
CANADA / JUDGMENT

T.L.L. v. C.R.L.

2011 BCSC 675

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.L.L. v. C.R.L.,

2011 BCSC 675

Date: 20110525

Docket: E8984

Registry: Chilliwack

Between:

T.L.L.

Claimant

And

C.R.L.

Respondent

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the Claimant:

N.J. Harold

The Respondent appearing In Person:

Place and Date of Trial:

Chilliwack, B.C.

March 28 - 31, 2011

Place and Date of Judgment:

Chilliwack, B.C.

May 25, 2011

I. INTRODUCTION

- [1] This case gives rise to a difficult mobility issue that arises because the claimant, mother, wishes to relocate with the two children of the marriage and her older child from a prior relationship to Winnipeg, Manitoba, a move that undoubtedly will have a significant impact on the relationship between the children of the marriage and the respondent, father, unless he also moves to Winnipeg. While the principles of law that apply to this issue have been well defined, their application is not an easy matter, particularly in the situation of this blended family.
- [2] Ultimately, the mobility issue must, of course, be determined according to the court's assessment of what is in the best interests of the children. In this case, for the reasons that follow, I have concluded that it would not be in the best interests of the children of the marriage to relocate with their mother to Winnipeg, Manitoba, as she wishes.

II. BACKGROUND FACTS

- [3] The claimant is 43 years of age. She was born and raised in Winnipeg, Manitoba, where she obtained her qualifications as a registered nurse in 1992. That year, the claimant moved to the State of Texas where she found work as a nurse, first in a hospital and then in a home health care unit. In Texas, the claimant met and commenced a relationship with a man with whom she had a son, R.L., who was born on October 31, 1997. Approximately thirteen months after R.L.'s birth, the claimant separated from the child's father due to the father's drug use and moved back to Winnipeg.
- [4] Upon her return to Winnipeg, the claimant, with R.L., lived for a few months with her parents before moving into her own accommodation.
- [5] The claimant took a three-month course to train as a dialysis nurse. After completing the course, the claimant obtained a position at the Health Sciences Centre in Winnipeg, in the dialysis unit. Initially, the claimant's parents and her older brother assisted the claimant by providing care for R.L. when she was at work. Later, the claimant placed R.L. in a daycare. The claimant's parents and brother continued to provide day care from time to time.

- [6] The claimant returned to Texas with R.L. and reconciled with R.L.'s father for a brief period of time, but returned to Winnipeg in early 2002. They stayed with the claimant's parents for a couple of weeks before the claimant and R.L. moved into an apartment. The claimant was rehired at the dialysis unit in May 2002.
- [7] The claimant met and began to date the respondent in the spring of 2002. The respondent operated his own flooring installation business. They began to live together, with R.L., in June 2002. The claimant testified that the respondent had a good relationship with R.L. and they seemed to enjoy one another's company. The respondent had little interaction with the claimant's family. He had no relationship with her mother. The lack of relationship between the respondent and the claimant's mother apparently stems from the first time when he met her at the claimant's apartment, where they barely said 'hello' to one another.
- [8] The claimant and respondent were engaged at the end of September 2002. The claimant's mother told the claimant that she was not thrilled with the engagement.
- [9] After the claimant and respondent began living together, the claimant spent little time with her family. The claimant ceased asking her mother to care for R.L. and began to rely upon the respondent's mother to help out. The relationship between the claimant and her family became strained. Her relationship with her mother further deteriorated following a Christmas dinner in 2002, when the claimant became annoyed at a comment that her mother made about the respondent's mother taking over.
- [10] The claimant's older brother provided some assistance caring for R.L. for a time, until an incident when her brother was late returning R.L. The claimant testified that the respondent suggested that they should no longer permit her brother to associate with R.L. and she acquiesced. She told her mother that she did not want her brother to be around R.L., but found out that her mother permitted them to associate, so she became even angrier with her mother.
- [11] The respondent, claimant and her parents attended a mediation session to try to repair the rift but, shortly before their wedding, the claimant's parents got into a dispute with the claimant and respondent. Harsh words were spoken by the claimant's mother to the respondent and the respondent replied in kind. The mutual dislike between the respondent and the claimant's mother intensified and neither of them took any steps to try to rectify the situation. The respondent's relationship with the claimant's father appeared to be, at least, civil. The situation was so bad that the claimant's parents did not attend the wedding.
- [12] The parties married on April 5, 2003. At some point after the parties were married, the claimant effected a legal name change for R.L. so that he took the respondent's surname. However, the respondent never adopted R.L., so he is not R.L.'s guardian.

