
CANADA / JUDGMENT

Salvador v. Creemer

2019 BCSC 2088

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 2088 Salvador v. Creemer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Salvador v. Creemer,

2019 BCSC 2088

Date: 20191205

Docket: E172925

Registry: Vancouver

Between:

Claire Joves Salvador

Claimant

And

Brett Martin Creemer

Respondent

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Claimant:

C. Lewis

F. Kennelly

The Respondent, appearing in person:

B. Creemer

Place and Date of Trial:

Vancouver, B.C.

November 18-21, 2019

Place and Date of Judgment:

Vancouver, B.C.

December 5, 2019

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Introduction

- [1] The claimant, Claire Salvador, and the respondent, Brett Creemer, began to live together on a date that is in dispute, but is between 2001 and 2003. They married on August 1, 2012.
- [2] Their son, C.C., was born on April 13, 2014. The parties separated on March 27, 2015. C.C. has lived with Ms. Salvador since separation. Mr. Creemer has had regular parenting time, which has increased over time. He consistently said at trial that he would like more time with C.C.
- [3] Ms. Salvador was born on December 8, 1977, and Mr. Creemer on October 4, 1968. Ms. Salvador is a biologist working for Fisheries and Oceans Canada ("DFO"). Mr. Creemer is a construction project manager currently employed by Regenerate Design Build Maintain Inc.
- [4] Both parties have re-partnered. Since October 2018, Ms. Salvador has been living with Alasdair Beattie. Apart from the parties, Mr. Beattie was the only other witness to testify at trial. Mr. Beattie has a twenty-year-old son who, until recently, had lived with them. Mr. Creemer testified that he has recently met a woman, Jill (surname unknown), who he described as his life partner. He testified that they are planning to move in together. Jill has two children who are older than C.C.

History of the Litigation

- [5] Ms. Salvador filed a notice of family claim on November 7, 2017, and Mr. Creemer was served on December 17, 2017. He was also served with a notice of judicial case conference ("JCC") scheduled for March 1, 2018. The issues then were:
 - (a) parenting arrangements for C.C. and child support;
 - (b) unequal division of property and debt, although, as the parties had no family property, the primary focus was on family debt;
 - (c) divorce; and
 - (d) costs.
- [6] Ms. Salvador proposed joint custody of C.C. under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and that the parties would continue as C.C.'s guardians. Ms. Salvador sought an order that C.C. live primarily with her. She also proposed that they share exercise of parenting responsibilities, with her having the final say if the parties were unable to agree.

- [7] Mr. Creemer requested an adjournment of the JCC in order to retain counsel. Ms. Salvador agreed to adjourn to May 4, 2018. On May 3, 2018, Mr. Creemer again asked to adjourn the JCC. Ms. Salvador did not agree, but Mr. Creemer did not attend. Justice Schultes ordered that Mr. Creemer file a response to the family claim and a financial statement by May 18, 2018, and granted costs thrown away. The JCC was adjourned to July 11, 2018.
- [8] On July 11, 2018, Mr. Creemer and his then counsel, Anu Sandhu, attended the rescheduled JCC. In breach of Justice Schultes' order, Mr. Creemer had not filed a response to the family claim, or a financial statement, until the date of the JCC. In his response, Mr. Creemer indicated that he did not agree with Ms. Salvador's proposed parenting arrangements or child support. He also disagreed with unequal division of property and debt.
- [9] On the same day, Mr. Creemer filed a counterclaim seeking a divorce and indicating that he would gradually like to move to shared parenting time of C.C. and asked that child support be set accordingly. He also sought an equal division of property and debt.
- [10] On August 8, 2018, Ms. Salvador filed a response to counterclaim.
- [11] At the JCC, Master Baker ordered the exchange of lists of documents by August 15, 2018, and that Mr. Creemer provide records with respect to a company called Shore Pine Projects Inc. ("Shore Pine"), a corporate vehicle through which Mr. Creemer operated his construction business. Because Mr. Creemer was an undischarged bankrupt, Ms. Salvador was the sole director of Shore Pine. Master Baker also set a trial date of April 1-5, 2018.
- [12] On July 13, 2018, Ms. Salvador's counsel wrote to Mr. Creemer's counsel, setting out a list of specific documents she was seeking. On August 15, 2018, the parties exchanged their lists of documents. Mr. Creemer's list did not include most of the documents requested on July 13, and Mr. Creemer never provided copies of the documents that he had listed.
- [13] On October 23, 2018, Ms. Sandhu withdrew as Mr. Creemer's counsel.
- [14] On October 31, 2018, Ms. Salvador's counsel requested documents directly from Mr. Creemer. He did not provide them.
- [15] On December 27, 2018, Mr. Creemer was personally served with an application for document production, interim child support, and to adjourn the trial due to the lack of disclosure. The application was heard on January 18, 2019. Based on an imputed income of \$100,000, Master Harper ordered Mr. Creemer to pay Ms. Salvador child support, commencing on January 1, 2019, of \$946 a month; \$575 a month for his share of Ms. Salvador's childcare costs; and \$83 a month for swimming lessons. The latter two payments were his share of C.C.'s s. 7 expenses. Mr. Creemer was required to produce a number of specified documents. The trial was adjourned to September 16-20, 2019.
- [16] On April 17, 2019, Louise Lam advised Ms. Salvador's counsel that she would be representing Mr. Creemer.

