

CANADA / JUDGMENT

McCann v. Idrobo

2025 BCSC 1286

COURT

Supreme Court of British Columbia

DECIDED

27 June 2025

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2025 BCSC 1286 McCann v. Idrobo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCann v. Idrobo,

2025 BCSC 1286

Date: 20250627

Docket: E57950

Registry: New Westminster

Between:

Craig Campbell McCann, George McCann, and Rachel McCann

Claimants

And

Marcela Vargas Idrobo also known as Marcela Vargas McCann

Respondent

Before: The Honourable Justice Fowler

Oral Reasons for Judgment

In Chambers

Counsel for the Claimants:

R. Huinink

Counsel for the Respondent:

L.R. Rana

Place(s) and Date(s) of Hearing:

New Westminster, B.C.

May 28-30, 2025

Port Coquitlam, B.C.

June 12, 2025

Further Written Submissions of the Respondent:

June 12, 2025

Place and Date of Judgment:

New Westminster, B.C.

June 27, 2025

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Introduction

- [1] By notice of application filed January 29, 2025, the respondent in these Family Law Act, S.B.C. 2011, c. 25 [FLA] proceedings, Marcela Vargas Idrobo (who stated during the hearing that she wishes to be referred to as Marcela) applies for a number of orders which are necessary for her to move with her son, A.M. to Norman, Oklahoma, where Marcela's parents and extended family reside.
- [2] The claimants, George and Rachel McCann, respondents to this application, are the paternal grandparents.
- [3] A.M.'s father, Craig David McCann (who I will refer to as Craig McCann) is deceased. I understand he passed away unexpectedly on January 16, 2023. He died without a will and therefore made no provision for the appointment of a guardian pursuant to section 53 of the FLA.
- [4] Further to an order made by Justice Elwood on January 9, 2024, Marcela is the sole guardian of A.M.

A.M.

- [5] A.M. was born April 10, 2016. In September 2020, he was diagnosed as neurodivergent, specifically autism spectrum disorder, and also attention deficit hyperactivity disorder. A.M. presents with a number of behaviours that can be challenging for those parenting him: he can become aggressive and violent; he self-harms, including banging his head; he engages in eloping behaviours, which means that he runs away from difficult situations; and he will self-isolate.
- [6] A.M. struggles academically and requires one-on-one assistance at school. He requires consistent and intensive on-going professional support, specifically occupational therapy, speech language therapy, and behaviour therapy. Although significant funding is available for his therapeutic needs, the amount does not come close to covering the full cost of what A.M. needs and benefits from.
- [7] Deborah Lightman, A.M.'s occupational therapist, described him as a very complex young boy, who is intelligent but his language difficulties get in the way. He requires an exhausting level of patience and a child led approach to learning. When he is calm he has the capacity to take in information. When he is agitated or unsafe, he paces and raises his voice. The most important qualities of his primary care-giver are patience, an understanding of A.M.'s behaviour, compassion and curiosity.

Notice of Application

- [8] The application seeks the following orders:

1. Permitting Marcela to relocate forthwith to Norman, Oklahoma, with A.M.;
 2. Marcela as the sole guardian shall exercise sole parental responsibilities;
 3. Contact time with the claimants be limited to one telephone call per week, in person contact in Norman, Oklahoma, as agreed by the parties, and an email, including photographs and videos, once per month from Marcela to the claimants providing updates about A.M.'s health, education and extracurricular activities;
 4. Termination of various clauses of other court orders that impact the above.
- [9] The claimants respond to the application by opposing all orders being sought by Marcela. This is surprising given that section 40 of the FLA makes it clear that only a guardian can exercise parental responsibilities, and the claimants are not guardians. It is therefore unclear the basis upon which they oppose an order affirming the mother's right to exercise parental responsibilities with respect to A.M.
- [10] The claimants' opposition to the Marcela's claims appears to be informed by a misunderstanding of their status in these proceedings. For example, in their application response, the claimants rely on section 47 of the FLA, which addresses the "changing, suspending or termination of orders respecting parenting arrangements." Given that the grandparents are not guardians, they cannot exercise parental responsibilities and cannot be a party to an order respecting parenting arrangements.
- [11] As non-guardians, pursuant to sections 58 and 59 of the FLA, the grandparents can be parties to an order or arrangement respecting contact with A.M. Applications to change orders respecting contact are made under section 60 of the FLA. As non-guardians the claimants have no standing to object to relocation: see section 68 of the FLA.

