
CANADA / JUDGMENT

Pepin v. McCormack

2014 BCSC 2230

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2230 Pepin v. McCormack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pepin v. McCormack,

2014 BCSC 2230

Date: 20141127

Docket: E140697

Registry: Vancouver

Between:

John Jason Pepin

Claimant

And

Fiona McCormack

Respondent

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Claimant:

Maureen Wesley

Counsel for the Respondent:

Clea Amundsen

Place and Dates of Trial:

Vancouver, B.C.

August 25-29, 2014

October 23, 2014

Place and Date of Judgment:

Vancouver, B.C.

November 27, 2014

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Introduction

[1] The primary question to be determined in this case is whether it is in the best interests of a delightful four-year-old girl called Madeleine to be relocated with her mother to Scotland or whether she should remain here in Vancouver where she was born and where her father resides. Either outcome will cause heartbreak and hardship for at least one parent, both of whom are decent people who dearly love their child.

- [2] For the reasons that follow, I have decided to permit the relocation. Further ancillary orders are also made regarding child support and parenting arrangements pertinent to the new realities.

Background Facts

- [3] Many of the facts in this case are not controversial. The primary dispute between the parties is the manner in which the facts should inform the analysis and determination of proposed relocation and parenting arrangements.
- [4] Mr. Pepin was born in Edmonton, Alberta on April 29, 1971, and is currently 43 years of age. He has a grade 10 education, having failed to complete grade 11.
- [5] Mr. Pepin joined the Canadian Armed Forces in 1991 and served until his honourable discharge in 1997. Since that time he has held a number of short-term jobs and has also been unemployed at various periods of time.
- [6] Following his discharge from the forces, Mr. Pepin initially worked as a carpenter's helper with Atco Structures in Calgary, Alberta and thereafter attempted employment and self-employment as a personal trainer, earning modest sums at various locations. He enrolled in Mount Royal College in the fall of 1999 to pursue a personal training certificate but failed to complete the course work.
- [7] Apart from employment at various fitness facilities both before and after his move to Vancouver in September 2002, Mr. Pepin held employment in his father's roofing business for a few months, as a driver for FedEx for five months, a driver for CanPar Transport for three months, a ramp attendant for Air Canada for a couple of weeks, and as a shipper-receiver for Premier Lighting for 18 months before being "downsized".
- [8] Ms. McCormack was born in Hong Kong to Scottish parents. She is a British citizen. She obtained a four-year nursing degree in Edinburgh, Scotland in December 1996. She worked as a registered nurse until she moved to Vancouver in February 2007 after being recruited by Vancouver Coastal Health.
- [9] Ms. McCormack's parents divorced when she was 13 years of age. She lived with her mother following the divorce. Both her parents remarried, although her stepfather died in 2007.
- [10] Ms. McCormack's mother, who is currently 70 years old, worked as a primary school teacher and retired from full-time employment as a deputy head teacher approximately seven years ago.
- [11] Ms. McCormack's mother, Christina Mateer, lives in the village of Innellan, located on the east shore of the Cowal Peninsula, on the Firth of Clyde, four miles south of the town of Dunoon on the west coast of Scotland. Although the modest industry of Innellan and Dunoon is mostly limited to tourism, both are essentially dormitory communities for the large City of Glasgow 40 minutes away.

- [12] Ms. McCormack's father, who also had a teaching career in secondary schools before retiring, remarried and some time ago moved to New Zealand with Ms. McCormack's stepmother to be closer to the latter's family in that country. Ms. McCormack says she has an excellent relationship with her father, whom she last saw a couple months ago during his visit to Vancouver.
- [13] Ms. McCormack has an older sister, Dr. Gillian McCormack, who lives in Brussels, Belgium and works as a regional director of an NGO managing media training projects in Europe and Russia. Her sister is not married and has no children.
- [14] Ms. McCormack also has a younger brother, Graeme McCormack, who is married and who lives with his wife and two children in London, England. He works as a senior financial consultant.
- [15] There was little evidence tendered respecting Mr. Pepin's family, although he lived with his parents when he moved to Vancouver in September 2002 and also worked for his father in the latter's roofing business for a number of months in 2004. According to Mr. Pepin he "was not a good fit" with his father's business.
- [16] It appears Mr. Pepin's relationship with his family has been challenging from time to time. One of his emails that was put into evidence describes certain aspects of his relationship with his parents as "absolute torment when I was a kid and all through my adulthood" and goes on "I just want to push them away, even for good".
- [17] In August 2007 Mr. Pepin and Ms. McCormack met via an online dating service. He moved into her apartment in early 2009 and thereafter the couple moved their household to other apartments, first in June 2009 and second in July 2010.
- [18] Ms. McCormack became pregnant in 2010 and the couple's daughter, Madeleine, was born November 18, 2010. She has just turned four years old.
- [19] Ms. McCormack had been working as a nurse with Vancouver Coastal Health and, following the birth of Madeleine, was on maternity leave until August 2011.
- [20] A comparison of the parties' respective incomes as set out on line 150 of their tax returns illustrates the contributions of each to the household finances:

Year

Mr. Pepin

(\$ rounded off)

Ms. McCormack

(\$ rounded off)

2009

\$6,800

\$84,000

2010

\$0

\$81,000

2011

\$1,300

\$52,000

2012

\$0

\$61,000

2013

\$11,000

\$12,500

[21] Mr. Pepin was unemployed when he first met Ms. McCormack in 2007. He essentially remained unemployed throughout their relationship. He says he "acted on a personal dream", which he claims to have been shared with Ms. McCormack, to start a woodworking business involving the production and sale of high quality furniture. He bought some equipment and worked long hours attempting to design, produce, and create a market for prototypes. When success failed to materialize, Mr. Pepin remained stubbornly determined and for a number of years refused to seek out alternative employment or other means of support notwithstanding what he described as "intense disagreements" and "financial meltdown discussions" with Ms. McCormack.

