
CANADA / JUDGMENT

T.T. v. S.Z.T.

2020 BCSC 1628

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1628 T.T. v. S.Z.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.T. v. S.Z.T.,

2020 BCSC 1628

Date: 20201030

Docket: E200735

Registry: Vancouver

Between:

T.S.T. also known as T.T.

Claimant

And

S.Z.T.

Respondent

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for Claimant:

A. Wormeli

Counsel for Respondent:

K. Hill

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 5, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2020

Overview

- [1] During their marriage of about 17 months duration, T.T. and S.Z.T. lived with T.T.'s parents in Burnaby, British Columbia and had a child, N.T., born on April 7, 2019. The parties separated in October 2019 at which time they agreed upon access/parenting time between T.T. and N.T.
- [2] In late 2019, S.Z.T. began spending time in Saanich B.C. and found a job in the area. She located a pediatrician for N.T. without informing T.T. In March 2020, S.Z.T. decided to stay in Saanich with N.T. due to the Covid-19 pandemic. In May 2020, T.T. brought an urgent application for her to return N.T. to the Lower Mainland. S.Z.T. told the Court that she was sheltering in place and had not decided to relocate to Saanich. Master Vos held that to be reasonable and ordered that T.T.'s parenting time alternate between the Victoria area and the Lower Mainland. In June 2020, S.Z.T. advised T.T. that she intends to relocate to Saanich with N.T.
- [3] In his application, T.T. seeks the following orders:
- a) an order prohibiting either party to change N.T.'s residence from the Lower Mainland;
 - b) increasing T.T.'s access/parenting time to equal parenting time from three five-hour periods a week agreed upon by the parties in October 2019;
 - c) an order requiring a publicly funded parenting capacity and assessment report to be undertaken pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25; and
 - d) an order compelling S.Z.T. to produce certain documents.
- [4] S.Z.T. consents to the s. 211 report and to the document disclosure, so long as it is mutual. S.Z.T. opposes the applications pertaining to N.T.'s residence and T.T.'s parenting time on the basis that the parties already agreed to parenting time, N.T. can reside in Saanich with S.Z.T. within the agreed-upon parenting terms, and the status quo should not be changed at this juncture.
- [5] The issues are:
1. Should the issues pertaining to N.T.'s residence and access/parenting be decided pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and/or the Family Law Act?

2. Is S.Z.T.'s move to Saanich with N.T. a relocation?
 3. What is in the best interests of N.T. with regard to residence and parenting time?
- [6] I have determined that the issues should be decided under the Divorce Act, S.Z.T.'s move to Saanich with N.T. is a relocation, it is in the best interests of N.T. that her access time with T.T. increase gradually to two 24 hour periods each week and her residence remain in the Lower Mainland pending receipt of the s. 211 report.
- [7] As an aside, the terminology under the legislative regimes differs. The Divorce Act uses the terms custody and access and the Family Law Act uses the terms guardianship and parenting. The parties refer to "parenting" in relation to their agreement made in October 2019. They both used that phrase in this application when arguing whether that arrangement should change. I will use the term when referring to their submissions and the October 2019 arrangement they made without it being a comment on whether the Divorce Act or the Family Law Act should govern.

The Applicable Statutory Regime

- [8] T.T. submits that the applications should be decided under the Divorce Act because they are seeking divorce and because the doctrine of paramountcy dictates that the Divorce Act should govern. S.Z.T. submits that the Family Law Act should govern because both parties plead the Family Law Act on parenting issues.
- [9] In *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20 the Court of Appeal said the following about mobility and relocation as between the Divorce Act and the Family Law Act:
- [20] The preferable basis for consideration of a child mobility issue is s. 16 of the Divorce Act where available, as the federal legislation is paramount (or where a custody order under s. 16 already exists, s. 17).
- [10] Many decisions of this court have followed this approach. However, other cases have questioned whether application of the Family Law Act provisions frustrate the purpose of the Divorce Act engaging the doctrine of paramountcy: *B.W.H. v. J.A.H.*, 2014 BCSC 2512, at para. 47; *B.D.M. v. A.E.M.*, 2014 BCSC 453 at paras. 113 - 120. In *B.D.M.*, Mr. Justice Sewell held the Family Law Act did not "frustrate" the purpose of s. 16 of the Divorce Act, which governs custody orders. Rather, he found both the Divorce Act and the Family Law Act were permissive in terms of the factors the court can consider regarding mobility/relocation.
- [11] Whether the applicable statute is the Divorce Act or the Family Law Act, the court must undertake a blended analysis that considers relocation as part of its determination of the parenting arrangement (*K.W. v. L.H.*, 2018 BCCA 204 at paras. 108, 110). The analysis "requires a balancing of all relevant factors, including a parent's proposed move with the child to a new community, in deciding what is in the child's best interests": *Falvai v. Falvai*, 2008 BCCA 503 at para. 25.

