IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *J.M.C. v. C.J.C.,*
2018 BCSC 1359

Date: 20180720
Docket: E17937
Registry: Smithers

Between:

J.M.C.

Claimant

And

C.J.C.

Respondent

Corrected reasons: The face page of these reasons were corrected on August 21, 2018

Before: The Honourable Mr. Justice Macintosh

Oral Ruling Re Matrimonial Relocation Application and Parenting Schedule

In Chambers

Counsel for the Claimant:	Janneke P. Lewis
Counsel for the Respondent:	Stacey S. Silber Amanda N. Winters
Place and Dates of Hearing:	Vancouver, B.C. July 9–12 and 16, 2018
Place and Date of Ruling:	Vancouver, B.C. July 20, 2018

[1] The first issue in this matrimonial relocation hearing is whether the two children of the parties' marriage, girls aged 13 and 10, will live in Victoria, BC, or instead in Regina, Saskatchewan. Smithers, BC is a third possibility, as the Claimant's alternative to her first choice of Regina, but most of the evidence and submissions were directed to the debate between Victoria, as the Respondent's choice, and Regina, as the Claimant's first choice.

[2] The Claimant all but abandoned Smithers as a possible choice, and I will not be considering it further in the assessment of which place should be selected. Furthermore, the evidence as a whole, and the submissions, made Victoria and Regina the only realistic possibilities, keeping in mind the girls' best interests.

[3] The second issue is the appropriate parenting schedule, which I will address toward the end of these reasons.

[4] An unusual aspect of this relocation hearing is that neither of the two possible locations are where the girls reside today. At present both parents, and the girls, live in Hazelton, BC, in north western British Columbia, which I am told is about an hour by car from Smithers.

[5] The other somewhat unusual aspect of this case is that both parents will move to the selected location in order to be with the children.

[6] With respect to the parenting schedule, the parties are in agreement that the long-term goal is shared parenting with the two girls being together.

[7] Counsel advised that they could find only two cases in Canada addressing relocation where both parties were seeking to move somewhere else away from the current place of residence: see *Cantillo v. Sani*, 2016 BCSC 1724; and *Kuntz v. Hogan*, 2006 SKQB 251. Both of those cases are unique on their facts, and their facts are readily distinguishable from the facts at bar. Neither decision adds new legal principles to a relocation analysis.

[8] Counsel are essentially on common ground regarding the legal tests for relocation. Of course the children's best interests are the over-arching concern. Whether the Court is addressing an initial parenting application, as in this case, or instead an application to vary an existing custody order, as the Court addressed in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the tests for relocation set out at para. 49 of *Gordon* continue to govern to the extent they are applicable. Obviously, the applicant for an initial parenting order need not address whether there is a material change in circumstances. Beyond that, as can also be seen from *Gordon*, as quoted below, *Gordon* needs to be applied with other necessary changes on points of detail in recognition that this application is the original one, and addresses two new possible places for relocation, but does not include the current residence as the future residence for the children. In *Gordon*, McLachlin J., as she then was, writing for herself and six other members of the Court, spoke as follows at para. 49:

> The law can be summarized as follows:
>
> 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
> 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
> 7. More particularly the judge should consider, *inter alia*:
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;

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

[9] For the law that *Gordon* applies to initial applications as well as to applications to vary existing custody orders, see *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230; *Nunweiler v. Nunweiler*, 2000 BCCA 300; and *T.K. v. R.J.H.A.*, 2015 BCCA 8, at para. 52. Further authorities were cited by both parties, all demonstrating, in my view, that the essential analysis in relocation applications remains largely as it was summarized at para. 49 of *Gordon*, quoted above.

[10] Counsel also directed my attention to s. 16 of the *Divorce Act*, R.S.C. 1995, c. 3 (2nd Supp.), and particularly subsection (8) (best interests of the child); subsection (9) (limited relevance of the parties' past conduct) and subsection (10) (seeking to maximize parent-child contact).

