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CANADA / JUDGMENT

## N.I. v. J.I.

2020 BCSC 409

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COURT

Supreme Court of British Columbia

DECIDED

18 March 2020

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2020 BCSC 409 N.I. v. J.I.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.I. v. J.I.,

2020 BCSC 409

Date: 20200318

Docket: E183372

Registry: Victoria

Between:

N.I.

Claimant

And

J.I.

Respondent

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

The Claimant, appearing in person:

N.I.

Counsel for the Respondent:

J. Stewart

Place and Date of Trial:

Victoria, B.C.

January 27-31, 2020

Place and Date of Judgment:

Victoria, B.C.

March 18, 2020

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## Introduction

- [1] N.I. and J.I. met in 2007 in Edmonton where they were both working: he as a pediatrician and she as a registered nurse. They were married on May 2, 2008, in Edmonton and separated on December 31, 2017, in Victoria. N.I. is 40 years old and J.I. is 57.
- [2] N.I. and J.I. are the parents of two children, a ten-year-old daughter and an eight-year-old son.
- [3] Although there is a dispute between the parties, I accept, on the evidence available, that J.I. was not working when the parties married. For reasons that are not entirely clear, J.I. resigned from his job prior to the parties' marriage, although he continued to be paid until sometime in June 2008.
- [4] In any event, after their marriage, and in the summer of 2008, the parties travelled throughout Canada and the United States. In July 2008, they returned to Edmonton and remained there until December 2009. J.I. did not work during that time. Their daughter was born in Edmonton in April 2009.
- [5] In December 2009, the parties travelled to India and remained there until either August 2010 (according to J.I.) or October 2010 (according to N.I.). Neither party worked while they were in India. They stayed with J.I.'s father and spent time travelling and meeting J.I.'s relatives.
- [6] Either at the end of August or in October 2010, the parties came to Vancouver so that N.I. could take the steps necessary to maintain the currency of her nursing license. They stayed for a few months. N.I. worked at Sprott Shaw College in the Licensed Practical Nursing program and at the safe injection site in the Downtown Eastside. J.I. did not work.
- [7] In February or March 2011, J.I. accepted a position as a pediatrician in Turks and Caicos, and the parties moved there and stayed until June 2011. N.I. did not work in Turks and Caicos. In June 2011, they returned to BC and travelled, and then spent some time in India.
- [8] At the end of June 2011, J.I. accepted a position as a pediatrician at the Juredong Park Medical Centre ("Juredong") in Brunei, and the parties and their daughter relocated. During his tenure there, J.I. became the head of the department of pediatrics. At the time, the parties were expecting their son, who was born in Brunei in December 2011.
- [9] N.I. did not work while the parties were in Brunei. Based on her evidence, J.I. did not want her to work, and, in any event, her visa was restricted. Her evidence was not seriously disputed. While in Brunei, the family visited a number of countries in Southeast Asia and travelled to India. Some of their travel was related to N.I. attending a number of yoga instruction courses.

- [10] At some point, and after discussion, the parties agreed that they would move to Victoria. Although the parties gave different evidence about the reason for the move and whether their plan was to remain in Victoria, in June 2017, J.I. purchased a family home for them in Victoria and, in late July 2017, N.I. and the two children moved into it.
- [11] The family home was registered solely in J.I.'s name. In addition, he leased a vehicle, licensed and insured in his name, for N.I.'s use. Shortly after the move, J.I. returned to Brunei, leaving N.I. and the children in Victoria. He returned to Victoria at the start of the school year in September and stayed until later that month.
- [12] At the end of October, N.I. and the children met J.I. in India to attend a family wedding. After a few days, N.I. and the children returned to Victoria, and J.I. returned to Brunei. In November 2017, J.I. gave notice to Juredong that he would resign effective at the end of February 2018. N.I. was not aware that he had resigned.
- [13] J.I. next visited his family in Victoria in early December 2017.
- [14] On December 31, 2017, just before J.I. was to return to Brunei, N.I. told him that she wanted a divorce. J.I. testified that her announcement came as a shock to him. N.I. testified that J.I. had always controlled all the family finances. She said that she did not know what he earned or what bank accounts he had. He held title to all matrimonial property, and she resented his economic control over her.
- [15] J.I. returned to Brunei in early January 2018 to wind things up there. He moved to Victoria in February 2018, slightly in advance of his scheduled resignation date.
- [16] By the early fall of 2017, N.I. found work as a registered nurse with the Victoria Island Health Authority. She started as an on-call nurse, but now has a permanent position. It is clear, on the evidence, that when they decided to move to Victoria, the parties knew that J.I. was not licensed to practice medicine, in any capacity, in BC.
- [17] J.I. did not work in any capacity from February 2018 until August 2019. He then accepted a position as a pediatric consultant with Aspire Medical Clinic in Calgary, Alberta ("Aspire"). His position is for a one-year term, but is renewable. Aspire's offer was dated June 26, 2019, and it indicated that the start date was negotiable. In cross-examination, J.I. agreed that Aspire had first offered him a position in March 2018. He decided to stay in Victoria after N.I. was criminally charged (those charged were ultimately stayed, as I will describe below). He did not clearly explain why he then waited until August 2019 to accept the position.
- [18] J.I. now resides in Calgary. He has negotiated a flexible work schedule so that on the weeks he has parenting time with the children, he travels to Victoria.

