

CANADA / JUDGMENT

Hambley v. Sharp

2022 BCSC 397

COURT

Supreme Court of British Columbia

DECIDED

22 February 2022

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2022 BCSC 397 Hambley v. Sharp

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hambley v. Sharp,

2022 BCSC 397

Date: 20220222

Docket: E18600

Registry: Duncan

Between:

Jarret Ryan Hambley

Claimant

And

Lisa Danielle Sharp

Respondent

Before: The Honourable Madam Justice Hardwick

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

A.G. LaCroix

Counsel for the Respondent:

R. Olorunjojon

Place and Date of Trial/Hearing:

Duncan, B.C.

February 17, 2022

Place and Date of Judgment:

Duncan, B.C.

February 22, 2022

- [1] THE COURT: These are my oral reasons for judgment in the application filed by the claimant, Jarret Ryan Hambley, on November 29, 2021, and heard before me on Thursday, February 17, 2022. As these are oral reasons for judgment, should a transcript be ordered, I reserve the right to edit for grammar and to include the full body of the statutory provisions referred to. However, the substance of these reasons for judgment shall not change in that event.
- [2] This application concerns the child, as defined by the Family Law Act, Nola Quinn Hambley-Sharp, born January 30, 2014. Nola, as I shall refer to her, recently turned 8 years of age. She is currently in Grade 2.
- [3] The specific relief sought is set out at paragraphs 1 to 5 of the notice of application of Mr. Hambley, as follows:
1. An Order pursuant to section 69(2) of the Family Law Act prohibiting the respondent, Lisa Danielle Sharp, from relocating with the child, Nola Quinn Hambley Sharp, born January 30, 2014, ("Nola") from Youbou, British Columbia to Victoria, British Columbia;
 2. In the alternative, in the event the respondent continues to reside in Victoria, British Columbia, an Order pursuant to section 215 of the Family Law Act that paragraphs 3 and 4 of the Order made by the Honourable Judge Rogers on June 13, 2018 in Provincial Court of British Columbia Action 12324, Duncan Registry ("Judge Rogers's Order") be changed, suspended or terminated and replaced with the following:
 - (a) An order pursuant to section 45(1)(b) of the Family Law Act that the claimant have primary parenting time with Nola upon such terms that Nola will be able to continue to attend school full time at Palsson Elementary School in Youbou, British Columbia, with the respondent to have specified parenting time that does not interfere with Nola's full time attendance at Palsson Elementary, and upon such terms as this Honourable Court may deem meet;
 - (b) An Order pursuant to section 45(1)(a) of the Family Law Act that the Claimant, Jarret Ryan Hambley, shall exercise the following parental responsibilities for Nola:

- (i) Making day-to-day decisions affecting Nola and having day-to-day care, control and supervision of Nola;
 - (ii) Making decisions respecting where Nola will reside;
 - (iii) Making decisions respecting with whom Nola will live and associate;
 - (iv) Making decisions respecting Nola's education and participation in extracurricular activities, including the nature, extent and location;
 - (v) Applying for a passport, licence, permit, benefit privilege or other thing for Nola;
 - (vi) giving, refusing or withdrawing consent for Nola, if consent is required;
 - (vii) Receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (c) An Order pursuant to section 45(1)a) of the Family Law Act that the Claimant, and the Respondent shall jointly exercise the balance of parental responsibilities set out in section 41 of the Family Law Act for Nola;
3. An order that the Respondent, Lisa Danielle Sharp, pay interim child support for the child, Nola Quinn Hambley Sharp, born January 30, 2014 ("Nola") in the amount of \$307.00 per month commencing December 1, 2021 and payable on the 1st of each and every month thereafter until further order of this Honourable Court, based on an imputed minimum wage annual guideline income of \$32,864;
4. An order pursuant to section 64(1) of the Family Law Act, that the Respondent, Lisa Danielle Sharp, be restrained from removing the child, Nola Quinn Hambley Sharp, born January 30, 2014, from Vancouver Island without further Court order or written agreement of the Claimant;
5. Costs.
- [4] Paragraph 3 of the notice of application, which pertains to the issue of child support payable to the claimant, was adjourned generally with the consent of both counsel, as neither party has filed a Form 8 financial statement in this proceeding and, as such, I was not in a position to be making a determination as to Guidelines income for either party at this time. The child support issue also clearly turns on the primary issue in this application, where should Nola primarily reside. It can be reset in accordance with the provisions of the British Columbia Supreme Court Family Rules.
- [5] Turning to the facts, the claimant is the biological father of Nola. At present, the claimant is a self-employed drywall contractor and has been so at all material times since at least 2017, in or around the Cowichan Lake area of British Columbia on Vancouver Island.

