IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *B.K.A. v. D.M.A.,*
2010 BCSC 604

Date: 20100513
Docket: E040142
Registry: Vancouver

Between:

B.K.A.

Plaintiff

And

D.M.A.

Defendant

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Plaintiff:	Angela Thiele
The Defendant:	Appeared on her own behalf
Place and Date of Hearing:	Vancouver, B.C. February 11-12, March 26, April 19, 26, 2010
Place and Date of Judgment:	Vancouver, B.C. May 13, 2010

INTRODUCTION

[1] On April 26, 2010, I informed the parties of my decision on this application respecting the primary residence and custody of the children of the marriage, and that I would deliver written reasons for judgment. These are my reasons for judgment.

[2] The plaintiff, B.K.A. and the defendant, D.M.A. married in 1996, separated in 2003, and divorced in 2005. This application is the latest of several applications since the divorce concerning the custody of the two children of the marriage, J.M.A. ("J"), born February 8, 1998 and now 12 years old, and A.M.A.("A"), born May 3, 2000, who has just celebrated her 10th birthday.

[3] By her order pronounced on August 29, 2008, Madam Justice L. Smith granted the plaintiff sole custody of the children. However, the plaintiff and the defendant currently share parenting of the children on an equal one week-on, one week-off basis, and have done so since January 2009, except for the period from early November 2009 until mid February 2010, when the children had their primary residence with the defendant. The circumstances which resulted in Madam Justice L. Smith's order and the changes in parenting arrangements since then are discussed below.

[4] On this application, the defendant applies for an order for sole custody and primary residence of the children. The defendant proposes that she and the plaintiff have joint guardianship of the children, and that the plaintiff have generous access to the children.

[5] The defendant also seeks an order permitting the children to relocate with her to San Diego, California in July 2010, after they have completed their current school year in North Vancouver. The defendant applies for the appointment of a parenting coordinator to assist the parties in communicating with each other, particularly for the purpose of facilitating access.

[6] J and A are both intelligent, healthy, and well adjusted children. They have both attended the same elementary school in North Vancouver since they each began school. J is in grade six and A is in grade four. Both children are doing well academically, enjoy their school, and have many friends at school and in their community.

THE PARTIES AND THEIR POSITIONS

[7] The defendant, who is 45 years old, is a registered nurse. She holds United States citizenship, but has been a resident of Canada since 1993. The defendant and the plaintiff first met in Florida in 1992. At the time, the defendant was employed there as a nurse. Her work took her to San Diego in 1993. Her relationship with the plaintiff continued, and in 1993 at Mr. A.'s invitation, she moved to British Columbia, where she and the plaintiff cohabited until their marriage in 1996.

[8] D.M.A. currently earns approximately $74,000 per annum as a nurse employed by the Vancouver Coastal Health Authority. She presently rents a three bedroom townhouse in North Vancouver for $2,200 a month. The defendant's principal financial asset is the $250,000 she retains from the net proceeds of sale of the former matrimonial home in North Vancouver in September 2009.

[9] D.M.A. identified a number of reasons for her intended move. The defendant says that she can no longer tolerate the emotional strain of intense conflict with B.K.A., and wants to move to avoid or minimize direct contact with her former spouse.

[10] During the marriage, differences over finances were the major source of strife between the parties. However, since the summer of 2008, the conflict between the defendant and the plaintiff has primarily concerned custody, access, and care of the children. The defendant's attempt to relocate to California with the children in July 2008 was highly acrimonious and continues to be a source of conflict with the plaintiff. When the plaintiff had the primary care of the children in the fall of 2008,

following their return from California, he on occasion denied the defendant access to the children. During the periods when the children have had their primary residence with the defendant, or the parties have shared parenting, requests by each parent for changes to their scheduled times with the children which have caused inconvenience to the other parent have provoked arguments or engendered resentment. Much of this conflict could have been avoided by earlier and more open communication between the parties.

[11] Ms. A. has recently sought and received an offer of employment in San Diego as a registered nurse case manager, to commence August 1, 2010. This offer is contingent upon the successful completion of reference checks, background screening, and a drug test. However the defendant anticipates no difficulty in securing this position. The letter dated March 26, 2010 produced by the defendant from her prospective employer that sets out the offer of employment does not stipulate a salary. The plaintiff testified that her starting salary will be $85,000 U.S. funds, and that she intends to accept the offer of employment in San Diego.

[12] Due to the current depressed state of the housing market in Southern California, the defendant says that she would be able to rent or purchase a home suitable for herself and the children at a substantially lower cost than in North Vancouver. She says that she can rent a three bedroom apartment in San Diego for about $1,800 per month, and has led some evidence that homes in the residential communities where she would like to live with the children are available for about $480,000 U.S. funds. The plaintiff has adduced evidence of various three bedroom townhouses listed for sale in North Vancouver at the time of this application at prices ranging between $550,000 and $700,000. While the defendant has the means to make a substantial down payment on a home in North Vancouver, she would likely be able to purchase a home in San Diego at a lower cost than she would incur here.

[13] Ms. A. says that by moving to California she will avoid the stress of conflict with Mr. A., and improve her financial security, and that this will enable her to be a happier and more confident parent, and thereby benefit the children.

[14] Ms. A. also says that she will have more support available to her in San Diego than she currently enjoys in North Vancouver. She has one very close friend, Ms. K.S., who resides in the same area of San Diego where the defendant hopes to live. The defendant says that she also has a circle of friends in San Diego, and that at least one of them has children of similar age to J and A.

[15] The defendant has no family in San Diego. Her father and two sisters all live in the eastern United States, near Washington, D.C.

[16] The plaintiff is also 45 years old. Mr. A. met the defendant in 1992 in Florida, where he obtained his Bachelor of Business Administration degree. Since 1992, Mr. A. has spent the whole of his working career in his family's automotive business, initially in Vancouver and more recently in Squamish, British Columbia. He currently manages the parts and service department of the new Toyota dealership that his family opened in Squamish, in January 2010. Mr. A. lives in North Vancouver and commutes to and from Squamish every workday.

[17] Mr. A.'s annual base salary for 2010 is $75,000. As shown in his February 2010 Form 89 Financial Statement, Mr. A.'s total *Guidelines* income for 2010, inclusive of salary, dividend and interest income is $122,250.

[18] Mr. A. is opposed to Ms. A. relocating with the children to San Diego. He says the move would be contrary to the best interests of the children because it would disrupt their schooling, sever their friendships, separate them from their paternal extended family, including grandparents, uncles, aunts and cousins, all of whom live in North Vancouver, and would interfere with their close bond with their father.

DISPOSITION UNDER RULE 18A

[19] The defendant brings this application pursuant to Rule 18A of the *Rules of Court*. In addition to extensive affidavit materials from the parties and their respective collateral witnesses, the court has received two reports from Dr. Elterman, a clinical psychologist, prepared pursuant to s. 15 of the *Family*

Relations Act, R.S.B.C. 1996, c. 128. Those reports provide Dr. Elterman's psychological assessments of the defendant, the plaintiff, and the children, and his recommendations respecting parenting arrangements. In addition, on the application of the plaintiff, Dr. Elterman has attended before the court for cross-examination. Both the plaintiff and the defendant have given oral testimony on matters relating to their respective parenting, and parenting plans. I am satisfied that on the evidence adduced, it is possible to make the findings of fact necessary to determine this custody application, and that it is just to do so.

ISSUE

[20] The issue on this application is whether the proposed move to San Diego, California is in the best interests of the children.

BACKGROUND FACTS

[21] Before turning to a discussion and analysis of that issue, it is necessary to deal briefly with the history of this litigation and the previous orders made in this proceeding relating to custody of the children.

[22] The plaintiff and the defendant were divorced pursuant to an order pronounced by Mr. Justice McEwan on February 17, 2005.

[23] The order of Mr. Justice McEwan provided that the plaintiff and the defendant would have joint custody and joint guardianship of the children, with primary residence with the defendant, and liberal and generous access to the plaintiff.

[24] Paragraphs 14 and 15 of Mr. Justice McEwan's order provided:

> 14. The plaintiff shall not unreasonably withhold his consent for the defendant and the children to relocate their residence to a location in the United States at some time in the future after the sale of the former matrimonial home in order for the defendant to complete a degree as a pediatric nurse practitioner, or to obtain better employment.
>
> 15. Should a dispute arise concerning the defendant wishing to relocate with the children, either party shall be at liberty to apply to this

> Honourable Court for an order determining the defendant's right to relocate with the children and the issue shall be determined on the merits in consideration of the circumstances then existing and not solely on the basis of the joint custody order and which party has primary residence of the children.

