%. Ms. L has not provided evidence to prove that she will earn more in Comox than she earned in Gold River.
- [48] As noted, the good-faith factors listed in s. 69(6) are not exhaustive. The three other factors that are relevant to assessing Ms. L's good faith are:
- a) the timing of the proposed relocation;
 - b) the fact that Ms. L has already relocated; and
 - c) Mr. T's belief that the proposed move is intended to limited his time with A.
- [49] Mr. T argues that Ms. L's assertion of good faith is undermined by the fact that Ms. L announced her intention to relocate following an incident in January 2022 that occurred during a transition from Mr. T's parenting time to Ms. L's parenting time. By contrast, Ms. L said that she has been working toward a move to the Comox Valley for a number of years.

[50] Mr. T's view that the timing is suspicious is understandable, but I accept that Ms. L started upgrading her qualifications in the fall of 2020 with a view to move from Gold River to the Comox Valley. The timing of her move was a function of completing that upgrade in April of 2022.

[51] As mentioned, Ms. L moved to Comox on August 10, 2022, and A stayed with Ms. L at her new residence before the hearing of this application. In some cases, courts have found that a moving parent cannot establish good faith when relocation happens prior to a court application. For example, in the finding of an absence of good faith where the mother had moved the child before bringing a relocation application, Justice Francis emphasized in *D.T.S. v. S.P.M.* at para. 63:

This Court will not countenance unilateral action on the part of a relocating parent.

[52] In similar circumstances, Justice Betton said in *L.J.R. v. S.W.R.*, 2013 BCSC 1344, at para. 73:

Parties seeking to relocate cannot gain advantage by carrying out the relocation in advance of any prospective court approval.

[53] In the case at bar, I am not convinced that Ms. L has relocated A in advance of this application. Ms. L herself has moved to Comox, and she made it clear to the court that she would exercise her parenting time at her current residence in Comox regardless of the outcome of this application. However, it is not so obvious that Ms. L has relocated A to Comox, particularly before school is in session.

[54] That said, my finding should not be taken as condonation of Ms. L's having parenting time with A at her new residence prior to the hearing of this application. At the very least, such conduct runs the risk of creating expectations and perhaps confusion and disappointment depending on the outcome of this application.

[55] Finally, Mr. T challenges Ms. L's good faith by arguing that Ms. L's attempt to relocate A is merely a continuation of her overly rigid approach to parenting as found by Justice Gomery at para. 72 of his Reasons for Judgment. Though not described this way by Mr. T's counsel, I considered whether the proposed relocation may also be a continuation of Ms. L's pre-trial view, as found by Justice Gomery, that she was A's primary parent: Reasons for Judgment, para. 67, 86, and 102. Justice Gomery acknowledged at para. 99 of his Reasons for Judgment that Ms. L's history of problematic conduct rendered difficult his decision regarding A's primary residence, although there were no signs that her conduct had alienated A from her father. Justice Gomery found that Ms. L recognized but did not fulfill her responsibility to facilitate A's relationship with Mr. T prior to the trial: Reasons for Judgment at para. 86. He accepted that she did not want A to have a negative relationship with her father, but the challenge for Ms. L was to put this good intention into effect: Reasons for Judgment at para. 68.

- [56] Following the trial, Ms. L has engaged in some parenting practices that might fairly be described as overly rigid: for example, her efforts to control A's extracurricular and social engagements. Despite Justice Gomery's comments that shared parenting would be appropriate if it was geographically feasible, Ms. L was not particularly cooperative in facilitating additional parenting time for Mr. T after he moved to Gold River, particularly in the fall of 2021 when he spent close to three months at home while attending school remotely.
- [57] Mr. T raises a legitimate question about Ms. L's true motivation. However, in the absence of cross-examination of Ms. L or other evidence, I am not prepared to impute an improper motive to Ms. L's proposal to relocate A based on the parenting steps she has taken.
- [58] Taking all of these factors into account, I am satisfied that Ms. L has established on a balance of probabilities that the proposed relocation is made in good faith. In particular, I accept that Ms. L wants to relocate to Comox in order to advance her career and to give A access to more extracurricular opportunities. Ms. L feels that offering her daughter such opportunities is very important to A's development. That said, it is not so clear that her stated objective of alleviating childcare concerns will be accomplished by relocating. Though not wholly unreasonable, Mr. T's suspicions about Ms. L's motivation for relocating do not overcome the objectively sound reasons for the proposed relocation.

