

CANADA / JUDGMENT

T.L.M. v. D.J.M.

2023 BCSC 2059

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2059 T.L.M. v. D.J.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.L.M. v. D.J.M.,

2023 BCSC 2059

Date: 20231117

Docket: E161902

Registry: Vancouver

Between:

T.L.M.

Claimant

And

D.J.M.

Respondent

Before: The Honourable Justice Fitzpatrick

Oral Reasons for Judgment

Counsel for the Claimant:

J. Werb

R. Ingram

Counsel for the Respondent:

K. Quong

Place and Dates of Hearing:

Vancouver, B.C.

November 6-7 and 15, 2023

Place and Date of Judgment:

Vancouver, B.C.

November 17, 2023

INTRODUCTION

- [1] The parties had a brief relationship that ended in July 2011. There is one child of the relationship, a son born in January 2010 (the "Child").
- [2] From 2012-2023, through a series of agreements and court orders, the parties agreed on a parenting schedule for the Child. The co-parenting of the Child has been complicated by the geographical realities in that the respondent, D.M., now lives in Maple Ridge, BC and the claimant, T.M., now lives on Bowen Island in West Vancouver, BC.
- [3] The agreements and court orders have essentially provided that D.M. would parent the Child during the week and T.M. would have access to the child every other or every weekend. That parenting schedule in turn has led to the parties' agreement that the Child's schooling would be in Maple Ridge.
- [4] Parenting issues still persisted from time to time and further trial dates were set in 2023. On the eve of that trial, on June 10, 2023, the parties consented to a final order that confirmed the parenting arrangements that had been in place for years before (the "Final Order"). The Final Order also provided that the Child would attend high school in Maple Ridge starting in September 2023.
- [5] Suddenly and without warning, on September 12, 2023, during the second week of school, the Child left school and travelled to T.M.'s residence without telling either of his parents. Despite the Child being repeatedly returned to Maple Ridge and his father's care over the ensuing almost two months, the Child continues to absent himself from school and travel to his mother's home.
- [6] Both parties agree that the Final Order must be varied or suspended on an urgent and interim basis to address the immediate concerns regarding the Child arising from his behavior. However, the parties have been unable to agree on a solution to the present dilemma. Each of them now advances starkly different proposals in terms of what is appropriate and in the Child's best interests, again on an interim basis. That choice is now in the hands of the Court and is to be decided on this application.

Background Facts

- [7] In 2009, when the parties' relationship began, T.M. had a son from a previous relationship. That son is now about 21 years old.
- [8] After the parties' separation (July 2011), they entered into a separation agreement in March 2012. D.M. was to have "sole custody" and the parties had joint guardianship. T.M. had access to the Child every other weekend. This arrangement continued for some five years from 2012-2017.
- [9] In 2013, T.M. and her son moved in with her current partner, C.M.
- [10] In 2015, D.M. moved in with his current partner, J.M., and her two sons from a previous relationship.
- [11] In June 2016, T.M. filed her notice of family claim ("NOFC"). By this time, D.M. and J.M. were living in Maple Ridge and T.M. lived in downtown Vancouver. T.M.'s sought-after relief in relation to the Child was that he would live primarily with her and that D.M. would have reasonable and liberal parenting time, all pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [12] In spring 2017, the parties agreed to a new parenting schedule by which the Child lived with D.M. in Maple Ridge on the weekdays and with T.M. on the weekends. This arrangement continued to spring 2019.
- [13] In April 2019, T.M. again wished to change the parenting arrangements.
- [14] In July 2019, the parties agreed to the preparation of a s. 211 report by Dr. Larry Krywaniuk. In June 2020, Dr. Krywaniuk completed his report. By this time, T.M. has relocated to a home on Bowen Island, without telling Dr. Krywaniuk who was preparing the report. In any event, Dr. Krywaniuk recommended a reversal of the current parenting arrangements, in that T.M. would parent the Child during the weekdays and D.M. would parent on the weekends (the "Krywaniuk Report").
- [15] A trial was scheduled for June 2021. In August 2020, T.M. brought an application to implement the Krywaniuk Report in advance of the trial, which application was dismissed.
- [16] In April 2021, the parties participated in a mediation. That mediation was successful and produced a final order (entered later in October 2022) that confirmed that the current parenting schedule would remain in place and that the Child would attend an elementary school in Maple Ridge. The matter of where the Child would attend high school was left open to be decided at a later time.
- [17] In June 2022, T.M. applied to the Court seeking an order for a "views of the child report" in advance of her summary trial application set for August 2022 (where again she was seeking to reverse the parenting arrangements).

- [18] On June 24, 2022, I dismissed T.M.'s application. I accepted D.M.'s position that the preparation of such a report was premature, particularly as the parties had agreed to implement counselling for the Child given some uncertainty as to his mental state and concerns for his mental health.
- [19] In September 2022, the Child began counselling with Jorge Gonzalez of Alyson Jones & Associates in West Vancouver. The parties are also participating in various counselling sessions with Mr. Gonzalez either on their own or with the Child.
- [20] T.M. was continuing to seek a reversal of the parenting schedule and trial dates were set for July 2023. In January 2023, the parties agreed to the preparation of a s. 211 report by Dr. Robert Colby.
- [21] In June 2023, Dr. Colby completed his report. Dr. Colby recommended that the Child continue his schooling in Maple Ridge, where he was scheduled to enroll in his first year of high school at Westview Secondary School ("Westview") in September (the "Colby Report"). This recommendation was made in the face of the Child indicating that he wished to live with T.M. on Bowen Island and go to high school in West Vancouver.
- [22] On the eve of the trial, the parties reached an agreement, as set out in the Final Order granted by Justice Milman. Terms of the Final Order (paras. 4-6) in relation to the Child's parenting included:
- a) On an "interim without prejudice basis", the parenting schedule would remain in place;
 - b) By consent, the Child would be immediately enrolled at Westview for the balance of his high school education and neither party would change or withdraw the Child's enrollment from Westview; and
 - c) By consent, the Child would be enrolled in the Westview Soccer Academy at Westview.