### Circumstances since the Breakdown of the Marriage

- [19] The events that occurred following N.I.'s announcement that she wanted a divorce are unfortunate. Both parties focussed on these events at some length during their evidence.

- [20] In my view, it will not be helpful to the parties' future parenting of their children to go into all of the details of how these parties interacted after their separation. As a result, I will only briefly describe the various state agencies that were involved with them, and the reasons for their involvement. To the extent that the events are relevant to my relocation decision, I will refer to them when dealing with the factors that inform that decision.
- [21] After J.I. returned to Victoria in February 2018, he lived with N.I. and the children in the family home. At N.I.'s request, J.I. left for a short period of time, but he returned on his former counsel's advice that vacating the family home might affect his interests in this family dispute. He then refused to leave the family home, despite N.I.'s continued requests that he do so, and the increasing tension between the parties.
- [22] According to J.I., at his former counsel's insistence, in March 2018, he filed a police complaint alleging that he had been assaulted by N.I. in February and again in March. Charges were laid, and N.I. was removed from the family home. She testified that she had no alternate housing and no access to the family accounts. Initially, she slept in her car. She then stayed with a friend and, eventually, moved into a shelter. For about three weeks, she had supervised access to the children, paid for by J.I..
- [23] N.I. has consistently denied physically assaulting J.I., although in correspondence to her friends, she acknowledges that she "lost it" with him. The Crown ultimately stayed the criminal charges.
- [24] In early February 2018, the children's school reported to the Ministry of Child and Family Development ("MCFD") that, during a class discussion about the London Bridge, the parties' son said that he wished his father would fall from it and die. He also said his father swore at him all the time, and he did not feel safe around him. Apparently, the MCFD did not follow up on the school's report. At the time, J.I. was in Brunei.
- [25] In August 2018, the parties' daughter reported to her counsellor that J.I. hit her frequently and had kicked her down the stairs. The MCFD opened a file and from August 21 to 30, while they were investigating, a safety plan was put in place under which J.I. had no contact with his children. After the investigation, the MCFD closed its file. J.I. denies that he swore at the children or kicked his daughter.
- [26] On a date that is not entirely clear on the evidence, but appears to have been in late December 2018, a complaint was made to the MCFD that J.I. had inappropriately touched his son. The MCFD investigated the complaint and took no action. J.I. denied the allegations.
- [27] Finally, after N.I.'s openly gay brother visited her and the children, J.I. is said to have contacted the MCFD about possible safety concerns arising from his children's contact with N.I.'s brother. J.I. denies that he initiated the call to the MCFD. He acknowledged discussing N.I.'s brother's sexuality with the MCFD, but said he did so in response to their questions.

[28] Not surprisingly, these events have eroded the parties' trust in each other and have seriously impacted any meaningful communication between them.

### The Existing Court Orders

[29] Before Master Bouck's order consolidating this Supreme Court file with the parties' Provincial Court file, the Provincial Court issued four court orders dealing with various aspects of parenting:

- a) On March 23, 2018, on an ex parte application by N.I., Judge Barrett ordered that J.I. not remove the children from BC, or change their residential address, without consent of the parties or further court order.
- b) On April 12, 2018, on consent, Judge Rogers ordered that the parties share parenting time on a 2-2-3 schedule, for set dates in the following two months. Both parties agree that they extended that parenting schedule until they varied it, on consent, to a week on/week off schedule shortly after Mr. Colby's s. 211 report, described below.
- c) On May 10, 2018, Judge Lowe ordered a s. 211 report. Mr. Colby was the agreed-upon author. His report was released on March 8, 2019. It will be discussed in more detail below. In addition, Judge Lowe ordered that the parties not question the children about the other parent, the time spent with the other parent, discuss the proceeding, or disparage the other parent.
- d) On August 15, 2019, on consent, Judge Wishart formalized the week on/week off parenting schedule; ordered that J.I. contribute to N.I.'s childcare costs; and, on terms, permitted N.I. to travel to Seattle with the children.

[30] All of the orders were made under the Family Law Act, S.B.C. 2011, c. 25 [FLA], although the parties' pleadings make claims under it and under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA].

[31] There are no DA orders dealing with custody, guardianship, or primary residence of the children.

### Robert Colby's s. 211 Report

[32] Pursuant to Judge Lowe's order, Mr. Colby prepared a s. 211 report to address the following:

1. The parents' emotional and psychological status as it related to their parenting abilities and involvement.
2. The parents' ability and willingness to satisfy their children's needs and to address matters related to their wellbeing.
3. The parent-child bonding and parental histories.
4. The children's emotional and psychological development.