The Pleadings

- [12] S.Z.T. argues that the pleadings dictate which regime should apply and because both parties cite the Family Law Act on parenting issues, it applies.
- [13] I am not convinced that is the correct approach. The parties also seek a divorce and plead the Divorce Act. Where they do so, matters such as custody, child support, and spousal support are ancillary orders to be made under the Divorce Act unless it cannot be said that the Family Law Act will frustrate the Divorce Act. I am also not persuaded that the pleadings point to the Family Law Act as solely selected to address parenting issues.
- [14] T.T. filed a notice of family claim on April 16, 2020, in which he pleaded an informal parenting arrangement in Schedule 2, Part 3. In Schedule 2, which deals with children, he pleaded the Family Law Act.
- [15] S.Z.T. filed a response to family claim on June 22, 2020, after Master Vos' order, in which she denied the informal parenting arrangement and asserted that Master Vos' order contained the parenting arrangements. In her counterclaim filed on June 30, 2020, she sought a divorce. She indicated that she was relying on the Family Law Act with respect to the parenting arrangement (Schedule 2, Part 4) and the Divorce Act and the Family Law Act in relation to spousal and child support (Schedule 3, Part 2 and 7).
- [16] In his response to counterclaim filed July 14, 2020, T.T. disagreed with all of S.Z.T.'s claims except the claim for divorce.
- [17] On this application, T.T.'s notice of application stipulates that he seeks an order pursuant to s. 16 of the Divorce Act, or in the alternative, under the Family Law Act. He relies on both the Divorce Act and the Family Law Act as legal bases (Part 3). In her application response, S.Z.T. relied on the Family Law Act as a legal basis.
- [18] In *Venables v. Venables*, 2019 BCCA 281, noting the limitations of the Family Rules of Court templates (at paras. 51, 54), the Court of Appeal endorsed an approach to family law claims that focuses on ensuring justice is done between the parties (at paras. 62-63) in part noting the "limitations of the template pleadings" (at para. 54). Provided the parties are aware of the opposing party's position, the formality of the pleadings will not dictate what statutory provisions the court can rely on to resolve the dispute.
- [19] In *M.M. v. L.M.*, 2020 BCSC 798, the parties pleaded the Family Law Act and the Divorce Act in different combinations in relation to their different claims, both by way of notice of family claim and counterclaim. Mr. Justice Hori concluded that the parenting arrangement should be dealt with under the Family Law Act because that was the statute pleaded by the claimant in relation to the parenting arrangement (at para. 71), even though the respondent pleaded both the Family Law Act and the Divorce Act in her counterclaim.

- [20] In my view, given that both parties' pleadings engage the Divorce Act for some purposes, ticking the box for the Family Law Act under parenting arrangement does not preclude T.T. from relying on the Divorce Act in relation to custody, access, and residence of N.T., especially as his notice of application seeks relief under the Divorce Act.

Comparison of the Legislative Regimes

- [21] The question is whether the doctrine of paramountcy is engaged because there is an operational or meaningful difference between the Divorce Act and the Family Law Act regimes.
- [22] The Divorce Act does not include explicit provisions dealing with mobility (the term used when considering moving a child's residence). Section 16(7) of the Divorce Act addresses the residence of a child as follows:

the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

- [23] Because of the lack of comprehensive statutory direction, the common law has developed a seven factor framework for analysis of mobility issues, set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 49. The framework directs that the court focus on the best interests of the child as opposed to the interests and rights of the parents. There is expressly no legal presumption in favour of the custodial parent, while according great respect to the views of the custodial parent. The court must consider identified considerations in determining the best interests of the child (the para. 49(7) considerations). The "importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?" (para.49).
- [24] *Gordon* concerned an application to vary an existing custody order. Where, as here, there is no existing custody or primary parenting order and there is a claim for increased access combined with mobility issues, a blended analysis is used: *N.A.F. v. C.D.M.*, 2013 BCSC 2294 at para. 27. This approach was summarized in *T.K. v. R.J.H.A.*, 2015 BCCA 8 at para 47 as a modification to the test in *Gordon*. The modified test involves five considerations set out at para. 49(7) of *Gordon* taking into account that there is no "custodial parent" or "access parent".
- [25] The Family Law Act addresses relocation in two places: s. 46 and Division 6 of Part 4 (ss. 65 - 71).

- [26] Section 46 addresses relocation in the absence of a written agreement or an order respecting parenting arrangements (s. 46(1)(a)); the framework in Division 6 of Part 4 applies when there is a written agreement or an order. Both Family Law Act regimes require, as a threshold matter, that the change in location would "reasonably be expected to have a significant impact on [the] child's relationship" with the other parent, see ss. 46(1)(c) and 65(1), respectively.
- [27] Section 46(2) of the Family Law Act requires the court to consider the best interests of the child in accordance with s. 37(2) of the Family Law Act and the reasons for the change of the child's residence. The court must not consider whether the guardian who is planning to move would do so without the child.
- [28] S.Z.T. relies on Division 6 of Part 4 of the Family Law Act in her application response. Division 6 of Part 4 applies where there has been a written agreement or previous order on parenting. It provides that the relocating guardian must give 60 days notice of the date and place of the relocation. It provides that if the relocating guardian and the other guardian do not have substantially the same amount of time with the child, the relocating guardian must satisfy the court that the proposed relocation is made in good faith and that the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to have contact with the child, and other persons who have a significant role in the child's life. If those requirements are met, the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise. S.Z.T. relies on Master Vos' order as an order that triggers Division 6 in Part 4 instead of s. 46.
- [29] It is not clear whether an interim order has this affect. In K.W., the Court of Appeal rejected the notion that any type of interim order on parenting would engage Division 6 of Part 4. Section 46 is to apply where the parties have no expectations about a parenting regime arising from an agreement in writing or a court order. Division 6 of Part 4 applies where the expectations of the parties have been affected by a court order granted before relocation issues have been raised. An interim order made after the relocation issue is pending does not affect the expectations of the parties and does not trigger Division 6 of Part 4: K.W. at paras. 91 - 92. The Court of Appeal declined to decide which regime would apply when an interim order is made "in advance of any claim or notice of intention to relocate". Subsequent to K.W., this court has ruled interim orders made in advance of a relocation claim trigger Division 6 of Part 4 see, D.L.R.A. v. S.K.C., 2018 BCSC 1472 at paras. 96 - 106.
- [30] In this case, at the time of Master Vos' order, T.T. had formally raised relocation in the notice of application that was heard by Master Vos. S.Z.T. told Master Vos she had not decided whether to relocate and Master Vos decided the issue was "premature": T.T. v. S.Z.T. (May 15, 2020), Vancouver No. E200735 (B.C.S.C.) at para. 28. A few weeks later, S.Z.T. gave notice that she intended to relocate.