[11] I turn from that brief summary of the applicable law to the circumstances warranting this application proceeding summarily. There is urgency in the case because there is a substantial degree of dysfunction present in the children's existing circumstances, which I will address as necessary later in these reasons. Also, the practicality of the girls starting school somewhere in September of this year needs to be kept in mind. At the same time, disputes about the facts meant that credibility was in issue. To address credibility, while at the same time proceeding summarily, the parties recognized that a hybrid trial was appropriate. They each took the stand to be cross-examined, and Dr. Nicole Aubé, the author of a report under s. 211 of the *Family Law Act*, S.B.C. 2011, c. 25, was also questioned by each party. I ruled that each party could be cross-examined for up to one and a half hours, and Dr. Aubé could be questioned by each party for up to one hour

15 minutes. That is what happened. Otherwise, the evidence was tendered by affidavits.

[12] The parties are on common ground that Dr. Aubé's recommendations should be implemented, including her opinion that it is necessary for the family to move, as soon as practical, from Hazelton.

[13] It was the Respondent, C.J.C., who brought the relocation application. He argued from the outset for a move to Vancouver Island. As the case moved along, that request was particularized as a relocation to either Parksville or Victoria. By the time the application was heard, C.J.C. advocated for Victoria only.

[14] J.M.C. opposed proceeding with this hearing on July 9. If she had succeeded, the family, by default, would have remained living in Hazelton. That would have meant the loss of an opportunity for the girls to begin the 2018/2019 school year in the place of relocation. I ruled that the application could proceed summarily, with the qualification, noted earlier, that the parties and Dr. Aubé would be examined orally as part of the hearing.

[15] C.J.C., the applicant, is 50. He is a medical doctor with training and experience in family medicine and emergency work. J.M.C. is 42. She is a physiotherapist. C.J.C. is from Regina, and J.M.C. is from a small farming community about 45 minutes outside Regina. The parties met one another in Ile-a-la Crosse, Saskatchewan, in 2000. Ile-a-la Crosse is a small community in north central Saskatchewan, well north of Saskatoon. C.J.C. was working there as a staff physician and chief of staff at the local hospital. J.M.C. was working there as a physiotherapist. She was employed by the government and by a First Nations tribal council. She worked full time before the couple had children.

[16] J., the parties' first child, was born in December 2004. C., the second child, was born in January 2008. To look after their girls, both parents took substantial time off from their work. J.M.C. returned to work part time after C.'s birth. C.J.C.

worked half time for three years from 2008 to 2010. He resumed full-time work in 2011.

[17] The family moved to Smithers, BC, in 2011. They moved to obtain better educational and extracurricular opportunities for the girls, and so that C.J.C. could obtain better employment as a doctor. Both parents worked outside the home. J.M.C. took a position, I believe as a physiotherapist, at a child development center. C.J.C. worked at a clinic in Houston, BC, about 45 minutes by car from Smithers, and worked shifts in emergency medicine at the district hospital in Smithers. In 2013, J.M.C. left her work at the child development centre. She worked increasingly in physiotherapy for First Nations bands.

[18] By 2014, J.M.C. was steering the family toward a move to Hazelton. At her request, C.J.C. worked a one-week locum in Hazelton, which he found more difficult than the challenging employment he had chosen to leave behind in Ile-a-la Crosse. As a result, he told J.M.C. he did not want to settle in Hazelton.

[19] J.M.C. and C.J.C decided that the family should travel the world for a year. They sold their home in Smithers. C.J.C. gave up his positions. J.M.C. arranged for other physiotherapists to take her contracts while she was away. The family departed Smithers in August 2015.

[20] The world trip caused or increased tensions within the family. Frequently, there were arguments and insults, which are now deeply regretted. By the end of the trip, J.'s relationship with her mother had badly deteriorated, and C.J.C. and J. had formed a small alliance from which J.M.C. was at least to some extent excluded. C., somewhat by default, became aligned with J.M.C., although C. has always, at the same time, maintained a good relationship with her father.