- [17] On May 28, 2019, Ms. Salvador's counsel advised Ms. Lam that Ms. Salvador had been offered a promotion that would require her to relocate to Yellowknife, Northwest Territories, and that she wished to move there with C.C. in August 2019.
- [18] Ms. Lam responded that she no longer represented Mr. Creemer, but would send him the May 28, 2019 letter. Mr. Creemer did not respond to Ms. Salvador's proposed relocation.
- [19] On June 14, 2019, Mr. Creemer was notified of the trial management conference scheduled for July 30, 2019.
- [20] On June 28, 2019, Mr. Creemer was served with a notice for examination for discovery scheduled for July 22, 2019, and the required travel allowance. Mr. Creemer did not attend on July 22, and a certificate of non-attendance was obtained.
- [21] On July 30, 2019, Mr. Creemer attended the trial management conference. Master Muir ordered that he file a financial statement, including all attachments, by August 16, 2019. The order also required that if Mr. Creemer intended to apply to adjourn the trial, the application must be heard by August 23, 2019.
- [22] On August 14, 2019, Colin Ferguson advised Ms. Salvador's counsel that Mr. Creemer had retained him on a limited scope retainer. Mr. Creemer was self-represented at trial.
- [23] On September 3, 2019, Ms. Salvador's counsel advised Mr. Ferguson that Ms. Salvador's job offer was deferred to start in January 2020 as opposed to September 2019, and that Ms. Salvador wished to accept the job. Through error, the email was sent to the wrong address. The position that Ms. Salvador has been offered is for an 18-month term, from January 2020 to June 2021.
- [24] On September 13, 2019, Mr. Creemer emailed counsel for Ms. Salvador that, on the first day of trial, he would seek an adjournment. On September 16, 2019, at the start of the trial, Justice MacDonald adjourned the trial on terms including the following:
- a) the trial was rescheduled to November 18, 2019, a date which was peremptory on Mr. Creemer;
 - b) within two weeks of September 16, 2019, Mr. Creemer was to make financial disclosure of all the items he was earlier ordered to produce by Master Harper on January 18, 2019;
 - c) Mr. Creemer was to forthwith pay Ms. Salvador \$1,000 pursuant to s. 213 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] as a result of his past failure to comply with orders for financial disclosure;
 - d) Mr. Creemer was to forthwith pay Ms. Salvador her costs of attendance on September 16, 2019, in any event of the cause, fixed at \$1,500;
 - e) Mr. Creemer was to forthwith pay Ms. Salvador her costs thrown away, fixed at \$500;

- f) Ms. Salvador was granted leave to amend her notice of family claim, which was to be filed within two days;
- g) Mr. Creemer had 15 days to respond to the amended notice of family claim.
- [25] Ms. Salvador filed her amended notice of family claim on September 16, 2019. The amendment was to seek an order permitting her to relocate with C.C. Mr. Creemer filed an amended response on September 30, 2019, opposing the relocation.
- [26] Mr. Creemer did not comply with any of the other terms of Justice MacDonald's order.
- [27] At the commencement of trial on November 18, I was advised that at 6:50 p.m. the night before, Mr. Creemer emailed some documents to Ms. Salvador's counsel. The documents did not include the financial records he was required, and ordered, to produce.

The Consent Order

- [28] I was advised, at the commencement of the trial, that the parties had resolved many of the issues reflected in the pleadings and a draft order was presented:
- appointing both parties as joint custodians under the Divorce Act;
 - affirming their joint guardianship under the FLA;
 - setting out the parties' parenting responsibilities and decision making authority;
 - confirming Ms. Salvador as C.C.'s primary residence parent;
 - setting out a regular and a holiday parenting schedule for C.C.;
 - dealing with passports and Nexus cards and permission to travel with C.C.;
 - setting the parties' places of residence and incomes for the purposes of child support under the Federal Child Support Guidelines, SOR/97-175 and detailing a process for an annual review of support;
 - setting the parties' proportionate share of special or extraordinary expenses and listing those expenses which were agreed to be special and extraordinary;
 - setting out the quantum of retroactive child support, which had been agreed to, and a payment schedule;
 - permitting the parties to keep the property they had in their possession and assigning responsibility for the parties' debt; and
 - setting the amount of costs then owed by Mr. Creemer to Ms. Salvador, and setting out a payment schedule.