Recent Events

- [23] As of summer 2023, the parties describe that the Child was a normal 13-14 year old boy. Apparently, the Child was diagnosed some time ago with dyslexia, that resulted in some adjustment of his educational program, which now includes tutoring.
- [24] I agree with Dr. Krywaniuk's assessment in his Report that the Child is well-loved and cared for in each parent's home. He has positive relationships with his parents' partners and the other children in each home. I also agree that no parenting issues were apparent then--and aren't apparent now--in respect of either parent, although they have different approaches to life and parenting.
- [25] Both parties describe that the Child had a number of friends both in Maple Ridge and in West Vancouver. The Child is described as very interested in soccer, and that he is involved in teams in both locations, including via his participation in the Westview Soccer Academy.

- [26] Neither party reports that the Child expressed any difficulties in the months leading up to fall 2023. At that time, the Child, principally with D.M.'s assistance, was getting ready to start high school, no doubt a big step in a child's life by any measure.
- [27] Yet, commencing September 12, 2023, the Child left school and travelled to T.M.'s home on Bowen Island. T.M. immediately informed D.M. of this development and tried to make arrangements with D.M. for him to pick up the Child to be returned to Maple Ridge.
- [28] In Justice Kirchner's October 17, 2023 reasons for judgment (described below as the Kirschner RFJ) at paras. 10-22, he described the following events that took place over the remainder of September and into October in terms of the Child not attending school and refusing to abide by the parenting schedule. By all accounts, the Child has been travelling on public transit while off on his own.
- [29] Both parties and the collateral witnesses, including their respective partners, have filed extensive affidavit evidence as to the course of events from September 12, 2023 to the present. Seventeen affidavits are before me which, when analyzed together, might allow someone to attempt to piece the course of the Child's locations and course of travel over this almost two-month period.
- [30] I do not intend to set out the details of that evidence, given the exigencies of the circumstances. At bottom, the situation from September 12, 2023 to the present time is that the Child attends school only sporadically or refuses to attend at all. He runs away from D.M.'s home or Westview and travels to Bowen Island.
- [31] On two occasions, the police were involved and North Shore Search and Rescue were involved specifically on September 18, 2023, when the Child ran away from both parties at the Horseshoe Bay Ferry Terminal ("Horseshoe Bay").
- [32] As of the time of this hearing, nothing had changed and the parties both describe that the Child's behavior was and is like "groundhog day". He continues to run away from D.M.'s home or his school and travel to his mother's home on Bowen Island. As of now, the Child has missed school 17 times out of the 34 days of classroom instruction.

The Cross-Applications

- [33] On October 3, 2023 (amended on October 13, 2023), D.M. filed his notice of application seeking:
- An order that D.M. have all parenting time and parenting responsibilities under s. 41 of the FLA on an interim basis (for at least 12 months) while the Child and the parties complete a specialized counselling program as recommended by Alyson Jones & Associates;
 - An order that T.M. is to bear all of the costs of the counselling program;
 - An order that, if the Child returns to T.M.'s care during D.M.'s parenting time, she must forthwith return the Child to D.M.'s care, or his school if in session;

- d) A declaration that T.M. has wrongfully denied parenting time and an order that she pay D.M. \$5,000 pursuant to s. 61(2)(g)(i) of the FLA; and
- e) In the alternative to (a)-(d) above, that Dr. Colby prepare an updated s. 211 report to specifically address whether the Child has been alienated by T.M., and that T.M. pay the upfront costs of that report.

[34] On October 4, 2023, T.M. brought an application before the Court for an order that the Child be represented in these proceedings by legal counsel appointed by the Child and Youth Legal Centre (the "Centre"). On October 17, 2023, Kirchner J. rejected that application, finding that the option of appointing legal counsel for the Child was not the obvious first choice to address the situation. Justice Kirchner decided that less adversarial options should be considered, including seeking the assistance of Mr. Gonzales.

[35] On October 27, 2023, T.M. filed a cross notice of application, seeking:

- a) An order that the terms of the Final Order set out above (paras. 3-6) be suspended for a period determined by the Court;
- b) An order that the Child be immediately enrolled at Rockridge Secondary School ("Rockridge") in West Vancouver, on an interim basis;
- c) On order that, on an interim basis, commencing November 17, 2023, D.M. shall have parenting time with the Child every second weekend from after school on Friday to 6:00 p.m. on Sunday (adjusted if there are non-instructional days on either Friday or Monday);
- d) An order that, on an interim basis, the parent commencing their parenting time shall be responsible for picking up the Child from school, the Horseshoe Bay or D.M.'s residence; and
- e) An order that I interview the Child as part of the process toward coming to a decision on these applications.

Relevant Legal Principles and Approach

[36] The relief sought in both applications involves a variation and/or suspension of the Final Order. There is no indication that the Final Order was granted pursuant to either the FLA or the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.). However, in her NOFC, T.M. sought parenting orders pursuant to the FLA. The parties agree that the FLA applies and requires that I first find that there has been a change in circumstances before any variation or suspension of the Final Order can be made: FLA, ss. 47 and 215(1).