- [13] Sometime after the parties were married, the claimant told her parents that she wanted them to be more involved with R.L. but that they had to follow and enforce the rules that she and the respondent laid down. The claimant testified that they were having some problems with R.L.'s behaviour, which seemed to be worse after R.L. had spent time with them. The claimant did not invite her parents to her home and she admitted that, other than let them spend time with R.L., she did not do anything to try to improve the relationship.
- [14] The coolness between the claimant's parents and the claimant and respondent continued after the birth of the parties' daughter, S.L., on June 2004, and their son, T.L. on June 2006.
- [15] The claimant suggested that her relationship with her family was strained because of the respondent's attitude and that he effectively alienated her from her family. While it is clear to me that the claimant's mother and the respondent never had a good relationship, I am of the view that the claimant's view of the past is distorted by her present desire to place her parents in the best possible light. Whether or not there was justification for their attitude, I am satisfied that the claimant was a willing participant, along with the respondent, in keeping her parents out of their life to a large extent. I am satisfied that the claimant's relationship with her mother did not suddenly change from positive to negative with the involvement of the respondent. The claimant admitted that, in the past, she had a strained relationship with her mother and that they argued frequently.
- [16] From early in the relationship between the claimant and the respondent, his mother, G.L., played a significant role in the lives of the children. She often assisted with day care when it was needed. R.L. called her Grandma [G.] Soon after the claimant and respondent began living together, in January 2006, G.L. moved into the parties' home and, thereafter, had daily contact with the children and played an even bigger role in their care and upbringing.
- [17] In January 2007, the parties and the children came to British Columbia for a visit and to look into the possibility of moving here. The respondent's aunt lives in Chilliwack, British Columbia, and had been encouraging the respondent to move. They came to Chilliwack again in May, when they looked at houses. The claimant looked into jobs at the Chilliwack Hospital and the respondent made job enquiries of local flooring companies. The claimant said she was not keen on moving, but the respondent said he was moving, whether she came or not. While the respondent probably made that threat, I doubt that he would have left the claimant and the children if she had said she was not prepared to move. In any event, the claimant agreed to move.
- [18] The parties and the claimant's mother agreed that she would also move with the family, that they would buy a house together, and that she would continue to assist with the children. In June 2007, they moved into a house in Chilliwack, which was registered in the names of the claimant, respondent and G.L.

- [19] The claimant took a job at the Chilliwack Hospital that entails working four twelve-hour shifts on a nine-day rotation. She works two day shifts from 7:00 a.m. until 7:00 p.m.; then two night shifts from 7:00 p.m. until 7:00 a.m.; followed by five days off. The claimant currently earns approximately \$78,400.00 per year.
- [20] The respondent took a position with a flooring company as an installer.
- [21] The parties' relationship began to deteriorate soon after the move. In June 2008, G.L. moved out because of the amount of arguing that was going on in the house. The claimant moved into the spare bedroom that had been occupied by G.L. In June 2008, the parties attended one counselling session together without success. The claimant told the respondent that she wanted a divorce. They sometimes took meals together and occasionally went to a social function with the children.
- [22] The respondent lost his job as a flooring installer in the spring of 2009.
- [23] In May 2009, the claimant retained a lawyer but did not move out of the house because, when the respondent lost his job, she lacked the funds. This proceeding was commenced on June 30, 2010, under the former Rules of Court.
- [24] The respondent was out of work until around the middle of 2010, when he found a job as a security officer. That job came to an end in March 2011, and the respondent recently found another job as a security officer. At the time of trial, it was a temporary position but he expected it to become permanent in April, 2011. He expects to earn \$11.00 per hour after a three-month probationary period.
- [25] An unfortunate event occurred on Christmas Day of 2010 that led to the claimant finally moving out of the former family home. The respondent gave R.L. a computer game as a present for Christmas. A dispute arose between R.L. and the respondent when the respondent was playing the game. R.L. wanted to play and was told he would have to wait. Regrettably, instead of diffusing the situation by letting the child play, the respondent permitted it to escalate. The claimant became involved and an argument ensued between the two of them. The claimant slapped the respondent. His reaction was, in my opinion, ill considered and unwise. Rather than retreat and allow matters to calm down, the respondent, in the presence of the two younger children telephoned the police and then told them that their mother would be taken to jail.
- [26] The police attended and told the claimant that she would have to leave the house. R.L. had already left the house. The next day, the claimant returned, but R.L. said he did not want to be around the respondent. R.L. and the respondent have not spoken since. The claimant was able to convince R.L. to be in the house if she was present and made temporary arrangements for him to stay with friends if she was at work.

