

CANADA / JUDGMENT

K.C.M. v. S.J.S.

2023 BCSC 435

COURT

Supreme Court of British Columbia

DECIDED

22 March 2023

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2023 BCSC 435 K.C.M. v. S.J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.C.M. v. S.J.S.,

2023 BCSC 435

Date: 20230322

Docket: E49587

Registry: New Westminster

Between:

K.C.M.

Claimant

And

S.J.S.

Respondent

Before: The Honourable Madam Justice Girn

Reasons for Judgment

Counsel for the Claimant:

D.N.S. Wilson

The Respondent, appearing in person:

S.J.S.

Place and Dates of Trial:

New Westminster, B.C.

May 9-13, 2022

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March 22, 2023

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INTRODUCTION

[1] In *Link v. Lenskyj*, 2022 BCCA 341, Justice Fenlon wrote:

[2] For judges, relocation cases are among the most difficult they are called upon to decide. For parents, such cases are far more difficult. No matter what decision is made, the child will not have day to day contact with one of his parents.

[2] This is one of those cases. The Claimant, K.C.M. seeks an order that she be permitted to permanently relocate with the children from Surrey to D'Arcy (near Pemberton, British Columbia). The Respondent, S.J.S. opposes the relocation and asks the children be returned to the Lower Mainland and seeks shared parenting time.

- [3] K.C.M.'s primary argument is that the move is in the children's best interests because it will give her financial stability by lowering her cost of living and provide permanency in employment. She says her financial stability will contribute to the children's wellbeing. She also says the relocation to D'Arcy will enhance the children's quality of life.
- [4] The respondent, S.J.S. opposes the relocation and says it is not in the children's best interests to relocate. He says K.C.M. has not complied with notice requirements nor was it made in good faith.
- [5] The children and K.C.M. currently reside in D'Arcy pursuant to an interim order of Justice Schultes (the "Schultes Order") dated January 4, 2021. Although that application was made pursuant to both the Family Law Act, S.B.C. 2011, c. 25 [FLA], and Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the Schultes Order was made pursuant to the FLA.
- [6] Both K.C.M. and S.J.S. ask that I terminate the Schultes Order. K.C.M. has proposed alternate parenting time for S.J.S. if the court permits her to relocate.
- [7] S.J.S. seeks to have the children returned to the Lower Mainland/Fraser Valley area. He proposes a shared parenting schedule. Additionally, S.J.S. seeks an order that the children be registered in their previous schools in Surrey or the catchment schools in Langley where he currently resides. K.C.M. is opposed.
- [8] Finally, he seeks a conduct order limiting their communications and an order that the younger child receive the Covid-19 vaccine and all other childhood vaccinations. K.C.M. does not oppose the conduct order but takes the position that the decision to be vaccinated should be made by the child.
- [9] K.C.M. is represented by counsel while S.J.S. represented himself at the trial. However, he received assistance from counsel on supplementary written submissions. The parties have provided a great deal of material and detailed submissions, both oral and written, on the facts and the law they consider to be relevant. While I have considered all of their material, in these reasons I will not address every argument made by the parties but rather only focus on the facts and law that I consider to be most directly relevant to the decision.
- [10] As I have indicated above, the Schultes Order was made pursuant to the FLA. During the trial both parties proceeded and made their submissions on the relevant principles under the FLA as well. The issue before me is for corollary relief under the Divorce Act given there is a final order which specifically dealt with parenting arrangements. As such, the parties were invited to make further submissions under the Divorce Act.
- [11] While both parties submit that the FLA does not trump the Divorce Act and acknowledge the doctrine of paramountcy, they submit that there does not exist an operational incompatibility between the two statutes and therefore the court has discretion as to which statute to apply in its analysis.

- [12] Under both the Divorce Act and the FLA, the primary consideration in my assessment of whether a parent may relocate children is driven by what is in the best interests of the children. Additionally, since the 2021 amendments to the Divorce Act, there is very little, if any, difference in the two statutes on how the court assesses the best interests of the children on a relocation application.
- [13] The parties were permitted to provide supplementary written submissions on the relevant factors and the test for relocation under the Divorce Act. Given that the parties have made their submissions under both statutes, I have considered both and have arrived at the same decision. However, in my view, the proper determination of the issue on relocation in this case is best approached pursuant to the Divorce Act.
- [14] For the reasons that follow, I have concluded that it is in the children's best interests that K.C.M. be permitted to permanently relocate with the children to D'Arcy with S.J.S.'s parenting time on alternate weekends and additional time during school holidays.

BACKGROUND

- [15] The parties were married on September 16, 2006. They separated in 2015 and were divorced by an order granted on April 14, 2016. K.C.M. and S.J.S. have two children, K., age 14 and J., age 9.
- [16] The parties were divorced pursuant to an order of this Court dated April 14, 2016 (the "Final Order").
- [17] The Final Order addressed parenting arrangements, child support including s. 7 expenses, spousal support, parenting responsibilities and guardianship.
- [18] The relevant terms of the Final Order are as follows:

BY CONSENT, that

7. The Children's primary residence will be with the Claimant.
 8. The Parties will share joint guardianship of the Children.
 9. The Respondent shall have parenting time as agreed between the parties.
 10. Holidays will be determined and discussed between the parties.
- [19] Before and after separation, K.C.M. has been the primary caregiver for the children. In respect of item #9 of the Final Order, the parties agreed that S.J.S. would have parenting time with the children every weekend.
- [20] However, according to K.C.M., S.J.S. changed this initial arrangement after a few months to every other weekend to accommodate his lifestyle. S.J.S. did not dispute this. Later on, S.J.S. also had parenting time on Mondays. This arrangement continued until K.C.M. advised S.J.S. of her decision to relocate in September 2020. The parenting time is detailed below:

Monday

Tuesday

Wednesday

Thursday

Friday

Saturday

Sunday

Week

1

Respondent

Respondent drops off at school

Claimant picks up from school

Claimant

Claimant

Claimant

Claimant

Claimant

Week

2

Claimant drops children off at school (or 10 a.m. if no school)

Respondent picks up

Children

Respondent drops off at school

Claimant picks up from school

Claimant

Claimant

Claimant

Respondent parenting time start 9/10 a.m.

Respondent

from school

- [21] Prior to her move to D'Arcy, K.C.M. resided in the Cloverdale area of Surrey with S.J.S. living nearby. In November 2019, S.J.S. moved into his partner's townhouse in Langley where he currently lives with his partner and her teenaged daughter.

The Parties

- [22] S.J.S., who is 45 years old, works for Gordon Food Services in Annacis Island as a material handler where he has been for the past 20 years. When the parties divorced, he worked Tuesday to Friday from 2:00 p.m. to midnight. In July, 2021, S.J.S.'s work schedule changed to day shifts. He says that while he has seniority and some potential flexibility with the start and end times of his shifts, it is not open to him to change the days on which he works, both because of the needs of the business and his role as lead first aid attendant on his shifts. Nor is he able to alter the dates of his vacation, which must be requested in November for the following year, and no particular weeks or months are guaranteed to him. These details were confirmed by his supervisor who testified at the trial.
- [23] K.C.M. is a special education assistant. She is currently employed by the Sea to Sky School District ("SSSD") and works in Pemberton in a permanent fulltime position. She has been employed with SSSD since September 2020. She is currently on a gradual return to work program due to a car accident in October 2021.
- [24] K.C.M. was formerly employed with the Surrey School District ("SSD"). She trained for, and when J. was in kindergarten, and began to work as a special education assistant with the SSD. She worked on the "spare board" which meant that she would receive a call for a shift at 6:00 a.m. each work day and directed to work at any of the schools in the SSD. Essentially, it was an on-call position. K.C.M. says she was very low on the spare board seniority list.
- [25] Prior to this she worked as a lunch time supervisor at the children's school and at a retail store.