[37] The change must "materially affect the child" and was either not foreseen or could not have been reasonably contemplated by the initial order: *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 13; *Williamson v. Williamson*, 2016 BCCA 87 at para. 31.

- [38] If the Court determines that a material change in circumstances has occurred, the Court must embark on a fresh inquiry into what is in the best interests of the child: Williamson at para. 34. Consistent with s. 37(1) of the FLA, the Court's sole consideration is the best interests of the child: Wong v. Rooney, 2020 BCSC 1387 at para. 56. In that event, the Court may consider any remedies it sees fit which include an interim order under s. 216 of the FLA: L.S. v. G.S., 2016 BCCA 346 at para. 40.
- [39] Section 37(3) of the FLA provides that "an agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security, and well-being".

Discussion

- [40] As a preliminary comment, I would emphasize that both parties seek interim orders. This Court's approach to considering what interim orders are appropriate is well-known.
- [41] It is generally accepted that interim orders are designed "to provide short-term solutions until issues regarding the best interests of a child can be fully canvassed at trial": Fitzgibbon v. Fitzgibbon, 2014 BCCA 403 at para. 22. Section 216(2) of the FLA directs courts to make interim orders in accordance with the requirements or conditions applicable to the subject matter, but only "to the extent practicable". In relation to interim parenting orders, Justice Saunders noted in G.L. v. J.K., 2022 BCSC 1714, that courts consider the best interest of the child "to the extent that those interests can be discerned from the evidence on the application": G.L. at para. 11, citing B.K. v. J.B., 2015 BCSC 1481 at para. 27.
- [42] It is also well-known that the evidentiary basis for interim orders can be challenging. As Justice Lamb recently stated in K.A. v. J.R.S., 2022 BCSC 2330, the parties involved in matrimonial litigation will "routinely" have conflicting versions of the material facts and due to the interlocutory nature of the proceedings, courts have to draw factual findings "almost invariably" from a limited record: K.A. at para. 3, citing I.F. v. R.J.R., 2015 BCSC 793 at paras. 13-14.
- [43] In this case, that evidentiary challenge exists to a large degree. Both applications have been brought on an urgent basis. The evidence that has evolved includes a series of affidavits, principally sworn by the parties. As between the parties, they have sworn and filed some ten affidavits over the last two months where they have sought to set out the relevant facts and respond to the other's evidence.
- [44] Unfortunately, much of that evidence, or the inferences that are said to arise, are conflicting. D.M. in particular alleges significant credibility issues in relation to T.M. I have addressed these issues, as best I can, in the discussion below, as necessary.

Change in Circumstances

- [45] The parties agree that the "material change" test has been met. I agree that there has been a substantial change to the Child's condition, needs and circumstances. The Child now refuses to stay in the care of D.M.; he refuses to stay in Maple Ridge and attend Westview. At the time the Final Order was entered, neither party foresaw or contemplated that the Child would consistently run away from school or D.M.'s residence.
- [46] In that event, I am in a position to move to the "best interests" test in respect of the Child under s. 37(2) of the FLA which requires that I consider all of the child's needs and circumstances.

Alienation Issues

- [47] The foundation for the relief sought by D.M. in his application is his contention that T.M. has alienated the Child from him.
- [48] There is no doubt here that there has been considerable push and pull between the parties over the Child's life as to who would have the "established" or "primary" residence for the Child. That contest has been largely dictated by the location of the Child's schooling, or vice versa, given the commuting distances involved.
- [49] One relevant aspect of this ongoing dispute between the parties has been the Child's involvement in expressing his views. There is a record of the Child expressing his views as to the location of his weekday/weekend residence as between his parents' homes, arising in the context of the ongoing dispute between the parties that has been extant for some years.
- [50] In the Krywaniuk Report (2019-2020), it was noted that the Child wanted to reverse the situation so that he lived with T.M. on the weekdays and went to a local school near his mother's home (pre-Bowen Island) and that he spent the weekends with D.M. in Maple Ridge. Somewhat presciently, Dr. Krywaniuk noted in his Report at p. 10:

His parents both want the best for him although they have different approaches to life and parenting, which may be a significant factor in [the Child's] life and the direction it will move in the future. It may be some of [the Child's] behaviors and characteristics represent emergent development issues that will continue to evolve and lead him in one direction or another.

- [51] Dr. Krywaniuk did not identify any issues of alienation or estrangement on the part of the Child in relation to either parent.
- [52] Ultimately, T.M. relented and she agreed, in the 2021 consent order that the Child would remain enrolled in a Maple Ridge elementary school and that the parenting schedule would essentially remain the same.
- [53] In the Colby Report (2023), the Child reiterated that he wanted to live with T.M. on the weekdays, not just through the school years, but all the time. The Child also stated that he had friends in West Vancouver and that he wanted to attend Rockridge. Dr. Colby came to a

different opinion as to the Child's residency during the weekday and his school. In coming to that conclusion, Dr. Colby noted that the Child had been ambivalent at various times; however, Dr. Colby attributed this to the Child not wanting to hurt or disappoint one parent by choosing the other's household as his "primary" residence. Presumably on the basis of the Colby Report, T.M. eventually again relented and agreed to the Final Order which confirmed the weekday/weekend parenting and that the Child would attend Westview.