Reasonable and workable arrangement

- [59] Ms. L must satisfy the court that she has proposed a reasonable and workable arrangement to preserve the relationship between A and her father and other persons who have a significant role in the child's life. I would include Mr. T's common-law spouse, Ms. I, in the latter category. I am satisfied that Ms. L has met this requirement based on Mr. T's current work schedule of spending 13 days per month in Gold River and 17 days at the work site or travelling to and from the work site.
- [60] A relocating parent is not required to propose a parenting arrangement that would match the status quo, as a "relocation" by definition is a change in the location of the residence of a child that can reasonably be expected to have a significant impact on the child's relationship with a guardian. The proposal must be reasonable and workable and serve to preserve the relationship, though not necessarily enhance the relationship.
- [61] Ms. L has proposed that if she is permitted to relocate A to Comox, then Mr. T would have parenting time as follows:
- a) Mr. T would pick up A from school on the day he flies into Comox from the work site and have parenting time until evening;
 - b) Mr. T would have two back-to-back weekends with A, one from Thursday to Sunday and the other from Friday to Sunday;

- c) Mr. T would have two-thirds of holidays and school breaks; and
- d) Mr. T would have additional day visits with A when he is able to travel to Comox.

[62] This proposed arrangement is reasonable and workable given the proximity between Gold River and Comox, and it is very similar to the schedule ordered by Justice Gomery. The proposal meets the minimum requirement of preserving the relationship between A and her father and Ms. I. However, if relocation is permitted, I would order more parenting mid-week than proposed by Ms. L if Mr. T's current work schedule continued and more weekend time and mid-week time if he is no longer travelling out of town on a regular basis.

Best interests of the child

[63] Having found that the proposed relocation is made in good faith and it is possible to create a reasonable and workable parenting schedule to preserve A's relationship with her father and his common-law partner, I will turn to an assessment of A's best interests. The onus of proving that the proposed relocation is in A's best interests remains on Ms. L. Further, the Court of Appeal in *K.W. v. L.H.*, 2018 BCCA 204, at para. 78 suggested that the court assessing whether to allow relocation ought to show deference to the existing parenting order:

Division 6 [of the Family Law Act] assumes that an existing agreement or order respecting parenting arrangements has been made in the best interests of the child and in those circumstances, deference should be given to that pre-established arrangement.

[64] As a result, in deciding whether relocation is in A's best interests, I am guided by Justice Gomery's findings of fact at trial, events that have occurred in circumstances that have arisen since trial that might necessitate the recalibration of Justice Gomery's findings, including the order made by Justice Steeves, and how relocation will be expected to affect A's best interests.

A) The child's health and emotional wellbeing

[65] Justice Gomery concluded that A was physically and emotionally healthy. He found that she was active and energetic and that she displayed impressive stamina for a child her age. Those comments remain valid.

[66] A continues to be outgoing and sociable. She continues to be physically active. She has no health or emotional challenges that require special consideration.

[67] In planning to relocate, Ms. L has not addressed the emotional effect of removing A from the place where she has spent most of her life. A has lived with her mother in Gold River since October 2017. She has lived with both parents in Gold River since her father moved there in March 2021. Due to the proximity of her parents' residences in Gold River, A has routinely enjoyed easy access to both parents for the last year and a half, even during the other party's parenting time. By all accounts, A has thrived in Gold River.

[68] In concluding that A should reside primarily with her mother, Justice Gomery placed "particular weight on the breadth and depth of A's connection to the community of Gold River": Reasons for Judgment, para. 96. Those connections have only increased two years later, especially since her father moved there. I am reluctant to anticipate that a move to a new place, no matter how exciting new activities may sound to an active seven-year-old, will not affect her emotional well-being, at least in the short term.