Procedural and Evidentiary Issues

- [12] Rule 11-3(5) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [the "Family Rules"], sets out how evidence may be introduced at a summary trial: affidavits; interrogatories; examinations for discovery; admissions under Rule 9-6; and expert reports. Evidence from the cross-examination of individuals who have filed affidavits is not admissible on a summary trial without leave of the court. No application was made to me as the Judge on this summary trial.
- [13] It appears that counsel were relying upon the order of Madam Justice Lawn made February 13, 2025, setting out terms upon which the hearing of the Marcela's application was adjourned, including that each party was to notify the other of the affiants they wished to have available for cross-examination at the hearing. In these circumstances I was prepared to hear cross-examination of the applicant, Marcela; the claimant, Rachel McCann; the Maternal Grandmother, Gloria Idrobo; and A.M.'s occupational therapist, Deborah Lightman.

Affidavits of Gloria Idrobo

- [14] During the course of the hearing it became clear that Marcela's mother, Gloria Idrobo, was not sufficiently fluent in the English language that she could swear an affidavit in English. The application record includes three affidavits from Gloria Idrobo; none indicate that they were made and sworn with the use of an interpreter. During the course of the hearing, applicant's counsel was given an opportunity to correct the record and file affidavits that comply with the Family Rules.
- [15] Rule 10-4 of the Family Rules governs the form and content of affidavits in family law cases. Subrule 7 makes it clear that where the affiant does not understand the English language, the affidavit must be interpreted to the affiant by a competent interpreter, who certifies, on the affidavit in an endorsement in Form F30, that they interpreted the affidavit before it was sworn or affirmed. None of the affidavits purportedly sworn by Gloria Idrobo contain the prescribed endorsement.
- [16] The applicant was given an opportunity to have the Gloria Idrobo affidavits resworn so that they comply with Family Rule 10-4(7). The resworn affidavits still do not contain the proper endorsement of the interpreter, but rather the affiant herself swears the affidavit was translated from English into Spanish and that the translation is true.
- [17] However, the purpose of the form of endorsement is for the interpreter to attest to their competency in the two languages and the accuracy of their translation:

[The following endorsement must be completed if required under Rules 10-4 (7) and 20-7 (7) of the Supreme Court Family Rules.]

ENDORSEMENT OF INTERPRETER [if applicable] I, ...[name]....., of
[address]....., ...[occupation]..... certify that: 1 I have a knowledge of the
English or French and languages and I am competent to interpret from one to the
other. 2 I am advised by the person swearing or affirming the affidavit and believe that the person
swearing or affirming the affidavit understands the language. 3 Before the affidavit
on which this endorsement appears was made by the person swearing or affirming the affidavit I
correctly interpreted it for the person swearing or affirming the affidavit from the English or
French language into the language and the person swearing or affirming the
affidavit appeared to fully understand the contents.

Date: Signature of
interpreter

- [18] Pursuant to Family Rule 10-4(14) an affidavit may be used in evidence despite an irregularity in its form with leave of the court. In determining whether to excuse an irregularity in the form of an affidavit, it must not be forgotten that an affidavit is intended to be a written version of the evidence a witness would be able to give orally at trial: see Family Rule 10-4(12). In this case, when Gloria Idrobo testified in court her evidence was translated by a certified Spanish interpreter, who affirmed that she was competent to translate from the

English language to the Spanish language, and vice versa. This is a matter of substance not form.

- [19] The failure to have affidavits properly endorsed by the interpreter is not an irregularity of form, but rather it impacts the substance of the affidavit. Without being satisfied that the interpreter of the affidavit is qualified to accurately translate and has in fact accurately translated to the best of their ability, a court cannot be confident that the affidavit accurately sets out the evidence of the person who swore the affidavit. It is also important to recognize that this is a summary trial in which a final order is being sought.
- [20] Given the problems with the Gloria Idrobo affidavits, I am not prepared to rely upon them in this summary trial.