- [33] Mr. Colby was asked to make recommendations with respect to parenting time and parenting responsibilities.
- [34] The parties could not afford Mr. Colby testifying at trial. Instead, his report was filed and relied on by both of them.
- [35] As is common in preparing such a report, Mr. Colby had the parents complete different parenting assessment tools and evaluated the results. Mr. Colby also spoke to: a number of collateral witnesses suggested by Ms. and J.I.; various professionals who had been involved with the parents and the children; MCFD officials; and the children's teachers. He observed the children with each of their parents, and interviewed the children separately from each other and from their parents.
- [36] Mr. Colby made recommendations regarding the emotional, psychological, and developmental needs of the children. As required under s. 211, matters of family violence were assessed and incorporated into his assessment.
- [37] Mr. Colby concluded that each parent presented themselves primarily in a positive light, were critical of the other parent, and rejected some aspects of the other parent's involvement with the children.
- [38] Mr. Colby observed both children interacting positively with their parents, being respectful of them, listening to them, and complying with their requests. He said that both children appeared comfortable in their interactions with their parents and in both their homes.
- [39] Mr. Colby said that N.I. presented as an optimistic, confident, and stable individual, who had social contacts, which she valued. The assessment tools did not raise concerns about N.I.'s parenting, her potential for child abuse, her parental stress, or the parent/child relationships. He concluded that N.I. felt supported in, and satisfied with, her role as a parent.
- [40] Mr. Colby expressed concern that, in some instances, J.I. responded defensively and did not acknowledge personal problems. However, he concluded that both parents enjoyed their involvement and communication with their children and established appropriate limits while supporting their move toward autonomy.
- [41] Mr. Colby said that both children were somewhat more interactive with their mother but concluded that was, in part, a result of the parenting history. He wrote that the parties' son "depreciated" his father, blamed him for the fact that his mother was poor, and said that his father was not supporting her. J.I. blames N.I. for their son's views. Mr. Colby says that the parties' son appeared to have a significant level of disconnect from his father. The parties' daughter was described as having an interactive and positive relationship with both parents. However, both children suggested that they would like to spend more time with their mother than with their father.

- [42] Mr. Colby commented that both parents provided information to the children about the breakup of the marriage and were critical of the other parent. As a result, the children took sides with the parent with whom they were closest.
- [43] He concluded that N.I. had depreciated J.I. with the children, but did not find indicators of alienation. Rather, he concluded that J.I. had interacted with the children in a way that decreased their desire to engage with him.
- [44] Mr. Colby opined that the children needed to be disassociated from the break up of the marriage and reassured that both parents had their best interests at heart and were able to support the other parent's engagement in the parenting process.
- [45] Mr. Colby recommended that the children "remain in the primary residence care with their mother", and that parenting time be shared.
- [46] J.I.'s counsel pointed out that there was no primary residence order in this case. I understand Mr. Colby's reference to primary residence as a reference to the fact that, from the spring of 2011 to June 2017, N.I. did not work and was primarily responsible for the children while J.I. pursued his career. Then, from June 2017 until February 2018, N.I. had primary responsibility for the children while J.I. travelled to and from Brunei. During that time, J.I. visited his children in Victoria for varying lengths of time.
- [47] After N.I.'s short period of supervised parenting, a shared parenting regime was put in place.
- [48] Mr. Colby recommended that J.I. and the children engage with a child therapist, for a minimum of six joint sessions, to assist in repairing their relationship and to provide J.I. with advice about how he related to the children and how to establish more positive communications and trust levels. He said it was necessary for the therapist to speak to N.I. to get information about the children.
- [49] He also recommended that J.I. engage with the therapist to address appropriate intervention and disciplinary strategies regarding the use of corporal punishment.
- [50] Mr. Colby recommended moving to a week on/week off parenting schedule to reduce the number of transitions that were required. He also recommended an equal sharing of the time the children had off school and other days of significance to the children and their parents.
- [51] Mr. Colby recommended a six-month review and reassessment to assess the children's safety and well-being.
- [52] Mr. Colby's report is now somewhat dated, and it was prepared for a different purpose. It did not consider the issue of relocation, as that possibility had not arisen when he made his recommendations. Nonetheless, it is of value for the purposes of this relocation decision.

- [53] With the agreement of N.I., J.I. had several sessions with the children and his own therapist, Don Deines. Mr. Deines testified about the counselling he provided to J.I. starting in April 2018 and continuing once every two weeks for about a year. He was assisting J.I. in dealing with the grief over the parties' separation and his transition through it.
- [54] In June 2019, Mr. Deines began to see the children with J.I.. He did so on six occasions in June and July. He spent time with the children together with J.I., and apart from him. He described J.I. as a good father, who was able to relate to his children and interact with them in a way they clearly enjoyed. He observed J.I. setting limits and the children complying with those limits without much push back. He testified that the children showed a lot of respect for their father.
- [55] Mr. Deines described the parties' daughter as being "back and forth" in terms of her relationship with her father. She expressed, in a private conversation during her first session with him, that she was more comfortable living with her mother. She did not explain why. The stress between her parents was distressing to her.
- [56] Mr. Deines said that the parties' son was direct about how he felt. He loved doing things with his dad and spending time with him. He said he was "mad" that when he showed affection to his dad in his mother's home, he would get in trouble. Mr. Deines said he was not sure if that was factual, but it was what the parties' son felt.
- [57] Mr. Deines had no concerns about J.I.'s parenting.
- [58] In cross-examination, Mr. Deines acknowledged that he was not a child therapist. He also acknowledged that despite Mr. Colby's recommendation that the therapist who provided counselling to J.I. and the children speak to N.I., he had not tried to contact her.
- [59] N.I. also attended counselling with Cheryl Adams, who testified. They began working together in June 2018. Ms. Adams testified that she helped N.I. navigate the separation and how N.I. could best support her children through the separation process. N.I. never said negative things about J.I.. She testified that N.I.'s focus was on the best interests of her children.

## The Issues

- [60] The issues in this matrimonial dispute involve property division, child and spousal support, and J.I.'s application to relocate the children to Calgary, where he now resides and works, to live with him as their primary care parent.
- [61] At the outset of the trial, the parties suggested, and I agreed, that it was most efficient to deal with the issue of relocation first as the support issues, and to some extent the property issues, will depend on where the children reside, and the associated parenting regime. As a result, this decision deals solely with relocation and the parenting plan.