- [31] There is evidence that gives rise to a concern as to whether S.Z.T. had decided to relocate by the time of the hearing before Master Vos, notwithstanding what she told Master Vos. S.Z.T. obtained a job in Saanich six months earlier, telling that employer she hoped to permanently move to Vancouver Island. Master Vos' reasons state that S.Z.T. had recently obtained employment in Victoria, not that she had done so six months earlier. She sought out a pediatrician in Victoria in March 2020. She had ceased negotiations about returning to work after her maternity leave with her employer in the Lower Mainland and a few days prior to the hearing before Master Vos, her Lower Mainland employer wrote her and advised her that it considered her to have abandoned her employment because she had not returned to work.
- [32] Accordingly, there is an argument that Master Vos' order was made while the mobility issue was pending and was not made "in advance of any claim or notice of intention to relocate" (K.W. at paras. 92-93). If this argument were to succeed, this application would be governed by s. 46.
- [33] Some cases have described the relocation provisions in the Family Law Act as inconsistent with the Divorce Act given that s. 46 of the Family Law Act mandates the consideration of the reasons for the proposed change, while there is no such similar provision in the Divorce Act, Gordon, or the jurisprudence that follows it: see the trial decision in T.K. v. R.J.H.A., 2013 BCSC 2112 at para. 39. Gordon prohibits consideration of the relocating parent's reasons for the relocation except "in the exceptional case where it is relevant to that parent's ability to meet the needs of the child" (at para. 49(7)).
- [34] Recently, the Court of Appeal emphasized this difference in K.W. at para. 104, but also stated that the reasons for the proposed move are legitimate considerations for the judge to weigh in determining whether the move is in the child's best interests, citing its prior decision in Stav v. Stav, 2012 BCCA 154, a case decided under the Divorce Act applying the Gordon framework. See also T.K. at para. 57. In Duggan v. White, 2019 BCCA 200 at paras. 13 - 20, the Court of Appeal diminished the differences between the regimes, stating that the paramount focus is the best interests of the child, although there may be some operational differences.
- [35] These cases assess the extent of the differences in the regimes as between s. 46 of the Family Law Act and the Gordon regime developed under the Divorce Act. In B.D.M., Mr. Justice Sewell's determination that paramountcy was not engaged was made in the context of the provisions pertaining to parenting generally, not the provisions and law pertaining to mobility and relocation.
- [36] As discussed, above, this case requires determining whether s. 46 or Division 6 of Part 4 are the applicable Family Law Act provisions. If the latter, the court is not required to consider the reasons for relocation, but rather whether 60 days' notice of the relocation has been given, that the relocation has been undertaken in good faith, and that arrangements have been made to preserve the child's relationship with other guardians, persons entitled to contact, and other important persons. If so, the relocation is presumed to be in the best

interests of the child and the onus shifts to the non re-locating parent to show otherwise.

- [37] I conclude that if Division 6 of Part 4 is the Family Law Act regime that applies, the differences between the regimes are pronounced because the Gordon framework contains no presumption about the best interests of the child.
- [38] This case involves difficulties applying either s. 46 or Division 6 of Part 4 of the Family Law Act. In particular, the difficulty in this case concerns the timing of S.Z.T.'s decision to relocate and her evidence regarding that decision compared to other evidence, raising credibility concerns which cannot be addressed adequately on affidavits. This creates difficulties for determining which framework to apply under the Family Law Act, for considering her reasons for relocating if s. 46 applies or for evaluating whether her decision was made in good faith under Division 6, Part 4. If the analysis is undertaken pursuant to Division 6 of Part 4, there are different problems because S.Z.T. did not give 60 days' notice of the date and place of relocation; rather she relocated and then gave notice.
- [39] The difficulties also accentuate the differences in the Family Law Act and the Divorce Act. Under the Divorce Act approach, her reasons for relocating are only relevant to the extent that they relate to her ability to provide for N.T. This narrower relevance reduces concerns with relying on affidavit evidence where there are credibility concerns.
- [40] The jurisprudence demonstrates that over time, the courts have come to see the differences in the Divorce Act and Family Law Act regimes as being less impactful in most cases where s. 46 of the Family Law Act is in play. In such cases, it is less likely that application of the Family Law Act will frustrate the Divorce Act. At the same time, Hejzlar remains good law and if, on the facts of the case, there is an operational difference that leads to frustration, the Divorce Act must govern.
- [41] If S.Z.T. is correct that Division 6 of Part 4 of the Family Law Act applies, it will operate to frustrate the Divorce Act because, assuming the evidentiary concerns do not preclude a finding of good faith, such a finding would result in the presumption that the relocation is in N.T.'s best interests and so shift the onus to T.T. to demonstrate that the relocation is not in N.T.'s best interests. Although the focus is still on the best interests of the child, the factors that trigger the presumption do not subsume the extent of the inquiry that takes place under the Gordon framework. I conclude a legislative direction to presume a move is in the best interests of the child to be operationally different than the Divorce Act approach. It may lead to a meaningful difference in the outcome.
- [42] I conclude that in this case there is an operational difference between the two regimes such that the Divorce Act may be frustrated. Given these concerns regarding paramountcy, the Divorce Act should govern.