B) The child's views unless it would be inappropriate to consider them

[69] After bringing her application for relocation, Ms. L suggested to Mr. T's counsel in July 29, 2022, that the parties obtain a "views of the child" report or "hear the child" report. I agree with Mr. T's position that A is too young to participate meaningfully in such a report, particularly where Ms. L has already spoken to A about activities she might pursue if the relocation is permitted. A is too young to appreciate the impact relocation would have on the relationship with her father and his partner, as well as what it would mean to change schools and move away from Gold River.

[70] My conclusion on this point is reinforced by the fact that Justice Steeves did not consider it necessary to solicit the child's perspective prior to making the order for shared parenting in April 2022.

C) The nature and strength of the relationships between the child and significant persons in the child's life

[71] Justice Gomery concluded based on the evidence at trial, including a s. 211 report prepared by Mr. Grootendorst on the eve of trial, that A was securely bonded with both her parents. I am satisfied that she remains bonded with both her parents.

[72] Justice Gomery recognized the close relationship between A and her maternal grandfather, nourished by their living together since October 2017. Although Ms. L deposed that her father would be relocating to Comox, I am troubled by the lack of direct affidavit evidence from him to confirm that he, in fact, moved to Comox on August 10, 2022, as Ms. L anticipated. As noted previously, there is no evidence that Mr. L has sold or rented his house in Gold River or that he intends to do so. There is no evidence regarding his current employment. This lack of evidence, which is within Ms. L's control to secure, remains unexplained.

[73] The new relationship that has developed since trial is the relationship between A and Ms. I, Mr. T's common-law spouse. I accept that this relationship is close and strong and overall a positive one for A. Further, I accept that A is looking forward to being the big sister for the child that Mr. T and Ms. I are expecting in April 2023.

- [74] The nature of A's relationship with her parents will change whether or not the relocation is permitted, given Ms. L's intention to live in Comox regardless of the outcome of this application. While both parents have had parenting time during the school week over the last year and a half, one parent's in-school parenting time will be reduced going forward. One parent will have more day-to-day time, and the other will have more vacation. This outcome is unavoidable given Ms. L's relocation.
- [75] Based on the commitment both parents have to A, I anticipate that the strength of her relationship with her parents will not diminish regardless of the order I make.
- [76] Mr. T mentions that A's best friend lives in Gold River. As a social butterfly, A would likely find new friends if relocation is permitted.

D) The history of the child's care

- [77] Justice Gomery reviewed the entire history of A's care from birth to trial, and I have taken it all into account. In the 18 months leading up to trial, there was a shared parenting arrangement in place that initially gave Mr. T nine parenting days out of 21 and then eight parenting days out of 20 based on his work schedule.
- [78] Due to the distance between the parents' residences as of August 2020, Justice Gomery ordered that A would reside primarily with her mother during the school year. Mr. T had parenting time on long weekends, plus an additional weekend per month of his choosing. He had parenting for two-thirds of non-school time, again of his choosing.
- [79] Once Mr. T moved to Gold River in March 2021, he requested additional parenting time. The parents informally followed a 5/3/4 or a 4/3/5 schedule for Mr. T's time off work, and A lived with Ms. L when Mr. T was working in Alberta. This informal arrangement was not consistently followed in the fall of 2021 when Mr. T was in Gold River most days of the week while he took courses. I accept that Mr. T asked for more parenting time, but Ms. L restricted his parenting time primarily to weekends in the fall of 2021.
- [80] As noted, Justice Steeves ordered shared parenting on April 27, 2022, on a 6/1/6 schedule for Mr. T's time in Gold River, with the balance of the month spent with Ms. L. But for a three week holiday in the summer of 2022, for which Mr. T will be exercising make-up time, A has followed the Steeves schedule without any reported difficulties.

