Citation: ☼T.C. v. S.C.
2013 BCPC 0217

Date: ☼20130813
File No: F12732
Registry: Port Coquitlam



# IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

## IN THE MATTER OF
**THE *FAMILY LAW ACT*, S.B.C. 2011 c. 25**

BETWEEN:

**T.C.**

APPLICANT

AND:

**S.C.**

RESPONDENT

REASONS FOR JUDGMENT
**OF THE**
**HONOURABLE JUDGE H.K. DHILLON**

| | |
|---|---|
| Counsel for the Applicant: | James M.W. Cudmore |
| Counsel for the Respondent: | Paul Mann |
| Place of Hearing: | Vancouver, B.C. |
| Dates of Hearing: | June 4, 5, 6, 7, 14, 2013 |
| Date of Judgment: | August 13, 2013 |

**Introduction**

[1] T.C., the mother of six-year old Z.C.C. (Z.) (born [DOB]), applies by Notice of Motion filed on February 14, 2012 and under s. 69 the *Family Law Act* S.B.C. 2011 c. 25 ["*FLA*" or "*Act*"] for permission to move with the child from Port Coquitlam, BC to Bellingham, Washington, USA. She seeks further ancillary parenting and support orders.

[2] Z.'s father S.C. opposes the application and applies for an order prohibiting the relocation and seeks orders for shared parenting between the parties or in the alternative, orders granting him primary residency with the child with parenting responsibilities as guardian of the child.

**Background**

[3] The mother, T.C., age 29, was born in 1984 in Malaysia and at around age 5 moved with her family to the Tri-Cities area of Metro Vancouver. She graduated from Simon Fraser University with a major in French and a minor in Kinesiology. In the Fall of 2007 and during the period of her maternity leave, she began studies for a Chartered Management Accounting designation which she has obtained. She is currently employed full time with a Metro Vancouver municipality, having started as an accounts clerk nine years ago and now as a facility booking supervisor.

[4] T.C. is in a committed relationship with a new partner, C.B., age 30, and resident of Bellingham, Washington State USA. After a brief courtship they were married in a civil ceremony in December 2011. She wishes to move with the child to Bellingham to join her husband and start her married life there.

[5] The father S.C. was born in North Vancouver and is age 36. He was raised in the Maple Ridge area of BC. His parents separated when he was age 7 and he lived with his mother until age 13 and thereafter with his father until high school graduation. Coming from a fractured family produced a divisive and negative environment for him during his formative years and not one he wishes to see his son experience.

[6] S.C. had difficulty in school due to dyslexia that may have been caused or exacerbated by a head injury sustained when he was 3 years of age. He persevered through school, and chose to go into the work force right after high school graduation pending a decision about education and career options. He worked in a variety of jobs in recreational facilities and community centers. He started working towards a college diploma in Recreation Management which he obtained in 2008.

[7] After attaining his diploma, S.C. worked for 14 months under a contract of employment which ended in September 2009, after which he was unemployed for 14 months. He is presently employed full time at his future father-in-law's sporting goods business and also augments this employment with work at two community centers. He works long hours, including three evenings a week until after 10:00 p.m. for financial reasons. S.C.'s income from his full time employment has ranged between $38,000 to $46,034.

[8] S.C.'s employment and personal life is based around the Tri-Cities area. In the spring of 2010 he began a common-law relationship with A.C. after dating for about one year, and they are to be married in August 2013. They rent the upper portion of a single family home in Port Coquitlam which has all the amenities for family living, including a

bedroom for Z. and a yard in which to play. A.C. has taken an active role with S.C. in parenting Z., as a result of which the child has also come to consider her a parental figure.



[9] A.C. has roots in the Port Coquitlam area, being raised there and presently employed at a middle school as a French Immersion teacher and Department Head. She earns an income of $60,000 per annum, and has weekends and summer holidays in July and August. She has extended family in the region and they are supportive of S.C. and Z. The father is not close to his parents or siblings, but has found support within his fiancée's extended family.

[10] There is also strong extended family support on the mother's side. In the six years since separation, from June 2007 to the present, T.C. and Z. have lived with the maternal grandparents. As occurs quite frequently in extended households, particularly of Asian origin, T.C.'s mother took an active role in caring for Z. in his early years, including sharing a bedroom with him. T.C.'s mother is very supportive of her daughter's marriage and move to the States. The maternal grandmother acknowledges the close bond between Z. and his grandparents and they plan to visit Bellingham frequently. She testified that the trip is not onerous and is part of the family's existing routine on weekends after church or for shopping.

**History of Parenting**

[11] The mother and father met in 2005 and began a friendship which evolved into a dating relationship. They began to live together in May 2006. The mother became pregnant at age 21, and their son Z. was born in February 2007.

[12] When their son was born, the father was enrolled in full time studies at Langara College and was also working 35-40 hours a week at various recreational facilities and other employers in order to be self-supporting. He did not have the capacity or support system to parent an infant on a regular or full time basis at that time.

[13] The mother had the support of her immediate family and she took her one-year maternity leave which ended February 2008.

[14] Within months of Z.'s birth, the parents realized their incompatibility as a couple and separated in June 2007, with the mother returning with the child to live with her parents in the Tri-Cities area of Metro Vancouver.

[15] In anticipation of their separation, the mother researched and drafted a separation agreement which the parties signed on June 19, 2007 ("the Agreement"). The Agreement recommended that the father seek legal advice. He signed the document as prepared and presented by the mother without such advice. He said he felt pressured to sign "on the spot" when presented with the Agreement.

[16] The Agreement was filed in the Provincial Court of BC, Port Coquitlam Registry, on August 1, 2007. It provided sole guardianship of the child to the mother, with the father to have reasonable and unspecified access. The father was to pay monthly child support and share with the mother reasonable special and extraordinary expenses in proportion to their incomes. At the time of separation, the father also signed a document permitting the mother to legally change the name of the child from his surname to that of the mother. He said he understood from their discussions that this

name change would occur only if something happened to him although logic suggests that his consent would be superfluous in those circumstances.

[17] For the first two years of the child's life (2007-2009), the mother had primary parenting responsibilities stemming from her sole guardianship, primary residency and the infant's dependency on her for all his needs. The father had contact with the child but not overnight parenting. He paid child support under the Agreement.

[18] In 2009, the father was unemployed, his previous work contract having come to an end.

[19] With unemployment came financial difficulty and the father found it difficult to maintain his support payments on his limited income. He sought more parenting time, but says that the mother was resistant because it was outside the parameters of their Agreement.

[20] With support falling into arrears, on November 13, 2009 the mother filed an application seeking to have the child support payments and special and extraordinary expenses correspond to the father's income. The father filed his reply seeking an order of joint custody, joint guardianship, and specified parenting time.

[21] At a Family Case Conference on September 7, 2011 the parties consented to an order of specified weekend access. No orders of guardianship or custody were made. The specified parenting time for the father was Friday after daycare to Sunday at 6 p.m. on the first weekend, and from Thursday after day care to Saturday morning 8:30 a.m. the second week. The father was to have the child in his care for two nights every

single week but full day parenting on every second weekend. Child support was agreed to at $365 per month effective March 1, 2011 on a "without prejudice" basis on the father's guideline income of $39,230 and extraordinary expenses for daycare and medical insurance were fixed.

[22] In 2009 and early 2011 the mother received treatment and therapy for her eating disorder of anorexia which was under control at the case conference in September 2011. This issue figures predominantly in the father's opposition to the relocation and will be addressed later in these reasons for judgment.

[23] In the spring of 2011 during a cross-border shopping trip the mother met C.B., a personal banker and financial advisor with a financial institution in Bellingham USA. C.B. grew up on Whidbey Island and went to Western Washington State University for his undergraduate degree. He has lived in Washington State all his life and in the Bellingham area for around 10 years. They dated over the summer of 2011, with one or the other travelling to meet up either in Metro Vancouver or Bellingham. They became increasingly committed about their relationship and by late 2011 decided to marry.

[24] The mother sent an email to the father indicating her desire to move to Seattle, Washington in November 2011. She was vague about her plans and she received no response.

[25] The mother and C.B. married in a small, private civil ceremony in December 2011. This information was not shared with the father until early 2012 when the mother and father and their respective partners met as a foursome to discuss issues of the mother's proposed relocation. They were not able to reach an agreement, and on

February 14, 2012 the mother filed her application seeking to vary the father's parenting access to accommodate her desired move with the child to Bellingham. The father reinstituted his earlier application for orders of joint custody and joint guardianship under the then *Family Relations Act*.