- [54] In addition, Dr. Colby expressly stated the Child was principally concerned about the effect of his choices on his parents in terms of feelings of rejection. Dr. Colby directly addressed the issue of alienation. He did not find any indication of alienation or inappropriate conduct on the part of either parent in relation to the Child's views and preferences, in stating at p. 94:

With [the Child] the main issues is in terms of where he will be living and the effects of his choice on each of the parents' emotional responsiveness, feelings of rejection or critique of him as the decision maker. While both parents state they are not influencing [the Child] in that regard their actions play a role in how he views each of his parents.

Having evaluated both parents and observed the dynamic between each of the parties interactions, including each of the parent's interactions with the children in this assessment, there appears to be no areas where there are significant demands being made on [the Child] to reject any of the parties. Although [the Child] is favourable of the Bowen Island environmental and the freedom that he has there including opportunity for employment and his engagement his with half-brother on the whole it presents as a positive engage with all parties with [the Child] appearing to be searching out a reason to justify the choices he makes while at the same time his choices do not seem to be securely established.

- [55] In Williamson, the court discussed alienation generally:

- [39] ... Some courts have said that alienation can occur as an unfortunate side-effect of the breakdown of a relationship, but can also occur because of deliberate actions, both direct and indirect, on the part of a parent LG. v. R.G., 2012 BCSC 1365 at paras. 1-2. Courts have said parents may engage in alienating behaviour without successfully alienating the child from the other parent: LG. at para. 206.

- [40] In D.S.W. v. D.A.W., 2012 BCSC 1522, Mr. Justice Barrow thoroughly discussed some of the concepts relating to parental alienation. At para. 64, Barrow J. stated that at the core of parental alienation is:

... the notion that the child's decision to refuse to have a relationship with the targeted parent is without justification or without convincing reason. If there is a reason given by the child for taking the extreme step of refusing to have a relationship with a parent, it will often be out of all proportion to the decision taken. The reasons for such decisions need to be assessed with the particular personality and experience of the child involved. What may seem a thin or unconvincing rationale for one child may have a much more convincing force in the context of

the personality and experience of another child.

[41] Barrow J. also observed that parental alienation must be distinguished from estrangement: D.S.W. at para. 28. Courts have said that the difference between estrangement and alienation lies in the cause; estrangement occurs when the child understandably refuses contact with a parent because of that parent's behaviour, and there is a logical and rational reason for the child's rejection of the parent. In the case of alienation, it is said there is little or no objectively reasonable cause for the child's rejection of the parent: N.R.G. v. G.R.G., 2015 BCSC 1062 at paras. 277-278.

[Emphasis added.]

[56] As was noted in Williamson at para. 43, the court may address a finding of alienation in a variety of ways. Those legal responses are many, but include, at the more extreme end, the remedy that D.M. seeks here, namely an order transferring sole custody or parenting time to him as the "rejected parent". At paras. 44-45 of Williamson, the court further noted that any remedy is driven solely by a consideration of the best interests of the child and that options may be more limited in relation to an older child, such as a teenager.

[57] T.M. points to substantial case law that emphasizes that an allegation of alienation is serious and requires serious consideration by the court: Williamson at para. 47. Any such allegation must be proved and the case law also suggests that admissible expert evidence on the issue is likely to be an important, if not essential, aspect of the evidentiary record: Williamson at para. 47.

[58] The approach of the Court is illustrated in Kanta v. Kanta, 2017 BCSC 1428. In that case, Justice Kent rejected a wholesale change of parenting sought at a chambers application, which was described as a "drastic remedy" at para. 2. Further, Kent J. found the absence of any expert testimony to support the allegations of alienation to be fatal, following Williamson: paras. 42 and 51.

[59] More to the point, this approach of the Court is found in cases relied upon by D.M., including A.A. v. S.N.A., 2007 BCCA 363; C.J.J. v. A.J., 2016 BCSC 676; H.J. v. P.J., 2020 BCSC 179; M.S.R. v. D.M.R., 2022 BCSC 1398. In all of these cases, findings of alienation were made after trial, and after consideration of expert evidence. D.M. cites one case--Richards-Rewt v. Richards-Rewt, 2015 BCSC 1391 where there was no expert opinion (para. 39)--although I would note that the Court only expressed "concern" about possible alienation and did not make a finding on that point: paras. 41 and 55.

[60] D.M. argues that T.M. is engaging in "active campaign of parental alienation" in order to achieve her long-held wish to have the Child live with her during the weekdays. He states that he has grave concerns that T.M. is not only implicitly condoning the Child's behavior, but that she is also actively facilitating the Child's decision-making and his movements in the community. D.M. argues that T.M. has consistently refused to take the Child to school or return him to D.M.'s residence on almost all occasions. D.M.'s detailed analysis of the Child's

movements, to the extent known, is said to give rise to the inference that, in addition to taking public transportation, the Child has been assisted in travelling to Bowen Island.