The Relocation

- [26] In March 2020, K.C.M. testified, she lost her job with SSD when schools closed due to the COVID-19 pandemic. Prior to this, she was in a temporary fulltime position for approximately six weeks.

- [27] During the summer of 2020, she once again applied to work on the spare board with SSD and made inquiries as to when she would get shifts. K.C.M. testified she was advised that those on the spare board would not receive shifts until October/November or when someone calls in sick. K.C.M. testified that she was unable to apply for a fulltime permanent position due to her lack of seniority. There were no job postings and she was becoming worried with school about to start and needed money.
- [28] K.C.M. says she applied for similar positions at other school districts. She also applied for work outside her field , including secretarial positions, without success. She testified having applied to Langley, Burnaby, and Richmond school districts.
- [29] In July 2020, K.C.M. began dating T.M., who resides in D'Arcy, approximately 30 minutes from Pemberton. During the summer, while camping in the Pemberton area with T.M.'s family, K.C.M. says the children told her they liked the area and suggested they move there. It was around this time that she applied for a position with the SSSD.
- [30] After being interviewed by SSSD on September 1, 2020, K.C.M. advised S.J.S. that her prospects for a job with SSSD looked positive and that she wanted to move to Pemberton with the children. She also provided S.J.S. with a parenting proposal. S.J.S. opposed the move and reminded her of her obligation to provide notice of relocation. They continued conversations by text messages and emails on the proposed move throughout September and October.
- [31] S.J.S. argues that K.C.M. did not comply with the notice provisions of either the FLA or the Divorce Act. K.C.M. takes the position that she did comply. I will address this below.
- [32] K.C.M. says she was offered a temporary fulltime position with the SSSD to commence immediately at the start of the school year. K.C.M. explained that the position was temporary in the sense that it was for a specified period but the work was fulltime in one school. She explained this was more secure than what she had with SSD, where shifts were not known until the day of the assigned shift.
- [33] Given S.J.S.'s opposition to the move, K.C.M. took on part time substitute work until she could resolve the relocation issue with him. From September to December 2020, K.C.M. and the children split their time in Cloverdale and D'Arcy.
- [34] K.C.M. and the children resided with T.M. While they lived in his home, she and the children slept in T.M.'s trailer located on his property as the children's room was still being prepared. K.C.M. continued to maintain her residence in Cloverdale until December 1, 2020. She moved to D'Arcy in January 2021.
- [35] During her parenting time, K.C.M. and the children would spend three nights with the children in D'Arcy and then three to four days in Cloverdale. S.J.S. continued to exercise his parenting time uninterrupted during this period. As well, S.J.S. agreed to meet in Squamish for the children's exchanges.

- [36] During her parenting time and while K.C.M. was working in D'Arcy, the children did not attend school. In fact, from September to December 2020, the children missed 40% of their classes. K.C.M. says the children were being home schooled as she needed to work and she had discussed it with their teachers who did not oppose. S.J.S. advised K.C.M. on numerous occasions that he objected to the children missing school while in her care.
- [37] On November 10, 2020, S.J.S. filed an application opposing K.C.M.'s relocation to D'Arcy. That application was heard by Justice Schultes on December 16, 2020 with reasons for judgment delivered on January 4, 2022, and the Schultes Order.
- [38] In the Schultes Order, Justice Schultes permitted K.C.M. to relocate to D'Arcy. S.J.S. was granted parenting time every weekend from Friday at 7:00 p.m. to Sunday at 7:00 p.m. (with additional time on statutory or school holidays or professional development days). The exchange of the children would continue to take place in Squamish. S.J.S. was also permitted to exercise any of his parenting time in the Pemberton area to relieve the children from travelling and if he did so, could deduct \$200 from his spousal support obligations to offset the transportation and accommodation costs associated with travelling to the Pemberton area.
- [39] Concerned about the children missing school, Justice Schultes also ordered that K.C.M. immediately register the children in the school nearest to her residence and no home schooling, distance education or alternative delivery methods were permitted.
- [40] Finally, Justice Schultes ordered a "Views of the Child" report pursuant to s. 211 of the FLA on the views of the children with respect to the relocation.

Notice

- [41] K.C.M. says that she provided notice to S.J.S. as early as September 1, 2020 through a series of text messages and emails. These were tendered at the trial by both parties. I have reproduced only those portions of the emails and texts that are relevant to the issue.

- [42] K.C.M.'s first message to S.J.S. was on September 1, 2020:

Just letting you know I had a job interview with the school district up there and it looks promising. And it's a permanent position not spare board like Surrey. And no, I haven't heard from Surrey School District about what's happening with my job here.

I won't find out for sure, they said I will know by the end of the week if I got it or not

And I still need to find a place to live.

- [43] On September 6, 2020, K.C.M. emailed S.J.S. once again advising of her intention to move to the Pemberton area. In this email she also included a proposed parenting schedule. The relevant details of this email are as follows:

Just writing to let you know that I've applied for a position as an EA at Squamish School District #48. I feel positive about this and the outlook is promising. My plan would be to move up to Pemberton, and naturally I'd prefer and appreciate if you are on board this decision.

The thing is, I feel I have no real alternative but to go where I can find employment, lower my overhead costs and also get on with my life. I believe I have found just that up at Pemberton. I'm sure you understand this, and please know that I do appreciate this would have impacts on your life too, but impacts I believe we can both manage if we work together with the kids best interests in mind. You have brought up some good points about visitation in our texts and I have tried hard to accommodate them in the attached schedule (from September 2020 to June 2021). As per my calculations you will get an extra 15 days during this time. And 3-4 weeks during the summer or extra weekends, I'm sure we can figure it out. There is room during Spring break if you would like more time please just let me know.

You will notice I have included Mondays every second weekend. It would not be hard to organise for the boys to bring work with them so you can do it with them (as you mentioned you enjoy helping them). This will allow for that. There is also kids Facebook messenger to face time with them whenever you want (and I will make sure they are available to chat whenever you have time). Missing 2 Mondays a month to spend with you and so you can do school work with them is acceptable I believe. As a comparison to what I'm proposing, there are families where the children spend one week on and one week off, or 2 weeks on and two weeks off, a month with one parent and a month with the other or even 6 months with one parent and 6 months with the other.

I think the schedule I have proposed would be more beneficial for our boys and less disruptive to their lives. I know you only get 5 weeks a year of holidays, so we can definitely work those into the schedule. I trust you will seriously consider the attached schedule and if there are any changes you would like to make because of holidays or anything else, please just let me know.

[44] Attached to this email was a detailed proposed schedule for parenting time for S.J.S. for the 2020-2021 school year.

[45] S.J.S. replied that he opposed her proposal as it would jeopardize his parenting time with the children:

In response to your email on September 6 2020, I do not agree to your proposal and as joint guardian of our boys, I cannot support a plan that has our boys living outside the lower mainland.

1. Have you been offered fulltime continuing employment Sea to Sky school district?
2. Have you given notice to your current landlord, if so, effective what date?

Finally, under the Family Law Act, you must give 60 days notice that includes date of relocation and the destination of residence.

[46] On September 9, K.C.M. emailed S.J.S. in response to his questions:

I heard back from Squamish School District yesterday. To answer your 1st questions, yes I had full time employment from the school district but due to your unwillingness to even consider the move or schedule even as a temporary or on trial basis. I have had to tell Squamish School District that I can only do part-time work for them. Living in the lower mainland is becoming more difficult for me financially as rent will be going up each year and I can't afford to move because I would be paying more than what I'm paying right now.