[26] The mother, with the support of her husband, sought a U.S.A. multiple entry spousal visa for herself and the child to allow them to cross the border on the weekends the child was being parented by his mother. The visa has been obtained but the mother still needs travel authorizations from the child's father for any cross-border trips, which he has for the most part provided. The mother spends the majority of her available weekends with her husband in Bellingham, taking the child with her on weekends she is parenting the child. She has a Nexus card for easier border crossing, and states it takes about 60 minutes on a typical day to travel from the Tri-Cities area to Bellingham.

[27] The mother wishes to permanently relocate with the child to Bellingham to live with her husband. She has researched and prepared a relocation plan in which she has included housing options, the schools available for the child, the medical and dental premium costs, and recreational activities and facilities. She has proposed parenting times for the child's father. The mother contends that she has proposed reasonable and workable arrangements, as contemplated under s. 69(4)(a) of the *Family Law Act* because her proposal reconfigures but does not reduce the total amount of parenting time the father enjoys in a calendar year.

[28] Under her proposal, instead of the father having the child for two nights each week but effectively two full parenting days every second week, the mother proposes

alternating full weekends with the father in Port Coquitlam during the child's school year, and longer periods of parenting by the father on extended holidays such as summer, Christmas, and Spring Break. She is prepared to transfer care of the child to the father on the Canadian side of the Border, unless the parties agree otherwise, in order to lessen the father's travel times.



[29] The father notes that the mother has family in Canada with whom the child is close, and she has a condominium and a job in Port Coquitlam. The father resides in Port Coquitlam with his fiancée and collectively they can provide good stable parenting for the child in this country. He states that if the mother were to amortize her housing costs in Canada over a longer term she could have similar housing options as available in the U.S.A. The father states that his parenting will be seriously affected if he is reduced to parenting every second weekend. He contends that the mother will be inflexible in affording him parenting time with their son.

**Position of the Mother**

[30] The mother contends that she has been the primary caregiver for their son from infancy, and has endeavored to put his best interests first in her decision making. She states that the father was not prepared to co-parent in the early years, and she has worked hard to attain her CMA designation and to maintain her health. She is now in a happy and committed relationship with a partner with similar values and aspirations, and she is confident that she and her husband's devotion to each other and their life plan will provide the child with a stable, emotionally bonded nuclear family within which the child will thrive. She is amenable to reasonable and workable parenting arrangements

with the child's father to facilitate and ensure that the child maintains close bonds with his father and all members of both their extended families.

**Position of the Father**

[31] The father is opposed to the application as not being in the child's best interests due to disruption in parenting times and routines, reduced opportunities for educational and recreational choices for the child, and the distance of travel both for the child and for him to exercise parenting time. The child's father says that over the child's young life, he has endeavored to maintain regular parenting time with the child, his level of involvement changing and increasing as the child has matured and as he has stabilized in his home and personal life. These gains will be adversely affected by the change in location.

**Legal Considerations**

[32] As of March 18, 2013, the new *Family Law Act,* S.B.C. 2011, c. 25 has come into force and the former *Family Relations Act* has been repealed.

[33] Under s. 65(2) of the *Family Law Act*, the mother's application for relocation must be assessed under Part 4, Division 6 of the *Act* because the change of residence of the child to Bellingham U.S.A. can reasonably be expected to have a significant impact on the child's relationship with his father and other persons having a significant role in his life. While there are no final court orders respecting parenting arrangements for the child, there is an interim consent order for specified access and orders of support of the child by the father, and the parties have been parenting pursuant to the terms of a self-

researched, lay written agreement prepared by the mother and signed by both parents early in the child's infancy.

[34] Having considered the threshold issues of notice and attempted resolution under the *Act*, I am satisfied that the requisite 60 days written notice of intended relocation under s. 66 was given by the mother to the father and, knowing of the father's objection, the parties have made their best but unsuccessful efforts to reach a resolution of the issues relating to the proposed relocation.



**Status of Parties**

[35] The next issue to be decided in this case is the correct legal test to be applied in determining the mother's relocation application. The *FLA* directs judges to consider the status of the applicant and respondent and whether or not they are guardians under the *FLA*.

[36] Section 69(2) of the *Act* reads: "[O]n application by a guardian, a court may make an order permitting or prohibiting the relocation of a child by the relocating guardian." Similarly, subsections 69(4) and 69(5) refer to a "relocation guardian and another guardian" as the parties having standing to seek orders permitting or prohibiting the relocation of a child by the relocating guardian.

[37] Accordingly, a central issue to be decided is whether the mother or the father are guardians within the meaning of the *Family Law Act*.

**Guardians Under the *Family Law Act***

[38] The *Family Law Act* sets out several ways of determining a person's guardianship status including transitional provisions for pre-existing family law orders or agreements, or fresh applications brought under the new *Act*. The relevant sections are the following [emphasis added]:

> **Transition — care of and time with children**
>
> **251** (1) If an agreement or order, made before the coming into force of this section, provides a party with
>
> (a) custody or guardianship of a child, the party is a guardian of the child under this Act and has parental responsibilities and parenting time with respect to the child under this Act, or
>
> (b) access to, but not custody or guardianship of, a child, the party has contact with the child under this Act.
>
> (2) For the purposes of subsection (1), a party's parental responsibilities, parenting time or contact with a child under this Act are as described in the agreement or order respecting custody, guardianship and access.
>
> **Parents are generally guardians**
>
> **39** (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.
>
> (2) Despite subsection (1), an **agreement** or order made after separation or when the parents are about to separate **may provide that a parent is not the child's guardian**.
>
> (3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:
>
> (a) section 30 *[parentage if other arrangement]* applies and the person is a parent under that section;
>
> (b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;

> (c) the parent regularly cares for the child.
>
> (4) If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.



[39] Section 44(3) of the *FLA* notes that "a written agreement respecting parenting arrangements that is filed in the court is enforceable under this *Act* as if it were an order of the court." Similarly, under s. 58(3) of the *Act*, a written agreement respecting contact that is filed in court is enforceable under the *Act* as if it were an order of the court.

[40] Under s. 45 of the *Act*, the court may do the following:

> 45 (1) On application by a guardian, a court may make an order respecting one or more of the following:
>
> (a) the allocation of parental responsibilities;
>
> (b) parenting time;
>
> (c) the implementation of an order made under this Division;
>
> (d) the means for resolving disputes respecting an order made under this Division.

[41] A plain reading of s. 39 indicates that a parent who resided with the child at the time of parental separation is a guardian under the *Act* by operation of law. Here, the father and mother lived together with the child at the time of their separation. Each is presumptively a guardian unless other provisions of the *Act* apply.

[42] The *Act* states that the presumptive status of a guardian who separates from the other guardian under s. 39(1) can be rescinded or revoked by a written agreement entered into, or by the terms of a court order pronounced, before or after the coming

into force of the *Family Law Act*: see s. 251(1) and s. 39(2). The legislation grants deference to a term of a written agreement in that the presumptive status of guardianship under s. 39(1) can be lost if a separation or parenting agreement provides otherwise

[43] In the case at bar, the separation agreement between the parties grants the mother sole guardianship. It was filed in the Provincial Court shortly after it was signed by the parties.

[44] The mother contends that the written agreement between the parties gave her sole guardianship as that term was used under the *Family Relations Act*, making her the sole guardian of the "person" and of the "estate" of the child, with sole parenting rights and responsibilities for the day to day care and decision-making for the child. She conducted parenting on the basis that the father was an access parent up to and including the 2011 interim consent order for specified access to the father.

[45] The mother argues that the father is not a guardian of the child under the *Family Law Act*. Under the Agreement, the father has access rights, and under s. 251(1)(b) of the transitional provisions of the *Family Law Act* he is not a guardian but a contact parent under the *Act*. On this reading, the father does not have standing to oppose the relocation, but can ask for parenting contact to be preserved.

[46] The mother refers the court to the explanation provided by the Ministry of Justice in the preamble to Division 6 of the *FLA* (as set out below) to support her interpretation of the parties' parental status for purposes of considering her relocation application under the *Act*:

> There is a difference between how guardians are treated under this Division and how persons with contact with the child are treated. Guardians have parental responsibilities toward the child and are charged with raising the child whereas persons with contact have time with the child but do not have any parental responsibilities or decision-making authority. Although both guardians and persons who have contact with a child are entitled to notice of a relocation, only a guardian can apply to prevent a move**.** [emphasis added]

[47] This view is reflected in the following provision of the *Act*:

> **Child may be relocated unless guardian objects**
>
> **68** If a child's guardian gives notice under section 66 *[notice of relocation]* that the guardian plans to relocate the child, the relocation may occur on or after the date set out in the notice unless another guardian of the child, within 30 days after receiving the notice, files an application for an order to prohibit the relocation.