[25] On or about July 16, 2008, the defendant, after telling the plaintiff that she was taking the children to California for a two-week vacation, moved to San Diego, California, with the children. Before departing for California, the defendant gave up her regular full-time nursing position in North Vancouver and leased her home there to tenants for one year.

[26] On July 29, 2008, on the *ex parte* application of the plaintiff, Mr. Justice Holmes ordered that the plaintiff have interim sole custody of the children of the marriage and that the defendant return the children to British Columbia forthwith.

[27] Counsel for the plaintiff served the defendant by e-mail with the order and supporting materials. Mr. A. went to San Diego to attempt to retrieve the children. However, the California authorities were not prepared to enforce the order of July 29, 2008 because it was *ex parte*, and was for interim, rather than permanent, sole custody.

[28] On or about August 13, 2008, the defendant enrolled the children in an elementary school in San Diego.

[29] On August 20, 2008, the plaintiff's application for an order for permanent sole custody of the children came on for hearing before Mr. Justice Powers. The defendant was represented by counsel. Mr. Justice Powers adjourned the plaintiff's application to August 27, 2008, and directed that the defendant return with the children to British Columbia forthwith.

[30] Despite Mr. Justice Powers' order, and his clear communication to defendant's counsel of the consequences of disobedience of orders of the court, when the matter came on for hearing before Madam Justice L. Smith on August 27, 2008, the defendant had not returned the children to British Columbia. Madam

Justice Smith found that defendant was aware of the orders of Mr. Justice Holmes and Mr. Justice Powers, and that she had committed contempt by leaving the children in California in contravention of those orders. Madam Justice Smith also ordered that the plaintiff have permanent sole custody of the children, and that he was entitled to pick up the children from California and return them to British Columbia.

[31] In her unreported oral reasons for judgment delivered August 29, 2008, Madam Justice Smith expressed great concern about the way in which Ms. A. made the move of July 2008 to California. She found, at paragraph 57, that there was no evidence that the children were prepared for the move or that they had an opportunity to know what they were doing when they left ostensibly for a vacation in Disneyland. Nor was there any evidence contradicting Mr. A.'s evidence that the children were expecting a two-week holiday with him and his family beginning on August 1. Madam Justice Smith observed that "The matter of the move does not indicate a parent who is wholly focused on the best interests of the children."

[32] At paragraph 58, Madam Justice Smith said this:

> [58] It appears that [Ms. A.] has persuaded herself that she is entitled to do what she did in moving the children abruptly out of their community, extended family and school and away from their father without any real discussion with the children's father, let alone seeking his consent as contemplated in the original order. She has persuaded herself so thoroughly that she has been prepared to ignore two court orders. That also causes me some concern.

[33] Madam Justice Smith found that sometime in March 2008 Mr. and Ms. A. had a discussion in a coffee shop that included some reference to Ms. A.'s wish to move to California with the children. The evidence of the parties differed on whether Ms. A. said that she wished to move the children to California in the summer of 2008, or that she would like to do so in the summer of 2008 or 2009. Madam Justice Smith also found that the parties' evidence was more or less consistent with respect to the fact that during the conversation Mr. A. made some reference to the court, or to following the procedure set out in paragraphs 14 and 15 of the 2005 order of Mr. Justice McEwan. Her Ladyship also found that there was no evidence that

Ms. A. had sought or received Mr. A.'s consent, or that she had sought to discuss the question of moving the children to California with Mr. A., or that she had tried to reach agreement with him before acting on her decision to relocate with the children to California in July 2008.

[34] Madam Justice Smith concluded that it was in the best interests of the children to remain in British Columbia in the primary care of their father.

[35] The defendant returned with the children to British Columbia on August 30, 2008.

[36] As the penalty for the defendant's contempt of court, Madam Justice Smith ordered the defendant to pay special costs to the plaintiff in the amount of $15,000. In her reasons for judgment on the contempt penalty, Smith J. took into account that the defendant had received erroneous legal advice in California regarding the orders of this court requiring her to return with the children to British Columbia, but found that did not excuse her deliberate disregard of two court orders. Her Ladyship also noted that while the defendant had purged her contempt by returning to this jurisdiction with the children, she had only done so after three orders and the scheduling of a Hague Convention hearing in California.

[37] After Mr. A. retrieved the children from California, he had them in his primary care from September until December 2008.

[38] In December 2008, the defendant applied to vary the custody order of Madam Justice Smith. Ms. A. sought an order providing that she and the plaintiff would have permanent joint custody of the children, except that when she was outside the jurisdiction of British Columbia together with one or both of the children, the plaintiff would have sole custody. The defendant also applied for an order that the children's primary residence would be with her, with the plaintiff having access on alternate weekends and overnight each Wednesday.

[39] The defendant's application came on for hearing before Mr. Justice Hinkson, (as he then was), on December 17, 2008. On the present application, the parties

initially disagreed on the result of the hearing before Hinkson J., and specifically, on the question of whether His Lordship made an order for joint custody of the children. The defendant understood that Hinkson J. had ordered joint custody, while the plaintiff said that His Lordship had not done so.

[40] The defendant had been represented by counsel before Mr. Justice Hinkson, but had terminated her counsel's retainer before his order was settled. The order of Mr. Justice Hinkson has not yet been entered.

[41] After the parties were afforded the opportunity to listen to the court's digital recording of the orders pronounced by Hinkson J. on December 17, 2008, they agreed that, in the result, Mr. Justice Hinkson did not vary that part of Madam Justice Smith's order granting the plaintiff sole custody of the children, but did order that the plaintiff and the defendant would share parenting on a 50/50, one week-on, one week-off basis. Mr. Justice Hinkson also ordered that the parties retain a registered psychologist for the purpose of preparing a report, pursuant to s. 15 of the *Family Relations Act* on the issue of an appropriate parenting arrangement for the children.

[42] From January 2009 until early November 2009, the plaintiff and the defendant each parented the children on a week-on, week-off basis. During this time, the plaintiff paid to the defendant child support in the amount of $1,200 per month, consisting of $700 payable pursuant to a set-off determination under s. 9 of the *Federal Child Support Guidelines* together with an additional $500 per month which the plaintiff paid voluntarily, in part to assist the defendant in recovering from the financial consequences of her brief move to California, which included an obligation to pay rent for the apartment she had leased in San Diego for a period of time following her return to British Columbia.

[43] During the time that the parties shared parenting in 2009, the plaintiff was not working in the family business. He was able to stay home to care for the children, and participate in their after school and extra-curricular activities. The plaintiff's father had sold the Vancouver car dealership in 2007. The family did not open their

new dealership in Squamish until January, 2010. From the proceeds of sale of the Vancouver dealership, the plaintiff's father provided each of his children with funds to invest in the new business in Squamish, and an advance against inheritance to tide them over until the new business opened.

[44] In the fall of 2009 when the plaintiff anticipated his return to work and the launch of the new Toyota dealership in Squamish, he proposed to the defendant that she have the primary residence of the children, and that he have access on Wednesday nights and every second weekend. The defendant agreed to this arrangement, which continued until February 14, 2010. During this period while the children had their primary residence with the defendant, the plaintiff increased his child support payment to $1,867 per month, based on his 2007 *Guidelines* income of $134,000. In addition, the plaintiff paid $633 per month for daycare costs directly to the defendant's daycare provider.

[45] On Sunday, February 14, 2010, the defendant arranged with the plaintiff to attend at his home to give the children their Valentine's Day gifts. Shortly after her arrival, the defendant informed the plaintiff that she was going to California for the week in connection with her job search there, and told the plaintiff that he would have to keep the children during that time. The defendant also insisted that she and the plaintiff must go back to the week-on, week-off parenting arrangement ordered by Mr. Justice Hinkson. A bitter quarrel ensued. From the plaintiff's perspective, the defendant had not given him any notice of her intention to revert to week-on, week-off parenting. For her part, the defendant appears to have believed that the plaintiff should be able to accommodate changes to their parenting arrangements on little or no notice. The argument degenerated into a loud and angry exchange of expletives in which both parties participated, and which unfortunately was conducted in the children's presence.

[46] This incident illustrates the difficulties the parties have experienced in communicating with each other on matters concerning the parenting of their children

since the summer of 2008, and demonstrates the obvious need for some consistency and stability in parenting arrangements.

[47] Both parents recognize that this kind of behaviour is not in the children's interest. When giving his evidence, Mr. A. expressed regret about this incident.

