
CANADA / JUDGMENT

R.C.L.N. v. A.D.N

2018 BCSC 2263

COURT

Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.C.L.N. v. A.D.N.,

2018 BCSC 2263

Date: 20181218

Docket: E55390

Registry: New Westminster

Between:

R.C.L.N.

Claimant

And

A.D.N.

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Claimant:

R. Davison

Counsel for the Respondent:

M. Verdun-Jones

Place and Dates of Trial:

New Westminster, B.C.

October 29-31 and

November 1, 2018

Place and Date of Judgment:

New Westminster, B.C.

December 18, 2018

[1]

Introduction

- [1] The claimant father, RN, seeks to vary the custody and access provisions of an order dated August 24, 2009 (the "Order"). The Order provides that: the respondent mother, AN, has sole custody of their son, D; RN has reasonable access; and both parents are joint guardians. At the time the Order was made, D was three years old.
- [2] Up until August 2018, both parties lived in the lower mainland and close enough to each other that RN had regular parenting time with D. In the last one and a half years, D has usually lived with RN six days out of 14, although occasionally it has been five days.
- [3] On April 19, 2018, RN gave formal notice of his intention to move to a city on Vancouver Island (the "City") with D. In August 2018, RN moved to the City. RN wants D to live with him and his family, and says that D, now 13 years old, also wants this. The father seeks orders that the parties have joint custody of D, with primary residence of D to be with him. AN opposes the variation and wants D to live primarily with her. If the Court does vary primary residence of D, RN also seeks variation of child support.

Legal Principles

- [4] Both counsel agree the variation and relocation application should be decided under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). RN also seeks orders under the Family Law Act, S.B.C. 2011, c. 25, with respect to parenting time and responsibilities.

- [5] Section 16 of the Divorce Act addresses custody orders, and s. 16(9) states:

In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

- [6] Section 17 of the Divorce Act states:

- (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
- (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.
- (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.
- [7] The leading authority is *Gordon v. Goertz*, [1996] 2 S.C.R. 27. The Court summarized the law at paras. 49-50:

The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
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.

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 the circumstances, old as well as new?

- [8] Before considering the merits of an application to vary a custody order, the judge must be satisfied of: "(1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order": *Gordon v. Goertz* at para. 13.
- [9] I turn now to the evidence at this trial. There were six witnesses: the parties, RN's common law spouse, and AN's mother, step-father, and brother.

Evidence

Parenting roles

- [10] The parties were married in 2002 and D was born in 2005. They separated in 2008 and were divorced in August 2009. During their relationship, RN worked full-time, and AN was primarily a stay at home mother, except for a short time near the end of their relationship when she worked part-time doing housekeeping.

- [11] Since the separation, RN has continued to work full-time, and AN has worked for periods of time, but mostly has been a stay at home mother. Because RN works full-time, AN has been the parent that takes D to medical and dental appointments, attends parent-teacher meetings, and addresses any issues at school. All of the witnesses, and the parties, described each other as good parents, although there were issues of past conduct that each party raised that I will address below.

Previous Order

- [12] The Order was made after a joint application for divorce. There was no hearing, and there are no findings of the Court.
- [13] RN did not have legal advice when he and AN filed the joint application for divorce. AN bought a divorce book and a friend, who is a legal assistant, typed the documents. The parties signed the documents and AN submitted them at the registry and subsequently picked up the order.
- [14] RN said that at the time it seemed appropriate for D to reside with AN because D was young and AN did not work outside the home. He did not expect AN would move away as she is close with her parents who also lived nearby. He said he did not want to go through a fight with AN, and create more stress for D. He was a joint guardian because he wanted a say in how D was being raised. AN gave similar evidence. She said if RN had custody, D would have had to be in day care when RN was at work.

History of parenting time

- [15] Until August 2018, both parties lived in nearby communities in the lower mainland of BC. Although there was no order or written agreement detailing an access or parenting schedule, RN maintained regular parenting time with D. The parties were flexible to accommodate each other's schedules. The parenting schedule for the year and a half prior to August 2018 was usually six nights every two weeks, as follows:
- b) week one, Monday night, Wednesday and Thursday nights. RN would drop off D Thursday morning at D's grandparents' home, and pick him up again that evening after work; and
 - c) week two, from Friday after school until Monday morning. Occasionally, this could be shortened to Sunday if there was an event in AN's family on Sunday evening.
- [16] The parties had been able to work out the sharing of winter break, spring break, and other holidays. The summer holidays were usually on the regular schedule.
- [17] Since RN moved to the City at the end of August 2018, and up until the time of trial, D had been to his father's home on only three weekends, with one of them being an extra-long weekend of four nights. D travels on the ferry by himself. His parents drop him off and pick him up at the ferry terminal.