[22] Ms. McCormack's version of events, which I accept without hesitation, is that she expected Mr. Pepin to be sharing their various expenses, and that while she was initially supportive of Mr. Pepin's attempt to develop a woodworking business, she found herself paying all the bills. As time went by, the couple's financial situation became a "huge drain and worry". Notwithstanding her good salary, the couple could not make ends meet and the resulting debt was incurred and increased in Ms. McCormack's name alone.

[23] Ms. McCormack had many discussions with Mr. Pepin about finding work and making a financial contribution but, notwithstanding assurances to the contrary, he failed to do so, persisting instead with his non-revenue producing woodworking efforts.

- [24] Following her maternity leave, Ms. McCormack returned to full time work at UBC Hospital in September 2011. The previous month she and Madeleine visited Scotland for three weeks. Her family paid for the trip. Indeed, by that point in time, Ms. McCormack was borrowing money from her sister and mother to cover some of the family expenses, as her maternity leave payments were inadequate to the task and Mr. Pepin was earning nothing at the time.
- [25] From September 2011 to the beginning of August 2012, Ms. McCormack worked full-time at UBC Hospital. As with most nursing positions, the work entailed 12 hour shifts, two days and two nights followed by five days off. Because the couple could not afford daycare, Mr. Pepin cared for Madeleine while Ms. McCormack was working. On her five days off, Ms. McCormack undertook most of the care for Madeleine while Mr. Pepin continued his woodworking endeavours.
- [26] Ms. McCormack says, and I accept as a fact, that she found herself ashamed of her circumstances. She had a partner who failed to recognize the gravity of their financial situation and one who refused to change his behavior despite assurances of contrary intent.
- [27] In August 2012, Ms. McCormack's mother became gravely ill as a result of complications arising from previously diagnosed but asymptomatic diabetes and liver problems. She eventually underwent a liver transplant in October 2012.
- [28] Ms. McCormack, who was of course a registered nurse, returned to Innellan with Madeleine so that she could care for her mother. She and Mr. Pepin discussed the situation beforehand and agreed that Ms. McCormack and Madeleine should move back to Scotland to help Ms. Mateer.
- [29] Mr. Pepin signed a "consent to travel" form indicating that Madeleine would be returning in March 2013, although he says he was aware that six months was likely too short a period of time for Ms. Mateer's recovery and that Ms. McCormack and Madeleine might very well be absent for up to a year. He says that although their relationship was strained at the time, Ms. McCormack's return to Scotland was not a decision by the couple to separate. Rather, his understanding arising from their discussions was that the Vancouver apartment would be maintained so that Ms. McCormack and Madeleine would have a place to come back to, but because woodworking was "pretty much dead in the water", Mr. Pepin was to find employment and take over the rent of the Vancouver apartment.
- [30] In the result, Ms. McCormack secured compassionate leave from her employment at UBC Hospital and she and Madeleine moved to her mother's house in Scotland on August 22, 2012.
- [31] It is clear that relatively soon after returning to Scotland, Ms. McCormack decided she would not likely be coming back to Vancouver. She testified that she informed Mr. Pepin of this in October 2012 and she made similar statements in her affidavit of November 15, 2013, prepared in respect of the Hague Convention petition proceedings issued by Mr. Pepin in the Scottish court for an order requiring the return of Madeleine to Canada.

- [32] Mr. Pepin says Ms. McCormack did not expressly tell him about her decision to remain in Scotland until March 2013. He acknowledges, however, that she stopped paying rent on the Vancouver apartment in the fall 2012, that by December 2012 he knew Ms. McCormack and Madeleine were not returning to Vancouver for Christmas, and that their "superficially pleasant" communications did not involve any talk about a return to Canada. He was, he says "giving her time and space", although he knew by March 2013 that their relationship was over.
- [33] Mr. Pepin obtained work as a "labour contractor" at various periods between January and June 2013 but then stopped working to "try and deal with the situation". That entailed hiring a Scottish solicitor and instituting Hague Convention proceedings in the Scottish courts.
- [34] On December 3, 2013, the Scottish court dismissed Mr. Pepin's Hague Convention petition . Appeal proceedings ensued and on February 11, 2014, the Scottish appeal court overturned the earlier decision and ordered Madeleine's return to Canada. In compliance with that order, both mother and child arrived back in Vancouver in late February 2014.
- [35] In Scotland, Ms. McCormack had obtained part time employment as a nurse in a local hospital in Dunoon. She testified there is a shortage of nurses in Scotland and she was hired immediately upon her application. The work entailed regular 6 to 8 hour day shifts. It is a 15 minute bus ride from her mother's house in Innellan to the hospital in Dunoon.
- [36] Before returning to Vancouver, Ms. McCormack had applied for a full-time position at the Dunoon hospital. Unlike the nursing schedule in Vancouver, the position entails regular "office-type hours" during the day and pays a salary of approximately \$45,000 to \$50,000. Her position is being held open for her by the hospital.
- [37] In addition to her salary as a part time nurse, Ms. McCormack also received a care allowance from the British government in respect of the nursing care she was providing to her mother. In Scotland, Madeleine was enrolled in a toddler's group with 6-8 other children at the local nursery. Such nursery care is available five days a week in Scotland free of charge.
- [38] The British government provides single parents with a working tax credit which pays for daycare providers outside nursery hours. Daycare costs are much cheaper in Scotland than in Vancouver and there are several people, both licensed and unlicensed, in Innellan and Dunoon, who can provide such daycare while Ms. McCormack is working.
- [39] Ms. McCormack's plan, both before leaving Scotland, and also should she now be permitted to relocate there with Madeleine, is to obtain full time nursing work and resume living with her mother. The latter owns a large apartment ("flat") in a stone mansion which is mortgage free and where Ms. Mateer says both are welcome to stay rent-free for as many years as they wish. Madeleine has her own bedroom in the apartment, and Ms. Mateer welcomes the company.

