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CANADA / JUDGMENT

## Nolie v. Reece

2016 BCSC 2201

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COURT

Supreme Court of British Columbia

DECIDED

16 September 2016

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2016 BCSC 2201 Nolie v. Reece

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nolie v. Reece,

2016 BCSC 2201

Date: 20160916

Docket: E13395

Registry: Campbell River

Between:

David Barry Allen Nolie

Claimant

And

Leeann Brenda Reece

Respondent

Before: The Honourable Madam Justice Fleming

(appearing via teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for Claimant:

H.A. Henning

Counsel for Respondent:

K.D. Stevan

Place and Date of Trial/Hearing:

Campbell River, B.C.

September 13, 2016

Place and Date of Judgment:

Campbell River, B.C.

### September 16, 2016

[1] THE COURT: The respondent, Leanne Reece, and the claimant, David Nolie, are the parents of two young children, Cecil, who is six, and Morgan Lee, who is four. Ms. Reece applies for an interim order allowing her to relocate the children from Campbell River to Massett, B.C., pursuant to s. 69 of the Family Law Act, S.B.C. 2011, c. 25 [Act]. Mr. Nolie is strongly opposed.

### Overview

- [2] The background briefly is as follows. The parties never lived together but shared a long term relationship that ended in or about November 2015. Ms. Reece was born and raised in Haida Gwaii, B.C.; she is a member of the Haida Nation. Mr. Nolie is from northern Vancouver Island. He is a hereditary chief of the Kwakwaka'wakw Nation.
- [3] The parties met in 2002. Ms. Reece was working as a housing administrator in Massett at the time. She moved to Alert Bay in 2004 to be with the claimant, where she worked as a substitute teaching assistant for some time. In or about 2007, she moved to Campbell River. The parties' relationship continued. Cecil was born in June 2010, and Morgan in May 2012. Mr. Nolie spent time with Ms. Reece and the children on weekends and holidays until their separation in November 2015.
- [4] There is no dispute that Ms. Reece was, and has remained the parent primarily responsible for the children's care.
- [5] Mr. Nolie married another woman in May 2016. He denies Ms. Reece's allegations of infidelity and says his relationship with his now wife began in December 2015.
- [6] A dispute arose over Mr. Nolie's parenting time. Ms. Reece was concerned about the presence of his then girlfriend so soon after the separation and its impact on the children, Cecil in particular. She took the position that he should spend time with the children alone for a period of time. Mr. Nolie accused Ms. Reece of denying him parenting time.

- [7] On June, 20th, 2016, he filed a notice of family claim and an amended notice seeking an order that the parties share parenting responsibilities, the children reside primarily with Ms. Reece, and that he have specified parenting time.
- [8] On July 5th, 2016, Ms. Reece notified Mr. Nolie she intended to move the children to Massett. Mr. Nolie then brought an application seeking interim orders including an order preventing the proposed move.
- [9] The parties appeared before Master Dick on August 8th, 2016. She granted an interim "without prejudice" order recognizing Mr. Nolie as a guardian of the children pursuant to s. 39(3) of the Act. She also ordered:
- the children's residence was to remain in Campbell River, unless agreed to by the parties, pending the hearing of Ms. Reece's relocation application;
  - Mr. Nolie was to have parenting time two weekends per month in Port Hardy, and the opportunity to spent alternate weekends with the children in Campbell River from Friday to Sunday; and
  - Mr. Nolie's financial contribution to Ms. Reece was to continue pending the relocation hearing.
- [10] Ms. Reece has not worked since prior to the birth of Cecil. Mr. Nolie owns a company that operates a cedar shingle mill in Port McNeill which he started in 2015.
- [11] Ms. Reece filed her interim relocation application on August 29th, 2016. She argues the proposed move offers significant financial, cultural, emotional, and social advantages the children and her. She has little family support in Campbell River and the cost of child care makes the minimum wage employment that might be available to her not worthwhile. She says she cannot rely upon Mr. Nolie financially. She describes him as dishonest about his income and financial circumstances. Until recently, he has largely provided support by paying some of her bills which she says he has threatened to discontinue during disputes over his parenting time. According to Ms. Reece, following the order of Master Dick, Mr. Nolie discontinued entertainment program and arranged for email transfers of funds late in the day, delaying her access to necessary support for the children, all of which Mr. Nolie denies.
- [12] Ms. Reece deposes that she and the children will have a great deal of emotional and practical support from family and friends in Massett. There are far better employment opportunities for her with the Band, her previous employer. Friends and family are available to provide her with free child care. She and the children can live at no cost in a home that used to belong to her grandfather. The children are registered to attend Old Massett school and community programs where they will be immersed in the Haida language and culture. Much of her evidence about what is available to her and the children in Massett is supported by letters from friends, relatives, and community members, as well as a brief affidavit from her adult son, Damon.