To answer your 2nd question, I have not given notice to my landlord because I haven't found accommodation up in the Pemberton/Whistler area yet. If and when I do find accommodation you would be the first to know. And I will give you the location and date of the move.

[Emphasis added.]

[47] On September 15, 2020, K.C.M. emailed S.J.S. with an update:

I have started working for Sea to Sky school district. I am really trying to accommodate your needs and the boys needs with these negotiations and don't want to have to drag the boys through mediation or court. The boys want to move, please consider this. You will still be able to spend every second weekend with the boys and many other holidays, long weekends and extra days with pro-d-days every month, you get 15 more days with your boys between September and June and I know they would want to spend it with you.

I have been able to find full-time employment at the school the boys would be attending but due to the fact that you won't let me take the boys I have had to except a part-time job which affects us financially.

[48] On September 28, 2020, K.C.M. emailed S.J.S. with her "official notice of relocation":

This is my official notice of relocation. To the Pemberton area.

.

Everything I have mentioned and proposed in the previous emails to have to do with the boys still stands. All the visitations. And holidays mentioned in them. Even the extra days between now and June 2021.

[49] In response to S.J.S.'s lawyer's email of October 13, 2020, K.C.M. sent a lengthy email on October 31, 2020, once again advising her intention to relocate. On this occasion, K.C.M. also provided an address (T.M.'s residence) and an intended date of relocation at the end of November. K.C.M. took the position that she had provided her official notice on September 28, 2020.

[50] S.J.S. filed a notice of application on November 10, 2020 opposing the move. That application was heard on December 16, 2021 and on January 4, 2021, Justice Schultes made the Schultes Order allowing the relocation on an interim basis.

LEGAL FRAMEWORK

Relocation

[51] As I have outlined earlier in these reasons, I am of the view that the Divorce Act provisions on relocation should govern over those in the FLA. The applicable Divorce Act provisions came into force on March 1, 2021.

[52] Section 2 of the Divorce Act defines relocation:

relocation means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility -- or who has a pending application for a parenting order -- that is likely to have a significant impact on the child's relationship with

- (a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or
- (b) a person who has contact with the child under a contact order; (déménagement important)

[53] Section 16.9 of the Divorce Act places a requirement to provide notice of the relocation on the parent who wishes to relocate:

Notice

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

Content of notice

(2) The notice must set out

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

[54] Pursuant to s. 16.9(3) of the Divorce Act, on application, the Court may not apply or modify the notice requirement within that section.

- [55] In *K.P.K. v. S.K.*, 2021 BCSC 1426, the lack of formal notice pursuant to s. 16.9 was not fatal to the applicant's proposed relocation to Alberta. In that case, formal notice under the Divorce Act was not provided prior to the relocation, something which the relocating parent's counsel attributed to the amendments to the Act which implemented the notice requirement. Justice Kirchner found that the non-relocating parent was "certainly aware of the plan and was given a proposed parenting plan", as well as there was no prejudice from the lack of formal notice. Justice Kirchner concluded that "it would not be in the children's best interest to permit this factor to prevent a move that is otherwise in their best interests": *K.P.K.* at para. 126.
- [56] In *B.M.W.G. v. J.W.G.*, 2022 BCSC 1346, at issue was the effect of non-compliance with the formal notice requirement in s. 16.9 of the Divorce Act. Justice Kirchner found as follows:
- [54] Ultimately, as this court has held, the notice requirement is a fundamental element of the relocation scheme under the Divorce Act but an innocent failure to comply with it should not, in the circumstances of this case, override a substantive consideration of what is in VWG's best interests: *K.P.* at para. 126. In *D.T.S.*, Francis J. found that even where a parent's relocation of a child without notice was done without good faith (which is not the case here), this should not circumvent the court's analysis of what is in the child's best interests.
- [55] Further, s. 16.92(1)(d) of the Divorce Act directs the court to consider as part of the best interests analysis in a relocation whether the person who intends to relocate the child has complied with the notice requirement under s. 16.9. This indicates that, while the notice requirement is mandatory, Parliament anticipated there would be circumstances where a party might fail to comply with it. This does not bring an end to the court's consideration of the relocation but rather requires the court to consider the effect of non-compliance on the child's best interests.
- [56] In my view, the way to address the non-compliance in this case is for me to remain mindful throughout the best interests analysis that BW has changed the status quo and keep in mind how this may affect the fairness to JG.
- [57] JG argues that to ensure BW does not unfairly benefit from the change in status quo induced by the move I must treat her application to relocate as though she never left Salmon Arm. In my view, that goes too far. The obligation to consider VWG's best interests compels me to consider all relevant factors and evidence that bear on that question. However, I agree that I must keep in mind how the playing field has been changed by the move and consider the effect of that on the fairness of the analysis to JG. Ultimately, though, it is the child's best interests that must govern.
- [58] Thus, while the failure to give notice of the proposed relocation is a serious matter, for the reasons I have given I do not agree it is fatal in the circumstances of this case to BW's application to relocate.

- [57] If the non-relocating parent does not consent to the relocation, then they may object to the relocation. After an objection is filed, the relocating parent may apply for a court order approving the proposed relocation: Divorce Act, s. 16.91(1).

Best Interests of the Child

- [58] In determining whether the proposed relocation is in the best interests of the child, the court must consider the list of factors in both section 16(3) and 16.92(1) of the Divorce Act. Not all factors will be relevant in every case and a number of the factors overlap one another.
- [59] Pursuant to s. 16(2), the primary consideration when determining the best interests of the child are "the child's physical, emotional and psychological safety, security and well-being".
- [60] Additionally, s. 16(6) of the Divorce Act provides that in allocating parenting time, the court "shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child", commonly referred to as the "maximum contact principle". This principle must not overshadow the best interests of the child, and the "obvious outcome" of relocation may be that there is a reduction of parenting time for the non-relocating parent: B.M.W.G. at paras. 29-32; Burton v. Carter, 2022 BCSC 2004 at paras. 102-103; Joseph v. Washington, 2021 BCSC 2014 at para. 98.
- [61] The court must not consider whether, if the relocation were not to be permitted, if the applicant parent intends to relocate without the child or not relocate at all: Divorce Act, s. 16.92(2). Commonly referred to as the "double bind", judges hearing such applications should not consider how the outcome of an application would affect the parties' relocation plans: Barendregt v. Grebliunas, 2022 SCC 22 at para.140.
- [62] Section 16.93 sets out the burden of proof in relocation applications. Pursuant to s. 16.93(1), where the children spend substantially equal time in the care of each parent, the parent who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.
- [63] Pursuant to s. 16.93(2), if the child spends the vast majority of their time in the care of the parent who intends to relocate, the burden of proof is on the parent who opposes to show that the relocation is not in the best interests of the child. Vast majority of the time has been interpreted to be 80%.
- [64] Not all proposed relocations match the scenarios described in these two sections. In those cases, or when parenting arrangements are not set out in a court order or agreement, both parents must demonstrate to the court why the proposed relocation is or is not in the best interests of the child: s.16.93(3)

[65] When considering both relocation and parenting arrangements, the court is to conduct a "blended analysis" in which the best interests of the child are considered together "'in the round', including the proposed move, in deciding what parenting arrangements are in the child's best interests" B.M.W.G. at para. 34.

Analysis

Has There Been Compliance with the Notice Requirement?

[66] I will first deal with the issue of whether K.C.M. complied with the notice requirement.

