

# SUPREME COURT OF YUKON

Citation: *ENAG v JSP*,  
2024 YKSC 31

Date: 20240116  
S.C. No. 22-B0065  
Registry: Whitehorse

BETWEEN:

E.N.A.G.

PLAINTIFF

AND

J.S.P.

DEFENDANT

AND

S.C. No. 23-B0064  
Registry: Whitehorse

BETWEEN:

C.S.P.

PLAINTIFF

AND

P.W.P.

PLAINTIFF

AND

E.N.A.G.

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for E.N.A.G.

Shaunagh Stikeman

Appearing on his own behalf

J.S.P.

Appearing on her own behalf

C.S.P.

Appearing on his own behalf

P.W.P.

Counsel for the Children

Norah Mooney

**This decision was delivered in the form of Oral Reasons on January 16, 2024. The Reasons have since been edited for publication without changing the substance.**

## REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): I am ready to give my decision on three matters.

[2] First, the application about relocation and parenting time.

[3] As many judges have said, relocation cases are amongst the most difficult in family law.

85. ... there can be no question that the determination of the mobility rights of parents is often excruciating for the parents and a daunting task for the courts. ...

[4] The Court said that in *BRC v KL*, 2021 NBQB 147.

[5] And as Justice Wenckebach of this Court noted in the case of *BBB v KLM*, 2022 YKSC 60:

[1] ... The stakes are high for both parties [in mobility cases]. For the parent who wants to leave, the decision is frequently made because there are opportunities for both the parent and child elsewhere. For the parent opposing the relocation, the move can result in drastically reduced opportunities for the parent to be with the child. The court's determination has a profound effect on all members of the family.

[6] Here, there are two children of the relationship: R., born [redacted], now age 10; and L., born [redacted], now age 7. The mother wants to relocate to Grand Bay-Westfield, New Brunswick, with the children. The father opposes relocation and seeks 50-50 parenting time, as opposed to the current schedule at the time of the hearing which was every weekend with the father and 1 to 1.5 hours with father every Wednesday.

[7] What makes the Court's determination more difficult in this case is that all the evidence was provided by way of affidavits and exhibits. There were many areas of dispute where the parties' versions of what occurred contradicted each other and in many of these situations there was no objective evidence to assist me in determining what actually occurred, so I was unable to make credibility findings. In other cases, the

parties agreed generally with the facts but have different interpretations or perceptions of what occurred. I am mindful that both parties have an interest in advancing interpretations, perceptions, and arguments that will support their self-interest.

[8] There was much material filed in this application. The mother filed five affidavits. The longest one had 308 paragraphs. And she filed six affidavits from other supporters. The father filed three affidavits. His longest was 263 paragraphs. And he also filed six affidavits from family and friends. There were three reports from the children's lawyer.

[9] In the following, I will set out the background, the approach to resolving the issues of parenting time and relocation, the relevant legal principles, and then I will apply the facts to the legal principles.

### **Background**

[10] The mother and father began their relationship in 2010. They met in New Brunswick, where the mother is from and has lived her whole life except for the last five or so years when she has lived in the Yukon. For most of the relationship, the father worked outside of the home. At the time of R.'s birth in [redacted], he was a cook in the restaurant. He also worked part-time on their small — or maybe full-time, I am not sure — on their small organic farm at home for a certain period of time.

[11] From 2016 to 2018, he was a graphic designer at [redacted]. In 2018, after their move to the Yukon, he became a cook at [redacted]. In 2019, he was a food and beverage manager at the [redacted]. In 2020, he took some online courses during the pandemic. He attended school to become an electrical apprentice and worked for an electrician in the Yukon. He also worked in IT for the Yukon government Department of

Education, and he is currently a functional analyst at the Yukon government. The father has been the primary financial provider for the family.

[12] The mother worked outside the home for approximately 6.5 months when R. was approximately three years old from March 2016 to September 2016 as a food security program coordinator for [redacted]. Later, in the Yukon, starting in November 2020, she launched an energy healing business. During this time in the Yukon, she also wrote funding grant proposals for various organizations on a regular basis.