[62] It is my hope that determining the parenting issues will assist the parties in resolving the financial and property issues without the need for further trial time. In particular, it appears that there is no dispute that, regardless of where the children reside, the family home in Victoria will need to be sold and no dispute that the net proceeds will be divided equally. The other property matters do not appear to be overly complex and, with the passage of time, there will be greater certainty about J.I.'s income earning capacity with Aspire.

### **J.I.'s Proposed Parenting Plan**

[63] J.I. proposes that, if the children relocate to Calgary, and N.I. chooses to move there, the parties would continue to share care of the children. However, if N.I. does not move, J.I. proposes that he would have primary care of the children and she would have parenting time with the children for: one month in the summer school holidays; spring break, which in Calgary is for one week; one half of the Christmas break; and certain unspecified long weekends in the school year. He also proposes that if N.I. visited Calgary, he would facilitate her parenting time there, and would provide reasonable Skype and FaceTime parenting time throughout the year.

[64] J.I.'s proposal did not include details of how the cost of N.I.'s parenting time would be paid or how the children would travel to and from Calgary.

### **The Legal Framework for Relocation Decisions**

[65] As set out above, J.I. is not licensed to practice medicine as a pediatrician, or otherwise, in BC. Following his move to Victoria from Brunei in February 2018, J.I. was unemployed and remained so until August 2019 when he took the position in Calgary.

[66] Since his move to Calgary, J.I. has been commuting to Victoria for the alternate week parenting schedule. He incurs considerable cost in doing so. His flights cost approximately \$800 a month, and transportation to and from the Calgary and Victoria airports costs about \$400 a month. In addition, he currently maintains the former family home in Victoria, where he stays when he is there, but which remains vacant when he is in Calgary. He has an apartment in Calgary. Financially, this continued cost is unsustainable. The parties will have to sell the family home.

#### **Preliminary Issues**

##### **Which Act Applies?**

[67] The first issue is whether the DA or the FLA should govern J.I.'s relocation application.

### **Relocation under the Divorce Act**

[68] There are no specific provisions in the DA dealing with relocation. Applications for custody and access are dealt with under s. 16, and variations to custody and access orders are dealt with under s. 17.

- [69] Section 16(6) of the DA provides that the court may impose any terms, conditions, or restrictions in connection to a custody or access order. Section 16(8) provides that, in making an order under s. 16, the court shall take into consideration only the best interests of the children, as determined by reference to their condition, means, needs, and other circumstances. Under s. 16(9), past conduct shall not be considered unless the conduct is relevant to the ability of a person to act as a parent. Section 16(10) provides that the court shall give effect to the principle that a child shall have as much contact with each parent as is consistent with the child's best interests and, for that purpose, shall take into consideration the willingness of the person who seeks custody to facilitate such contact.
- [70] Section 17 of the DA deals with applications to vary, rescind, or suspend custody and access orders. Section 17(5) provides that, before varying a custody order, the court must satisfy itself that there has been a change in the condition, means, needs, or other circumstances of the child occurring since the last order, and that the court shall take into consideration only the best interests of the children as determined by reference to that change.
- [71] Under s. 17(6), past conduct shall not be considered where it could not have been considered in the first instance. Section 17(9) provides that, in varying a custody order, the court shall give effect to the principle that a child shall have as much contact with each former spouse as is consistent with the child's best interests. For that purpose, where the variation would grant custody of the child to a person who does not currently have custody, the court must consider the willingness of that person to facilitate such contact.
- [72] As I have said, none of the orders in this case were made under the DA.
- [73] In *S.Z. v. D.Z.*, 2015 BCSC 2157 at paras. 71-80, Justice Voith concluded that there were some significant differences in the approach to relocation decisions under the DA and the FLA. He concluded that the doctrine of paramountcy weighed in favour of applying the DA, where it or the FLA or both could apply.
- [74] Even in cases in which there is no difference in the statutory approach, in accordance with the paramountcy doctrine, it is preferable to make orders under the DA: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20.
- [75] The leading case on relocation under the DA continues to be *Gordon v. Goertz*, [1996] 2 S.C.R. 27. It involved an application to vary an existing custody/access order so that one parent could relocate with a child. The Court said that each case turned on its own circumstances and set out a two-stage test for the variation of a custody/access order under the DA.
- [76] According to *Gordon* at para. 9, the parent seeking to vary an existing order must first demonstrate a material change in circumstances affecting the child. If this threshold requirement is met, the court engages in a fresh inquiry into the child's best interests, having regard to all of the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

[77] The fresh inquiry is based on the judge's findings at the time of the previous order and the evidence of the new circumstances. There is no legal presumption in favour of the custodial parent, although that parent's views are entitled to great respect: at para. 48. The only concern is the best interests of the child, in the particular circumstances of the case, and not on the interests and rights of the parents: at para. 28.

[78] In determining whether a proposed relocation would be in a child's best interests, Justice McLachlin, as she then was, listed a number of factors to be considered, at para. 49:

[49]

7. More particularly the judge should consider, inter alia:

- (a) the existing custody arrangement and relationship between the child and the custodial parent;
- (b) the existing access arrangement and the relationship between the child and the access parent;
- (c) the desirability of maximizing contact between the child and both parents;
- (d) the views of the child;
- (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
- (f) disruption to the child of a change in custody;
- (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[Emphasis in original.]