Expert Evidence of Deborah Lightman

- [21] During this summary trial the claimants objected to the admissibility of the report of the Deborah Lightman, A.M.'s treating occupational therapist. I declared a voir dire and ultimately admitted the report. Counsel for the claimants then cross-examined Ms. Lightman.
- [22] The basis for the objections to the report and evidence of Ms. Lightman appears to have been two fold: that in FLA cases an expert report that, as counsel submitted, "squarely addresses the questions and makes recommendations as to arrangements for the custody, parenting time and related matters must be made pursuant to section 211 of the FLA"; and that the report did not meet the threshold test for admissibility of expert opinion evidence as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.
- [23] Counsel for the claimants was unable to point to any authority for the proposition that section 211 of the FLA is the only basis upon which expert reports can be admitted in FLA cases and withdrew their objection to Ms. Lightman's report on that basis.
- [24] It is important to recognize that the majority of Ms. Lightman's report is a description of A.M.'s therapeutic needs and interventions. To the extent that the report contains opinions, or more specifically expert opinions, I am satisfied that they are admissible pursuant to the Mohan and White Burgess frameworks: Ms. Lightman was clearly qualified to provide these opinions; the opinions are relevant and necessary and they are not subject to any exclusionary rule. Although, Ms. Lightman is A.M.'s treating occupational therapist, I accept that she was being impartial and was attempting to assist the court rather than being a partisan advocate. To the extent that any of her opinions, for example that A.M. has experienced trauma and has PTSD, are based on the evidence of others, I consider that to be a matter of weight rather than admissibility.
- [25] It is also important to recognize that the result of this application does not depend to any significant extent on the opinions of Ms. Lightman.

Suitability for Summary Trial

- [26] As set out above, Rule 11-3 of the Family Rules allows for a family matter to be heard by way of a summary trial. The court may grant judgment either on an issue or generally, unless the court cannot find the facts necessary to decide the issues of fact or law, or the court considers it would be unjust to decide the issues summarily: Family Rule 11-3(15).
- [27] The claimants submit that this matter is not suitable for a summary trial because, as I understand it, the history between the parties has been lengthy and complex and that a full trial is essential to ensure a fair and just result.
- [28] The difficulty with the claimants' position is that it is premised on a misunderstanding of what is in fact in issue: This is not a relocation case as that term is understood within the context of FLA proceedings, because it is not a dispute between two guardians each with parenting responsibilities. It is also not a 'battle' over what is alleged to have occurred in the past between any of the parties. It is not, as the claimants suggest, an inquiry into what orders the applicant has not followed in the past.
- [29] It is important to note that there are no applications or cross-applications by the claimants for guardianship or even contact. There is no application for a section 211 FLA report to set out the views or needs of the child, despite the claimants arguing in their submissions that such a report is necessary.
- [30] The only matters to be decided are set out in the application, which has been summarized above.
- [31] The applicant is the sole guardian and has the responsibility to decide, amongst other things, where and with whom the child will reside, and importantly, given A.M.'s diagnoses, making decisions about A.M.'s education and therapeutic needs. Existing court orders have clauses that prevent the mother from fully exercising her parental responsibilities, for example there is a non-removal order, and an order that the applicant shall surrender all passports in A.M.'s name.
- [32] In my view this application is properly characterized as an application under section 60 of the FLA to change, suspend, or terminate an order respecting contact with A.M.
- [33] This is then, essentially a summary trial to determine the extent to which the claimants should have contact with A.M. going forward.
- [34] Applying the factors identified as being relevant to the analysis of the suitability of the summary trial process by Justice Pearlman in *Andermatt v. Tahmasebpour* 2015 BCSC 1127 at para. 24: credibility is not a critical factor; the cost of taking this matter to a full trial would be prohibitive for the mother, whose limited resources are better spent meeting the complex needs of A.M.; the matter is not complex but it is urgent; and the issue of ongoing contact is the only remaining issue between the parties; I am therefore satisfied that this application is suitable to being decided on a summary trial.

Relocation and Contact

- [35] A child's guardian who plans to relocate with the child, must give at least 60 days written notice of the planned date of relocation and the name of the proposed location to all other guardians and persons having contact with the child: see section 66 of the FLA.
- [36] Section 67(1) of the FLA requires that the guardian and the persons having contact with the child must use their best efforts to cooperate with one another for the purpose of resolving any issues relating to the proposed relocation. This section is not intended to prevent a person having contact from making an application under section 59 or 60 of the FLA for an order respecting contact, or an order changing, suspending or terminating contact.
- [37] It is important to recognize that the claimants have not brought an application under either section 59 or 60 of the FLA for orders respecting contact. They rely, I infer, from the existing interim orders that currently restrict Marcela from relocating with A.M., and which set out a regimen of significant contact between the claimants and A.M.
- [38] Pursuant to section 68 of the FLA, only a guardian can object to a proposed relocation.