[29] The consent order also included a divorce. Both parties signed the draft order and, on hearing Ms. Salvador's evidence with respect to the divorce, and being satisfied that the parties had appropriately provided for C.C., and that Mr. Creemer understood and agreed to the terms of the consent order, I signed the consent order from the bench.

[30] Thus, the remaining issues for determination are:

- (1) whether Ms. Salvador should be permitted to relocate with C.C. to Yellowknife to accept her DFO promotion, and
- (2) costs.

The Preliminary Application

[31] As a preliminary matter, Ms. Salvador applied to strike Mr. Creemer's pleadings and/or to limit his participation in the trial due to his ongoing failure to comply with his disclosure obligations under the Supreme Court Family Rules, or with the terms of the various court orders.

[32] In oral reasons delivered on the first day of trial, I concluded that Mr. Creemer's conduct could not be countenanced.

[33] As the parties had resolved all issues except Ms. Salvador's request to relocate and costs, and as the court's focus with respect to the relocation issue was the best interests of C.C., I limited Mr. Creemer's participation in the trial to the issue of relocation. With respect to that issue, I permitted him to cross-examine Ms. Salvador and Mr. Beattie, to call his own evidence, and to make submissions. I did not permit him to introduce any documents, financial or otherwise, and indicated that I would consider Mr. Creemer's past litigation conduct as one of the costs considerations at the end of the trial.

The Legal Framework for Relocation Decisions

[34] As I have said, Ms. Salvador wishes to move with C.C. to Yellowknife, where she has been offered a promotion with the DFO. She is a biologist working as a member of the fresh water team dealing with species at risk. Her new position, as a Territorial Liaison and Partnerships Coordinator, is a term position which is scheduled to commence in January 2020 and will run until the summer of 2021, with the possibility of an extension.

[35] Since 2018, Ms. Salvador has been living with Mr. Beattie, who is also employed by the DFO. Mr. Beattie has accepted a promotion in Yellowknife to a more senior biologist position. Until the issue of Ms. Salvador's relocation is resolved, he is working there on what is called "travel status" three weeks a month and spending one week a month in Vancouver.

Preliminary Issues

Which Act Applies?

- [36] The first issue is whether the Divorce Act or the FLA should govern Ms. Salvador's relocation application.
- [37] There are no specific provisions in the Divorce Act dealing with relocation applications. Applications for custody and access are dealt with under s. 16 and variations of custody and access orders are dealt with under s. 17.
- [38] Section 16 of the Divorce Act deals with applications for custody and access. Section 16(6) provides that the court may impose any terms, conditions, or restrictions in connection to a custody or access order. Section 16(8) provides that, in making an order under s. 16, the court shall take into consideration only the best interests of the children, as determined by reference to their condition, means, needs, and other circumstances. Under s. 16(9), past conduct shall not be considered unless the conduct is relevant to the ability of a person to act as a parent. Section 16(10) provides that the court shall give effect to the principle that a child shall have as much contact with each spouse as is consistent with the child's best interests and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.
- [39] Section 17 of the Divorce Act deals with applications to vary, rescind, or suspend custody and access orders. Section 17(5) provides that, before varying a custody order, the court must satisfy itself that there has been a change, in the condition, means, needs, or other circumstances, of the child occurring since the last order, and that the court shall take into consideration only the best interests of the children as determined by reference to that change. Under s. 17(6), past conduct shall not be considered where it could not have been considered in the first instance. Section 17(9) provides that, in varying a custody order, the court shall give effect to the principle that a child shall have as much contact with each former spouse as is consistent with the child's best interests. For that purpose, where the variation would grant custody of the child to a person who does not currently have custody, the court shall consider the willingness of that person to facilitate such contact.
- [40] There are two different approaches to dealing with relocation under the FLA, depending on whether there is a written agreement or order respecting parenting arrangements.
- [41] If there is no such agreement or order, an application to relocate is dealt with under s. 46. It requires the court to consider the best interests of the child factors set out in s. 37(2) and the reasons for the change in location of the child's residence. Pursuant to s. 46(2)(b), the court must not consider whether the guardian who is planning to move would do so without the child.
- [42] If there is an existing written agreement or order, an application is brought under s. 69. The assessment undertaken in accordance with this provision varies depending on the arrangements for parenting time in the existing order.