- [6] The respondent is the biological mother of Nola. The respondent worked in administrative, hospitality management, and service industry positions during the material time. She is presently unemployed. The respondent's present unemployment and plans for returning to the workforce are relevant to the application before me and so I shall return to that point later.
- [7] The parties cohabitated in a marriage-like relationship prior to Nola's birth. The exact date upon which that cohabitation commenced is disputed in the affidavit evidence, but that fact is not material to the matters before the court on this occasion, given the nature of the relief sought, particularly since it is agreed that the parties were clearly cohabitating at the time of Nola's birth.
- [8] The parties married in May of 2015. They are not yet divorced. The parties separated on or about January 1, 2018, but continued to reside together in the former family home located in Youbou, British Columbia, until December 1, 2019, when the respondent vacated by consent, pursuant to the order of Master Dick addressed below.
- [9] Given that the parties are married and not yet divorced, I canvassed with counsel at the outset of this hearing whether there was agreement that the relief sought was solely pursuant to the Family Law Act and not the Divorce Act. Counsel confirmed they agree, on behalf of the parties, that the Family Law Act governs. I have thus based my decision by considering and applying the Family Law Act. This is further, it is agreed, an interim application only and, as such, I have relied upon affidavits which contain hearsay evidence that would otherwise be not admissible if a final order was being sought.
- [10] The claimant has no other children other than Nola. The respondent has two children from two prior relationships who are now over the age of majority. Given that they are adults, the eldest I shall refer to by his initial A., and the younger I shall refer to by his initial R.
- [11] The claimant presently resides in Youbou, British Columbia. Youbou is a small community on the north shore of Cowichan Lake in the Cowichan Valley area of Vancouver Island.
- [12] The respondent presently resides in the District of Saanich. Saanich is located in the Greater Victoria area in the Province of British Columbia. The respondent has done so since approximately June of 2021. The respondent resides in Saanich in a residence owned by her parents, Bob and Barb Sharp. Although I have some concern with respect to the stability of the relationship between the respondent and her parents, this is not the first time the respondent's parents have provided her with accommodation. The evidence is clear that the respondent's parents previously purchased a residence for her to reside in and she was residing in that residence at the time the parties commenced cohabitating.

- [13] I will note that although the respondent provides an explanation for her failure to do so, notice of her intended relocation from Youbou and/or the Cowichan Valley generally to Victoria/Saanich was not provided to the claimant as required by Part 4, Division 6 of the Family Law Act. Similarly, although the claimant did not consent to the relocation, he did not file his notice of application until November 2021, due to issues involving his former counsel, which are also detailed in the material.
- [14] As set out below, I have proceeded to determine this matter on its merits and not on these competing procedural issues, as I consider that to be in Nola's overall best interests.
- [15] With the agreement of present counsel and to assist me in understanding the geography relevant to this application, I have consulted several Google maps for the purposes of taking judicial notice that Youbou is approximately the following distance from Duncan and/or the Victoria/Saanich area: Duncan, 41 kilometres, approximately 35 minutes, and Victoria/Saanich, 102 kilometres and approximately one hour, 25 minutes. I further understand there are two ways to travel between Youbou or the Cowichan Valley generally to Victoria/Saanich: by car over the Malahat Highway or by a ferry to and from the Mill Bay, British Columbia, terminal. I understand that both of these means of transportation have potential complications, such that the estimate of one hour, 25 minutes is likely optimistic.
- [16] The parties did not always reside in Youbou. They have, however, resided on Vancouver Island at all material times. As I understand the evidence, the claimant moved to Youbou full-time in the summer of 2017 with R. This is significant only because it does suggest that the respondent was comfortable with the parenting ability of the claimant, otherwise she presumably would not have left R. in the primary care of the claimant voluntarily.
- [17] As detailed in the affidavit evidence, the respondent and Nola resided primarily outside of the Cowichan Valley area and commuted to Youbou on weekends or other times until January of 2018, when they both moved to Youbou full-time. As indicated, the parties and Nola remained in Youbou until separation and after, until the respondent moved to Saanich in or about June of 2021.
- [18] Following the separation, there have been certain court orders made and it is apparent that this matter could be regarded as a somewhat high-conflict family law matter. The first key order for the purposes of determining this application is the British Columbia Provincial Court order of Judge Rogers made June 13, 2018. The material terms of that order provide that the parties shall have equal shared parenting of Nola upon a specified parenting schedule; the parties shall equally share the parental responsibilities for Nola; and a s. 211 report is to be prepared by Dr. Aubé or other qualified person as agreed by the parties.
- [19] The other relevant order is the British Columbia Supreme Court order of Master Dick made on October 31, 2019. This order, which was by consent, consolidated this proceeding with the prior Provincial Court file in which Judge Rogers made the aforementioned order. It also provided for the payment of the sum of \$20,000 by the claimant to the respondent in full and final satisfaction of the parties' property issues, including any interest the respondent may

have in the former family home located in Youbou. By consent, the respondent was to vacate that family home on or before December 1, 2019, and exclusive occupancy was granted in favour of the claimant.

