
CANADA / JUDGMENT

L.D.R. v. J.C.L.

2020 BCSC 1267

COURT

Supreme Court of British Columbia

DECIDED

27 August 2020

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2020 BCSC 1267 L.D.R. v. J.C.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.D.R. v. J.C.L.,

2020 BCSC 1267

Date: 20200827

Docket: E15149

Registry: Chilliwack

Between:

L.D.R.

Claimant

And

J.C.L.

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Claimant:

K. Naslund

The Respondent, appearing in person:

J.C.L.

Places and Dates of Trial:

Chilliwack, B.C.

March 2-5, 2020

New Westminster, B.C.

June 15-18 and August 18, 2020

Place and Date of Judgment:

Chilliwack, B.C.

August 27, 2020

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Introduction and issues

- [1] The main issue in this family law trial is the primary residence and possible relocation of the parties' nearly four-year-old son A. The claimant lives in Chilliwack, BC. The respondent lives in Calgary, AB. The parties currently share parenting time, with A alternating every two weeks between the parties' respective homes. The parties wish to put A in pre-school, and he will attend kindergarten next year. The two-week alternating schedule will no longer be possible. The claimant seeks an order that A has primary residence with her in Chilliwack and that A spends all long weekends and half of all school holidays with the respondent in Calgary. The respondent seeks the equivalent order, but in favour of him. Both parties acknowledge the other is a loving parent.

- [2] The next significant issue is contact with another child. The claimant has a son from a previous relationship (L, now age 12) who lives with her. The respondent had originally sought an order appointing him as a guardian of L, but at the beginning of the trial amended his pleadings to seek defined contact time with L in Calgary. The claimant is not opposed to contact, and says she encourages it, but opposes defined time and says that contact should be as agreed to by L.
- [3] Both parties seek retroactive and future child support for the children. The respondent has incurred very large travel and accommodation costs to exercise parenting time. The claimant acknowledges these costs and agrees that to some degree they should be taken into account. The claimant also seeks to impute income to the respondent for 2017.
- [4] There are no claims for division of property and debt, as these have been previously settled between the parties. Neither party seeks an order for spousal support. The claimant seeks a divorce, and the respondent does not oppose this. However, for the reasons discussed below, I have concluded that on the present pleadings, this court does not have jurisdiction to order a divorce or any corollary relief under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA].
- [5] The claimant presently seeks parenting orders and child support under the Family Law Act, S.B.C. 2011, c. 25 [FLA] only. There is an existing agreement regarding parenting arrangements that the claimant seeks to change. Although the respondent references both the DA and the FLA in his pleadings, he specifically seeks relocation of A pursuant to s. 69 of the FLA, and seeks contact with L, a term found only in the FLA.

Evidence and Findings of Fact

Overview of parties' relationship up to separation

- [6] The claimant is 33 years old and the respondent is 41 years old. The parties met in June 2013 over the internet. At the time, the claimant lived in the Philippines and the respondent lived in Calgary. The respondent travelled to the Philippines in December 2013. In February 2014, the claimant applied for a visitor visa to Canada for herself and L. This was rejected. Subsequently, the parties discussed marriage. The parties married in June 2014 in the Philippines.
- [7] In August 2014, the parties applied for the claimant and L to immigrate to Canada, with the respondent sponsoring them. The application was approved. In June 2015, the claimant and L, then seven years old, immigrated to Calgary.
- [8] The parties separated in April 2016. At the time of the separation, the claimant was three months pregnant with A. Within a few days of the separation, the claimant and L moved to Chilliwack.

Reason for claimant moving to Chilliwack

- [9] The reason for the claimant's move to Chilliwack was put in issue. The respondent argued that it was the claimant who had previously relocated in bad faith without consulting him and he sought the "return" of A.
- [10] The parties gave evidence of the last two incidents before the separation. Both incidents were verbal arguments between the parties which resulted in the police being called. There was no allegation of physical violence toward each other, but the last argument involved the claimant smashing the respondent's computer, and the respondent smashing a chair. L was witness to part of both of the arguments. Both parties blamed the other for the arguments.
- [11] The claimant and L moved to a women's shelter. The claimant said she needed someone to support her and she could only stay at the shelter for two weeks. She spoke with her aunt in Ireland who told her that she had a "godmother" in Chilliwack and an uncle in Pemberton, BC. The godmother had a spare room. Although the claimant had a few friends in the Calgary area, she did not think she could live with them. The claimant felt the best option for her and L was to move to Chilliwack and live with the godmother. She said that at the time she was not thinking whether the move would create a challenge for the respondent to be with L and A (when he was born), but her intention in moving was not to keep the children away from the respondent. She wanted to leave a "toxic" relationship. She did not tell the respondent she was going to move until after she arrived in Chilliwack.

Separation until commencement of litigation

- [12] After staying with the godmother for a short period of time, the claimant and L moved to an apartment in Chilliwack. The respondent provided the claimant with between \$1,000 and \$1,300 per month from then until approximately January 2017. From April 2016 to January 2017, the respondent regularly drove to Chilliwack to see his family. His schedule was working 10 days in Calgary and then spending five days in Chilliwack. While in BC, he stayed at the claimant's apartment. When A was born in October 2016, he stayed for two to three weeks. Over the winter holidays, the parties and the children travelled to Quebec and visited the respondent's family.
- [13] The respondent testified that when the claimant first moved he believed she would probably move back to Calgary within six months. He was trying to save his marriage and family and this is why he did not immediately bring a court application to relocate A (when he was born) to Calgary. The claimant testified that although they lived together during this time, the parties were not reconciled.

January 2017 commencement of Supreme Court action and orders

- [14] On January 26, 2017, the claimant filed this action in the Supreme Court seeking a divorce, parenting orders, and child and spousal support. The parenting orders she sought included that: she is the sole guardian of L; the parties are guardians of A; the children have "sole

residency" with her; she has sole decision-making responsibility; and the respondent will have parenting time. On the same day, she sought and obtained a without notice protection order and an order that the children reside with her on an interim basis. Both of those orders expired on February 9, 2017.

February 2017 Provincial Court of BC order

[15] The respondent filed a family law claim in the Provincial Court. On February 8, 2017, the day prior to the Supreme Court orders expiring, the parties obtained an "interim without prejudice" order in the Provincial Court. Neither the pleadings in the Provincial Court nor the entered order were in evidence, but the court clerk's notes were produced. The notes state:

1. Not remove the children from a geographical area of the Fraser Valley - defined as Hope to North Vancouver.
2. Mr to have parenting time with his child [A] twice a day (am and pm) on the days he is here from Alberta. Parenting time to commence on February 10, 2017.
3. Mr to have parenting time with [L] as agreed upon by the parties.
4. Parties are to communicate by text message or email, and only in relation to the children.
5. Interim without prejudice.

[16] There was no evidence that any steps have been taken in the Provincial Court since that time, except the parties agree that on June 22, 2017 the claimant filed a counterclaim to that action. Although the order refers to parenting time with L as opposed to contact, the parties subsequently agreed that the respondent is not a guardian of L. Only a guardian can have parenting time under the FLA: s. 40(1).

March 2017 counterclaim in Supreme Court

[17] On March 30, 2017, the respondent filed a response to family claim and counterclaim in this Supreme Court action. In the response to family claim he pleaded that he has been a resident in BC since October 2016. In the counterclaim he sought orders that included equal shared parenting time for both children, and child and spousal support. He did not seek relocation of A to Calgary. On June 22, 2017 the claimant filed a response to counterclaim, in which she disputed the above claims for relief and alleged the respondent is not a guardian of L.

[18] From February 2017 to October 2017, the respondent drove back and forth between Calgary and Chilliwack. His schedule was now seven days in Calgary and seven days in Chilliwack. Because he could no longer stay with the claimant, for the first month he stayed in a hotel. After that month, he rented an apartment in Chilliwack. Commencing in about February 2017, the respondent paid approximately \$300 per month to the claimant until sometime in 2018.

October 2017 mediation and March 2018 Agreement

[19] On October 25, 2017, the parties attended a mediation with their counsel and subsequently continued to negotiate. Eventually, the parties entered into a written agreement entitled "Memorandum of Understanding" which was signed on March 1, 2018 (the "March 2018 Agreement") and which provides:

- a) The parties are the guardians of A, and the claimant is the sole guardian of L, as defined by s. 39 of the FLA (paras. 1-2);
- b) The primary residence of A and L will be with the claimant (para. 3);
- c) The parties will share parental responsibilities for A, and the claimant will have sole parental responsibilities for L, as defined by s. 41 of the FLA (paras. 4-5);
- d) The parties have an obligation to discuss any matter of a significant nature concerning A and try to reach an agreement. If they cannot reach an agreement, they will participate in a dispute resolution process. If they still cannot agree, either party will be at liberty to make an application to the Supreme Court of BC (para. 6);
- e) The parties agree to vary term two of the Provincial Court order with respect to parenting time for A. The order is varied on a "without prejudice" basis as follows (para. 7):
 - i. The respondent will have seven to ten days of parenting time with A each month;
 - ii. Parenting time will take place in BC;
 - iii. The respondent will have a gradually increasing specified schedule of overnight parenting time for A;
 - iv. Any other parenting time as agreed between the parties;
- f) Any communications regarding changes to the parenting schedule will be in writing (para. 8);
- g) Other terms concerning: the process for exchanges to be facilitated by neutral third parties at a neutral location (paras. 9-11); communication by text or email (para. 21); and the agreement to encourage a good relationship with each parent and terms in support of that (para. 22);

- h) The parties will review the agreement at the end of February 2018. If the parties are unable to reach an agreement at that time, the respondent's parenting time will continue as in the agreement or a court order. If the parties cannot agree, either party is at liberty to proceed with a court application. The parties agree to secure a date for a Judicial Case Conference by January 30, 2018 (para. 23);
 - i) The parties consent to the filing of the agreement in the Supreme Court of BC (para. 24).
- [20] On March 13, 2018, the March 2018 Agreement was filed in this court pursuant to s. 44(3) of the FLA, and is thus enforceable as if it were an order of this court. There was no review of parenting time at the end of February 2018 as required by para. 23. Although the March 2018 Agreement was not signed until March 1, 2018, the parties implemented the new parenting time schedule soon after the October 25, 2017 mediation. The respondent testified that at the time of the mediation, the claimant was breastfeeding A and therefore A had to live with the claimant. The respondent continued to drive to BC to exercise parenting time.