[67] I am mindful that when K.C.M. provided her notice she was providing it under the FLA. From my review of the parties' communications, K.C.M. did not have a lawyer assisting her. I also note that her communications were prior to the amendments under the Divorce Act that came into force.

[68] While K.C.M. provided details of her applying for a position with SSSD on September 1, her first notification to S.J.S. regarding relocation was on September 6, 2020 when she advised that if she was successful in securing a position, she intended to move to Pemberton. On that date, she also provided a proposal for S.J.S.'s parenting time. It is evident from her message that she was mindful that S.J.S.'s parenting time would be reduced as a result of the proposed move and proposed additional make up time. In fact, K.C.M. offered S.J.S. 15 additional days during the school year. However, I find that K.C.M. did not strictly comply with the notice requirements set out in s.16.9(1) of the Divorce Act (or under the FLA) because it did not set out the expected date of relocation, address of the new place of residence or contact information.

[69] K.C.M. then provided more details on September 9 after she was successful in obtaining work in Pemberton. In this email, she also addressed S.J.S.'s questions including whether she had given notice to her landlord in Surrey. K.C.M. indicated that she had not provided notice to her landlord as she had not yet found accommodation in the Pemberton area and would provide details of the location and date of move once she found accommodations. Once again, I find that this email is not proper notice as required under s.16.9(1).

[70] By September 15, K.C.M. began working for the SSSD but continued to retain her residence in Surrey. On September 28, 2020, K.C.M. emailed S.J.S. She wrote that it was her official notice of relocation to the Pemberton area. Strictly speaking, this also did not comply with s. 16.9 of the Divorce Act because it did not provide an expected date of relocation or address.

[71] It was only on October 31, 2020, that K.C.M. provided the details that would bring her into compliance with the notice requirements. While K.C.M. moved out of her residence as of December 1, she ultimately moved to D'Arcy in January 2021. No evidence was led by either party as to where she and the children resided during the month of December. Based on the limited evidence in this regard, I can infer that the children resided with K.C.M. in Pemberton during her parenting time and with S.J.S. during his parenting time and the

shared parenting time during the Christmas holidays. As no evidence was led to the contrary, I accept K.C.M.'s evidence that she moved to D'Arcy in January 2021 and therefore complied with the notice requirements under s.16.9(1) of the Divorce Act.

- [72] I will address the issue of K.C.M. moving to Pemberton in mid-to-late September while still maintaining her residence in Surrey. While it was unfortunate that the children missed a substantial amount of school time, she ensured that the children's parenting time with S.J.S. was not affected. S.J.S. wants me to find that in doing so K.C.M. did not act in good faith. In support of his position he relies on *M.D.G. v. C.J.G.*, 2016 BCPC 298.
- [73] In *M.D.G.*, Judge Marchand, as he was then, heard the matter pursuant to the FLA. An interim order had been in place prohibiting relocation and the mother relocated from 100 Mile House to Langley but had maintained the existing parenting arrangements and therefore argued that the child's residence had not changed. In determining that the mother's decision was not made in good faith, the Court found the mother was not transparent with the father, did not use her best efforts to cooperate with the father to resolve issues arising out the proposed relocation and in spirit had breached the interim order.
- [74] I am of the view that this case is distinguishable. In this case, there was no prohibition against relocation and in fact K.C.M. continued to maintain her Surrey residence until December and ultimately moved in January 2021. As well, I find that K.C.M. was transparent. This is evident from the emails between her and S.J.S. I also find that she put in a lot of effort to ensure that S.J.S.'s parenting time was not affected.
- [75] In the event that I am wrong, I agree with and adopt the comments of Justice Kirchner in *K.P.K. and B.M.W.G.* In *K.P.K.*, Justice Kirchner noted that while the relocating parent did not strictly comply with the notice requirements, the non-relocating parent was "certainly aware of the plan and was given a proposed parenting plan".
- [76] I find that is the case before me as well. By September 28, S.J.S. was well aware of K.C.M.'s plan and had received a proposed parenting plan multiple times as early as September 6, which was reiterated in her emails throughout the months of September and October. I also find that S.J.S. was aware of the location that K.C.M. and the kids were residing during her parenting time - at T.M.'s residence - by mid-October. This is evident from earlier emails as well as a letter from S.J.S.'s lawyer on October 13, 2020, indicating that he was aware that K.C.M. was staying with the children at her partner's residence.
- [77] As well, I note that there was no prejudice from the lack of formal notice. S.J.S. has not pointed to any evidence that he was prejudiced from the lack of formal notice. S.J.S. continued to exercise his parenting time throughout the fall of 2020. I also share Justice Kirchner's view that "it would not be in the children's best interest to permit this factor to prevent a move that is otherwise in their best interests": *K.P.K.* at para. 126.

Is the Relocation to D'Arcy in the Children's Best Interests?

- [78] I will first address who has the burden of proof. K.C.M. argues that S.J.S. has the burden of proof. At the time that K.C.M. provided notice, the children spent the vast majority of their time in the care of K.C.M. and had been since the parties separated. As such, the burden of proof would be on S.J.S. to show that the relocation is not in the best interests of the children: s. 16.93(2) of the Divorce Act.
- [79] S.J.S. argues that K.C.M. has the burden of proof. Since the Schultes Order, parenting time changed and the children have spent substantially equal time in the care of each parent. S.J.S.'s parenting time amounts to roughly 40% of the time. As such, K.C.M. would have the burden of proving that the relocation would be in the best interests of the child: s. 16.93(1) Divorce Act.
- [80] Section 16.93(3) provides that when s. 16.93(1) and 16.93(2) do not apply, each parent must demonstrate why the proposed relocation is or is not in the best interests of the child.
- [81] The Divorce Act does not address who has the burden of proof when there have been two different parenting scenarios as a result of interim orders. However, it does contemplate that not all proposed relocations match the scenarios described in ss. 16.93(1) and 16.93(2) and in those circumstances, the court can look to s.16.93(3).
- [82] The situation before me is one of those scenarios. In my view, given that there are two different scenarios at play, s.16.93(3) is most appropriate in the circumstances. As such, both parties share the burden of proof on whether the relocation is in the best interests of the children.
- [83] I will now address the relevant factors set out in s. 16(3) of the Divorce Act in assessing whether the relocation is in the children's best interests. Not all of the factors listed in s.16(3) are relevant in this case and some overlap. I will address each of these separately or together in the event there is an overlap.
- [84] I will then move to the additional factors set out in s. 16.92(1).

The needs of the children, given their age and stage of development such as their need for stability (s. 16(3)(a))

- [85] While I have no concerns about each parent being able to address the needs of the children, K.C.M. has been the primary caregiver of the children since their birth. Even after the Schultes Order, K.C.M. continues to provide the day to day care of the children except on the weekends when they are in S.J.S.'s care.
- [86] There is no doubt that frequent parenting time with both parents contributes to a stable environment for the children. I also appreciate that any relocation will almost always diminish parenting time for one of the parents. But it must be kept in mind that Langley is not a great distance from the Pemberton area. One could travel to and from in a day, which many do so daily.