[27] At the end of February, the claimant secured temporary accommodation in a townhouse owned by friends and moved out with the children. She took a medical leave of absence from her job so that she could be with the children. Since then, the two younger children have been with the respondent during those days and nights when the claimant was supposed to be working and with her during her days off. R.L. has not spent any time with his step-father.

[28] On August 11, 2010, the claimant filed a notice of family claim under the current Rules, in which she seeks the following relief:

- (a) a divorce;
- (b) sole custody and guardianship of the three children with generous access to the respondent and the right to relocate with the children to Winnipeg, Manitoba;
- (c) child support in accordance with the Federal Child Support Guidelines, S.O.R./97-175;
- (d) reapportionment of family assets.

III. ANALYSIS AND DETERMINATION OF THE ISSUES

1. Divorce

[29] I am satisfied that while they shared the same residence until the end of February 2011, the marital relationship has been completely broken down and the parties have lived separate and apart within the meaning of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [D.A.], for well over a year. Accordingly, the claimant is entitled to a divorce under s. 8(2)(a) of the D.A., to take effect on the 31st day after the date of this order.

2. Division of Family Assets

[30] The only family assets in question in this proceeding are a 2004 Chevrolet Venture Van with an estimated value of \$4,000.00 and the parties' interest in the former family home, which likely has little, if any, net equity.

[31] The respondent is content that the claimant retain the van.

[32] The parties are in agreement that the house should be sold and it is currently listed for sale. G.L. testified that, even though she contributed to the down payment and is a registered owner of the property, she does not seek any part of this asset and is content that it be used to discharge the parties' family debts to the extent possible. It is entirely possible that the parties will not be able to sell the house at a price that is sufficient to pay the selling costs and the debt that is secured against title, namely a first mortgage and a judgment of approximately \$11,278.00 obtained against the parties jointly and severally and registered against title to the house. If the house is not sold, foreclosure is imminent since nobody is making the mortgage payments.

[33] The claimant submits that, if there are any funds remaining after the house is sold and the registered encumbrances are paid, those funds should be used, firstly, to pay down family debt that was incurred in the name of the claimant alone, rather than family debt that was incurred in their joint names. She seeks this order because there is no other way for her to seek contribution from the respondent for the family debt that is in her name alone. While it appears unlikely that there will be any funds to pay down these debts, I accept the submission as fair and equitable.

[34] Accordingly, in the circumstances, I consider the appropriate order to be as follows:

- (a) a declaration that each party has an equal undivided interest, as tenants in common, of the interest in the property other than that which is owned by G.L.;
- (b) the property be sold;
- (c) upon sale of the property and:
 - (i) payment of the usual adjustments;
 - (ii) payment of the registered financial encumbrances; and
 - (iii) satisfaction of the interest of G.L., if any;

if there are funds remaining belonging to the parties, those funds are to be used to discharge the following debts in the following priority:

- (i) the Visa debt in the name of the claimant;
- (ii) the MBNA MasterCard in the name of the claimant;
- (iii) the joint Royal Bank Line of Credit;
- (d) the claimant shall be entitled to retain ownership of the 2004 Chevrolet Venture Van; and
- (e) the parties shall be entitled to retain for their own use absolutely all other family assets currently in their possession.

3. Custody Access and Relocation of the Children

- (a) The pleadings

[35] In her notice of family claim, the claimant seeks custody of all three children. Her claim for custody of R.L. is brought pursuant to the Family Relations Act, R.S.B.C. 1996 c. 128, [F.R.A.], since R.L. is not a child of the marriage under the D.A.