[43] In *S.Z. v. D.Z.*, 2015 BCSC 2157 at paras. 71-80, Justice Voith concluded that there were some significant differences in the approach to relocation decisions under the Divorce Act and the FLA. He concluded that the doctrine of paramountcy weighed favour of applying the Divorce Act, instead of the FLA, where either or both could apply. I note that in either statutory regime, the only consideration is what is in the child's best interests as opposed to what is the parents' best interests. The factors looked at under the two statutes differ, most particularly as they relate to the reasons for the relocation.

[44] Even in cases in which there is no difference in the statutory approach, in accordance with the paramountcy doctrine, it is preferable to make orders under the Divorce Act: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20.

[45] I will consider Ms. Salvador's application under the Divorce Act.

Should this be considered as an initial custody application or an application to vary?

[46] The leading case on relocation under the Divorce Act continues to be *Gordon v. Goertz*, [1996] 2 S.C.R. 27. It involved an application to vary an existing custody/access order so that one parent could relocate with a child. The Court said that each case turned on its own circumstances and set out a two-stage test for the variation of a custody/access order under the Divorce Act.

[47] According to *Gordon* at para. 9, the parent seeking to vary an existing order must first demonstrate a material change in circumstances affecting the child. If this threshold requirement is met, the court then engages in a fresh inquiry into the best interests of the child, having regard to all of the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

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

[49] In determining whether the proposed relocation would be in the best interests of a child, Justice McLachlin, as she then was, listed a number of factors to be considered at para. 49(7):

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

- (a) the existing custody arrangement and relationship between the child and the custodial parent;
- (b) the existing access arrangement and the relationship between the child and the access parent;
- (c) the desirability of maximizing contact between the child and both parents;

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

[Emphasis in original.]

[50] She concluded at para. 50:

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

[51] Applying the Gordon test requires a full, sensitive, and individualized inquiry, taking into account all the relevant circumstances relating to the particular child's needs and the ability of the parents to satisfy those needs: *McArthur v. Brown*, 2008 BCSC 1031 at para. 12.

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

[53] At paras. 58-67, the court in *T.K.* discussed the "double-bind" problem that can arise if the relocating parent is asked whether he or she would move without the children if the relocation application is refused, and the need in mobility cases to avoid a presumption in favour of the status quo.

The Proper Approach in This Case

[54] Until the Sunday before the trial started, this case was framed as an initial custody application involving a mobility issue. There was no earlier decision regarding custody or parenting. The expectation was that, as outlined in *T.K.*, the argument would focus on a blended analysis of the factors relevant to making parenting orders and relocation.

- [55] However, as set out above, the parties negotiated the terms of a final consent order in the days immediately preceding the trial and, at the commencement of the trial, the parties presented the terms of a parenting order to which they had agreed. The order included a term that C.C. would be in the claimant's primary care. They had reached that agreement on the understanding that I would be asked to rule on mobility issues based on it.
- [56] As a result, this case falls somewhere between the fact situation in *Gordon* and *T.K.* To the extent that it is considered a variation case, it is varying a days-old consent order.
- [57] In my view, in light of the recency of the consent order, the threshold step of establishing a material change in circumstances should not be applied. There can have been no change in C.C.'s situation since the court order as there has been no earlier judicial consideration on his circumstances or an earlier exercise of discretion on which the presumption of correctness outlined in para. 11 of *Gordon* would arise. The child's needs, and the ability of the parents to meet those needs, cannot have changed, and there is no basis for isolating factors which could not have been anticipated.
- [58] Rather, it is appropriate to apply the factors listed in para. 49(7) of *Gordon* with the knowledge that the parties have recently agreed, on a final basis, that Ms. Salvador is C.C.'s primary care parent.

Applying the Gordon Factors in This Case

- [59] After some general comments about the credibility and reliability of the parties' evidence, I will review each of the *Gordon* factors and conclude with an overall assessment of C.C.'s best interests.

Credibility and Reliability

- [60] This case will not be determined on the credibility of the parties. While there is some evidence that Mr. Creemer has not been honest with Ms. Salvador, I accept that they both love C.C. and that this relocation application is emotional for both of them.
- [61] Although credibility is not determinative, there are issues with respect to the credibility and reliability of Mr. Creemer's evidence. These credibility and reliability concerns are relevant to his parenting capacity and factor into an assessment of C.C.'s best interests.
- [62] Mr. Creemer explained some of the issues with his evidence on the basis that he suffered a mild traumatic brain injury in a work-related car accident on June 17, 2019. He is in receipt of workers' compensation benefits. However, despite his concussion symptoms, Mr. Creemer was able to recall a lot of details about certain things and said he could not recall when he was confronted on others.