[13] In April or May of 2018, the family moved to Whitehorse in the Yukon, where the father is from and where his parents live. They have been in the Yukon since approximately 1970 and are now retired. The mother and father agreed to move to the father's parents' home in [redacted] area, which is approximately a 30-minute drive from downtown Whitehorse, to help care for the father's parents.

[14] The parties separated in December 2021. The mother moved into a condominium in downtown Whitehorse. The children's primary residence has been with her since separation. They have stayed with the mother from Sunday at 6 p.m. to Friday at 4:30 p.m., later changed to 3 p.m. at the father's request, and they have been with the father every weekend and also for approximately one hour on Wednesday evenings.

[15] The parties' ability to communicate and co-parent was reasonably positive from separation and throughout much of 2022, as evidenced by text messages submitted by the father. The tone of the communication began to change towards the end of 2022. The mother began to impose more conditions on the children's visits with their father and no longer asked the father to take the children from time to time while she attended appointments or was out of town.

[16] Around this same time, in late November 2022, the mother's new boyfriend, whom she had met online in a meditation group in 2021 and who is from British Columbia, moved in with her and the children. The mother also sought legal advice to finalize their separation around that time and a statement of claim was filed on January 18, 2023.

[17] The father brought an application shortly after this time to increase his access time with the children. This decision was deferred until the appointment of a children's lawyer to attempt to ascertain the children's views and preferences — or at least those of R., the older child — to assist in the decision.

[18] This application of the father was then superseded by several other applications: first, an application of the mother to take the children to New Brunswick in the summer to see sick relatives — which was eventually consented to by the father — and then these current applications for the mother to relocate and have sole custody, and for the father to increase his parenting time to 50-50.

[19] R. has issues with anxiety and aggression. These worsened after the separation but at the time of the applications were improving. For example, he has a phobia of bugs which makes it difficult for him to sleep; he often needs to have someone stand outside the bathroom door while he is in the bathroom; and if his boundaries are invaded, he becomes aggressive towards others. Developing strategies and approaches to help him has been challenging. The school, [redacted], has agreed to allow him to attend half days only in order to allow him to decompress and self-regulate.

[20] L. is a well-adjusted, happy child.

### **Analytical Approach**

[21] A principled analytical approach must be taken when a decision is needed on changes to both parenting time and relocation. Some courts have taken the approach that the custody-parenting time issue must be decided first before the relocation application is addressed, but I accept the approach articulated in the case of *Lemay v Lemay*, 2023 ABKB 303, where the Court, after reviewing a number of cases in which courts took different approaches, held that the appropriate analytical approach depends on the factual circumstances of each case.

[22] In this case here, like the case of *Lemay*, at the time of application, there was a shared parenting arrangement being followed by agreement. If relocation to New Brunswick is permitted, then the father's application for 50-50 parenting time is moot. So to address the parenting time and custody issues first would ignore the reality of the proposed relocation, so I will adopt the same approach as the Court did in *Lemay* — recognizing that that decision was under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) (the "*Divorce Act*") — to have one hearing, which we have already had, where I will first consider the relocation application and the sole custody application; and then, if necessary, I will consider the father's parenting time application.

### **Relocation**

[23] As the Supreme Court of Canada stated in *Barendregt v Grebliunas*, 2022 SCC 22 ("*Barendregt*"), the leading case on relocation in the common law context —like the case at bar — at para. 112:

... a parent's desire to relocate is simply part of the factual matrix in the assessment of what parenting arrangement is in the best interests of the child. ...

[24] The mother seeks to relocate to Grand Bay-Westfield, New Brunswick, for four reasons:

- a) New Brunswick is where she and the children are from;
- b) there are more family and friend supports there for her than in Whitehorse;
- c) the children can attend a better resourced school, especially for R.'s special needs; and
- d) life is more affordable in New Brunswick than in Whitehorse.

[25] I will elaborate on each of these reasons.

[26] First, New Brunswick is where the mother grew up, met the father, and where the children were born. The father's oldest daughter is from New Brunswick and lives there when not attending university. The mother contends that their move to the Yukon was intended to be temporary. It was to care for the father's aging parents and, in particular, as a result of the declining health of his father.