[48] The plaintiff was able in short order to adjust his working hours to 9:30 a.m. to 6:00 p.m. Mondays to Fridays. This enables him to drop the children off at their school in the morning before he commutes to Squamish. Generally, his friend T.S. picks the children up after school and either takes them to after school activities with his own children, or takes all of the children back to the plaintiff's home where J spends time on his computer or Game Boy, and A and T.S.'s two daughters, aged 10 and 8, play together until the plaintiff returns from Squamish around 6:45 p.m. in the evening.

[49] The plaintiff has known T.S. and his wife, N.S. for five years, and has had a close friendship with them for the last three years. The plaintiff, the children, Mr. and Mrs. S. and their children have taken family vacations together. The plaintiff and T.S. have arranged for A and T.S.'s two daughters to attend Tai Kwan Do and swimming classes together. T.S. is a self-employed contractor who is generally able to adjust his work to the children's school hours and therefore has been available to assist the plaintiff by picking up J and A after school, along with his own children, and by providing after-school care for the children until the plaintiff gets home after work.

[50] The 50/50, one week-on/one week-off shared parenting arrangement has continued since mid February. When the parties resumed week-on, week-off parenting, the plaintiff reduced his monthly basic child support payments to $1,200 but continued to pay the defendant's child support provider, Ms. H., $633 per month for childcare for the months of February and March 2010. On April 2, 2010, the plaintiff gave Ms. H. notice that he was terminating her childcare services effective April 30, 2010. By this time, the plaintiff had made his own arrangements with T.S. for the after-school care of the children during the weeks they were in his care, and

took the position that he no longer required Ms. H.'s services. This became a further cause of acrimony between the plaintiff and the defendant, who says that she is unable to pay for childcare without the plaintiff's assistance and that she may be required to stay at home with the children rather than take a casual nursing position with the Vancouver Coastal Health Authority until her intended move to California in July.

SECTION 15 REPORTS AND RECOMMENDATIONS

[51] Pursuant to the order of Mr. Justice Hinkson of December 17, 2008, Dr. Michael Elterman prepared a Section 15 report dated September 25, 2009, which provides psychological assessments of the plaintiff, the defendant, and the two children of the marriage, and Dr. Elterman's opinions respecting appropriate parenting arrangements for the children.

[52] Dr. Elterman interviewed the plaintiff and the defendant and each of the children. He also observed the children in each of their parent's homes.

[53] At the time Dr. Elterman prepared his first report, he understood that he was to provide his opinions with respect to parenting arrangements in the context of the defendant either remaining in North Vancouver, or moving to Coquitlam, rather than California.

[54] When Dr. Elterman interviewed the defendant, she was considering a move to Coquitlam in order to reduce the accommodation costs she was then incurring in North Vancouver. Dr. Elterman also knew from his interview with the defendant and from correspondence received from her that she wanted to move to California with the children at some point. In the course of taking instructions from counsel for the parties, Dr. Elterman became aware that there was a difference between counsel for the plaintiff and counsel then acting for the defendant about whether his report should include California. He left it to counsel to resolve this matter. Ultimately, Dr. Elterman understood as a result of communications received from counsel then

acting for the defendant that he should restrict his report to an examination of the North Vancouver and Coquitlam options.

[55] I attribute no blame for this situation, but the result was that although Dr. Elterman had received information from the defendant about her desire to relocate to California, and had obtained the views of the children about moving there, his first report did not provide his recommendations on parenting arrangements in the event that the defendant did relocate to California.

[56] Dr. Elterman was also aware when he prepared his report of September 25, 2009 that Ms. A. had taken the children to California in the summer of 2008, and that she had returned with them to British Columbia as a result of the proceedings initiated by the plaintiff.

[57] Dr. Elterman found that the plaintiff and the defendant were defensive in their responses to psychological testing, which as he explained, meant that the test results might under-represent the extent of any significant findings. His test results revealed that the defendant was normally optimistic, had a clear sense of purpose, and “an interpersonal style characterized as warm, friendly and sympathetic”. Dr. Elterman found that the defendant presented as an energetic, enthusiastic and sociable woman.

[58] According to Dr. Elterman, psychological testing results for the plaintiff revealed “an interpersonal style characterized as self-assured, confident and dominant”. Dr. Elterman noted that the plaintiff presented as a quietly spoken, reserved man, and as somewhat taciturn. Based on his observation of the plaintiff with the children, Dr. Elterman described Mr. A.’s communications with the children as being “friendly but typically quite taciturn and short, although not in an unfriendly way”. Ms. A tended to be more talkative, and the children responded in kind.

[59] Both the plaintiff and the defendant scored within normal limits on tests designed to measure anger and aggression and the potential for child abuse.

[60] Dr. Elterman reported that each child, when asked what advice they would give their father about being a better parent, said that their father should not yell so much. J also said that his mother should not yell so much, but identified his father as yelling more than his mother. Dr. Elterman found that neither child was afraid of their father and that the children enjoyed their time with the father and benefited from contact with him.

[61] Both children said that if they had a problem they would find it easier to talk to their mother than to their father.

[62] J enjoyed the one week-on, one week-off parenting arrangement because his father was not working at the time, and he was able to see his father every day that his mother was working. However, A did not enjoy going to back and forth between parents and said that she would prefer to be with her mother all week and with her father on Wednesdays and alternate weekends.

[63] During his interview with J, Dr. Elterman asked him what it was like being in San Diego. Dr. Elterman reported that J responded by stating that he liked San Diego as a vacation but not to live there. When asked whether he felt pressure from his mother to move to Coquitlam, J said that he had told his mother that he did not want to move.

[64] Dr. Elterman also reported that A told him that she did not want to move because she would not be able to stay in the same school with her friends and that her mother should stay in North Vancouver and not move again.

[65] Dr. Elterman described the attachment between the children and Mr. A. as good. He observed that both children, and particularly A, have a very close relationship with their mother.

[66] Dr. Elterman concluded his report with this recommendation:

> My recommendation in this case is for the parents to have joint custody and joint guardianship. I would strongly recommend that Ms A. continue to reside in North Vancouver and if necessary find

> accommodation that she can better afford. While the children are well adjusted and resilient and could adjust to a relocation, they have both strongly stated a preference not to move. Clearly the access between Mr A. and the children would change if Ms A. moved to Coquitlam or elsewhere. The children enjoy the time with their father and benefit from the contact. In anticipation of Mr A. working in Squamish and perhaps moving to Squamish, I would recommend that primary residence be with Ms A. and that Mr A. have alternate weekends plus one weekday overnight each week. Even if Mr A. lives in North Vancouver and works in Squamish, he likely will need to work longer hours and he will need to arrange childcare were the arrangement to continue as week-on week-off, I think that it would be more stable for the children to revert back to the primarily weekdays with Ms A. as A has stated is her preference. I also think that this arrangement is more reflective of the children's attachment to the parents. My recommendation is that the parents share the summer and Christmas vacation equally.

[67] Because Dr. Elterman's first report did not address parenting arrangements in the event of the defendant's relocation to California, the court requested a supplementary report from Dr. Elterman providing his recommendations concerning the options of Ms. A. relocating to California with the children or Mr. A. being the primary caregiver for the children in North Vancouver.

[68] In a brief report dated March 3, 2010, Dr. Elterman recommended that the children go to California with Ms. A. His reasons were as follows:

> (1) Ms A. has been the children's primary caregiver for most of the post-separation period.
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> (2) My interviewing of the children found that the children's primary attachment is with their mother.
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> (3) The children in interviewing speak about their father being more prone to get angry and yell at them. As a single parent this is likely to be even more of an issue.
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> (4) Mr A. has recently opened a Toyota dealership in Squamish where he is the manager. If he lives in North Vancouver to keep the children in their schools he would need to depend on extensive daycare and babysitting with the work hours needed. More likely, and a possibility he acknowledged, he may relocate to Squamish to be closer to work. If this were to happen and the children started new schools the question is what difference is this compared to a move to California with the parent they are closer to.

> (5) Up until Ms A. went to California and the Court ordered equal time, the children were primarily with Ms. A. and Mr A. was the parent they spent a lot less time with.

[69] Dr. Elterman recommended that if the court permitted the children to relocate to California, then Mr. A.'s access should include six weeks during summer vacation, a week at spring break, 10 days at Christmas and one weekend every month that had a public holiday or professional day attached to the weekend. Conversely, if the court decided that the children should reside with Mr. A., Dr. Elterman recommended that Ms. A. have the same access schedule.