Access and Residence

- [43] Pursuant to the agreement that the parties made when they separated in October 2015 when N.T. was about six months old, T.T. spends time with N.T. on Fridays, Saturdays and Sundays from 1 pm until 6 pm. Prior to Master Vos' order, with a few exceptions, N.T.'s time with T.T. was spent at T.T.'s residence in Burnaby where he lives with his parents.
- [44] S.Z.T.'s parents live in Saanich, B.C. S.Z.T. deposed that after the separation she began spending Monday to Thursday in Saanich and returning to the Lower Mainland for T.T. and N.T. to have parenting time Friday through Sunday.
- [45] At the time, S.Z.T. was on maternity leave. She was scheduled to return to her pre-maternity leave employment in late March 2020. She applied for work in October 2019. She applied for positions in the Lower Mainland and on Vancouver Island. She told two prospective Vancouver Island employers that she hoped to permanently relocate to Vancouver Island during this process. She obtained a part-time job in the Victoria / Saanich area in her field of human relations in November 2019, where she has worked until the present.
- [46] The evidence suggests that S.Z.T. decided to keep this information from T.T. In December 2019, S.Z.T. asked T.T. to assist her by providing her with \$1,000 per month of financial support. T.T. replied that he would. In the same exchange of text messages, T.T. asked S.Z.T. how much income she had from employment insurance. S.Z.T. did not answer that question but reminded T.T. that he had said he would help her if she needed financial help. In the exchange, S.Z.T. referred to the stresses of being on E.I. At this time, S.Z.T. had already secured her new job but did not disclose that to T.T. in answering the question about employment insurance.
- [47] On a few occasions between November 2019 and March 2020, S.Z.T. did not return to the Lower Mainland for N.T.'s time with T.T. For example, over the Christmas holidays at the end of 2019, S.Z.T. asked T.T. if he would agree to miss one of his afternoons with N.T. so that S.Z.T. could stay in Saanich to celebrate her mother's birthday. According to T.T., he agreed to forgo this afternoon for the purpose requested by S.Z.T. However, S.Z.T. did not return with N.T. for the second and third days of T.T.'s time with N.T. that weekend. In February 2020, S.Z.T. advised T.T. that she was not going to return to the Lower Mainland with N.T. on a particular weekend because her sister, with whom she stayed in Burnaby, had returned from Whistler and S.Z.T. was concerned about possible exposure to the Covid-19 virus. On that weekend, T.T. travelled to Saanich to spend time with N.T.
- [48] N.T. had a pediatrician in Burnaby whom she had seen since birth. In March 2020, S.Z.T. took her to see a pediatrician in Victoria. The Victoria pediatrician wrote a consult note dated March 25, 2020, in which she reported that N.T. and S.Z.T. were living in Victoria, where S.Z.T. was working. The pediatrician made plans to see N.T. in the next two months.
- [49] In March 2020, S.Z.T. advised T.T. that she would not return to Burnaby because of the Covid-19 pandemic.

- [50] T.T. sought to have an urgent application heard pursuant to the procedures then in place under the Covid-19 restrictions on court hearings. During the hearing before Master Vos, S.Z.T.'s counsel characterized the parenting time status quo as being back and forth between Saanich and the Lower Mainland. It does not appear that the reasons for the back and forth as described above were in evidence before Master Vos.
- [51] Master Vos held that the relocation issue was premature, the application was not urgent, and it was appropriate for S.Z.T. to have chosen to shelter at her parents' residence because the alternative was to reside in Burnaby with her sister, who is a health care worker. Master Vos decided the parenting arrangements the parties had agreed to in October 2019 should continue with the modification that every other weekend the parenting time between T.T. and N.T. should occur where S.Z.T. designates and on the other weekends it would occur at T.T.'s residence. He ordered T.T. to pay for S.Z.T.'s travel costs.
- [52] Subsequent to Master Vos' order, when T.T. travels to Saanich for access time with N.T., they have it in a motel as T.T. does not have a residence available to him in Saanich for their time together.

Is a Move from Burnaby to Saanich a Relocation?

- [53] In considering the issue of relocation, I must first answer the threshold question regarding whether moving from Burnaby to Saanich constitutes a material change: Gordon at para. 14.
- [54] In Gordon at para. 14, the Court said that a "move to a neighbouring town might not affect the child or the parents' ability to meet its needs in any significant way." However, when a child enjoys "frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child."
- [55] In *Berry v. Berry*, 2013 BCSC 1095, Master MacNaughton, as she then was, concluded a move from Surrey to North Vancouver was not a relocation under either the Divorce Act or the Family Law Act (at para. 19).
- [56] In *Wong v. Rooney*, 2016 BCSC 1166, the parties were living separate and apart in the same residence in Vancouver and the father wanted to relocate with the child to Sechelt. Madam Justice Fisher distinguished *Berry* because a one-way trip to Sechelt from the mother's residence was well over two hours and required a ferry. The two locations could not "be described as communities that are within commuting distance from each other in the sense described in *Berry*" (at para. 29 of *Wong*).
- [57] In my view, these circumstances are like *Wong*. In addition, given that due to the pandemic T.T. has been exercising his parenting time in a motel and there is no indication this will change in the near future, the relocation has a material impact on his access time with N.T.
- [58] Accordingly, the move from Burnaby to Saanich is a material change and so meets the threshold requirement for being a relocation.

Best Interests of N.T.

[59] The factors that Gordon requires be considered when determining N.T.'s best interests are:

- (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.

[60] I will consider each of these factors except N.T.'s views. N.T. was 16 months as the time this application was argued so her views cannot be ascertained.

[61] In undertaking this analysis, I am mindful that in *Nunweiler v. Nunweiler*, 2000 BCCA 300 at para. 28, Madam Justice Saunders explained that there are three significant features to the *Gordon v. Goertz* framework: (1) the court may 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; (2) the decision confirms the principle of maximum contact set out in s. 16(10) of the *Divorce Act*, by directing the court to consider the willingness of a parent to facilitate contact while noting that this consideration is subordinate to the best interests of the child; and (3) the analysis is approached from the perspective of respect for a parent's decision to live and work where he or she chooses, barring an improper motive.

Existing Custody Arrangement and Relationship between N.T and Her Parents

[62] The informal arrangement between the parties is that N.T. is with S.Z.T. other than from 1 pm to 6 pm. On Fridays, Saturdays and Sundays when she is with T.T. He seeks to increase his access time to equal access time on a 2/2/3 rotating schedule.

[63] Although both parties criticize the other's parenting, neither party submits that there is anything but a strong relationship between N.T. and both her parents.