Description of D

[18] By all accounts, D is doing well. He has a loving and close relationship with both parents and his extended family on both his mother's and father's side. Both parents and extended family described their time with D and the things they do together in their respective homes, such as reading, watching TV, playing board games and video games, going on walks, swimming, and running errands together. D enjoys school and is involved with clubs there. D also takes swimming lessons. He wants to get a part-time job when he is 14. He has friends, some of them since kindergarten. There was conflicting evidence on D's maturity level and his ability to handle change.

Relationship with RN in lower mainland

- [19] RN is 42 years old. He grew up in the City, and up until August 2018 lived in the lower mainland. His parents still reside in the City. Since 2003, RN has worked for a manufacturer of equipment, and his current income is about \$64,000 per year.
- [20] RN and his fiancé, VM, have lived together since February 2013. They have a son, C, who is now four years old. RN and VM described a close relationship between C and D. VM and D also have a good relationship and she has helped care for D when he resides with them.
- [21] VM is a stay at home mother. She has some health conditions, which aside from pain, do not affect her. She takes Advil. She has a 12 year-old son from a previous relationship, who lives in the lower mainland with another family in an open adoption. She maintains contact with this son and D has met him. VM agreed she occasionally consumes marijuana but not in front of the children. She does smoke in front of the children, but said not close to them.
- [22] All of AN's family, including AN, described RN as a good father. Despite this, AN made allegations against RN in her examination in chief about RN's past conduct. These concerned events prior to and during their marriage. These allegations were not put to RN or VM in cross-examination, and as a result, I allowed RN and VM to be recalled to address these allegations. I do not find it necessary to detail these allegations. There is no evidence of any current issues, nor was there evidence that AN had ever raised the historical allegations as a concern for RN having access and parenting time during the past nine years. After the lunch recess, and while still in examination in chief, AN testified that by describing two incidents in 2008, she did not mean to imply that D was not safe in RN's care.
- [23] RN has suffered from depression, but said he does not struggle like he used to. He has never been hospitalized. The worst was in 2008 at the time of the separation. He went on anti-depressants then, but he did not like the way they made him feel, so he went to counsellors who helped him. The last time he took an antidepressant was in 2009. The last time he saw a counsellor was two months ago as a refresher. He says his depression has been fully resolved for a year.

Move to the City

- [24] In 2018, RN's employer opened a new location on Vancouver Island, about an hour and 15 minute drive from the City. RN was offered the opportunity to transfer to that location. His rate of pay at this new location is the same as it was at the lower mainland location, except he now also gets a travel allowance.
- [25] RN's father is 84 years old and has a terminal illness. He is in the last stages of that disease with a poor prognosis. RN's mother is 78 years old, and has some health problems that may require assistance in the future. RN is an only child. He said he moved to the City because of his father's illness, to assist his mother now and after his father passes, and to raise his children in a location that allows his sons to enjoy the outdoors. In August 2018, he and his family moved in with his parents in their home and his plan is to stay in the City. RN was cross-examined as to his sworn form F8 financial statement which states he moved for a job opportunity. He agreed he did not really move for the job. He moved for his family and it was just lucky he had the job.
- [26] RN's parents' home is located on a two-acre lot in a rural area outside the City. The home is a four-bedroom rancher with three bathrooms. The house has a spare bedroom which would become D's bedroom if he is able to relocate.
- [27] RN was questioned regarding the time he would have available for D because of the assistance he provides to his father and the hour and a quarter commute he has to his job. He said he would always make time for his sons, just like when he lived in the lower mainland.
- [28] RN has spoken with staff at the high school in the City. There is space for D in that school. It is a 10-15 minute drive from the home and a school bus goes by the home. VM could also drive him to school. The family has a doctor in the City who has agreed to take D as a patient. They do not yet have a dentist, but they are looking into it. There is a pool in the City and swimming lessons are offered. There is lacrosse, a sport which D has previously played. VM has the family car and can take D to any extra-curricular activities. In addition to RN's parents, RN has six uncles and aunts, and a number of cousins in the City. Four of his cousins' children are about D's age.
- [29] RN agreed that if D moved to the City he would be disrupted from his current school where he is doing well. He also agreed that travel between the homes would be three to four hours each way.

Relationship with AN in lower mainland

- [30] AN is 35 years old. Her parents (her mother and step-father) live near her. Her 25 year-old brother, CN, also lives with her parents. She has another brother who lives in the lower mainland.