September 2018 Agreement

- [21] On August 27, 2018, the respondent filed an amended counterclaim. He withdrew his claim for spousal support, and sought new orders which included: appointment of him as a guardian of L with equal parental responsibilities, and parenting time with L in Calgary; relocation of A from Chilliwack to Calgary pursuant to s. 69 of the FLA; primary residence of A with the respondent, and with the respondent having all parental responsibilities; and the claimant having parenting time with A during holidays.
- [22] On September 11 and 12, 2018, the parties agreed to change the parenting time. No written amending agreement was ever signed. The parties referred to correspondence between their respective counsel. The correspondence does not show a concluded agreement on all points in issue, but shows a new agreement for parenting time with A. The new agreement was for equal shared parenting time with A on a three-month repeating schedule (the "September 2018 Agreement"). Within that three months, the parties would have parenting time with A on an alternating two-week schedule. The respondent would exercise his two-week parenting time with A in Calgary in the first two months, and in Chilliwack in the last month. The rotation would continue until further court order or written agreement between the parties.
- [23] Following the September 2018 Agreement, the respondent again did all of the traveling. He drove to BC for his parenting time in Chilliwack and flew to Abbotsford, BC to pick up and drop off A for his parenting time in Calgary. The respondent gave up his apartment in Chilliwack, and stayed in various accommodations or with a friend for his two weeks in BC every three months.
- [24] The email exchange between counsel indicates there were negotiations with respect to contact time with L. The respondent proposed defined contact time, and the claimant proposed the respondent have contact with L on the weekends the respondent was in BC

with A, subject to L's wishes. The respondent produced a draft written agreement and during a discussion of the pleadings at the beginning of this trial, said this had been agreed to by the claimant. However, during his evidence he stated this document was a draft to come to a final agreement. He expressed frustration that the claimant or her counsel did not immediately respond to this document. In May 2019, the claimant did respond, and she did not sign the document. I find that with respect to L, the parties did not reach an agreement for defined contact time. The draft agreement is missing information and contains terms that are not included, or are contrary to the claimant's position, in the exchange of emails between counsel. Despite this, commencing in September 2018, the respondent did exercise contact time with L on weekends when the respondent was in BC for the two weeks of the three-month schedule.

- [25] On September 19, 2018, the claimant filed an amended response to counterclaim in which she pleaded that on October 25, 2017 the parties "reached an interim agreement on parenting time for A", which the parties have been following "despite the fact the parties agreed to discuss a new plan in February 2018". The claimant further pleaded that in mid-September 2018 the parties reached a "further interim agreement as to parenting time and contact".

May 2019 s. 211 report

- [26] In May 2018 the parties had attended a judicial case conference, and Master Muir ordered a report concerning both children pursuant to s. 211 of the FLA. This was completed by Ms. Erica McCuaig, family justice counsellor. Interviews and home visits took place between January and March 2019 and Ms. McCuaig produced the report in May 2019.

- [27] With respect to the ability of the parties to parent the children, Ms. McCuaig concluded:

[The parties] are loving and caring parents to both [A] and [L]. Each is wishing the best for their children. There are no concerns with either parent as to their ability to care for [L] and [A].

It is difficult to surmise how the family breakdown actually occurred as each parent has a different perspective on their familial life in Calgary. Regardless of their past, each is committed to making the children's lives as comfortable and rewarding as possible. Each parent is of paramount importance to the children and maintaining those relationship and bonds will also be essential. Whether [the claimant] is asked to return to Alberta or whether she is allowed to remain in British Columbia, I would suggest the children continue shared parenting time.

[The respondent's] parenting time with [A] should be consistent to ensure his bond is strengthened and developed during his toddler years. [L] is wishing to have more parenting time with [the respondent]. Perhaps during his spring and winter vacations, [L] could spend a week with [the respondent] and during summer vacations spend an alternating two week vacation.

- [28] Ms. McCuaig reported that L had told her that he wanted to spend more time with the respondent and that he said "I would like to live with him". The claimant testified that L has recently been reluctant to spend time with the respondent. I discuss this further below.

June 2019 Agreement

- [29] In June 2019, the respondent filed an application for orders that included: two-week alternating parenting time for A, with all parenting time with the respondent to take place in Calgary; and for "parenting time" with L in Calgary during school holidays. The claimant and her then counsel, and the respondent and duty counsel, met outside court on the day of the application. The parties came to an agreement with the result that the application was adjourned to August 19, 2019. The parties disagree on the scope of the agreement that was reached. No written amending agreement was signed.
- [30] With respect to A, the parties agree that the parenting time schedule was amended to a two-week alternating schedule, with all of the respondent's parenting time with A now to take place in Calgary (the "June 2019 Agreement").
- [31] With respect to L, the parties disagree on what was agreed. The respondent testified that the claimant agreed that L would go to Calgary for two weeks at the beginning of the school summer holiday and if it went well, for another two weeks later that summer. However, the next day the claimant sent him an email stating she was only agreeable to the respondent seeing L on their next court date on August 19, 2019. The claimant testified that she did not agree to the defined schedule alleged by the respondent. She agreed to encourage L to go to Calgary for two weeks, but it was subject to consulting L. She subsequently consulted L and they agreed it was best if he went to Calgary during the school winter holiday because he already had scheduled sports camps in the summer and a trip to Calgary would interfere with those. The result was that L did not go to Calgary during the summer holiday of 2019.
- [32] I accept the claimant's evidence over the respondent's evidence on this issue. The claimant has consistently taken the position that any contact time with L is subject to his input. Further, it makes little sense that she would agree to a schedule that she knew interfered with summer camps for which L was already registered, without consulting L.
- [33] Since June 2019, and except for one instance in April 2020, the parties have exercised parenting time with A on the alternating two-week schedule with A traveling to and from Calgary. Until the COVID-19 pandemic in 2020, the respondent flew to Abbotsford to pick up and drop off A. In December 2019, L went to Calgary for two weeks for contact time with the respondent.

August 2019 Consent Order

- [34] On August 19, 2019, the parties attended court and obtained a consent order, as yet un-entered. A handwritten copy of the order, signed by the parties, states:

1. Until the trial of this matter, [the respondent's] parenting time to the child [A] as presently agreed to shall continue to be in Calgary with the pick and drop off to occur at the Abbotsford Airport, and travel costs continued to be paid by the [respondent]. Flight itinerary shall be sent to [the claimant] seven days in advance by email.
 2. The parties shall with[in] 6 weeks attend a formal mediation to attempt a resolution to the issues of
 - i) child support for [A] and [L]
 - ii) costs relating to [the respondent] exercising parenting time
 - iii) special and extraordinary expenses
 - iv) arrears of child supportfailing which the issues shall be dealt with at trial.
 3. The parties shall exchange sworn financial statements on or before August 31, 2019 with all travel, daycare or extracurricular receipts.
 4. [The claimant] shall encourage the child [L] to have contact with [the respondent].
- [35] No mediation took place. The respondent stated he determined that a free mediation could take place in Calgary and the claimant refused. The claimant stated the mediation was to take place in BC during one of the times the respondent was in BC. Despite this, she contacted the mediation service in Calgary, but by the time she heard from the mediator, she did not think a mediation would be successful.

Application during COVID-19 state of emergency

- [36] This trial was set for seven days, and began in March 2020, but could not continue during all of the seven days reserved. After four days of trial, the trial was adjourned and shortly thereafter the COVID-19 state of emergency was declared and court services were restricted. In April 2020, I heard an urgent application brought by the respondent as the claimant had refused parenting time for A, citing COVID-19 risks. I ordered that parenting time resume with the parties observing COVID-19 precautions and some change to travel. The exchange of A was now to take place at a mid-point, Revelstoke BC, with both parties driving. The respondent also agreed to an interim child support order for A. It appeared from the evidence and arguments during the application that there had been new events since the trial had adjourned in March. As a result, at the resumption of this trial in June, I permitted each party to provide an update on the events which had taken place since March 2020.

L's biological father

- [37] The claimant testified that L's biological father is DG, who lives in the Philippines. The claimant contacted DG when she was pregnant, and attempted to contact him after L was born and again when L was seven years old, but did not receive a response. The claimant contacted DG again in 2017. DG has not admitted paternity. There was no evidence that DG has ever supported or exercised any parental responsibilities toward L.
- [38] The claimant swore an affidavit in connection with her application for her and L to immigrate to Canada, the substance of which is that DG has had no involvement with L. She also swore that she knew L's biological father only by his first name and a contact number. This was shown not to be true, and is an event that reflects negatively on the claimant's credibility, although on most issues I generally found the parties to be of equal credibility.

Relationships and living arrangements in Chilliwack

- [39] The claimant testified that she, L and A live in a three-bedroom condominium in Chilliwack. Prior to the COVID-19 pandemic, when the claimant was at work during the week, A attended a daycare facility. A is a friendly and social child. Every Wednesday A attends a sports class at the YMCA. A has been able to adjust between homes. The claimant has inquired regarding a French immersion school for A in Chilliwack. A and L have a very close relationship despite their difference in age. They play, talk and are happy to be with each other. L helps looks after A.
- [40] The claimant testified she has been in a committed relationship with KI for over two years. KI is employed as a sports coach of children and young adults. He is also separated or divorced and has two children. When the COVID-19 state of emergency was declared, the claimant lost her employment and she and the children temporarily moved in with KI and his youngest child and isolated there. The claimant plans to return to live in her condominium and see KI on the weekends as before. The claimant and the children have a close relationship with KI and his extended family and are treated as part of that family. She described weekly dinners with KI's parents and monthly family activities with KI's large extended family where there are other children with whom A and L play. She thinks A would feel isolated without her and his brother, if A were ordered to live in Calgary.
- [41] KI testified and gave similar evidence regarding the activities with and close relationship between his family and the claimant and the children. His parents, sister and brother, and nieces and nephews, live in the lower mainland. A and L refer to KI's parents as grandpa and grandma, and his parents think of A and L as their grandchildren. Sometimes his parents look after A and L, and he looks after A and L on Saturdays when the claimant works. KI described the claimant as a caring and loving mother.

Relationships and living arrangements in Calgary

- [42] At the time of the trial in March 2020, the respondent testified that he was living in a house he shared with a friend he has known since high school. It was not his preference to have a roommate, but with the cost of travel to Chilliwack, it was a way he could afford to live in a house. By the June 2020 trial dates, the respondent had moved to a house where he now lives by himself. He is friendly with a woman, and after this court case and the granting of the divorce, he expects the relationship to become a romantic one. A has met his friend.
- [43] The respondent stated that family is the most important thing to him. The respondent likes sports and the outdoors and he shares this with the children. The respondent described the many outdoor and sports activities to which he has introduced the children, and which the children enjoy. He has supplied all of the necessary sports equipment for the children.
- [44] When the respondent is working, A is looked after by the respondent's cousin's wife, JL, in her home. JL also looks after the son of another of the respondent's cousins. This child is four years old and A is close with him. Since the COVID-19 pandemic, the respondent has taken time off work while A lives with him. If A lives in Calgary, the respondent has arranged for A to attend a French-immersion pre-school. The respondent speaks French at home with A, but at this point A is more comfortable in English.
- [45] The respondent has a brother (ML) and sister-in-law who live near Calgary. A is their godson. Sometimes A will spend Sunday afternoons alone with ML and his wife. The respondent's parents live in Quebec, but come to Alberta each year for one to two months. They have looked after A when they are in Alberta. The respondent's sister lives in Quebec and has six daughters. In 2018, his sister and her family visited the respondent and A.
- [46] ML testified the respondent is a very good father who never gives up on the current situation. In the last six months, ML has seen A 30 to 50 times, even if for just a short time to say hello. ML considers L to be his nephew, and L calls him his uncle.
- [47] The respondent testified that he has many friends in Calgary who have children, and if he has an opportunity to visit them, he brings A. He described his friends DS and MH, who have children. DS testified that he has known the respondent since 2006 and the respondent is treated as part of his family. He described the respondent as very family-oriented and a good father, who treats L as his own son. Currently he sees the respondent about once a month.
- [48] The respondent described his relationship with L. He has supported L financially. When the claimant and L were still living in the Philippines, the respondent sent the claimant \$300 to \$500 per month, although the time period for this was not specified. The respondent supported the claimant and L in Canada, although once the claimant obtained a job she contributed financially as well. The respondent established a relationship with L when L was five years old. Prior to L immigrating to Canada, the respondent visited the Philippines five or six times and when not in the Philippines had daily contact with L by phone or video.