[36] The respondent has not filed a counterclaim seeking custody. Counsel for the claimant takes the position, fairly and properly in my view, that because any custody order that I make must be in accordance with the best interests of the children of the marriage, I have the jurisdiction to make a custody order in favour of the respondent without requiring the respondent to amend his pleadings. Such an order would be in the best interests of the children.

(b) Positions of the Parties

[37] The claimant submits that it would be in the best interests of the children that she and the children relocate to Winnipeg. While she does not have a firm job commitment in Winnipeg. The claimant has made enquiries of her former employer and believes that she could return to a position in the dialysis unit of the hospital where she would not have to work an overnight shift. She says that she and the children can reside with her parents in their five-bedroom home until she gets on her feet. She says that her parents can assist with child care when she is at work.

[38] The claimant's mother, B.Y., testified and confirmed that her daughter and grandchildren could live with her and her husband as long as necessary. B.Y. is also a nurse and works permanent nights from 11:00 p.m. to 7:00 a.m., four shifts every two weeks. Her husband, who is not employed, would be available to be with the children overnight when she was working, even though he has some health issues.

[39] The claimant says this is the only solution for the situation that has resulted from the breakdown of the relationship between R.L. and the respondent. She says that if she remains in Chilliwack the younger two children could continue to be with their father during the days that she is working, but there is no one who can provide overnight care for R.L. and she could not afford to hire a live-in nanny.

[40] The claimant is also of the opinion that she could better prepare for the children financially in Winnipeg, not only because she would have free accommodation and free child care, but also because, when she is able to secure independent accommodation for her and the children, the cost of living in Winnipeg would be less because the cost of housing is lower.

[41] With regard to access, the claimant says that she would be prepared to have the two younger children spend most of their school holidays in British Columbia with their father, if he chose to remain in Chilliwack, and would share the travel costs that would be incurred. She suggests, however, that there is nothing to prevent the respondent from also returning to live in Winnipeg, in which case they could share the parenting of the two younger children.

[42] The respondent says that it would be in the best interests of the children that they and their mother remain in Chilliwack, where they could continue to co-parent and where the children could continue their close relationship with their paternal grandmother. He says that the children could live with him during the times when the claimant works and with the claimant when she was not working. His mother is available and is prepared to assist with

child care as necessary, as she has done in the past. He says he wants to work on the relationship with R.L. and would be happy to attend counselling. He says that until that situation has resolved, R.L. could spend nights with G.L. when the claimant is working nights.

- [43] The respondent says that he should not have to move to Winnipeg in order to remain close to the children when there is no need to do so. He also says that the claimant has a good job in Chilliwack that pays more than she could make in Winnipeg, assuming she was rehired into her former position, which is not certain.

(c) The Law

- [44] The starting point for discussion of the principles to be applied to the determination of custody with regard to the children of the marriage must of course be the D.A., c. 3 and, particularly, s. 16, which provides, in part:

16 (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

- (9) 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 to the child.

- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

- [45] Where the claim for custody is made under the FRA, s. 24(1) of the Act applies. It reads as follows:

24(1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

- (a) the health and emotional well being of the child including any special needs for care and treatment;
- (b) if appropriate, the views of the child;
- (c) the love, affection and similar ties that exist between the child and other persons;
- (d) education and training for the child;
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

[46] Where a custody application involves an issue of mobility, consideration must be given to the principles set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 [Gordon], where, at para. 49, McLachlin J. set out the following principles:

49 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.

[47] Although *Gordon* dealt with mobility in the context of an application to vary an existing order, the Court of Appeal concluded in *Nunweiler v. Nunweiler*, [2000] B.C.J. No. 935 (C.A.) [Nunweiler], that many of the principles discussed by McLachlin J. in *Gordon* should be considered with appropriate modification in an original application where a mobility question exists. At para. 28, Saunders J.A. said:

28 The significance of the reasoning in *Gordon v. Goertz* in an initial determination of custody is, I consider, three-fold. First, the decision directs the court to consider the motive for a parent's relocation only in the context of assessing the parent's ability to meet the needs of the child. This, in my view, is as relevant a direction on an initial custody hearing as on a variation hearing. Second, the decision confirms the significance of the instruction, found in s. 16(10), to consider the willingness of a parent to facilitate contact, but notes that this consideration is subordinate to over-all consideration of the best interests of the child. Third, and more broadly, it approaches the issue of a relocation of residence from a perspective of respect for a parent's decision to live and work where he or she chooses, barring an improper motive.