- [40] The present proceedings were commenced by Mr. Pepin in Vancouver in March 2014. A judicial case conference was held in Vancouver on April 25, 2014, at which time a consent order was issued by Master Taylor including the following terms:
- (1) Mr. Pepin was to have overnight parenting time with Madeleine commencing May 17, 2014, starting at 10:00 a.m. on Saturday and ending at 6:00 p.m. on Sunday;
 - (2) all examinations for discovery in the action were to be completed by July 31, 2014; and
 - (3) the trial was to commence August 25, 2014.
- [41] Since returning to Vancouver Ms. McCormack and Madeleine initially stayed with one of Ms. McCormack's friends but were able to rent a small apartment as of April 1, 2014.
- [42] Ms. McCormack has looked into the possibility of securing a nursing job. While there are some jobs available, they are all of the full-time variety with the same schedule from her previous employment at UBC Hospital, i.e. 12 hour shifts for two days and two nights followed by five days off. She says, however, the childcare costs are simply prohibitive. Daycare costs would exceed \$1,200 a month and to hire a nanny to accommodate the lengthy shifts and overnight work costs a minimum of \$15 an hour. Her rent is \$1,000 a month and with the high cost of childcare she simply "can't make it work" economically. Even if she were to be able to afford the childcare, Ms. McCormack points out that her working schedule would mean that she would not see Madeleine for several days and she would be "paying strangers to look after her".
- [43] It is important to note that Ms. McCormack's evidence on these points was essentially uncontroverted. No evidence was adduced by or on behalf of Mr. Pepin to gainsay any of Ms. McCormack's evidence respecting Vancouver, B.C. job opportunities, day care costs and options, schooling, and so on.
- [44] Ms. McCormack is currently receiving social assistance benefits as well as child support from Mr. Pepin. Even so, she says she is in a dire situation and that her family has been loaning her money to cover her additional costs.
- [45] Ms. McCormack has been able to find a part-time retail job in a small store, working Saturdays and earning \$10.50 an hour. She initially worked on Sundays as well but says she had to stop because Mr. Pepin kept canceling the court-ordered Saturday overnight visitations with Madeleine.
- [46] Ms. McCormack remains Madeleine's primary caregiver. After getting up, the two of them will plan their day. They will often visit the local library for free stories or sing-along sessions. For a small amount, they can attend a drop-in center at the Westside Family Place. Ms. McCormack says that Madeleine has not really developed any friends at these places because they generally entail different children attending most of the time.

- [47] Ms. McCormack has daily Skype and phone contact with her mother back in the United Kingdom, as well as weekly such contact with each of her sister in Belgium and her father in New Zealand. She visits her brother via Skype, every couple weeks. Madeleine will participate in most of the sessions and her mother says she is familiar with Skype and is an engaging participant.
- [48] For his part, Mr. Pepin has continued with his employment as a "labour contractor". This entails searching for construction project employers via Craigslist or occasionally more direct communications and soliciting work for the duration of any particular project. His income to date in 2014 is relatively modest but he has been nonetheless been paying \$480 a month to Ms. McCormack for child support, an amount in excess of Guidelines requirements. His stated goal is to obtain permanent full-time employment in the construction industry and he believes an income in the amount of approximately \$42,000 per annum is attainable in that regard.
- [49] For the first half of 2014, Mr. Pepin was living with his parents in their house in Port Moody. He has since moved to a house in Burnaby which he is sharing with other individuals, but he hopes to set aside enough money to be able to obtain a small apartment in Vancouver.
- [50] Although the April 25, 2014 order of Master Taylor granted Mr. Pepin parenting time commencing May 17, 2014 from 10:00 a.m. on Saturday to 6:00 p.m. on Sunday, he has only had Madeleine for one overnight stay since that time. While he was staying with his parents until at least the end of June 2014, he cancelled the overnight arrangements because he was "not on good terms with them [parents] at the moment". Since moving to the shared accommodation in Burnaby in July 2014, Mr. Pepin acknowledges that these are not "suitable quarters" in which Madeleine could stay overnight.
- [51] Mr. Pepin has generally exercised his parenting time with Madeleine on Saturdays and Sundays, as well as some Skype sessions on Wednesday evenings. He has however canceled some visits on account of work commitments or other scheduling conflicts. He is not always punctual and has sometimes picked up Madeleine later than 10:00 a.m. in the morning on Saturdays, but has not been so late that Ms. McCormack has not been able to start her retail work as scheduled at midday. Ms. McCormack opines that Mr. Pepin is not a bad father but she is of the view that he is somewhat unreliable, which is probably a fair characterization on the facts of this case.

The Legal Issues and Framework for Analysis

- [52] Mr. Pepin and Ms. McCormack are not formally married and the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) ["Divorce Act"], has no application to this case. Rather it is the Family Law Act, S.B.C. 2011, c. 25, which governs the mobility and parenting issues.

- [53] The Family Law Act provides two approaches for relocation of children. The first is under Part 4, Division 6 of the Act, which applies if there is a "written agreement or an order respecting parenting arrangements or contact with the child" (s. 65(2)(b)). The second approach is set out in s. 46 of the Act, which applies if there is no order or written agreement respecting parenting arrangements in place.
- [54] There is presently conflicting authority in this Court as to which of s. 46 (Part 4, Division 2) or s. 65 (Part 4, Division 6) governs where, as here, an interim parenting arrangement order exists. In *L.J.R. v. S.W.R.*, 2013 BCSC 1344, the court held that as long as the interim order deals with parenting arrangements or contact, it is an "order" and Part 4, Division 6 governs. However, in *S.J.F. v. R.M.N.*, 2013 BCSC 1812, the court held that s. 65 is not intended to apply on an initial application for orders respecting parenting arrangements under s. 45 of the Act.
- [55] The conflict between these two decisions was considered by the court in *A.J.D. v. E.A.E.*, 2013 BCSC 2160, where it was concluded that the reference to "order" in s. 46 of the Act includes an interim consent order establishing parenting arrangements which, as here, was made at a judicial case conference. I agree with the analysis and outcome in this latter decision and I therefore conclude that the relocation issues in this case are governed by Part 4, Division 6 of the Act.
- [56] Whereas s. 46 of the Act directs a relatively straightforward consideration as to whether the relocation is in the best interests of the child, and the reasons for the proposed change, s. 69(4) of the Act involves a more nuanced approach. Where, as here, the relocating parent and the other parent do not have substantially equal parenting time with the child, the relocating parent is given some deference in the sense that, where the court is satisfied that the proposed relocation is made "in good faith", and there are "reasonable and workable arrangements" to preserve the child's relationship with the other parent and other significant persons in the child's life, s. 69 mandates that the relocation must be considered to be in the best interests of the child unless the other parent satisfies the court otherwise.
- [57] For the purposes of determining if the relocation proposed by the parent is made in good faith, s. 69(6) of the Act mandates consideration of "all relevant factors" but expressly includes the following:
- (a) the reasons for the proposed relocation; and
 - (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.
- [58] Quite apart from the various factors set forth above, s. 69(3) of the Act mandates the court to also consider the factors set out in s. 37(2) of the Act, which addresses the best interests of the child and provides as follows:

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (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.
- [59] The starting point of s. 37 of the Act is a consideration and determination of the child's needs and how, in the circumstances of any given case, the health, psychological and emotional well-being of the child can be protected and promoted to the greatest extent possible.
- [60] Determining what may be in the best interests of a child is sometimes obvious (e.g. protection from violence or abuse), but often entails a more complicated analysis and one perhaps vulnerable to "common sense" assumptions informed by stereotype, popular but not necessarily accurate social science, and even myth. This may be particularly true respecting perceptions of "good parenting" and "bad parenting" and the roles of parents as a central variable and major predictor of child outcomes. There can be diverse and opposing views, often strongly held, on such matters, which is why the court may have a preference for evidence respecting the unique development needs of very young children and social/psychological science to be presented through expert witnesses who can be cross-examined as to the value and weight to be given to the research and opinions in question.

- [61] In this case, as in many family law cases, no expert evidence was adduced respecting either the most recent research on parenting - child outcomes following separation generally, nor in respect of the identification, promotion and protection of the child's particular needs in relation to health and psychological or emotional well-being.
- [62] Rather, Mr. Pepin expressed opinions to the effect that the absence of a father figure in Madeleine's life would "weigh heavily into her psyche", may affect her self-esteem, and may make relationships difficult for her later in life. For her part, Ms. McCormack submitted biology does militate in favour of her claims in this case, a thinly-veiled invocation of the assumption embodied in the so-called "tender years doctrine" that women are inherently imbued with characteristics rendering them better custodial parents of very young children (a notion that has in recent years been expressly rejected as legal doctrine).
- [63] Both parties cited and rely upon *S.S.L. v. J.W.W.*, 2010 BCCA 55 [S.S.L.], as the leading judgment in British Columbia addressing the question of mobility in custody cases. However, I am not at all sure that the case has much application to any relocation determination made under s. 69(4) of the Family Law Act.
- [64] S.S.L. dealt with an original application for custody and guardianship under s. 16(1) of the Divorce Act and s. 30(1) of the Family Relations Act, R.S.B.C. 1996, c. 128. Neither of those acts contain a provision identical or even similar to s. 69(4) of the Family Law Act and, in particular, neither act mandated a deemed best interests of the child determination of a sort set out in s. 69(4)(b) of the Family Law Act. The latter subsection imposes a shifting onus of proof that did not exist under the earlier legislation.
- [65] However, the Court of Appeal in S.S.L. did make a number of observations which may still apply to relocation determinations under s. 69 of the Family Law Act involving joint parenting. They include:
- The factors listed in para. 49 in the judgment of McLachlin J. in the Supreme Court of Canada decision in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, provide insufficient guidance for two good parents, their counsel, and the trial court as they face the agonizing decision required in two circumstances: (1) a pre-school age child being in the primary care of one parent (usually the mother) where age-appropriate access is unworkable if one parent moves away, and (2) a joint parenting situation where one or both parents' needs (economic, educational, or personal) are seen as requiring a change.
 - In joint parenting cases, the court should analyze the evidence in four possible scenarios: (1) primary residence with the mother; (2) primary residence with the father; (3) shared parenting in the mother's location; and (4) shared parenting in the father's location, but to do so knowing the court's first task will be to determine which parent is to have primary residence [emphasis added - this does not apply to the present case].

- When the question of primary residence is evenly balanced and the court finds the best interests of the children require both parents to be in the same locale, then the court will need to choose between the shared parenting options offered by the parents, without presuming the current care-giving and residential arrangement is to be the preferred one [emphasis added - again, this does not apply to the present case].
- Proximity of parental homes will usually be in the best interests of children with two good parents. But proximity may be achieved in either proposed location. The choice of the existing location cannot be the default position.
- Where the courts are called upon to make an "educated prediction" as to the best interests of the children, based not only on evidence of their old life, but also evidence of what parents believe will transpire in their new life, the parents' evidence should focus on all of the four possible scenarios.
- There are no presumptions in mobility applications: both parties must demonstrate how their position advances the best interests of the children by reference to all four scenarios.
- Such an approach takes into account the court's inability to order a parent to stay or move and the unfairness of preferring the obstinate over the more flexible.
- The court should assess the resources available to each parent in personal and economic terms that permit them to make their respective contributions to the care of their children, and the potential effect of relocation on those resources. This may require an assessment of a parent's emotional and economic prospects because the children's interests are necessarily intertwined with those of their parents.

[66] As indicated, the above principles may have more application to a proposed relocation where both parents had substantially equal parenting time with the child, i.e. an application under s. 69(5) of the Family Law Act. In cases such as the present one, where it is clear that the parents do not have substantially equal parenting time with the child, the "decision tree" mandated by s. 69(4)(a) and (b) of the Act is to determine the following questions:

- (1) Is the proposed relocation made in good faith?
- (2) If so, has the relocating parent proposed reasonable and workable arrangements to preserve the relationship between the child and his/her other parent and significant others?
- (3) If so, has the non-relocating parent satisfied the court that deeming the relocation to be in the best interests of the child is inappropriate?

Discussion and Determination of Issues

[67] I will deal separately with each of the analytical steps referred to above.

- (1) Is the Proposed Relocation Made in Good Faith?