The respondent produced cards from L referring to the respondent as his father. There is also a father's day card referring to the respondent by his first name. The respondent represents himself as L's father to other people. The respondent testified he loves and treats L as his son, his door will always be open for L, he has an RESP for L, and he hopes one day L will come to live with him. He believes L "gives me back this relation". The claimant also testified that L considers the respondent to be his father.

- [49] The respondent feels his relationship with L has been "cut" because the claimant has not let him see L. From January 2017 to the summer of 2018 he only saw L when the parties exchanged A, or sometimes on weekends. In that period, L stopped calling him dad, and started calling him by his first name. Then, when the parties started the three-month cycle of parenting time in the September 2018 Agreement, the respondent had contact time with L on weekends when the respondent was in BC. When L visited the respondent in December 2019, L called the respondent "papa" again, but never in front of the claimant. At that visit, L enjoyed himself and asked the respondent if he could come back at spring break. The respondent stated he wants the children to be together and he does not want L to feel that he has stolen his brother from him.
- [50] I pause here to note that despite the claimant stating several times that she encourages and facilitates parenting time and contact with the respondent, she still made some negative comments about the respondent and his living situation. For example, she said L reported they didn't eat good food. The respondent denied each of the claimant's concerns. I give little weight to the claimant's concerns, primarily because there was no evidence the claimant had ever raised these concerns with the respondent, and I am satisfied the respondent loves the children and is a capable parent. If the claimant truly was concerned, as a responsible parent, she would have raised these issues. The claimant also commented on the respondent's relationship with his family, stating it was cordial but not close. Again, I give little weight to these comments considering the very brief period the parties lived together. For example, the claimant did not know that JL was the respondent's cousin's wife.

Claimant's employment

- [51] The claimant testified she has a computer science degree from the Philippines. When the claimant lived in the Philippines, she worked as an information technology specialist. After she arrived in Calgary, she obtained a job within a month as a cleaner. After the parties separated and A was born, she received employment insurance and took a community support worker course. In 2018 she became employed at a child care facility where A attended. She also worked as a family support worker. At the time of the trial in March 2020, she had just started working as an educational assistant at a private school, and was also working part time on Saturdays as a family support worker. At the resumption of the trial in June, the claimant had just accepted full time employment as an IT support technician in Abbotsford, BC at an annual salary of \$34,000 plus insurance benefits and a possible bonus.

[52] The claimant's tax returns and assessments show the following line 150 income:

- a) 2016 - \$16,765;
- b) 2017 - \$23,276;
- c) 2018 - \$28,688;
- d) 2019 - \$30,220.

[53] I find the above is the claimant's income for the purposes of child support under the Federal Child Support Guidelines [Guidelines]. The claimant stated if A were to live in Calgary, she would not be able to afford to visit. She also said her previous job did not have the flexibility to travel, whereas the respondent's job has flexibility. She does not know if she could find the same work in Calgary. She said it would be hard for her to start again.

Respondent's employment

[54] The respondent is a repair technician for a roofing and exterior repair company. He has worked for this company since 2009. His employer is accommodating and his work schedule is flexible. On the weeks he does not have A, he works longer and extra days so he can take time to travel to BC and be with A. Prior to the COVID-19 pandemic, when A was with him in Calgary, he worked shorter days. His brother ML works in the same company, doing the same job, and has the same seniority. They are at the top of the seniority list. The respondent has insurance benefits through his employment, and the children are beneficiaries.

[55] The respondent's tax returns and assessments show the following line 150 income:

- a) 2016 - \$93,090
- b) 2017 - \$23,978
- c) 2018 - \$69,877
- d) 2019 - \$91,482

[56] I find the above is the respondent's income for the purposes of child support under the Guidelines for 2016, 2018 and 2019. I will discuss 2017 income below. ML testified his income for 2016 to 2019 has been between \$100,000 and \$115,000 per year. When the respondent was in BC, ML would sometimes cover the respondent's work, for which he was paid.

[57] The respondent testified that his income dropped after separation because he had to travel to see the children. His income increased as he was able to work out a flexible schedule with his employer, and now that he does not have to exercise parenting time in Chilliwack. He also went on employment insurance from January to September 2017 to deal with the separation. In cross-examination, it was suggested to him that he was "willingly unemployed" in 2017. He described that there are six repair technicians hired by his employer, and one had to be laid off. Of the six employees, he was the one who needed the

time off and so he was the one laid off.

- [58] The respondent plans to stay with this employer. He has a good relationship with the management and it is stable work. His employer has been very accommodating but the flexibility cannot continue long term. If he were to move to BC, he would have to start from scratch and thinks he would earn less income.

Issues with cooperation since separation

- [59] The parties testified regarding a number of events since their separation that are relevant to the parties' ability to cooperate and facilitate parenting time and contact. These were mostly complaints by the respondent of events where he believes the claimant limited his parenting time and contact, and why he believes defined contact time with L is required. The claimant has a different version of these events or provided an explanation for them.
- [60] With respect to A, the respondent testified to events where he believes the claimant withheld parenting time without reason. These were: in the week after the October 2017 mediation; around the time of A's first birthday when the respondent's brother ML wanted more time with A; and in the summer of 2018 when the respondent suggested his parents could babysit while they were in BC. All of the instances cited by the respondent concerned a distinct event which was limited to a short period of time, and the claimant provided an explanation in each instance. For example, in the emails with ML's wife around A's birthday in 2017, the claimant explained A was still breastfeeding, but invited ML and his wife to a birthday party she was hosting for A. It was also evident from the emails that the claimant thought the respondent's alleged anger made it inadvisable for the respondent to also attend the birthday party.
- [61] The respondent also testified that the claimant has not shared pertinent information concerning A. The claimant denies this. One situation was in December 2017, when A required day surgery. Emails show the respondent requested that the claimant advise him of the surgery date. The claimant did not tell him A was having surgery until 5:00 pm the day before the surgery, making it impossible for the respondent to travel to Chilliwack. The claimant originally justified this by saying a previous tentative date had been canceled, the surgery was only confirmed at that time, and the respondent could have contacted the surgeon. I find the claimant knew of the tentative surgery date for some time before this, and that the respondent was relying upon her to tell him of the surgery date. Later, the claimant testified the parties were arguing at the time, she was receiving counselling regarding their relationship, and she did not think it was a good idea for both of them to be in the same room. I find this was the real reason the claimant did not tell the respondent of the surgery. The respondent also alleged that the claimant did not provide sufficient information regarding A's recovery, but I am not satisfied I received the complete communications between the parties. These events were in the first year of A's life and there was no evidence of a current problem with sharing medical information.

- [62] Another situation is that the claimant has not always provided the respondent with her residential address, work address, and for a short period of time, the address of a previous daycare A was attending. The claimant said she refused to provide these because the respondent had a habit of being in the vicinity of her home, and had harassed the previous daycare provider, requiring her to find a new daycare. The respondent denies this and says it was the claimant's actions that caused the daycare provider to quit. Since A has been placed in a commercial daycare, there have been no further issues.
- [63] Considering all of the evidence, I find that the respondent has not established on a balance of probabilities that the claimant has a pattern of withholding parenting time with A without reason, or that the claimant is attempting to limit the respondent's parenting time. Any disputes have mostly been in the past, and were a result of the parties' strained relationship and the claimant's desire to limit contact between the parties themselves, rather than limit parenting time with A. The respondent has had regular parenting time with A from the time of his birth, and equal parenting time since September 2018.
- [64] With respect to L, the respondent testified that L enjoys spending time with him and he believes the claimant is discouraging L from having contact time. In cross-examination, the respondent agreed that since May 2019, L has told him several times he does not want to spend time with him but the respondent does not believe this is genuine because he has different conversations with L when they are alone. The claimant stated she encourages L to have contact time with the respondent. However, recently when she asks L, he says no or that he has plans.
- [65] Both parties testified to a number of events that concerned contact with L. These included: the respondent being asked to leave L's 2017 birthday party when the respondent said he contributed to the organization and cost; the claimant blocking L's phone in the past when she said the respondent was asking L inappropriate questions concerning her relationship with KI; the claimant changing the place of L's Tae Kwan Do training from the facility where the respondent was teaching, when there was also an issue over its cost; an interrupted camping trip over the long weekend in May 2018; and the claimant picking up L from the respondent's home on a weekend in August 2018 when L called her and was crying.
- [66] Similar to the issues concerning parenting time with A, I find these events were a result of the strained relationship between the parties rather than a desire by the claimant to limit contact, in addition to one other factor. The respondent is not L's biological parent or guardian, and the claimant, as L's guardian, has consistently taken the position that it is in L's best interest that contact be subject to L's wishes.
- [67] The events of the May 2018 long weekend are a good example of both causes creating the difficulty. The parties had agreed that the respondent would have a camping trip with A, L, and L's friend. The respondent stated the claimant arrived unannounced at the campground on Sunday morning and interfered with his time with the children by taking L and his friend home. The claimant stated that L called her twice crying and wanting to be picked up. The

weekend started with a dispute between the parties over the return of summer car tires. The claimant called the police twice, once over the summer tires and once when the respondent did not answer her phone calls. The respondent did not pull over his car to answer phone calls from the claimant as to why L was crying. Neither party testified why L was upset, but I find the unfortunate situation the parties created and in which they put L in front of his friend, likely contributed to L wanting to be picked up.