- [31] After the separation, she attended college to become a phlebotomist. She then worked for a laboratory for one year, but quit because she was concerned about bringing diseases home to her son. She worked one and a half years as a salesperson in a ladies clothing shop. She has sold cosmetics from home. At the time of testifying, she had just been hired for a part-time job in customer service at a toy store. She had worked only one four-hour training shift at the time of trial. She had not worked in the previous two years following a motor vehicle accident in January 2016, from which she suffered soft tissue injuries. She is on CPP disability, so can only make \$5,500 per year before her disability benefits are impacted. Her anticipated income for 2019 is about \$20,000 including disability benefits.
- [32] All witnesses, including RN, described AN as a good parent. The circumstances of two marriages she has had since the divorce were raised, one of which had a negative effect on D, and one which potentially could have had a negative effect on him. The last of these ended four years ago. I do not find it necessary to detail the circumstances of these marriages. There is no evidence of any current relationship of concern, nor is there evidence these marriages had ever been raised by RN as a concern for AN not to have custody over the past nine years.
- [33] AN also has had mental health challenges. She said she has been diagnosed as having borderline bipolar disorder, seasonal affective disorder, depression, and anxiety. She has been hospitalized twice and takes medications for her conditions. She is trying to reduce her medications, with her physician's approval, as some give her side effects. AN smoked until six months ago, and now vapes.
- [34] She agreed she has been the subject of reports to the Ministry of Children and Family Development ("MCFD") on two occasions. The first concerned her parenting skills, and the last concerned an argument she had with her son about him taking antibiotics at school for an infection. In both cases, she was interviewed and there was no evidence of any danger to D and the file was closed.
- [35] AN has a lot of support from her parents and they have a very close relationship. AN gave several examples of how her family has assisted her personally and in caring for D. D spends much time at the home of his maternal grandparents, and participates in family life with them.
- [36] AN's parents live six blocks from her, and closer to D's school than her home. RN testified that he almost always picked up and dropped off D at the grandparents' home, and not at AN's home. On school days, this would have to be before 7 a.m. since he started work then. AN denied that RN usually dropped D off at her mother's house, but acknowledged a significant portion of the time that happened. AN said that sometimes this happened because her mother makes D breakfast. Sometimes she is already at her mom's house at that time in the morning because she and her mom go for walks together, or because sometimes she stays over at her parents' home. The extended family has meals together two or three times per week.

- [37] The grandparents see D often when he is not with his father. The grandfather said they see D five days per week, and D usually comes to their home after school. Ninety percent of the time, AN is also with him. D's uncle, CN, also does things with D. The grandmother was unable to say what percentage of time D is in her care and AN is not present. She agreed she spends a lot of time with D. She denied she is looking after her daughter but says there have been times when AN has been unwell. She said when AN gets physically ill with infections, she vomits her medicine and is not herself. The grandmother could not say how many times AN has been this unwell, but said it has occurred more than two, but not 50 times.

Conversations with D regarding relocation

- [38] RN said that for the last few years D has asked if he could live with him and his family, and has asked about schools he could attend near RN's home. RN had thought about bringing an application previously, but considered what was involved and the fact that he was living close to D and AN. After he decided to move to the City, the requests from D increased and D asked RN to do what he could so he could live with him. D has asked what would happen if he refused to go on the ferry or locked himself in a bathroom.
- [39] AN's family denied any knowledge of D wanting to live with his father until the relocation issue arose. AN said D had never said he wanted to live with his dad, except once when he was mad at her regarding chores. He always said he loved living with her.
- [40] AN said that at first D told her he did not want to move with his dad, but after two weekends spent with his dad said he did want to live with him, and since then what he wants "comes and goes". AN referred to a text exchange on April 28, 2018 she had with her son as evidence of going back and forth on his position. It states:

AN: Goodmorning []! So you told your dad you want to stay here with me for a couple years.?

D: Good morning. I told him I'd probably going to stay at your for a few years.

AN: Ok. Was he ok with that?

D: Yeah.

AN: Ok good. I miss you and love you! Have a good day!

D: Love you too

- [41] RN said he talked to D about the text. D told him he said "probably" so AN would not bother him anymore and because he did not want to disappoint his mom. VM gave similar evidence. AN said she had a conversation with D where she told D when he is 14 or 15, if he wants to live with his dad, she will agree because she will have had time "to adjust to it". She said the "probably" refers to the number of years when this might happen.