- [87] I have carefully considered all of the evidence including documentary materials tendered by both parties. I am of the view that K.C.M. is better able to support the needs of the children given her primary care of the children since they were born.
- [88] I will address the children's need for stability in more detail below under "impact of relocation on the children", however, I will make some comments now.
- [89] It cannot be ignored that the children have settled into their lives in D'Arcy. This is evident from the children's comments in the s. 211 Views of the Child Report authored by Mr. Colby, which I have addressed in more detail below. As in B.M.W.G., I am also cognizant that the relocation has "changed the playing field" as I am not only considering hypothetical future events.
- [90] I also take into account that the children have had a great deal of instability in their young lives thus far. This began with the breakdown of their parents' marriage, the interim move to D'Arcy, and the weekly car rides for parenting time with their father. In my view, moving them back to Langley would create even more instability.
- [91] In my view, there is greater stability for the children in remaining in their current home, school and community in D'Arcy. It is not in their best interests to be uprooted once again.
- [92] This is particularly more so for K. who is now a teenager. Removing him from D'Arcy where he has now started high school will, in my view, lead to more instability, which will include starting a new school and making new friends. While he has a close friend in Surrey, it is very unlikely that they will attend the same school.
- [93] This factor weighs in favor of relocation.

The nature and strength of the Children's Relationship (s. 16(3)(b))

- [94] While the children do have a strong bond with each parent, it is evident from the evidence that the children have a closer bond with their mother. This is not surprising considering she has been and continues to be the primary caregiver for the children.
- [95] In this regard, I note the observations of Mr. Colby, that while waiting for their interviews with him, the children were actively engaged in conversation with their mother. However, while waiting with their father, both children were not engaged with him but rather were on their electronic devices.
- [96] Under this factor, consideration is given to the role grandparents, aunts and uncles and cousins have in the children's lives: B.M.W.G at paras. 76, 120.
- [97] In the present circumstances, the children do not have extended family in the Lower Mainland with whom they have close bonds except their half brother N. K.C.M. says that her son N., who lives in the Lower Mainland, supports the relocation and visits the children in D'Arcy. As well, she says her other close relatives also support the move.

- [98] The children have also formed a close bond with T.M. and his children, who are close in age to the children. I am of the view, that returning the children to the Lower Mainland will have a negative impact on the relationships they have formed with T.M. and his children, who they refer to as their step brothers.
- [99] On the other hand, S.J.S. submits that the relocation would impact the children's relationship with aunts and uncles and grandparents (who are his partner's families). I have no information as to the nature of these relationships or how often the children see his partner's family.
- [100] In my view, this factor weighs in favour of relocation to D'Arcy.

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

- [101] Both parents are willing to support the children's relationship with the other parent. I note that K.C.M.'s initial proposal included additional parenting time for S.J.S. In my view, this is one indication of K.C.M.'s willingness to support the children's relationship with S.J.S.
- [102] I am, however, concerned about S.J.S.'s lack of support of K.C.M.'s relationship with T.M. His introduction of a transcript of court proceedings relating to T.M.'s parenting of his children in light of his struggles with alcohol was unfortunate and not necessary. The court proceeding was held prior to K.C.M. commencing her relationship with T.M. K.C.M. testified that T.M. is now sober and his children are back in his care. S.J.S. was not able to point to any concerns relating to T.M.'s interactions with the children.
- [103] Conversely, K.C.M. did not raise any concerns about S.J.S.'s relationship with his partner.
- [104] Despite her decision to maintain two households in the fall of 2020, K.C.M. nevertheless ensured that S.J.S.'s parenting time continued as scheduled and also proposed extra days to compensate the loss of Mondays from S.J.S.'s parenting time. I did not hear any evidence that while K.C.M. was in D'Arcy part time and after the Schultes Order was in place, that she interfered with S.J.S.'s parenting time.
- [105] Overall, I find this factor weighs slightly in favour of relocation to D'Arcy.

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

- [106] As noted above, K.C.M. has been the primary caregiver. I note that after separation, S.J.S. while initially caring for the children every weekend, changed the parenting arrangements to every other weekend to accommodate his lifestyle. However, S.J.S. increased his parenting time when K.C.M. asked him to take the children on Mondays so that she could work.
- [107] As I have already noted, S.J.S. has had increased parenting time since the Schultes Order.
- [108] This factor weighs slightly in favor of relocation to D'Arcy.

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

- [109] I acknowledge that children, particularly those under the age of 16 do not have a right to determine their living arrangements. It is the responsibility of the court to make that determination with regard to their best interests: D.J.S. v. J.M.D., 2014 BCSC 1143 at para. 39.
- [110] Section 211 Reports, while not binding on the court, do act as the "eyes and ears" of the court and are an invaluable tool: D.L.M. v. A.L.F., 2022 BCSC 1874 at paras. 37-39.
- [111] As ordered by Justice Schultes, the children's views were canvassed in the "Views of the Child" section 211 Report authored by Mr. Colby.
- [112] Both children were interviewed twice and each parent was also interviewed. I found Mr. Colby's report to be considered and balanced. The parties did not object to any parts of the Report.
- [113] Mr. Colby reports that both children expressed a preference to reside in D'Arcy.
- [114] K.'s views are summarized as follows:
- a) He likes the "country life" and can do "stuff outside" and that it is not crowded, with less cars, less noise and less people. He enjoys riding on his ATV (also referred to a quad) and fishing
 - b) Although he likes living in D'Arcy, it is most important that his residence be with his mother and if his father was living in D'Arcy he would want to live with his mother primarily.
 - c) While he wants to live with his mom, he wants to be closer to where his dad lives and wishes they lived closer to each other.
 - d) He likes the school he attends and his school mates because they are "energetic" and enjoys being outside with them.
 - e) Although the current schedule has worked out well, he would like to spend every other weekends with his mother because during the week he is busy with school and other activities. Although he revised that to say "perhaps every third weekend."
 - f) He does not want to change the school week.
 - g) He would like to attend church with his mother but is unable to do so because he visits his father on weekends.
 - h) Enjoys spending time with [T.M.]'s sons, who he refers to as his step brothers. He does not know if [S.J.S.'s partner's] daughter [L.] likes him as she does not talk to him.
 - i) He expressed positive comments about both of his parents' partners.

- j) In D'Arcy, [K.] shares a room with his brother and they have lots of room. At his father's residence, he enjoys his own room downstairs because it is quiet. [K.] enjoys doing activities with both parents.

[115] J.'s views are summarized as follows:

- a) He preferred to live his mother and liked living in D'Arcy because it is sunny and hot there.
- b) He enjoys riding his ATV with stepbrothers, mother and his brother and the trampoline. He enjoys the outdoors and that it was a safe place.
- c) He would like to live in Whistler and would want his parents, their partners and siblings to live there as well.
- d) His current schedule is nice and likes where he is and does not want to live in Langley.
- e) He has a nice school with friends and prefers to attend school in D'Arcy.
- f) He did not think sharing a room with his brother was a problem.

[116] Mr. Colby noted that both children indicated that they prefer not to do the long drive for parenting exchanges but seem to be able to cope with it.

[117] Mr. Colby concluded that the children had a preference to living in D'Arcy. At page 13 of his report, Mr. Colby writes:

The children's focus on being in maternal care appears to be related both to their level of comfort with their mother while they also state that they are appreciative of an environment that allows them outdoor activities. Those activities take precedence in their accounting for their desire to live in D'Arcy as a primary factor. If their mother were to relocate they would want her to relocate to a location that is a mix of country and city so that they can maintain their outdoor activities.

[118] In my view, this factor weighs in favor of relocation to D'Arcy.

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

[119] When K.C.M. resided in Surrey, the children attended church with her on weekends. Since the Schultes Order came into effect, the children have not attended church. K. expressed a desire to be able to attend church. The children do not attend church when they have parenting time with S.J.S.

[120] K.C.M. testified that her church has a number of activities for the children including summer camps, which she would like the children to participate in.

[121] In my view, this factor weighs slightly in favor of relocation to D'Arcy.