- [68] After the September 2018 Agreement, the respondent had contact with L on the weekends when he was in BC. There was no evidence of a dispute concerning contact from September 2018 until June 2019 when the respondent filed the application resulting in the June 2019 Agreement for A. With respect to L, the dispute at that time again centered on whether there should be defined contact time or contact subject to L's wishes. L did go to Calgary in December 2019 for two weeks and the respondent testified L asked to return over spring break. However, L did not return to Calgary at spring break. As of the June trial dates, there had been no contact (other than by phone or electronically) since March 2020.
- [69] The latest event was in June 2020, just prior to the resumption of the trial. I will set this out in more detail because it is the most current issue, includes comments by L, and shows L is being negatively affected by being put in the middle of the parties' dispute. Text messages between L and the respondent from June 7-9, 2020 were produced. The respondent had proposed that he would spend the evening of June 16 with L, the day prior to this trial being scheduled to end. The text messages start with an exchange between the respondent and L concerning activities they would do that evening. There is no indication L does not want to see the respondent. L then states "Mom said I should have dinner with you on the 17 Because of the trial". The respondent indicated why the 16th would be a better choice. Later, the respondent asked if L would like to spend overnight with him, but L responded that they should only meet on the 17th and that, "Mom said if I spend time with you on the trial it might change something. Or my lawyer might say I should not". The respondent's answer to this was appropriate - that the dispute between L's mom and him did not change his relationship with L. Then L stated, "I'm just trying to make excuses coz I don't want to be involved until it's done". Text messages between the respondent and L the next day on June 9, 2020 show that L repeatedly states that the respondent is not respecting his decision, but is instead "accusing mom", and that he does not want to see the respondent. The respondent repeatedly wonders why and asks L whether it is really him sending the text messages or the claimant.
- [70] The claimant stated she has encouraged L to tell the respondent how he feels, but L is scared the respondent will be angry if he tells him he does not want to see him. L asks her to tell the respondent, but if she does, the respondent accuses her of not encouraging contact. She does not want to hurt L, but she does not want to strain her relationship with the respondent either. The claimant explained L's text messages by stating she had told L that a date for contact after the trial was finished would be better, as commuting would be easier. The other comments of L related to a discussion they had where L did not want to hurt anyone's

feelings and she suggested to L that he could have his own lawyer so he could freely express what he wants.

- [71] The claimant then raised for the first time that L told her he was uncomfortable about sleeping arrangements at the respondent's home and the respondent calling him terms of endearment and telling him he loves him. She said as a nearly teenage boy, L does not want her to display affection toward him in public either. The claimant had never before raised these issues with the respondent. The claimant stated she was not suggesting anything inappropriate was taking place. I find it surprising that the claimant had not raised this concern with the respondent previously, and also that she suggested L needed his own lawyer. This is something the parties as responsible people should be able to address in L's best interest without hiring a lawyer for a 12-year-old. The respondent was unaware these were a concern of L's. He testified that L has his own bedroom, and when he uses terms of endearment it is "simple father love". The respondent referred to the s. 211 report in which L never expressed concern regarding sleeping arrangements. He recognized L had grown older, but said he had not seen any drastic change in L that he would now say this.
- [72] Considering all of the events, I find that the respondent has not established on a balance of probabilities that the claimant has a pattern of withholding contact time without reason, or that she is discouraging L from having contact with the respondent. Instead, the events show that the parties need to be able to better communicate concerning L so that they can freely raise any concerns L may have and act in his best interests.
- [73] Finally, the claimant called evidence which she argued showed the respondent's alleged inability to always act in the children's best interests. KI testified regarding an alleged inappropriate comment made by the respondent at L's birthday party in early 2017, and a discussion with the respondent at the end of 2019 when both he and the respondent became upset. The 2019 discussion concerned a posting to an Instagram account run by the older children in KI's extended family. One of KI's children or their cousins had posted pictures of their families, including the claimant and the children. The photos have a caption that states they are honored to have the claimant, A and L as part of their family. The respondent took offence to the post, and wrote to the account holder, complaining that the children had been tagged, and commenting on the legal dispute between the parties and that KI's family had no right to "pretend" that the two children are more important to their family than to the children's "real family". KI was upset the respondent had written to a child. There was no evidence the respondent knew the account holders were children.
- [74] I find the alleged comment to KI in 2017 was a reflection of the respondent's upset at the parties' recent separation, rather than a consistent inability to act in the children's best interests, and is not something likely to be repeated. There was no evidence of similar comments since then. Similarly, while the respondent's response to the Instagram post was not ideal, I do not find it reflects an inability of him to recognize that the children benefit from loving relationships with others. Rather, I find it was a brief lapse of judgment and a result of his frustration with the difficult situation in which the respondent finds himself.

Parties' positions regarding best interests

- [75] The claimant stated it is in the best interests of A to have primary residence with her because it would enable both children to be together at all times. She, L and A are established in Chilliwack. A was born in Chilliwack, has mostly lived in Chilliwack, and his brother L, friends, and KI's family are close to or in Chilliwack. Relocation would negatively affect these close relationships and support and would significantly lessen her parenting time with A. She does not want to relocate as she feels she would be in the same situation she left. She does not know anyone in Calgary, has no job there, and would have to start from scratch. She intends to live in Chilliwack long term because L has friends and is established in school in Chilliwack, and she has a job there. She stated L is agreeable to some contact and she thinks it is a good experience and L would benefit from having the respondent in his life. However, she does not want to force L. She asked that the respondent respect L's wishes.
- [76] The respondent stated that ideally the best interests of the children are that the claimant returns to Calgary so that the children can have both parents nearby. If that is not possible, primary residency in Calgary is in the best interests of A because A has family, extended family, and friends in Calgary and it is a stable environment. While the respondent stated that family is the most important factor, if A relocates to Calgary, it also allows the respondent to earn a good living. His income is a benefit to the children and would increase if he did not have to travel so frequently to see them. He stated it would be easier for the claimant to start from scratch. The claimant has just started new work. He wonders if her concern is to stay in Chilliwack because KI is there. He also has a relationship he would like to pursue. The respondent testified that if the claimant wishes to visit, she will always be welcome and he would be able to help with the cost of her travel. He noted the claimant has a friend in Calgary and friends in Red Deer, AB. He also stated it is in the best interests of L to be consulted with respect to contact time, however he wants defined contact time to be set after that consultation. He believes defined contact time will decrease any pressure on L. However, he does not want the children to associate his parenting time with being apart. He wants to find a way for the children to see him together.

Analysis

Primary residence and relocation of A

- [77] When the claimant moved to Chilliwack, she was the sole guardian of L in Canada, and A was not yet born. There was no order or agreement for contact, as defined in s. 1 of the FLA, with respect to L. As a result, no notice of intended relocation was required by s. 66 of the FLA.
- [78] When A was born, neither party commenced an action and brought an application pursuant to s. 46 in Division 2 of Part 4 of the FLA. That section provides that when there is no existing written agreement or order with respect to parenting arrangements, the court may make an order regarding parenting arrangements where a guardian plans to change the location of a

child's residence, and it can be reasonably expected to have a significant impact on that child's relationship with another guardian. Instead, the claimant and the children continued to reside in Chilliwack and established a life and relationships there. By the time this trial was heard, four years had gone by, during which time the parties had attended a mediation, negotiated the March 2018 Agreement and agreed to two amendments to that agreement.

- [79] The claimant argued that when she filed the notice of family claim in January 2017, she raised only primary residency, not relocation, in her pleadings. The respondent did not raise relocation in his response pleadings, but only sought shared parenting of A. The claimant argues primary residency was subsequently settled by the parties in the March 2018 Agreement when the respondent agreed to primary residency of A with the claimant; and the only interim part of the March 2018 Agreement was that the parties agreed to review parenting time. It was not until August 2018 that the respondent raised relocation in his pleadings.
- [80] The claimant seeks to change only the parenting time clauses in the March 2018 Agreement pursuant to s. 44(4) of the FLA. Pursuant to that subsection, the court must set aside or replace with an order all or part of an agreement respecting parenting arrangements if satisfied the agreement is not in the best interests of the child. It is not necessary for the parties to establish a material change in circumstances: *Nijjar v. Gill*, 2017 BCSC 1362 at para. 113; *S.C.B. v. K.M.B.*, 2018 BCSC 1148 at para. 51. Even though a material change is not required, I find there has been a material change as the parenting time cannot continue on a two-week schedule once A commences pre-school or school. Although the claimant referred only to the March 2018 Agreement in her argument, I have found the parenting time clauses in that agreement were verbally amended by the parties in the September 2018 Agreement and again in the June 2019 Agreement. I will therefore refer to all three of these collectively as the "Agreements" and in light of my findings, I will treat the claimant's submissions as referring to the Agreements.
- [81] The respondent applies pursuant to s. 69 of Division 6 of Part 4 of the FLA for an order for relocation. Division 6 only applies when there is a written agreement or an order respecting parenting arrangements or contact with the child: FLA s. 65. However, at the same time, the respondent also argues that the Agreements are wholly interim and it was the claimant who relocated in bad faith. Such an argument is possibly one that would be advanced when an order is sought pursuant to s. 46 of the FLA: see *K.W. v. L.H.*, 2018 BCCA 204 at para. 93; *J.M.W. v. B.R.P.W.*, 2019 BCSC 1395 at para. 70. The respondent did not plead or refer to s. 46, however he was self-represented, and I have considered this possibility. He did make submissions on whether the Agreements were interim. The respondent argues that in 2016 he was trying to save his marriage so he did not immediately bring a relocation application. When the parties mediated in September 2017 leading to the March 2018 Agreement, the claimant was breastfeeding, so A had to live with her. He argues the September 2018 Agreement and the June 2019 Agreement were pending the trial.

- [82] In my view, the March 2018 Agreement with respect to primary residency is not an interim agreement pending an application for relocation. At the time the March 2018 Agreement was made, the claimant and the children had already been living in Chilliwack for nearly two years, with no application having been made pursuant to s. 46 of the FLA. The relocation of A had not yet been pleaded by the respondent, and was not pleaded until six months later. There was no evidence any notice was given at or prior to the time of the March 2018 Agreement of a pending application for relocation. There is nothing in the March 2018 Agreement that states or indicates that it is without prejudice to a pending relocation application, as opposed to an application generally if an agreement could not be reached in the February 2018 review. The March 2018 Agreement provided for review in February 2018, but in my view that does not make the agreement interim. It is an acknowledgment by the parties that circumstances may change. Further, there was no evidence of a review in February 2018. Subsequently, the parties twice amended the parenting time clauses in the March 2018 Agreement, but there was no amendment to the primary residency clause, although for the past two years, the parents have had equal parenting time. I find there is a written agreement respecting parenting arrangements that applies to A, and therefore s. 69, as pleaded by the respondent, applies: s. 65(2)(b).
- [83] As the parties have substantially equal parenting time of A, s. 69(5) applies. That subsection sets out the test for relocation. The relocating guardian must satisfy the court the proposed relocation is made in good faith; the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians and other significant persons in that child's life; and the relocation is in the best interests of the child. 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 (the "double-bind" issue).

Who is the relocating guardian?

- [84] As noted previously, the respondent argues the claimant's move to Chilliwack, without notice to him, was not made in good faith, and he seeks "return" of A. This is in effect an argument that the claimant is the relocating parent, even when pleading s. 69.
- [85] This case is not the more typical situation where a guardian proposes to move from a location where both parties are residing. The claimant had moved six months before A was born and A has been living in Chilliwack since he was born nearly four years ago. As primary residence was addressed two years ago in the March 2018 Agreement, in my view it is the respondent who is the relocating parent, and thus the onus is on him to establish the criteria for relocation in s. 69.

Proposed relocation made in good faith

- [86] Section 69(6) provides that for the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including:

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

The respondent seeks primary residency because he loves A, and wants to spend as much time as he can with him. His application is sincere. The respondent believes he can provide a good home for A and this will enhance the general quality of A's and his own life. The respondent has shown admirable devotion in shouldering all of the burden of travelling for the past four years, but this cannot reasonably continue without a toll on the respondent. Having A in Calgary will allow the respondent to work more and provide a financial benefit for A and the family. It will allow him to pursue a possible relationship with his friend. I find A's relocation would enhance some aspects of A's quality of life, and would greatly enhance the respondent's quality of life.