Previous Court Orders

- [39] On July 17, 2019, Justice Armstrong ordered Marcela to surrender all of A.M.'s passports to the claimant's counsel; at the time the only claimant was A.M.'s father. The order also established a parenting schedule.
- [40] To avoid any confusion going forward, given that the death of the claimant, Craig McCann, is a change of circumstance, I will terminate this order in its entirety.
- [41] On August 2, 2019, Madam Justice Fitzpatrick approved an interim consent order between Craig McCann and Marcela: all proceedings were transferred to the Supreme Court in New Westminster registry; pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), the parents were granted joint custody of the child; both parents were guardians under section 39 of the FLA; as guardians both parents were to share the parenting responsibilities set out in section 45 of the FLA; neither party was to apply for a passport and any existing passports were to be surrendered to Craig McCann's counsel; the guardians/parents agreed on a parenting time schedule including reasonable telephone contact when the child was with the other parent; the guardians agreed not to remove the child from the lower mainland; and they agreed to various conduct orders pursuant to section 49 of the FLA.
- [42] Again, to avoid any confusion going forward, the death of Craig McCann is a change of circumstance that justifies the termination of this order in its entirety. No terms of this consent order continue to make sense now that Marcela is the only guardian and the file has been transferred to the Supreme Court registry in New Westminster.

- [43] On September 11, 2019, Justice Macintosh approved an interim consent order between Craig McCann and Marcela, varying some of the terms of the order made by Madam Justice Fitzpatrick, to address a different parenting schedule and choice of school for A.M.
- [44] Again, to avoid confusion going forward, the September 11 order of Justice Macintosh is terminated in its entirety because the terms of the consent order are no longer applicable given the death of the only other guardian.
- [45] On April 4, 2023, Craig McCann's mother, Rachel McCann, applied before the Provincial Court in Surrey for a non-removal order pursuant to section 64(1) of the FLA. The terms of the interim consent order are important:

Until the hearing of the application of Rachel McCann on April 13, 2023, for a non-removal order Marcela Vargas Idrobo shall not remove the child or permit others on her behalf to remove the child from the Lower Mainland of British Columbia, this order being made without prejudice to the determination of the non-removal application to be heard on April 13, 2023.

- [46] I am unable to determine from the evidentiary record whether the application for a non-removal order was ever continued in the Provincial Court. A plain reading of this "Consent Order" is that it continued only until April 13, 2023.
- [47] This order was later relied upon by the current claimants to obtain an order, made without notice before Justice Girn, declaring that Marcela had wrongfully removed the child from the jurisdiction of British Columbia. What followed this declaration will be set out below. Suffice it to say that the relationship between Marcela and the present claimants appears to have been irreversibly impacted as a result.
- [48] Given that on September 13, 2023, Justice Girn declared that the Supreme Court has exclusive jurisdiction over all matters related to the child, but again to avoid any uncertainty, the purported non-removal order made in the Provincial Court in April, 2023, is no longer in force.
- [49] On September 11, 2023, Justice Duncan ordered that the consent order signed by counsel for the claimant, Craig McCann, and the respondent, joining Rachel and George McCann as claimants, be entered in the registry in the Supreme Court of New Westminster.
- [50] On September 13, 2023, Justice Girn heard a without notice application of the current claimants, George and Rachel McCann, and made a number of declarations and orders:
- a. A declaration that A.M. is habitually resident in B.C.
 - b. Supreme Court of British Columbia has exclusive jurisdiction over all matters related to A.M.;
 - c. A declaration that Marcela has wrongfully removed A.M. from the jurisdiction of B.C.

- d. An order that George and Rachel are joint guardians of A.M. and granted primary care of the child;
- e. Various enforcement provisions permitting the authorities to bring A.M. back from the State of Oklahoma;
- f. An order pursuant to section 40(2) of the FLA that George and Rachel McCann will exercise all parental responsibilities for A.M.;
- g. An order that Marcela not remove A.M. from the lower mainland;
- h. And orders about sharing A.M.'s autism funding with George and Rachel McCann.

[51] Marcela was given leave to apply to vary the terms of this order.

[52] On January 9, 2024 Justice Elwood heard an application, which to a great extent was an application to vary the order of Justice Girn.