E) The child's need for stability given the child's age and stage of development

- [81] The comments of Justice Gomery at para. 82 of his Reasons for Judgment regarding family occupying the centre of A's world remain appropriate.
- [82] A remains deeply involved in the community of Gold River, more so now than at the trial date as a result of her attending the local elementary school and participation of various extracurricular activities such as hockey and swimming.

[83] Her need for stability is better satisfied by staying in Gold River.

F) The ability of each parent who is a guardian or who has parental responsibilities, parenting time, or contact with the child to exercise his or her responsibilities

[84] Justice Gomery's conclusion at para. 84 of his Reasons for Judgment that both parents are capable parents continues to be valid.

[85] Similarly, I find that Ms. L has continued to limit Mr. T's parenting time since his move to Gold River, particularly in the fall of 2021. Her reluctance to allow more liberal access on a consistent basis without a court order is unfortunate in light of Justice Gomery's clear statement that he would have ordered shared parenting if they had lived close enough for it to be practical.

[86] I find that Ms. L's insistence on controlling A's extracurricular activities and birthday party attendance is a further example of her overly rigid and heavy-handed approach to parenting. There is no evidence to explain why Mr. T could not bring A to hockey or to birthday parties that occur during his parenting time.

[87] Despite her acknowledgment at trial of the importance of facilitating a positive relationship with Mr. T, I find that Ms. L continues to have difficulty putting A's interests in spending time with her father ahead of Ms. L's preference for controlling A's time and activities. That said, as was the case at trial, there is no evidence of alienation.

[88] On the other hand, I am satisfied on the evidence that Mr. T has done his best to remain flexible and avoid friction with Ms. L for the most part when it comes to parenting A. I will make no comment about the incident in January 2022 given the outstanding criminal proceedings.

G) & H) With respect to family violence

[89] Justice Gomery's finding that this is not a case involving family violence continues to apply. Neither party has alleged and I do not find that the January 2022 incident qualifies as family violence on the part of either party.

I) The appropriateness of an arrangement that would require the child's guardians to cooperate

[90] Justice Gomery was prescient when he anticipated that cooperation between the parents would continue to be a problem.

J) Any similar criminal proceeding relative to the child's safety, security, or wellbeing

[91] There are no civil or criminal proceedings relevant to the child's safety, security or wellbeing. The criminal charges that are currently outstanding as against Ms. L as a result of the incident in January 2022 are not relevant to the child's safety, security or wellbeing.

K) Anticipated care for the child

- [92] When assessing A's best interests, Ms. L says the court must consider "reality": Ms. L has moved to Comox, and Mr. T is away from Gold River for 17 days out of 30 for work. Ms. L says that refusing the relocation application will result in A being cared for by neither parent but rather by Ms. I for significant periods of time.
- [93] In response, Mr. T deposes that he anticipates he will be in Gold River for the follow periods during A's 2022/2023 elementary school year:
- a) from October to December 2022 while attending his final course at North Island College in Campbell River for his Red Seal electrician trade program;
 - b) from January 2023 to March 2023, for vacation and unpaid leave from his current employment; and
 - c) from March 2023 to October 2023, taking parental leave for the child he and Ms. I are expecting.
- [94] Mr. T plans to look for employment locally once he completes his Red Seal program at the end of December 2022. He deposed that he would change his current work schedule so that he is available to parent A full-time if her primary residence is with him in Gold River. Ms. L argues that this plan is not credible because he returned to work at Imperial Oil in late September 2020, when he insisted at trial that he had no intention of doing so. However, I accept Mr. T would take the steps required to be available to parent A if she resides primarily with him for the following reasons:
- a) Mr. T's plan at trial to leave Imperial Oil understandably changed as a result of Justice Gomery's parenting order;
 - b) Mr. T will soon have enhanced qualifications that will give him more opportunities to find employment in Gold River or within reasonable commuting distance, making his goal to work locally more achievable; and
 - c) Mr. T has demonstrated his strong motivation to parent A by moving twice to be closer to her, even though it meant living further away from the Imperial Oil worksite that he travels to.
- [95] I recognize that Mr. T's stated intention regarding vacation, unpaid leave, and parental leave may change if he is able to secure new employment in the near future.
- [96] Regardless of the outcome of the application, I am satisfied that both parents will require assistance with childcare, whether from a spouse, family member or other whenever their work schedule overlaps with their parenting time. Although both parents may take steps to maximize the time they spend parenting A, some childcare is likely unavoidable given their duty to provide support for A: Family Law Act, s. 147. In the short term, for the current school year, Mr. T will be at least as available to parent A as Ms. L would be, if not more so.