- [42] AN and her brother CN related conversations with D that RN had been giving D reasons why he should live with him in the City. These were that he would miss out on his half-brother C growing up and that he would miss the last days of his grandfather's life. AN said these were upsetting to D. CN said that many times he and D went over the pros and cons of moving or staying. D initially said his dad told him if he lived in the lower mainland he would not see his brother as much and he would miss out on time with his grandfather. After a few weeks of discussion, these became D's own ideas.
- [43] RN denied he told D that if he did not move he would miss his grandfather before he died. He said they had a conversation about his younger brother C, and D said he had missed something C had learned to do. D asked whether he would miss things like this. RN told him he would miss the first time C did something but C would show him again when he next came.
- [44] Both parties and AN's parents testified regarding a family meeting that took place to discuss the relocation. The grandmother said she called the meeting at her home and it did not go as she had planned. Initially, just the adults met without D and each expressed their views on the relocation.
- [45] The grandparents then left the meeting and D met with both his parents. RN said D told both of them that he wanted to live with RN and his family. RN said it was hard for D because he did not want to hurt anyone. AN agreed that D told everyone present that he wanted to live with his father. She said he was confused. She told him he could do whatever he wanted to do but it was not a good idea at the beginning of a school year.
- [46] The grandmother agreed that AN has said it would be better for D to move in a couple of years when it was not thrown at her.

Views opposing relocation

- [47] AN was asked why she opposed the relocation. She said she was fighting to keep custody. She said: "I'm a mama bear. This is my child. He's my everything. He is the reason I get up in the morning. He is the reason I do everything for him. He's my child. I birthed him. I carried him for nine months. The love I have for him is like no other. I want to raise him. I don't want somebody else other than [RN] raising my child when he is my child." In re-examination, she spoke of a mother's right to raise her child, and thought she was better able to raise D than VM.
- [48] The grandmother gave evidence of what she expressed at the family meeting. She said D is in high school, and he has had a group of friends since kindergarten. She knows D loves his paternal grandparents and that his grandfather is dying. She understood RN had taken on a big load by helping his father. She did not know how long he would be there and wondered about the paternal grandmother's health, as she thought she had been ill with a serious illness. She knows that RN and D love each other. She thought they should keep everything the same until RN is in a more stable situation. She commented later in testimony that D is

used to a routine and has a lot of support in the lower mainland with her family. She wonders what kind of support he will have in the City with his paternal grandparents' health failing and his dad working long hours.

Hear the Child Report

[49] The parties jointly requested a Hear the Child Report, prepared by Sandra M. Jennings. She interviewed D on August 23, 2018 when his father brought him to the interview, and again on September 4, 2018 when his mother brought him to the interview. Both interviews were conducted without the parents present and were one hour and a half hour respectively. Ms. Jennings states she reported only the responses of D to her questions. She did not analyze nor evaluate the responses or make any recommendations.

[50] Ms. Jennings reports that in both interviews, D stated he wanted to live with his father. Ms. Jennings reported the following from the first interview:

"I've wanted to live with my dad for a while - at least a couple of years, maybe 4 or 5 years. A big part of it is I want to live with my younger brother." Then he stated, "I'd move with dad and my step mom - and animals."

D said also he'd wanted to live with his dad even before his brother was born.

I asked [D] if he's told anyone that he wanted to live with his dad and he replied, "I've told my closest friends, dad obviously, mom, and grandma - on my mom's side." He told me that a couple days ago, on Monday night, he was discussing the subject with his mom. He told me, "My mom said it's about what she wants not what I want, "cuz I have custody".

I asked D if he could change anything, what would he change. He replied, "I'd live with my dad and see my brother every day."

[51] In the second interview, Mr. Jennings reports:

When asked if he was ok with moving away from his mom, he said, "Ya, because I want to live with my dad and move with him".

[52] AN said her comments as reported from the first interview were taken out of context. Both parents alleged that the other parent had subsequently spoken to D about what he said in the interviews and report. Both parents denied this.

[53] Ms. Jennings described D's responses to questions about what he enjoyed doing with his mother and her extended family, and what he enjoyed doing with his father and his extended family. D gave reasons for why he wanted to live with his father rather than his mother. He responded to questions about how he would be able to keep in contact with his mother and her family, and friends if he moves to the City.

- [54] The parties referred to a paragraph in Ms. Jennings' report where D reported details of the parenting schedule. Both parties agree it is not accurate. Ms. Jennings also reported that D said that his mom had moved three times within the last few years. That is not accurate as it was three times since separation. Either D was in error or there was a miscommunication.

D's behaviour since relocation

- [55] AN, her parents, and brother all reported that in the last few months D has been repeatedly, several times a day, telling them he loves them. It would not be unusual for D to tell them he loved them, as he is affectionate, but it is unusual he is doing it repeatedly. AN says that since the relocation issue has come up, D seems distant and a little despondent. He gets emotional about his ill grandfather. The uncle said D has appeared to be more stressed and he avoids answering his uncle when he is asked how he is feeling. There was no admissible expert evidence as to why D may be repeatedly saying this.