[27] The children are connected to friends and family in New Brunswick. The mother has an older sister with whom she is very close and will provide her with emotional support and childcare, as well as will help organize family gatherings and outings.

[28] The mother has researched schools and spoken to a good friend whose son with special needs attends Westfield Primary School as well as to the principal of that school. Based on those conversations, the mother is convinced that this school could offer more and better resources to R. than he is receiving in Whitehorse at [redacted].

These include:

- a) small classes; it is suggested that he will be in a class of 16, especially if he stays in French immersion;

- b) one educational assistant for him alone rather than sharing an educational assistant with other students;
- c) weekly meetings, which parents are encouraged to attend, with two resource teachers who create weekly modified learning plans, the classroom teacher and other support staff, as opposed to team meetings approximately every two to three months to review and modify the learning plan in Whitehorse;
- d) like [redacted], acceptance that some students need shorter school days with a view to building up to full days;
- e) the vice-principal of the school in New Brunswick is a cousin of the mother;
- f) the school has offered a preparatory meeting before school starts by Zoom; and finally
- g) the mother has also found a therapist willing and able to accept R. as a client for counselling and is located in Saint John, New Brunswick, which is approximately 10 minutes away.

[29] The mother says that rent in New Brunswick for houses is more affordable than in Whitehorse. The average rent is \$1,600 to \$1,900 a month in New Brunswick as opposed to \$2,200 to \$2,400 a month in Whitehorse. The cost of a three- to four-bedroom home in New Brunswick ranges from \$290,000 to \$320,000 versus over \$600,000 in Whitehorse. Utilities and food are less expensive in New Brunswick and therapy costs are \$135 an hour in New Brunswick as opposed to \$178 an hour in

Whitehorse. As a result, the mother says there will be more money available for extracurricular activities for the children.

[30] The mother anticipates a greater income earning potential with the move. In New Brunswick, the mother says there will be a larger population for her energy healing business. She has found a space to rent for her business. She has an offer to work with her sister's first aid training company providing mental health training to clients of her sister's company. She will continue to train professionally as an herbalist. She says she could still do all of this and be available for R. in the afternoons, if necessary. Her partner, J.R., who will accompany her, is an investor and works remotely from home so will be able to assist with childcare.

[31] The father disputes the mother's reasons for relocating.

[32] First, he says the only person in the family from New Brunswick is the mother. Although the children were born there, R. was four and L. was one when they moved to the Yukon. More than half their lives have been spent in the Yukon. They have support of family and friends in the Yukon, including their paternal grandparents, more so than in New Brunswick. The extended family of the father visits two to three times a year in Whitehorse. The children can return to New Brunswick each year to visit family and friends. The father says that the move to the Yukon was originally agreed to be a minimum of two years. In December 2021, the mother said that she wanted to stay in the Yukon longer. They sold their house in New Brunswick and decided together to make Yukon their home.

[33] The father says that [redacted] is an excellent school for both children. They are familiar with R.'s special needs. They have a team in place for him called "Team R." and

they have a specific modified learning plan for him. The spending per child in a school in the Yukon is on average \$8,000 more than in New Brunswick. The father would like to see the Westfield Primary School plan in writing, including participating in the Zoom team meeting, because the father is sceptical that there will be a plan in place for R. at the outset of the school year.

[34] The father is concerned about the disruption and uncertainty to R.'s life of a move to New Brunswick and to change counsellors at this time, given that he has a good relationship with his current counsellor, Joseph Graham.

[35] The father's internet searches show rental, housing, gasoline, and other utilities costs are approximately the same in New Brunswick as in the Yukon. The father says the mother's assertion that she has greater income earning potential in New Brunswick than in Whitehorse is not well-founded. There is insufficient detail in the mother's plan to rent space for her energy healing business to demonstrate profitability; she has no formal mental health training; and he believes working at two businesses and pursuing courses to become an herbalist as well as being available to care for R. every afternoon, if necessary, is not realistic.