- [61] D.M. argues that T.M.'s credibility in terms of her involvement is very much suspect, given certain circumstances. In that respect, I agree that credibility issues arise with respect to T.M. Some examples include:
- a) During the June 2022 hearing, I expressed the view that T.M.'s evidence as to concerns about the Child, said to support the relief that she sought, but which concerns arose years earlier, was "troubling". Either she was not telling the truth or her failure to act earlier indicated failings in terms of a parent's care of a child;
 - b) On one occasion, T.M. was caught in a lie. In her Affidavit #11 sworn October 4, 2023, she stated that on September 26, 2023, she had no communication with the Child prior to him appearing at her home at 1:11 p.m. However, cell phone records later showed that she had a phone call with her son before he arrived at the residence; and
 - c) Also in her Affidavit #11, and in support of her application to appoint counsel for the Child, T.M. suggested that she had nothing to do with assisting the Child to meet with the Centre. D.M. later filed evidence setting out the results of his investigation of communications on the Child's cell phone, which showed many efforts by T.M., C.M. and a Bowen Island neighbour to assist the Child in dealing with the Centre. Only then, in her Affidavit #12 sworn October 9, 2023, did T.M. provide a detailed description of her, C.M.'s and her friend's involvement. As Kirchner J. described in the Kirchner RFJ:
- [45] the evidence persuades me that [T.M.], along with her partner and her friend, have been more active in assisting [the Child] in contacting legal counsel than [T.M.] lets on in her affidavit.
- [62] Leaving T.M.'s credibility issues aside, the uncontroversial evidence on these applications is that she has consistently immediately advised D.M. every time the Child has shown up at her home. Further, contrary to D.M.'s allegation, on a number of occasions, T.M., C.M. or other family members have returned the Child to school. T.M. has also either taken the Child to the Bowen Island/Snug Cove Ferry Terminal for pick-up in Horseshoe Bay or accompanied him on the ferry to Horseshoe Bay for that purpose.
- [63] I also accept T.M.'s evidence that she has punished the Child for his behavior and repeatedly asked the Child or D.M. to call each other to discuss the matter. She has made arrangements for the Child and D.M. to meet for pick-ups. She has arranged for counselling sessions for the Child and engaged with the school to attempt to continue at least some educational efforts on the Child's part.

- [64] Each party also levels accusations at the other concerning the situation. Both parties accuse the other of not dealing with the Child in an appropriate manner to get the situation back on track: D.M. refers to inappropriate comments by T.M. in the presence of the Child; T.M. accuses D.M. of taking an approach to the Child that is too severe and strict.
- [65] D.M. says that T.M. has done little to deal with the Child and return him to his care. He cites many authorities to the effect that a parent has an obligation to facilitate parenting in accordance with the agreed schedule or one that has been ordered: *Angus v. Angus*, 2013 BCSC 2414 at paras. 34, 37 and 42; *Waters v. Taylor*, 2021 BCSC 1572 at paras. 25, 27 and 31; *S.C. v. T.J.B.P.*, 2022 BCSC 418 at paras. 18-19.
- [66] However, I have found that T.M. has made some efforts to respect the parenting schedule and she had not withdrawn parenting time from D.M. The reality is that T.M. cannot simply bundle up a 13-year old boy and physically manhandle him into a car in order to force him, even temporarily, to go to his father's home when he refuses to do so.
- [67] Further, I agree with the conclusion at para. 44 of the *Kirchner* RFJ that the facts are not sufficiently clear here to support that T.M. has been coaching or facilitating the Child's travel, despite D.M.'s strongly held suspicions.
- [68] As stated in *Williamson*, an allegation of alienation is a serious one and must be proven to justify any relief. For the most part, I consider that the parents are struggling with the abrupt change in the Child's behavior that, by all accounts, is unusual. Dr. Colby found no evidence of alienation in the early months of 2023. Prior to September 12, 2023, there is no evidence to support that T.M. was attempting by subterfuge to alter the parenting that she had agreed to only months earlier. The situation over the last two months has no doubt been stressful for both parties and they have sought, unsuccessfully, to find a solution for the Child and themselves.
- [69] D.M.'s allegation of alienation is no doubt borne at least in part from what he considers as the Child's rejection of him and his home. He is searching for reasons for the Child's recent behavior, but those reasons are not clear. More importantly, the evidence does not support that T.M. has sought to, if not succeeded in, alienating the Child from D.M.
- [70] At its highest, D.M.'s concerns are based on suspicions, which I accept arose quite clearly from the circumstances past and present, including those that give rise to credibility concerns regarding T.M. However, suspicions are not proof and cannot be used to support these serious allegations.
- [71] Significantly, as I will discuss below, the evidence from the Child, based on the more recent counselling sessions, do not comport with the concept of alienation or even estrangement in terms of the Child refusing to have a relationship with his father. The Child is not rejecting D.M. The Child states that he still wishes to spend weekends with his father in Maple Ridge. The crux of the matter appears to be that the Child now has expressed a preference to go to school in West Vancouver and spend more time with his mother at her Bowen Island home

on the weekdays.

- [72] In summary, I decline to make any finding of alienation in respect of T.M. The only expert evidence, which is recent, would not support such a finding. In addition, the evidence on this interim application is insufficient to support such a finding, let alone the drastic remedy sought by D.M. to deny T.M. any parenting time. In that event, there is also no basis upon which to order a further s. 211 report to consider the alienation issue. Only recently, the parties engaged Dr. Colby who reported on that very issue and at great cost. There is no need to have the parties expend further substantial sums to address this issue at this time, even if the parties' incomes had supported that cost, which they do not.
- [73] I now turn to the specific and relevant factors set out in s. 37(2) of the FLA that provide an appropriate framework for the necessary discussion of the issues in determining the best interests of the Child.