- [63] Mr. Creemer also had a tendency to exaggerate when giving his evidence. For example, he testified that he had asked repeatedly for increased parenting time with C.C. and was "never" given it and that all of his requests to spend a long weekend with C.C. were refused.
- [64] On the evidence, it is clear that Mr. Creemer's parenting time did increase over time. Later in his testimony, he qualified his earlier evidence to say that his parenting time had increased, but it had never been granted in an easy negotiation, and it was extremely painful to get extra time. He also acknowledged that, on his request, his parenting time with C.C. on long weekends had been extended on two or three occasions.
- [65] Mr. Creemer said that he was not allowed to see C.C. on Father's Day in 2018 and that "no father does not want to spend Father's Day with his son". He described it as extremely shocking to him and all those around him. However, the evidence was clear that Mr. Creemer did not request parenting time on Father's Day in 2018 until after he agreed to holiday dates suggested by Ms. Salvador. He was apparently unaware that Father's Day fell during those holiday dates. By the time he made his request for parenting time, Ms. Salvador's plans had been confirmed.
- [66] Ms. Salvador testified that when Mr. Creemer did not schedule anything for Father's Day in 2019, she texted him and asked him if he wanted to keep C.C. for an extra day, and she then arranged for it.
- [67] He described how he was "shocked" by the fact that Ms. Salvador had moved to Burnaby to live with Mr. Beattie and, later, by her proposed relocation. Ms. Salvador had addressed both of those matters in correspondence to his counsel. He testified that he did not receive the correspondence and then said that he did not read some correspondence. Ms. Salvador is not to blame for Mr. Creemer's failure to read correspondence.
- [68] When he was cross-examined about the fact that his sworn August 14, 2019 financial statement did not list any bank accounts, Mr. Creemer acknowledged that he had a bank account but testified that his lawyer had prepared the financial statement and he signed it without reading it.
- [69] Mr. Creemer's evidence and conduct displayed a pattern of avoidant behaviour and blaming others for feeling ambushed when events moved forward without his input.
- [70] I turn now to the Gordon factors applied to the facts of this case.

The Existing Parenting Arrangement and the Relationship between C.C. and Ms. Salvador

- [71] It is clear on the evidence, and was not seriously disputed by Mr. Creemer, that Ms. Salvador has always been C.C.'s primary caregiver. That reality is now reflected in the final consent order.

- [72] Both parents agreed that Ms. Salvador has a close and loving relationship with C.C. She has always made him her priority. Mr. Creemer described Ms. Salvador as an "amazing" mother and did not question her care of C.C. The bulk of responsibility for decision-making has been assumed by Ms. Salvador. A few examples will demonstrate this.
- [73] In November 2018, Ms. Salvador asked Mr. Creemer for input into where C.C. should be enrolled for kindergarten and expressed an interest in enrolling him in a French immersion program. When she did not receive a response, she followed up in December 2018.
- [74] Again, having not received a response, and because of the fast approaching school registration dates, on January 14, 2019, Ms. Salvador emailed Mr. Creemer, indicating where she would like to enrol C.C. in Burnaby. She explained that she planned to enrol him at her neighbourhood school, but that she would like to put his name in the lottery for French immersion programs at three different schools in Burnaby.
- [75] Mr. Creemer did not respond to her email and, as a result, Ms. Salvador went ahead without his input. Ms. Salvador was unsuccessful in the lottery for French immersion, and C.C. began attending the neighbourhood school.
- [76] In cross-examination, Mr. Creemer testified that he did not know whether he had responded to Ms. Salvador and could not say whether the reason he did not respond was because he did not read her email. He said that he "did not not trust Claire to choose a good school" and that he "knew that she would do the best she could."
- [77] As is usual for kindergarten, C.C.'s first two weeks were a gradual adjustment, starting with short daily visits which increased in length until Friday of the second week, when the children were attending for a full day.
- [78] Ms. Salvador advised Mr. Creemer of C.C.'s school, and he agreed in cross-examination that he looked it up online. At least by the end of C.C.'s first week, Mr. Creemer was aware of the gradual entry. Mr. Creemer said he would have liked to have taken C.C. to school but he did not offer to assist because he and Ms. Salvador were not speaking. He said Ms. Salvador never mentioned the gradual entry to him and it "would not have occurred" to him to speak to Ms. Salvador's counsel about it.
- [79] Ms. Salvador and Mr. Beattie each took a week off from work to cover the two weeks of gradual entry.
- [80] In addition to arranging for C.C.'s kindergarten enrollment, Ms. Salvador took the lead on issues such as trying to establish a consistent approach to reducing C.C.'s amount of screen time before he turned three, his toilet training, and his transition to sleeping on his own. She described how she would communicate with Mr. Creemer about enrolling C.C. in day care, swimming lessons, and taekwondo. She said Mr. Creemer would not respond or would take a long time to do so. Mr. Creemer did not dispute that evidence.