[21] The family, which was by then in some emotional disarray, returned from the trip in July 2016, and settled in Hazelton. The evidence strongly suggests that J.M.C. was the prime mover for moving to Hazelton. She thought Hazelton would be the best place for her physiotherapy work for First Nations, and, I assume, believed

as well that it would be good for the family. As matters unfolded, it was not good for the family. The girls are both exceptionally bright, and needed more stimulation at school than the Hazelton schools were providing.

[22] C.J.C. obtained a position at the Hazelton hospital, and J.M.C. resumed contract work part time in her physiotherapy practice. C.J.C. found his work very hard. He was on 24-hour shifts, which were draining and kept him from the family.

[23] In 2017, J.M.C. was encountering difficulty with depression. J. and her mother continued to quarrel often. J.M.C. stopped driving J. to school, and stopped making her lunch, which illustrated the strain between them. As 2017 unfolded, mother and daughter grew further apart. The only agreement that slowly developed in the family was that they ought to move from Hazelton, particularly in recognition of J.'s best interests.

[24] Dr. Aubé incorporated in her report J.M.C.'s description as follows:

> [J.M.C.] shared her concern regarding the fact that she believes that her daughter [J.] is at the present time quite isolated and that she has no friends in her community. She depicted her daughter as a very bright youth who is doing well academically.

[25] J.M.C. and C.J.C. separated on November 26, 2017. C.J.C. moved into a small house near the hospital in Hazelton where he continues to work. J. moved there with him. J.M.C. and C. remain in the family's rented home.

[26] Matters grew worse this year. Two events, one in January and the other in April, call into question J.M.C.'s capacity to parent J. at this stage, particularly at times when she, J.M.C., is feeling anxious or disrespected. In January, she left J. alone one afternoon at J.M.C.'s home, telling J. that she, that is J.M.C., and C., were only going to the store, and would soon return. Instead, they were leaving to go away over night and J. was temporarily left alone, not knowing what the circumstances were until her father collected her later that day. In April 2018, J.M.C. fought with J., and sat on her, while struggling to take away J.'s phone. J. fled from

the house into the woods. Twice in the past three or four months, J. has expressed to suicidal thoughts.

[27] The evidence as a whole causes me to conclude that J.M.C. has kept C. away from C.J.C. without a reasonable basis for doing so. Dr. Aubé wrote that C.'s schedule for seeing her father has been curtailed by J.M.C.'s fear of being left alone. In the result, there are at present two separate families in Hazelton: C.J.C. and J., and J.M.C. and C. Dr. Aubé frankly recognizes the dysfunction but says, rightly in my view, that there is no basis for keeping C. from C.J.C. He should have regular parenting time with her. On the other hand, J. at present wants nothing to do with her mother, and the gulf remains between them.

[28] The first question, as noted at the start of these reasons, is whether to relocate this family to Victoria or to Regina.

[29] This Court has described a relocation decision as only "an educated prediction," as opposed to a decision based on the application of proven facts to the parties' present circumstances. See, for example, *A.D.W. v B.J.W.*, 2018 BCSC 1179, at para. 113. The inherent uncertainty in determining relocation is increased where, as here, the existing place of residence does not serve as the known quantity against which the Court compares only one new alternative as the possible destination for relocation. There is, in my view, yet a further difficulty in the case. The Court is having to select between two roughly-mid-sized Canadian cities. This is not a choice, for example, between an existing place of residence in Canada and somewhere else in the world that cannot offer the benefits we enjoy from life in this country.

[30] Despite those concerns, the parties have asked the Court to decide relocation, and the Court must reach a determination. The Court must decide based on the evidence before it. I say that, when it may sound trite, because while most of us as Canadians hold views about the pluses and minuses of various Canadian cities, it would of course be an error for a judge to be steered by his or her own such views, perhaps under the guise of taking judicial notice about some fact or other.