- [64] S.Z.T. submits that N.T.'s best interests are served by the current arrangement in which S.Z.T. and N.T. have the support of S.Z.T.'s parents, including day care for N.T., and free accommodation with the access time between N.T. and T.T. as agreed upon. She submits that granting the orders that T.T. seeks would alter the status quo and courts are reluctant to do that on an interlocutory basis, citing *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403 and *Poole v. Poole*, 1999 BCCA 203.
- [65] The case law urges caution when disturbing the status quo because it may affect "circumstances which will create the most stable, least disruptive environment for the child": *Poole*, at para. 23. This view of the status quo is inextricably bound up with the best interests of the child: *Poole* also at para. 23. The significance of the status quo is reduced when it is short-lived or one party makes a unilateral decision to change the arrangement, such as moving: *E.D. v. B.L.*, 2020 BCPC 114 at paras. 42 - 43, citing *P.D.B. v. A.J.B.*, 2020 ABQB 298 at para. 18 and *L.M.B. v. F.J.D.*, 2020 ONCJ 239 at paras. 29 - 31. As Madam Justice Groper observed, in *Nojkovic v. Panjkovic*, 2010 BCSC 1060 at para. 36: "[t]he difficulty here is that in a two-year olds' life, status quo is a hard concept to address."
- [66] In *Fitzgibbon*, at para. 22, the Court of Appeal explained that interim orders are designed to maintain the status quo until the issues regarding the best interests of the child can be fully canvassed at trial. There are, of course, exceptions to this where the best interests of the child are not served by what one parent asserts to be the status quo. As described in *Poole*, the status quo is the servant of the best interests of the child, not the other way around.
- [67] S.Z.T. defines the status quo as the arrangement the parties made in October 2019 with Master Vos' modification about where T.T.'s access time shall take place and who shall pay for the travel, and includes that she and N.T. live with S.Z.T.'s parents in Saanich. S.Z.T. points to a passage in Master Vos' reasons in which he said the status quo included the parties' going back and forth between the Lower Mainland and Victoria. S.Z.T. asserts that N.T. is living and thriving in Saanich where S.Z.T.'s parents care for her while S.Z.T. works. She asserts that the home in which they live is better than S.Z.T. could afford in the Lower Mainland.
- [68] I do not accept that this is the status quo. Similarly, I do not accept the current circumstances are the type of status quo that the court should leave intact pre-trial.
- [69] The parties made an informal arrangement when N.T. was six months old for T.T. to have time with her father. The duration of the arrangement and the location of the access were not expressed in the agreement, which was made over text. Given N.T.'s age and the fact that S.Z.T. was on maternity leave at the time but was to return to work in about five months, the circumstances were bound to change and it could not be said to have created a status quo. The evidence before me is that the parties had both been living in the Lower Mainland for 10 years and had not discussed moving. It cannot be that if the parties created a status quo with that informal arrangement, it included that N.T. and T.T.'s access time would be in Saanich or involve two ferry trips for one of them each week.

- [70] By spending most of her time in Saanich and obtaining a job there, S.Z.T. set out down a path of creating a different status quo than the informal arrangement. By intention or not, she disrupted the then status quo by taking N.T. away from the place where she lived and frustrated the ability of N.T. and T.T. to have meaningful time together in the short term and long term. Even before the Covid-19 state of emergency, S.Z.T. had on, a few occasions, provided reasons for not returning to the Lower Mainland for T.T.'s access time. T.T. tolerated this until S.Z.T. advised of her intention to not return for the foreseeable future due to Covid-19 at which time T.T. immediately sought an order preventing the relocation.
- [71] Master Vos' order cannot be taken to have created a status quo or entrenched the status quo that S.Z.T. unilaterally created. His decision was highly influenced by the then-prevailing circumstances of the Covid-19 pandemic, particularly his view that S.Z.T.'s decision to shelter at her parents' residence was reasonable. The full extent of the public health recommendations and directives in place at that time that informed the reasonableness of that decision are no longer all in play.
- [72] S.Z.T. also asserts that the current arrangement is in N.T.'s best interests because of the support she receives from her parents and other family members. I do not doubt the emotional support and child care support that S.Z.T. received from her parents was extremely beneficial to her, and therefore to N.T., during the weeks and months following the separation. Prior to separation, T.T., S.Z.T. and N.T. were living with T.T.'s parents. S.Z.T. was on maternity leave and receiving employment insurance. N.T. was six months old and still nursing. The care requirements for a six month old child are intense and very difficult to do alone. It is natural that she would seek out the comfort and support of her parents in such a difficult time, including caring for N.T. Leaving aside that she sought and obtained employment and a pediatrician for N.T. there without telling T.T., when the COVID-19 pandemic hit, it was again natural that she should seek to shelter there in a larger home with support for N.T.'s day to day care from her parents rather than returning to her sister's apartment or trying to find accommodation the Lower Mainland.
- [73] While it is understandable how the situation arose, there are several problems with S.Z.T.'s assertion that this arrangement is in N.T.'s best interests to continue. First, the post-separation circumstances were temporary and transitory in the sense that the intensity of caring for an infant as a single parent would ease both as she adjusted to it and as N.T. aged.
- [74] Second, T.T.'s parents are prepared to assist with free child care in the Lower Mainland, as they do with N.T.'s cousins (the children of T.T.'s siblings). S.Z.T. does not embrace this option because she believes T.T.'s mother is too busy with her other grandchildren. I note that T.T. also has reservations about S.Z.T.'s parents as caregivers. The evidence on this application is not such that I can determine that issue either way.
- [75] Third, S.Z.T.'s determination to relocate to Saanich does not take into account that this arrangement limits N.T.'s ability to have increased time and more natural time with her father, ie: real daughter-father time, not defined by ferry rides and visits in motels. S.Z.T.

does not acknowledge this detriment which must be taken into account in determining N.T.'s best interests. It is a matter of real concern that a parent submits an arrangement as being in the best interest of such a young child without acknowledging that there are aspects of it which are not beneficial.

- [76] Finally, the public health orders that required sheltering in place, limited ferry travel except for essential purposes, and limited day care options to parents of front line health care workers are no longer in place. The pandemic persists, but public health management of it has changed. The current reality, or "new normal" as it is called, does not provide a rationale for T.T.'s access time to accommodate S.Z.T. and N.T. "sheltering in place" in Saanich as Master Vos decided.
- [77] The evidence on this application is that S.Z.T. has real, valuable support that is of benefit to N.T. in Saanich. Both T.T. and S.Z.T. also have support from T.T.'s parents and siblings in the Lower Mainland. I do not view that the benefit of the Saanich support outweighs the detriment to N.T. of her time with her father being constrained and limited by the logistics of the back and forth travel.