The Existing Access Arrangement and the Relationship between C.C. and Mr. Creemer

- [81] Mr. Creemer has always had access to, or parenting time with, C.C. His parenting time has gradually increased over time. When C.C. started kindergarten, Mr. Creemer agreed that an alternate weekend schedule was in C.C.'s best interests. He has C.C. from Friday at 3:00 p.m. until Sunday at 7:00 p.m. every other weekend, and on Wednesday evenings. Mr. Creemer also has telephone and FaceTime parenting time with C.C. Both parents agree that, unlike many children of his age, C.C. enjoys telephone and FaceTime with his father. They play music together.
- [82] Mr. Creemer testified about how much he loves C.C. and that C.C. is upset when he leaves him. Although Mr. Creemer said that he always wanted more parenting time with C.C., apart from seeking shared parenting time in his counterclaim, he has never applied for more parenting time.
- [83] The evidence also establishes that Mr. Creemer has been reluctant to disclose information to Ms. Salvador about what child care arrangements he had made for C.C. when C.C. was in his care. He acknowledged that he had acceded to his nanny's request that she need not communicate with Ms. Salvador.
- [84] Mr. Creemer also did not tell Ms. Salvador that from the spring or summer of 2017, until about July 2018, he partially relocated to Pender Island for work. Mr. Creemer testified that he commuted to Pender Island on Monday morning and returned on Thursday evening. While on the island, he stayed in a rented cabin. He testified that he had researched C.C. attending a Montessori school on Pender Island and described how it would have been a wonderful opportunity for C.C., who really enjoyed the time he spent on Pender Island.
- [85] In cross-examination, Mr. Creemer could not recall discussing his work on Pender Island with Ms. Salvador. He said if he had not done so, it was because it did not affect his parenting time with C.C.

The Desirability of Maximizing Contact between C.C. and Both of His Parents

- [86] There can be no dispute that a relocation to Yellowknife would affect C.C.'s contact with his father. However, in *R.E.Q. v. G.J.K.*, 2016 BCSC 1498 at para. 122, Justice Fleming, quoting Justice McLachlin in *Gordon*, wrote that while the maximum contact principle forms part of a child-centred inquiry, it is not an absolute. If a child's needs are likely to be best served by remaining with the parent who has been their primary caregiver, and this offsets the loss or reduction of time with the other parent, then the relocation should be permitted.
- [87] The significant disruption for C.C., if Ms. Salvador is permitted to relocate to Yellowknife, is losing the benefit of spending every other weekends and Wednesday evenings with Mr. Creemer.

The Views of C.C.

- [88] Ms. Salvador testified that C.C. knew it was possible that they would move to Yellowknife and had said that he wanted to go. Mr. Creemer did not give evidence about what C.C. has said his views are, but said that he knew that C.C. did not want to move to Yellowknife.
- [89] C.C. is too young to have formed firm views. His views are likely to change from time to time and depending on which parent he is speaking to.
- [90] I accept that C.C. would miss his father as the evidence shows that he misses him now when he does not see him.

Ms. Salvador's Reason for Moving as It Is Relevant to Her Ability to Meet C.C.'s Needs

- [91] Ms. Salvador's reason for moving is to accept a promotion. Although the approximately \$6,000 increase to her base salary is not, in and of itself, significant, she will also receive an isolated post allowance of more than \$25,000, which is significant and will help her to meet C.C.'s needs. In the circumstances of this case, which include Mr. Creemer's failure to pay any child support since June 2018, it is of great importance.
- [92] The fact that Mr. Creemer has now consented to an order that he will pay support is no guarantee that he will do so. In January 18, 2019, Master Harper ordered Mr. Creemer to pay child support of \$946 a month, commencing on January 1, 2019, and on the first of each month thereafter, and to pay 62.4% of the cost of day care and swimming lessons for C.C. He did not comply with the order.
- [93] In addition, if Mr. Creemer does not deal with the debts of Shore Pine, as he has agreed to do in the final consent order, Ms. Salvador, who was its sole director until her resignation in April 2016, is potentially exposed. The Canada Revenue Agency (the "CRA") contacted Ms. Salvador in 2016 and 2018 about Shore Pine's debts. She advised Mr. Creemer about those contacts. On August 8, 2018, the CRA advised Shore Pine that it owed \$51,751.31 in outstanding GST and HST on which interest continued to accrue. On October 22, 2018, the CRA estimated Shore Pine's outstanding taxes at \$55,362.47 and warned of potential legal action.
- [94] In addition to the financial benefits of Ms. Salvador's position in Yellowknife, it will allow her to have more time to participate in activities with C.C. She testified that her current commute is 45 to 60 minutes, whereas in Yellowknife, everything is close, and her office would be only five minutes away from C.C.'s school. Because of the flexibility in work hours that she and Mr. Beattie would have in Yellowknife, one of them would always be able to drop off and pick up C.C. from school, eliminating the need for after school day care and increasing the time available to participate in activities with C.C.