Even if I did take judicial notice, that Regina has colder winters than Victoria, for example, I would not know how to apply that fact to the children's best interests. So the analysis below is confined to weighing the evidence about the two cities which the parties chose to present in their respective cases.

[31] J.M.C. presented evidence of the significantly higher housing costs in Victoria compared with Regina. I accept that evidence, although I do not find that it translates to a factor for finding that living in Regina is more in the children's interests than their living in Victoria. That is because C.J.C. has demonstrated that he is highly employable in Victoria, able to earn enough income to provide good accommodation, education and amenities for the girls and the family as a whole, notwithstanding high prices in that city.

[32] It appears from the evidence that C.J.C. is ready, willing and able to secure work in Victoria which is perhaps less stimulating than his "dream job," and he would do so in order to have increased time for parenting the girls. Dr. Aubé recognized that the girls' welfare is C.J.C.'s central focus, and I reached the same conclusion from hearing his testimony.

[33] J.M.C. has shown herself to be innovative, hardworking and dedicated as a physiotherapist. She has an excellent reputation in that profession. I therefore could not accept her evidence in cross-examination that she would be virtually unemployable in Victoria. J.M.C. found a negative answer for every employment possibility in Victoria that was put to her. I do not believe she has willingly yet canvassed the Victoria employment market for her work.

[34] A related concern from the evidence was J.M.C.'s focus more on her own employment prospects than on the girls' best interests overall. Dr. Aubé noted in her report, and in her oral testimony, that a move to Regina would be intended more to support J.M.C. than it would for recognizing the children's best interests.

[35] Dr. Aubé noted that neither of the girls in their interviews with her appeared to be too fond of their maternal grandparents, who live about 45 minutes outside

Regina. C.J.C.'s parents, who live in Regina, are supportive of the family moving to Victoria rather than Regina. They are retired and travel often. J.M.C. has a sister in Regina, but she has her own difficulties, and C.J.C. and J.M.C. agree that they would not have her looking after the girls. Finally in regard to extended family, C.J.C. has a married sister who lives in Vancouver. Both girls enjoy being with her and she would be in their lives more regularly with the girls being in Victoria rather than in Regina.

[36] The evidence with respect to schooling demonstrated that J. could begin grade 9 in Victoria this fall at a school she has visited and likes. Grade 9 is the first year for that school, which would allow J. to begin there when all grade 9 students were also newcomers. That would help her not to feel like an outsider. She has felt she was an outsider in Hazelton, and she needs to overcome that feeling. The school has a strong focus on fine arts, and other subjects which particularly interest J. Dr. Aubé described both girls as being highly intelligent and requiring strong academic stimulation. The school has space available for J. this fall.

[37] For C., who wants to pursue French immersion, there is a school, next door to the school J. wants to go to, which offers French immersion, and it too has available space in September 2018.

[38] The evidence presented about schooling available in Regina was more limited because the girls have not been to the possible schools there. J.M.C. has been to Regina several times in recent years but did not inspect schools on those visits. J.M.C. only formally raised Regina as a place for relocation in her response filed June 22, 2018, and even in her affidavits filed on June 21 and July 5, she still appeared to be stating at least some preference for Smithers over Regina. Dr. Aubé's report was dated June 11. She was clear in her view that the girls should move away from small communities in northern British Columbia. Of the two schools J.M.C. named for the girls in Regina, one has a waitlist for this fall, and the current curriculum information for grade 9 was very limited for the other school. No Regina school information was introduced for C., the younger girl.