[48] The mother's primary position, but one that is not vigorously asserted by her, is that the father is not a guardian under the *FLA* and therefore does not have any standing to oppose the move.

**Analysis: The Father's Standing to Object to the Relocation**

[49] The *Act* requires judges to give effect to the terms of a written agreement between parents on their separation, or the terms of an existing *Family Relations Act* order (unless such a term at the time of hearing would not be in the best interests of the child or the agreement is sought to be set aside or a term varied under contract law principles or under the *Act*.) Section 44(3) of the *FLA* notes that "a written agreement respecting parenting arrangements that is filed in the court is enforceable under this *Act* as if it were an order of the court."

[50] On a plain interpretation of these aforementioned provisions of the *Family Law Act,* the father in the case at bar is not a guardian of the child because he never

obtained an order for custody or guardianship under the *Family Relations Act* and his agreement with the mother provides only access to the child. He is at law a contact parent.

[51] He does not have standing to file his application opposing the relocation under s. 68 of the *FLA*.

[52] However, the substance of his parenting particularly in the last two years since the 2011 Consent Order has been regular and meaningful. Interestingly, Section 39(3) of the *Family Law Act* permits a non-guardian parent who has never lived with the child to establish his or her status as a guardian by showing on a balance of probabilities that he or she "regularly cares for the child". Given the opening words "a parent who has never resided with his or her child..." of s. 39, this section seems to preclude a guardianship application by a parent (such as S.C.) who in fact lived with the child until parental separation after which he gave up his guardianship status by agreement or under a court order. The result is that a parent who has never lived with a child but regularly cares for him or her may be found to be a guardian under s. 39(3) but a parent who once lived with the child until parental separation but gave up guardianship status under the former *Family Relations Act* or under a separation agreement can not avail himself of the "regular care provider" pathway to guardianship under s. 39(3).

**Application to Set Aside part of the Agreement**

[53] The father applies to set aside the term of the Agreement granting the mother sole guardianship. On the evidence of the parents, I am not satisfied that there is any evidence of fraud or unconscionability which induced the father into entering into the

separation Agreement. I accept that he signed it without the expressly recommended legal advice and in the hopes of sorting out his role in the life of a very young child. The separation Agreement was a document intended to address parenting issues as best as could be done in the circumstances in which two young, unmarried parents found themselves. The father agreed he thought it was a good idea to sign the Agreement at the time.



[54] On a consideration of the whole of the circumstances at the time of separation, I am satisfied that at the time of signing the Agreement, the father was not in a position to exercise the duties and obligations of a guardian or custodial parent of the child. That is very clear on the evidence. I am further satisfied that he believed, at the time of signing, that the Agreement was fair and in the best interests of the child given the greater stability and support for the child in the mother's extended family parental home and his own less stable life circumstances. Although his circumstances have changed since then, the evidence does not support any legal grounds for setting aside the term of sole guardianship under the Agreement.

**Pathway to Guardianship**

[55] As a "contact parent" the father has no standing to oppose the relocation under Division 6 of the *FLA* but can seek to preserve his contact time. Yet, on the evidence adduced by both sides in this case, the father has played a significant role in the regular care of the child and it is my view that it would be unjust for the father not to be treated as a guardian under the *Act* in determining the merits of the relocation application.

[56] I am satisfied that a pathway to guardianship for the father exists under the following provisions of the *FLA* and Rule 18.1(2) of the *Provincial Court Family Rules* B.C. Reg. 417/98 [as amended B.C. Reg. 40/2013 eff. March 18, 2012] (*"PCFR"*).

**Orders respecting guardianship**

**51** (1) On application, a court may

(a) appoint a person as a child's guardian,

…

(2) An applicant under subsection (1) (a) of this section must provide evidence to the court, in accordance with the Supreme Court Family Rules or the Provincial Court (Family) Rules, respecting the best interests of the child as described in section 37 *[best interests of child]* of this Act.

**Court may make interim orders**

**216** (1) Subject to this Act, if an application is made for an order under this Act, a court may make an interim order for the relief applied for.

(2) In making an interim order respecting a family law dispute, the court, to the extent practicable, must make the interim order in accordance with any requirements or conditions of this Act that would apply if the order were not an interim order.

**Rule 18.1(2) PCFR – Interim order may be made**

A judge may make an interim order for guardianship without an affidavit in Form 34 having been filed if the judge is satisfied that it is in the best interests of the child that an interim guardianship order be made before the affidavit is filed.

[57] Accordingly, for the purposes of determining the issues in the relocation application before the court, I grant an interim order under s. 216 of the *Act* appointing the father a guardian of the child under s. 51(1) of the *Family Law Act* and under Rule 18.1(2) of the *PCFR* on certain terms and conditions. I do so because I find that such an order is in the best interests of the child and also in the interests of the administration of justice to permit a parent who has had a significant role in the life of a child to have

relocation application considered on the basis of the parent having the status of a guardian of the child.

[58] To deny standing to the father to argue for his parental rights is to fail to consider a just and reasonable approach in this family law dispute.

[59] The terms of the interim guardianship order are that the father shall file and serve the requisite guardianship affidavit with the required attachments as mandated under Rule 18.1(1) and (4) of the *Provincial Court Family Rules* within 60 days of the date of these reasons. The interim order of guardianship may be finalized as a final order of guardianship by way of a desk order within the time limits under the *PCFR* without further hearing if the supporting materials so allow and the mother does not file an objection to the order sought within 30 days of being served with the affidavit in support of the order.

[60] Having granted the father an interim order of guardianship, I intend to proceed with the court's analysis on the relocation application on the basis that the father and mother are each guardians of the child.

**Relocation under Part 4 Division 6 the *FLA***

[61] Where both parents are guardians of the child, the court must determine whether they have substantially equal parenting time with the child or not. The determination of this preliminary issue sets the course for the correct legal test to be applied in deciding the relocation issue under the legislation.

[62] There is little dispute that the mother has been the child's primary residence parent exercising substantially all of the rights and responsibilities of a guardian under s. 41 of the *FLA*. The parents do not have substantially equal parenting time, which means the test to be applied on this application is to be found under s. 69(3) and s. 69(4).

[63] The principle under s. 37 of the *FLA* that the "only consideration" is the best interests of the child is tempered by the opening words of s. 69(3) "despite s. 37" and by the statutory presumption that the relocation is "deemed" to be in the child's best interests if the factors set out in s. 69(4)(a) are established. Section 69(3) reads as follows:

> **s. 69(3**) Despite s. 37 (*best interests of the child)*, the court, in making an order under this section, must consider, in addition to the factors set out in s. 37(2), the factors set out in subsection (4)(a) of this section.

[64] Under s. 69(4) the burden is on the mother as the relocating guardian to prove on a balance of probabilities all of the following requirements:

1. The proposed relocation is made in good faith (s. 69(4)(a)(i)), having regard to the test for good faith under s.69(4)(6) including
    a) the reasons for the proposed relocation;
    b) the proposed relocation is likely to enhance the general quality of life of the child or the mother as the relocating guardian including
        i. increasing emotional well being; or
        ii. financial opportunities; or
        iii. educational opportunities;
    c) notice was given under s. 66; and
    d) there are no restrictions on relocation under a written agreement or an order.

2. The relocating guardian has proposed reasonable arrangements to preserve the child's relationship with the child's other guardians and persons with contact (s. 69(4)(a)(ii)).

[65] Accordingly, if the relocating parent establishes the two elements of "good faith" and "preservation of the child's relationship" with other guardians or contact persons under s. 69(4)(a)(i) and (ii), and addresses *prima facie* the factors under s. 37(2) of the *Act*, the proposed relocation must be presumed to be in the child's best interests. To overcome this presumption, the burden shifts to the parent opposing the move to show that the relocation is not in the child's best interests under s. 37: see (s. 69(4)(b) and *M.K.A. v. A.F.W.* 2013 BCSC 1315 at paras. 17 and 18.

[66] There is an express prohibited consideration under the *FLA*. In making an order permitting or prohibiting a proposed relocation, the court must not consider whether the guardian would still move if the child's relocation were not permitted (s. 69(7)). This relates to the admonition expressed in the case law that such a consideration puts the relocating parent in a "double bind" and is an improper consideration in relocation or mobility hearings: *S.S.L. v. J.W.W*. 2010 BCCA 55.