- [13] Ms. Reece suggests Mr. Nolie could maintain contact with the children through Skype, Facetime, phone calls, et cetera, and he or the children could travel to and from Massett and Campbell River for extended visits once or twice a year.
- [14] Mr. Nolie takes the position the proposed move would effectively sever his relationship and those of his family members with Cecil and Morgan Lee, given the time, difficulties, and cost involved in travelling between Campbell River and Massett. He deposes that most of Ms. Reece's immediate family live in northern Vancouver Island, not Massett, including her mother and brother. He questions the likelihood of her securing better employment in Massett and complains she could have, but has not sought a job with the First Nations community in Campbell River, or in northern Vancouver Island, indicating that he and his family are prepared to assist her in finding such a position.
- [15] Mr. Nolie says as the hereditary chief, he has much to teach the children culturally and it is important that they learn from him, his family, and his Band. He identifies his grandfather in particular as very traditional and sharing a close connection with Cecil and Morgan Lee. According to Mr. Nolie, Cecil will one day become a hereditary chief, too.
- [16] He also submits it would be inappropriate to grant an interim order allowing the children's relocation and the matter should be decided after a trial.

## Legal Framework

- [17] Section 216 of the Act provides the court may make interim orders to the extent practicable, based on the requirements that would apply to a final order.
- [18] Ms. Reece's application for interim relocation of the children is brought pursuant to Part 4 of the Act.
- [19] Section 46 of the Act governs applications when there is no agreement or order regarding parenting arrangements and the child's guardian plans to change the location of the child's residence in a way that can reasonably be expected to significantly impact on his or her relationship with the other guardian. Ms. Reece appears to concede that Master Dick's order is an order regarding parenting arrangements. Section 69 applies to relocation applications where such an order or agreement exists. Because the parties do not share substantially equal parenting time, the following provisions of s. 69 govern this application:
- (3) Despite section 37 (1) [best interests of child], the court, in making an order under this section, must consider, in addition to the factors set out in section 37 (2), the factors set out in subsection (4) (a) of this section.
- (4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,
- (a) the relocating guardian must satisfy the court that

- (i) the proposed relocation is made in good faith, and
- (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and
- (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise.

[20] In addition, section 69(6) provides in part:

- (6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following:
  - (a) the reasons for the proposed relocation;
  - (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
  - (c) whether notice was given under section 66 [notice of relocation];

[21] Mr. Nolie argues Ms. Reece's application must fail because her evidence falls short of establishing it has been made in good faith, nor does she propose workable and reasonable arrangements to preserve his relationship with the children.

[22] In *C.M.B. v. B.D.G.*, 2014 BCSC 780, I concluded the correct approach under s. 69(4) is for the court to consider whether proposed relocation made in good faith, and whether reasonable and workable arrangements have been proposed but if one or both of these criteria are not met, the court must still go on to consider whether the proposed relocation is in the child's best interest. Satisfying the good faith and reasonable working arrangements criteria is necessary for the relocating party to benefit from the presumption under s. 69(4)(b) that the move is in the best interest of the child.

[23] While Mr. Nolie asserts Ms. Reece is proposing the move to thwart his involvement with the children, he also appears to be under the misapprehension that where a parent seeks to relocate to improve their own circumstances, be they financial, social, emotional, or cultural, that they are not acting in good faith.

[24] In dealing with applications to relocate under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the courts have repeatedly recognized that career fulfillment and the emotional well-being of a parent are legitimate considerations effecting a child's best interest. (See for example: *S.S.L. v. J.W.W.*, 2010 BCCA 55 at para. 33; *D.B.S. v. D.A.C.*, 2005 BCSC 913 at para. 66; *McArthur v. Brown*, 2008 BCSC 1061 at para. 153; and *S.B.C. v. F.A.C.*, 2013 BCSC 211, at para. 380). Section 69(6) makes it clear the same is true in relation to a relocation application under s. 69. As a matter of common sense, children benefit from a parent who is happier,

more fulfilled, and more financially secure.