- [20] The parties, by mutual agreement, revised the parenting schedule that was in place following the order of Judge Rogers somewhat in August of 2020, wherein the schedule became a two-two-five-five rotating schedule with exchanges at noon. The evidence before me suggests that the parties have substantially complied with that schedule and whatever fairly minor difficulties that may have occurred from time to time are not material to the issues before the court on this application.
- [21] The school where Nola attends is in the catchment district for the former family home in Youbou. That is Palsson Elementary school. It is the only school that Nola has formally attended. Following the respondent's move to Victoria/Saanich, it was not possible for Nola to attend school during the respondent's parenting time at Palsson Elementary school as the commuting time is prohibitive. Given the commute and the inability to cross-enrol a child in two public schools concurrently, Nola has been home schooled by the respondent on all school days she is in the care of the respondent during the 2021/2022 school year.
- [22] Without suggesting that the respondent is not capable of adequately home schooling Nola, this is not an ideal situation. Nola, if attending public school, should be attending on a full-time basis. Nola, if she were being home-schooled, should be doing so on a full-time basis. The hybrid arrangement that exists presently is not sustainable and it is for this reason primarily that I have decided to give oral reasons for judgment in a timely way.
- [23] So turning back to the order of Judge Rogers, as set out above, it contemplated the preparation of a s. 211 report by Dr. Aubé or another professional. It is trite to say that a s. 211 report is intended to be the "eyes and ears" of the court. The evidence indicated that arrangements were made to comply with that order in a timely way thereafter. However, for reasons I will refer to later, this report was never completed and Dr. Aubé prepared a letter to the court on August 15, 2019, some 13 months after the order appointing her was made, advising that she was unable to complete the s. 211 report. No report has been prepared by any other qualified expert since that time either.
- [24] Since leaving the former family home in Youbou in accordance with the order of Master Dick, the respondent's accommodation arrangements have been varied and I find, on balance, unstable. I shall again return to this point in my consideration of the merits of the application as it is a concern to me that the options for stable accommodation in the Youbou area or closely surrounding communities are limited.

- [25] In terms of the respondent's present accommodation arrangements in the residence of her parents, Bob and Barb Sharp, I do find them to be generally acceptable. It appears clear Bob and Barb Sharp reside for a portion of the year out of the country, and even when they are residing in the home, the evidence suggests that it is more than suitable for the respondent and Nola. My greater concern is with respect to the potential volatility of the relationship between the respondent and her parents.
- [26] I shall specifically refer in this regard to Exhibit "N" of the affidavit number 2 of the claimant in this proceeding, which is an email from April 18, 2018 that is apparently sent from the respondent's father to the respondent, and then forwarded to the claimant. Although the chain of forwarding is admittedly not apparent on the face of the email, the respondent notably does not dispute that the email was sent. Further, and more significantly, the respondent relies upon the affidavit of her mother, Barb Sharp, which is supportive of her and seeks to distance herself from any conflict with the respondent, and places certain blame on the claimant for having tarnished the relationship. But the respondent does not rely upon an affidavit of her father Bob Sharp to suggest that this email was not sent or that it did not adequately explain his thoughts as at April 18, 2018.
- [27] Other than as set out below in applying the relevant provisions of the Family Law Act, I shall not refer further to the facts of this case. However, as I indicated to counsel and the parties at the time of the hearing of the application, I reviewed the materials in detail before the hearing and have reviewed them again in the process of preparing these reasons for judgment. I am thus comfortable that I understand the factual background of the case, including those portions of the evidence which are disputed and cannot necessarily be resolved on the basis of affidavit evidence without the benefit of cross-examination.
- [28] Turning to the law, as the parties have agreed that the Family Law Act governs, the law on this application is not controversial. Section 37 of the Family Law Act provides that the court is obligated to engage in an analysis of the best interests of the child. I refer first to s. 37(1), which provides that:
- 37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.
- [29] Section 37(3) further provides that an order is not in the best interests of a child unless it provides, to the greatest extent possible, the child's physical, psychological and emotional safety, security, and well-being.
- [30] Turning to the relocation provisions of the Family Law Act, s. 65(1) defines a relocation as:
- a change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with
- (a) a guardian, or

(b) one or more other persons having a significant role in the child's life.

[31] In this case, both parties have correctly conceded that moving Nola's residence from Youbou to Victoria and/or Saanich constitutes a relocation, because it is not possible to continue the current shared parenting arrangement that sees Nola attending school on an only part-time basis. For a shared parenting arrangement to continue, the parties would need to be within reasonable driving distance of Nola's school, whatever that school might be, such that she could attend on a full-time basis.

[32] This is also consistent with the case law in this regard. I reference briefly the decision of the British Columbia Court of Appeal in *L.A.C. v. G.N.W.*, 2016 BCCA 132, which is a case that considers a move which is incompatible with the existing parenting schedule, including the educational arrangements in place for the child.

[33] Continuing with the application of Division 4, Part 6 of the Family Law Act, there is an order for shared parenting time. The schedule was modified slightly by the parties as indicated, but it remains truly a shared parenting regime. As such, the operative section is s. 69(5).

[34] For the purpose of the transcript, I shall set out all of the provisions of s. 69:

69 (1) In this section, "relocating guardian" means a guardian who plans to relocate a child.

(2) On application by a guardian, a court may make an order permitting or prohibiting the relocation of a child by the relocating guardian.

(3) Despite section 37 (1) [best interests of child], the court, in making an order under this section, must consider, in addition to the factors set out in section 37 (2), the factors set out in subsection (4) (a) of this section.

(4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,

(a) 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, and

(b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise.