[79] She concluded at para. 50:

[50] In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all of the circumstances, old as well as new?

[80] In *T.K. v. R.J.H.A.*, 2015 BCCA 8 at paras. 47-48, the court discussed how the Gordon test had been modified for mobility cases arising in the context of an initial application for custody and principal residency under the DA as opposed to in the context of a variation. At para. 47, the court said that the first stage, requiring a material change in circumstances, was not applicable. At para. 48, the Court said that a blended analysis was appropriate, which included a consideration of the mobility issues as part of, not separate from, the determination of the custody issue. The analysis was done on the factors listed in para. 49(7) of *Gordon*, modified to reflect that there was no pre-existing order that had established the

custodial or access parent. Applying the Gordon test requires a full, sensitive, and individualized inquiry, taking into account all the relevant circumstances relating to the particular child's needs and the ability of the parents to satisfy those needs: *McArthur v. Brown*, 2008 BCSC 1061 at para. 112.

[81] In *One v. One*, 2000 BCSC 1584 at para. 24, Justice Burnyeat summarized a number of factors that had been considered by courts in BC when reviewing requests for a change in custody and access, and in considering relocation applications in circumstances where a move may make access more difficult. They included:

- (a) the parenting capabilities and the children's relationships with their parents and new partners;
- (b) the employment security and the prospects of each spouse and, where appropriate, their partner;
- (c) the access to and support of extended family;
- (d) the difficulty of exercising proposed access and the quality of proposed access if the move is permitted;
- (e) the effect, if any, on the children's schooling;
- (f) the psychological and emotional well-being of the children;
- (g) the disruption of the children's existing social and community support and routines;
- (h) the desirability of a proposed new family unit for the children;
- (i) the relative parenting capabilities of either parent and their respective ability to discharge their parenting responsibilities;
- (j) the children's relationship with both parents;
- (k) the separation of siblings; and
- (l) the retraining or educational opportunities for the moving parent.

[82] Most of those factors have been incorporated directly or indirectly into the best interests of the children mandatory considerations in s. 37(2) of the FLA.

### **Relocation under the FLA**

[83] There are two different approaches to dealing with relocation under the FLA, depending on whether there is an existing written agreement or order respecting parenting arrangements.

[84] In this case, pursuant to Judge Wishart's order of August 15, 2019, the parties share parenting time on a week on/week off basis. Thus, under the FLA, this case is governed by s. 69(5):

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

(a) of the factors described in subsection (4)(a), and

(b) that the relocation is in the best interest of the child.

[85] The incorporated subsection 69(4)(a) of the FLA provides:

(a) the relocating guardian must satisfy the court that

(i) the proposed relocation is made in good faith, and

(ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians and other persons who have a significant role in the child's life.

[86] For the purposes of determining whether the proposed relocation is made in good faith, s. 69(6) directs the court to consider all relevant factors. As they apply in this case, those factors include: the reasons for the proposed relocation; and whether the relocation is likely to enhance the general quality of life of the children and, if applicable, the relocating parent, including increasing emotional well-being or financial or educational opportunities.

#### Good Faith

[87] As Justice Kent wrote in *Pepin v. McCormack*, 2014 BCSC 2230:

[69] Good faith is a subjectively held state of mind. It involves an assessment of whether the reasons asserted by [the relocating parent] for the proposed relocation are the real reasons for the move. If so, and if the court determines on an objective basis that relocation will likely enhance [the children's] general quality of life, then the decision to relocate will normally be found to have been made in good faith.

[88] In this case, the sole reason for J.I.'s application to relocate the children is that he is working in Calgary and cannot do so in BC, without sitting qualifying exams. On the evidence, there is a way for J.I. to obtain licensure in BC, but it requires J.I. to complete one or two examinations, apparently depending on whether he wishes to work as a general practitioner or as a pediatrician.

[89] There is some uncertainty about what exactly is required of J.I. because his complete file with respect to his efforts to obtain licensure in BC has never been produced. This is so despite N.I.'s attempts to obtain his file, including seeking an authorization from him to allow her to access it. J.I. never signed the authorization. J.I. produced some of the correspondence from the licensing authorities to him, but did not disclose his correspondence to them. It is also clear that J.I. was corresponding with the Royal College of Physicians and Surgeons of Canada, but that correspondence was not disclosed. Without justification, he suggested that he was concerned about N.I.'s potential misuse of the file.