[70] When cross-examined by counsel for Mr. A., Dr. Elterman qualified his recommendation by stating that the move to California would only be a good idea if Mr. A.'s access were honoured. He agreed that it would not be in the children's best interests if Ms. A. cut off contact with their father. It was Dr. Elterman's opinion, with which I agree, that it would be better for the children's psychological well-being if they had regular contact with both parents, rather than only one parent.

[71] Dr. Elterman agreed that Ms. A. had less of a support network available to her in California than Mr. A. does in North Vancouver.

[72] In his cross-examination, Dr. Elterman confirmed that both the children had told him that they did not want to go to California to live there. Dr. Elterman testified that the children were intelligent, and that if they did not want to stay in California, they would likely express their views strongly when they came to North Vancouver to see their father. In terms of their capacity to adjust to a new situation in California, Dr. Elterman opined that J and A were in the upper 50th percentile for children of their age. If they did not adjust, in Dr. Elterman's opinion, when they came up to North Vancouver they would tell their father that they wanted to stay. As Dr. Elterman put it, the children would "vote with their feet". Dr. Elterman also thought that by the time J entered grade eight and was 14 years old, his views would likely be given considerable weight. When cross-examined by plaintiff's counsel, Dr. Elterman denied that his recommendation that the children move to California with their mother amounted to an experiment with their well-being.

[73] Another factor which Dr. Elterman said he took into account in making his recommendation was his understanding that Ms. A. would have more flexibility in her hours of work than Mr. A.

[74] Dr. Elterman also thought it likely that at some point Mr. A. would move to Squamish when the daily commute to and from North Vancouver became too much of a burden. Mr. A.'s evidence on this hearing was that he will continue to reside in North Vancouver in order to enable the children to remain in their current school and community.

DISCUSSION AND ANALYSIS

[75] The factors which the court must consider on an application to vary a custody order are set out in s. 17(5) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.):

> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

[76] In each case, the court must review all of the relevant circumstances in order to determine whether the proposed move would be in the best interests of the children.

[77] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, Madam Justice McLachlin (as she then was) set out the principles to be considered when determining the best interests of the child at paras. 49 and 50:

> [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.
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> 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.
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> 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.
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> 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.
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> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
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> 7. More particularly the judge should consider, inter alia:
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> (a) the existing custody arrangement and relationship between the child and the custodial parent;
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> (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) views of the child;
>
> (e) 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.

> [50] In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[78] When considering the best interests of the children, there are no presumptions: *Robinson v. Filyk* (1996), 84 B.C.A.C. 290.

[79] The defendant and the plaintiff each referred to various authorities which apply and explain the principles in *Gordon v. Goertz*. The defendant relied upon *Falvai v. Falvai*, 2008 BCCA 503, and *McArthur v. Brown*, 2008 BCSC 1061. The plaintiff referred to *One v. One*, 2000 BCSC 1584, *Karpodinis v. Kantas*, 2006 BCCA 272, *E.L.C. v. E.S.B.*, 2009 BCSC 1543, and *Betz v. Joyce*, 2009 BCSC 1199. In

each of these cases, the court determined custody based on an assessment of the best interests of the child in the particular circumstances before the court.

[80] In this case, the defendant has testified that she intends to relocate to California, and will do so without the children if the court denies permission for the children to accompany her.

[81] I treat this evidence with caution, bearing in mind its potential to deflect the court from focusing on a full assessment of the best interests of the children based on evidence of both parents' roles as care-givers in all of the circumstances, old as well as new: *Spencer v. Spencer*, 2005 ABCA 262 at para.17. As the Prince Edward Island Court of Appeal stated in *B.(R.) v. P.(D.)*, 2009 PECA 12 at para. 32:

> ... Various courts have cautioned that it is problematic to rely on representations made by the custodial parent that he or she will not move without the children should an application to relocate be denied. This inquiry is commonly called the "classic double bind." If a parent responds by stating they are not willing to remain behind with the children, this raises the prospect of the parent looking after their own interests and not having the interests of the children paramount. Then, on the other side of the equation, if a parent advises the court that they are willing to forego a move if unsuccessful, this suggests that such a move is not necessary for the well being of the parent or the children. If a trial judge mistakenly relies on a parent's willingness to stay behind "for the sake of the children," the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents. See: *Spencer v. Spencer*, *supra*.

[82] I intend to examine the various scenarios which this case raises for the children's care, rather than rely upon the defendant's representations about what she may do in the event that her application to move the children to California is denied.

[83] Recently, in *S.S.L. v. J.W.W.*, 2010 BCCA 55, at para. 32, the Court of Appeal emphasized that the role each parent has played in the children's lives is far more significant to the determination of the best parenting arrangement than is the length of time the children have spent with each parent. As the Court stated, "[t]he analysis of the parent's role is fundamental to the determination of a primary care-giver, whether continued shared parenting is in the children's best interests, and where they should live."

[84] At para. 33, the Court noted that:

> ... in this assessment of each parent's contributions to the care of their children, it is inevitable the court will be required to assess the resources available to each, in personal and economic terms that permit them to make those contributions, and the potential effect on those resources in each proposed scenario. As many courts have noted, this may require an assessment of a parent's emotional and economic prospects because children's interests are necessarily intertwined with those of their parents: *Burns v. Burns* 2000 NSCA 1.

[85] What the defendant seeks in this case is a variation of both the order of Madam Justice L. Smith of August 29, 2008 awarding sole custody of the children to the plaintiff, and the order of Mr. Justice Hinkson of December 17, 2008 providing for the equal shared parenting of the children.

[86] The defendant's proposed move to California meets the threshold requirement for a material change of circumstances affecting the children.

[87] On an application to vary custody, there is no legal presumption in favour of the custodial parent: *Gordon v. Goertz*. Furthermore, although the plaintiff has had the sole legal custody of the children since the summer of 2008, the defendant has been the primary caregiver for the children for most of their lives. The plaintiff has shared parenting of the children for much of the last 16 months on a week-on, week-off basis. In these circumstances, the views of both parents concerning custodial arrangements are entitled to respect. However, ultimately, the court must determine what is in the best interests of these children.

[88] In embarking on that inquiry, I bear in mind that the *status quo* does not represent the default position, or a benchmark against which the changes resulting from the move are to be measured: *S.L.C. v. K.G.C.*, 2010 BCSC 349 at para. 96. In each case the court must examine the potential scenarios for parenting of the children and clearly explain its conclusions: *S.S.L.*

[89] On a mobility application, the court is required to make an "educated prediction" (*McArthur v. Brown* at para. 161), about the best interests of the children, based not only on evidence of their old life, but also evidence of what parents

believe will transpire in their new life: *S.S.L.* at para. 29. As the court observed in *S.L.C. v. K.J.C.*, at para. 97, because the parent cannot know precisely how things will turn out for the children in the new location, it would "be unreasonable to require the moving parent to prove on the balance of probabilities that after the proposed move a certain thing will happen for the children's benefit".

[90] In this case, there are several potential options for the care of the children. They include:

a. the defendant relocates to California with the children, and has them in her primary care;

b. the defendant has the primary care of the children in North Vancouver;

c. the current shared parenting regime continues in North Vancouver;

d. the defendant relocates to California but the children remain in North Vancouver in the primary care of their father.

[91] A fifth option, that Mr. A. relocates to California to share in the parenting of the children there, is not viable in this case. The plaintiff has been employed in the family automotive business throughout his working career, and now holds a managerial position in the family's recently launched new enterprise in Squamish. The plaintiff's employment precludes him from relocating, and the defendant has no desire that he share parenting of the children in California.

[92] While the defendant wishes to reduce her contact with the plaintiff, I am satisfied that her intended move to California is not motivated by a desire to reduce the children's contact with Mr. A. The defendant supports Mr. A. having generous access to the children and applies for the appointment of a parenting coordinator to assist the parties in facilitating that access.

[93] In *Gordon v. Goertz*, the court held that a parent's reasons for moving ought not to be taken into account except in exceptional circumstances, for example, where the true purpose of the move is to frustrate access, or is motivated by bad faith, or where the reason for the move is otherwise relevant to the relocating

parent's ability to meet the needs of the children. However, as Ballance J. observed in *McArthur v. Brown* at para. 143:

> In reality, most desired moves have little direct connection with the child's interests on needs. For example, few moves are ever proposed in order to enable the child to attend a special school, take advantage of athletics or arts or receive medical attention in the new location. Almost invariably, the move is desired by the applicant parent in order to further his or her interests or needs such as a career transfer or advancement, educational opportunity, employment relocation of a new partner, enhanced psychological well-being or to pursue a new relationship. It would seem from surveying a sampling of the post-*Gordon* case authorities, that the trial courts do on occasion consider a parent's reason for a proposed move even in plainly unexceptional circumstances. I would suggest that those cases do not represent an outright rejection of the explicit direction given in *Gordon*, so much as they demonstrate the practical difficulty in disregarding the reasons for the move from the overall assessment of what may be in a child's best interests, and reveal how often a parent's reasons for the relocation are bound up in that assessment and are therefore relevant.