[53] Significantly, the orders that George and Rachel McCann are joint guardians with primary care of A.M. and exercising all parental responsibilities for A.M., were set aside, which I take to mean they were terminated.

[54] Most importantly it was ordered that Marcela is A.M.'s sole guardian. However, the court ordered Marcela to share with George and Rachel McCann information and consult with them about important decisions concerning A.M.

[55] Justice Elwood's order also contains a number of consent orders including that Marcela will surrender her passport to her lawyer's office and where A.M. will attend school. Justice Elwood adjourned the McCanns' application for a section 211 of the FLA views and needs of the child report. It does not appear to have ever been rescheduled.

[56] Importantly, the non-removal order made by Justice Girn was varied to permit A.M. to be removed from the lower mainland with written consent of the other party or further court order. In August 2024, the parties signed a consent order permitting Marcela to take A.M. to Oklahoma, upon her depositing \$10,000 in the trust account of the McCanns' lawyer. This order was not entered until May 28, 2025.

[57] Finally, in November 2024, the parties signed a consent conduct order. This order does not appear to have ever been entered.

[58] From my review of the Justice Girn and Justice Elwood orders, for Marcela to fully exercise her parental responsibilities for A.M., attendant on her being his sole guardian, including decisions about where the child will reside, a number of terms of those orders will need to be varied or terminated:

Order of Justice Girn - September 13, 2023.

Clause 1 - that A.M. is habitually resident in the Province of British Columbia

Clause 10 - surrender any and all passports and identification cards respecting A.M. to George and Rachel McCann

Clause 13 - non-removal order

Clause 14 - A.M. will attend bi-weekly autism therapy sessions funded by Autism BC

Clause 15 - Marcela will share access to A.M.'s Autism BC portal with the McCanns.

Order of Justice Elwood - January 9, 2024.

Clause 3 - the varied non-removal order

Clause 5 - consult and share information about A.M.

Clause 6 - contact and parenting schedule

Clause 7 - Marcela shall surrender her passport to her lawyer

Clause 8 - A.M. will continue in the school enrolled in by the McCanns

Applications to change, suspend, or terminate court order

- [59] Pursuant to section 215 of the FLA a court may change, suspend, or terminate an order if there has been a change in circumstances since the order was made.
- [60] The applicant argues that the previous order of Justice Elwood granting the claimants extensive contact with A.M. is a consent order, made on a without prejudice basis, such that a proof of a change in circumstances is not required.
- [61] Rather than engage in an extensive discussion about what types of orders can or cannot be varied without a change of circumstances being established, I have little difficulty concluding that the evidence on this summary trial has established a change of circumstances, such that relying on section 215 of the FLA, I have the jurisdiction to vary the previous orders, notably the orders of Justices Girn and Elwood.

Change of circumstances

- [62] During the course of these FLA proceedings, A.M.'s guardians have changed: initially Craig and Marcela were joint guardians; upon Craig dying without a will, and without any provision being made for the appointment of a guardian pursuant to section 53 of the FLA, Marcela became A.M.'s sole guardian; on September 13, 2023, after a without notice application, Justice Girn ordered that the claimants were joint guardians for A.M.; and finally in January 2024, Justice Elwood ordered that Marcela was A.M.'s sole guardian.
- [63] Given that under the FLA only a guardian can exercise parental responsibilities and parenting time, and that only a guardian can object to relocation, I am satisfied that the fact that Marcela is now the only guardian is a change of circumstance that permits the court to vary previous orders, particularly those that were made when there were multiple

guardians.