(5) If an application is made under this section and the relocating guardian and another guardian have substantially equal parenting time with the child, the relocating guardian must satisfy the court

- (a) of the factors described in subsection (4)(a), and
 - (b) that the relocation is in the best interests of the child.
- (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 . . . [and]
 - (d) any restrictions on relocation contained in a written agreement or an order.
- (7) In determining whether to make an order under this section, the court must not consider whether a guardian would still relocate if the child's relocation were not permitted.
- [35] As is apparent from the foregoing, there is no presumption that relocation is in the best interests of Nola and the onus rests upon the respondent to satisfy this court that the relocation should be permitted on an interim basis.
- [36] In terms of case law, beyond confirming the appropriate application of the aforementioned statutory framework, the case law on relocation or mobility cases has somewhat limited utility as each case turns on its own unique facts. That said, there are two decisions, in addition to that already referred to, which I find instructive and which I will reference.
- [37] *Pepin v. McCormack*, 2014 BCSC 2230: In this case, which involves a trial involving a young child and a possible relocation between Vancouver and Scotland, the court found at paragraph 69 that good faith under the Family Law Act is a subjectively-held state of mind. It involves an assessment of whether the reasons proposed by the relocating 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, the decision to relocate will normally be found to have been made in good faith.
- [38] The second decision is *C.M.B. v. B.D.G.*, 2014 BCSC 780, a decision of Madam Justice Fleming of this court, which stands for the proposition that the court must, in addition to the factors in s. 69(4)(a), also consider the factors in s. 37(2) with respect to the best interests of the child. Those best interests effectively trump good faith and reasonable arrangements for preserving the relationship with the other guardian, such that relocation may be granted where it is exclusively in the child's best interests.
- [39] Applying the provisions of the foregoing law to the facts of this case, I have reached the following conclusions.

- [40] Good faith: This is the most difficult portion of the application to make a determination in respect of. The respondent clearly had difficulties finding stable accommodation since departing the former family home. Although the evidence as to the respondent's income prior to her leaving her employment was scant in the record, it is not difficult for the court to recognize that rental accommodation is limited in this region, and that the cost of the rental accommodation presented by the claimant in his evidence would likely be challenging, based upon the likely income for a person with the respondent's general work history and skillset.
- [41] In this regard, I also note that the claimant does not pay child support for Nola, despite the fact that there is a shared parenting arrangement, and he, despite the lack of a Form 8 financial statement, would clearly appear to have income in excess of the respondent, given that he works on a full-time basis and the respondent is, at least currently, unemployed.
- [42] The respondent has also had difficulty securing stable and enduring employment in the Cowichan Valley. In this regard, however, I find the respondent's evidence less compelling. There is limited evidence before the court to assist in determining the respondent's present job opportunities in that region. Beyond the respondent's own scant evidence, there is no meaningful evidence as to the limitations on the respondent's ability to work in certain industries due to an injury which it is conceded she suffered. Most significantly, there is no evidence the respondent has employment secured or even tentatively secured in the Victoria/Saanich area. Her plan appears to be to return to school to retrain, and I had evidence before me that this retraining could be done in the Cowichan Valley region, as it is not specific course or set of courses that the respondent is proposing to take which are only available in Victoria.
- [43] The next point I turn to is with respect to the s. 211 assessment which was ordered to be prepared by Judge Rogers, by Dr. Aubé. The respondent's conduct with respect to her compliance with that order is problematic.
- [44] I shall specifically refer to the letter from Dr. Aubé to the court which is attached as Exhibit "C" to the affidavit number 2 of Jarret Hambley. It provides as follows:

The following is to inform you that I won't be able to provide you with the requested (June 2018) comprehensive Section 211 report on the above parties because one of the parties has not been collaborative in this process. Despite serious and extensive efforts, at the present time, I am unable to comply with your Order.

The following is a summary that illustrates the various steps attempted to complete this assessment

1. June 13, 2018: Court Ordered for the completion of a section 211;
2. July 13 2018: A joint letter from counsels sent to Dr. Aubé requesting a psychological assessment/ section 211;