[36] More generally, the father notes that they have no home in New Brunswick and, again, this will be disruptive to the children. Q., his daughter, is likely going to find a summer job in the Yukon after her school year so may not be in New Brunswick at all.

[37] The mother points out in response that the father has one extended family member, L., the father's sister, who along with her husband and their daughter, come to visit one to two times a year to Whitehorse from Alberta for approximately one weekend.

The frequency of visits was confirmed by L. and J. in their affidavits. They added that their family has visited them in Alberta as well.

[38] The mother responds that she would choose lower cost rental homes around the \$1,500 a month rate and not the \$2,400 rate that was quoted as the higher end. The mother says her house price search was based on realtors, the Multiple Listing Service, and other websites, not just Google searches. She also said that she has considered the costs of business and notes that joining her sister's already established business with existing clients would reduce overhead and marketing costs.

### **Analysis**

[39] The legal framework applicable to relocation applications when the parents have never been married is the case of *Barendregt*, a 2022 decision of the Supreme Court of Canada. This decision refines the framework that was previously set out by the Supreme Court of Canada in the case of *Gordon v Goertz*, [1996] 2 SCR 27 ("*Gordon*"). It also takes into account the amendments to the *Divorce Act* related to relocation. These amendments codify some of the principles in *Gordon*, depart from those principles in other ways, and respond to new issues identified in the case law since *Gordon*. The common law relocation framework is as follows in *Barendregt*.

First:

[152] The crucial question is whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being. This inquiry is highly fact-specific and discretionary.

[153] ... A court shall consider all factors related to the circumstances of the child ...

[40] Unlike the *Divorce Act* amendments related to relocation, the common law framework does not impose a burden of proof on either party. While the Supreme Court of Canada said that the history of caregiving will sometimes warrant a burden of proof in favour of one parent and also that some provincial legislatures and Parliament have enacted presumptions through legislation, at common law, which this case is, the inquiry remains an individual one: that is, the judge must consider the best interests of the particular child in the particular circumstances of the case. Other considerations may demonstrate that relocation is in the child's best interests even if the parties have historically co-parented. So, no burden of proof and no presumption in favour of one or the other parent.

[41] I will now address each of the 12 factors related to the circumstances of the children that are set out by the Court in *Barendregt* and address each of those factors in the factual context of this case.

*Children's views and preferences*

[42] We have all had the benefit here of three reports from the child lawyer, who has met with both children on several occasions. The child lawyer is appointed by the Public Guardian and Trustee under s. 76 of the *Child and Family Services Act*, SY 2008, c 1 (the "CFSA") and s. 168 of the *Children's Law Act*, RSY 2002, c 31. Their role is described in guidelines developed for the Yukon family law practice. Those guidelines state:

- the child lawyer must be and appear to be independent;
- the child lawyer must communicate their views about the best interests of the child or the child's wishes and preferences;

- they are there to represent the interests of the child and not that of any other party;
- they are to advise the child that discussions between the child lawyer and the child are confidential;
- the child lawyer is to determine if the child can provide formal instructions and if so, the child lawyer acts on those instructions and communicates them to the Court; if not, because of the child's age, maturity, or ability to express wishes and do so consistently, then the child lawyer is similar to a friend of the court and must ensure that the child's views, wishes, and all relevant evidence relating to the child's best interests are before the Court;
- the child lawyer is also to consider whether a child is being influenced or pressured by a party; and
- overall, the child lawyer must take a child-centred approach in determining and communicating views about the best interests of the child or the child's wishes and preferences.

[43] Here, the child lawyer, Ms. Mooney, met with the children several times in April, May, June, July, and August 2023. She noted that both children were talkative and not shy to speak with her and answer questions. She found that R. was mature enough to provide instructions while L. was not. After the first few meetings, she began to meet with R. separately. Because L. was so talkative, she thought she could get more information from R. if she met with him on his own.

[44] R. was consistent in all their meetings that he would like the access schedule and the parenting time to remain the same, that is, primary time with mom and weekends and Wednesday evenings with dad.