- [90] From the correspondence that was disclosed, it appears that in the spring of 2013, and then again in the late fall of 2016, J.I. corresponded with Health Match BC, a health care recruitment service funded by the Government of BC, about permanent and locum opportunities. Over a prolonged period, he provided Health Match with information about his education and work history, and they assessed his credentials on behalf of the BC College of Physicians and Surgeons. He was given information about the steps necessary for him to register with the BC College of Physicians and Surgeons and to obtain licensure in BC. He was required to write a qualifying exam, but never pursued it, as he said that colleagues had told him that it was very difficult for foreign-trained doctors to pass the exam.
- [91] In testifying about the difficulties involved in preparing for and passing those examinations, J.I. relied on the comments of colleagues as opposed to any real evidence that he would have been unable to do what was necessary to complete the exams. I note that since April 2018, he was parenting the children on a half-time basis, and it was not at all clear why he could not have studied for the examinations when the children were not in his care.
- [92] Nevertheless, I accept that there was uncertainty about the ongoing parenting situation and the outcome of Mr. Colby's parenting assessment, which was delayed until the spring of 2019. Thus, while I accept that, on the evidence, J.I. could have chosen to write the qualifying examinations, he did not do so. He has been surviving on the family's savings and needed to find work. For this analysis, I will assume that his application to relocate the children is made in good faith.
- [93] I also accept that J.I.'s move has improved his quality of life and was in his best interests. It was clear to me, during his evidence, that J.I. is justifiably proud of his career accomplishments and that, in part, his identity and sense of self-worth is tied to his ability to practice in his field. Once he establishes his practice in Calgary, according to correspondence from Aspire, he can expect net earnings of \$9,000 a week if working full-time. His income will improve his economic circumstances, thereby indirectly improving the quality of his children's lives. He is required to do what he can to earn an income to support his children.
- [94] I note that under either the DA or the FLA, the only consideration is what is in the child's, as opposed to the parent's, best interests. The factors looked at under the two statutes differ, most particularly as they relate to the reasons for the relocation. I will use the considerations in s. 37 of the FLA as the basis for my analysis of the facts in this case.
- [95] Section 37(2) directs the court to consider all of a child's needs and circumstances, including:
- (a) the child's health and emotional well-being;
  - (b) the child's views, unless it would be inappropriate to consider them;

- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

[96] The application of these considerations is entirely fact-driven. No two cases involve the same circumstances, and what is in the best interests of a child in one case may not be in another child's best interests. Thus, the cases relied on by J.I. are not determinative of the outcome in this case.

### **The Children's Health and Emotional Well-being**

[97] On the evidence, the children are physically and emotionally healthy. They have no special medical needs. As outlined above, the children had emotional challenges with respect to their parents' separation, but they are doing well in school and they are not currently seeing a counsellor.

[98] Mr. Colby reported that the children presented with a high degree of stamina, positive self-perception, and sense of their own value. Nevertheless, Mr. Colby expressed concern about the child/parent relationship between J.I. and his children and made recommendations for therapeutic intervention. J.I. did engage in that intervention with his own counsellor, Mr. Deines, who is not a child therapist. Mr. Deines did not speak to N.I. as recommended by Mr. Colby.

[99] I have no specific evidence about the children's views of the proposed relocation. It is in this context and in the context of the parents' capacity, that I have considered the information in Mr. Colby's report.

## The Nature and Strength of the Relationships between the Children and Significant Persons in Their Lives

- [100] Despite N.I.'s attempts to downplay J.I.'s involvement in his children's lives, I am satisfied that he had meaningful and active involvement in their lives. Although J.I. was working full time when the parties lived in Turks and Caicos and Brunei, he engaged with his children when he could.
- [101] From the witnesses who testified about their observations of the children with their parents, it appears that the children have strong relationships with both parents. That was also Mr. Colby's conclusion, as summarized above.
- [102] The children do not have a strong relationship with members of their mother's family. They have recently had some contact with their maternal grandmother, who has visited them in Victoria from Edmonton, and with their maternal uncle. While Nicole Drexhage, N.I.'s friend, testified about the children's positive interaction with their uncle, her observation was on one occasion and I cannot assess whether he is a significant person in their lives. N.I. testified that he is looking for work in Victoria and may move there, but that evidence is too speculative for me to consider.
- [103] J.I.'s parents are both deceased. He has two brothers who live in India and the children have cousins with whom they communicate by Skype and with whom they play on-line chess. These interactions can continue regardless of where the children live.
- [104] In the absence of close familial connections in either Victoria or Calgary, the social connections that N.I. has cultivated in Victoria play a larger role in the children's lives and these would be disrupted by a move to Calgary.

## The History of the Children's Care

- [105] I agree with Mr. Colby's comments that, until recently, N.I. has been the parent most involved with the children's care.
- [106] After their daughter was born, and during their time in India, neither party worked. In India, the parties were supported in their parenting by J.I.'s extended family and by staff who worked in J.I.'s father's home.
- [107] J.I. worked when the family lived in Turks and Caicos and in Brunei, but when he was not at work, he participated in the children's lives. They travelled as a family, and N.I. left the children in his care while she attended various yoga training programs.
- [108] Initially, on the family's arrival in Victoria, N.I. had full parenting responsibility for the children as J.I. returned to work in Brunei. This continued for about seven months with the exception of J.I.'s visits to the family. After J.I. moved to Victoria, for the most part, they have been sharing parenting, first on a 2-2-3 schedule, and most recently on a week on/week off schedule.

- [109] I accept that when he was not at work, J.I. engaged with his children in a meaningful way.
- [110] Since April 2018, both parents have engaged with their children and provided for their needs. N.I. arranged for the children to be enrolled in a public school in Victoria. That school was later changed, as J.I. preferred them to be enrolled in a private school. He pays the cost of their private schooling, which is of importance to him.
- [111] J.I. found a family doctor and dentist for the children and has been responsible for taking them to appointments.