3. August 15, 2018: Response from Dr. Aubé proposing February 2019 to complete the assessment In Youbou and explaining that the psychological evaluation will take 2 full days of the parents' time;
4. August 29, 2018: Dr. Aubé received \$2,000 from Mr. Hambley as a retainer to secure the assessment;
5. January 16, 2019: E-mail to Ms. Sharp and Mr. Hambley proposing to complete the assessment In Youbou on February 11 and 12;
6. January 17, 2019: Response from Ms. Sharp saying that she won't be able to take time-off from her work to complete the section 211 evaluation;
7. January 18, 2019: E-mail from Dr. Aubé to both Counsels to inform them of the situation;
8. January 18, 2018: Mr. Hambley's lawyer (Ms. Barbara Read-Greenan) confirming that her client is available for February 11 and 12;
9. January 18, 2019: Through E-mail correspondence, Ms. Sharp's counsel (Ms. Patricia Blair) asking Dr. Aubé for other dates to accommodate her client's work schedule;
10. January 18, 2019: Dr. Aubé proposed 3 sets of schedules: Feb 7 & 8; Feb. 12 & 13; Feb. 13 & 14;
11. January 18, 2019: E-mail from Ms. Sharp's counsel asking for a weekend schedule to accommodate her client;
12. January 21, 2019: Dr. Aubé proposed a compromise for the assessment 2 Days: one weekday and one weekend day: a Friday and a Saturday;
13. January 22, 2019: Ms. Sharp's counsel wrote that her client has spoken to her employer and is unable to take the Friday off during the low season. She explained that once the tourist season picks up, she can arrange for coverage.
14. February 14, 2019: Dr. Aubé proposed to postpone the evaluation/ section 211 to the month of July or August 2019;
15. Mr. Hambley reported that he found out via "Facebook" that Ms. Sharp went skiing for the weekend to Mt Washington on Friday February 22 and that once the weekend was over she dropped her children off the following Monday and went to Vancouver for an overnight "girls trip";
16. July 4, 2019: E-Mail to Ms. Sharp and Mr. Hambley. Dr. Aubé proposed to come to Youbou on August 13 and 14;
17. July 5, 2019: Response from Mr. Hambley; the dates are fine for him;
18. July 8, 2019: Considering the non response from Ms. Sharp, Dr. Aubé sent a 2d E-Mail to both counsels.

19. July 8, 2019: Brief response from Ms. Sharp who wrote : "August 13 and 14 is fine";
20. July 12, 2019: An assessment schedule is sent to both parents. The schedule stipulated that no children be present during the interviews with each parent;
21. August 9, 2019: E mail from Ms. Sharp, indicating that she has no one to watch her daughter during the interviews;
22. August 9, 2019: Response from Dr. Aubé explaining that it could be harmful for children to be present for these interviews;
23. August 9, 2019: I was informed by Ms. Blair that she no longer was representing Ms. Sharp;
24. August 9, 2019: Mr. Hambley indicated that his mother is available to take care of Nola.

On August 13, 2019, I met Mr. Hambley at his home in Youbou. The parties are still living in the same house: Mr. Hambley lives in the basement and Ms. Sharp lives upstairs. Before my interview with Mr. Hambley, I went upstairs and gave Ms. Sharp a psychometric questionnaire to complete in the morning. She was brisk, unfriendly and clearly not pleased to be part of this assessment.

I then had a complete clinical interview with Mr. Hambley, downstairs, for a duration of 4 hours. Following the scheduled arrangement, around 13.00 h, I went upstairs to meet with Ms. Sharp for the clinical interview. Ms. Sharp's son Rhys, 17 years old, was sitting beside his mother. I explained to Ms. Sharp that I could not conduct the interview in the presence of her son. The material we were going to discuss was private and should not be heard by a child. I proposed to have the interview with her, outside on a patio or to ask her son to be the one who would go outside. I also related to Ms. Sharp that I wished she gave me the opportunity to explain the process of the evaluation but I needed to do so without the presence of her son. Ms. Sharp reported that her son should not leave because it was his house. She then indicated that she was not interested to be part of this assessment considering what she read on the web about me. I asked Ms. Sharp to come outside so we could talk more privately which did not happened.

Considering the tense atmosphere and the obvious resistance of Ms. Sharp, I opted to end the assessment. I informed her that I would simply need to write to the Court to provide an update about the status of this psychological evaluation.

Overall, it is clear that Ms. Sharp is not interested in participating in the evaluation. I am unable to complete this evaluation without her consent and full participation.

This said, I am able to relate that after meeting Mr. Hambley for 4 hours, I did not see any sign of psychopathology. He presented as a soft-spoken, kind and well-balanced man. He is clearly overwhelmed by the caustic and stressful situation that is going on with Ms. Sharp. The situation is not easy considering that they still live under the same roof of a small house. I am sure that anyone living under those circumstances would feel an enormous tension and stress.

I also deplore that Ms. Sharp involved her son in this process. It seems clear that he did not need to be there and be part of that scene.

I am very much aware that many parents are not pleased to complete such assessments following a Court Order. Although many resent the process, most parents comply. They figure that it is in their best Interest to convince me of their parenting skills. In over 30 years completing Custody and Access reports, I never encountered a situation when I went out of my way to accommodate people, traveled from Vancouver to their home in Youbou after they agreed on the date and location, and getting a refusal once on site. What happened in Youbou, was a first for me, especially considering that trying to set up this assessment had been particularly lugubrious.

I must point out to the Court that I spent a great deal of time preparing for the evaluation which included: extensive correspondence trying to find a time to do the assessment; the travel time to Vancouver Island and Youbou and reading the material that was sent by counsels including several affidavits.

I am looking for the Court's Directions. If the Court needs any additional information, I would be more than happy to be of assistance. I add to this letter my Curriculum Vitae.

Respectfully submitted

Nicole Aube Ph.D.

Registered Psychologist

[45] The respondent's conduct in complying with the order of the court, based on the letter of Dr. Aubé, is, in my view, unacceptable. I do not consider her explanation that she was concerned about negative reviews of Dr. Aubé online to be convincing. The nature of a s. 211 assessment is such that it is very common that one party is not satisfied with the results. However, this court has accepted Dr. Aubé's expert opinion on multiple occasions, and there is nothing to suggest she was not qualified for this particular appointment. Had the report been prepared and the respondent did not agree with its findings or recommendations, her right was to require Dr. Aubé to attend for cross-examination as the court is not bound to follow the recommendation of a s. 211 report.