Maximizing Contact

- [78] Section 16(10) of the Divorce Act provides that in making section 16 custody and access orders, 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".
- [79] In K.W., the court noted that in certain cases the reduction of contact between a parent and child may be sufficient reason to deny a relocation application. In *Walker v. Maxwell*, 2014 BCSC 2357, aff'd 2015 BCCA 282, the parties' daughter was two years' old. The court accepted that a move at that young age would be detrimental for the child because it would endanger the age-appropriate bonding with her father.
- [80] However, maintaining the same contact between the non-relocating parent and the child cannot overwhelm the analysis; rather, it is one factor to be considered and must be subordinated to the overall consideration of the best interests of the child, K.W. at para. 132, citing Stav and Nunweiler.
- [81] Below, I address the issue of access time between N.T. and T.T. as part of the blended analysis on access and mobility. I find that it is in the best interests of N.T. to increase the access time between her and T.T. gradually, pending the s. 211 report and subject to change on the basis of the recommendations made in that report once it is received or at the eventual trial of the matter. Relocation to Saanich will make the access time I have determined to be in her best interests pending the s. 211 report difficult but not impossible.

- [82] I also consider that as N.T. ages, one would expect that, barring evidence that T.T. is not able to parent, it would be very unusual that the access time between him and N.T. would remain as the parties agreed or even as I have increased it. If relocation now precludes the optimal access time cannot be achieved in the future because of the relocation, then allowing for relocation is detrimental to N.T.'s best interests and the factors that favour the relocation in her best interests must outweigh that.

Reasons for Relocation Regarding S.Z.T.'s Ability to Provide for N.T.

- [83] S.Z.T. does not wish to return to the Lower Mainland because she has the support of friends and family in Saanich, including the housing which her parents provide for her and N.T. She deposed that in the Lower Mainland she has very little support and "no home or job". She is concerned that her cost of living will increase substantially in the Lower Mainland. Living with her sister is not a long-term option.
- [84] S.Z.T. deposed that prior to her anticipated return to work from her maternity leave, she was concerned about the cost of renting a two-bedroom apartment and paying for N.T.'s childcare compared to her salary at her pre-maternity leave employer. She sought to return to work by working remotely from Vancouver Island but that was not agreeable to her pre-maternity leave employer. The evidence shows that her pre-maternity leave employer tried to assist her with finding child care. S.Z.T. objected that her pre-maternity leave employer breached her privacy interests by doing so. On May 11, 2020, her former employer wrote to her and advised that it considered her to have abandoned her employment.
- [85] T.T. deposed that when S.Z.T. voiced concerns about utilizing T.T.'s mother for child care, T.T. began looking into child care for N.T. in the Lower Mainland. S.Z.T. deposed that she located a Lower Mainland child care for which the net cost would be about \$1,000 per month but she deposed that T.T. refused to contribute to the cost. This does not square with T.T.'s evidence that he looked into paid child care for N.T. for when he thought S.Z.T.'s maternity leave would be over. That is another evidentiary issue I cannot resolve on this application.
- [86] S.Z.T. has advised that her current position in human resources with Canadian Tire provides her with career advancement options. At the time the application was heard she was working 18 to 20 hours per week and anticipated her hours increasing to 28 to 30 hours per week in August 2020. She deposed that her future career prospects are better in her current job than in her pre-maternity job because her current employer will support her in completing coursework that will enhance her credentials and offer her more opportunities in her field. However, she has not deposed why those opportunities were not available with her prior employer, how the pay compares, and whether she could transfer to a similar position with Canadian Tire (or any other employer) in the Lower Mainland. In short, the evidence only shows that S.Z.T. sought work in October 2019, not that she sought better paying work with more opportunities for advancement and only found suitable work in the Saanich/Victoria area. Nor has she explained why her new job will better allow her to provide for N.T. than her pre-maternity leave work, beyond the general statement that she

believes she will be better able to financially provide for N.T.

- [87] Earlier in these reasons, I described how the manner in which S.Z.T. has dealt with these issues creates a credibility issue that needs to be addressed in relation to her reasons for relocating. However, I noted it cannot be adequately assessed on this application where the evidence is by affidavit and no cross examination has taken place.
- [88] I also observed the credibility issue is not as problematic in the narrower inquiry under the Divorce Act, which only considers reasons for relocating when it is relevant to that parent's ability to provide for the child. Although S.Z.T. has deposed that her reasons for relocating include her belief that she can better provide financially for N.T., she has not provided any evidence to support this. As such, it is not necessary to assess her credibility because she has not advanced even a basic level of evidence on which to conclude that relocation will allow her to meet N.T.'s needs and staying in the Lower Mainland will not allow her to meet N.T.'s needs.
- [89] After I heard submissions and reserved on this application, T.T. received disclosure from S.Z.T. which included information about her finances. He sought a hearing to supplement the record which I permitted. The new evidence shows that S.Z.T.'s pre-maternity leave income was \$80,572.49 in 2017 and \$109,348 in 2018. In her financial statement she states her annual income in her current employment is \$53,248. This more specific evidence does not support S.Z.T.'s general assertion that her Canadian Tire employment allows her to better provide financially for N.T.
- [90] S.Z.T. did not address debt retirement as a strain on her finances when this application was initially heard. When T.T. sought to file additional evidence showing her income at Canadian Tire is less than she could have been earning in her Lower Mainland position and that she had significant cash on hand at the time of separation that she could have used for child care, S.Z.T. advised that she used those funds to repay loans to her parents and still has significant indebtedness to them. She argues that living with them in Saanich will allow her to get back on her feet financially which will be to the benefit of N.T. T.T. questions the legitimacy of these debts. I agree with S.Z.T. that I cannot decide, on this application, the nature of the debt and the legitimacy of the decisions that S.Z.T. made to repay it.
- [91] However, it is clear that S.Z.T.'s income earning potential was greater at her pre-maternity leave employment by an amount that would easily cover day care, without taking into account T.T.'s responsibility to contribute to the costs of daycare.
- [92] Although S.Z.T. deposes to her concerns about housing costs and child care costs in the Lower Mainland, there is no evidence that affordable housing and child care cannot be arranged in the Lower Mainland if both parties meet their financial obligations to N.T.

Disruption to N.T.