- [68] The first step in any analysis under s. 69(4)(a) and (b) of the Family Law Act is to determine whether the proposed relocation is made in good faith. Section 69(6) of the Family Law Act requires the court to consider all relevant factors in determining whether any proposed relocation is made in good faith but also expressly invites scrutiny of:
- (a) the reasons for the proposed relocation; and
 - (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating parent, including increasing emotional well-being or financial or educational opportunities.
- [69] Good faith is a subjectively held state of mind. It involves an assessment of whether the reasons asserted by Ms. McCormack 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 Madeleine's general quality of life, then the decision to relocate will normally be found to have been made in good faith.
- [70] There is no evidence Ms. McCormack wishes to move back to her family home in Scotland for the purpose of excluding Mr. Pepin from Madeleine's life. To the contrary, Ms. McCormack says that Madeleine's contact with Mr. Pepin must be maintained and I accept she genuinely invites Mr. Pepin to play as constructive and active a role in Madeleine's life as is practical in admittedly difficult circumstances. She says that Mr. Pepin is welcome to visit Madeleine at any time and, indeed, if he wished to move to Scotland on a permanent basis, he is welcome to do so.
- [71] Ms. McCormack's stated reasons for wanting to return to Scotland are generally that it is the place where she can best provide for Madeleine's needs in the future. She has both part and full time nursing work available with flexible hours that do not entail night shifts. Nursery care (daycare for toddlers) is available five days a week free of charge. Daycare outside of the local nursery for preschoolers and young children in school is readily available while Ms. McCormack is working and the cost is covered by the government tax credit provided to working single parents.
- [72] Both Madeleine and Ms. McCormack would be able to live with Ms. Mateer, Madeleine's grandmother, in the latter's home without the payment of rent. Madeleine already has several friends in the local community and the McCormack family network is ready and willing to extend love and support to both Madeleine and Ms. McCormack.
- [73] The closest elementary school is a quarter-mile away from Ms. Mateer's house in Innellan and is a modern primary school with an attached nursery (which is where Madeleine attended when she was living in Scotland). There are several other primary and secondary schools in the Innellan/Dunoon area at which Ms. Mateer was a teacher and which she gave high marks for quality. Scotland operates a grant system for students who wish to obtain a university education which mostly defrays the cost of such education. The healthcare system is excellent and the local hospital is modern and well appointed.

- [74] The Innellan/Dunoon area is a beautiful part of the Scottish west coast. Ms. Mateer's house is spacious and is located on extensive grounds with the sea and beach on the one side and hills and forest on the other. Madeleine loved playing in the garden where she had a trampoline and a sand pit and there was also a playground nearby.
- [75] In contrast, Ms. McCormack says that while Vancouver is also a beautiful city in many respects, it is extremely expensive and the economics are much more difficult for a single mother. Daycare is prohibitively expensive. While work is available for nurses, it would be neither practical nor economical for her, as a single parent, to work the lengthy day and night shifts required. Indeed, Ms. McCormack says that staying in Vancouver would mean that she would likely have to give up her profession. She said that she is under much financial distress here in Vancouver ("it was a dire situation when I left Vancouver, and I have returned to a greater one") but if the court denies the proposed relocation, she will find a way to make things work even though it will be very hard.
- [76] I accept Ms. McCormack's uncontroverted rationale for the proposed relocation and find it meets the requirements of subjective good-faith.
- [77] Most of the reasons stated by Ms. McCormack for the proposed relocation are the same reasons why the relocation would likely enhance the general quality of life of both Madeleine and her mother. They are compelling and militate very strongly in favor of the relocation. They stand in stark contrast to the likely quality of life of both mother and child were they to stay in Vancouver where the cost of living is very high, free daycare non-existent, and financial support for a struggling working mother modest, if available at all. The evidence clearly establishes the availability of a supportive network of McCormack family and friends in Scotland, whereas in Vancouver the relationship with Mr. Pepin's family is strained and perhaps even estranged. I have no doubt that the proposed relocation of Madeleine to Scotland would significantly enhance her emotional well-being, increase her educational opportunities, and significantly improve the family finances.
- [78] The most significant negative factor militating against the proposed relocation would be the physical absence of Mr. Pepin from Madeleine's life. He has not explored the possibility of moving to Scotland and he intimated that such a move is not a practical possibility. He stated, perhaps with resigned realism, "if Madeleine goes to Scotland, she pretty much won't have a father".
- [79] Mr. Pepin describes himself as compassionate, patient and understanding. He says that Madeleine is "the center of my world" and I accept that this is probably the case.
- [80] In *D.G. v. A.F.*, 2014 ONCA 436, the court held at para. 34 that "[t]he best interests of very young children are usually best served by stable custody and access arrangements, and the formation of strong relationships with both parents", although it must be noted no source or evidentiary basis for the statement was provided by the court.

[81] In S.S.L., the Court of Appeal cited an Australian case proclaiming the sentiment "[i]t is now recognised as self-evidently true that, apart from some cases of abusive relationships, children benefit from the development of good relationships with both their parents" (at para. 26).

[82] There could well be a body of social science research which indicates young children with involved fathers may be more sociable as infants, have a greater capacity for empathy, have better peer relationships, and have fewer behavioral problems. But no admissible evidence to that effect was tendered in this case and, indeed, no expert evidence of any sort was tendered respecting the impact of any diminished parental involvement on the part of Mr. Pepin on Madeleine's present or future development and psychological or emotional well-being.

[83] In the result I have no hesitation in concluding that the proposed relocation of Madeleine to Scotland is made in good faith insofar as all relevant factors are considered as required by s. 69(6) of the Family Law Act.

(2) Proposed Reasonable and Workable Arrangements?

[84] The second step in any analysis under s. 69(4)(a) and (b) of the Family Law Act is to determine whether Ms. McCormack has proposed reasonable and workable arrangements to preserve the relationship between Madeleine and her father and any other persons who have a significant role in Madeleine's life.

[85] Firstly, the evidence has not established the existence of anyone in Vancouver other than Mr. Pepin as any person who has a significant role in Madeleine's life. The limited evidence respecting Mr. Pepin's family is to the effect that the relationship is strained and his parents have had little if any involvement or contact with Madeleine since the return of Ms. McCormack and her daughter to Vancouver earlier this year.