[94] In *McArthur v. Brown* at paras. 153 and 154, the court found that the psychological well-being of the moving parent was a valid consideration in assessing the best interests of the children.

[95] In order to determine whether the proposed move to California is in the best interests of the children, I begin by examining the various factors identified by the Honourable Mr. Justice Burnyeat in *One v. One*, 2000 BCSC 1584 at para. 24 as they apply to the circumstances of this case.

Parenting Capabilities of and Children's Relationship with Parents

[96] The plaintiff and the defendant each acknowledge that the other is a good parent. However the plaintiff and the defendant have very different parenting styles. When discipline is required, Mr. A. tends to assert his authority with firmness, and undoubtedly raises his voice with the children from time to time. The defendant told Dr. Elterman that she was not particularly good at disciplining the children. However, she is patient with the children and has taught them to negotiate with her, and with each other.

[97] The defendant is the more empathetic of the two parents.

[98] The defendant, who has been the primary caregiver to the children for most of their lives, has a very close bond with both children. She has taken an active interest in all of their activities, assists them with their homework, and makes sure that they complete their school projects. She has also played the major role in performing such mundane parenting tasks as purchasing the children's clothing, and arranging medical and dental appointments.

[99] Before the defendant moved the children to California in July 2008, the plaintiff spent most Wednesday nights and every second weekend with the children. Between September 2008 and December 2008, Mr. A. was the primary residence parent, and was able to provide full-time parenting to the children, because he was not working at that time. From the beginning of January 2009 to November 2009, the plaintiff parented the children on a week-on, week-off basis. Again, because he was not working during this time, he was also able to provide after-school care for the children during Ms. A.'s weeks with the children. When interviewed by Dr. Elterman, J identified daily contact with his father as the reason why he enjoyed the week-on, week-off parenting arrangement then in effect.

[100] Mr. A. has shared in the children's Christmas, Easter, spring break and summer holidays. He skis with the children, and takes them swimming on the weekends. The plaintiff has coached J's baseball team, and attended the children's after-school baseball and soccer games and practices during the time between the closing of the Vancouver dealership in 2007 and his return to work in late 2009. The plaintiff has taken a real interest in the raising of his children, and has participated in their upbringing, although the extent of his participation has been limited by the demands of his work.

[101] From November 2009 through January 2010, Mr. A. devoted much of his time to the opening of his family's new car dealership in Squamish. During this time as a result of the long hours he was working, he did not always have his Wednesday overnight access with the children. When the dealership first opened, his hours of work were from 8:00 a.m. and 6:00 p.m. In addition, the plaintiff spent 45 minutes at

the beginning and the end of each day commuting to and from Squamish. Currently, his hours are 9:30 a.m. to 6:00 p.m. Monday through Friday, which enables him to give the children breakfast and take them to school during the weeks they are in his care.

[102] Mr. A. takes the children grocery shopping, plans and prepares meals by the week, and is therefore able to produce dinner for the children promptly following his return from Squamish at about 6:45 each weekday evening. He assists the children with their homework when they are in his care, and puts them to bed between 9:00 and 9.30 each evening. The plaintiff recognizes that as the children get older, and have more homework, he will have to spend more time in the evenings helping them, or ensuring that they complete school projects, and is committed to doing so.

[103] According to Dr. Elterman, when he observed J and A with each of their parents, the children seemed relaxed and close to both parents. The children have a good bond with Mr. A., but a stronger emotional attachment with their mother.

Employment Security and Prospects of Each Spouse

[104] Mr. A. has a secure and well-paying position as parts and services manager of his family's Toyota dealership in Squamish, British Columbia. He has earned, and continues to earn, an annual income in excess of $100,000. I have found that for 2010, his *Guidelines* income is $122,250. The plaintiff has the financial means to provide for the children and has generally met or exceeded his obligations to pay basic child support and special or extraordinary expenses, including his share of the children's daycare. The one exception to his otherwise admirable record of fulfilling his child support obligations was the plaintiff's recent and unilateral decision to terminate the monthly payments of $633 to the defendant's child care provider.

[105] The defendant holds a Master's degree in paediatric intensive care nursing. During the marriage, and since the divorce, she has been employed as a nurse by the Vancouver Coastal Health Authority. The defendant gave up her regular full-

time position when she moved to California in July 2008 and was not able to return to the same position when she came back from California. However, the defendant was able to find nursing positions with the Vancouver Coastal Health Authority which permitted her the flexibility to work dayshifts and to partially accommodate her schedule to the children's school days, although she has still required after-school daycare.

[106] The defendant's term appointment as a community care nurse came to an end on March 26, 2010. At the conclusion of this hearing, following the expiry of her term appointment, the defendant was on unpaid personal leave status. While on unpaid leave, contributions to her pension cease. However, she retained her status as an employee of the Vancouver Coastal Health Authority and as a member of the nurses' collective bargaining unit.

[107] The defendant is currently seeking, and expects to find casual work with the Vancouver Coastal Health Authority until her intended move to California in July 2010. The defendant's seniority, qualifications, work experience and training are such that she could probably obtain a full-time permanent nursing position with the Vancouver Coastal Health Authority within a matter of months if she chose not to relocate to California.

[108] The fact that the defendant does not currently hold a permanent full-time position with the Vancouver Coastal Health Authority results from choices she made to move to California in July 2008, and more recently, to seek short-term positions pending her intended relocation to California this summer.

[109] At her level of seniority in 2009, the defendant earned $38.10 per hour for a 36-hour work week. Under the Collective Agreement, her hourly rate increased to $39.24 on April 1, 2010. The defendant confirmed during the hearing of this application that her annual employment income as a nurse employed by the Vancouver Coastal Regional Health Authority is about $74,000. I would determine her *Guidelines* income to be $74,000.

[110] The position the defendant intends to take up in California will provide her with an increased annual salary of $85,000 U.S. funds. It is probable, given the defendant's training and experience, that she will successfully complete the screening process and the 90-day probationary period. The new position in California provides for a Monday to Friday, forty-hour, flexible work week. The defendant anticipates that she will have the flexibility of working from home in the afternoons, when the children return from school.

[111] Although the new position is described as permanent, and pays a somewhat higher salary than the defendant earns in North Vancouver, I am not persuaded that the new employment in California would provide the defendant and the children with any significant enhancement of their financial security. In California, the defendant will no longer have the relative security of terms and conditions of employment governed by a collective agreement. The offer of employment in California stipulates that the employer reserves the right to modify the position at its discretion, and retains the right to terminate the employment relationship at will, at any time, with or without cause. The hours of work are also subject to change. The defendant will no longer have the benefit of a pension plan, but will be eligible to contribute, after six months' employment, to a 401(k) savings plan. There is no evidence before the court about the terms or conditions of that plan.

[112] While the new position offers the defendant the opportunity to earn a higher salary, the trade-off is that the at-will employment contract affords her less job security than would a regular full-time position with the Vancouver Coastal Health Authority.

Access to and Support of Extended Family

[113] The plaintiff's parents, brother and sister and their children all live in North Vancouver. Currently, the plaintiff and the defendant both reside in North Vancouver. The plaintiff owns a three-bedroom townhouse which is less than a 10 minute drive from the defendant's current home in North Vancouver.

[114] The paternal grandparents own recreational properties at Whistler and at Osprey Lake near Penticton, British Columbia where the plaintiff, the children, and the extended family vacation together. The children ski at Whistler with the youngest of their three cousins, a 15-year-old boy, and have some contact with their two older cousins, who are both in their early 20s, when they attend family events. The children and the plaintiff regularly attend family celebrations at their grandparents' home, including Christmas, Thanksgiving and Easter dinners, and family birthdays.

[115] The defendant does not have a warm relationship with the plaintiff's parents. In her evidence, she tended to minimize both the extent of their contact with the children and the significance of the relationship between the children and their grandparents. Although it is true that the plaintiff's parents, who are both in their late seventies, have not regularly babysat J and A, and do not see them every week, they do host family dinners and celebrations which the children attend, spend time with their grandchildren during family vacations, and attend some of the children's sports and recreational activities. The children benefit from their contact with their paternal extended family.