[48] Nunweiler also made clear that it is not proper to approach the question on the basis that, failing a convincing case being made for a move, the status quo is the preferred position because to do so would be to insert into custody discussions a presumption which is contrary to the instructions in *Gordon*.

[49] The most recent decision from our Court of Appeal dealing with the question of mobility in an original application for custody is *S.S.L. v. J.W.W.*, 2010 BCCA 55 [S.S.L.]. In that case, there was no custody order but the parents had shared the parenting of the children for a considerable period of time pursuant to a written agreement before one parent sought to relocate with the children. That is similar to the present case, although the claimant and the respondent shared parenting under a *de facto* arrangement, while living in the same residence after the breakdown of their marriage. Huddart J.A. stated the issue in para. 1 of the judgment as follows:

1 This appeal requires this Court to clarify the approach to be taken by a trial judge on an original application for custody and guardianship under s. 16(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and s. 30(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 where one parent seeks to vary existing consensual shared parenting of school-age children to permit a move for personal or employment reasons. In particular, it requires this Court to consider the appropriate weight to give to parents' testimony about their intentions if their preferred parenting arrangement is rejected.

[50] The circumstances giving rise to the application and the parties' proposals in *S.S.L.* are described in paras. 3-5:

3 For approximately five years, the children had spent about 60% of their time with their mother and 40% with their father. Both had homes in the same community near Victoria. When the mother became engaged to marry, she applied for an order establishing the children's residence in London, Ontario, so she might live with her fiancé and his two daughters, whose custody he shares with their mother. His children and business responsibilities preclude his moving to Victoria. The move would also ensure the mother's continued successful career, which is centred in Ontario, less travel to earn her living and thus more time for her with the children, and increased contact for her and the children with her family and for the children with their father's extended family. The mother believed she could provide a happy family life and better schooling

for the children in London, given the resources she would enjoy with her fiancé.

4 The mother's plan was to marry in the summer of 2010 and, thereafter, provide the children's primary home with her fiancé and his two daughters in Ontario. Nevertheless, when asked by her counsel what she would do if the court favoured one of the father's proposed plans, she replied that she would reconsider her plans "to marry next summer"; that her children's lifestyle would be "in for a reality check" unless both she and their father started "making a lot more money"; and that she felt "strong" and "would keep going." On cross-examination, she confirmed she would not leave her children. Her fiancé testified he would not ask her to do that. Both agreed they would try to sustain their loving and committed relationship long distance.

5 On the other hand, the respondent father was "adamant" he would not move to London, although he acknowledged a job offer with a sports organization that was aligned with his interest in Ironman competition would pay him well and permit him to reside in south western Ontario. Without paid employment for about seven months, he intended to look for new work that would permit him to continue to live in Victoria, where he believed it would be in the best interests of the children to continue to live and go to school, whether or not their mother moved. He also wanted to remain relatively close to his five-year old daughter of another relationship, who lives with her mother in Calgary. He offered the Court two proposals for care of the children, then 12 and 9: equally shared parenting in Victoria or primary residence with him.

[51] The trial judge determined that the best interests of the children required them to live in Victoria, whether their mother moved or not. Huddart J.A. observed that the probability that the mother would stay in Victoria undoubtedly was fundamental to that decision. That, she concluded was an error. At paras. 12 and 13. she observed:

12 In my view, the trial judge fell into what is an easy error in difficult parental mobility cases, to prefer what is seen as the status quo, if, in response to the other parent's proposed parenting plans, the parent seeking to move offers what some judges have called the "third option" of not moving, if moving means leaving the children behind. The status quo is allowed to supersede the balancing of other relevant factors. That is not the correct approach: see *Chera v. Chera*, 2008 BCCA 374 at para. 60; *Spencer v. Spencer*, 2005 ABCA 262 at paras. 15-19. ...

13 Opting to maintain what is perceived as the status quo, without more, avoids the difficult decision of having to prefer one parent's plan to the other's, without acknowledgment that the status quo is ephemeral in any family.