The same is true if he changes jobs as planned.

Extracurricular activities

- [97] As noted, when considering the good-faith factors, Ms. L argues that relocation is in A's best interests because Comox is a place that can help to foster all A's passions and has resources and services to challenge her and to help her grow into the person she wants to be. In particular, in Comox, A will have the opportunity to participate in gymnastics and to join a track team and swim club. The commute to the ski hill from Comox would be 30 minutes as compared to an hour and 45-minute drive from Gold River.
- [98] Mr. T says that A is able to participate in some extracurricular activities in Gold River, such as hockey and karate. She is close to many outdoor activities that the family enjoys, such as hiking and fishing. There are opportunities for other extracurricular activities within a reasonable driving distance.
- [99] I accept that Comox offers more opportunity than does Gold River to engage in extracurricular activities. I appreciate that A is an exceptional seven-year-old with great potential. However, I am not convinced that this factor outweighs all others in the overall assessment of A's best interests.

Assessment and conclusion

- [100] Justice Gomery's comments at para. 93 of his Reasons for Judgment remain apposite:

At her age, the kind of bond that A shares with her parents and [Mr. L.] is nourished by frequent, close, personal contact, and interaction. The unfortunate reality of this case is that her relationships with her father or her mother and [Mr. L.] will be impaired to at least some degree when the shared parenting arrangement ends. The shared parenting arrangement has served A well, and it is a shame that it cannot be sustained.

- [101] Similarly, I largely adopt Justice Gomery's comments at para. 95 of his Reasons for Judgment:

- [95] Instead, this case presents a difficult choice between two loving households. Both parents are capable and will secure A's physical, psychological and emotional safety, security, and well-being. Choosing between them is a matter of degree.

- [102] As compared to August 2020, the parties' residences are much closer together, making it more likely that mid-week parenting time can occur at least occasionally. Further, A is older, and the relationships with her parents are more firmly established. Although she may not see one of her parents as often during certain periods of time, it is less likely than it was two years ago that this change in parenting arrangements will put her relationship with one of her parents at risk.

- [103] In my view, weighing the factors I have identified leads me to conclude that having A live and attend school in Gold River is in her best interests. As in August 2020, A has a strong connection to the community. She is a member of a household that includes her father and his common-law spouse and will soon include her younger sibling.
- [104] I agree with Justice Gomery that whether life in the village of Gold River will continue to meet her needs when she grows older remains to be seen. I am not satisfied, however, that A has outgrown Gold River at the age of seven.
- [105] Like Justice Gomery, I have taken account of Ms. L's problematic conduct, both before and after trial. I am more confident that Mr. T will take appropriate steps to preserve A's relationship with Ms. L, including showing flexibility when her work schedule permits additional parenting time, than Ms. L would be if A was permitted to relocate to Comox.
- [106] I conclude that the parenting arrangement that will best serve A's interests and needs is for her to reside with her father in Gold River while school is in session. Ms. L shall have substantial parenting time on weekends and during school holidays. In particular, I direct that Ms. L will have parenting time on long weekends and one additional weekend per month while school is in session. Mr. T will have parenting time at least one weekend per month. When school is not in session, Ms. L will have two-thirds of the parenting time.
- [107] If her work schedule permits, Ms. L may also exercise mid-week parenting time in Gold River. The parties may involve a parenting coordinator if they need assistance working out such details. The parenting coordinator will be authorized to approve additional parenting time for Ms. L during the week provided that the overall parenting time for Ms. L does not exceed 60%. To be perfectly clear, mid-week parenting time during the school year will take place in Gold River. I will provide further details of the revised parenting order later in these reasons.