[116] The defendant's father and her two sisters all live in Maryland, near Washington D.C. Although the children have some contact with their maternal aunts through Skype video conferencing and occasional visits, the children have had relatively little direct contact with their mother's family. No member of the defendant's extended family resides in California.

[117] If the defendant relocates to California with the children, their contact with their paternal extended family will be eroded. A move to California would not likely result in any significant increase in the children's contact with their maternal extended family.

Difficulty of Exercising Proposed Access and Quality of Proposed Access if the Move is Allowed

[118] If the children move to California with their mother, their father will have less direct contact with them, and less involvement in their parenting than he does now. Conversely, if the children remain with their father and the defendant relocates to California, she will not enjoy the same level or quality of day-to-day contact with the children as she does now, nor will the children have the same access to her emotional support as they do now.

[119] The plaintiff and the defendant each agree that the other should have liberal access, in accordance with Dr. Elterman's access recommendations, which include the children spending six weeks during the summer with the access parent, as well as one week during spring break and 10 days during the Christmas vacation. The plaintiff and the defendant will have to cooperate in making arrangements for the children's air travel to and from San Diego. If the defendant relocates to California, she and the plaintiff will both have the financial means to share the costs of that air travel. However if the children travel as frequently between San Diego and North Vancouver as Dr. Elterman recommends, both parties will incur additional expenses for which they currently do not have to budget . The defendant has investigated air fares from Bellingham to San Diego, and has testified that discount fares are available for between $89 and $350. Even at those rates, the transportation costs for two children over the course of a year will be significant.

[120] As the children get older, become more independent, and develop their own interests, they may resist travelling between California and North Vancouver with the frequency or for the length of access time recommended by Dr. Elterman. In that event, both the amount of direct contact and the relationship between the children and the access parent would be diminished.

[121] The plaintiff expresses considerable distrust about the defendant's commitment to facilitating his access to the children if they were to relocate with their mother to San Diego. For her part, the defendant has testified that she will abide by

the terms of an access order and that she accepts that it is important that the children have regular contact with their father. Her application for the appointment of a parenting coordinator lends credence to her testimony on this point.

[122] I proceed on the basis that the defendant has learned from her experience in the summer of 2008, and that she now understands that she must obey orders of this Court, and will do so.

[123] Both parents agree that a parenting coordinator should be appointed to assist them in communicating with each other, and to facilitate access.

[124] In my view, with the assistance of a parenting coordinator, it is probable that the parties will be able to deal successfully with the logistics of access, whether the children relocate to California with the defendant, or remain in North Vancouver in the primary care of their father.

Effect Upon Children's Academic Situation

[125] Both children have attended the same elementary school in North Vancouver since they started school. The plaintiff and the defendant both agree that school provides good quality instruction. The children are doing well academically, have good teachers, and have many friends at their school. Both children have expressed a strong desire to remain at their present school.

[126] The defendant maintains that the elementary school that the children attended for about two weeks in late August 2008 in San Diego is also a good school. However, there is absolutely no evidence to suggest that that school will offer the children a superior education, or that the move to California would provide the children with any academic benefit or advantage not available to them at their school in North Vancouver.

Psychological/Emotional Well-Being of Children

[127] The children's friends and social relationships are all centered in the North Vancouver community where they have spent their lives. The defendant's close friend in San Diego, Ms. K.S., does not have children of her own.

[128] The defendant's evidence that the children made "fast friends" with local children during the six weeks they were in San Diego during the summer of 2008, and that J and A were prepared to stay there is contradicted by J's clear communication to his father in August 2008 of his wish to come home, and by Dr. Elterman's testimony that both children expressed to him their opposition to a permanent move to California. The two weeks the children spent in school in San Diego in August 2008 was hardly sufficient time for them to form any enduring friendships with classmates there.

Disruption of Children's Existing Social and Community Support and Routines

[129] Again, the children have attended the same elementary school throughout their school lives. They have each been involved in various sports and recreational activities, including baseball, soccer, dance, swimming and Tae Kwon Do. Both children have a wide circle of friends in North Vancouver. A move to San Diego would constitute a major disruption of their routines and social relationships.

[130] According to Dr. Elterman, both children are well adjusted, and are within the upper 50th percentile, or top half of children in terms of their capacity to make the adjustment to a new school and a new community. However, these children have both expressed a strong desire not to move to California, to stay in North Vancouver, to continue to attend the school they know, and to maintain their current friendships.

[131] The views of these children, who are intelligent, and have had the experience, albeit relatively brief, of living in San Diego with their mother in the summer of 2008, are entitled to considerable weight. Hearsay evidence of children is admissible in child custody cases where that evidence meets the tests of necessity and reliability: *P.V. v. D.B.*, 2007 BCSC 237 at paras. 17 and 18, *R. v. Khan*, [1990] 2 S.C.R. 531.

[132] In this case the children did not testify. Hearsay evidence is necessary to fully address the question of their best interests. The hearsay evidence of the children's wishes reported by Dr. Elterman meets the test of reliability. Dr. Elterman is a highly experienced clinical psychologist who interviewed each of the children independently of their parents. He reported their views in his report of September 25, 2009, which he prepared to assist the court, and in his testimony on the hearing of this application. Further indicia of reliability include the absence of any motive by Dr. Elterman to report the children's statements other than accurately, the solicitation of the children's views in response to non-leading questions, and the absence of any evidence of either parent exercising undue influence or coaching the children prior to their interviews with Dr. Elterman. I conclude that the hearsay evidence provided by Dr. Elterman regarding the views of the children is admissible.

[133] The plaintiff has also adduced evidence of an e-mail dated August 9, 2008 sent by J to his father expressing his desire to come home from San Diego and to go to his school in North Vancouver. That e-mail is a spontaneous expression of J's wishes, and is consistent with the views expressed by J to Dr. Elterman. I find that it is reliable, and admissible.

[134] The plaintiff also gave evidence of a telephone call from J on March 5, 2010 and an e-mail he received from J on March 15, 2010, in both of which J expressed his opposition to moving to California. The timing of these communications, following the delivery to the parties of Dr. Elterman's second report of March 3, 2010, raises the possibility that either the plaintiff or the defendant informed the children of Dr. Elterman's recommendation that the defendant be permitted to relocate to California with the children. The plaintiff and the defendant each deny having done so. I accept Mr. A.'s evidence that around 11:00 p.m. on the evening of March 5, 2010 he received a call from J, who was distressed, and told his father that he did not want to move to California. The plaintiff has produced a telephone bill showing an incoming call from his son's cell phone at the time in question. The plaintiff's evidence of his conversation with his son is consistent with J's views as expressed to Dr. Elterman. Further, given the timing of his call to his father it is

probable that J, who was then in the defendant's care, had been informed by her of Dr. Elterman's recommendation, and then expressed his unhappiness about the possible move to California to his father.

[135] When counsel for the plaintiff showed J's March 15, 2010 e-mail to Dr. Elterman, he agreed that it was age appropriate and consistent with the views J had previously expressed. However, Dr. Elterman quite properly stated that he could not comment on its spontaneity. The production of this e-mail prior to the hearing of March 26, 2010, at a time when both parties knew that Dr. Elterman would be cross-examined on his reports at that hearing, does raise a possibility that the plaintiff solicited the March 15 e-mail from J. In that e-mail, J lists the relatives in North Vancouver that he says he will miss, and then speaks of how much he will miss his school and his friends if he moves to California. The timing of this e-mail, the plaintiff's interest, and the potential for manipulation all lead me to conclude that the March 15, 2010 e-mail is not sufficiently reliable to be admissible as hearsay evidence of J's views.

[136] In finding that both children are opposed to moving to California, I have disregarded J's e-mail of March 15, 2010 and have relied primarily upon Dr. Elterman's evidence, but have also attached some weight to the evidence of those statements of J to his father which I have determined to be admissible.

Desirability of Proposed New Family Unit

[137] This is not a case where the moving parent is doing so because she is in a new relationship, or where the moving parent and her children would become part of a new, blended family unit.

[138] The proposed move to California would reduce the children's family unit there to the defendant. If the defendant moves to California without the children, the children's family unit in North Vancouver will include their father, grandparents and extended family, but no longer include their mother. Neither alternative is as

desirable as the children continuing to have a close relationship with both parents in the same community.

Relative Parenting Capabilities of Each Parent and their Respective Abilities to Discharge their Parenting Responsibilities

[139] Both the plaintiff and the defendant are loving parents with the capacity to be good parents to their children. According to Dr. Elterman, both parents have close relationships with their children, although the defendant by virtue of her role as the primary caregiver through most of the children's lives has the stronger bond.