[52] At para. 15, Huddart J.A. noted:

15 Once the trial judge accepted the father would not move and that the mother would stay if the children were not permitted to move, there was only one possible outcome: the children would stay. If their mother moved, the children would have their primary residence with their father in Victoria. If their mother stayed in Victoria, they would live with her 60% of the time. As the trial judge affirmed at para. 24 of his reasons for costs (2009 BCSC 1390), the potential for the children's move to disrupt their close relationship with their father was the "determinative factor"

in the case. The trial judge did not explain why he found the father's proposed relocation any more impractical than the mother's not moving in the circumstances of this case as he found them.

[53] Huddart J.A. held that the correct approach in such a case is to consider the four different scenarios that exist and determine which of them is in the best interests of the children. At paras. 24-25 she said:

24 In my view, the court's task in these joint parenting cases is to analyze the evidence in four possible scenarios, in this case, (i) primary residence with mother (London, Ontario); (ii) primary residence with father (Victoria, B.C.); (iii) shared parenting in Victoria; and (iv) shared parenting in London, but to do so knowing the court's first task will be to determine which parent is to have primary residence. When the question of primary residence is evenly balanced and the court finds the best interests of the children require both parents to be in the same locale, then the court will need to choose between the shared parenting options offered by the parents, without presuming the current care-giving and residential arrangement is to be the preferred one.

25 Proximity of parental homes will usually be in the best interests of children with two good parents. But proximity may be achieved in either proposed location.

(d) Application of the Legal Principles

(i) Roles of the parties in the parenting of their children

[54] When considering the relevant factors from Gordon and assessing the possible scenarios in this case, it is important to recognize what roles the parents have in fact played in the care and raising of the children thus far.

[55] I am satisfied that the respondent has played a significant role with regard to raising all three children. Apart from the times when she was on maternity leave, the claimant has worked shift work. At times, the parties had the assistance of other family members in caring for the children, but it is clear that a large part of the responsibility for their care has been shouldered by the respondent. Further, he was unemployed for a considerable period of time and while unemployed, he, along with his mother, took care of the children while the claimant was at work.

[56] The claimant conceded that the respondent is a good father to his own two children and he loves them more than anything else in the world. However, she said that he treated R.L. differently from the way he treated the other children and compared R.L. unfavourably to the younger two children. Part of her complaints about the respondent's interaction with R.L. concerns his discipline. However, there is no evidence that the respondent physically disciplined R.L. inappropriately. In fact, the claimant agreed that the respondent had told her that she should not hit R.L. when she became frustrated with him. It is clear that R.L. has posed challenges because of his behaviour, including his failure to do homework assignments. The picture that emerged from the evidence was that the claimant willingly

left matters of discipline in the hands of the respondent. She now uses that fact to suggest that the respondent does not care about R.L.

- [57] I had the opportunity to observe the respondent as he testified about his feeling towards and interaction with R.L., and I believe that he was being truthful when he told me that he loves him and wishes to once again have a good relationship with him. It is regrettable that the respondent permits the events of Christmas Day 2010 to spiral out of control and to assume a greater importance than, in my view, they deserve.
- [58] In summary, I am satisfied that the respondent is a fit and capable parent and can discharge his responsibilities as a parent to all three children. At the present time, R.L. is apparently reluctant to have anything to do with the respondent, who has been in his life since he was four years old and who is the only father-figure whom R.L. has really known. That, in my view, is unfortunate. I am of the opinion that it would be in R.L.'s best interest that steps be taken, involving counselling, to repair the damage.
- [59] I have no doubt that the claimant also loves the children very deeply and that she is a very capable and caring parent. She has provided for the children emotionally and financially and they are very close to her.
- [60] In my view, it is in the best interests of all the children that they be able to maintain maximum contact with both parents.