Proposals for maximizing contact

- [56] If D lives with RN, he proposed that D see his mother every other weekend, and that they split holidays. If AN wanted more than half of the holiday time, he would be agreeable, but he would like to have a week in the summer to go camping. He also said that D has talked about getting a part-time job and if that happens, it would reduce the time that D would be able to see his mother. He said he would also facilitate contact by text, phone, Skype and FaceTime. He said D is old enough to go on the ferry by himself and he would drop him off and pick him up at the ferry.
- [57] If D lives with AN, she proposed that D have access to his dad every second weekend if not every third weekend. She has told D she would drive him to and from the ferry. She proposed that holidays should be split. She wants D to have time with his dad and family and said she would never deny him that.

Willingness to facilitate contact

- [58] RN said that since his move to the City, there has been some lack of cooperation by AN in facilitating access. He had to argue to get her to agree to let D come to the City. He said AN took the position D should only go to the City once a month but AN denied this. Initially, RN did not see D for three weeks, and since then he has seen him every over weekend. He referred to texts between AN and him, where AN would not drop off D at the ferry terminal unless he paid a three dollar parking charge. AN said her response to RN "was a big faux pas". She said she was upset because he had not paid other expenses and she should not have said it.
- [59] AN agreed that other than the regular schedule, she did not let D stay a full two weeks with his father this summer because it overlapped with her camping plans and she did not know what would happen with this case.

Issues over alleged s. 7 expenses

- [60] AN gave evidence about recent issues regarding payment of alleged s. 7 expenses: see Federal Child Support Guidelines, SOR/97-175. RN's perspective is this has only come up since the relocation issue has arisen, and AN has "thrown everything" at him. I do not find these particularly relevant to the determination of primary residence of D. There is no evidence of a history of dispute over s. 7 expenses, and I find this is likely a result of the current dispute between the parties, and the financial situation both have found themselves in after the motor vehicle accident and with the recent move to the City.
- [61] I turn now to findings of fact and the application of those to the legal principles.

Threshold Requirement - Material Change in Circumstances

- [62] AN argues that there is no material change in circumstances. In the last year and a half, D lived 5-6 nights every 14 days at his father's home. She argues that RN was never the custodial parent and that parenting arrangements can be crafted to be six to eight nights per month. I find a more realistic travelling arrangement would be four to possibly six nights per month. In either scenario, this is a substantial reduction in the amount and quality of time.
- [63] I find that RN moving to the City constitutes a material change in circumstances affecting the condition, means, needs or other circumstances of D. The move materially affects the ability of RN and D to have time together. The time is substantially reduced and the quality of the time will be changed. Further, while the mere fact of growing older does not by itself constitute a material change in circumstances (see *B.D. v. L.K.*, 2004 BCSC 455 at para. 21; and *Gray v. Wieggers*, 2008 SKCA 7 at para. 25), this combined with D's expressed wish to live with his father contribute to the material change in circumstances.
- [64] A material change in circumstances also must be one that was not actually contemplated at the time of the Order. The circumstances of the move, in particular the paternal grandfather's terminal illness, indicate that it likely was not anticipated. Further, RN testified that he agreed to the Order because he thought AN would not move. The unstated underlying assumption is that he was not moving either. I find that RN has met this preliminary burden to consider varying a custody order.

Best Interests of the Child Factors

- [65] As the threshold requirement is met, the Court must embark on a fresh inquiry into what is in the best interests of D, having regard to all the relevant circumstances relating to his needs and the ability of the his parents to satisfy them. There is no presumption in favour of AN, although her views are entitled to respect. The focus is on the best interests of D, and not the interests and rights of the parents.

Previous Order

[66] In this case, there are no findings of a judge. The parties submitted a joint divorce application and the order was granted. The parties did agree that AN would have sole custody. RN said he agreed to sole custody given the circumstances that then existed.

Existing relationship between D and RN

[67] I find D and his father and VM share a devoted loving relationship, and that D is a capable parent.

[68] Although RN has had health issues, it has not prevented him from being steadily employed for the past 15 years at the same job. Nor is there evidence that any health issue has affected his current ability to care for D. All witnesses said he is a good father.

[69] Although AN alleged past concerning conduct of RN, there was no evidence of current concerning behaviours, and none of these alleged concerns impacted RN's parenting time for the past nine years. Pursuant to ss. 16(9) and 17(6) of the Divorce Act, such conduct is not to be taken into account unless it affects current parenting ability, and I find that it does not.

[70] D loves his father and his paternal extended family. Moving would allow him to further enjoy those bonds and live a more rural lifestyle with outdoor activities he enjoys. Living with RN would allow D to further grow up with his half-brother C. One of the main reasons D wants to move is to have more time with his half-brother. Keeping siblings together is a factor to consider, though not determinative of custody and access: *Poole v. Poole*, 1999 BCCA 203.

[71] Although there would be disruption of the routine and friendships in the lower mainland that D has always known, he would have the opportunity to develop new friendships in the City. There was conflicting observations on D's maturity and ability to adapt to change, but there was no evidence of any unusual immaturity or susceptibility which would lead me to conclude he is not a typical 13 year old who will be able to adapt. There is no evidence the education in the City is better or worse than that offered at D's school in the lower mainland. There are similar extracurricular activities offered in the City.