Current Child's Views

- [74] Since this situation began, the Child and the parties have continued to meet with Mr. Gonzales in various counselling sessions. I have reports from some of those sessions that have revealed the Child's views. The sessions are:
- a) On September 13, 2023, the Child had a counselling session;
 - b) On September 20, 23 and 26, 2023, D.M. had counselling sessions;
 - c) On October 4, 2023, the parties met with Mr. Gonzales in what was described as a "joint parent session";
 - d) On October 6, 2023, D.M. and the Child met with Mr. Gonzales in what was described as a "dyad session". The Child stated that he had "no friends" at Westview, but he had friends at Rockridge. The Child stated that he disagreed with his parents' decision as to what school was best for him. The Child said that he was not angry with his father, but rather he just did not want to go to school at Westview. In response to stated concerns about his safety, the Child said that he would continue to behave that way "until he gets what he wants" and he could go to school at Rockridge. Both son and father told each other that they loved them and they hugged and kissed each other at the end;
 - e) On October 20, 2023, the Child had a counselling session; and
 - f) On October 28, 2023, the Child and D.M. had a further "dyad session". Mr. Gonzales noted a change in the Child in that he seemed somewhat "emboldened". The Child reiterated that he wanted to go to school, but not at Westview. He also said that he wanted to live with T.M. and that he would like to see his father every other weekend.

- [75] One aspect of the relief sought by T.M. was that I interview the Child. To some degree, that relief arose from the Child's own wishes. On October 2, 2023, the Child indicated to personnel at the Centre that, if he was denied the ability to have his own legal counsel (as did Kirchner J.), he would like to speak to the presiding judge.
- [76] D.M. initially opposed any judicial interview in his response materials. However, at the conclusion of counsel's submissions, D.M. did agree that I should interview the Child so as to have the Court hear his views directly.
- [77] On November 15, 2023, I interviewed the Child. The interview was conducted and recorded in the presence of the court clerk and the recording was sealed. At the conclusion of that interview, I provided a summary to the parties as to what was discussed at the interview and then invited any further submissions. My summary was:

I found the Child to be a well-mannered and thoughtful person. The Child displays maturity and self-awareness that more than satisfy me that he is able to voice his views from an independent position.

The Child discussed his life in both Maple Ridge and Bowen Island. He confirmed his love for both parents.

The Child talked about his schooling and the subjects he liked and disliked. He also spoke extensively of his participation in soccer. He is clearly passionate about the game and wants to continue to succeed to higher levels.

On the central issue, he is frustrated by the fact that his wish to reverse the parenting schedule has not been implemented, despite him expressing these views for some years now. The Child spoke of how his friends have become more and more important in his life as he has grown up. He does not consider that he has friends in Maple Ridge that have transitioned from his elementary school days. He wishes to develop his West Vancouver friendships - both in school and in his soccer life.

The Child described how he began missing school and travelling to Bowen Island out of frustration about his views not being respected by his parents. He is not concerned about his safety in terms of travelling on the transit system alone. He wants to go to school, rather than continuing with the home schooling he is now receiving. However, he is adamant that he wants to go to a West Vancouver school.

The Child confirmed to me what he had earlier advised [D.M.] during the dyad counselling session - namely, that he wishes to live with [T.M.] on Bowen Island during the weekdays and go to Rockridge Secondary School. He also wishes to have parenting time with [D.M.] on every other weekend, which he came up with so as to be able to spend time with his friends on Bowen Island/ West Vancouver on the alternate weekends. He is aware of [D.M.'s] concern about not seeing his son as much as before; however, the Child considers that [D.M.] can re-arrange his schedule to accommodate more time with him.

- [78] Counsel for the parties then indicated that each parent remained firm in their positions.
- [79] Having considered the evidence and having heard from the Child directly, I have no difficulty concluding that it is appropriate to consider the Child's views pursuant to s. 37(2) (b) of the FLA. The Child is now 13 years of age and will turn 14 in January 2024. I am satisfied that he displays a sufficient level of maturity to adequately understand the gravity of the issues at stake and to express his honestly held views.
- [80] I respectfully adopt the comments of Justice Gomery in *H.M.H. v. J.E.*, 2023 BCSC 922 regarding the significance of the age of the child expressing his or her views:
- [24] H's age matters for two reasons.
- [25] First, the views of a child who is the subject of a parenting order carry increasing weight with age. A court will rarely, if ever, attempt to override the considered views of a competent, older teenager concerning parenting time. The reasons for this are both principled and practical. The principled point is that heightened respect is due to the views of a more mature individual. The other point is that once teenagers are moving about in the world, they can make their own decisions as to where they will live, so that parenting orders must reasonably conform with their wishes to be practical: *O'Connell v. McIndoe* (1998), 1998 CanLII 5835 (B.C.C.A.), 56 B.C.L.R. (3d) 292 (C.A.) at para. 13; *L.G.P. v. C.F.B.*, 2018 BCSC 1168 at para. 16.
- [81] I conclude that the Child's views should be given weight at this application. The Child has been consistently expressing his current views for some time now to various psychologists. He continues to want his voice heard in terms of what decisions are to be made in respect of him. The Child is adamant that his wishes be respected and, in doing so, he seems to have gone beyond his earlier expressed concerns not to hurt the feelings of his parents. Having said that, the Child's views are not determinative, but must be considered in the overall context of the Child's best interests: *D.J.S. v. J.M.D.*, 2014 BCSC 1143 at para. 39.
- [82] The Child is now not just expressing his views, but implementing them whether his parents wish that or not. As the well-worn saying goes, the Child is now voting "with his feet".