(ii) Disruption to the children that would result from a move to Winnipeg

- [61] A move to Winnipeg would obviously mean a change in schools for the children and the loss of friends. However, the claimant would be content to wait until the end of this school year to make the move. I do not believe that a transition to a new community and a new school would be difficult for the two youngest children given their ages. R.L. is in high school, where friendships with school mates tend to be more important, but R.L. has the advantage of having spent the better part of the last three summers in Winnipeg with his maternal grandparents, so he has greater connections with that community than do his younger siblings.
- [62] In my view, however, a move to Winnipeg would have a significant impact on the children's relationship with their paternal grandmother, G.L. She has always been close to them and has been a significant caregiver. Having had the opportunity to hear from G.L. at the trial, I am satisfied that she loves all three children equally and that she has not treated R.L. any differently than she has his siblings. She has played a very significant part in the children's lives to date. This important factor in their lives would be adversely affected by a move.
- [63] The claimant submits that while the children may suffer some loss of contact with G.L., that loss will be compensated for by a corresponding gain in being able to enjoy a closer relationship with her parents and her brother. However, apart from R.L., the children have seen very little of their maternal grandparents, either before or after they moved to British Columbia. That does not mean, of course, that they may not benefit from the creation of a

new relationship. I am satisfied that the claimant's mother, who testified at trial, is anxious to be in a position to spend more time with her grandchildren and I have no doubt that she is a caring and capable grandmother. It is a fact, however, that the younger two children are simply not close to their maternal grandmother at this time.

(iii) Reasons for the move

[64] I am aware of the admonition given by McLachlin J. in *Gordon*, that the reasons for the intended move, at least in the sense of the motive for the move are not relevant absent an improper motive. It is the effect of the move on the children that should be the focus of the consideration in assessing what is in their best interests. In this case, the claimant is not acting out of any improper motive in seeking to relocate with the children. She believes she can better provide for them if she is able to move with them to Winnipeg. However, the single biggest factor behind her desire to move, in my opinion, is that she believes that if she remains in Chilliwack there is no viable solution for the problem that she sees with the care and supervision of R.L. when she has to work. As she put it during her cross-examination "[he] is the main reason I need to go back to Winnipeg".

(iv) Respect for the views of custodial parent

[65] Gordon says that barring an improper motive for the proposed move the question must be addressed with an attitude of respect for a custodial parent (*Gordon* at para. 36). In this case, there is not yet any order giving either party custody. However, respect must also be given to the views of a parent who has been the primary caregiver and provides the primary residence for the child: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230, at para. 33. In this case, however, there was no primary residence until very recently and the parties shared almost equally the parenting responsibilities for the children.

[66] It is my view, however, that somewhat different considerations apply to R.L. While the respondent has been a large part of R.L.'s life since the child was about four years old and has played a very significant role in his upbringing, he is not R.L.'s guardian. His only guardian at law, at the present time, is the claimant and she is, in my opinion, entitled to respect with regard to her wishes with regard to R.L.

(v) Assessment of the possible scenarios

[67] The four scenarios that I must examine and assess if the three children are to be kept together as a unit are:

- (a) continuation of a joint parenting regime in Chilliwack, if the claimant remains in Chilliwack;
- (b) continuation of a joint parenting regime, if the respondent moves to Winnipeg;
- (c) primary parenting by the claimant in Winnipeg; and
- (d) primary parenting by the respondent in Chilliwack.

- [68] For a long time now, both before and after the marriage broke down, the children have had the benefit of being co-parented by two capable parents. That has been the situation for the two younger children since their births. It was the situation for R.L. since he was about 4 years old and only ceased as a result of the unfortunate incident at Christmas. However, I am not satisfied that the rupture in the relationship between R.L. and the respondent is irreparable.
- [69] It is my opinion that, of the four possible scenarios for the future parenting of the children, the latter two would not be in the best interest of the children because it would mean that they would lose the benefit that they have enjoyed of maximum contact with two loving and capable parents.
- [70] I have to consider whether it is in the best interest of the children that they and their parents continue to live in Chilliwack or that they move to Winnipeg so that, in either scenario, the claimant and the respondent can continue to co-parent the children.
- [71] The claimant submits that she cannot remain in Chilliwack because she has no way to provide necessary and appropriate care for R.L. when she works nights. I accept that R.L. cannot be left unsupervised throughout the night and that the claimant cannot permanently rely on friends to let him sleep over when she is at work. The claimant says that there are no other nursing jobs available that would provide comparable pay without the need to work night shifts. However, she did not provide evidence of any actual job searches apart from one enquiry at the dialysis unit at the Abbotsford Hospital, where night shifts would not be required. She was told that the only position open was a .6 relief position for a nurse who was on maternity leave.
- [72] The claimant submits, and I accept, that it is not economically feasible for her to hire a live-in nanny to provide overnight supervision for R.L. when she is at work.
- [73] The claimant submits, therefore, that the only viable solution to accommodate R.L.'s situation is for her and the three children to move to Winnipeg, where they can reside with her parents and she can, hopefully, return to her old job.
- [74] The claimant submits, further, that there is nothing to prevent the respondent from returning to Winnipeg, where he lived all his life until 2007 and finding work there at his trade as a flooring installer, unlike the situation in S.S.L. where the respondent had a concrete job opportunity.
- [75] The respondent wants to find employment in the corrections field with either Correctional Service Canada or the British Columbia Corrections Branch. He sees his present employment as a security officer as hopefully providing an entry into corrections work. He does not want to give up this opportunity by moving to Winnipeg.
- [76] It is my opinion that, contrary to the claimant's submission, it is not necessary that the claimant relocate all three children to Winnipeg in order to provide appropriate care regime for R.L. Further, it is my opinion that it is not in the best interests of the children of the