[72] Although AN has been the parent who has primarily looked after matters such as medical and dental appointments, and any issues with school, I find that is because she is the parent who has stayed at home. This does not mean that RN is not capable of fulfilling these roles.

[73] If D relocates, and AN stays in the lower mainland, D will still have the love and support of his mother and her extended family, but the face-to-face contact will be much diminished from what it is now. If AN were to move to the City, D would be able to have parenting time with his mother more often, but his mother would not have the support of her family, and D would still not see his mother's extended family as often, possibly even less than if his mother were to stay in the lower mainland.

Existing relationship between D and AN

- [74] I find D and his mother share a devoted loving relationship, and AN is a capable parent. She has not worked significantly outside the home and does not have the same level of income of RN.
- [75] All witnesses described AN as a good mother. Although AN has some health challenges, she has received great support from her family in raising D. D in turn has received the benefit of the love and support of an extended family whom he sees often and whom he loves. Living with AN would allow D to continue with that support on a regular basis.
- [76] AN previously was in a marriage that negatively impacted D, and a second marriage that potentially could have done the same. There is no evidence she is now in a romantic relationship that would potentially cause D any harm. Pursuant to ss. 16(9) and 17(6) of the Divorce Act, such conduct is not to be taken into account unless it affects current parenting ability, which I find it does not. Similarly, although there have been two reports to the MCFD, the uncontradicted evidence is that these were investigated and closed with no action being taken by the Ministry. I therefore do not make any adverse finding against AN concerning this.
- [77] D has always lived in the lower mainland, and has friends there he has known since kindergarten. He is involved in school clubs, and extracurricular activities. He has a routine. Staying in the lower mainland would allow those friendships and activities to continue.
- [78] If he does not relocate, D will still have the love and support of his father and his extended family, but his direct contact with them will of necessity be much diminished from what it is now, and he will be deprived of the opportunity of growing up with his half-brother. If RN were to return to the lower mainland, then D would have the opportunity to see his mother and extended family often, but he would still want to live with his father.

Desirability of maximizing contact between D and both parents

- [79] Section 17(9) of the Divorce Act requires that the court give effect to the principle that a child have as much contact with each parent as is consistent with the child's best interests. Consideration of this is mandatory, but it is not absolute.
- [80] Up until this summer, the parties were cooperative in facilitating access. There were some issues in the last few months, but I find this is likely the result of the stress and uncertainty resulting from this trial.
- [81] I find RN has indicated a greater willingness to have D spend most of the holidays with his mother. AN proposed holidays be shared if D had primary residency with her, but not to the extent RN was willing to accommodate her.

The double-bind issue

[82] The evidence of what a parent would do if a relocation were permitted or not must be treated with caution. The reason for this is the double-bind it puts on parents, and the risk of faulty reasoning. If a relocating parent says he or she will still move without a child, or a non-relocating parent says he or she will not follow a relocating child, it may reflect negatively on the parent. If a relocating parent says he or she will not move without a child, it can lead to a presumption in favour of the status quo. If a non-relocating parent says she will follow a relocating child, it may create a presumption in favour of relocation. Such reasoning may prevent a court from considering the best interests of the child by an analysis of all four possibilities: shared parenting in the current location; shared parenting in the new location; primary residency in the current location; primary residency in the new location: *S.S.L. v. J.W.W.*, 2010 BCCA 55 at paras 24-30.

[83] However, in circumstances where the only custodial arrangement that is in the best interests of a child is a joint custody or shared residency arrangement, evidence of both parents as to whether they would move or stay if the relocation was granted or refused may be relevant. It will be relevant if the "evidence is carefully weighed together with all of the other relevant circumstances in determining which of the two potential dispositions could, practically, be made in the best interests of the children": *K.(T.) v. A.(R.J.H.)*, 2015 BCCA 8 at para. 66.

[84] In *J.B.D.K. v. T.A.B.*, 2017 BCSC 1186, *aff'd* 2018 BCCA 308, the Court at para. 58 stated:

If the court concludes that the question of primary residence is balanced as between the parents, or the only custodial arrangement in the best interests of the child is shared custody, the parents' answers to the double-bind questions can be considered to determine where the parents should live, so long as the evidence is carefully weighed and is not allowed to overpower the analysis or militate towards the status quo (*S.S.L.* at para. 24 and *T.K.* at para. 66). Ultimately, the court cannot order either parent to live in a particular place (*McIntosh v. Kaulbach*, 2014 BCCA 299 at paras. 16-19), so the court should be careful to make realistic decisions and give workable directions if the court concludes that shared parenting is in the best interests of the child (see *R.E.Q. v. G.J.K.*, 2016 BCSC 1498 at paras. 90-93). The court might, for instance, make alternative orders in the event that the parents do not ultimately retain or change residence in accordance with the court's decision, as they indicated at trial that they would do.