## Analysis

- [25] There is a great deal of conflict in the evidence before me that relates to the factors that bear on the analysis of the children's best interest and each party has suggested the other is not credible. There are also significant gaps in the evidence regarding the children. I have little sense of Cecil and Morgan Lee as individuals, or their daily lives. Who are their friends? How did Cecil enjoy kindergarten? What activities are they involved in? What are each child's needs and strengths and personality? How have the children responded to weekly weekend visits with Mr. Nolie since August 8th, 2016?
- [26] I appreciate the parties have not had a great deal of time to prepare some of their materials. Understandably perhaps, the evidence focuses to a large extent on the proposed move and Ms. Reece's plan, its benefits from her perspective, and its weaknesses from Mr. Nolie's.
- [27] Relocation is, as Master Scarth said in *D.R.K v. S.G.G.*, 2013 BCSC 2107, one of the most serious decisions the court is asked to make. It can have a lifelong impact on a child and his or her relationship with a non-moving parent. When granted at the interim stage, it can be tantamount to a final order.
- [28] The authorities indicate that courts are reluctant to consider relocation applications at the interim stage particularly where the move would significantly reduce the non-moving parent's time with the child.
- [29] In *D.R.K.*, Master Scarth granted the father's application to prevent the mother from relocating their three-year-old child from Pitt Meadows to the Okanagan. The mother who was the child's primary caregiver had notified the father of her intention to move the child to Vernon. She argued the application was urgent because of her precarious financial and employment position. Master Scarth concluded that urgency had not been established and the issue of relocation should be addressed at a trial along with the issue of custody.
- [30] By contrast in *C.A.P.*, 2015 BSCS 183, Justice W. Harris granted the mother's interim application to relocate the parties' two-year-old child from the interior of British Columbia to White Rock. Unlike here, the proposed relocation did not significantly reduced the father's time with the child. The father was the chief of a Band located somewhere in the Province's interior. After separation, the mother and child had remained in the family home located near Ashcroft and the father had moved to Ashcroft. The father's work commitments, however, took him to the Lower Mainland and Merritt most of the week. The mother had already moved when the hearing occurred. She proposed returning with the child to the father's community three days every other weekend, to accommodate his work schedule and allow the child to spend time not only with the father but also his paternal grandparents. She also proposed additional time in the Lower Mainland where the father worked two to three days a week. The father argued the mother should return with the child to his parents' ranch located close to the family home. There was no dispute the mother had

been the primary caregiver to the child.

- [31] Acknowledging the cases where the courts had refused interim applications for relocation, Justice Harris found the circumstances before her made it unreasonable to expect the mother to remain living with the father's parents, and determining relocation on an interim basis, appropriate. She concluded it was in the child's best interest to allow the move.
- [32] In *S.L.S. v. J.A.S.*, 2013 BCSC 1775, Mr. Justice Rogers refused to grant the mother's interim application to relocate the parties' nine-year-old child from Peachland to Pitt Meadows because the mother's new partner had a job that required him to move. The parties had shared parenting time equally up to that point by agreement. The court dismisses the mother's application based on an analysis of s. 69(4) and the child's best interest, but also expressed concern about deciding the issue on an interim application.

- [33] At paragraph 31, he said in part as follows:

I will start this discussion with a cautionary note. These are interim applications. They are based on affidavit evidence. The parties have not yet conducted examinations for discovery. Neither the parties nor their supporting affiants have been subject to cross-examination before the court. C's views, whatever they may be, are not known other than through the party's clearly self-serving hearsay attestations. The court does not have the benefit of a report pursuant to s. 211 of the Act. Much about this case has not, therefore, been fully elucidated. Under such circumstances, the court should proceed cautiously. The court should be careful about making an interim order that endorses a parenting regime that is significantly different than one that served the child well for some time after the parties' separation. That is not to say that the status quo should be slavishly preserved - it is only to say that the trial judge will likely be in a much better position than a chambers judge to fully assess all of the factors that will influence a decision about where C's best interests lie.

- [34] I entirely agree with these comments. In this case, it is clear the proposed relocation would significantly reduce the frequency with which the children are in the care of Mr. Nolie. Although the cost of flying from Campbell River to Massett is disputed, it is clearly significant. Although there is some indication the children could fly unaccompanied once Morgan Lee is five for an extra fee, until then she could not. Further, I have been provided with no evidence about what care and supervision the airline would provide to these young children. Travel by ferry is even more expensive and extremely time-consuming. Realistically, and as Ms. Reece proposes, Mr. Nolie would likely spend time with the children once or twice a year.
- [35] In my view, the claimant's proposal should be considered at a trial where more fulsome evidence can be presented. Testimony can be tested by cross-examination and the trial judge can properly assess the creditability and reliability of the witnesses' evidence.

[36] Although Ms. Reece is anxious to move the children and I sympathize with her emotional distress over the loss of her relationship with Mr. Nolie, as well as her desire to return to what I accept would be a highly supportive environment for her and the children, I do not regard it as in the children's best interest to make such a critically important decision based on the record before me.

"Fleming J."

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