Contact time with Grandparents

- [64] Despite the volumes of evidence relied upon, arising from multiple affidavits from Marcela, Rachel McCann, as well as other family members, much of which either makes allegations or responds to allegations about past 'misconduct' by the other, the legal issue is straight forward: what contact with the paternal grandparents (the claimants) is in A.M.'s best interests.
- [65] Section 37 of the FLA sets out that in making an order for contact with a child, the court must consider the best interests of the child only. However, when a non-guardian seeks contact, section 37 should be read in conjunction with section 41 of the FLA, which sets out the scope of parental responsibilities with respect to a child. Furthermore, pursuant to section 43 of the FLA, a child's guardian must exercise parental responsibilities in the best interests of the child.
- [66] It is clear, therefore, that deference must be afforded the views of the guardian, unless it can be shown that the guardian is not acting in the best interests of the child.
- [67] With specific reference to contact with grandparents, Judge McQuillan held in *T.D.(1) v. T.D. (2)*, 2017 BCPC 201, as follows:
- [41] Applications by grandparents for contact time are amongst the most troubling of cases. In the perfect world, grandparents can bring enormous value to the life of a grandchild and there should be no question of them having contact, nor any need for a court to intervene. Parents will generally recognize the importance of those relationships and willingly cultivate them. However, we do not live in a perfect world and all families are more complicated than the idealized version. Consequently, all too often these matters end up having to be decided by the courts.
- [42] The leading case in British Columbia in this area is that of *Chapman v. Chapman* 1993 CanLii 2598 BCSC. The principles in that case can be summarized as follows:
- a. There is no presumption that grandparent contact is in the best interests of a child;
 - b. The onus to establish grandparent contact time is in the best interests of the child is on the grandparent - not on the parent to establish otherwise;
 - c. The courts should be reluctant to interfere with a custodial parent's decision in this sort of matter and should only do so where it is in the best interest of the child; and
 - d. While judges must be vigilant to prevent parents from alleging fictitious or imagined conflicts as a reason to deny contact time, in cases of real conflict and hostility between the parent and grandparent, the child's best interest will rarely be served by granting access.

- [43] Chapman v. Chapman was decided prior to the enactment of the Family Law Act in 2013. The Family Law Act mandates an even greater emphasis on the best interests of the child than under the previous legislation. However, the approach to grandparent contact remains essentially the same. In Fawcett v. Read 2016 BCSC 310, Madam Justice Russell confirmed that approach. At paragraphs 28-33 she states:
- [28] Deference to the custodial parent's views has also been recognized in case law: see Chapman v. Chapman, 1993 CanLII 2598 (BC SC), [1993] B.C.J. No. 316 (S.C.). While Chapman does precede the passage of the FLA, it has been cited for several of the principles it enunciates, including giving deference to the custodial parent: N.F. v. H.L.S., [1998] B.C.J. No. 1739, aff'd 1999 BCCA 398 (CanLII). In T.F. v. K.R.C., 2010 BCSC 1808 (CanLII), the court in making its finding, said the following at para. 47, after considering Chapman and N.F.:
- I am mindful of the principle that the court should generally accord considerable deference to the wishes of the custodial parent who is charged with the child's long term care.
- [29] I will note that the approach has changed somewhat since the introduction of the FLA, for example Bruce J. in Kalafchi SC, at para. 24, does suggest that deference to the custodial parent's decision about contact with a non-guardian may conflict with the emphasis in the FLA on the best interests of the child, but she does state that the other principles established by Chapman remain valid and should be applied to applications under s. 59 of the Act. In the final analysis, she ultimately still considers deference to custodial parents to be valid because at para. 25, she finds that the custodial parent is entitled to deference regarding contact pending trial. Therefore, I do not find that this statement means that giving deference to the custodial parent's decision is no longer appropriate.
- [30] Deference to the custodial parent's views is a relevant consideration, subject to any other evidence with respect to the best interests of the child. The custodial parent's views cannot trump the best interests test but may form one component of it.
- [31] Consequently, I find, that in making a decision for contact under s. 59, I must consider the best interests of A. in light of all applicable considerations. Further, given the codified deference owed to guardians under the Act when it comes to parental responsibilities, and given the case law, I find that in this analysis I may consider the reasonable views of the respondent, so long as they are reflective of the best interests of A.
- [32] In T.F., at para. 47, the court ultimately found that the Mother's views had more to do with her own feelings than the needs of her son, and that the grandparents had demonstrated significant bonding with the child such that ongoing and regular contact was warranted. I point this out to show that I am mindful of the fact that the respondent's views are not to be taken to be synonymous with the best interests of A., without a full analysis of what is in the best interests of the child in these circumstances.

[33] I have no difficulty recognizing the potential problem arising from the application of Chapman on deference to a parent's decision to deny contact, where that decision conflicts with the best interests of the child. Clearly, it must be the case that the child's best interests are not just the paramount, but the only, consideration.

[44] In the same case, Justice Russel also stated:

I do of course agree that only the best interests of the child, A., may be considered in determining whether and how much contact should be afforded. But that analysis should be a nuanced and contextual consideration.