[86] With respect to Mr. Pepin, Ms. McCormack proposes that, assuming Mr. Pepin stays in Vancouver as opposed to moving to Scotland:

- Mr. Pepin will have contact or parenting time with Madeleine for two weeks either at Easter or at Christmas each year;
- Madeleine will also spend three weeks in Vancouver during the summer, with the number of weeks to increase as she ages so that by the time she is 15 she will be spending up to six weeks in Canada;
- Ms. McCormack will pay for the cost of Madeleine's travel at Christmas or Easter, depending on the year, as well as her own cost to accompany Madeleine, and Mr. Pepin will be responsible for the cost of Madeleine's travel for the summer visits as well as his own cost to accompany Madeleine;

- while Mr. Pepin will pay child support in the amount set out in the Federal Child Support Guidelines, these sums will be set aside and used to pay for at least one of the twice yearly visits by Madeleine to Canada that would otherwise be payable by Mr. Pepin, and if there is any surplus then the amount of same would be returned to Mr. Pepin;
- the summer visit with Madeleine will occur in Scotland if Mr. Pepin does not have in place appropriate accommodation arrangements in Vancouver for Madeleine at least 30 days before the scheduled visit;
- Mr. Pepin will also have additional parenting time in Scotland of up to two consecutive weeks and four weeks in total during any given year with written notice to Ms. McCormack of not less than 60 days beforehand. Any costs associated with his travel and time in Scotland for such visits will be to Mr. Pepin's own account;
- in addition Mr. Pepin will have Skype and telephone contact with Madeleine for up to two hours on each of Saturday and Sunday or as otherwise mutually agreed between the parties, and as Madeleine ages and becomes more mature, she will be allowed additional Skype contact with Mr. Pepin as frequently as she wishes.

[87] In the unique and difficult circumstances of this case, I conclude that these proposed arrangements are both reasonable and workable to preserve a relationship between Madeleine and her father. I accept Mr. Pepin's argument that Skype sessions and phone calls cannot substitute for physical presence and hands-on care and that the physical separation of father and daughter will be difficult for Mr. Pepin. I also accept Mr. Pepin's argument that the distant geography may negatively impact the bonding between Mr. Pepin and his daughter and this worries him enormously. But I have already concluded that the proposed relocation to Scotland is likely to enhance Madeleine's general quality of life and in the absence of any evidence suggesting that diminished bonding with Mr. Pepin would negatively impact Madeleine's overall development or emotional well-being, this objection is insufficient to render the proposed arrangements unreasonable or unworkable.

[88] For these reasons, I am satisfied that Ms. McCormack meets the requirements stipulated in s. 69(4)(a) of the Family Law Act and that the proposed relocation is *prima facie* considered to be in the best interests of Madeleine.

(3) Has Mr. Pepin Satisfied the Court that Deeming the Relocation to be in the Best Interests of the Child is Inappropriate?

[89] The third step in any analysis under s. 69(4)(a) and (b) of the Family Law Act is to determine whether Mr. Pepin has satisfied the Court that deeming the relocation to be in Madeline's best interests is inappropriate. In the next section of this judgment there is a further analysis of each of the factors listed in s. 37(2) of the Act pertaining to the best interests of Madeline in the circumstances. My conclusion is that they militate strongly in favor of relocation to Scotland. It follows that Mr. Pepin has not met the onus imposed by s. 69(4)(b) of the Act and the proposed relocation of Madeleine to Scotland is therefore allowed.

Alternative Section 46 FLA Analysis

- [90] In the event that, contrary to this decision, the Court of Appeal resolves the conflicting authority referred to above in favor of s. 46 (Part 4, Division 2) of the Family Law Act governing when an interim parent parenting arrangement order exists, I will undertake an alternative analysis as if s. 46 of the Act did indeed apply.
- [91] That section applies when a parent plans to change the location of the child's residence in a manner that can reasonably be expected to have a significant impact on the child's relationship with the other parent. In such circumstances, the court is required to determine whether the change of residence location and the resulting impacts on parenting arrangements would be in the best interests of the child having regard to:
- the "best interests of the child" factors listed in s. 37(2) of the Act;
 - the reasons for the change in the location of the child's residence; and
 - without regard for whether the parent who is planning to move would do so without child.
- [92] The reasons for the change are more fully described earlier in this judgment. I have already concluded that the reasons meet both the objective and subjective standards of good faith on the part of Ms. McCormack.
- [93] The "best interests of child" factors listed in s. 37(2) of the Act and relevant to this particular case mandate consideration of:
- (1) the child's health and emotional well-being;
 - (2) the child's views, unless it would be inappropriate to consider them;
 - (3) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (4) the history of the child's care;
 - (5) the child's need for stability, given the child's age and stage of development; and
 - (6) the ability of each parent to exercise the parental responsibilities referred to in s. 41 of the Act.
- [94] Section 46 of the Act does not provide for any "deemed determination" of the sort contemplated by s. 69(4) of the Act where the relocation involves parents who do not have substantially equal parenting time. Hence it is arguable the "four scenario" evidentiary analysis mandated by the Court of Appeal in S.S.L. may be required, although I hasten to add that, unlike that case, the present circumstances do not involve a joint parenting situation where the question of primary residence is evenly balanced..
- [95] It will be recalled the four scenarios posited in S.S.L. were:

- (1) primary residence with the relocating parent (Ms. McCormack) in the place to which he or she is proposing to move (Scotland);
- (2) primary residence with the parent who is not relocating (Mr. Pepin in Vancouver);
- (3) shared parenting with either parent in the location to which the relocating parent wishes to relocate (Scotland); and
- (4) shared parenting with both parents in the place from which the relocating parent is proposing to move (Vancouver),

with the court's first task being to determine which parent will have primary residence.