[45] In July 2023, both children were asked specifically, at my request, about the possibility of moving to New Brunswick. Both children had recently returned from a holiday in New Brunswick where they had both enjoyed themselves. L. was not opposed to moving to New Brunswick and thought she could easily make new friends there. R. said, in three meetings in July and August with the child lawyer, that he would like to move to New Brunswick. They discussed staying in touch with the father and R. said he could do so through phone/video calls and visits with his father in either New Brunswick or the Yukon to maintain their relationship.

[46] The father says that the children's views and preferences as expressed by the child lawyer should be given no weight. He fears the high-conflict nature of the parents' relationship, including the mother's alleged statements that she was willing to spend every last penny to get the children and her attempts to minimize his time with the children, suggests that she has coached the children about their preferences. The father also believes the children do not understand the full implications of a move. To them, New Brunswick is a place associated with fun, as they go there for their holidays only.

[47] Ms. Mooney was clear in her letters and orally in court that R. understands the court process, understands that he is not the decision-maker — the judge is — and that the relocation has not been decided, and his views will be one factor only.

Ms. Mooney's consistent view was that R. has very strong opinions of his own and she did not believe he was being coached.

[48] I accept the child lawyer's conclusion that both children are not opposed to a move to New Brunswick and in R.'s case, he would like to relocate, understanding it will affect his relationship with his father. Because of L.'s age and her disposition — which seems to be generally happy, adaptable, and upbeat — it is not as clear whether she understands the full implications of the move on her relationship with her father. But on balance, this factor favours relocation.

*History of caregiving*

[49] The mother insists that she was the primary caregiver throughout the relationship. The father states that they were equally responsible and involved in the care of the children before separation. After separation, the father says he had the children for approximately 37% to 38% of the time until early 2023.

[50] I accept the evidence of the mother in this case that she has been the primary caregiver for the children. The fact that the father has been the main financial provider for the family throughout the relationship while the mother has chosen to stay home with the children supports this. The text messages between the mother and R.'s school throughout 2021, 2022, and 2023, when he was having difficulties with anxiety and aggression, shows the intensity and regularity of her involvement with the school on his behalf and with him at the school. She has also participated as a board member at L.'s daycare and was an active volunteer at both schools.

[51] Having said this, I accept that the father was involved in the children's lives, loves them both very much, and did help with the caregiving when possible. Given his work obligations, he has been unable to spend the time caregiving that the mother has and can. This factor favours relocation.

*Incidents of family violence*

[52] The mother does not allege violence but claims emotional harm from the father. She gives examples of his animosity and controlling and overbearing personality as follows:

- discussing with the children changes to the parenting schedule;
- refusal to accept R.'s struggles with anxiety;
- withholding of consent for R. to attend counselling and to receive osteopathic treatment;
- refusal to return the children at 6 p.m. on Wednesdays;
- animosity towards her new partner;
- refusal to permit her to travel to New Brunswick for a holiday in the summer;
- refusal to consent to the issue of new passports;
- an attempt to change the location of the pick-ups and drop-offs to the RCMP station; and
- refusal to reimburse expenses.

[53] The mother relies on a letter from her own therapist that concludes the father has emotionally harmed the children using many of these same examples.

[54] I place no weight on this therapist's letter and, frankly, find it surprising that it would be written and submitted in a high-conflict court proceeding such as this. The child lawyer expressed a similar view.

[55] I agree with the father, who noted the therapist has only heard one side of the story from the mother with whom she is in a therapeutic relationship. The therapist has never met the father or the children.

[56] These allegations of the mother demonstrate the heightened conflict between the parties, including the significant communication challenges between them. The mother has shown a tendency throughout this litigation to leap immediately to an interpretation of a situation or event that puts the father in the most negative light.

[57] For example, the April court order for Wednesday access provided that the visit of the children with the father was approximately one hour and he should return the children by no later than 6:30. This leeway was granted, given the location of the father's home outside of Whitehorse and the vagaries of travel, as well as the relatively short duration of a one-hour visit. There is no evidence that the father returned the children later than 6:30, which is allowed by court order. There is no basis for the mother to criticize the father for returning the children after 6:00 and before 6:30 on Wednesdays.