- [93] S.Z.T. has been residing with her parents in Saanich. T.T. deposed that S.Z.T. has advised him that she intends to move out of her parents' home because they usually take in international students and need the rooms that S.Z.T. and N.T. are using for that purpose. S.Z.T. says she is not planning to move out of her parents' home at any time in the near future.
- [94] S.Z.T.'s sister lives in the Lower Mainland. S.Z.T. lived with her when the parties separated and would stay with her when she returned to the Lower Mainland between late 2019 and March 2020.
- [95] T.T. lives in his parents' residence in Burnaby. T.T.'s siblings also live in the Lower Mainland and have children with whom N.T. spends time. If T.T. is permitted overnight access with N.T., he has made plans to equip his parents' house with a crib and other equipment appropriate for a child of N.T.'s age.
- [96] In summary, the evidence is that N.T. has extended family in Saanich and Burnaby and homes in either location in which to live with each parent and her grandparents.
- [97] S.Z.T. says moving N.T. to the Lower Mainland will be disruptive for N.T. For the reasons I have already expressed, this is based on looking at the issue from the wrong "status quo" perspective. S.Z.T. already moved N.T. from the Lower Mainland to Saanich. If there is disruption in the move back, then it is because S.Z.T. moved her there in the first place. Allowing the current situation to persist until trial will result in a status quo that N.T. resides outside the Lower Mainland and her relationship with her father will be at least in part defined by ferry travel and visits in motels. By the time of trial, the choices will be greater disruption for N.T. if the trial judge orders her to be returned to the Lower Mainland or a status quo that is so entrenched the trial judge will not order her back and her relationship with her father will be permanently affected. Setting up those options is not in N.T.'s best interests.

Access Between N.T. and T.T.

- [98] T.T. seeks increased access time such that the parties have equal time on a 2/2/3 rotating schedule.

Parenting Issues

- [99] S.Z.T. resists T.T. having increased parenting time because S.Z.T. has concerns with T.T.'s approach to parenting. As well, she resists increasing his overnight parenting time because, at least at the time the application was argued, when N.T. was 15 months old, she was still nursing some times at night.
- [100] S.Z.T. and T.T. each accuse the other of inappropriate parenting techniques and behaviour. For example, S.Z.T. deposed that T.T. does not keep to N.T.'s schedule, was not involved in N.T.'s care when they were together, and smoked marijuana each night.

- [101] With the exception of the allegations of marijuana use while caring for and around N.T., I will not address these issues for two reasons. First, in my opinion, these issues are not so crucial that N.T.'s best interests are affected by them in a way that would result in a restriction of time with either parent. Second, and related, the Court is not an expert and the parties have agreed to have an expert assess the situation in a s. 211 report. The report author is better positioned to take those issues into account.
- [102] With regard to marijuana use, T.T. deposed that due to a motor vehicle accident in 2012, he has back pain and migraines and was prescribed marijuana to prevent and relieve the pain and help him with sleep. He deposed that S.Z.T. never advised him that his marijuana use bothered her. He maintained he has never smoked marijuana near N.T. or while caring for her. He deposed that he has stopped using marijuana and is now using prescription medication as well as nutrition to deal with and prevent migraines. He provided a negative six-month drug test.
- [103] I am satisfied that T.T.'s prior marijuana use does not impact N.T.'s best interests in terms of access time with her father.

Admitting Social Science Evidence

- [104] The s. 211 report T.T. seeks and to which S.Z.T. has agreed will not be available for some time. In the meantime, T.T. wishes to increase his access time with N.T. in part so that his chances for N.T. to bond to him are not diminished. On this application, T.T. cites several scholarly studies on the importance of bonding in young children in support of his goal of equal parenting time. These studies clearly fall within the realm of expert evidence but they have not been tendered in that form.
- [105] The options to utilize such evidence include relying on the fact that these studies have been cited by this court and the Court of Appeal in other cases involving young children and bonding issues. Another option is to take judicial notice of the fact that it is in the best interests of a child to maximize his or her contact with each parent so as to have the opportunity to develop deep bonds with both parents. This has essentially been codified in s. 16(10) of the Divorce Act. As I have already expressed, the principle does not mean that access time must be equal or that relocation cannot occur. It is a factor to be considered with the other factors relevant to the best interests of the child.
- [106] The approach of relying on social science evidence in family cases is not unusual: see Gordon at para. 121, L'Heureux-Dubé J. concurring. In addition, taking judicial notice of certain social facts in the family law context ensures "decisions will address and interpret the law placed within its social context": Willick v. Willick, [1994] 3 S.C.R. 670 at 704, L'Heureux-Dubé J. concurring.
- [107] However, doing so is not automatic and can be controversial. For example, in Walker at paras. 62 - 83, Mr. Justice Kent discussed this problem and observed (at para. 67) that there is a "relaxation of the strict rules of evidence in family law cases where the best interests of

the child is concerned" but noted that there was no clear answers on whether "it is permissible or even mandatory for the court to apply judicial statements of 'principle' respecting parental arrangements that are in the best interests of the child". Mr. Justice Kent determined he did not need to use the controversial approach because he had expert evidence. The Court of Appeal did not comment on the issue.

- [108] In my view, the use of social science evidence by way of judicial notice or as part of judicial precedent on this application, is unnecessary and inappropriate. It is unnecessary because s. 16(10) of the Divorce Act codifies the presumption of maximum contact subject to the qualifications I have expressed and because the parties have agreed to a s. 211 report which will provide the expert evidence needed to make an informed decision on the facts of this case. It would be inappropriate to rely on what other courts have said about the social science and try to apply it because it may not translate well.