[46] I will further note in this regard the submissions made by counsel for the claimant in respect of the respondent's relationship with the father of her two adult sons, A. and R., and the state of those children's relationships with their father and the claimant. A. has no relationship with his biological father. While unfortunate, the evidence does not persuade me that this is a factor that ought to undermine the respondent's good faith.

- [47] The situation with R. is more complicated. I have before me evidence, an affidavit from R.'s biological father, initials R.V., and the reasons for judgment of Judge Kay of the Provincial Court of British Columbia made December 15, 2006. The reasons for judgment of Judge Kay, which were based upon hearing viva voce evidence from the respondent, are not favourable to the respondent. I will refer specifically to paragraphs 6 to 10 of the reasons for judgment found at tab 5 of the application record starting at paragraph 6:
- [6] As counsel for Mr. Valenti says, in the three and a half years since Ms. Sharp and Mr. Valenti separated, there have been 10 court orders with respect to this one very small boy, who is approximately four and a half years old. That, in itself, speaks volumes.
- [7] The evidence is that when the child was very young, Ms. Sharp obtained an ex parte custody order from the court in Ontario and removed the child from Ontario within days. The documentation makes it very clear that at the time she obtained that order she knew she was moving to British Columbia and she did not tell the Ontario court. As a result, that court cancelled that order within days.
- [8] The documentation also makes it clear that during a custody hearing in Ontario, I believe it was October 2003, after Ms. Sharp had given evidence, the trial did not finish and had to be continued in April 2004. Before that trial continued, Ms. Sharp obtained an ex parte order in British Columbia without telling the court that she was in the middle of a custody trial in Ontario. One would think that would be of huge significance.
- [9] Ms. Sharp's evidence before Judge Hubbard when she applied for the ex parte order included the fact that Mr. Valenti was using a different name and she did not know where he was. However, he was served that afternoon, so it is quite clear that she knew where he was. The Sheriffs were able to serve him immediately with a copy of the ex parte order.
- [10] The bottom line is that Ms. Sharp's evidence cannot be relied on in many, many aspects.
- [48] If this were a trial, the respondent would be subject to cross-examination on these matters, and so I am not considering myself in any way bound by the rulings of Judge Kay on an entirely different fact pattern. I am, however, taking into consideration those findings on the issue of good faith, as it is a concern to this court that the respondent has previously been found to have, in effect, misled the court, at the very least by omission.
- [49] I am, as indicated, not going to put weight, for the purposes of this interim application, on the affidavit of R.'s father, R.V. It details the challenges he encountered in obtaining and enforcing access, as it was then known, to R. However, it fails to address the fact that R.V. was apparently charged and convicted of at least one Criminal Code violation arising from family violence as against the respondent. Should this matter come on for trial, R.V. will have the opportunity to be called as a witness to explain all of the circumstances, if they are relevant, but in light of the failure to address this point in his affidavit, I am not placing weight on it for the purposes of this interim application.

- [50] In concluding to not put weight on the evidence of R.V., I will make mention of the fact that the parties here have been consistently following the parenting schedule for Nola and neither has taken "self help" remedies to alter that schedule in a material way. As such, I do not consider the relationship between the respondent or the father of R., and A. for that matter, to be of assistance for the purposes of this application.
- [51] I have considered the deterioration of the relationship between R. and A. and the claimant following separation. It, too, is unfortunate; however, both of those children are now adults and it is ultimately their choice as to whether or not they continue to have a relationship with their mother's former spouse.
- [52] Having regard to all of the circumstances and considering the weight to be placed on the relative factors, I have concluded that the proposed relocation is not in good faith, as the respondent has not convinced me that there are any significant benefits to the relocation beyond the fact that she is presently able to live without paying rent in a home owned by her parents.
- [53] I also do have concerns about stability of that arrangement, given there is some evidence before me as to strains in the relationship between the respondent and her parents, and a lack of evidence as to solid employment or educational plans.
- [54] Turning to reasonable and workable arrangements. If the respondent were permitted to relocate to Victoria or Saanich, the respondent has proposed a parenting schedule for Nola as set out in paragraph 59 of her affidavit sworn December 21, 2021, which is at Tab 8 of the application record. It states as follows:
59. I propose that Nola should be allowed to remain with me in Victoria with the following parenting time between us:
- a For me, Monday - Friday and every fifth weekend
 - b. For Jarrett, Friday after school - Sunday at 4:00. In the event that Nola does not have school on any Friday and/or Monday, parenting time will be from Thursday after school - Monday at 4:00.
 - c. All holidays - spring, summer and Christmas will be split equally.
 - d. Special holidays - Easter and thanksgiving will be rotated
 - e. And as otherwise agreed between us
- [55] Having regard to Nola's attendance at school and the distance between Victoria/Saanich and Yubou, I find this schedule to be reasonable. I specifically note that should one parent be the primary weekday parent, they still ought to have some opportunity for quality weekend time with Nola. Every fifth weekend is entirely appropriate in this regard. This would also spare Nola some commuting time for those weeks and give her the opportunity to spend time with friends from school or her home community which, given her age, she would

likely appreciate.