[87] Both parties propose that the other party have parenting time on all long weekends, and half of all school holidays if A has primary residency with him or her self. The respondent, earning a larger income than the claimant, has also offered to pay for some travel for parenting time, so long as tickets are booked in advance to reduce cost. He has also indicated he will take a generous approach to parenting time should the claimant wish to come to Calgary and see A at other times. Although the respondent did not specifically address KI and his family, it is likely KI and his family would see A when the claimant is caring for A. Whether A lives in Chilliwack or Calgary, unless one of the parents follows him, there is no parenting arrangement that will not result in a significant disruption to the parenting time of the other parent. Considering this, I am satisfied the respondent has proposed the best possible reasonable and workable parenting arrangements to preserve relationships that could be made in these difficult circumstances, even though to each parent who does not have primary residency, the arrangements will not be desirable.

[88] There was no evidence the respondent gave notice of relocation under s. 66, but A relocating to Calgary has been in issue since the respondent's amended pleadings in August 2018. No prejudice is alleged by the claimant for an alleged failure to give notice under s. 66. There are no current restrictions on relocation.

[89] Considering all of the above, I find that the respondent's application for relocation is made in good faith.

Double-bind issue

[90] Section 69(7) of FLA prohibits consideration of whether a guardian would still relocate if the child's relocation were not permitted. As noted previously, this is not the more typical situation where a parent is proposing to move to another location and wants the child to move with him or her, so the facts of this case do not fit within s. 69(7). The prohibition addresses the concern that such evidence may lead to an error in reasoning by defaulting to the status quo. However, as discussed in *Fotsch v. Begin*, 2015 BCCA 403 at para. 78:

In my view, the analysis mandated by the FLA would seem to foreclose any presumptive disposition based on an existing parenting arrangement given the extensive list of factors that must be considered before concluding what parenting arrangement is in the best interests of the child. It would also seem to create a complete code for the required analysis, one that differs in some respects from the common law test.

[91] In this case, the status quo for some time has been that A is living two weeks in Calgary and two weeks in Chilliwack. There is no risk of defaulting to the status quo because it is clear that cannot continue as A becomes school age. There is nonetheless still a concern that statements of intention by the parents as to whether they will or will not follow A, and reliance on such statements as factual assumptions, may prevent a comprehensive analysis of the best interests of A: *Fotsch* at para. 80.

[92] While both parties have expressed a desire not to move and both stated an intention to stay in their current jobs, it is important that I do not rely on these statements to permit a presumptive disposition that prevents a full analysis of the factors in s. 69 and s. 37 and what is in the best interests of A.

A's best interests

[93] Section 37 of the FLA sets out the factors that must be considered by the court in assessing the best interests of A. I will discuss each of the relevant factors in s. 37 in relation to both the claimant's claim under s. 44(4) and the respondent's claim under s. 69(5).

[94] A's health and emotional well-being: Both parties provide A with a good home where he enjoys physical and emotional health. Family income can also affect well-being. The respondent has seniority, stability, and a good income and benefits in his job in Calgary. The claimant has had a few jobs in the last couple of years, earns substantially less than the respondent, has not accumulated seniority, and has just started a new job. There was no evidence at trial regarding the availability of jobs in Calgary or Chilliwack for which the parties are qualified. The financial impact to this family of the respondent not being able to keep his job or having to continue to travel is greater than the claimant not being able to keep her job or having to travel. In my view, enabling the respondent to keep his job in Calgary is a factor that weighs in favour of the best interests of A being that A has primary residency Calgary. Tempering this, the respondent is fortunate to have an understanding employer and a flexible job, and thus it may be possible for him to keep his job in Calgary,

perhaps with some reduction in hours, and have increased parenting time with A in Chilliwack. As the claimant has just begun a new full time job, it is unknown whether she would enjoy that same flexibility.

- [95] Nature and strength of relationships: A enjoys a loving relationship with both parties, their families and close friends. Whether A has primary residency in Chilliwack or Calgary, his relationship with both parents will be equally affected because of the reduced time he will be able to spend with each parent unless one of them moves.
- [96] With respect to A's relationship with extended family and friends, if A lives in Calgary, and the claimant and L follow, the claimant's relationship with KI may be affected. As a result, A may lose the relationships not only with KI, but also KI's extended family. Conversely, if A lives in Chilliwack and the respondent follows, A will not see ML as often, and the respondent may lose his potential new romantic relationship. However, A's relationship with the respondent's parents or sister will not be affected as they do not live in Calgary, and can just as easily visit BC as Alberta. I have also considered that the claimant is in a committed relationship with KI for two years, and currently the respondent is not yet in a romantic relationship. If the claimant or respondent move to follow A, their personal happiness may be affected from the potential impact on their romantic relationships, and this may affect A.
- [97] With respect to the relationship between A and L, the evidence establishes they are close. Keeping siblings together is a factor to consider, though not determinative of parenting arrangements: *Poole v. Poole*, 1999 BCCA 203 at para. 31. A and L have an eight-year age difference and this may make this relationship less important for a period of time as L becomes a teenager. Both parents want to keep the children together, but the respondent is not the guardian of L, and the respondent is not currently seeking an order that L live with the respondent. If A lives in Calgary, and the claimant and L do not follow, the siblings' relationship will be disrupted.
- [98] Considering all of the relationships, in my view, the greater negative effect on relationships caused by a move to Calgary as opposed to a move to Chilliwack, is a factor that weighs in favour of the best interests of A being that A has primary residency in Chilliwack.
- [99] History of A's care: The parties have had equal to or close to equal parenting of A since he was born. As a result, this is a neutral factor in assessing the best interests of A.
- [100] A's need for stability: As there has been equal shared parenting for the past two years, and both parties propose mirrored parenting schedules for the future, I find there will be equal stability in either proposal.
- [101] Ability of each guardian to exercise responsibilities: Each of the parties is able to appropriately exercise parental responsibilities.

- [102] Ability of parties to cooperate: While there have been a number of disputes regarding contact with L, there have been comparatively few with respect to parenting time with A. Fortunately, most of these have been in the past, and I have found they reflect the parties strained relationship at the time, rather than the claimant desiring to withhold parenting time. In my view, both parties are able to cooperate with respect to parenting time.
- [103] Conclusion: Weighing all of the above, I find that it is in the best interests of A to have primary residency with the claimant in Chilliwack. This is not a negative conclusion regarding the respondent, who is a loving parent and who has shown admirable devotion in a very difficult situation. The significant factor that has favoured residency with the claimant in Chilliwack is the disruption a move to Calgary would have to the supportive relationships A has with persons in Chilliwack, and the effect a potential move would have on other relationships in Chilliwack which would in turn affect the well-being of A. The claimant, L and A have lived in Chilliwack for the past four years and established a life there. Both parties want A and L to live together, but that will not happen unless the claimant and L move to Calgary. If they do so, L's life will also be disrupted, and the relationship between the claimant, L and A, and KI and his family may be affected. I acknowledge the relationships A has with the respondent and his family will also be disrupted, but I find not to the same degree. I further find that the importance of the close relationships in Chilliwack outweighs any financial benefits there would be to the respondent being able to work more because he does not have to travel. The respondent does have flexibility in his job and if he does not move, he still may be able to work at that job and exercise parenting time in BC. In my view, in the current circumstances of both parties living in separate cities, primary residency with the claimant in Chilliwack is the order that will protect, to the greatest extent possible, A's physical, psychological and emotional safety, security and well-being. It is also in A's best interests that if the respondent chooses to remain in Calgary, that the respondent have as much reasonable and generous parenting time with A as is possible. It is important that the bond between the respondent and A continue to be strengthened. The respondent should not continue to be alone in bearing the burden of travel, and this will also enhance the respondent's ability to provide for the children. Finally, if the respondent chooses to move to the Chilliwack area, it is in A's best interests that equally shared parenting time continue.
- [104] I therefore dismiss the respondent's claim pursuant to s. 69. It follows that pursuant to s. 44(4), I find that the current parenting time provisions of the Agreements are not in A's best interests and those clauses should be set aside and replaced with an order. A will start school and he cannot continue to travel back and forth between two cities, nor would the toll of such travel be in his best interests.

Orders

- [105] I therefore make the following orders:

- a) The respondent's claim to relocate A to Calgary is dismissed. The primary residency of A will continue to be with the claimant in Chilliwack;
- b) Clauses 7 to 13 of the March 2018 Agreement, the September 2018 Agreement, and the June 2019 Agreement, are set aside. All other provisions of the March 2018 Agreement continue to be in effect;
- c) Commencing the later of September 14, 2020, or the date A commences regularly attending pre-school (being defined as at least three half-days per week), if the respondent does not relocate to a location within the lower mainland of BC that is a reasonable commuting distance to the claimant's residence, so that equal shared parenting is possible: During the school year, the respondent shall have parenting time with A in Calgary, on each statutory long weekend or long weekend created as a result of a school professional development day. In addition, except for the month of December, and the month in which A has spring break, the respondent shall have, at his option, one extra weekend per month of parenting time with A, to be exercised in the lower mainland of BC. The respondent must provide the claimant with one month notice of the weekend he chooses. If the parties cannot agree on the weekend, they will resolve such dispute pursuant to para. 6 of the March 2018 Agreement. For each weekend and long weekend, the parenting time will commence on the evening of the last school day, and will end on the evening of the day before school commences. The commencement of the respondent's parenting time will be no later than 7:00 pm; and the end of the respondent's parenting time will be no earlier than 5:00 pm; both times to be in the location where the exchange takes place;
- d) If the respondent does relocate to a location within the lower mainland of BC that is within a reasonable commuting distance to the claimant's residence, so that shared parenting is possible: The parties shall equally share parenting time of A, on an alternating two-week schedule;
- e) The parties shall equally share parenting time with A during the school winter holiday, with the parties yearly alternating who has the first half. The respondent will have the first half in 2020;
- f) The parties shall equally share parenting time with A during the school spring holiday, with the parties alternating who has the first half. The respondent will have the first half in 2021;
- g) The parties shall equally share parenting time with A during the school summer holiday, in alternating two-week periods. The respondent will have the first two-week period in 2021;
- h) The parties shall equally share the responsibility for escorting A on travel for parenting time in Calgary. Subject to safe traveling practices as a result of the COVID-19 pandemic, the respondent shall be responsible for picking up A from the Abbotsford airport at the beginning of his parenting time, and the claimant shall be responsible for picking up A at the Calgary airport at the end of the respondent's parenting time. Each party will bear their own cost of the travel, but the respondent will be responsible for the cost of A's travel;

- i) The respondent shall have electronic or telephone parenting time with A on Wednesday and Sunday of each week at 7:00 pm PST if he does not have in-person parenting time on those days. The respondent will have other electronic or telephone parenting time with A as agreed to by the parties.