[58] The father did not withhold consent to counselling with Joseph Graham. He may have delayed his consent, which caused stress for the mother, but that was because he wanted to speak with both R. and the counsellor in order to be satisfied of the need and the type of counselling treatment. Consent was given as soon as those conversations occurred, and R. has continued to see Joseph Graham regularly.

[59] The father vehemently denies that he does not accept R.'s struggles with anxiety. The many text messages, especially from 2022, between him and the mother confirm his recognition of this, as they discussed strategies to cope with R.'s challenges.

[60] The father admits he has disagreed with proposed treatment for R.'s anxiety, including initially having only half-day attendance at school — which he now acknowledges was a mistake — but this is different from failing to recognize the problem in the first place.

[61] There is no dispute that the father has shown animosity towards the mother's partner, but that situation could have been handled differently. Although there were meetings between the men at the pick-ups and drop-offs of the children, there appears not to have been a formal introduction meeting arranged. When the meetings other than at the pick-ups and drop-offs, where the focus was appropriately on the children, when a meeting did occur, it was the disastrous meeting on March 1, 2023, at McDonald's, which apparently descended into yelling and swearing on both sides. The two versions of that event are directly contradictory and I have no way of assessing which one is accurate, but it was after this episode that the father wanted to change the location of the pick-ups and drop-offs because of the degree of animosity shown at the McDonald's meeting.

[62] It is impossible for me to determine why this relationship has deteriorated in this way. But given the important role that J.R. has in the mother's life, as well as in the children's lives, and given the ongoing role that the father wants to have in the children's lives, it is not in the children's best interests to have this animosity between the two men continue. I encourage both of them to work on their relationship and to develop a civil and respectable form of communication for the sake of the children.

[63] When one compares the text messages exchanged between the parents in 2022 to the correspondence starting in the last months of 2022 and beyond, the tone has a

marked shift from a relatively cooperative co-parenting relationship to a more demanding, conditional, critical, and negative interaction. This change in tone and approach can explain some of the father's behaviours. However, the father unfortunately let the conflict between him and the mother obscure his ability to act in the best interests of the children. His eventual agreement to counselling for the children, the trip to New Brunswick, and the issuance of the passports were all ultimately decisions in the best interests of the children but the way that he got there prolonged and escalated the conflict. Though, as I have said in the case of counselling, I think it was reasonable that he wanted to speak to R. and the counsellor before agreeing.

[64] The father's discussion of the possible parenting scheduling changes with the children was an inappropriate and unnecessary involvement of the children in the conflict, which the father now acknowledges after taking For the Sake of the Children course.

[65] None of these examples rises to the level of family violence. They are examples of sub-optimal behaviour occurring in a high-conflict case. They show the parents need to work hard at improving their ability to communicate about the children and not let the conflict between them overwhelm their acting in the children's best interests either by, in the mother's case, unfairly criticizing and jumping to the most negative interpretations of the father's actions rather than trying to understand where they are coming from and, in the father's case, of delaying agreement or making discussion difficult because of his distrust of the mother's intentions or his need to control the situation.

[66] To conclude on the factor of incidents of family violence, this factor is neutral and it neither favours nor disfavors relocation.

*Cultural, linguistic, religious, spiritual upbringing, and heritage*

[67] While there are some examples of the father speaking negatively about the mother's healing rituals or attributing beliefs to her that she denies, these are relatively small parts of the affidavits. They are the mother's alleged beliefs and practices and do not appear to be related to the children's upbringing and heritage.

[68] There is no real evidence on this factor and so it is neutral with respect to relocation.

*Parent's willingness to support the development and maintenance of the child's relationship with the other parent.*

[69] As noted above, the mother was supportive of the children's relationship with the father and they had a reasonable co-parenting relationship right after separation. As noted, this changed in late 2022/early 2023 around the time this litigation began. The mother has now focused on the negative aspects of the father as set out in her affidavits #4 and #5, and has imposed more conditions on his parenting time, including, for example, requiring him to call every day on a four-day trip to Haines, Alaska; and requiring that she be notified immediately if the children exhibited anxiety during that trip and she would go to retrieve them. She also asked the father not to attend the children's first day of school in August 2023.