Section 37 Factors - Best Interests of the Child

[56] I must now turn to considering the factors set forth in s. 37 of the Family Law Act. From the decision of this court in C.M.B. v. B.D.G., these factors can trump the fact that I have concluded on the evidence that the relocation request has not been made in good faith.

(a) the child's health and emotional well-being

[57] Nola, on the basis of the evidence on this interim application, appears to be a generally happy and well-adjusted child who transitions between her parents without significant difficulty. She has the benefit of good relationships with key members of her extended family. She is attending counselling, but nothing in this regard gives the court significant concern.

[58] Specifically while reference was made to concerns about Nola being potentially dyslexic, the evidence before the court at this particular time does not support anything more than a general concern from the respondent. However, I do consider the respondent to have been acting in Nola's best interests in having this concern assessed with the Learning Disability Centre in Victoria, and if there is an ongoing concern, I would hope that the claimant would be supportive of Nola receiving services available from or through this organization, regardless of where her primary residence shall be.

(b) the child's views, unless it would be inappropriate to consider them

[59] Having just turned 8 years old, Nola is on the cusp of when the court might consider her views, having regard to the circumstances and her maturity. There is no evidence as to her maturity and, more importantly, no real evidence as to her views as to where she wishes to primarily reside and attend school. Accordingly, I have not considered this factor under s. 37.

(c) the nature and strength of the relationships between the child and significant persons in the child's life

[60] As set forth above, Nola appears to have a strong relationship with both of her parents. The respondent was, based on her evidence, more of the primary caregiver for Nola in her early years. There is some conflict on the evidence on this point which is hard to entirely reconcile simply on the affidavits. However, and more importantly, based on the evidence before the court currently, it appears Nola is doing well in a shared parenting situation where both parents assume responsibility for caring for her during their parenting time. This started while the parties were still residing separate and apart in the former family home, but more importantly has continued since the parties ceased doing so effective December 1, 2019. That was more than two years ago.

(d) the history of the child's care

- [61] My findings on this issue effectively mirror those set out above regarding subsection (c). Since at least December 1, 2019, both parties have been able to care for Nola during their portions of the shared parenting time. This is more significant than who bore what role when Nola was an infant or a preschooler, an issue that is hard to resolve on the basis of the conflicting affidavit evidence.
- [62] I will briefly reference the fact that in the materials there are allegations by both parties of excessive alcohol consumption by the other. However, I have placed no weight on those allegations as (a) the evidence is conflicting and (b), more importantly, there is no evidence of any substantive concerns such as the involvement of the Ministry of Children and Family Development, or any effort by either party to obtain an order that restricts the ability of the other parent to consume alcohol during or before parenting time. Had that concern been live, one would have assumed that either parent would have sought such an order, potentially on a mutual basis.
- (e) the child's need for stability, given the child's age and stage of development
- [63] I consider this to be a significant factor. Nola only just turned 8 years of age. She needs stability. She is, on the basis of the evidence, doing very well considering that she has been doing a hybrid model of schooling and living in two different communities over the past school year. However, this is not sustainable.
- [64] On this issue, I find the evidence of the claimant to be persuasive. He continues to reside in the former family home. He has stable self-employment and has for some time. He has a stable relationship with his parents who, although live primarily in Victoria, are able to assist him and are clearly someone that the respondent trusts, as she placed her sons in the childcare operated by the claimant's mother before the relationship even commenced and is still prepared to let Nola attend after-school care with the claimant's mother if it is needed and the relocation is allowed.
- [65] In contrast, the respondent is struggling to find stability. I have addressed her accommodation concerns above, and recognize the real challenges that this has presented. However, she has moved and changed occupations on multiple occasions since separation. Her only obvious reason for seeking the right to relocate is the provision of free rental accommodation from her parents. However, the respondent's relationship with her parents, as I have indicated, has its blemishes.
- (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
- [66] Although I am concerned about Nola's part-time attendance at school while this issue was before the court, I am satisfied that the parties, despite their difficulties, are able to exercise their parenting 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

[67] This factor is not applicable on the evidence before me on this interim application.

[68] Similarly:

(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

[69] Again, this is not applicable on the evidence before me.

(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

[70] Again, I am satisfied that the parties, despite their difficulties from time to time, are able to exercise their parenting responsibilities and that there is no increased risk to the safety, security, or well-being of Nola or other family members.

[71] The last paragraph is subsection (j) which says:

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being

[72] There are no such proceedings.

[73] Having considered all of the factors set forth in s. 37, combined with my findings above, I have concluded that it is in Nola's best interests to reside primarily in Youbou. In doing so, as articulated above, I have considered in all the circumstances that Nola's need for stability is the most significant factor.

[74] Having regard to that and my findings that the proposed relocation was not made in good faith, I cannot, under the relevant provisions of the Family Law Act, make any other order.