Contact time with L

[106] The respondent is not L's guardian: s. 26(1) and s. 39(1) of the FLA. A person who is not a guardian may have contact with a child by agreement of the child's guardians having the parental responsibility to make that decision, or court order: ss. 58 and 59 of the FLA. Section 59 permits the court to make an order for contact time, including the terms and form of contact.

[107] The Provincial Court order states that the respondent will have parenting time with L as agreed to by the parties, but it is an "interim without prejudice" order and in my view was only intended to be in effect until further order or an agreement of the parties. In this case, this was the March 2018 Agreement which states that the respondent is not the guardian of L, but otherwise does not have any terms regarding contact with L. I have found that the September 2018 Agreement and the June 2019 Agreement did not include an agreement with respect to contact with L, and that any contact time was still as agreed to by the parties. The August 2019 Order states only that the claimant will encourage contact time with L, and is an interim order until the trial of this action. There is no existing agreement nor a judicial determination of whether there should be defined contact time with L.

[108] In making an order for contact with a child, the court must consider only the best interests of the child: s. 37 of the FLA. The party seeking contact bears the onus of establishing it is in the best interests of the child: *Kalafchi v. Yao*, 2015 BCCA 524 at para. 12. The best interests of the child test should be "read in harmony" with s. 41 parental responsibilities and with a "degree of deference" to a guardian's wishes so long as they are in the best interests of the child: *L.J.G. v. N.G.*, 2017 BCSC 350 at paras. 49-53. I will discuss each of the relevant factors in s. 37.

[109] L's views: although a child's views are not necessarily determinative, the court should give consideration to those views, commensurate with the child's age and maturity. For teenagers, for orders to be practical, they must "reasonably conform to the wishes of the child": *D.A.F. v. R.D.F.*, 2017 BCSC 873 at paras. 34-35. The s. 211 report, which is now over a year old, states that L said it would make him happy if he could have more time with the respondent and that he would like to live with him. The claimant acknowledges that L has wanted to spend time with the respondent, but the evidence also shows that recently L has declined some, but not all, in-person contact time with the respondent.

- [110] Nature and strength of relationships: The evidence establishes that L enjoys a good relationship with the respondent and his family, but naturally not as close as his relationship with the claimant, who has cared for him constantly since birth. L considers the respondent to be a father.
- [111] History of care: L has always lived with his mother, but the respondent also lived with them: for short periods in the Philippines starting when L was age five; for 10 months in Canada prior to the parties' separation; and for regular periods of time from then until January 2017. After that time, the respondent only saw L at exchanges or occasionally on weekends for the next 1.5 years, but after that cared for him on one or two weekends every three months. From June 2019 on, L has spent even less time living with the respondent, the most significant time being limited to the two weeks in December 2019. I conclude the decreasing contact over time indicates there should be some caution in any contact initially ordered.
- [112] L's need for stability: The respondent provides a stable home, but there is a need for stability of a different sort - an end to the dispute between the parties regarding contact time.
- [113] Ability of the respondent to exercise responsibilities: Persons who are not guardians do not exercise parental responsibilities as defined in the FLA; however, the respondent is able to exercise any responsibilities needed for contact time.
- [114] Cooperation between parties: The strained relationship between the parties has the potential to negatively affect the best interests of L. The June 2020 dispute exemplifies this. The parties need to be able to freely communicate with respect to any concerns of L so that they act in his best interests.
- [115] Conclusion: I find that it is in the best interests of L to have contact time with the respondent. L has benefited from the love and guidance of the respondent. They have a form of father-son relationship. The issue is whether there should be defined contact time. Although the respondent seeks this, he states he does not want to force L, and that contact time should be set after consultation with L. The claimant wants A and L to be together with the respondent, and therefore contact time with L to take place at the same time the respondent has parenting time with A in Calgary. In my view, that provides some assurance the claimant will encourage contact time. Although in-person contact time has not taken place while L has been out of school during the COVID-19 pandemic, given the unusual circumstances of the pending trial and the pandemic, I am not prepared to assume that in-person contact will not take place once these events are over. L is at an age where his wishes should be given some weight. The parties have not been able to communicate well concerning L's wishes, and L is now put in the middle of their dispute. Some deference must be given to the claimant's view that the best interests of L is contact as agreed to by him. I find that view is consistent with L's best interests.

[116] Weighing all of these, I find it is in the best interests of L not to have defined contact time, but rather contact time with the respondent as agreed to by the claimant and L. It is not in L's best interests to order he travel to another province to have contact if he does not agree, and particularly when the parties have not been able to communicate well regarding any concerns L may have. The respondent also does not want to force L. Further, there has been a lengthy period of time when L has not had regular in-person contact time, and a sudden order for significant contact time would not be in his best interests. Given the above, defined contact time would not protect, to the greatest extent possible, L's psychological and emotional well-being. I also find that it would be in L's best interests for the parties to communicate better concerning L. It appears the parties may need some assistance to achieve this.

Orders

[117] I therefore make the following orders:

- a) The respondent may have in-person contact time with L when the respondent has parenting time with A, but subject to the agreement of the claimant and L;
- b) The claimant will encourage L to have contact time with the respondent;
- c) The parties shall promptly communicate to each other any concerns expressed by L with respect to contact time, so that they can be addressed by the parties;
- d) In arranging any contact time with L, both parties will be respectful of L's wishes;
- e) If L accompanies A for contact time in Calgary, the respondent will be responsible for picking up L from the Abbotsford airport at the beginning of his contact time, and the claimant will be responsible for picking up L at the Calgary airport at the end of the respondent's contact time. Each party will bear their own cost of the travel; but the respondent will be responsible for the cost of L's travel; and
- f) The respondent may have reasonable electronic or telephone contact with L, as agreed to by L.

[118] In closing argument, the respondent indicated that he has extended health benefits through his employer that may cover the cost of counselling, and the claimant also indicated through her counsel a willingness to explore counselling to improve the parties' communication, and possibly to involve L to assist in resolving any concerns he may have. I encourage the parties to explore this option in the best interests of L. To be clear, the problem is communication between the parties, not with L, so this is not a suggestion that L needs counselling. Given the lack of evidence of what counselling is available, I am not making an order at this time. As discussed with the parties, there may be other resources to improve communication between them.

Other parenting orders

[119] The claimant seeks to change the March 2018 Agreement to the Joyce model for parenting responsibilities, and in particular to change para. 6 of the March 2018 Agreement, so that in the event of disagreement she will be entitled to make the decision with respect to A, and the respondent will have to apply for directions if he does not agree. The claimant argues there is continuing conflict between the parties and such an order is needed. I do not see any need to amend the March 2018 Agreement in this manner, nor do I consider it to be in the best interests of A to do so. The parties agreed to primary residency, joint parenting responsibilities pursuant to s. 41 of the FLA, and a mechanism for resolving disputes in the March 2018 Agreement. Primary residency has not changed, and I see no need to modify the parenting responsibilities or give the claimant the final decision. Any disputes between the parties have not been insurmountable, and my impression is that they have decreased over the years. Except as modified by the orders in these reasons, the March 2018 Agreement continues in force, and contains the clauses addressing shared parental responsibilities which is enforceable as a court order.

[120] The parties seek a number of orders by consent, which I find are appropriate and I therefore make the following orders:

- a) By consent, the parties will:
 - i. put the best interests of the children before their own interests;
 - ii. encourage the children to have a good relationship with the other party and speak to the children about the other party and that party's partner in a positive and respectful manner; and
 - iii. make a real effort to maintain polite, respectful communication with each other, refraining from any negative or hostile criticism, communication or argument in front of the children.
- b) By consent, each party will cooperate with the other in the provision of passports, consents to travel, and other necessary documents as may be required to allow A to travel.
- c) By consent, each of the parties is permitted to travel inside or outside of Canada with A by providing one month's notice to the other party in writing, such notice to include the travel itinerary, and contact addresses and telephone numbers while the party is traveling so that the other party may maintain contact with A during the travels.
- d) By consent, the claimant shall not apply for citizenship for A in the Philippines without the consent of the respondent.
- e) By consent, within 60 days, the claimant will take such steps as are necessary to remove her name from the RESP, as agreed to in para. 20 of the March 2018 Agreement.

Child support

[121] There are four main issues:

- a) whether a claim for child support for L is barred on the present pleadings pursuant to s. 147(4) of the FLA; and if it is not barred, the extent of the respondent's obligation as a stepparent pursuant to s. 147(5);
- b) whether income should be imputed to the respondent for 2017;
- c) the appropriate amount of child support considering the factors in s. 9 of the Guidelines, in particular the significant travel costs the respondent has incurred to exercise parenting time and contact;
- d) the appropriateness of an award for retroactive child support.

[122] The parties agree that the total amount the respondent has paid in child support from the separation in 2016 to June 2020 is \$14,269. Except for approximately \$1300 that has been paid between April and June 2020, all of the support was paid between 2016 and sometime in 2018.

Child support for L

[123] At the commencement of this trial, the pleadings were not entirely reflective of the parties' positions. Both parties amended their pleadings with the consent of the other and were prepared to proceed. At the time, claimant's counsel advised that the claimant was seeking parenting arrangements and child support under the FLA only. What I conclude was likely not recognized by claimant's counsel at the time (who was relatively new to the file) is that in the original pleadings, the claimant had sought parenting arrangements pursuant to the DA and FLA, but child support pursuant to the DA only. As a result, at the time the pleadings were amended, claimant's counsel did not raise with the court that there was a potential limitation defence with respect to child support for L. I do not suggest this was intentional by claimant's counsel. From the conversation at the time, it appears claimant's counsel did not realize this, and thought the claim had been made in the original pleadings.

[124] The respondent is a stepparent as defined in s. 146 of the FLA because he is a spouse of L's parent, and lived with the claimant and L. Section 147(4) of the FLA states:

- (4) A child's stepparent does not have a duty to provide support for the child unless:
 - (a) the stepparent contributed to the support of the child for at least one year, and
 - (b) a proceeding for an order under this Part, against the stepparent, is started within one year after the date the stepparent last contributed to the support of the child.

[125] In closing at trial, claimant's counsel argued that the respondent had contributed to the support of L for at least one year, and this action, which included a claim for child support, had been commenced in January 2017 while support was still being paid. As such, counsel argued the criteria of s. 147(4) had been met. As set out above, I have concluded counsel was likely unaware that the claim for child support "under this Part" (being the FLA) had not been commenced in this action as the box for the FLA under the child support section

in the original pleadings had not been checked off. As a result, this submission was in error, but not realized at the time.