Increasing Access Time

- [109] T.T. has informally sought increase to his time with N.T. to include Friday mornings and to have overnights on his existing parenting days. S.Z.T. resists because she still nurses N.T. during the nights (or did in July 2020 when she made her affidavit) and because she is concerned that the home in which T.T. lives with his parents does not have proper accommodation for N.T. to spend the nights. As I have already noted, T.T. has a plan to address the latter concern.
- [110] The evidence is that during the day, when N.T. is in the care of S.Z.T.'s parents for significant periods of time, alternates to nursing are available and work. While the issue of how long to nurse children is a personal one, eventually children stop nursing, often between the ages of one and two. At the time these reasons are released, N.T. will be 18 months old. There is no compelling evidence before me that it will be inappropriate to increase her time with her father due to nursing. I intend to do so gradually so that the adjustment will be manageable.
- [111] In my view, it is appropriate for N.T. and T.T. to have more access time together. The present schedule allows for only five hours at a time which seems insufficient for N.T. to fully benefit from a father-child relationship with T.T. especially when one half of the visits are in motels. However, I am not prepared to increase the access time between T.T. and N.T. to equal parenting time on a 2/2/3 basis at this juncture. In my view, given N.T.'s age and the many changes that have already occurred, the changes ought to be gradual. In addition, given the parties have agreed to a s. 211 report, the changes ought to leave open the ability to adjust once the report is available. At this time, it is my view that gradual changes should be made such that over the next several months, the access time between N.T. and T.T. increases to two overnight stays per week pending the s. 211 report. T.T. and N.T.'s time together should be in a home environment or at least an environment which facilitates a parent child relationship. T.T. has a home in the Lower Mainland and that should be the base for his access time with N.T.

- [112] The first appropriate step is for N.T. and T.T. to have a longer periods of time together with T.T.'s home as a base for that access time. The next step is to provide for overnight visits. Since N.T. and T.T. currently spend five hours together on Fridays, Saturdays and Sundays, the overnight visits should be incorporated into some of those days but at the same time, given that S.Z.T. works weekdays, she and N.T. should also have weekend time together.
- [113] I consider the following graduated changes to the access time between N.T. and T.T. to be appropriate:
- a) commencing November 6, 2020, T.T. and N.T.'s access time shall be in the Lower Mainland;
 - b) commencing on November 6, 2020, N.T. and T.T. shall have access time on Fridays from 10 am to 6 pm and on Saturdays and Sundays from 1 pm to 6 pm;
 - c) commencing on December 4, 2020, N.T. and T.T. shall have access time on Fridays from 10 am until Saturdays at 10 am and on Sundays from 1 pm to 6 pm; and
 - d) commencing on January 1, 2021, N.T. and T.T. shall have access time on Fridays from 10 am to Saturday to 10 am and on Sundays at 10 am to Monday at 8 am.
- [114] Once the s. 211 report is complete, the parties may agree to implement its recommendations if they include a change to the schedule or either party may apply to change the schedule based on the s. 211 report.

Blended Analysis on Access and Residence

- [115] I conclude that N.T.'s best interests are served by residing in the Lower Mainland. I reach that conclusion taking into account that the increased access time that I have set out above does not preclude relocation to Victoria if S.Z.T. and N.T. travel back and forth weekly.
- [116] Maintaining the status quo does not serve as a reason to permit the relocation. For the reasons given above, the status quo is illusory and I have concluded that the disruption that will occur if N.T.'s residency resumes in the Lower Mainland is less than the disruption and problems if she resides in Saanich. In order to make the changes as least disruptive as possible, I have increased the access time between N.T. and T.T. in stages.
- [117] S.Z.T. has not led evidence that supports her assertion that her reason for relocating is to better provide for N.T. as I have set out above. There must be specific and concrete evidence because what she is seeking to do has concrete consequences for N.T.'s relationship with her father. Without evidence, it is impossible to properly weigh her assertions and consider it as part of the matrix of what is in N.T.'s best interests. The evidence that is available does not support her assertion.
- [118] The relocation does not permit the access time between N.T. and T.T. to foster a father-child relationship. Logistically, if N.T. resides in in Saanich it will be problematic for the reasons I have described above including ferry travel.

[119] Taking into account all of these circumstances, it is my view that relocation is not in the best interests of N.T and increased time with her father is appropriate. I order that N.T.'s residence be re-established in the Lower Mainland by December 1, 2020, which provides S.Z.T. with two months to plan for and implement the return to avoid disruption to N.T.

Costs

[120] T.T. has been substantially successful on this application. I award costs of this application to T.T. as costs in the cause.

Conclusion and Order

[121] By consent, I order that:

- a) pursuant to s. 211 of the Family Law Act, a publicly funded parenting capacity and assessment report be done;
- b) pursuant to Rules 5-1 and 9-1, within 3 weeks:
 - i. both parties will disclose their bank and credit card statements from January 1, 2019 to the present;
 - ii. S.Z.T. will disclose documentation concerning her employment including her ROE and correspondence between her and her past or future employers in 2019 and 2020 prior to actually assuming employment at Canadian Tire as well as any correspondence with Hard Bite Chips after her employment with Canadian Tire;
 - iii. S.Z.T will disclose copies of job applications, including e-mails, cover letters, and confirmation of applications or resumés sent between mid-2019 to the present, as well as her contract with Canadian Tire.

[122] Pursuant to s.16 of the Divorce Act, I order that:

- a) neither party is permitted to change N.T.'s residence from the Lower Mainland;
- b) by December 1, 2020, S.Z.T. shall re-establish N.T.'s residence in the Lower Mainland;
- c) commencing November 6, 2020, access time between N.T. and T.T. shall be in the Lower Mainland;
- d) commencing on November 6, 2020, N.T. and T.T. shall have access time on Friday from 10 am to 6 pm and on Saturday and Sunday from 1 pm to 6 pm;
- e) commencing on December 4, 2020, N.T. and T.T. shall have access time on Friday from 10 am until Saturday at 10 am and on Sunday from 1 pm to 6 pm; and
- f) commencing on January 1, 2021, N.T. and T.T. shall have access time on Friday from 10 am to Saturday at 10 am and on Sunday at 10 am to Monday at 8 am.

[123] This access time is on an interim basis and is subject to variation as follows:

- a) the parties may agree to a different schedule;
- b) once the s. 211 report is complete, the parties may agree to implement its recommendations if they include a change to the schedule or either party may apply to the court to change the schedule based on the s. 211 report; or
- c) an order at trial.

"Matthews J."

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