Disruption to C.C. of a Change in Custody

[95] Since C.C. has always lived primarily with Ms. Salvador, and the final consent order continues that arrangement, this factor is of limited assistance in the circumstances of this case.

Disruption to C.C. Consequent on Removal from Family, Schools, and the Community He Has Come to Know

[96] Because C.C. is only five years old, and has just started kindergarten, the community that he knows best is his family. Both of his parents have extended family in the Lower Mainland, and he has contact with them. If he moves, he will not have the same level of contact with Ms. Salvador's family as he has had to this point in his life. Ms. Salvador's mother has provided childcare for him, and he is close to Ms. Salvador's brother's child, whom C.C. refers to as his sister.

[97] I accept that a change in schools will cause some disruption, but this would be of more significance if he were older. Ms. Salvador testified that C.C. is a good student with good social skills, and she is confident that he will make new friends in a new school. Ms. Salvador has communicated about C.C.'s transition with the vice-principal at the school in which C.C. would be enrolled. She has also sought out opportunities for C.C. to continue in taekwondo.

[98] Mr. Creemer also testified that C.C. formed friendships easily. He said that C.C. had formed a friendship with a boy on Pender Island when C.C. spent time there with him. He also described C.C. as smart, happy, and emotionally mature. He said that C.C. was socially active with kids his own age and with Mr. Creemer's friends.

[99] Mr. Creemer's relationship with his parents has been strained at various times in his life. Most recently, he testified that it was strained "under the weight of this". It was not clear what "this" referred to. However, he testified that his parents were looking forward to being a supportive part of C.C.'s life. Mr. Creemer also has two brothers who reside in Ontario, and he testified that they would miss the opportunity of spending time with C.C. when they are in British Columbia if the relocation is allowed.

[100] Mr. Beattie is an important part of C.C.'s life. He calls him "poppa". They participate in activities together and, as described above, he actively participated in C.C.'s transition into kindergarten. Mr. Creemer said that he was grateful for the contribution that Mr. Beattie has made to C.C.'s life.

[101] As Mr. Beattie has accepted a promotion within the DFO, and is currently working in Yellowknife three weeks a month on travel status, if Ms. Salvador is permitted to relocate, he will continue to play a positive role in C.C.'s life.

Overall Assessment of C.C.'s Best Interests

- [102] I am satisfied that it is in C.C.'s best interests to permit Ms. Salvador to relocate to Yellowknife. The relocation will bring about an immediate improvement to Ms. Salvador's financial situation, and the likelihood of better long-term prospects in her field of choice. Because of the unreliability of Mr. Creemer's financial support, Ms. Salvador's financial viability is essential to C.C.'s well-being.
- [103] Although Ms. Salvador is well-educated and employed, historically she has not earned as much as Mr. Creemer. Permitting her to relocate with C.C. will allow her to move forward in her career, earn a higher income, and improve her advancement options. All of which will benefit C.C.
- [104] As the historical primary care parent, a role that is now incorporated in the final consent order, Ms. Salvador's self-determination of the best way for her to achieve her career goals and to provide a safety net for C.C., against the possibility that Mr. Creemer will not meet his support obligations, is entitled to respect. I am satisfied on her evidence that she will take the steps necessary to ensure that C.C. has continuing involvement with his father and his extended family.
- [105] Mr. Creemer has not suggested an improper motive for the move. Nor has he suggested that, as an alternative, he would become C.C.'s primary care parent. Rather, he says that Ms. Salvador has a nice life and a nice home in Burnaby and that she is employed, suggesting that there is no need for Ms. Salvador to move.
- [106] I accept that the move Ms. Salvador proposed is not necessary, but, as the Court of Appeal explained in *Duggan v. White*, 2019 BCCA 200, albeit in the context of the FLA, a focus on necessity is not appropriate: para. 61. The focus of the court should always be on the best interests of the child. With respect, Mr. Creemer's view of Ms. Salvador's life and employment does not appropriately focus on C.C.'s best interests.
- [107] As Justice Saunders wrote, on behalf of the court, in *Duggan* at para. 68:
- [68] Relocation cases present a difficult straddle. Opportunities for employment and education are not spread evenly throughout the province. For this reason, it is not unusual for parties in family disputes to have to adapt to changes that require relocation, and to find ways to maintain and foster relationships across boundaries. In my view, just as parties must adapt, courts must allow for adaptation in parenting situations, and be assiduous in seeking to avoid results that artificially keep one of the parents down. The best interests of the child is a large concept - one which, in my view, can be quite capable of providing, with a generous stance, an opportunity for one of the parents to lift himself, or herself, closer to the level of the more advantaged parent. It is important in the pursuit of this approach that alternative ways to foster strong relationships between the child and each parent be explored fully, so as not to close the door on a parent to a sensible plan that in the longer sense will strengthen the family, even in its separated circumstance.