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

[122] As the children are older, there does not appear to be any concerns about their care. This factor is neutral.

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

[123] I have addressed these points in other factors.

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

[124] Although a history of family violence was raised by K.C.M., it was noted by her counsel in final submissions that it was not clear how this history of abuse would affect the result. In any event, I find that there is insufficient evidence for me to conclude there was indeed any family violence. As such, this factor is neutral.

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

[125] This factor is not applicable.

Reasons for the Relocation (s. 16.92(1)(a))

[126] K.C.M. submits that her reasons for moving are for economic stability which includes her ability to work in a fulltime permanent position and the reduced costs of living in D'Arcy. She says her economic stability enhances the children's well being.

[127] In *Burton* at para. 52, Justice Branch relies upon helpful comments from *Stav v. Stav*, 2012 BCCA 154, leave to appeal to SCC ref'd, 34833 (6 September 2012), for the proposition that a move justified by financial or emotional gains that ultimately inure to the benefit of a child is a relevant consideration:

[88] As noted in this passage, often the parent seeking to relocate will submit that doing so will enable him or her to obtain financial and/or family support that is unavailable in his or her present situation, and which will both directly and indirectly benefit the children. The other parent will argue that whatever benefit there is to the relocating parent in those situations is more than offset by the detriment to the children of being removed from their community and, more importantly, from regular contact with the other parent. In my view, these are legitimate considerations which may assist a judge in determining to what extent the move will operate in the children's best interests. It is simply one more factor to weigh in the balance. The trial judge considered these factors in this case and, in my view, she was right to do so.

[128] As well, in *Barendregt*, Justice Karakatsanis noted that a relocation that provides a parent with more education, employment opportunities, and economic stability also contributes to a child's wellbeing: at para. 171.

[129] I am also guided by Justice Karakatsanis's instructive comments:

[173] It is often difficult to disentangle the interests of a parent from the interests of a child. Indeed, "the reality that the nurture of children is inextricably intertwined with the well-being of the nurturing parent" is far from novel: *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 845; see also Willick, at pp. 724-25, per L'Heureux-Dubé J. A child's welfare is often advanced in tandem with improvements in the parent's financial, social, and emotional circumstances.

[Emphasis added.]

[130] Finally, the Court of Appeal in *Duggan v. White*, 2019 BCCA 200, a case in which the primary parent sought to relocate from the West Kootenays to the Lower Mainland in order to complete her education and improve her financial prospects, stated:

[68] Relocation cases present a difficult straddle. I return to my observations at the beginning of these reasons. Opportunities for employment and education are not spread evenly throughout the province. For this reason, it is not unusual for parties in family disputes to have to adapt to changes that require relocation, and to find ways to maintain and foster relationships across boundaries. In my view, just as parties must adapt, courts must allow for adaptation in parenting situations, and be assiduous in seeking to avoid results that artificially keep one of the parents down. The best interests of the child is a large concept - one which, in my view, can be quite capable of providing, with a generous stance, an opportunity for one of the parents to lift himself, or herself, closer to the level of the more advantaged parent. It is important in the pursuit of this approach that alternative ways to foster strong relationships between the child and each parent be explored fully, so as not to close the door on a parent to a sensible plan that in the longer sense will strengthen the family, even in its separated circumstance.

[131] I find that K.C.M.'s economic stability will be enhanced, which weighs in favor of relocation. While working for the SSD, K.C.M. was not able to obtain fulltime permanent work. I accept that the lack of certainty in work can create economic instability for anyone, especially a single parent.

[132] I also accept that K.C.M. made efforts to apply for positions in the lower mainland including Burnaby, Richmond and Langley and even took steps to learn sign language to make herself more employable. While S.J.S. produced a document from the Langley School Board indicating that they had no record of K.C.M. having applied to that school board, K.C.M. explains that the Langley School Board does not keep resumes past six months. In any event, there is evidence that she did apply to other school boards in the Lower Mainland that was not contradicted. I accept that this lack of certainty in her work hours prompted her to seek employment outside the Lower Mainland.

[133] K.C.M. was offered a temporary fulltime position with SSSD commencing September 2020. She accepted that position after being advised by SSD that those on the spare board would not receive calls for shifts until October or November.

- [134] While the evidence shows that her hourly wage with SSSD is slightly higher than it was with SSD, it nonetheless provides her with more disposable income.
- [135] S.J.S. argues that K.C.M.'s living expenses did not dramatically reduce with the move to D'Arcy. I accept K.C.M.'s evidence that her overall expenses have been reduced with her move to D'Arcy. While her expenses may have not reduced dramatically, they are nonetheless lower. For a single parent, any reduction in living expense means more funds to spend on the children's needs. In my view, reduced living expenses along with certainty of income provides for economic stability which undoubtedly affects the children's well-being.
- [136] S.J.S. argues that the relocation was not made in good faith but rather because of K.C.M.'s desire to pursue a relationship with T.M. and reside with him in Pemberton. While I accept that one of the reasons she chose to apply to SSSD was because her partner lived in the area, that does not mean that she was not economically motivated as well. As such, I am unable to accede to S.J.S.'s argument that the relocation was not made in good faith.
- [137] K.C.M. also submits that the relocation provides improved educational and extracurricular and outdoor opportunities for the children.
- [138] In terms of improved educational opportunities, K.C.M. says the children were struggling at their school in Surrey and did not receive the support they needed in the larger class sizes. Given that K.C.M. works in the school system in Pemberton and previously worked in the school system in Surrey, I accept her evidence that the children's classes in Pemberton are smaller and that the children are receiving additional support as needed. I note that K.C.M. at one point worked in the children's school in Pemberton giving her additional insight to the children's schooling.
- [139] By the time this matter came before me, the children had been in the SSSD for two academic school years. Report cards and emails from teachers tendered as evidence show both boys have adjusted to their new schools and are doing well academically.
- [140] S.J.S. argues the children are struggling at school in Pemberton. He directed the court to one specific grade eight report card of K., which indicates that K. struggled in one particular subject, French. However, I do not agree that K. is struggling in school. After reviewing all of the report cards from grade 8, my interpretation is that K. is a student who is enjoying and thriving in school but can be distracted with his electronic devices. I have also reviewed all of K.'s grade 7 report cards, which also confirm that K. adjusted well in his new school and received above average grades.
- [141] J.'s report cards also indicate that he has adjusted well to his new school. Remarks from his teachers are positive. While there were concerns in regards to two behavioral incidents on the school bus, I am of the view that this does not equate to J. struggling in school as S.J.S. suggests. I note that in cross-examination, S.J.S. acknowledged that J. also had similar behavioral issues when attending school in Surrey.

[142] S.J.S.'s concerns of the children's limited educational opportunities because of the lack of educational paths in Pemberton is without foundation, speculative and premature. No evidence was presented that K. or J. did not have access to educational opportunities that would otherwise be available if they lived in the Lower Mainland. As well, it is premature to make any decisions relating to post-secondary education opportunities in the Pemberton area as there is no guarantee either child will attend university. I pause to note that it is common knowledge that thousands of students who live in rural communities across British Columbia travel to the Lower Mainland to attend university and college.

[143] Overall, this factor favors relocation to D'Arcy.

Impact of the Relocation on the Children (s. 16.92(1)(b))

[144] The relocation will allow the children to have primary residence with the parent who has been most involved in their upbringing. This is an important factor in the relocation assessment.

[145] I must also consider the impact of the move on the children's parenting time with S.J.S. If K.C.M. is permitted to continue to reside in D'Arcy, based on her proposal, S.J.S.'s parenting time would essentially be very close to the same as it was prior to the Schultes Order.