[45] It is also important to bear in mind that the Grandmother bears the onus of establishing that contact with her is in the best interests of the children: *Kalafchi v. Yao*, 2015 BCSC 1152 (CanLII) at para. 26 [Kalafchi SC], *aff'd* 2015 BCCA 524 (CanLII).

[68] In *D.D. v. A.C.* 2017 BCPC 5, Judge Koturbash applied the same approach to contact time with grandparents, adding this observation:

[24] Generally, grandparents are more reluctant than parents to bring applications for contact time. As a result, it is usually the case that when such applications reach the courtroom, there is a significant degree of conflict and hostility between the parent(s) and grandparent(s).

[69] This is unquestionably true in this case.

Discussion

[70] It is important to understand that this application is about what should happen in the future. It should not be an opportunity to apportion blame between the parties for what has occurred in the past. Consequently, a review of the extensive factual record is simply not required.

[71] The applicant is asking that I make a finding that there has been family violence, most specifically arising from the claimants' conduct in using the courts to obtain Justice Girn's order permitting the police in Oklahoma to remove A.M. from Marcela's care and place him in the care of his grandparents, to be brought back to the Lower Mainland.

[72] I decline to make any finding that there has been family violence. It is not necessary to the determination of the issue in this case and in any event, it will simply fuel more conflict going forward.

[73] As the sole guardian of A.M., Marcela would normally be able to choose to live where she wants. These are the kinds of parenting decisions parents make every day: parents often relocate across this vast country for employment opportunities, lifestyle or because of other opportunities, for example more affordable housing.

- [74] What is preventing Marcela from choosing where to live with her son is the existing court orders that prevent her from removing A.M. from the lower mainland, as well as a contact order with the grandparents.
- [75] As the sole guardian, it is Marcela's decision to live where she wants. Section 68 of the FLA makes it very clear that only a guardian can oppose a relocation. It would render this section meaningless if a non-guardian were able to rely on an order respecting contact to prevent the guardian from exercising their right to choose where to live: see section 41(b) of the FLA.
- [76] Marcela has indicated her desire to move to Norman, Oklahoma, to reside close to her parents and her brother's family. She wishes to attend school to upgrade her education.
- [77] Having reviewed Marcela's affidavits, I am satisfied that her decision to move is well intentioned. She has no relatives in Canada. She is isolated and struggling emotionally and financially. A.M.'s behavioural and therapeutic needs are substantial. Marcela needs all the help she can get to look after A.M..
- [78] Unfortunately, Marcela's relationship with the claimants is broken beyond repair. It does not matter why, or who caused this, the fact remains that the claimants and Marcela do not get along. There is simply no trust between them; there is much animosity
- [79] It is entirely understandable that Marcela wants to be closer to her own parents and her brother's family. The fact that this will mean that the McCanns will have considerably less contact with A.M. is unfortunate. But the benefits to Marcela, and thereby to A.M., are considerable. For example, A.M. will be able to develop relationships with his maternal grandparents and other relatives, for example an uncle, aunt and cousins.
- [80] There is simply no reason to interfere with Marcela's decision to move with A.M. to Oklahoma. There is nothing to lead me to conclude it is contrary to A.M.'s best interests. It is entirely reasonable to defer to Marcela's views on the benefits of moving.
- [81] To enable Marcela to move with A.M. to Norman, Oklahoma, I order that the following clauses of the order of Justice Girn, dated September 23, 2023, be terminated:

Clause 1 - that A.M. is habitually resident in the Province of British Columbia

Clause 10 - surrender any and all passports and identification cards respecting A.M. to George and Rachel McCann

Clause 13 - non-removal order

Clause 14 - A.M. will attend bi-weekly autism therapy sessions funded by Autism BC

Clause 15 - Marcela will share access to A.M.'s Autism BC portal with the McCanns.

- [82] Furthermore, in respect of the order of Justice Elwood, dated January 9, 2024, I order that the following clauses be terminated.

Clause 3 - the varied non-removal order

Clause 5 - consult and share information about A.M.

Clause 6 - contact and parenting schedule

Clause 7 - Marcela shall surrender her passport to her lawyer

Clause 8 - A.M. will continue in the school enrolled in by the McCanns

Contact

[83] This brings me to the issue of what contact is in A.M.'s best interests.

[84] As stated above, there is no application by the claimants for a contact order, which is understandable given that they currently have a contact order. But the onus is on the grandparents to establish that contact is in A.M.'s best interests.