**The Evidence Adduced and Findings**

[67] The court heard from the relocating parent T.C., her mother D.C., T.C.'s husband C.B., the child's father S.C., S.C.'s fiancée A.C., and Family Justice counselor Karen Fenton.

**Issue 1: Is the Proposed Relocation being Made in Good Faith?**

Reasons for the Proposed Relocation

[68] In *Nunweiler v. Nunweiler*, 2000 BCCA 300 the court held that a relocating parent's reason for moving is only relevant if that parent's reason for the move is improper.

[69] The *Family Law Act* requires the relocating guardian to satisfy the court that the move is being made in good faith. Thus, the burden is on the mother to show that the move is not for improper reasons and is likely to enhance the general quality of life for the child or herself.

[70] T.C.'s reasons for wishing to move to Bellingham are primarily because she wishes to join her husband who has roots there, and she believes that there are significant gains to be achieved both emotionally and financially for the child and for herself from the relocation. The emotional gains are related to her happiness and well-being which she believes will translate into a positive family environment for the child. The financial gains are related to a higher standard of living attainable with a two household income in a region with a lower cost of living. Her husband's banking career is on an upward trajectory supported by his work experience, client contacts and mentors.

[71] The mother will have to give up her nine years of employment as a clerk with a municipal corporation. Her annual Canadian income is around $48,000 but her work duties are not effectively utilizing her accounting training. She notes that she has not advanced in her occupation even though she has succeeded in attaining her designation as a Certified Management Accountant (CMA) which is recognized in the U.S.A. within the umbrella organization of Chartered Professional Accountants (CPA).

She states her opportunities for working in the accounting field are superior in Bellingham to those in Metro Vancouver. Her nine years of pensionable earnings are many years short of making a discernable difference to her retirement.

[72] She plans to take a few months off from employment to settle the child into the new community and then use her CMA/CPA accreditation to pursue employment opportunities in business or accounting. She has received good job offers in the accounting field from Bellingham employers which she has turned down because of her present residency in Canada.

[73] Importantly, T.C. has the support of her own family who are fond of C.B. and want to see her succeed in her future life.

[74] Her husband C.B. has extended family long-settled in the Whidbey Island area, and he was lived for many years in northwest Washington State. His employment in Bellingham as a personal banker and insurance and investment advisor is stable, and he has attained licences specific to the American investment regulatory system and not readily transferrable to the Canadian financial sectors. Admittedly his earnings of $40,000 USD at present are base line, but C.B. believes, with his recent licensing qualifications, that his income will increase as his portfolio increases and as his commission earnings start to augment his basic income. He expressed a sincere desire to welcome the child into their home, and to contribute to his care and nurturing.

[75] As for housing, the mother has lived with her parents who have helped raise the child. Living with her extended family has allowed the mother to save money to invest in a Port Coquitlam condominium which she is renting out at present. It has over

$100,000 in equity which may eventually provide a down payment for a house in Bellingham. Real estate prices in the Metro Vancouver region would not allow them to afford their own detached single family home. C.B. is sharing a rented apartment in Bellingham with a roommate until the relocation issue is determined before investing resources in housing.

[76] I am satisfied that the reason for the proposed relocation is to unite a young married couple who have considered their various options and have determined that they can make a better life as a family in the Bellingham area instead of in Metro Vancouver. It is easier for T.C. to start her career in accounting in the U.S.A. than for C.B. to give up his portfolio of business clients and retrain and start a new banking career in Canada. I accept that the cost of living is lower as far as housing is concerned. I find there are no improper motivations in the mother's desire to relocate and there is objective evidence as to a valid marriage, and employment and economic opportunities to support the mother's subjective belief in the benefits arising from the move to Bellingham.

Is the General Quality of Life of the Child or Mother Likely to be Enhanced?

[77] Next, under s. 69(6)(b) of the *Act*, I must consider the extent to which the relocation is likely to enhance the general quality of life of the child or the mother. The mother will gain independence from her family of origin as she sets up her own household with her husband. The move may enhance the mother's emotional health, and allow the family to live as a nuclear family instead of under rules and strictures of

her extended family. Counterbalancing that will be that the mother will lose the day-to-day support of her extended family in helping her parent the child.

[78] Schools in Bellingham or the Tri-Cities area can each provide a good standard of education for a child in grade school, but a French Immersion program is not available in Bellingham. T.C. and A.C. are both fluent in French and speak the language with the child at home at a level appropriate to his age and comprehension. As well, activities in the United States have a different focus – ball sports such as football, soccer, T-ball, baseball and basketball are common in both countries, but opportunities to learn or play organized ice hockey are not available in Bellingham.

[79] I accept that French Immersion and ice hockey, both being quintessentially Canadian, would not be available in a regularized way in Bellingham. These are losses that can be ameliorated by the option of enrolling the child summer hockey camps in Canada, or Spanish as a second language rather than French in the U.S.A. These are reasonable but not perfect compromises. Otherwise, all other forms of recreational sports of choice are available in both communities.

[80] The range and affordability of housing options is likely to be superior, and the community of family and friends on both sides of the border will be expanded. This is a positive factor. The father argues that the mother can use her condominium equity for more affordable housing in Canada if she chooses a far longer amortization period to lower her monthly payments. No parent or court should interfere with the investment decisions of another, or direct how they may use their property, savings or assets.

[81] There is also the issue of the general availability of comprehensive medical health insurance coverage in the United States. The child will be eligible for coverage through a medical insurer as a family member under C.B.'s employment benefits package. The mother has a pre-existing eating disorder with which she struggles which may or may not be covered to the extent available in Canada. C.B. notes that some form of standardized universal medical coverage, colloquially called "Obamacare", is being transitioned within the individual states and contains a provision that pre-existing conditions can not be a bar to coverage. It is not clear what coverage is available at a minimum and what exclusions apply. This is a negative factor insofar as the issue of general quality of life is concerned.

[82] To round off the considerations going to the "good faith" analysis I note that s. 66 notice of relocation was properly given and that there are no restrictions on relocation in any written agreement or order.

Balancing Good Faith Factors

[83] I find that the mother's reasons for the relocation are to start her married life with her husband in a community of their choice. As a general proposition, independence, pursuit of life goals, and self-actualization are generally positive factors in a young adult's life and should translate well for the child's general quality of life.

[84] I accept that there are reasonable grounds for the mother to believe that she and her husband can attain greater financial stability and opportunities in Bellingham and improve their general quality of life which would not be as quickly or as readily available to both of them in Canada. I accept that there are risks with unknowns, such as

employment trends or future economic outlook, which would affect both countries. I do accept that once housing and employment are stabilized in Bellingham, and medical insurance options are explored and settled on, in the long term the general quality of life of the child and the relocating guardian is likely to be enhanced through the relocation.



**Issue 2: Preserving the Relationship Between the Child and other Guardians**

[85] Section 69(4)(a)(ii) requires the mother as the relocating guardian to satisfy the court that she "has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardian…".

[86] This section requires the mother to show how the father's relationship with the child can be preserved, not augmented or enhanced. It does not require anything other than a reasonable and workable arrangement to maintain the parent-child relationship.

[87] At present, the father has one full weekend of parenting time every other week, with the other week providing for parenting Thursday overnight, and Friday overnight to Saturday morning. The parents have shared holidays as agreed on between the parties.

[88] I am satisfied that the mother's proposal for the father to have alternating full weekend parenting time and specified shared holiday and long weekend parenting time will maintain and preserve the father's relationship with the child. There is no question that there will be some disruption from weekly contact to alternating weekends of parenting. The father will lose ease of travelling to the child's school or after school activities should the child be permitted to leave the Tri-Cities area.

[89] In substance, the same disruption in travel and reduced access to school events and sporting activities would arise were the mother to move with the child from her present location in the Tri-Cities area to, for example, South Surrey, Squamish or Abbotsford for work or other valid reasons. It is unrealistic to expect that parents will stay in the same community in which their parenting started for the whole of a child's life. To expect so would be to forever bind a parent to the same neighbourhood and to the existing status quo.



[90] Moreover, the extended periods of parenting time over long weekends, summer school vacation and the father's holidays can provide meaningful parenting opportunities. The mother's offer to transport the child to the Canadian side of the border on terms they can agree to presents a reasonable and workable solution to preserving the father's parenting relationship. It is to be remembered that driving time of around 60 minutes is not by any means a hardship for the child nor for a parent wishing to attend any special activities in Bellingham.