Child's Health and Emotional Well-being and Need for Stability

- [83] Both parents have expressed the same concerns for their son in terms of his personal safety and the risks that are entailed by his unsanctioned travels. Those risks have been manifested on at least two occasions to the point where police and rescue personnel had to be called.
- [84] In addition, both parents express their concern for the harm or potential harm to the Child's education arising from the missed school time. Given the Child's previous diagnosis of dyslexia, their concerns are only heightened.

- [85] There continues to be risk to the Child if this untenable situation continues. The true emotions of the Child are to some degree unknown to the parents and the Court, although he is no doubt being assisted by Mr. Gonzales. D.M. has expressed repeatedly that the Child is behaving in a manner that he does not recognize. However, continually forcing the Child to live where he does not want risks increasing hostility on the part of the Child toward D.M.
- [86] The need to stabilize this situation is paramount. The only means of doing so is by changes to the current parenting arrangements. Understandably, neither parent has sought a continuation of the current regime enforceable by police action, which I agree should be avoided if at all possible.

Nature/Strength of the Child's Relationships and History of Care

- [87] I have no trouble concluding that the Child has strong and loving relationships with both parents. Both have provided the Child with stable homes and D.M. in particular has provided care and support during the weekdays in the context of the Child's schooling. In particular, despite my concerns about her credibility, I cannot conclude that T.M. has acted in a manner to justify the drastic remedy of a wholesale cancellation of her parenting of the Child for the foreseeable future, such as is sought by D.M.
- [88] Not unexpectedly, there are differences in the respective homes and the Child's relationships with his step-parents and the other children in their homes. Nevertheless, I see no difficulty in either situation in terms of endorsing or negating one household over the other.

Ability of the Parties to Exercise Her/His Responsibilities and Cooperate in Regard to the Child's Care

- [89] I also have no difficulty concluding that either parent here is able to exercise his or her responsibilities in an appropriate manner, including meeting the demands of providing the more immediate parenting for the Child to stabilize the situation.
- [90] Despite the increased tension, if not suspicion and hostility that has arisen since September 12, 2023, I conclude that the parties are capable of putting aside their differences for the sake of the Child's safety, security, well-being and stability. Simply put, they must work together in the best interests of the Child, which is paramount.

Overall Assessment of the Child's Best Interests

- [91] At bottom, we have a very determined child who is seemingly set in his views as to where he wants to live during the weekdays and where he wants to go to school. Given the Child's age and maturity, there is no reason not to give weight to his views. In addition, the consistency of his expressed views over time lends further weight to my conclusion that the Child's views are not capricious or, as alleged by D.M., borne from active alienation by his mother.

- [92] It is difficult to conclusively pinpoint the cause of the recent and alarming reaction of the Child to his circumstances. However, by all accounts, it can possibly be described as a manifestation of his refusal to accept his parent's agreements as to where he will live and go to school, arising from his increasing independence as a teenager in making his own decisions.
- [93] Generally speaking, the other s. 37(2) factors are fairly neutral in terms of either parent here providing the necessary stability and support for the Child's needs.
- [94] In assessing all of the s. 37(2) factors, I have been assisted by previous case authorities that have considered similar circumstances. Having said that, each case is to be decided on its own unique facts in terms of the assessment of any particular child's best interests.
- [95] In *O'Connell v. McIndoe* (1998), 56 B.C.L.R. (3d) 292, the court varied an order which originally awarded sole custody of a 13-year old boy to his mother. The child had run away from his mother's home on numerous occasions and wished to reside with his father.
- [96] Similar to what the Child is expressing here, the court noted in *O'Connell* at para. 11 that the child's continued behaviors of running away "demonstrated ... that he has the ability to frustrate a solution which he does not accept". Even though there was evidence that the father had alienated the child from his mother, the court found that it was in the best interests of the child to reside with the father. The court stated:
- [13] In order for custody orders relating to children in their teens to be practical, they must reasonably conform with the wishes of the child. See *Shapiro v. Shapiro* (1973), 33 D.L.R. (3d) 764 (B.C.C.A.) and *Alexander v. Alexander* 1988 CanLII 3385 (BC CA), (1988), 15 R.F.L. (3d) 363 (B.C.C.A.).
- [14] I believe it to be in Craig's best interests to return to his father's home and put his life back in order. This is not a perfect solution, but in my view, it is the only one that will work. I am concerned about the learned trial judge's finding, which I accept, that Craig needs counselling and therapy to deal with deeply-seated psychological problems. Accordingly, I would recommend, but not order, that the father see promptly to this need. Compulsion in this regard is counterproductive; it is too easily resisted. I would prefer to urge the father to act on his professed concern for Craig's best interests.
- [15] This decision will be profoundly disappointing to the mother. It may appear to her that the father has triumphed in his program to alienate her sons from her and that a 13-year-old is allowed to make decisions about his own life which are not in his best interests. It must be recognized, however, that the damage to the relationship with her sons, however it has been caused, cannot be repaired, and indeed will probably be exacerbated, by forcing teenagers to act against their will.