[146] S.J.S. points out that since January 2021, his parenting time with the children has been every weekend. However, it must not be forgotten that the order which granted him this increased time was always meant to be an interim one. Prior to the interim order, S.J.S. appeared to be content with alternate weekends and every Monday.

[147] I accept that if I allow the relocation, S.J.S.'s parenting time would decrease given that the original arrangement included Monday nights. In my view, this can be rectified with adjustments by providing additional parenting time to S.J.S. during summer vacation.

[148] S.J.S. asks the court to order that the children be returned to the Lower Mainland/Fraser Valley area. He also asks for shared parenting time. In my view, that would not be in the children's best interests. I cannot ignore that since January 2021 (on a part time basis in the fall of 2020), the children have lived in D'Arcy. In that respect, unlike many relocation cases, I am not looking into the future in terms of what impact the relocation will have on the children.

[149] Forcing them to change their residence and schools will disrupt their friendships and uproot them from a community to which they have become attached.

[150] As I have previously noted, the children have adjusted well to their new home and school. The children live in a complex where there are other children with whom they have formed friendships and discovered new activities and hobbies. My assessment of all of the evidence including that from K.C.M., the views expressed by the children to Mr. Colby, report cards and emails from their teachers, and photographs tendered at the trial, leads me to conclude that it would be in their best interests to remain in D'Arcy. To remove them from an

environment in which they have adjusted to living in for almost one and a half years would be detrimental to their emotional, physical and psychological stability.

- [151] S.J.S. says that the children would be closer to their friends in Surrey. However, S.J.S. acknowledges there is no guarantee the children would be permitted to attend their old schools in Surrey given that S.J.S. no longer lives there. In fact, it is very unlikely. Both children would have to adjust to new schools and make new friends if they were returned to Langley. K. is now in high school. In my view, the move back to Langley would be much more difficult for him.
- [152] The current interim parenting schedule is also not workable for the children in the long run. Both children have expressed a desire to see their mother on weekends and do activities in Pemberton on the weekends with their friends. What is more manageable and, in the children's best interests is to resume the arrangement that was in place before the Schultes Order with the exception of Monday nights. S.J.S. says the drive to do the exchange in Squamish is six hours round trip. K.C.M. says the round trip is three hours. It is more likely around four hours. In my view, this drive is manageable if it were to occur less frequently than the current state of affairs.
- [153] I will also address S.J.S.'s argument regarding the children's participation in sports and other activities. He says that since the move to D'Arcy, the children have not participated in any sports or any school-based activities. He points out that the children were involved in golf and baseball. K.C.M. says the children are involved in many activities in and outside of school.
- [154] In emails exchanges between the parties, K.C.M. approached S.J.S. regarding J.'s desire to play organized soccer in Pemberton in the fall of 2021. S.J.S. opposed because the children were with him every other weekend. K.C.M. offered alternate parenting options and suggested that S.J.S. come to Pemberton to watch J. play.
- [155] This was certainly an option Justice Schultes provided to S.J.S. to offset spousal support with the expense of travelling there. However, there was no willingness on the part of S.J.S. to make any changes in his parenting schedule to allow J. to play soccer. I also note, that despite having the children every weekend, S.J.S. did not explore options for J. to play soccer in Langley.
- [156] K.C.M. points out that the children engage in and enjoy participating in numerous outdoor activities in the Pemberton area. The children also confirmed that in the s. 211 Report.

The Amount of Time Spent with the Children by Each Parent and level of involvement by each parent (s. 16.92(1)(c))

- [157] I have addressed this point in my analysis of other factors noted above.

Geographic Area Restrictions (s. 16.92(1)(e))

[158] There is no express order governing residency of the parties.

Reasonableness of the Proposal to Vary Parenting Time (s. 19.62(1)(f))

- [159] When K.C.M. initially advised of her intention to relocate, she provided a detailed proposal for S.J.S.'s parenting time. K.C.M. says that it was reasonable because she proposed an additional 15 days of parenting time for S.J.S. Her proposal would have S.J.S. continue to exercise his parenting time every other weekend with additional days during school holidays.
- [160] While S.J.S. would receive additional days, in my view, it was not practical given that the children would still have to miss every other Monday (or the day after a statutory holiday or professional development day) from school. This would not have been workable. The children missing school is not a viable option and not in their best interests.
- [161] K.C.M. has since amended her proposal to one that she submits is more reasonable. Her proposal essentially mirrors the parenting arrangement prior to her move to D'Arcy - alternate weekends during the school year; spring breaks and Christmas break equally split; 2 consecutive weeks on and two consecutive weeks off during summer break.
- [162] S.J.S. argues that K.C.M.'s proposal would actually reduce his parenting time given that the Schultes Order allows him parenting time every weekend. Once again, I must stress that the order of Justice Schultes was always meant to be interim.
- [163] I find that for the most part, the schedule being proposed by K.C.M. is reasonable given that it was the schedule the children were used to prior to the Schultes Order. I would, however, make certain changes to K.C.M.'s proposal so that S.J.S.'s parenting time is increased to make up for the Mondays that would be lost from his parenting time. This will be discussed below.
- [164] S.J.S. asks the court for shared parenting time. If the court were to do so, it could/would effectively force K.C.M. to move from D'Arcy, which the court has no authority to require her to do. This is the "double bind" that the court is not permitted to engage under s.16.92(2) of the Divorce Act. Accordingly, a shared parenting arrangement is not reasonable nor would it be in the best interests of the children. The children should have a permanent stable home with one of their parents. In all of the circumstances, that home should be K.C.M.'s residence in D'Arcy.

Compliance with Notice Requirements, Orders and Obligations (s. 16.92(1)(d))

- [165] This has been addressed above.

Conclusion

- [166] Considering the totality of the evidence "in the round" and all of the factors set out in ss. 16(3) and 16.92(1) of the Divorce Act, I find that the children's best interests, including their physical, emotional, and psychological safety, security and well-being, are best met by allowing K.C.M. to permanently relocate to D'Arcy with the children and with S.J.S. having regular parenting time on alternate weekends and school holidays. I have come to this conclusion on the basis that K.C.M. has been the children's primary caregiver since their birth and has continued to be so. I have found her reasons for relocating compelling and were made in the best interests of the children, not hers.
- [167] As I have noted, the relocation and K.C.M.'s proposal will bring S.J.S.'s parenting time back in line with the arrangements the parties had agreed to prior to the interim order with the exception of Mondays. As I must also consider the maximum contact principle, in my view, that can be addressed through additional parenting for S.J.S. during school holidays.

Vaccination

- [168] S.J.S. asks the court to make an order that J. receive vaccinations including the Covid-19 vaccine and other childhood vaccinations. K.C.M. opposes such an order and says that J. should be permitted to make that decision.
- [169] S.J.S. tendered an email from Dr. Finnigan in support of his position. On January 17, 2022, the parties met with Dr. Finnigan at the Pemberton Medical Clinic to discuss whether the children and K.C.M should receive the Covid-19 vaccinations and other childhood vaccinations. Dr. Finnigan recommended that they should all receive the Covid-19 vaccination and the children should also catch up on routine vaccinations. Dr. Finnigan also confirmed in the email that during their meeting he discussed immunity via vaccine versus natural immunity through an active infection, which he opined was a risky tactic. Finally, Dr. Finnigan confirmed that he discussed the side effects of the Covid-19 vaccinations and provided a number of reliable resources for the parties to review.
- [170] I also note that S.J.S. also tendered an email relating to golf lessons for K. whereby the policy from the organization was that all participants were required to have the Covid-19 vaccination. It is unclear to me whether or not K. was actually able to participate in those lessons.
- [171] In cross-examination, S.J.S. agreed that the Final Order gave him and K.C.M. joint guardianship and shared parental responsibilities and that would include authority over medical decisions. When asked what stopped him from having J. vaccinated, S.J.S. responded that the parties both have to be in agreement on these decisions but wants the court to make the decision because it is in the child's best interests.