Retroactive child support

- [108] Ms. L seeks an order for retroactive child support based on the difference between what Mr. T paid and the amount he ought to have paid based on his actual earnings. Mr. T opposes the application by arguing that the D.B.S. criteria are not met. I am satisfied that it is appropriate to order retroactive child support paid by installments.
- [109] At trial Justice Gomery imputed income of \$90,000 per year to Mr. T for child support purposes based on his stated intention of finding employment in Victoria BC. Justice Gomery ordered that Mr. T's obligation to pay child support was subject to annual review or earlier in the event of a material change of circumstance.

- [110] Mr. T returned to work at Imperial Oil on September 21, 2020. On October 6, 2020, Ms. L wrote to Mr. T's lawyer requesting an adjustment to child support payments. In November 2020, Mr. T sent Ms. L a current pay stub, though I agree with Ms. L that it was difficult to discern what his actual pay was at that time. On December 13, 2021, Mr. T sent Ms. L his 2020 notice of assessment which showed that he earned \$141,146 in line 15000 income in 2020.
- [111] Mr. T has not received his 2021 notice of assessment. He has not provided any documents to establish his 2021 income. In an affidavit made on April 7, 2022, in answer to an application for a change to child support payable prospectively, Mr. T said that he had not completed his 2021 taxes, but he was "agreeable to [his] income for child support being set at \$175,000 per year, which [he] believe[s] represents the approximate amount of income [he is] able to earn while working at Imperial Oil."
- [112] Section 152(1) of the Family Law Act provides the authority to vary retroactively an order for child support.
- [113] D.B.S. v. S.R.G., 2006 SCC 37 sets out the factors a court should consider when determining whether to order retroactive child support. The core principles that govern child support, including retroactive child support, were identified by the Supreme Court of Canada in D.B.S. v. S.R.G. and restated at para. 10 in Michel v. Graydon, 2020 SCC 24. I have considered these principles in reaching my decision.
- [114] The first factor is the reason for the delay in applying. I find there is no delay in applying in this case. Ms. L gave notice that she expected child support to be adjusted promptly upon learning that Mr. T had returned to a job that paid more than \$90,000 per year. Ms. L did not receive his 2020 notice of assessment until December 2021. He still does not have his 2021 notice of assessment in hand. Ms. L did not delay bringing this application.
- [115] The second D.B.S. factor considers the payor's conduct. Mr. T says he cooperated by providing information and agreed to Ms. L's preferred parenting schedule in exchange for leaving child support at the level ordered by Justice Gomery. Mr. T acknowledges that he and Ms. L did not intend to and did not in effect bargain away the child's right to support. He simply emphasizes his level of cooperation with Ms. L.
- [116] Ms. L acknowledges that A's needs have been met despite Mr. T's failure to pay the appropriate amount of child support. Ms. L has benefitted from sharing accommodation with her father in Gold River, in effect reducing her expenses from what they otherwise would be.
- [117] The final D.B.S. factor is financial hardship to the payor parent if a retroactive award is made. As the primary breadwinner in his family, with a baby on the way, Mr. T says he will suffer financial hardship if he is required to pay retroactive child support of \$13,724. However, Mr. T has not provided the court with sufficient evidence to conclude that he will suffer such hardship. In particular, there is no updated F8 financial statement, no 2021

notice of assessment, no recent pay stub, no information about his family's income and expenses, and no information about his assets and debts.

- [118] In summary, I accept that it is appropriate in this case to order retroactive child support. I accept Ms. L's ultimate submission that income of \$140,000 ought to be imputed to Mr. T for September to December 2020 (i.e., net monthly child support of \$1,278 was payable), and \$175,000 ought to be imputed to Mr. T for 2021 through to April 2022 (i.e., net monthly child support of \$1,551 was payable). On that basis, I order Mr. T to pay retroactive child support in the amount of \$12,632 payable by monthly installments of at least \$1,000 in addition to other child support payable through Family Maintenance Enforcement Program until the balance and interest is paid.