Conclusion as to Whether the Relocation is Presumptively in the Child's Best Interests

[91] I conclude that the mother has shown on a balance of probabilities that the proposed relocation is likely to be in the child's best interests. I find that the relocation is made in good faith and the mother has put forward reasonable and workable arrangements to preserve the father's relationship with the child. As a result, the relocation is presumptively in the best interests of the child unless the father proves otherwise. Section 69(3) of the *FLA* requires the court to consider the best interests of

the child factors under s. 37(2). I have conducted that analysis in the next section of these reasons.

**Issue 3: Rebutting the Statutory "Best Interests" Presumption**

[92] Given the foregoing findings and conclusions, under s. 69(4)(b) the father carries the legal burden to rebut the statutory presumption that the relocation is in the best interests of the child. S.C.'s arguments for why the proposed relocation is not in Z.'s best interests are that the move will disrupt Z.'s relationship with him and with other significant persons in his life, and the mother has unaddressed health issues which may adversely affect her parenting of the child. He relies to a great extent on the report of Family Justice Counsellor Karen Fenton.

[93] Before I address the best interests of the child test under s. 37 of the *Family Law Act*, I will address the objections of the father relating to the mother's capacity to parent if she moves to Bellingham and the recommendations in the report of Ms. Fenton.

**Mother's Alleged Lack of Transparency, Eating Disorder and Other Factors**

[94] The father believes that the mother has been less than fully transparent in disclosing the seriousness of her relationship with C.B., her marriage plans, and her plans to obtain U.S. immigration papers for herself and their son.

[95] I accept that the mother is guarded about disclosing details about her private life, but has done so where those details and decisions impact on decisions concerning the child. The evidence shows that the father knew about the cross-border romance by the fall of 2011, within 6 months of the couple's introduction to one another. By early 2012

the mother had disclosed to the father that she wished to move to Bellingham. As a result of this disclosure, the father and mother and their respective partners met together to discuss that prospect and its impact on the child.

[96] No guardian is obliged to reveal private, personal developments in "real time" to the other unless it is likely to affect that guardian's ability to parent the child or will affect the child's emotional or physical health or comfort. In this case, I accept that there was some reticence by the mother about disclosing the speed with which her relationship developed but not so that it impaired the right of the father to make parenting decisions or impacted in any adverse way on the child.

[97] The father contends that the mother's eating disorder raises an issue about her capacity to parent away from her extended family and if she moves to the U.S.A. its recurrence may put the child at risk.

[98] Under s. 37 of the *FLA*, the following is stated:

> (3) 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.
>
> (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor

[99] The evidence shows that the mother has struggled with an anorexic eating disorder from a young age, her weight loss first becoming noticeable when she was in grade 5. She stabilized relatively quickly from this episode. Her health next became a considerable concern when she was in her mid-teens, in grade 10, when she was admitted on an outpatient basis to B.C. Children's Hospital to be monitored. In the late

spring of her graduating year she was admitted into a day program for her eating disorder, and thereafter sought therapy and support groups to help manage her illness.

[100] With respect to the child, she had a good pregnancy, gaining 50 pounds of weight, and safely delivered her son in early 2007. By September 2009 she struggled post-partum with her weight, falling as low as 97 pounds. She was admitted on doctor's orders to the eating disorders clinic at St. Paul's Hospital in October 2009 for a period of one month and was discharged with the full support of her medical team. She took follow-up in-hospital programs on a voluntary and pro-active basis in the summer of 2010 and February 2011. She has disclosed her disorder to her husband and he is aware of her history.

[101] The father contends that the mother did not inform him of a deterioration of her health condition or disorder, and that she did not afford him the opportunity to parent the child while she was in residential treatment in 2009 and during follow-up programs. As the child's sole guardian, the mother maintained the same parenting schedule, with the child in her parents' care at the family home, and with the father continuing with his weekly access.

[102] In March 2011 the mother met her future husband. She believes that this was a turning point in her life, and she has maintained a healthy weight over the past two years.

[103] At the time of the hearing of the application, she appeared to be in good health and at a reasonable weight, which she said was about 125 pounds, for her height of 5'6".

[104] I found the evidence of the mother's eating disorder relevant but not for the reasons the father asserts. In my view, the importance of the evidence is that a parent's physical or emotional health is always relevant. Its impact on her capacity to parent is also relevant if it can be shown to interfere in a substantial way with the emotional or physical health or safety of the child: ss. 37(2) and (4).

[105] I find that there is no credible evidence that her eating disorder has compromised the child in any manner, including with respect to his physical, psychological and emotional safety, security or well-being. The evidence is that the mother had a good weight gain during pregnancy, the child was born a healthy weight and remains in good health. The child is at present a good weight for his age and frame, and by all accounts is well cared for.

[106] I draw no adverse inference from the mother having the courage to seek treatment because to do so would stigmatize those who are ill, need help and should seek help. The mother suffers from an eating disorder or condition with a risk of recurrence during times of anxiety or stress. What is important is that she be able to realize when she should seek appropriate medical intervention. She has generally, with some relapses, followed a treatment plan to maintain herself in reasonable health. When she has been in treatment, she has kept that fact within her immediate family for reasons of privacy. That is understandable.

[107] She was forthcoming in answering questions about her illness at trial. On the father's part, as disclosed by the diary kept by the father and his fiancée (discussed below), there appears to be a lack of empathy or sympathy about the mother's illness,

her health struggles and a lack of credit for what she has accomplished. I reject the father's contention that his rights to parent the child during the mother's illness were intentionally ignored. A more child-centered view is that during her illness, the mother and her parents maintained the same stable parenting arrangement for the child as when she was healthy, with the child being cared for by the maternal grandparents as he had been from infancy and with the father having his usual access during his parenting time. I draw no adverse inference on these facts. Rather I find the over-emphasis on a parent's disorder, with no compelling evidence that it has affected her parenting capacity, to be unhelpful.



**The Diary**

[108] One of the remarkable aspects of this case is the emergence of a detailed multi-page diary kept by the father and his fiancée relating to their tracking of issues in relation to the mother, the child and his behaviors, and on occasion the child's grandmother. The father testified he kept these notes to help him with his memory. A.C. said both of them contributed to the document and I am satisfied that she had an equal role in its creation. I have taken the time to review this document and find that it reveals as much, if not more, about the authors as it does about the subjects under scrutiny.

[109] Mr. Justice Wallace in *Tobias v. Meadley* [1991] B.C.J. 2510 stated the following which I adopt:

> If I may be permitted, by way of an aside, to take this opportunity, speaking for myself, to express my concern and disapproval about this relatively recent practice of parties ... to keep diaries wherein they set out in great detail each day the actual or imagined slights or misconduct they

> have been subjected to by the other side - presumably lest they forget such incidents prior to the trial. For some reason, the diaries never set out their own failings or misconduct! Regrettably, such diaries provide a record over which the authors can brood and, if necessary, embellish, as they engage in their introspective analysis of how they are wronged by their adversary. In my view, if one has to rely on a diary to place the alleged wrongs of the opposite parties before the Court, I would assume such allegations are in fact of little consequence and should in the main be ignored. The constant review of these self-serving diaries, however, reinforces the adversarial position adopted by each parent making the object of the litigation - an eventual resolution of the parties' problems - virtually impossible to achieve.

[110] In *D.A.H. v. S.H*., [2003] B.C.J. No. 1844 the court said :

> **18** In my opinion diaries can be helpful tools if a person wishes to record the events of the day or week, and their feelings about those events, both positive and negative. I accept that it can be therapeutic for a person to be recording their feelings about something for the purpose of sorting out those feelings and then putting them aside to move on, especially if these feelings are a source of frustration or anger or depression.
>
> **19** However, in my view, there is a fine line between using a diary to record feelings, both good and bad, for therapeutic reasons, and using a diary to record negative feelings as a method of dwelling on those feelings. There is nothing therapeutic about using a diary to constantly lash out at your former spouse.

[111] Putting it charitably, the single spaced typed “diary” is replete with negative commentary as to the mother’s faults and failings, the grandmother’s perceived lack of respect for the father, and a laser focus on the mother’s eating disorder and how it might make her a less fit parent. It shows that in January 2011 the father wrote a detailed letter to the Ministry of Children and Family Development about the mother’s eating disorder history. It focused on her “binge-purging”, her “abandonment issues”, her “manipulative behaviours” and her “negative attention seeking”. It was a self-

admitted “long winded” commentary in the guise of child safety designed to diminish the mother’s standing.

[112] This theme has permeated this family law litigation, as seen in the emails and documents provided by the father or A.C. to the Family Justice Counselor, Ms. Fenton, including the diary itself. A similarly worded lengthy email was sent by A.C. to Ms. Fenton ostensibly to set out her concerns, and that of the father, about parenting issues.