- [126] In closing at trial, the respondent acknowledged he was a stepparent within s. 147. However, the focus of the discussion was on s. 147(4)(a), rather than s. 147(4)(b). The evidence supports the conclusion, and I find, that the respondent contributed to the support of L for at least one year, so the criteria in s. 147(4)(a) is met. However, upon my review of the pleadings, the error in counsel's submission with respect to s. 147(4)(b) became apparent. As it appeared that neither party realized there was this issue, I sought further submissions from the parties.
- [127] It is in the best interests of L that he receive support from the respondent. The respondent considers that L is his son, and had originally sought an order that he be appointed a guardian of L, in which case he would have had an obligation to provide child support. At trial, the respondent was not opposed to providing some support for L, and acknowledged that support was the right of the child, but disputed the amount.
- [128] In further submissions, claimant's counsel argued that the claimant had commenced a proceeding under the FLA by way of counterclaim in the Provincial Court action, and this was commenced within the one year time limit. Claimant's counsel argued that the pleadings in the Provincial Court were sufficient to meet the criteria of s. 147(4)(b). The respondent disagreed, but his argument was not responsive to the issue, and focused on the quantum of child support for L.
- [129] The purpose of s. 147(4)(b) is to provide the stepparent with timely notice a claim is being made: *O.Z. v. M.Z.*, 2016 BCPC 416. In this case, the respondent knew in a timely way that a claim for child support for L was being made, either through the DA or the FLA. I asked the respondent to identify any prejudice to him, but again his submissions focused on quantum, not the obligation for child support. Section 147(4)(b) refers to "a proceeding" not "this proceeding". In the circumstances of this case, I find that a proceeding has been commenced and that the respondent is a stepparent within the meaning of s. 147. If I am in error in this conclusion, I would have made an order consolidating the provincial court proceedings with this action pursuant to s. 194(3)(c).
- [130] Although it is not necessary to do so, I address here the claimant's alternative submission that her pleadings be further amended to revert to the original pleading seeking child support as corollary relief under the DA. I do so because it also explains by conclusions regarding the jurisdiction to grant a divorce. Section 4(1) of the DA states:
- (1) A court in a province has jurisdiction to hear and determine a corollary relief proceeding if
 - (a) either former spouse is ordinary resident in the province at the commencement of the proceedings; or
 - (b) both former spouses accept the jurisdiction of the court.

[131] A claim for corollary relief includes a child support claim. The difficulty with the claimant's argument is that the claimant and the respondent are not yet "former spouses", so s. 4(1) does not apply unless I can make an order of divorce. I have concluded that I do not have jurisdiction to make an order for divorce on the present pleadings.

[132] I raised with counsel at the beginning of the trial whether the court had jurisdiction to make a divorce order as the claimant had not been ordinarily resident in BC for one year prior to commencement of the proceeding. Section 3(1) of the DA states:

A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.

[133] At the time, claimant's counsel argued that the claimant had filed amended pleadings in this action after the claimant had been ordinarily resident in BC for over a year, and therefore the claimant came within s. 3(1). I have been unable to locate any case authority that supports this argument. The respondent did not contest jurisdiction, and agrees to a divorce, however jurisdiction under the DA cannot be admitted: *MacLean v. MacLean*, [1990] B.C.W.L.D. 337 (S.C.). In my view, an amended notice of family claim, which does not seek to add a new claim for divorce, does not come within s. 3(1) of the DA. The claimant commenced an action for divorce prior to being ordinarily resident in BC for one year. Both parties were represented by counsel at the time, but unfortunately they did not recognize this jurisdictional error. I have also considered whether jurisdiction for a divorce (and corollary relief) could be found through the respondent's pleadings. While the respondent could rely on the claimant's residency in establishing jurisdiction, he did not commence his own claim seeking a divorce after the claimant had been ordinarily resident in BC for one year, so on the present pleadings there is no possible jurisdiction through the counterclaim.

[134] Having found that the respondent meets the definition of stepparent in s. 147, it is necessary to consider s. 147(5) of the FLA, which states:

- (5) If a stepparent has a duty to provide support for a child under subsection (4), the stepparent's duty
 - (a) is secondary to that of the child's parents and guardians, and
 - (b) extends only as appropriate on consideration of
 - (i) the standard of living experienced by the child during the relationship between the stepparent and his or her spouse, and
 - (ii) the length of time during which the child lived with the stepparent.

- [135] In addition, s. 5 of the Guidelines provides that where a person stands in the place of a parent for a child, the amount of child support is the amount "the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child".
- [136] There was no evidence of any attempt by the claimant to prove paternity and seek support from DG for L. Her only explanation for why she had not done so was her inadmissible voluntary statement that the laws of the Philippines would now not permit her to pursue DG. There was no admissible or expert evidence of the laws of the Philippines and whether at this stage, child support could be pursued. The respondent argues it seems unfair to him that he is not having contact time, yet is being asked to pay full child support. He argues if he is not having contact time, his support should be limited to items such as sporting equipment and the RESP he has for L. He also points to clause 4 of the March 2018 Agreement which states that the claimant will have sole parental responsibilities for L, which he interprets as including child support. Despite all this, the respondent states he loves L as his son, and he does not want L to go without.
- [137] The obligation to pay child support is not dependant on contact or parenting time, but in this case, on the factors in s. 147(5) and the Guidelines. Further, parental responsibilities in s. 41 do not include a child support obligation, which is addressed separately in s. 147. Clause 4 of the March 2018 Agreement does not include child support when it refers to parental responsibilities.
- [138] Referring to the factors in s. 147(5), and s. 5 of the Guidelines, it appears unlikely that DG will be pursued for child support at this time. However, I am not finding that the claimant does not have an obligation to pursue DG for support or that such support is not obtainable. I also note the Philippines is not a reciprocating jurisdiction under the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29, so even if there were a support order, there may be difficulty enforcing it. For the time being, the respondent's obligation is practically second to no one. In *U.V.H. v. M.W.H.*, 2008 BCCA 177 at para. 41, the Court of Appeal noted that where one parent is not present, a stepparent may be required to pay the full table amount.
- [139] The standard of living for the time L lived with the respondent is likely greater than he experienced for the past four years, but there is no evidence that he has wanted for items. L has participated in extra-curricular activities such as gymnastics, Tae Kwan Do, and summer camps, and the respondent has provided all of his sporting gear. Further, given there are now two households to support and the significant travel costs the respondent has incurred, the standard of living in both households would necessarily be less than during the time the parties lived together. L lived with the respondent for a short period of time, even taking into account the time in the Philippines and after separation. Even though it is a separate matter and not determinative of the issues here, I note the respondent brought L to Canada under a sponsorship agreement.

[140] Considering the present circumstances, in my view, the respondent should be responsible for past support in accordance with the table amount, and subject to any other relevant factor in the Guidelines. However, in my view it is also reasonable for the claimant to take steps to pursue child support for DG or explain by admissible evidence why this has not been done. I therefore give the respondent leave, without the need to prove a material change in circumstances, to seek a review of child support for L in one year's time if the claimant has not provided satisfactory information as to why child support for L is not being pursued in the Philippines. Further, if the relationship with the claimant and KI progresses, there may also be reason to review the child support obligation.

Imputation of income

[141] The claimant seeks to impute \$50,000 income to the respondent for 2017. She argues the respondent was intentionally unemployed. The relevant provision in the Guidelines states:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[142] The Court of Appeal noted in *Barker v. Barker*, 2005 BCCA 177 at paras. 18-19 that under s. 19(1)(a), it is not required to show that there was intent to evade or minimize child support; what matters is whether the parent is earning what the parent is capable of earning. In this case, there was no evidence the respondent was incapable of working because of a diagnosed health condition, although it was clear the respondent was upset by the separation. In that sense the unemployment was intentional as he was the one who volunteered to be laid off. Was his decision justified by the needs of A? In my view it was. At the beginning of 2017 the respondent had a newborn first born child with whom he naturally wanted to bond. His desire to bond with A, and the importance of that bond, is no less than that of the claimant. Were the parties not separated, he may well have taken paternity leave. Legal proceedings were commenced and resulted in orders in the early part of 2007 that required attention in BC. While I do not find the claimant moved to Chilliwack in bad faith, her relocation put the respondent in a position where he had to travel to see the children. The Provincial Court order provided that the children were not to leave the lower mainland. The respondent had no choice but to travel extensively to see A. The claimant agreed to the schedule where the respondent saw A frequently.

[143] I therefore decline to impute any income to the respondent for 2017 beyond what income is reported on line 150 of his tax return.

Section 9 of the Guidelines

- [144] Section 3 of the Guidelines sets out the presumptive amount of child support payable, which is the table amount, when there is no shared or split parenting.
- [145] Section 9 of the Guidelines provides the factors that must be considered in setting the appropriate amount of child support when there is shared parenting:
- (9) Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [146] The leading case on s. 9 of the Guidelines is *Contino v. Leonelli-Contino*, 2005 SCC 63, which sets out the proper contextual approach to a s. 9 analysis.
- [147] After A was born, there was a hybrid shared parenting regime. L lived with the claimant, and there was shared parenting of A. In *Dyck v. Bell*, 2015 BCCA 520 at para. 27, the Court of Appeal dealt with a situation similar to here, where one child was in a joint custody scenario, and another was primarily living with one parent. The court outlined the approach:
- [27] the starting point of the analysis would be a payment based on the table amount of Mr. Bell for two children, less the table amount of Ms. Dyck for one child. The court would then be required to consider the application of s. 9 of the Guidelines in accordance with the principles set out in *Contino*.
- [148] The first issue is whether s. 3 or s. 9 applies. From May to October 2016, the respondent and claimant lived together in Calgary for 33% of the time (10 days in Chilliwack, five days in Calgary). Up to October, there was only one child, and I find s. 3 applies as there was not 40% shared parenting up to then.
- [149] Claimant's counsel provided calculations of table amounts of child support based on no shared parenting in 2016, and the hybrid of no shared parenting of L and shared parenting of A commencing in 2017. I agree the evidence establishes that the respondent had care of L less than 40% of the time on a yearly basis, at all times since separation. I also agree that the evidence establishes that the respondent had care of A greater than 40% of the time since his birth, with the possible exception of 2018. In that year, the respondent had care of A in BC from January to August 2018 for approximately 33% of the time (10 days in Chilliwack, 20 days in Calgary), and from September to December 2018 50% of the time. The weighted average of this is 39%, however the evidence was not clear how the four

travelling days that would have been incurred every month to and from Chilliwack were included in the 10/20 day split, and several months are 31 days not 30. The parties did not present a detailed calendar of every day parenting. Four extra days at any point in the year would have put the respondent at 40%. Given the claimant did not argue there was not shared parenting, I conclude it is likely the respondent had those four extra days at some point to bring him to the 40% threshold.

[150] There is one other relevant provision. Section 10 of the Guidelines permits the court to consider any undue hardship when determining child support. Section 10(1) states:

(1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

[151] Circumstances of undue hardship include "unusually high expenses in relation to exercising access to a child": s. 10(1)(b). The respondent's arguments with respect to his traveling expenses are the same with respect to s. 9(b) and s. 10(1)(b). Since the court has discretion in s. 9 to consider "other circumstances", it should only be necessary to resort to s. 10 in extraordinary circumstances: Contino at para. 72. However, I have found the calculation of standard of living ratios in Schedule II of the Guidelines, and as referred to in s. 10, to be useful in this case, and have included those in the table below.