Decision on Mobility

[75] Thus, as set out above, I have come to the conclusion for the purposes of this interim application that the relief sought in paragraph 1 of the notice of application shall be granted. For the purposes of Madam Clerk, I shall read paragraph 1 into the record. That order is that:

1. An Order pursuant to section 69(2) of the Family Law Act prohibiting the respondent, Lisa Danielle Sharp, from relocating with the child, Nola Quinn Hambley Sharp, born January 30, 2014, ("Nola") from Youbou, British Columbia to Victoria, British Columbia;

- [76] Given my findings that I accept there are genuine difficulties with the respondent finding accommodation in the Cowichan Valley area, I am going to delay the implementation of a change in the parenting schedule until April 4, 2022. I have chosen this date on the basis that Nola will be on spring break from March 21 until April 4, 2022, and her part-time attendance at school between now and March 21 will not be a significant prejudice to her best interests given that the respondent is home schooling her during her parenting time.
- [77] If the respondent has not secured or chooses not to secure accommodation in the Cowichan Valley area by April 4, 2022, or such other date as may be agreed between the parties, the parenting schedule will be varied to provide what the respondent has proposed to the claimant if relocation is allowed. Specifically, the parenting schedule will be as set out at paragraph 59 of tab 8 of the affidavit of Ms. Sharp, which I have already read into the record, with the exception that the parenting schedule will be reversed: i.e., Nola will be primarily resident with the claimant and will spend four out of each five weekends with the respondent. The holiday time will be as proposed by the respondent as equally shared.

Parenting Responsibilities

- [78] The parties have at times had some difficulties in their co-parenting relationship. However, I am satisfied that they are able to communicate in a functional way and that they both have Nola's best interests in mind. As such, I do not consider it appropriate to reallocate the parenting responsibilities for Nola as between them under s. 41 of the Family Law Act, at least on an interim basis.
- [79] Accordingly, paragraph 2(b) of the notice of application is dismissed.
- [80] The one caveat to the foregoing is that Nola should, subject to the orders that I have made above, be attending Palsson Elementary full-time after the conclusion of the 2022 spring break. If there are any issues with the respondent's compliance with this portion of the order, this specific issue may be brought back before the court on an interim basis for consideration, whether the claimant shall have sole responsibility for making decisions about Nola's education pursuant to s. 41(d) of the Family Law Act. However, I am not prepared to make that order at this time.
- [81] Paragraph 4 of the notice of application seeks an order that, pursuant to s. 64(1) of the Family Law Act, the respondent be restrained from removing the child Nola from Vancouver Island without further court order or written agreement of the claimant.
- [82] Although notice of the relocation to Victoria and/or Saanich was not provided in accordance with the Family Law Act, there is nothing on the evidence before me that indicates that Nola has been inappropriately removed from British Columbia, and this was confirmed by counsel. There is also nothing to suggest that the respondent has ties to another jurisdiction at this point or has any intention to remove Nola from British Columbia. As such, this relief is dismissed.

- [83] Obviously the parties, as guardians of Nola with shared responsibility, should be communicating with each other regarding any travel for Nola that is outside the Vancouver Island region, but that is a recommendation and not an order.

Conclusion and Costs

- [84] I thank counsel for their helpful submissions in this matter. As set out above, I have not, for the purposes of these oral reasons for judgment, referred to all the facts, but counsel directed me to those which were material and I have considered them.
- [85] As this is only an interim application, the opportunity still exists for the respondent to set this matter for trial and seek a final order for relocation, wherein the parties are able to give viva voce evidence and be subject to cross-examination.
- [86] Having regard to that, although the claimant has been substantially successful on this application before the court today, I shall order that he is entitled to the costs of this application on the basis of it being a one-day hearing as costs in the cause.
- [87] Does counsel have any questions arising from the form of order?
- [88] A. LACROIX: I do not, Madam Justice.
- [89] R. OLORUNJOJOWON: I'd ask to clarify the order on the record, Madam Justice, so -- just so that my client understands. So the status quo remains until April the 4, by which time she has to relocate -- well, essentially with the child back to Youbou.
- [90] THE COURT: Correct.
- [91] R. OLORUNJOJOWON: And then if she does go back to Youbou, then the parties revert to Judge Rogers' order of shared parenting, correct?
- [92] THE COURT: Yes, as I am specifically prohibited by the Family Law Act, I cannot consider whether or not Ms. Sharp will move back. Given the possibility that she might consider to do so, she has until April 4 to find accommodation and the parties shall continue the existing two-two-five-five schedule with a new drop-off as existing, other than the fact that I would understand that they would share spring break perhaps on some different schedule, but that is up to them. In any event, the regular parenting schedule will govern. If Ms. Sharp does not or is unable to move back by the 4 of April, then the new parenting schedule, under which she will have parenting time every fourth weekend, will govern.
- [93] R. OLORUNJOJOWON: Every fifth weekend? As indicated in the -- you said she --
- [94] THE COURT: Sorry, she would have four of five weekends and Mr. Hambley would have every fifth weekend.
- [95] R. OLORUNJOJOWON: Yes. Yes, Madam Justice, yes. Thank you, that's all I wanted to clarify.

"Hardwick J."

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