[108] Justice Saunders' comments are equally applicable to the circumstances of this case.

Parenting Arrangements

[109] Pursuant to the terms of Ms. Salvador's employment offer, and the terms of Mr. Beattie's employment agreement, each will be entitled to Vacation Travel Assistance for one trip per year for the two of them and C.C. They testified that they would commit to using that travel assistance to defray the cost of facilitating Mr. Creemer's parenting time in Vancouver.

[110] In addition, Ms. Salvador testified that, during the course of their employment in Yellowknife, she and Mr. Beattie would have the opportunity of attending training sessions in Vancouver and that they would bring C.C. with them for such courses. She is close to her family in the Lower Mainland and would take every opportunity to visit with them with C.C.

[111] Finally, Ms. Salvador testified that she would facilitate Mr. Creemer's parenting time with C.C. if Mr. Creemer wished to travel to Yellowknife to see him. Mr. Creemer has the financial means to do so and expressed his love of nature and the outdoors during his evidence. There is no barrier to him visiting C.C. in Yellowknife.

[112] C.C. and Mr. Creemer enjoy telephoning each other and their FaceTime contact, which Ms. Salvador has agreed she will facilitate.

[113] I was not asked to set the parenting terms in the event Ms. Salvador was permitted to relocate. Nonetheless, I have concluded that, in the circumstances of this case, which include past difficulties in communication, it is appropriate to set out broad parameters which should govern the parties' discussions going forward.

[114] Annually, Mr. Creemer should have at least three extended periods of parenting time with C.C. in Vancouver. I would suggest that those periods align with the school spring break, summer holidays, and the December holiday season, and that they should be for a minimum of two weeks. The travel costs for such parenting time should be borne by Ms. Salvador and, because C.C. must be accompanied to travel, Ms. Salvador is to arrange for her or Mr. Beattie to accompany him.

[115] Mr. Creemer should also be entitled to other shorter periods of parenting time in Vancouver, as Ms. Salvador's work schedule allows.

[116] At his option, annually, Mr. Creemer should have at least two extended periods of parenting time with C.C. in Yellowknife on dates to be agreed between the parties. The travel costs for such parenting time should be borne by Mr. Creemer.

[117] Mr. Creemer should have phone and FaceTime parenting time with C.C. no less than twice weekly, on days and at times to be agreed between the parties. Ms. Salvador will ensure that C.C. is available for the agreed-upon times.

[118] The parties are encouraged to agree on additional parenting time.

Costs

- [119] At the close of submissions, counsel for Ms. Salvador sought special costs for what she described as Mr. Creemer's reprehensible conduct during this litigation. In support of her submissions, she relied on the history of the litigation I outlined above.
- [120] While I agree that Mr. Creemer's conduct was worthy of rebuke, in my view, the costs orders that have already been made against him, and the restrictions which were imposed on his participation in the trial, adequately address his conduct; awarding special costs would have an unduly punitive effect.
- [121] I am also concerned that an order for special costs would detract from the positive advance in the parties' communications which is reflected by the detailed consent order agreed to in advance of trial. It might also affect the need for the parties to communicate and cooperate in ensuring that Mr. Creemer has a continuing relationship with C.C., which is in C.C.'s best interests.
- [122] For the most part, the trial dealt with the issue of relocation, and the resolution of this issue was necessary. Mr. Creemer's litigation misconduct was not specifically with respect to the relocation issue, and it was not wrong of him to want the court to rule on Ms. Salvador's request. Mr. Creemer's litigation misconduct involved his non-disclosure of records with respect to the financial issues which were resolved prior to trial. He has already been censured with costs orders in that regard.
- [123] As a result, I order that Ms. Salvador is entitled to her costs of this proceeding on a scale of ordinary difficulty. Her entitlement to costs is to take into account the earlier costs orders of the court so that there is no double recovery. If the parties are unable to agree on an appropriate quantum of costs, they may seek to appear before the Registrar to assess them.
- [124] Up until the eve of trial, child support continued to be an issue for the parties. In my view, none of the costs for the days of trial should be allocated to child support. On the other hand, I am satisfied that one half of the pretrial costs related to Ms. Salvador's efforts to obtain the information necessary to quantify Mr. Creemer's child support. The balance related to the parenting issues and the remaining financial issues.

"MacNaughton J."

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