[152] Turning to s. 9(a), I have set out the Guidelines table amounts in the table below. I note that my calculations for the table amounts vary slightly from those of claimant's counsel. This is because her calculations assume the respondent was a resident of BC, while I find he was a resident of Alberta, and for some years the Guidelines income I determined is a little different. Although current child support is often adjusted by parties mid-year based on the previous year's income tax information, in this case there was no existing child support order or agreement, and the parties have the benefit of now retrospectively knowing income for each calendar year for the past four years. Therefore, I have based table amounts on the known income for a particular year. For child support, commencing July 1, 2020, it will be based on 2019 income, and going forward adjusted yearly on July 1, each year based on the previous year's Guidelines income.

[153] With respect to s. 9(b), at para. 52 of Contino, the Court refers to the "total cost of raising children", and that "consequently, all of the payor parent's costs should be considered under s. 9(b)". In my view, the costs of travelling to BC to exercise parenting time as well as the cost of duplicating a household in BC to exercise that parenting time, should be considered as part of the "increased cost of shared parenting".

- [154] For the past four years, the respondent has incurred all of the cost, both in time, inconvenience and money, to exercise parenting time. The respondent testified that the cost of travel depended on the parenting arrangements and the time of year. He gave evidence of average costs as follows:
- a) From May 2016 to January 2017 he drove to BC. The cost of gas round trip was \$300. He did not incur accommodation costs because he was staying with the claimant. He traveled to and from BC twice each month. The total cost for this period was \$600/month.
 - b) As of February 2017 he was no longer staying with the claimant. He continued to drive to BC, but also had the cost of accommodation. This was a hotel. The accommodation cost was \$400, for a total cost this month of \$700.
 - c) From March 2017 to September 2018 he rented an apartment in Chilliwack at a cost of \$850 per month. He gave up the apartment in September 2018. He again incurred gas costs. The cost was \$1,150 per month.
 - d) From October 2018 to June 2019, when A came to Calgary for two of the three months, he bought six airfare tickets per month to travel. The cost was \$600-850 per month. I have taken an average of \$725. For the two weeks he was in BC every third month, he drove (\$300) and he had to rent accommodation or stay with a friend, and the average cost was \$400. The cost for this period was \$725/month for the months in Calgary, and \$700/month for the months in Chilliwack.
 - e) From July 2019 to March 2020, he has bought six airfare tickets each month. The cost for this period was \$725/month.
 - f) From April 2020 the parties have shared driving costs to Revelstoke.
- [155] The total out of pocket cost from A's birth in October 2016 to June 2020 is approximately \$44,750, and I find the costs were likely greater. The respondent did not include food in the cost of any of the travel because he said he cooked in BC. However, it is likely there were meals out when traveling between Calgary and Chilliwack. The airfare costs also seem low. None of these costs include the sacrifice of personal time for the very lengthy drives between Calgary and Chilliwack, and the long hours he worked when in Calgary to take the time to travel. I have calculated the travel costs claimed on a yearly basis and included them in the table below.
- [156] In argument, the claimant acknowledged the travel and accommodation costs the respondent had incurred and agreed there should be a deduction for such costs. The claimant proposed that no more than 50% of the respondent's travel expenses be offset against the past child support payable on the theory that had the respondent continued to pay child support, she would have shared the travel costs to some degree. On the claimant's argument, that would result in a deduction of up to \$22,375. In Contino, the majority directed that costs should be shared proportionately: para. 78. However, that is still subject to s. 9(c) factors.

- [157] Using the claimant's approach of taking the total table amount (\$37,242), and deducting up to 50% of the travel costs (\$22,375) which she acknowledges she would have partially paid, deducting the amount paid by the respondent (\$14,269) results \$598 in past support amount owing. However, given the discrepancy in the parties' incomes, in my view it would not be in the best interests of the children to require the claimant to pay one half the cost of the travel expenses. Following Contino, in my view the correct approach is to calculate the claimant's proportionate share of travel expenses and then consider the s. 9(c) factors. I have also calculated the yearly travel costs proportionate to income in the table below. Based on the proportionate calculations, the deduction would be \$14,280. Deducting this amount and the amount already paid by the respondent (\$14,269) from the total table amount results in \$8,693 before consideration of s. 9(c).
- [158] Finally, with respect to s. 9(c) of the Guidelines, the majority in Contino stated that s.9(c) vests a "broad discretion for conducting an analysis of the resources and needs of both the parents and the children". A court must keep in mind the objectives of the Guidelines of a fair standard of support for the children and fair contributions from each parent, based on evidence. I have considered the F8 financial statements of the parties, and found the standard of living calculations under Schedule II to be helpful in putting those costs in perspective. Neither party has significant assets. The respondent has large credit card debt. The variable costs for the children are similar after considering that the claimant has L living with her full time. I have considered each year.
- [159] For 2016, there is a marked disparity in incomes, but the parties were actually living together in Chilliwack. In my view, the claimant should not have to pay for any travel costs.
- [160] For 2017, given the parties equal income and the very large expenses the respondent incurred, in my view, child support payable should be reduced to zero. I have done so pursuant to s. 9(c), but even if it were necessary to consider s. 10, I find that the travel costs amounted to undue hardship, and should result in a reduction in child support to zero. In *Kelly v. Kelly*, 2011 BCCA 173 at paras. 33 to 35, Madam Justice Neilson set out the high bar that must be met for undue hardship. The threshold was described as "severe, extreme, improper, unreasonable, or unjustified". The total table amount of child support payable was just over \$2,000, but the travel expenses incurred by the respondent were nearly six times that amount. Factoring in the claimant's proportionate contribution to these expenses, the travel expenses are still nearly three times the table amount of support owed. Taking into consideration the respondent's total income that year, in my view, this meets the test of severe and extreme. Even if the respondent were to pay no child support, after he paid the travel expenses, his household's standard of living ratio would still be lower than that of the claimant's household. I conclude the hardship is significant enough that no child support should be paid for 2017.

[161] For 2018 and 2019, the standards of living are not markedly different, and I find the parties sharing travel expenses proportionate to their incomes is appropriate. In reviewing the fixed and variable expenses, I do not see any need to vary the amount of child support to establish a fair level of support and contribution to support.

Resp's income

Claim's income

Table amount

Travel costs (prop. split)

Greater SOL ratio

May to Dec. 2016

93,090

16,675

806/mo. x 6 (until A's birth) plus

1047/mo x 2 mo. = 6930 (R = 1326; C = 279)

4800 (4080 / 720)

Resp.

2017

23,978

23,276

183/mo x 12 mo. = 2196 (R = 378; C = 195)

12,800 (6528 / 6272)

Claim.

2018

69,877

28,688

753/mo x 12 mo. = 9036 (R = 1017; C = 264)

12,500 (8875 / 3625)

Claim.

2019

91,492

30,220

$1060/\text{mo} \times 12 \text{ mo.} = 12,720$ (R = 1341; C = 281)

8650 (6487 / 2163)

Resp.

Jan. to June 2020

91,492

30,220

$1060/\text{mo.} \times 6 \text{ mo.} = 6360$

6000 est. (4500 / 1500)

Resp.

Total

37,242

44,750 (30,470 / 14,280)

[162] In all the circumstances, I determine that the retroactive amount of child support payable up to the end of June 2020 is \$8,693 plus \$720 minus \$2,196 = \$7,217. The parties will also need to make an adjustment to increase this for the difference between what the respondent has paid for child support for July and August, and the child support of \$1,060 per month. Assuming interim support was paid as ordered, that is $(\$1,060 \times 2)$ less $(\$423 \times 2) = \$1,274$ to be added to the \$7,217.

[163] As for future child support, if the parties live in separate cities, then there is no shared parenting and child support is payable pursuant to s. 3 and the table amounts. Presently this is \$1,341 per month.

[164] Neither party seeks past s. 7 expenses.

Retroactive child support

[165] Neither party suggested that the court should not award retroactive child support based on the factors in *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.], including whether undue hardship would be occasioned by a retroactive award. I invited the respondent to provide me with any reasons he thought I should not make a retroactive award.

[166] In *D.B.S.*, the majority directed a holistic view of each case, balancing the need for a parent to have certainty as to whether support will be claimed and in what amount, with fairness to the child whose right it is to receive support, and the need for flexibility. The Court held

that four factors should be considered: the reason for the recipient parent's delay in seeking child support; the conduct of the payor parent; the past and present circumstances of the child, including the child's needs when the support should have been paid; and whether a retroactive award would cause hardship. If retroactive child support is ordered, it is usually to the date of notice, and not more than three years in the past.

[167] In this case, there was no delay in seeking child support. The respondent paid the claimant between \$1,000 and \$1,300 per month commencing in the month after they separated. This was more than was required under the tables. While this was still being paid, the claimant started this action and the counterclaim in the Provincial Court seeking child support. Support continued to be paid (at \$300/month), more than was required by the tables, throughout 2017. Sometime in 2018, so less than three years ago, child support stopped being paid. There was no evidence the respondent was lulled into the belief that child support was not being pursued. There was no evidence that the circumstances were that they did not need support. Although the respondent alleged hardship in relation to the calculation of a retroactive award as a result of travel costs incurred, he did not allege hardship more broadly if he was required to pay a retroactive award. He quite fairly said support was the right of a child, and he wants to support A and L. Considering these factors and the continued disparity in the incomes between the parties, in my view, there is no reason a retroactive award should not be made.

Orders

[168] As a result, I make the following orders:

- a) The Guidelines income of the parties for 2016 to 2019 is as set out in the table above;
- b) The respondent shall pay to the claimant retroactive child support of \$7,217 owing up to June 2020, in addition to any amount owing for July and August 2020;
- c) Commencing September 1, 2020, in the event the respondent does not relocate to a city within a reasonable commuting distance of the claimant's residence, the respondent shall pay to the claimant the monthly sum of \$1,341 in child support for A and L, and continuing on the 1st day of each and every month thereafter for as long as A and L are eligible for support under the FLA or until further agreement of the parties or court order;
- d) In the event the respondent does locate to a city within reasonable commuting distance of the claimant's residence and the parties resume equal shared parenting of A, the parties shall adjust the child support payable in accordance with the Guidelines;
- e) The parties shall pay to each other their proportional share for A's and L's s. 7 special or extraordinary expenses, calculated in accordance with the Guidelines. By consent, the following expenses will be special or extraordinary expenses:

- i. For A, daycare and preschool, and for A and L any other extracurricular activities as agreed between the parties in writing;
- f) By consent, the party incurring a special or extraordinary expense shall provide the other party with a copy of the receipt for reimbursement;
- g) For as long as A and L are eligible to receive child support, the parties shall exchange a copy of their complete tax returns by June 1, each year; and a copy of any notice of assessment or reassessment received by them upon receipt; and
- h) The parties shall adjust the monthly amount of child support payable as of July 1, 2020 each year for so long as A or L remain a child eligible for child support pursuant to the FLA.

Divorce

[169] As discussed above, the claimant commenced this action seeking a divorce in BC when she did not meet the criteria in s. 3 of the DA. The court is therefore presently without jurisdiction to make the divorce order.

Costs

[170] If the parties cannot agree on costs, they may make arrangements through Supreme Court Scheduling within the next two months to attend before me to speak to the issue.

"Norell J."

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Prepared on 25 October 2026 · Esheria