[140] During the period between the sale of the family's automotive dealership in Vancouver in 2007 and the fall of 2009, prior to the opening of the new dealership in Squamish, the plaintiff was not working and was an active participant in the children's extracurricular activities. During that time, he cared for the children after school and both valued their extra time with their father.

[141] During the marriage and since the parties have separated, the defendant has borne the greater share of arranging for and attending the children's extracurricular activities and arranging for and accompanying the children to doctors and dental appointments, although the plaintiff has also taken some responsibility for these matters.

[142] While the defendant undoubtedly has a strong emotional bond with the children, she is also capable on occasion of putting her own interests ahead of those of the children. Her decision to take the children to California in July 2008 without disclosing to them, or their father, that she intended the move to be permanent, or affording them an opportunity to say goodbye to their father, their grandparents, or their friends, demonstrated self-centered behaviour without regard for the best interests of the children.

[143] Mr. A. acknowledges that in the past, his long working hours have prevented him from being as actively involved in his children's upbringing as he would have liked. The plaintiff has adjusted his hours of work in order to be able to take the

children to school each morning. He has the support of his family in making further adjustments to his hours of work in order to spend additional time with his children. In the event that the children are ill while in his care, the plaintiff plans to take time off from work to care for them.

[144] If the plaintiff has the primary care of both children, the demands of his work are such that he will continue to need childcare assistance for after-school childcare. The plaintiff presently has that assistance available through his friends T.S. and N.S. If they are not available, the plaintiff is also able to call upon Ms. E.K., a friend who has two children of her own who socialize with J and A and who has offered to provide back-up childcare support. There will be reliable adults, who the children know, available to assist the plaintiff with the after-school care of the children.

Children's Relationship with Both Parents

[145] The children have close relationships with both of their parents. If the defendant moves to California, with or without the children, their relationship with one parent or the other will be adversely affected. The non-custodial parent will no longer have the same involvement in the children's lives as he or she does now. The generous access arrangements recommended by Dr. Elterman would only partially ameliorate the children's loss of day-to-day contact by providing the access parent with significant blocks of time with the children throughout each year.

Retraining/Educational Opportunities for Moving Parent

[146] The defendant says that she will have the opportunity to obtain her Paediatric Nurse Practitioner's Certificate in California. Ms. A. has deposed that with that certification she could earn an annual salary of $125,000, and that there are a number of educational facilities in Southern California where this one year program is offered. The defendant has not led evidence of an imminent plan to enrol in a program leading to certification as a Paediatric Nurse Practitioner. Nor has she suggested that it would be possible for her to take this retraining program while she works the full-time nursing case manager's position in San Diego, or that she intends

to do so. The defendant described the advantages of the move to California, as she saw them, as the avoidance of conflict with the plaintiff, the higher salary of $85,000, the availability of cheaper housing, and support from her friends there. Her omission of retraining from that list suggests that it is a longer term objective, rather than an immediate goal.

[147] I accept that the move to California would offer the defendant an opportunity to up-grade her professional qualifications and increase her earning capacity at some point in the future. That opportunity, when realized, would benefit the defendant by enhancing her sense of professionalism and her job satisfaction, and would also provide a financial benefit both to her and to the children. However, the realization of the retraining opportunity does not appear to be imminent.

Other Factors

[148] The children have already experienced the disruption of their abrupt move to California and their apprehension and return to British Columbia during the summer of 2008. Since then, following an initial period in which they were in the primary care of their father, they have alternated between periods of week-on, week-off shared parenting and primary residence with their mother. Although the children seem to have coped with the successive parenting arrangements in place since their return from California, a stable and consistent parenting arrangement is certainly in their best interests.

[149] The defendant maintains that the move to California will diminish her contact with the plaintiff and thereby reduce their conflict and improve her emotional well-being, which in turn will benefit the children. The defendant claims that she suffers from depression induced by her conflict with the plaintiff. Dr. Elterman noted in his report that the defendant described an episode of depression at the time of the divorce. The defendant told him that it was not clinical depression, and that her physician had prescribed a sleeping medication at the time.

[150] Notably, in her interview with Dr. Elterman, the defendant gave as the main reason for leaving for California in the summer of 2008, the lower cost of living in San Diego as compared to Vancouver, rather than strife with the plaintiff.

[151] When Dr. Elterman interviewed her, the defendant presented as “an energetic, enthusiastic and sociable woman”. Dr. Elterman testified that although the defendant was stressed when he interviewed her, she was not suffering from depression. The defendant presented a letter from her physician, dated December 9, 2009 that did not diagnose depression, but referred to the stress experienced by the defendant as a result of her acrimonious separation from the plaintiff. Unfortunately the physician, rather than offering a medical opinion, engaged in rather strident advocacy for the defendant’s relocation to California with the children, based on what her patient told her about the plaintiff’s relationships with the defendant and the children. That correspondence offered little assistance to the court, and was not admissible as expert opinion evidence.

[152] Although the evidence on this application does not support a finding that the defendant currently suffers from depression induced by her conflict with the plaintiff, their conflicts since the summer of 2008 have certainly caused the defendant a high level of stress.

[153] There is no question that the plaintiff and the defendant communicate with each other in a manner that frequently induces conflict and causes stress to both parties. The plaintiff and the defendant each bear some responsibility for their negative communications. Whether or not the defendant moves to California, the parties will need to continue to communicate with each other concerning the children. It is in the children’s best interests that they do so more effectively, and with less rancour. The appointment of a parenting coordinator should assist both parties to communicate more productively regarding the children, and thereby reduce their level of conflict, and the level of stress that the defendant, in particular, currently experiences. The involvement of a parenting coordinator will be beneficial for the parties, and the children, whether or not the defendant relocates.

Conclusions on Primary Residence, Custody and Access

[154] The optimal outcome for the children would be for the defendant to remain in North Vancouver and to have the primary residence of the children, with generous access to the defendant. The children would continue to benefit from their relationship with both parents and the presence of their paternal extended family, and would maintain their close ties with their school, friends, and community.

[155] Shared parenting does not serve the children's interests as well as would primary residence with the defendant in North Vancouver. The one week-on, one week-off equal shared parenting regime has been somewhat disruptive for A. Furthermore, since the plaintiff's return to work, he has not had the time available to devote to the children's after-school care that he did when the shared parenting arrangement was initially implemented in January 2009. One week-on, one week-off shared parenting ought not to continue beyond June 30, the end of the current school year.

[156] The defendant's close emotional bond with the children and her more flexible hours of work are both factors which support her having the primary care of the children in North Vancouver. Although the best result for the children, and the one that would promote maximum contact with both parents would be for the defendant to stay in North Vancouver and provide the primary residence for the children, I am unable to compel her to do so.

[157] This brings me to the heart of a difficult question of whether to make the orders sought by the defendant that would permit her to move the children to California, and have the sole custody and primary care of the children there.

[158] The move to San Diego would afford the defendant the opportunity to earn a somewhat higher salary, and to purchase a home for less than she would pay in North Vancouver. However, it would not offer the children any significant improvement to the level of financial security both parents are capable of providing the children in this jurisdiction. For the children, the financial benefits of the move

are insufficient to justify relocating them to a place where they do not wish to live. At least until such time as the defendant is able to take advantage of the opportunity for retraining, the move is unlikely to result in a more affluent lifestyle for the children.

[159] Nor would the move to California offer the children any educational advantage.

[160] If the defendant were to relocate to California with the children, they would be in the primary care of the parent with whom they have the closer bond but would be uprooted from their familiar routines and would be living in a place where they do not wish to reside. Conversely, if the children remain in North Vancouver and the defendant relocates to California, J and A will be in the care of a parent who will require childcare assistance notwithstanding the adjustments he has already made, or is likely to be able to make to his hours of work, and who will have less time during the work week to personally care for the children than would their mother.

[161] The disruption of these children's routines, the loss of social connections with their friends and community in North Vancouver, and the reduction in contact with their paternal extended family, combined with their wish to remain in North Vancouver rather than move permanently to California are all factors I take into account in determining that the children should remain in North Vancouver in the primary care of their father if the defendant relocates to California.

[162] In determining that the children will be in the primary care of their father if the defendant relocates to California, I have also taken into account the significant fact that the children will not, in that event, have the same close contact with the parent who has been their primary care giver, or the same access to her emotional support as they currently enjoy. I appreciate that the children's loss of direct contact with the defendant will be only partially mitigated through their opportunity to spend substantial amounts of time with her during the summer and throughout the year under the terms of access proposed by Dr. Elterman. However, in my view, the disruption to these children of a move which they do not want to make outweighs the

benefits to the children of being in the primary care of the defendant in a place where they do not want to make their permanent home.