[85] There is no question that the claimants, A.M.'s paternal grandparents, have played an important role in A.M.'s life. But it has been a relationship fraught with conflict with A.M.'s mother, Marcela. It is highly unusual that grandparents would 'fight', to the extent to which the McCanns have, to have as much contact as they have had with A.M.

[86] As I stated at the beginning, the fact that the claimants rely on section 47 of the FLA, a section that deals with changing, suspending or terminating an order respecting parenting arrangements, is a clear indication that the grandparents do not appreciate their legal status in these proceedings, and thereby also in A.M.'s life. They do not exercise parenting responsibilities. They did not automatically become A.M.'s guardians when his father passed away: see section 54 of the FLA. They cannot be a party to a parenting arrangement, and they do not exercise parenting time: see Part 4 Division 2 of the FLA - Parenting Arrangements.

[87] I appreciate that for a brief period of time, between September 23, 2023 (order of Justice Girn making them joint guardians) and January 9, 2024 (order of Justice Elwood making Marcela the sole guardian of A.M.), they were A.M.'s guardians. However, Justice Girn's order was made after an application without notice in which serious allegations were made that Marcela had absconded with A.M.

[88] Having reviewed the factors set out in section 37(2) of the FLA, and having considered what I have been able to learn from the expansive materials about A.M.'s needs and circumstances, I am able to conclude that some contact with the paternal grandparents is in A.M.'s best interests. I arrive at this conclusion primarily because the McCanns have a long history of caring for A.M., and have thereby contributed to his health and emotional well-being.

- [89] When I consider what contact is in A.M.'s best interests, I cannot ignore the fact that he has significant behavioural, emotional and linguistic challenges. What I take from Ms. Lightman's evidence is that A.M.'s primary caregiver is the person best placed to understand A.M.'s needs and how to respond to them. In other words, when it comes to contact with his grandparents, I must not impose a rigid schedule that does not account for the variability in A.M.'s behaviour and in A.M.'s therapeutic needs.
- [90] The McCanns suggested a schedule that included A.M. spending weeks away from his mother over Christmas and in the summer. I have no hesitation in concluding this is not in A.M.'s best interests. It was quite clear from the cross-examination of Rachel McCann that she believes A.M. has too much professional intervention. I mention this because I believe that Marcela is doing everything she can to ensure that A.M. gets all the interventions he needs to maximize his future potential, and that there should be no conflicts between the McCanns and Marcela about A.M.'s needs. I am also concerned that lengthy breaks in his treatments or programs will not be in his best interests.
- [91] That said it will clearly be in A.M.'s best interests to have some contact with his paternal grandparents. But as in most households, the parents or guardians are the ones that usually decide these things, not the courts. However, given the deep mistrust and animosity that continues to govern the relationship between the McCanns and Marcela, it is in A.M.'s best interests that I make an order setting out the minimum contact that A.M. should have with his paternal grandparents:
- a. For two weeks per year, either as one two-week period, or two one-week periods, upon giving Marcela at least 30 days notice, the McCanns may visit A.M. in Norman, Oklahoma.
 - b. During these visiting times, Marcela will decide how much time A.M. will spend with the McCanns, but it must not be less than four hours on each day.
 - c. A minimum of once per month Marcela will provide a detailed update on A.M.'s life, including information about his school, treatments/therapies, and outside of school activities by email to the McCanns.
 - d. Once every two weeks, Marcela will facilitate contact between A.M. and the McCanns, by telephone or videoconferencing. Marcela will use her best judgment based on A.M.'s needs when and for how long these calls will last.
 - e. The parties are at liberty to suggest modifications to the terms of this contact order.

Costs

- [92] The applicant has been substantially if not entirely successful on this summary trial. This trial took place over four days. It took that long in part because the claimants mischaracterized some of the issues. Given the claimants status as non-guardians this application was never about parenting arrangements or objecting to a relocation. It should only have been about what contact with his grandparents was in A.M.'s best interests going

forward. That said the applicant also bears some responsibility for unnecessarily complicating the proceedings.

[93] I am going to exercise my discretion pursuant to Rules 11-3(15), 16-1(1)(d) and 16-1(14) and fix the costs for this application. Based on the schedule in Appendix B of the Supreme Court Family Rules, the amount payable for this four-day summary trial is \$8,000, payable forthwith.

"The Honourable Justice Fowler"

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