- [172] Counsel for K.C.M. replied upon A.B v. C.D., 2020 BCCA 11, for the proposition that courts should refrain from making declarations that specific medical treatments are in the child's best interests:
- [141] Respecting the best interests consideration in this case, it must be recognized that s. 17 of the Infants Act has entrusted health care providers with the responsibility of assessing AB's understanding and capacity, and satisfying themselves that his treatment decisions were in his best interests. The court should not presume to declare a treatment in a minor's best interests in light of its limited authority, which is confined to reviewing compliance with s. 17.
- [173] However, I find that A.B. does not apply in these circumstances, as the decision in that case was made in the specific context of the application of s. 17 of the Infants Act, R.S.B.C. 1996, c. 223. That provision is not at issue in this case.
- [174] In A.S.N. v. K.E.K, 2021 BCSC 2435, Justice G.P. Weatherill granted an order that the child receive vaccinations, including the Covid-19 vaccination, as soon as practicable pursuant to the FLA at paras. 44-45:
- [44] Now, respecting vaccinations, I understand that to date C.N. has received no vaccinations of any kind. The responsible governments and public health authorities have all concluded that vaccinations of children are safe and effective. These authorities are in a better position than the Court to consider health benefits and risks associated with vaccination of children. In my view, absent compelling evidence to the contrary, the general proposition is that it is in the best interests of children to receive vaccinations as recommended by the public health system.
- [45] Here there is no evidence, compelling or otherwise, that would rebut this presumption. Accordingly, I conclude that it is in C.N.'s best interest to receive the usual vaccinations as recommended by the public health system, including the Covid-19 vaccination when it becomes available to children of his age, and I make the order that those vaccinations be arranged as soon as practicable.
- [175] A number of decisions from the Provincial Court of British Columbia have also addressed this issue under the FLA: R.S.L. v. A.C.L., 2022 BCPC 9; T.K. v. J.W., 2022 BCPC 16; G.W. v. C.M., 2022 BCPC 29 and A.T. v. C. H., 2022 BCPC 121.
- [176] In each of these cases, the Court concluded that the only relevant consideration was whether it is in the best interests of the children to be vaccinated: FLA, s. 37.
- [177] K.C.M. has not provided any compelling evidence to the contrary as to why the children should not be vaccinated. I also have no reason to disregard the recommendations of Dr. Finnigan. Having considered all of the factors on the best interests of the child set out in s.16(3) of the Divorce Act, I am of the view that it is in J.'s best interests to be vaccinated for all outstanding childhood vaccinations as well as the Covid-19 vaccine. I note that S.J.S.'s request was made pursuant to the FLA. However, as I have noted previously, the factors in

considering the best interests of the child are virtually the same, if not identical, under both statutes.

[178] As S.J.S has only asked that I make an order for J. to be vaccinated, I do not make the same order for K.

Conduct Order

[179] Both parties need to find a way to parent the children in a respectful manner. I have reviewed the many emails and text messages exchanged between them. While the parties for the most part have been respectful, there were occasions that one accused the other of discussing parenting issues with the children. In my view, a conduct order is appropriate in the circumstances.

Conclusion

[180] The Schultes Order is terminated.

[181] Having regard to all of the circumstances, I conclude it is in the children's best interests to continue to have their primary residence with K.C.M. in D'Arcy with S.J.S.'s parenting time on alternate weekends and holidays.

[182] This arrangement is similar to the parenting arrangement that was decided on by the parties prior to the Schultes Order. Though the relocation may inevitably impact the quality of the children's relationship with their father, I am of the view that it can be mitigated by providing additional parenting time to S.J.S. during school holidays.

[183] Accordingly, I order the following relating to parenting time:

- a) The children will primarily reside with K.C.M. in D'Arcy.
- b) The children will have parenting time with S.J.S. every other weekend from Friday at 7:00 p.m. to Sunday at 6:00 p.m.
- c) If S.J.S. is able to make the necessary arrangements with his work schedule or take vacation to be at home, the children will reside and have parenting time with him on all statutory holidays and professional development days that fall on a Friday or Monday. In which case, if it is a Friday, his parenting time will begin on Thursday at 7:00 p.m. and if it is a Monday, his parenting time will end on Monday at 6:00 p.m.
- d) The exchange of the children will take place in Squamish at the scheduled beginning and end times of S.J.S.'s parenting time.
- e) Up to five times in a calendar year, S.J.S. may have overnight parenting time with the children in D'Arcy. He is to give K.C.M. two week's notice of his intention to do so. He will bear the costs of the overnight stays.

- f) The children will reside and have parenting time with S.J.S. for 75% of spring break. He is at liberty to determine which consecutive days he wishes to exercise his parenting time during spring break depending on his ability to make the necessary arrangements with his work schedule or take vacation to be at home. S.J.S. will provide a written schedule to K.C.M. by December 31 each year with his preferred dates. The parties are at liberty to reduce S.J.S.'s parenting time during spring break if they jointly agree.
- g) For summer vacation, S.J.S.'s wishes will be given priority. He will have six weeks of parenting time during the summer vacation. S.J.S. will provide a written schedule to K.C.M. by May 1 each year with his preferred dates. There will be two exceptions: the children will reside and have parenting time with K.C.M. for two consecutive weeks and the week before school commences. This will allow the children to get ready for the start of the school year.
- h) During summer vacation, K.C.M. will have two overnight visits while the children are with S.J.S. so long as it is scheduled around any out of town trips S.J.S. may have planned. K.C.M. will give S.J.S. at least two week's notice of her intention to do so. K.C.M. will bear the costs of the overnight stays.
- i) The children will reside and have equal parenting time with S.J.S. and K.C.M. during the Christmas vacation. The parents will have one portion including Christmas and the other having New Year's Eve. The exchange will occur on Boxing Day. S.J.S. will have parenting time for Christmas day this year. Thereafter, parenting time on Christmas day will alternate each year.
- j) The children will spend Mother's Day and Father's Day with the respective parent. I will leave it with the parties to determine whether this would be overnight or not.

[184] Regarding vaccinations, I order that S.J.S. has the parenting responsibility and authorization to obtain the Covid-19 vaccination and other childhood vaccinations for J. without the consent of K.C.M.

[185] I make the following conduct order:

- a) The parties will not question the child(ren) about the other parent or time spent with the other parent beyond simple conversational questions.
- b) The parties will:
 - i. put the best interests of the child(ren) before their own interests;
 - ii. encourage the child(ren) to have a good relationship with the other parent and speak to the child(ren) about the other parent and that parent's partner in a positive and respectful manner; and
 - iii. make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of the child(ren).

Costs

[186] The general rule in respect of costs is that the party who is substantially successful is entitled to his or her costs: *Gold v. Gold*, 106 D.L.R. (4th) 452, 1993 CanLII 1248 (B.C.C.A.) at para. 19. This general rule accords with the rule that costs follow the event, as expressed in Rules 16-1(7) and 16-1(9) of the Supreme Court Family Rules, B.C. Reg. 169/2009.

[187] Given that K.C.M. has had substantial success, she is entitled to her costs to be assessed on the ordinary scale, but not payable forthwith.

"Girn J."

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