### **The Children's Need for Stability Given Their Age and Stage of Development**

- [112] The parties and the children have lived in and travelled to many different countries. Their daughter, who was born in Edmonton, has lived in India, Turks and Caicos, Brunei, and Canada. By my count, she has moved six times. Their son has lived in Brunei and Canada. This suggests that the children are adaptable.
- [113] However, most of the relocations occurred when the children were at an age when their relationship with their parents was the most important in their lives and all of the moves involved an intact family unit.
- [114] Since moving to Victoria, the children have put down roots and have an established community fostered by their mother. They are now in their second year at Christ Church Cathedral School, and have developed a network of friends with whom they share play dates and activities. They are doing well at school. The parties' daughter is involved in a choir and practices four times a week.
- [115] The children have also been attending Sunday school with their father.
- [116] In the absence of close family members, the children's friends, and those friend's parents and extended families, have been actively involved in their lives.
- [117] On the evidence, I conclude that J.I. has done less to foster his children's broader community relationships. According to his description of the activities he engages in with his children, they are focussed on him and the children. Contact with other children is incidental.
- [118] For example, J.I. described playing badminton, soccer, and cricket with the children, and cycling and walking with them in a nearby park. He described watching soccer, tennis, and cricket with them on television and taking them to the museum, to the library, and to community events in Victoria. J.I. testified about his effort to maintain his children's relationship with cousins in India.

- [119] J.I. has not invited his daughter's best friend to spend time with his daughter while she is in his care and has not facilitated his daughter spending time with her best friend. Their contact with other children is incidental when they are with him. It was telling that, in cross-examination, J.I. was unable to name his children's best friends, or the parents of those friends. He was also unable to name the girls with whom his daughter attended choir.
- [120] The children have not been to Calgary since their father relocated.
- [121] It was of concern to me that J.I. does not appear to have a well-thought-out plan for parenting the children if they move to Calgary. In his evidence, he has not suggested a school for the children. He testified that he contacted a few private schools by email and said that they would not know about enrollment for the next academic year until the end of March. He did not name the schools he had contacted.
- [122] Apart from saying that his employer is flexible, J.I. did not explain what support network he would have in place for when he is unable to care for the children due to his work demands or when their needs conflict with his work demands.
- [123] Despite acknowledging that his son loves soccer, J.I. has not proposed to enroll him on a soccer team. He generally testified about sports facilities in Calgary without specifying which ones were in proximity to where he proposes to live.
- [124] J.I.'s work history demonstrates periods of time when he has not worked, and he has changed employers a number of times. It is also of note that J.I.'s current contract with Aspire is for one year. Although it is renewable, in a letter addressed "To Whom It May Concern", confirming J.I.'s terms of employment, Aspire's medical director wrote that he had discussed Calgary's "high need for pediatric consultation work" and that Aspire looked forward to him expanding his hours with them in the near future. This suggests that the flexibility J.I. has currently negotiated is short-term. Aspire is clearly expecting J.I. to develop his practice with them. As the demands of his work schedule increase, J.I. will need to have a support network in place. He has not demonstrated an ability to develop those support networks in his time in Victoria.
- [125] I conclude that the children's need for stability at this stage in their lives will be best met by having them remain in Victoria.

### **The Ability of Each of Their Parents to Exercise Their Parental Responsibilities**

- [126] According to Mr. Colby's report, both parents seek to be highly engaged in the parenting process, to the exclusion of the other parent. Both parents attested to their ability and willingness to carry out parenting responsibilities and to meet the children's needs. Both parents challenged those assertions with respect to the other.

[127] On the evidence, I am satisfied that both parents have the ability to exercise parental responsibilities for their children. While J.I. had historically less day-to-day responsibility for caring for the children's needs, since the shared parenting regime was first put in place in the spring of 2018, he has demonstrated that he is capable of caring for the children. He is the parent who arranged for the children's doctor and dentist appointments, perhaps not surprisingly given his profession.

### **The Impact of Family Violence on the Children's Safety, Security, or Well-being**

[128] There is a dispute as to whether violence occurred in this family. As I have said, N.I. denies that she assaulted J.I., and he denies that he was financially or emotionally controlling of N.I.

[129] There is no evidence of a history of physical violence in this case and, as a result of the parents' parallel parenting, no opportunity for ongoing family violence. The assaults reported by J.I. were isolated and occurred during the termination of the marital relationship, when tensions between these parties were high. Even if N.I. physically assaulted J.I., there is no evidence that it was in the presence of the children. The police were not called at the time. J.I. reported it some time afterwards and, based on his evidence, on the advice of his former counsel. The allegations were never proven as the charges were stayed.

[130] There is evidence that J.I. controlled the family finances, and although he had explanations for why that was so in Brunei, his explanations were not clear with respect to why that continued to be so in Victoria.

[131] I conclude, on the evidence and my observation of the parties at trial, that if there was any physical or emotional abuse between the parties, it was situational and there is no reason to expect it to reoccur. There were no issues of ongoing physical violence between the parties. Both say that they have abided by the court orders which prevent them from disparaging the other to the children or discussing the court proceedings with the children.

[132] With respect to the allegations that J.I. was violent with respect to his daughter or "mean" to his son, there was no objective evidence to support those allegations. The MCFD investigated the allegations of violence against the parties' daughter and closed its file. Nevertheless, Mr. Colby was concerned enough that he recommended the intervention of a child therapist to improve the relationship between J.I. and his children. Although in a slightly different way, that intervention occurred, and since 2018, the children have not reported any inappropriate interactions between their father and them.

[133] As a result, I am satisfied that family violence is not a concern in this case.