- [96] This approach is intended to ensure that all possible options are examined without favoring the status quo or the relocating parents' proposal and to avoid the so-called "double-bind" referred to in S.S.L. (which is avoided in any event by virtue of s. 46(2)(b) of the Act).
- [97] Each parent is responsible to put forward evidence in support of the parenting plans they propose in each of the four possible contexts referred to above. In this instance, the evidence tended by Mr. Pepin is weak. He acknowledges that living with his parents is not an option given the strained nature of their relationship and he also acknowledges that his current accommodations are unsuitable for Madeleine. While he expresses hope that he will be able to put together enough money to obtain an apartment in Vancouver where he can parent Madeleine in the future, the fact of the matter is that he has not done so to date and at present any option involving primary residence of Madeleine with Mr. Pepin is simply not viable.
- [98] Part of the analysis in these cases involves an assessment of each parent's emotional and economic prospects, because Madeleine's interests are necessarily intertwined with those of her parents. Mr. Pepin's prospects are likely modest. He has only a grade 10 education. He has a history of temporary employment interspersed with periods of unemployment. He has failed as an entrepreneur both in physical fitness enterprises and the woodworking/furniture-making undertaking, and with respect to the latter he ignored the pleas from Ms. McCormack to obtain employment to make a financial contribution to the household in favour of stubbornly pursuing an unsophisticated and unrealistic goal. He has a troubled relationship with his own family and has rejected his own parents. None of this bodes particularly well for Mr. Pepin's emotional and economic future.
- [99] As indicated earlier, I do not doubt that Mr. Pepin loves Madeleine dearly. And it is perhaps a good sign that he has managed to earn some relatively steady income in 2014, albeit as a self-styled "labour contractor" on various different construction projects. I certainly wish Mr. Pepin good fortune with his future economic endeavours, but given his history it would be unwise to determine Madeleine's future based on Mr. Pepin's statements of intent and aspiration.

- [100] It is apparent from all of the above, and indeed it is acknowledged by Mr. Pepin, that Madeleine must have her primary residence with Ms. McCormack. The more narrow question to be determined is thus whether Madeleine's needs and circumstances are best addressed and protected by such primary residence being in Innellan, Scotland or Vancouver, British Columbia.
- [101] I have already determined that Madeleine's general quality of life is likely to be enhanced by a relocation to Scotland. That, in and of itself, perhaps answers the question posed but I will address each of the "best interests of the child" factors set out in the s. 37(2) of the Family Law Act in any event.
- [102] Ms. McCormack has been Madeleine's primary caregiver since birth. She was on maternity leave until August 2011, and following her return to work in September of that year her evidence, which I accept, is that she was the primary caregiver for the five days off that she had following the four days of 12 hour shifts. She was obviously Madeleine's primary caregiver since August 2012 while the two of them were in Scotland and she has remained the primary caregiver since her return to Canada in February 2014.
- [103] Madeleine is only four years old so her views on the matters in dispute should be given little if any weight. However, the witness Christine Koziok did testify that Madeleine had spontaneously expressed to her a desire to return to Scotland to see her grandmother and her friends. There was also testimony that Madeleine has been inquiring of her mother when she will be able to see her grandmother and her "special friend" Lucia in Scotland.
- [104] Since Madeleine has spent the majority of her life in the care of Ms. McCormack, it is perhaps not surprising that as the only constant presence in Madeleine's life, the bond between the two is very strong, much more so than is the case with Mr. Pepin. Of course, Mr. Pepin was deprived of day-to-day contact with Madeleine during her sojourn in Scotland. He has spent most of the weekend days with Madeleine since her return to Vancouver. Even without overnight stays, some perhaps significant bonding must have occurred between Mr. Pepin and Madeleine, albeit perhaps different in the nature and strength of that with Ms. McCormack.
- [105] There is very little evidence as to the nature of the relationship or bonding between Madeleine and her paternal grandparents or Mr. Pepin's siblings. At best, it is of a very modest nature. In contrast, Madeleine has strong relationships with both her grandmother, with whom she lived in Scotland, and with other members of Ms. McCormack's family with whom there were frequent visits. This factor militates strongly in favour of the move to Scotland.

- [106] I have already commented on the absence of any expert evidence addressing Madeleine's needs in terms of stability and psycho-emotional well-being given her age and stage of development. Both parties describe Madeleine as a happy and well-adjusted child. What is clear from the evidence, however, is that there is a network of supportive and involved family and friends available in Scotland which will provide nurture and assistance to Madeleine, whereas in Vancouver neither exists (except for Mr. Pepin, of course).
- [107] In Vancouver, even though Madeleine would have primary residence with Ms. McCormack, the latter will be confronting many difficult challenges associated with the high cost of living, finding available and affordable day care, and obtaining employment that can accommodate these constraints and yet provide for the expenses involved. These will obviously impact the family's quality of life, most likely in a negative way.
- [108] By contrast, Ms. McCormack's employment in Scotland is readily available, as is no-cost accommodation and day care, as well as excellent schooling and medical care systems. The Scotland scenario favours and better promotes Madeleine's needs and prospects for stability, health and psycho-emotional well-being.
- [109] For all of these reasons, as well as the additional factors reviewed in respect of the analysis under s. 69(4) of the Family Law Act set out above, I would conclude that the proposed relocation to Scotland is very much in the best interests of Madeleine.

Outcome and Related Relief

- [110] It follows from all of the above that an order will be granted permitting the proposed relocation of Madeleine to Scotland where she will assume primary residence with Ms. McCormack at the house owned by Ms. Mateer in the village of Innellan. That leaves to be determined the issues respecting ancillary relief (child-support and parenting arrangements), as well as the division of debts.

Guardianship and Parenting Arrangements

- [111] Section 39 of the Family Law Act provides that both parents will be guardians of their child following separation, but also permits the declaration of sole guardianship should the circumstances warrant.
- [112] Section 40 of the Act restricts the exercise of parental responsibilities and parenting time to a guardian, although it expressly permits the allocation of parental responsibilities as between guardians in such manner as the court deems appropriate in the circumstances. The Act expressly prohibits any presumption that any particular arrangement will be in the best interests of the child, i.e. that responsibility should be allocated and parenting time should be shared equally.