[85] RN has already moved. He says he intends to stay in the City. AN said if D relocated she would consider following him but noted that if she did so she would lose the support of her parents and would have to find a new job. The parties' evidence is only one factor to be weighed together with all other factors in determining what is in the best interests of D.

Views of D

[86] D is now 13 years old. D's wishes are not determinative, but he is of an age where the Court should give weight to his views. D's wishes are to be considered along with all other factors.

[87] In *D.A.F. v. R.D.F.*, 2017 BCSC 873, which involved a child who had just turned 12 years old, the Court stated at paras. 34-35:

Although the child's views are not necessarily determinative, it is a well-established principle that the court should give considerable weight to the views of an older child, proportionate to their age and level of maturity: *O'Connell v. McIndoe* (1998), 56 B.C.L.R. (3d) 292 (C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 576 [O'Connell]; *T.T. v. J.M.H.*, 2014 BCSC 451 [T.T.] at para. 54. In *O'Connell*, the Court of Appeal said at paragraph 13 that for custody orders relating to children in their teens to be practical, they must reasonably conform to the wishes of the child.

Although R. is younger than the children involved in *O'Connell* and *T.T.*, the principle has been applied in relation to children of his age or younger: *D.N.L. v. C.N.S.*, 2013 BCSC 809. If R. is not already at an age where the same conditions and considerations apply, he soon will be. By the time he reaches his teens, he will be making his own decisions about how much time he spends with each parent, as his sister appears to be doing now. Dr. Beloff found him to be "a mature boy who is truthful, insightful, considerate and thoughtful."

[88] AN argues that D did not make an informed and reasoned decision. She argues he may not know what the true impact of a move will be and what is best for him.

[89] I find that D has expressed his wishes clearly and wants to live with his father. To the extent he may have expressed alternate views to his mother, by the time of the Hear the Child Report those views were gone.

[90] There are limitations to the Hear the Child Report. Ms. Jennings made no assessment of why D said what he did. Both parties argued that the other party influenced D. I am persuaded by the persistency of D's expressed wishes that he wants to live with his father. He expressed this to his parents at the family meeting that was organized by his grandmother. He repeated that wish to Ms. Jennings. AN and her brother have acknowledged that D has told them he wants to move, although both put caveats on those statements.

[91] While both parties and their extended families have spoken to D regarding his wishes, and both suggest he has been influenced by the other, I find that D's decision is his own. Ms. Jennings' report indicates that D has logically thought about the pros and cons of living in both locations, and how he will be able to maintain contact with his mother and her family. His responses indicate his father had indicated to him the amount of time he would realistically be able to spend with his mother.

- [92] There are some inaccuracies in Ms. Jennings' report, but the inaccuracies do not concern the substance of the interviews which concerned D's views of where he wants to live. I find that any inaccuracies in Ms. Jennings' report do not affect the accuracy of her reported statements of D regarding his wishes. They are consistent with what he has told his parents and their extended families.
- [93] D has recently been telling his mother and extended family that he loves them. AN's family described D as a people-pleaser. No doubt this has been a stressful time for D. No admissible psychological opinion was given explaining this, but in light of Ms. Jennings' Hear the Child Report, I do not consider this to be ambivalence on the part of D.

RN's reason for moving, only in the exceptional case where it is relevant to his ability to meet the needs of D

- [94] RN moved to the City for a number of reasons. His desire to assist his ill father and mother, though understandable, is not to be considered as this did not improve his ability to meet the needs of D. RN said he also moved because he wanted to raise his boys in an area where they could enjoy the outdoors. This is a relevant consideration, but not one I consider significant. RN did take a job in a new location, but his pay did not increase and there was no evidence it improved the financial standard of living of the family. I conclude little weight should be given to RN's reason for moving, and only to the extent it may have been a result of an outdoors lifestyle choice.

Disruption to D of a change in custody

- [95] D has lived approximately 35 - 43 % of the time with his father. I do not find there would be any disruption to him in the sense that he would be going to a strange or unfamiliar family environment.

Disruption to D consequent on removal from family, schools, and the community he has come to know

- [96] There will be disruption to D's close relationship and routine with AN and her extended family. He will have to change schools; however, he is a good student and no evidence was led that would lead me to conclude he would not be successful in that change. He will lose some contact with his friends in the lower mainland. He will have contact with them through social media and text, but this is not the same as face-to-face time.
- [97] The amount of travel is a concern. Each trip would be three to four hours. RN agreed that travelling back and forth on the ferry two or three times per month would be a lot for D, but whether D lives with him or lives with his mother, the amount of travel will be the same. As a result, as D grows older and possibly has a part-time job, I consider that it may be more difficult for him to travel back and forth, and access time for one of the parents may decrease.