marriage to move them to Winnipeg, away from their father, from the community they have become accustomed to, including their schools, friends and from their maternal grandmother, and have them placed in a new environment, living with their maternal grandparents with whom they have not, in fact, had a particularly close relationship. A move to Winnipeg would involve a number of uncertainties. The claimant is not guaranteed a position at her former place of employment. The claimant has, in the past, had a conflicted relationship with her mother and moving into her parents' home with three children may not be the happy solution that she believes it to be. The two younger children, particularly, would be placed in a new environment with grandparents whom they do not know well and far away from a grandmother who has been very close to them. There is no certainty that the respondent would be able to find suitable employment in Winnipeg.

- [77] Can the alternative scenario, remaining in Chilliwack, permit a viable solution to the situation regarding R.L.? I believe it can. In my view, it is not in R.L.'s best interest to allow what happened at Christmas destroy the relationship with his step-father. It should not have happened and the respondent ought to have dealt with the issue in a better, more mature manner. One can understand why R.L. was upset and angry with his step-father, but the event is not something that should cause the end of the parental relationship. In my view, it is in R.L.'s interest and the interests of his siblings as well that steps be taken to mend the damage and repair the relationship. The respondent can provide the necessary care and supervision of R.L., along with the other children, when the claimant is working. In that way, there need not be any disruption to the children that would result from a move. The claimant does not have to change jobs and give up a secure, well-paying position that she enjoys.
- [78] I believe that enlisting a counsellor to work with R.L. and the respondent in addressing their relationship is important and I am satisfied that the respondent is committed to engaging in counselling.
- [79] It may be appropriate, for a time and during the initial phases of counselling, to provide R.L. with an opportunity to be able to spend time apart from the respondent when his mother is at work and he is not in school. His paternal grandmother, G.L., with whom he has enjoyed a close relationship, is able and very willing to assist. There is no reason why R.L. should have any bad feelings towards his grandmother. She has done nothing that ought to cause him to be uncomfortable in her company. While I cannot force the claimant to engage G.L. in this way, she has the opportunity to do so.
- [80] I have, therefore, concluded that the two youngest children should remain in Chilliwack and that the parties should have joint custody and guardianship of them.

- [81] The two children of the marriage, S.G.L. and T.G.L., will reside with the claimant on those days when she is not working and with the respondent, on the days when the claimant is working. The parties will have liberty to apply, if necessary, to further specify the times when the change of residence will occur and to specify, if necessary, what is to happen during those times when the children are not in school.
- [82] Having regard to the present tensions concerning R.L., and having regard to the fact that the claimant is his sole guardian, I think it is appropriate that the claimant have sole custody and guardianship of R.L. pursuant to the FRA, with the respondent having reasonable access, provided however, that R.L. will stay overnight with the respondent only if the claimant agrees. There will be a further term of the access order that the respondent is to engage with R.L. in a program of counselling and for that purpose the claimant shall ensure that R.L. attends the counselling sessions.
4. Child Support
- [83] The parties spent almost no time at trial on the issue of child support, the focus of this trial being on the mobility issue.
- [84] I will, therefore, give the parties liberty to make further submissions regarding child support before making any order.

"B.M. Joyce J."

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