Parenting coordinator

- [119] Justice Gomery ordered that the parents agree on the identity and retainer of a parenting coordinator within 30 days of the final order to assist with the implementation of the final order from trial. Justice Gomery ordered that the cost of the parenting coordinator be shared equally between the parties. He further ordered that either party may apply to the court to appoint a parenting coordinator and determine the contractual basis for the appointment if they were not able to agree within 30 days.
- [120] The parties did not in fact retain a parenting coordinator after trial, and neither party sought to enforce the parenting coordinator provisions of the final order before Ms. L brought this application.
- [121] The parties now agree to appoint Joan Cotie as parenting coordinator, though she did not confirm the retainer before this application was heard. I will renew Justice Gomery's order for the retainer of a parenting coordinator, either Joan Cotie or another parenting coordinator if Ms. Cotie is not able to assist.
- [122] The only remaining issue is how the costs of the parenting coordinator will be shared. I am satisfied that Justice Gomery's order leaves open the option to order a different fee split than was ordered at trial. Given the current disparity in the parties' incomes, I find that allocating the parenting coordinator's fee 75/25, with the larger share payable by Mr. T, is appropriate in the circumstances.

Disposition

- [123] For these reasons, I order as follows:

- a) Within 30 days of this order, the parties will retain Joan Cotie or if she is not available or willing to be retained, they will agree on the identity and retainer of a parenting coordinator to assist in the implementation of this order, including the parenting arrangements, the resolution of any disagreements concerning the exercise of parental responsibilities as provided in the final order made by Justice Gomery and such other matters as the parties may agree in writing.
- b) The reasonable costs of the parenting coordinator shall be shared, with 25% payable by the claimant and 75% payable by the respondent. If one party refuses to pay his or her share, the other party may pay it and claim it from the party who refused to pay.
- c) If Joan Cotie is not willing or available to accept the retainer and the parties have not agreed on the identity of a parenting coordinator within 30 days of this order, either party may apply to the court to determine who will be appointed as parenting coordinator and on what contractual basis.
- d) A will reside with Mr. T in Gold River BC while school is in session.
- e) While school is in session, A will have parenting time with Ms. L as follows:
 - 1) Every long weekend, including long weekends attributable to pro-D days, from the evening preceding the long weekend until the last afternoon of the long weekend;
 - 2) In addition, one weekend per month to be chosen by Ms. L from the Friday evening to the Sunday afternoon, provided that Ms. L will notify Mr. T of the weekends chosen by her for parenting time by text or email at least seven days in advance.
- f) When school is not in session, A will have two-thirds of her parenting time with Ms. L and one-third of her parenting time with Mr. T, in both cases rounded to the nearest full day, on dates to be chosen by Ms. L with notice to Mr. T by email at least 30 days in advance.
- g) The parenting schedule provided by this order may be varied by a written agreement between the parties expressed by text, email, or otherwise in writing.
- h) In addition to the parenting time with Ms. L while school is in session as set out in paragraph (e), Ms. L may have additional mid-week parenting time with A in Gold River BC, as agreed by the parties in writing or as allocated by the parenting coordinator, provided that parenting time allocated to Ms. L does not exceed 60 percent on an annual basis.
- i) Transitions of A from Ms. L's care to Mr. T's care and from Mr. T's care to Ms. L's care shall be arranged at a location and specific time as agreed by the parties or as determined by the parenting coordinator if the parties are not able to agree.
- j) Mr. T is liable to pay Ms. L retroactive child support in the amount of \$12,632 for the period September 2020 to April 2022 payable by monthly installments of at least \$1,000 in addition to monthly child support otherwise payable through Family Maintenance Enforcement Program until the balance and interest are paid.

- k) As Mr. T succeeded on the relocation applications, the most significant issue in dispute, he is entitled to costs of his summary trial application and Ms. L's summary trial application on the relocation issue. Ms. L is entitled to costs on her application for retroactive child support and allocation of the cost of the parenting coordinator.

[124] Those are my reasons.

"Lamb J."

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Prepared on 26 October 2026 · Esheria