[113] The diary details references and comments on the child’s eating or acting out, hypothesizing he is learning a similar disordered “patterning” allegedly picked up from the mother. As the Ministry and others have noted, there is no evidence that the child is not well cared for by the mother from a health or safety point of view. He is meeting his benchmarks, and is an active and intelligent child.

[114] On the other hand, the father has admitted to physically striking the child in an attempt to discipline him, uncovered when the child disclosed it to his mother and to his day care provider. I am satisfied that the father deeply regrets that choice of corrective action and has not repeated it after MCFD investigated the matter. This is not a factor I need be concerned with and the mother did not dwell on it in her case.

[115] In my view, the exercise of “tracking” and recording the mother over a period of years and transferring suspicions to the child appears to pathologize what may fall within the normal range of acts of misconduct in a child, including his not liking certain food, or being tired, frustrated or angry or being oppositional at times. It also sets the stage for an unflattering comparison of the different parenting styles in their households.

[116] There is an absence of self-reflection in the diary and a failure to look on many events in a less judgmental and non-accusatory way. A day care's failure to record or transfer the father's name provided to it by the mother onto a "safe list" is elevated to something far more sinister on the part of the mother. The mother's attempts to keep all school registration options open, even after consultation with the father, is seen as intentionally subverting an agreement on schooling. When the mother adopts incentives used in the father's household such as giving the child stickers or stars for good behaviours, or buys the child a similar toy or toothpaste that he enjoys in his father's home, these are not seen as possible child-centered adaptations in order to provide consistency for the child between the child's two parental households but noted in the diary as "competing" or "showing us up". Parenting is difficult under the best of circumstances and this type of focus does little to advance the father's argument about what is in the best interests of the child.

[117] The positive aspect of the diary is that, apart from the single-minded focus on the mother's alleged personal and parenting deficiencies, the self generated record discloses a glimpse into the life of the child and shows many varied and enriching parenting activities the child enjoys at his father's home, particularly with the support of A.C. who parents the child on Friday evenings when the father is at work. I accept that S.C. and A.C. are committed to providing a loving, stable, and supportive environment for the child and have provided structure, security, and happiness to Z. while he has been in their care. They are devoted and capable parents and have much to offer in the way of love, guidance, and encouragement.

Report of Family Justice Counselor

[118] The father relies on the s. 15 [now s. 211 under the *FLA*] report of Family Justice Counsellor Karen Fenton dated March 30, 2012. Ms. Fenton prepared a comprehensive report after interviewing a number of persons with information about the child or his parents. I have reviewed her report, her interview notes, and her trial testimony.

[119] Ms. Fenton acknowledges that the child has known his maternal grandparents' home as his and his mother's home since birth. Since 2010 or 2011 he has started to become more comfortable being in his father's care, including overnights and after a period of transition and adjustment he is now happily in his father's care two nights each week.

[120] Ms. Fenton does not recommend that the child relocate with his mother to Bellingham. She recommends that if the mother intends to move to live with her American husband, the court may wish to order that the child live primarily with the father in Port Coquitlam with liberal and generous access to the mother.

[121] Ms. Fenton notes as follows:

> Although T.C. has developed a comprehensive plan to move forward with her life with C.B. and wants to relocate to the United States, the move is not in the best interests of the child. T.C. and C.B. may need to canvas the resources available to them to either live as a family unit in Canada and maintain Z.'s ties to his community, or move to the United States without him.
>
> Should T.C. proceed with her plans to move to the United States, the court may wish to consider changing Z.'s primary residence to his father's care, while implementing access to the mother on a liberal and generous basis.

[122] Ms. Fenton wrote her report before the *Family Law Act* was enacted. At the time she prepared her report, mobility decisions were guided by the principles in existing case law, among others being *Gordon v. Goertz* [1996] S.C.J. No. 52, *S.S.L. v. J.W.W*. 2010 BCCA 55, *Hejzlar v. Mitchell-Hejzlar* 2011 BCCA 230, and *R.E.Q. v. G.J.K*. 2102 BCCA 146.

[123] The most fundamental principle in mobility or relocation cases remains the best interests of the child but how one arrives at that determination has shifted under the *FLA*. Under *Gordon v. Goertz* the court emphasized there is no presumption in favour of the custodial parent and the child's best interests is the "only consideration".

[124] Under Part 4 Division 6 of the *Family Law Act*, the drafters appear to have adopted aspects of *Gordon v. Goertz* such as a limited inquiry into the parent's reasons for moving and that the custodial parent's views are "entitled to great respect". That is, under the *FLA,* if the relocating parent is the sole guardian, or one with greater parenting time, there is a rebuttable statutory presumption that the relocation is in the child's best interests if made in good faith and reasonable and workable arrangements are made to "*preserve* the child's relationship" with the other guardian or contact parent. The "desirability of *maximizing* contact between the child and both parents" under *Gordon v. Goertz* has been replaced with preservation or maintenance of the child's relationship with the parent opposing the relocation.

[125] The B.C. Court of Appeal in *S.S.L. v. J.W.W.* and *Hejzlar v. Mitchell-Hejzlar* held that relocation disputes must analyse what parenting options best meet the child's needs by four-fold examination or by an "in the round" review of the evidence as

regards the child's residency with one or both parents at either the current location or the proposed relocation. The status quo of the child's current residence or parenting regime has no attached exceptional weight or presumption in the "child's best interests" analysis.



[126] Justice Saunders noted in *Hejzlar v. Mitchell-Hejzlar* at para. 46 that it is a material error for the court to place any weight on evidence that the relocating parent would not move without the child because:

> The subtle, and troublesome, consequence of approaching the question with preference for the status quo is that the fully rounded analysis does not occur.

[127] This caution has found statutory expression in s. 69(7) of the *FLA* (also s. 46(2)(b) not relevant here) which reads:

> 69 (7) In determining whether to make an order under this section, the court must not consider whether a guardian would still relocate if the child's relocation were not permitted.

[128] Accordingly, to determine what parenting location and parenting arrangements would be in a child's best interests, a fully rounded analysis must be conducted and it must include "a consideration of the potential effect of refusing the move upon the relationship between the child and the moving parent." *Hejzla*r para. 46.

[129] I turn to the s. 211 *FLA* report of Ms. Fenton which the father has adopted in is submissions.

Analysis

[130] There are a number of difficulties with Ms. Fenton's analysis on the facts, and on the law as it stood at the time of its writing, and also under the *FLA*. They can be described generally as failing to follow an "in the round analysis" of the potential parenting outcomes for relocation and their impact on the child's best interests, in using prohibited reasoning to arrive at her opinion, and deciding the ultimate question for the court.

[131] As a starting point, I accept that for the "in the round analysis" it is not realistic to expect the father to move to Bellingham and that scenario is not a reasonable consideration.

[132] Ms. Fenton states that if the mother should move to Bellingham, the court should consider changing the child's primary residence to that of his father. However, she would not recommend changing the child's primary residence should the mother decide not to move to Bellingham.

[133] Yet, in arriving at her conclusions about the proposed move to Bellingham, Ms. Fenton gave little weight to the mother's comprehensive and detailed relocation plans, considering them "speculative" and based on her proposals rather than on concrete plans that were already underway, particularly as to housing. A planned move that is dependent on the court's permission means that the applicant must maintain the status quo in the jurisdiction governing the child's parenting until permission is obtained to relocate. In significant ways, Ms. Fenton has undervalued the mother's comprehensive "plan" for relocation. It is a reasonable and well thought out plan. Its implementation depends on litigation outcome because a person will not expend resources on a family

home in the new location or leave employment until the right to do so has been obtained. In *L.J.R. v. S.W.R.* 2013 BCSC 1344 at para. 73(d) the court criticized the mother for having "already relocated" and having abandoned her BC connections for Tennessee before the relocation application was decided.



[134] Further, Ms. Fenton's reasons for recommending a change in "primary residence", with the effect of shifting the child's full time parenting to the father should the mother decide to move, is extremely problematic. First, it is not the father's primary position to have full time parenting.

[135] Second, Ms. Fenton looked at the fact that the father's parenting relationship with the child of two weekly overnights would be altered by the proposed change to alternating weekends but failed to consider the significant adverse impact on the child's emotional well being if he were to be removed from his mother's full time care. The child and mother have lived together and are well bonded. She has been his day-to-day caregiver, as supported by her family.

[136] Ms. Fenton acknowledged that with additional holiday time to the father, he might gain in overall annual parenting time under the mother's proposed arrangements but would lose something in the regularized parenting involvement he presently has. On being cross-examined about the total time increase, Ms. Fenton stated that relocation would result in not necessarily diminished 'time' with Z., but a diminished parental 'role'. For example, the father would not be able to as readily attend after school or extra-curricular events if the child was living and going to school in Bellingham some 60 plus minutes travel time away.