**The Appropriateness of an Arrangement that Requires the Children's Parents to Cooperate on Issues Affecting the Child**

- [134] These parties have difficulty in trusting each other and do not communicate well. They are engaged in parallel, as opposed to cooperative, parenting.
- [135] Mr. Colby reported that both parents downplayed the other's parenting role in the marital relationship, claiming that the other was disengaged with that process. N.I. said that on the occasions when she was not available to parent the children, J.I. required the assistance of others. J.I. expressed concerns about N.I.'s mental health and her ability to meet the children's medical needs. There was no objective basis on which I could find that either parent's concerns were warranted. The fact is that for over a year, they have each parented their children appropriately, albeit separately.
- [136] Mr. Colby wrote about how both parents reported historical issues in cooperation and expressed concern that the parties had not done the ground work to facilitate cooperative parenting moving forward.
- [137] This is a major concern with respect to the proposed relocation of the children, which would require a great deal of cooperation between them.

### Maximizing Contact

- [138] In addition to those factors outlined in the FLA, I will also consider the principal of maximizing contact with each parent, as required under ss. 16(10) and 17(9) of the DA.
- [139] J.I.'s proposal for N.I.'s parenting, if the children are relocated and she chooses to stay in Victoria, does not adequately address the differential in their incomes and the fact that N.I. is unlikely to have the financial wherewithal to maximize her contact with the children.
- [140] According to N.I.'s pay stub for the pay period ending November 28, 2019, she had earned \$56,113.06 to that date in 2019. She agreed that her income for 2019 was likely to be closer to \$60,000.
- [141] J.I.'s income is a little harder to calculate, but based on the incomes set out in Aspire's letter confirming his employment, once his practice is established, his net income is expected to be \$9,000 a week. If he works full time, he has the capacity to earn a net income of close to \$470,000. Working half-time would net him an income of \$234,000.
- [142] Financially, J.I. is in a much better position to earn a significant income both to support his children and to afford the cost of travelling to Victoria to maximize his parenting time with the children.

### Conclusion

- [143] Having considered all the factors appropriate to this case, I conclude that it is not in the children's best interests to relocate them to Calgary.

- [144] J.I.'s move to Calgary was economically sensible and permitted him to work as a consultant in the pediatric field which, as I have said, is an understandably important part of his self-image. The financial well-being of the family unit, and most particularly, their children, will benefit from J.I. maximizing his financial contribution to the family unit.
- [145] J.I. testified that he could not see how a change in the parenting schedule to the schedule proposed by N.I. (three weeks with their mother and one week with him) would work. He testified that the children "need him all the time" and he believed it was important for him to live with them at this crucial age to provide them with emotional stability and support. His evidence in this regard was focussed on his own interests. There was no evidence that his children need him all the time or that they were at a crucial age. His evidence also downplayed the importance of their mother to the children. In this regard, it is of note that Mr. Colby concluded that both children showed a preference, albeit slight, to spend more time with their mother.
- [146] J.I. downplayed the significant impact on his children's lives of a move at this time and of N.I.'s continuing contribution to the children's emotional stability and support. N.I. has demonstrated that she is able to parent the children when their father is living elsewhere. J.I. has never done so.
- [147] While I accept that the children are adaptable, they have had to adapt as a result of J.I.'s work for much of their lives. At this stage in their development, and during these school years, they need a stable environment. They have friends, school and other activities in Victoria. They will shortly have completed two full years in their current school and are doing well. J.I. does not have a clear plan for their schooling or for their lives in Calgary.
- [148] The children are at an age at which they have strong relationships with their parents and will be able to understand their father's need to be away from them to pursue his career. They adapted to that reality when their father was in Brunei for the first seven months of them living in Victoria.
- [149] J.I. also appeared to discount Mr. Colby's reporting of his children's expressed wishes to spend more time with their mother.
- [150] There would have been no need to consider relocation if J.I. had pursued licensure in BC by sitting the exams required of him. Had he done so, a shared parenting arrangement would continue to be appropriate. However, if as J.I. says, there is no viable path for him to practice in BC, the best alternative for the children is to remain in Victoria and for J.I. to spend one week out of four with their father with additional time at Christmas, during spring break, over the summer holidays, and at Easter.
- [151] I therefore deny J.I.'s application to relocate the children to Calgary and vary the current parenting schedule, commencing at the end of the last week in March 2020 in which J.I. exercises his parenting time. Thereafter, the children will spend three weeks in their mother's care followed by one week in J.I.'s.

[152] This regular parenting schedule will be interrupted so that the parties will:

- (a) share parenting time over the summer school holidays, as agreed between them by March 31, 2020, in each year. The parties may decide how to best share the months of July and August;
- (b) share parenting over the two-week spring break with N.I. having the children for the first week in even years and J.I. having the second week; and J.I. having the first week in odd years and N.I. having the second week; and
- (c) share parenting over the two-week Christmas holidays with J.I. having the first week in even years, and N.I. having the second week; and N.I. having the first week and J.I. having the second week in odd years.

[153] In addition, the regular parenting schedule will be interrupted so that J.I. will have parenting time over the Easter and Thanksgiving long weekends.

[154] J.I. will also be entitled to parenting time via Skype, FaceTime or other electronic means twice a week while the children are in their mother's care. The logistics of this are to be worked out between the parties. The children have demonstrated that they are amenable to using Skype to keep in touch with family members in India.

[155] The parties may agree to other parenting time as their schedules permit.

[156] When the children are not in school, J.I. may choose to exercise his parenting time in Victoria or in Calgary, and N.I. is to cooperate with J.I. in that regard. The children's passports are to travel with the children as required.

[157] During her evidence, N.I. expressed concern about J.I. travelling to India with the children. J.I. is not currently seeking to do so. I need not decide whether such travel is in the children's best interests or the terms on which such travel might be permitted.

"MacNaughton J."

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