- [113] As part of his submissions at the conclusion of the trial, Mr. Pepin acknowledged that any move by him to Scotland is unrealistic and unlikely to happen. However, he made no submissions or proposals respecting guardianship or parenting arrangements in the event relocation of Madeleine to Scotland was permitted.
- [114] Any order I make on these matters must reflect and accommodate the reality that Madeleine will now be living with her mother in Scotland and that Mr. Pepin will not likely be moving to that country. Accordingly, this is an appropriate situation where both parties will be awarded joint guardianship of Madeleine, but Ms. McCormack will be exclusively allocated all of the parental responsibilities set out in s. 41 of the Family Law Act, with the sole exception that Mr. Pepin shall have the right to exercise the responsibilities set out in s. 41(a) the Act (making day to day decisions affecting Madeleine and having day to day care, control and supervision of Madeleine) when she is visiting with Mr. Pepin.
- [115] Since Mr. Pepin neither addressed Ms. McCormack's parenting time proposal referred to in para. 86 of these reasons nor made any proposals of his own in that regard and I have already concluded that the arrangements proposed by Ms. McCormack are reasonable and workable, I therefore order that they be put in place.
- [116] I would also observe for the benefit of the parties there are many online parenting tools which can be creatively used to try and reduce the impact of geographic separation. The parties are already familiar with Skype which, much like Apple's "facetime" offers free video chat. Other programs, some free and some paid, offer an entire online forum where parents and their children can share files, share screens, read together, watch movies and even do homework together (see for example "bringface.com", "familyclick.com", "google hangout", and the like).

Child Support

- [117] Three fundamental legal principles apply to the issue of child support in this case:
- (1) both parents have a joint and ongoing legal obligation to support Madeleine regardless of where she resides;
 - (2) it is Madeleine, not Ms. McCormack as her custodial parent, who has the right to support; and
 - (3) support payments are based on earning capacity and not only on what a parent actually earns and as a result, both parents, including Mr. Pepin, have a legal obligation to earn as much as he or she is reasonably capable of earning.

(See M.A.G. v. P.L.M., 2014 BCSC 126 at para. 52.)

- [118] Section 150(1) requires that if a child support order is made, the amount of support must be calculated in accordance with the Federal Child Support Guidelines established under s. 26.1 of the Divorce Act, as adopted and modified pursuant to the Family Law Act Regulation, B.C. Reg. 347/2012.
- [119] Section 150(2) of the Family Law Act permits the court to order child support in an amount different from that required by the Guidelines if it is satisfied that reasonable arrangements have been made for the support of the child.
- [120] Mr. Pepin made no submissions with respect to child support, although in his notice of family claim he endorses support in the amount set out in the Guidelines, as well as the payment of special and extraordinary expenses in accordance with s. 7 of the Guidelines.
- [121] Ms. McCormack also submits Mr. Pepin should pay child support in the amount determined by the Guidelines; however, as indicated above, she proposes that this amount be set aside and used to pay for one of the twice yearly visits by Madeleine to Canada that would otherwise be payable by Mr. Pepin.
- [122] Child support under the Guidelines is determined with reference to Mr. Pepin's annual income. The starting point for determining his income is line 150 "total income" in his T-1 General Income Tax Return form. Those amounts for the years 2009-2013 are set out in para. 21 of these reasons. They are very modest.
- [123] However, s. 19 of the Guidelines permits the court to impute such amount of income to Mr. Pepin as it considers appropriate in the circumstances. Such circumstances can include intentional unemployment or underemployment.
- [124] In both his evidence and in his most recent financial statement sworn on August 21, 2014, filed as an exhibit at the trial, Mr. Pepin says:
- he does not wish to remain self-employed;
 - he is seeking stable full-time permanent employment with an established and reputable company at \$22 an hour or more, resulting in an expected minimum gross annual income of at least \$42,000; and
 - he considers this goal attainable having regard to both his experience and qualifications, as reflected in the fact that he had recently been hired by a general contractor as a carpentry subcontract earning \$22 an hour for the duration of a project.
- [125] It is clear that the numbers in Mr. Pepin's past income tax return are not an accurate reflection of what he is capable of earning. However, as noted earlier in these reasons, Mr. Pepin's long history of temporary employment interspersed with periods of unemployment, and his failures as an entrepreneur, may not bode well for obtaining and retaining full-time permanent employment along the lines he suggests. Nonetheless, I conclude that Mr. Pepin is capable of earning a reasonable level of employment income should he apply his talents to the task and a reasonable annual income to be imputed in

that regard for child support purposes is \$30,000. Using this figure as the basis for calculating the amount of child support in accordance with the Guidelines generates a payment obligation of \$269 per month, which is the amount I order Mr. Pepin to pay on the first day of each month starting December 1, 2014 and following.

- [126] While Ms. McCormack may make no claim for the payment by Mr. Pepin of additional monies to cover Madeleine special or extraordinary expenses pursuant to s. 7 of the Guidelines, and is also prepared to set aside the child-support payments as a fund to pay for future transportation costs, I would note that both parents nonetheless have an ongoing legal obligation to pay all reasonable and necessary expenses in that regard. The guiding principle applicable to the sharing of such expenses is that they be paid by the parents in proportion to their respective incomes.
- [127] Given Mr. Pepin's current circumstances and also the apparent preparedness of Ms. McCormack to absorb the lion's share of Madeleine's support following any relocation to Scotland, I will accede to the suggestion that no order for the payment of s. 7 special and extraordinary expenses be made at this time.

Division of Family Debt

- [128] The last item to be dealt with is division of the family debt. I am advised that the parties have come to an agreement that the family debt amounts to \$30,000, comprising approximately \$11,000 owing on a credit card and approximately \$19,000 on a line of credit, both of which are solely in the name of Ms. McCormack. The parties have agreed that the debt will be divided equally and that Mr. Pepin therefore owes \$15,000 to Ms. McCormack, which he is to repay in accordance with the schedule and amounts agreed between the parties.

Costs

- [129] I am also advised that both parties have agreed to bear their own costs of these proceedings and that no order as to costs is to be made. Accordingly, I make no order as to costs.

"N. Kent J."

The Honourable Mr. Justice N. Kent

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