[137] Ms. Fenton failed to place weight on the alternative scenario should the child be removed from his mother's care. He would lose both his mother's time and her larger role as the central figure in his daily life since his birth.

[138] Ms. Fenton did suggest that C.B. should consider relocating to Canada in order to allow the child to maintain his present family connections. However, for the reasons earlier discussed, this option would require the mother to support her husband and the child while he retrains and builds up a business base in the Canadian financial sector. In the U.S.A. the mother does not need to retrain as she has the CMA/CPA designation recognized in both jurisdictions.

[139] Ms. Fenton stated during testimony that any move outside of the Metro Vancouver area would be problematic in preserving the father's relationship and would not be in the child's best interests because it would make it difficult for the father to meaningfully participate in the child's schooling life, or his sporting or recreational activities. The reasoning of Ms. Fenton binds the mother to stay in the Tri-Cities area regardless of the child's needs, or her life events. Had the mother decided to move for reasons of employment or marriage to White Rock, Squamish or the Fraser Valley, for example, the same travel inconveniences and changes to the father's parenting would arise.

[140] Section 69 (4) of the *FLA* contemplates "reasonable and workable arrangements" to preserve the parenting relationship, not the same arrangements. The parenting time for the father would be in a different pattern in any move by the mother from the Tri-Cities area.

[141] Lastly Ms. Fenton's conclusion as to what parenting orders should be made in the child's best interests answers the ultimate question that the court is required to answer.

[142] It is preferable for the author of a s. 211 report to note the parenting roles, significant relationships, and other factors relevant to the best interests of the child in his or her present location, and what may be available or proposed for the new location, and to set out a list of recommendations for parenting in either location and with either parent. In my view, it is not appropriate to decide the ultimate question of whether permission to relocate should be granted and to suggest the recommended orders of parenting for the court, including a transfer of custody, on the conclusions drawn by the author of the report.

[143] I find that although the background information collected by Ms. Fenton is well presented and very helpful, I can not place great weight on the inferences she drew from that information or her recommendations concerning the changes to the parenting orders to be made in this case.

[144] I have carried out an independent analysis having regard to the evidence at trial and have come to a different conclusion than recommended by Ms. Fenton. I have considered the submissions of the parties on where and in whose care the best interests of the child lie, following the tests under s. 69(3), s. 69(4)(a) and (b), and s. 37(2) of the *FLA*.

[145] For ease of reference s. 69(3) states that s. 37(1)'s test of best interests of the child being the "only consideration" is subsumed in the process set out under s. 69(4)

that permits a guardian with more than "substantially equal parenting time" to establish a good faith basis for moving and a reasonable plan to preserve the child's relationship with the other parent, after which best interests is presumed unless the opposing parent can show why the move is not in the best interests of the child under the factors set out in s. 37(2).



[146] The best interests of the child test under s. 37(2) of the *FLA* requires the court to consider the following:

a) The child's health and emotional well-being: The child is healthy, intelligent, inquisitive, active and loving. He is meeting his developmental milestones and is of good weight. He is closely bonded to his mother who has been his primary caregiver since birth, as supported by her parents. The child has an important and valuable relationship with his father, particularly within the past 2 to 3 years as his parenting has increased with his settling in with his fiancée and more regularized employment.

b) The child's views: At age 6 the child is too young to articulate any meaningful view but he has an understanding of having two parental homes, one with his mother which includes her weekend time in Bellingham and the other with his father and his father's fiancée A.C. in Port Coquitlam.

c) The nature and strength of the child's relationship with significant others: The child has very strong bonds with his mother and her family, having grown up in the maternal extended home. He has good bonds with his father that have been strengthened by being with him two overnights each week. The child's connection with his paternal relatives is very minimal. Although the child has been included in the father's fiancée's family gatherings they are not "significant others" in the sense the legislation contemplates. It is expected that the maternal grandparents, who have a significant relationship with the child, will maintain their bond through visits, and the child will over time develop a relationship with his step-father's family in Washington State. Each parent brings a unique set of values, parenting and lifestyle choices to the child's life.

d) The history of the child's care: The mother and her parents have primarily cared for the child since birth in their extended household. The father was an access or contact parent. Until around 2010 the

mother made the day to day decisions regarding the child's needs, but this changed gradually as the father's circumstances stabilized and the parents began to make more collaborative decisions about daycare and schooling as the child approached those milestones.

e) The child's need for stability: The child's young age of 6 years means that the most important relationships are family bonds and not places or institutions. He is in transition into the grade school system. The family connections can be preserved with appropriate parenting orders.

f) The ability of each guardian to exercise his or her responsibilities: Having considered the evidence as a whole, I find that both parents have the capacity to discharge their duties as loving guardians. The father requires the support of his fiancée to help parent the child both because of his evening work schedule and because he is particularly reliant on her input for decision making, as can be seen in the documents including the diary in evidence. The mother is efficient and organized, very detail oriented and has endeavoured to make important decisions in a child-centred manner. As discussed above, I do not find there is any merit to the father's suggestion that the mother's health issues impact adversely on her ability to provide a safe and loving family environment for the child or to meet his needs.

g) Impact of family violence: There is no issue of family violence.

h) Impairment of parenting ability due to a parent's resort to family violence: This is not a factor.

i) The appropriateness of parenting arrangements requiring the child's guardians' cooperation: Having reviewed the evidence as a whole, including the written email communications between the parents, I am satisfied that there is good evidence that the guardians can do their best to cooperate with each other for the best interests of the child. Even where there have been disagreements on issues they have managed to find workable if not ideal solutions which translates in a positive way for their future parenting.

[147] Having considered the facts and the law, I am not persuaded that the statutory presumption that the relocation is in the child's best interests has been rebutted. I am therefore satisfied that the relocation of the mother with the child to Bellingham is being proposed in good faith, and that the relocation proposal takes into account Z.'s need to have his father S.C. in his life in a meaningful way. The mother has set out a reasonable and workable parenting schedule of alternating weekends between the child

and his father in Port Coquitlam with the mother prepared to undertake the transfer driving to a location across the border. There is no significant impediment in time or distance to the father being able to preserve and enhance his relationship with his son.

[148] For the foregoing reasons, the mother's application for relocation with the child under s. 69(2) of the *FLA* is granted effective August 26, 2013.

**Child Support Issues**

[149] The issues of child support and special and extraordinary expenses require resolution pursuant to s. 149 and s. 150 of the *FLA*.

[150] For purposes of child support and s. 7 special and extraordinary expenses I find that the parties income is as follows:

| Year | Mother's Income | Father's Income | Monthly Amount | Annual Support | Paid | Shortfall |
|---|---|---|---|---|---|---|
| 2011 (Mar.-Dec.) | $46,608 | $64,696 | $608 | $6,080 | $3,650 | $2,430 |
| 2012 | $49,392 | $46,034 | $420 | $5,040 | $4,380 | $ 660 |
| 2013 (to June) | $49,392 | $46,034 | $420 | $2,520 | $2,190 | $ 330 |
| Total due | | | | | | $ 3,420 |

[151] Special and extraordinary expenses are as follows:

| Year | Father 's share | Daycare | Health Costs | Total | Paid | Shortfall |
|---|---|---|---|---|---|---|
| 2011 (Mar.-Dec.) | 58% | $ 873.45 | $181.56 | $1,055.01 | $940 | $115.01 |
| 2012 | 48% | $1,410.50 | $180.49 | $1,590.99 | $1,128.00 | $462.99 |
| 2013 ( to June) | 48% | $1,189.60 | $ 90.24 | $1,189.60 | $ 564.00 | $715.84 |
| Total Due | | | | | | $1,293.84 |

[152] The total amount due in past child support of $3,420 and past special and extraordinary expenses of $1,293.84 is $4,713.84. Out of fairness to the father, he is to

be credited the sum of $555.96 for extra payments made in 2010 when his guideline income was lower than anticipated, leading to a child support payment due as of June 30, 2013 of $4,157.88. The parties will have to adjust any payments made for July and any shortfall arising in accordance with the foregoing calculations.

[153] The father's future obligations for child support will follow his annual guideline income of $46,034 until there is a change in that income, as agreed to by the parties or as determined by the court.

[154] Going forward, I order that commencing August 1, 2013 and on the first of each month thereafter until further court order, the father shall pay the sum of $420 per month in child support, and towards arrears of support a further sum of $100 until the arrears of $4,157.88 are satisfied in full.