[39] J. is living with her father, and, at this stage, will not engage in any way with her mother. Great effort will be needed from all four in the family, and from counsellors, to heal the wounds between J. and her mother. Dr. Aubé found that J.M.C. had a general anxiety disorder, and that she needs diagnostic and therapeutic help in her own right. C. lives with her mother. As Dr. Aubé found, J.M.C. sometimes keeps C. with her away from C.J.C. when C. should be with her father. C. and her father are ready for normal parenting at this stage. I expect that the services of a parenting coordinator may well be required. Such services are available in Victoria but not in Regina.

[40] From all that is set out above, I have concluded that J. and C. will relocate to Victoria as soon as practically possible.

[41] With respect to parenting time, the order I am making below is heavily reliant on Dr. Aubé's report and testimony, which in turn were based on her extensive preparation, including her interviewing the family members in Hazelton. All of the terms of the order below are consistent with Dr. Aubé's views. I found Dr. Aubé to be intelligent, candid and practical.

[42] The long-term goal for J.M.C. and C.J.C. is shared parenting. While it appears that everyone in the family may benefit from professional guidance to some degree, the essential first step is that J. and J.M.C. each receive individual therapeutic assistance before they focus primarily on reuniting as mother and daughter.

[43] The orders I am making are as follows:

1. The parties will relocate the children from Hazelton, British Columbia to Victoria, British Columbia. The children will attend school in Victoria beginning in September 2018.

Parenting responsibilities

2. The Respondent will have the obligation to discuss with the Claimant any significant decisions that have to be made concerning J., including significant decisions about the health (except emergency decisions), education, religious instruction, and general welfare of J. In the event there is no agreement, the Respondent will make the final decision regarding the health (except emergency decisions), education, religious instruction, and general welfare of J.

3. Paragraph 2 of this order may be reviewed when the Claimant has parenting time of at least three (3) days a week with J.

4. The Claimant and the Respondent will share equally all of the s. 41 (*Family Law Act*) parental responsibilities for C.

Parenting time with J.

5. The Respondent will have the primary residence of J.

6. The Claimant's parenting time with J. will be in accordance with the recommendations of J.'s counselor, and in accordance with J.'s best interests.

Parenting time with C.

7. Commencing on the date of this order, the Respondent will have parenting time with C. for two consecutive days each week.

8. Commencing August 1, 2018, the Respondent will have parenting time with C. for three consecutive days each week.

9. Commencing September 1, 2018, the parties will share parenting time equally with C. on a week-on-week-off schedule.

Parenting time with both children

10. In the long term, J. and C. will reside together, and there will be shared parenting. Either party is at liberty to apply after one year from the date of this order, to have parenting time reviewed in accordance with this order and the evidence available at that time from the parties and the relevant counsellors.

Counselling

11. Within fourteen (14) days of the date of this order, the Claimant and the Respondent will each propose the names of at least two (2) counselors located in Victoria, with whom J. may begin a therapeutic relationship.

12. Each party will consult the other about their choice of counselor for J., with such consultations to conclude no later than August 31, 2018. In the event the parties cannot reach an agreement on their choice of counselor, the Respondent will make the final decision as to the counselor J. will see.

13. J. will commence counselling as soon as possible thereafter.

14. Any counsellor who is retained will receive a copy of these reasons and Dr. Aubé's report dated June 11, 2018.

Other orders

15. Costs of this application are payable from the Claimant to the Respondent but they are not payable forthwith.

16. This file E17937 is to be transferred from the Smithers registry to the Vancouver registry for all purposes.

17. For holidays, I ask the parties, through their counsel, to review the bottom of page 50 and page 51 of Dr. Aubé's report, and incorporate those recommendations as part of this order. If the parties need to appear before me to adjudicate the holiday times, leave is granted for that.

[44] MS. LEWIS: My Lord, can I have a clarification?

[45] THE COURT: I expect so.

[46] MS. LEWIS: It is to do with the application for spousal support that was set for the first day of trial. Can that be adjourned generally?

[47] THE COURT: Yes.

[48] MS. LEWIS: And can that be heard in Vancouver?

[49] THE COURT: Yes.

"MACINTOSH J."