Views of custodial parent

- [98] Although there is no presumption in favour of the custodial parent once a material change in circumstances has been established, the views of the custodial parent are entitled to respect. I have also considered the views of the maternal grandmother who spends much time with D.
- [99] Between AN and her extended family members, I found the grandmother's views expressed in the family meeting to be the most balanced, although she did not mention what D wanted.
- [100] On the other hand, AN's comments were not always focused on the best interests of D. I am not suggesting that AN does not want what is best for D, because she clearly loves him, and thinks she will provide the best home for him. However, she is obviously upset by the prospect of D moving away, and her comments focused on her interests and rights. She spoke of her right as a mother to raise D, and did not mention what D wanted. Some of her comments indicated she needed time to adjust to the idea of D not having primary residence with her. She said she had told D she would consent to him moving in a couple of years so she could adjust to it.

Decision

- [101] In considering the circumstances of all four scenarios, I find the best interests of D are for his parents to have joint custody, with D having primary residence with his father, and reasonable access for his mother. I find that the best interests of D are to have primary residence with his father, whether his father lives in the City or in the lower mainland. The ideal situation would be D having primary residence with RN in the lower mainland so that D could also have frequent contact with AN and her extended family through access and parenting time. However, in the present situation, that ideal is not possible because of where the parents and extended family live.
- [102] The next best situation is primary residence of D with RN in the City, but this necessarily means that there is less access and parenting time with AN. I do not find that primary residence with AN in the lower mainland or in the City is in D's current best interests. By saying that, I am not finding that D was not well cared for by AN in her home; he is well cared for there. It may have been in his best interests to reside primarily with AN when he was younger, but he has for some time wanted to live with his father and his half-brother. It is not in his best interests to force him to continue to reside in a home that is not his preference.
- [103] Although D's ties to family, school and friends will be disrupted by a move in primary residence to RN's home in the City, I find that he will adjust. This is balanced by the benefits he will receive from living with his father and his extended family, and the new friends and experiences he will form in the City. The factors that tip the scale in favour of primary residence with RN are D's desire to live with his father and half-brother, and the father's

willingness to accommodate access and parenting time with AN. In his statements to Ms. Jennings, D has demonstrated that he understands the pros and cons of moving his primary residence, he has thought about it for a long time, and he is of an age where his wishes carry some weight.

[104] I have also considered the needs and circumstances set out in s. 37 of the Family Law Act, that are to be considered in determining the best interests of a child. These are the same factors I have considered under *Gordon v. Goertz*, and I again find the best interests of D are to have primary residence with his father with reasonable parenting time with his mother. Despite the terms of the Order giving AN sole custody, RN has in fact exercised parental responsibilities over the past nine years. It is appropriate to vary the Order to reflect the new parenting arrangement and the reality of the parties' relationship.

[105] I therefore order that:

- a) the Order is varied so that the parents have joint custody of D pursuant to the Divorce Act;
- b) the primary residence of D will be with his father in the City effective January 1, 2019; and
- c) the parents are joint guardians of D pursuant to the Family Law Act and share the parental responsibilities set out in s. 41 of the Family Law Act, except as affected by this order (i.e. primary residence will be with the father in the City).

[106] As for access and parenting time, the parties have demonstrated an ability for the past nine years to work cooperatively and flexibly in parenting. Given that AN's access and parenting time will now be less than she had before, so long as the parties maintain their current locations, AN should have greater time with D on long weekends, school holidays and during the summer.

[107] I order that AN will have reasonable access and parenting time which, unless otherwise agreed to by the parties, shall be:

- a) for three quarters of the school summer holiday;
- b) all long weekends during the school year;
- c) for the school spring break except that D will return to RN's care the Friday before school re-commences;
- d) for the school winter break except that D will return to RN's care the Friday before school re-commences. Further, every second year, starting in 2020, D shall spend Christmas eve, Christmas day and Boxing day (D travelling on the first and last of those day) with RN;
- e) at a minimum, two weekends per month during the school year. This shall be included in and is not in addition to any long weekends or the winter or spring breaks in a month.

[108] With respect to child support, the Order is varied so that RN's obligation to pay child support ceases as of January 1, 2019. Depending on AN's income there may be a need for a further child support order. If the parties cannot agree on child support, s. 7 expenses, or the cost of travel, I will hear any application for the next three months.

[109] The parties did not address costs in their submissions. If they cannot agree, they may make arrangements through Supreme Court Scheduling to speak to costs within the next three months.

"Norell J."

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