[155] There remains unanswered the issue of any extra transportation costs likely to be borne by the father in exercising his parenting responsibilities which the parties will have to address in some manner and adjust.

[156] With respect to future special and extraordinary expenses, the father's pro-rata share is presumptively at 48% but there is a large unknown as to what would be a reasonable expense in the totality of the circumstances if relocation is undertaken. The mother presented a relocation plan that would have her not work outside the home for a significant period of time, thereby making child care costs for a large portion of the first year unnecessary. The choice not to work is her own as she has a capacity to work and this reduction in income will not affect or increase the father's pro-rata share of any special and extraordinary expenses. Further, by not planning to work, she would be

expected to be available to care for the child after school in the first year of resettlement.

[157] As for the medical expenses, the child and the mother would retain Canadian coverage until eligible to receive coverage under his step-father's benefits plan. In Canada the child's portion of the mother's health care premiums was about $30 per month placing the father's pro rata share at $15.00 per month.

[158] It is anticipated that health care coverage as an expense would be shared by the step-father and the mother on one or more of their plans once she is also employed and it is unknown at present what that may entail and who should be primarily responsible for those costs. The mother carries the burden of showing on a balance of probabilities the amounts and the reasonableness of this expenditure, and I am not satisfied on the evidence adduced that anything further than maintaining the costs of coverage under the Canadian system should be the obligation of the father until the issue can be properly determined by agreement or order.

[159] Accordingly, I order on a provisional basis special and extraordinary expenses for health care costs of $15.00 per month until varied by consent or further court order. The total monthly amount payable for child support ($420), towards arrears ($100) and future special and extraordinary expenses ($15) is $535.

**Conclusion**

[160] I grant the following orders:

**Interim Orders**:

*[161]* Pursuant to an interim order of guardianship made under s. 51(1), s. 39(3) and s. 216 of the *FLA* and Rule 18.1(2), the father is a guardian of the child on the following terms and conditions.

[162] The father shall file and serve the requisite guardianship affidavit with the required attachments as mandated under Rule 18.1(1) and (4) of the *Provincial Court Family Rules* within 60 days of the date of these reasons. The interim order of guardianship may be finalized as a final order of guardianship by way of a desk order without further hearing if the mother files no objection by Notice of Motion within 30 days of receiving the father's Affidavit and the supporting materials otherwise allow for such an order.

**Final Orders**

[163] The mother T.C. is a guardian of the child under the *Family Law Act* and her application for relocation pursuant to s. 69(2) of the *Family Law Act* is granted.

[164] Effective August 26, 2013 the mother has liberty to relocate permanently with the child Z. born [DOB] from Port Coquitlam, British Columbia, Canada to Bellingham, Washington State, United States of America. The child's primary residence shall be with the mother.

[165] Each guardian may exercise day to day decisions affecting the child while the child is in that guardian's care. The guardians must consult with each other about, and attempt to reach agreement on, significant decisions respecting the child's education, medical care, dental care, extra-curricular activities, or with respect to any matters likely to significantly affect the health or welfare of the child failing which they shall refer the

matter to a parenting coordinator and shall equally share the costs of such intervention and assistance.

[166] The mother shall advise the father in writing of the names, addresses and contact information of the child's intended school and key school personnel, and his medical and dental service providers and she will ensure that the father's name, address and contact information is registered at the same time as she provides her contact information. The mother has the primary obligation of forwarding to the father any documents received by her from these service providers respecting the child and the father will also have the right to obtain such information directly from them.

[167] By consent, the Provincial Court of BC retains exclusive jurisdiction over guardianship and parenting arrangements under the *Family Law Act* concerning the child Z. notwithstanding the relocation order granted herein. Pursuant to s. 64(1) of the *FLA* the court orders that the mother shall not remove the child from Bellingham Washington USA without order of this court.

[168] Commencing on Friday September 6, 2013 the child will be in the care and control of his father from Friday 7 p.m. to 7 p.m. of the Sunday immediately following and on alternating weekends thereafter unless otherwise specified in this order or as agreed to by the parties in advance and in writing. The father shall have liberal and generous telecommunication contact with the child (including Skype) during times when the child is not in his care.

[169] Commencing in October 2013, the father shall have the child in his care on Canadian Statutory Holidays including weekends (excepting Christmas and New Years

Day) and his parenting weekends will be switched to allow the father such parenting time and extended to include the Statutory Monday holiday to 7 p.m.

[170] If a Canadian statutory holiday does not fall on a Monday (excepting Christmas and New Years Day), the father must give the mother 30 days written notice of his intention to exercise such a holiday as a parenting day.

[171] The child will be in the care of his mother for the American Thanksgiving weekend extending to the last weekend of November regardless of which parent is scheduled to parent the child that weekend, with a switch in weekends or make-up time for the father if the father's weekend parenting time falls on that weekend, unless the mother gives written notice 30 days in advance waiving her U.S. Thanksgiving holiday parenting time.

[172] Commencing December 2013, the child's Christmas holiday shall be shared equally between the parties with one guardian to have care of the child from end of the last day of school to until 2 p.m. on December 24th (Period 1) and the other parent to have the child from 2 p.m. December 24th to January 1 (Period 2), with the mother having the child during Period 1 in odd-numbered years the father having the child for Period 1 in the even-numbered years.

[173] Commencing in 2014, unless the parties otherwise agree in advance and in writing:

a) School Spring Break shall be divided equally between the guardians;
b) The mother shall parent the child on Mother's Day and the father shall parent the child on Father's Day regardless of which parent has that specific parenting Sunday;

c) The guardians shall parent their child in alternating two week periods during the summer school holidays with the first transfer of the child to the father occurring on the first Friday evening at 7 p.m. after school is formally recessed for holidays, regardless of whether or not that first Friday is the father's regularly scheduled parenting weekend, and with the mother to have the first summer holiday period after school is recessed for summer in 2015 and alternating in a similar manner thereafter.

[174] All transfers of the custody of the child between the guardians shall take place on the Canadian side of the Peace Arch Border unless otherwise agreed to by the guardians in advance and in writing, which may include by text or email.

[175] The child may be transferred from or to the custody of either guardian, the child's step-mother A.C. or step-father C.B. or any other adult person agreed upon by the guardians in advance and in writing.

[176] Each guardian shall grant any written consent or permission necessary to allow the transfer and cross-border travel of the child to or from Canada and the U.S.A. when the child is accompanied by a guardian or by a step-parent or a designated family member as agreed upon by the guardians from time to time.

[177] The mother must ensure that the child has extended medical and/or travel insurance coverage in Canada and the U.S.A. and provide proof of same to the father at his request.

[178] Arrears of child maintenance inclusive of special expenses for the period March 1, 2011 to June 30, 2013 are fixed at $4,157.88.

[179] Commencing August 1, 2013 and on the first of each month thereafter until further court order, the father shall pay the sum of $420 per month in child support, and towards arrears of support a further sum of $100 until the arrears of $4,157.88 are satisfied in full.

[180] The father shall pay the sum of $15 per month for his pro rata share of the child's medical premiums until such time as being provided with proof of payment of the child's portion of the U.S. medical insurance premiums, at which point the father shall pay his pro rata share with liberty to apply to determine future reasonable and necessary special and extraordinary expenses, or any additional costs to the father in exercising his parenting time under this court's order.

[181] Commencing in 2014 the parties shall exchange income documents for the previous calendar year, including T4's, filed income tax returns, applicable tax schedules, and notices of assessment and their U.S. equivalents on or before July 31, 2014 and on or before July 31 of each subsequent year until further court order and the parties shall review and make any necessary adjustments to the child support or s. 7 obligations paid the previous calendar year.

_____

The Hon. Judge H.K. Dhillon
Provincial Court of British Columbia

**Mobility Case law Considered**

*Gordon v. Goertz,* [1996] S.C.J. No. 52
*S.S.L. v. J.W.W.*, 2010 BCCA 55
*Hejzlar v. Mitchell-Hejzlar,* 2011 BCCA 230

*R.E.Q. v. G.J.K.*, 2102 BCCA 146.
*Nunweiler v. Nunweiler*, 2000 BCCA 300

**Relocation Case Law Under the *FLA***

*L.L.J. v. E.J.,* 2013 BCSC 1233
*L.J.P. v. D.L.B., 2013 BCPC 104*
S.G. v. J.P., 2013 BCPC 126
*Berry v. Berry*, 2013 BCJ No. 1334
*L.J.R. v. S.W.R.,* 2013 BCSC 1344
*M.K.A. v. A.F.W.* 2013 BCSC 1415