[163] Dr. Elterman based his recommendation that the children go to California with the defendant in part on his finding that their primary attachment is with their mother. I accept that finding. However, Dr. Elterman also found that the children have a good attachment with their father. During his observation of the children with each of the two parents he noted that the children seemed relaxed and close to both parents. The plaintiff is well-organized, loves his children, and is capable of providing a stable home for them.

[164] Another reason that Dr. Elterman gave for his recommendation was that the children when interviewed spoke about the plaintiff being more prone to get angry and yell at them. Dr. Elterman thought this might become more of an issue for the plaintiff as a single parent. As Dr. Elterman noted in his first report, J also said that the defendant yelled, although not as much as the plaintiff. Both children also reported that their parents yelled or swore at each other. I am not able to determine how much of the plaintiff's or the defendant's yelling at the children is a by-product of their conflicts with each other. However it seems likely that from time to time anger generated by their own fraught relationship permeates their communications with the children. To the extent this is so, the engagement of the parenting coordinator should reduce the level of conflict between the plaintiff and the defendant, and thereby assist the plaintiff to curb his anger, and consistently maintain a more measured tone when disciplining the children.

[165] Both children also spoke positively about each parent, and neither child feared their father. Dr. Elterman did not suggest that the plaintiff has psychologically abused the children. In all of these circumstances, the yelling referred to by Dr. Elterman, while not to be condoned, does not render the plaintiff unfit to have the primary care of the children.

[166] Dr. Elterman was also concerned that because the plaintiff worked long hours and commuted to and from Squamish, he would need extensive daycare. He

thought it likely that the plaintiff might relocate to Squamish to avoid the commute. If that were to happen, the children would change schools, just as they would if they moved to California.

[167] When Dr. Elterman interviewed him in the late summer of 2009, the plaintiff was anticipating the opening of the new dealership in Squamish. He expected to work, and initially did work longer hours than his current 9:30 a.m. to 6:00 p.m. work day. As previously discussed, by adjusting his start time to 9:30, the plaintiff is now able to take the children to school in the mornings, rather than depend upon others to do so. The plaintiff still has the 45 minute commute every morning and evening during the work week. However, he is surely not the only single parent in the Lower Mainland who must cope with this inconvenience, put in a full work day, and also do his best to meet the needs of his children.

[168] The plaintiff will require daycare assistance. However, with the assistance available to him from responsible adults known to the children, the plaintiff has the resources to provide safe and reliable care for the children when he is at work. I accept the plaintiff's evidence that he intends to maintain a home for the children in North Vancouver, rather than relocate to Squamish, so that J and A will be able to continue their schooling and maintain their friendships in the community that is familiar to them.

[169] The applications of the defendant to move the children to California and to have their sole custody and primary residence there are dismissed.

[170] In the event that the defendant, D.M.A. relocates to California:

A. The plaintiff B.K.A. will have the primary care and sole custody of the children.

B. The plaintiff and the defendant will have joint guardianship of the children of the marriage on the Master Joyce model for sole custody and joint guardianship;

More particularly, the plaintiff and the defendant shall have joint guardianship of the children. Joint guardianship means:

(a) the parents are to be joint guardians of the persons and estates of the children;

(b) in the event of the death of either parent, the remaining parent will be the sole guardian of the persons and estates of the children;

(c) the plaintiff, who has the primary responsibility for the day-to-day care of the children, will have the obligation to advise the defendant of any matters of a significant nature affecting the children;

(d) The plaintiff will have the obligation to discuss with the defendant any significant decisions which have to be made with respect to the children, including significant decisions concerning;

(i) health (except emergency decisions),

(ii) education,

(iii) religious instruction and

(iv) general welfare

of the children.

(e) the defendant will have the obligation to discuss the matters set out in paragraph (d) with the plaintiff;

(f) Each parent will have the obligation to try to reach agreement with respect to major decisions referred to in paragraph (d);

(g) In the event that the parents cannot reach agreement with respect to a major decision referred to in paragraph (d) despite their best efforts, the plaintiff will have the right to make such decision and the defendant will have the right, under. s.32 of the *Family Relations Act*, to seek a review of any decision which the defendant considers contrary to the best interests of the children;

(h) each parent will have the right to obtain information concerning the children directly from third parties, including teachers, counsellors, medical professionals and third-party care givers.

C. The defendant will have access to the children for six weeks during the summer school vacation, for one week during spring break, and for 10 days during the Christmas vacation, and on the one weekend each month that has a British Columbia public holiday or professional day attached to it.

D. As the access parent, the defendant will have the right to select access times for the summer vacation, spring break and Christmas vacation access.

[171] The plaintiff and the defendant will select by mutual agreement a parenting coordinator who is a registered psychologist to assist them in communicating with each other, including for the purpose of making arrangements for the defendant's access to the children and for the transportation of the children to and from California. In the event that the plaintiff and the defendant are unable to agree on the selection of a parenting coordinator, within 30 days of the release of these Reasons for Judgment, the court will appoint the parenting coordinator.

[172] The expenses incurred for the services of the parenting coordinator will be shared between the parties in proportion to their respective *Guidelines* incomes.

[173] The plaintiff and the defendant will also share the costs of the children's travel to and from California for access in proportion to their respective *Guidelines* incomes.

[174] In the event that the defendant chooses to remain in North Vancouver after July 1, 2010, she will have the primary residence of the children. In that event, the plaintiff and the defendant will have joint custody and joint guardianship of the children on the Master Joyce model.

[175] During the course of this hearing, both parties supported the appointment of a parenting coordinator to assist them in communicating with each other. With the assistance of a parenting coordinator who is available to sit down with both parties and work with them, the plaintiff and the defendant should be able to communicate at a level which makes joint custody in North Vancouver feasible. Between February 17, 2005, when Mr. Justice McEwan made his order awarding the plaintiff and the defendant joint custody of the children, until the summer of 2008, the parties were, by and large, able to communicate with each other in a way that made joint custody workable.

[176] In the event that the defendant remains in North Vancouver, the plaintiff will have generous access to the children including alternate weekends from Friday after school until Sunday evening at 7:00 p.m. and each Wednesday after school until Thursday morning at which time the plaintiff will deliver the children to their school. I will leave it to the parties, with the assistance of the parenting coordinator if necessary, to work out the time and place for pick up of the children on Wednesdays and alternate Fridays. It may be necessary for the plaintiff to make arrangements for the after-school care of the children on those days. The access of the plaintiff will also include equal sharing of the children's summer school holidays and Christmas holidays and such further access, as the parties, with the assistance of the parenting coordinator agree, or in the event of disagreement, the court orders.

Child Support

[177] Effective April 30, 2010 the plaintiff unilaterally terminated his monthly payments of $633 to the defendant's childcare provider. The plaintiff did so because he had made his own arrangements for the after-school care of the children during the alternate weeks they were with him. The defendant had engaged her childcare provider by the month, and was unable on short notice to find a replacement care provider for the alternate weeks the children were in her care. The defendant will continue to require the services of a childcare provider until the end of the school year, whether or not she relocates in July. The plaintiff will forthwith pay to the defendant the sum of $633 for childcare for the month of May, and will pay the further sum of $633 to the defendant on June 1, 2010 for childcare for the month of June.

[178] In the event that the defendant chooses not to relocate to California and has the primary residence of the children, the plaintiff will pay basic child support to the defendant in the *Guidelines* amount of $1,721 per month commencing July 1, 2010 and continuing on the first day of each and every month thereafter. In the same event, commencing July 1, 2010 the plaintiff and the defendant will each share s. 7 special or extraordinary expenses, including the costs of childcare, in proportion to

their respective *Guidelines* incomes, which I have found to be $122,250 for the plaintiff and $74,000 for the defendant.

[179] The plaintiff has not made an application for child support in the event that the defendant relocates to California without the children. In that event, the parties are at liberty to apply to the court respecting child support.

[180] I will remain seized of this matter to hear such further applications and provide such further directions as may be necessary respecting the appointment of the parenting coordinator, matters relating to access which the parties are unable to resolve with the assistance of the parenting coordinator, or child support.

COSTS

[181] I request that the plaintiff provide his written submission on costs within 14 days, and that the defendant deliver her written submission on costs within 14 days after receiving the plaintiff's submission.

"PEARLMAN J."