[70] The mother's more recent behaviours leading up to this application appear to support her desire for more distance between the father and the children. While early on after separation she was encouraging of the access and the relationship development with the father, her more recent actions do not inspire confidence that she will support the development and maintenance of the children's relationship with the father.

Conversely, there is no evidence that the father does not want the children to have a strong relationship with their mother.

[71] This factor does not support relocation.

*Child should have as much time with each parent as is consistent with the best interests of the child*

[72] This reframes the maximum contact principle to make it a more child-centred approach. Instead of the assumption that as much contact as possible with both parents is ideal for the child — that is, equal or shared access — the principle is now what amount of contact with each parent is consistent with the best interests of the child. In the context of this dispute, the question is whether it is in the children’s best interests to move to New Brunswick notwithstanding the impact on their relationship with the father. The access arrangements of weekends and one night during the week for the father, with primary caregiving by the mother seems to be in the children’s best interests despite R.’s reluctance to visit his father from time to time.

[73] This arrangement will not be possible if relocation is allowed to happen, so this factor does not support relocation.

*Reason for relocation*

[74] I will not repeat the mother’s stated reasons for relocation and the father’s disagreement. While the father raises valid concerns, I accept that the mother will have promising work opportunities through her sister and in a larger, more populated centre. The mother has done more reliable searches on the cost of housing, including by speaking with realtors and utilities, than the father, who has relied on Google searches which are less reliable.

[75] I accept the mother's evidence that the cost of living may well be less in New Brunswick than in Whitehorse. A northern community has significant higher housing, food, and utility costs. The mother's research on the Westfield Primary School is thorough and encouraging. Although, of course, the father is correct to have concerns until the promised plan is implemented, the detailed information provided by the mother about the school is impressive. The mother is close to her older sister and has good friends and other family members in New Brunswick. The children also have good friends and R. stays in contact with one of them from the Yukon.

[76] The reasons for the mother wanting to move to New Brunswick are legitimate and this favours relocation.

*Impact of relocation on the children.*

[77] There appear to be the same kinds of opportunities for the children in New Brunswick as in the Yukon: a good school with additional hands-on assistance for R. through educational assistant; a modified learning plan; regular meetings; adapting school requirements, such as shortening the days; a good school for L. as well; and the availability of extra curricular activities: archery for R. and horseback riding for L.

[78] The children will be able to bond with their maternal extended family in New Brunswick. Return trips to the Yukon may be organized at a time where extended family in the West will be in the Yukon to ensure bonds are maintained with the paternal side of the family. The additional support the mother will have in New Brunswick from family and friends will help her provide for the needs of the children. There will be an additional adjustment period, as there would be with any move. The difference is that

New Brunswick is a familiar environment for them and they have family and friends there.

[79] This factor does favour relocation.

*Amount of time spent and level of involvement in the children's lives by each parent*

[80] I accept that the mother has been the primary caregiver before and after separation. She has been very involved in the children's schooling, especially R.'s, and also with their healthcare needs, including counselling, dentistry, osteo therapy, naturopath, physiotherapy, and the spirituality of both children. She has driven and picked up the children to and from school or the bus stop regularly. She has volunteered at both schools. She facilitates and encourages their extra-curricular activities. I accept her evidence that she gave up personal time to ensure that her children were well cared for.

[81] The father has been less involved in the day-to-day activities of the children. He has missed several meetings for R.'s learning plans. He has attended only one school concert for L. He has not attended the same number of therapy and medical appointments for either child as the mother has. He has not volunteered at their school or pre-school as often as the mother has or attended field trips. Some of this, of course, is because of his work responsibility and some of it is because he has chosen not to attend.

[82] This does not mean that the father was not and is not an involved parent.

Evidence from the text messages between him and the mother, as well as other affidavit evidence, refer to him taking the children on long nature walks in the forest and explaining flora and fauna phenomena, playing with Lego, playing video games, going

swimming at the Canada Games Centre, reading to them voraciously at bed time, preparing healthy meals and snacks, taking them on camping trips, and doing many other outdoor activities both in winter and summer.