- [97] Similarly, in *Alexander v. Alexander*, [1988] B.C.J. No 1570 (C.A.), the court varied a custody order and awarded custody of the 14-year old boy to the mother. The child had continually asserted his wish to reside with the mother, after primarily residing with the father pursuant to a final order. The court stated:
- [12] This court is now faced with the decision as to what is best for this boy who has been in the middle of a protracted custody battle between two parents who are both equally well qualified to parent and who would each offer him a good home. What the child wishes is not necessarily best for the child, but there does come a point when at near adult years a child capable of responsible thought must now be deemed to be able to settle his own future in this important matter. Concomitant with that he must take the responsibility for his own actions. I think that that point has now been reached. For three years or more he has been unswerving in his wishes and no change is to be expected. It is not fair to push this boy to the point of rebellion and, consequently, I think that the change should be made sooner rather than later.
- [98] The common sense approach evident in *Alexander* was applied in *R-P.T. v. D-P.T.*, 2013 BCSC 732 where Justice Pearlman stated:
- [59] while what the child wishes is not necessarily best for the child, there does come a point when at near adult years a child capable of responsible thought must be deemed to be able to settle his or her own future on the matter of custody and access.
- [99] *Rashtian v. Baraghoush*, 2013 BCSC 2023 also involved similar facts. Following a trial, the Court ordered that the 12-year old child live primarily with the mother. Months later, the child had run away from his mother's house on a number of occasions, including one where police were involved to assist with the search. The Court ruled that, applying *O'Connell*, a material change in circumstances had arisen which necessitated a change in the parenting arrangements to allow the child to primarily live with his father, as he wished.
- [100] In *D.A.F. v. R.D.F.*, 2017 BCSC 873, the 12-year old child primarily resided with the father, based on a final consent order. A report on the child's views indicated that the child wanted to change his living arrangements to spend more time with the mother in her home and with other family members in that home and friends in the area. At paras. 34-35, Justice Smith again, as in *Rashtian*, applied *O'Connell* and varied the parenting arrangements. Justice Smith further stated:
- [40] However, this matter must be decided on the basis of R's best interests. His clearly stated views are entitled to considerable weight... I find it is not in R's interests to force him to accept continuation of a living arrangement he clearly wants to change. As a practical matter, an order contrary to his wishes would likely become effectively unenforceable in the near future. It would also have the potential to damage the claimant's relationship with R, if R blamed him for blocking a change.

- [101] Finally, O'Connell was recently cited in *S.M.S. v. S.M.U.*, 2021 BCSC 933. In that case, a 15-year old child had refused to spend time with her father, pursuant to a separation agreement which provided for shared parenting time. The child had expressed her views as to where she wanted to live and, ultimately, she had relocated to her mother's home on her own. In the face of competing applications by the parents similar to those here, at paras. 45-49, the Court found that it was in the child's best interests to respect her choice of residence.
- [102] Overall, I consider that it is in the Child's best interests to adjust his parenting schedule to allow him to live with T.M. during the weekdays and attend Rockridge in West Vancouver.
- [103] As did the court in O'Connell, I recognize that D.M. will be deeply disappointed and possibly hurt by this conclusion. I would strongly suggest that D.M. view this more as allowing his son to exercise more agency in making life choices as he moves through his teenage years and into adulthood, rather than a rejection of him and his family life in Maple Ridge. Again, I emphasize that the Child does wish to continue to spend time with his father.
- [104] I agree that D.M. should continue to have regular access to the Child so that he can continue to foster the close and loving relationship that he has had with his son since his birth. Reinforcement of the father/son relationship into the future will be important to the Child.
- [105] T.M. has suggested an alternating weekend access for D.M., based on the Child's expressed statement during one counselling session. I consider that it is important to foster D.M.'s parenting in accordance with the Child's wishes. Therefore, I am ordering access every other weekend, which substantially results in a reversal of the parenting under the Final Order. Obviously, that order is subject to the agreement of the parties and I would predict, but not order, may be subject to the views of the Child, given his current display of independence in terms of dictating his own schedule.
- [106] Part of the relief sought by D.M. was to compel the parties and the Child to participate in a specialized counselling program, as recommended by Alyson Jones & Associates. The programs on offer include "Specialized Services" for complex cases and multi-level family counselling or the "Family Forward Program" for cases of reunification or estrangement.
- [107] For the reasons expressed above, I do not consider that any alienation issues arise at this time that require that type of counselling. At present, the parties and the Child continue to participate in family counselling with Mr. Gonzales at Alyson Jones & Associates, which does not sound materially different than what is proposed.

[108] Accordingly, I see no need to direct that the parties and the Child embark upon another counselling program. I do see the need to continue the current counselling program that has been underway since at least mid-September 2023. I order that this counselling continue, with some emphasis on the immediate needs of this family, as the Child and the parties adjust to the new arrangements that I am ordering.

Conclusion

[109] The relief sought in D.M.'s application is dismissed.

[110] With respect to T.M.'s application, I grant the following interim orders as follows:

- a) Paragraphs 4-6 of the Final Order are suspended until the end of June 2024, at which time this Court will review the issue of the Child's parenting schedule, subject to any agreement of the parties;
- b) Neither parent will schedule any activities for the Child or allow any employment to be undertaken by the Child post-June 2024, save with the consent of the other parent;
- c) The Child will be immediately enrolled at Rockridge Secondary School in West Vancouver, BC;
- d) Commencing November 24, 2023, D.M. shall have parenting time with the Child every other weekend from after school on Friday (or Thursday if Friday is a non-instructional day) to 6:00 p.m. on Sunday (or Monday if it is a non-instructional day), subject to any other or alternative agreement that may be reached by the parties;
- e) The parent commencing their parenting time shall be responsible for picking up the Child from Rockridge, the Horseshoe Bay Ferry Terminal or D.M.'s residence; and
- f) The parties will continue to facilitate the Child's participation in the counselling program with Mr. Gonzales at Alyson Jones & Associates that is currently underway. The cost of this counselling will continue to be equally shared by the parties.

[111] Finally, the parties will bear their own costs of these applications.

"Fitzpatrick J."

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