[83] On balance, though, this factor does favour relocation as the mother has spent more time and been more involved in the children's lives.

*Existence of order or agreement specifying where the children are to reside*

[84] There is no order or agreement specifying where the children are to reside geographically, so this factor is inapplicable.

*Reasonableness of proposal for relocation to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration the location of the new place of residence and travel expenses.*

[85] The mother proposes once weekly access by the father to the children by phone or videoconference, as well as visits three weeks per year: one at Christmas, one at March break, and one in the summer in New Brunswick. The New Brunswick location is because of the long distance between the Yukon and New Brunswick, and the potential for the negative effects of travel on the health of the children. The mother proposes to reimburse the father for 50% of the cost of his return flight from the Yukon to New Brunswick to a maximum of \$500 three times a year.

[86] This is not reasonable in my view. For access to be limited to three weeks per year for a parent who has been as involved as this father has been in his children's lives is not in the best interests of the children. It will not allow for the development and maintenance of a decent ongoing relationship between the father and the children.

[87] This factor does not support relocation.

*Whether each parent has complied with their legal obligations and likelihood of future compliance*

[88] The mother cites the father's failure to return the children at 6 p.m. on Wednesdays, his discussion of the parenting schedule with the children, his unreasonable withholding of consent for passports and travel to New Brunswick demonstrated a failure to comply with family law obligations. By contrast, the mother says she has kept the father informed and requested consent from him for decisions, such as education and health, and she has sought court orders for travel to New Brunswick and shared access time and provided him with passports.

[89] As noted earlier, the mother's examples show again a leaping to negative judgment and an exaggeration of the seriousness of some of the father's actions. As already stated, I do not agree that the father's failures to return their children at 6 p.m. on Wednesdays was a breach of any court order. Consent was provided by the father for passports and travel. Although it was delayed, it was not refused. This was not a failure to comply. The discussion of the schedule with the children showed bad judgment but it is not illegal.

[90] This factor is either not applicable or neutral.

[91] In conclusion, there are five factors that support relocation and three factors that do not. The other four factors set out are either neutral or not applicable. I will grant the mother's application to relocate but not her proposal for the father's access to the children. The father shall have access to the children for eight weeks in the year and at least half of those visits shall be in the Yukon. I recognize the challenges of travel of young children, and I ask that the parents through their legal counsel to work out the arrangements and if they are not able to do that to return to court.

[92] The relocation shall not occur until the summer of 2024 after R.'s birthday and in time to get settled before the school year begins.

[93] Between now and then, I would like if both parents could work on continuing to develop the father's relationship and bond with L. and work on repairing the relationship with R. I will address this further in a moment.

[94] The father's application for 50-50 shared parenting time is now moot.

### **Custody**

[95] To date, there has been no custody order and the mother is now asking for sole custody. The father opposes and requests joint custody. The mother is relying primarily on the application of principles from case law that state that where parents are in high-conflict and unable to communicate well, joint custody is inappropriate. These cases say that if there is poor communication based on an absence of mutual trust and respect the best interests of the children will not be met. An example of that is *LB v PE*, 2021 ONCJ 114 ("*LB*")/*LB v PE*, 2021 ONCJ 198.

[96] In the case of *SS v SK*, 2013 ONCJ 432, the Court wrote that courts should assess whether granting of a joint custody order is:

- (a) more or less likely to de-escalate or inflame the parents' conflict;
- (b) more or less likely to expose the children to parental conflict; and
- (c) whether a parent is seeking the order to inappropriately control the other parent, such parents can be rights-based, overly litigious, unbending, and the best interests of the children can be a secondary consideration (*LB* at para. 98).

[97] Here, at this time, unfortunately, the parties are not good candidates for joint custody because of the lack of trust between them and the consequent inability to communicate appropriately. The father is convinced that the mother is trying to sever his relationship with the children by restricting access and making false allegations about his parenting abilities. The mother fears that the father will withhold consent for reasonable care to be provided to the children and also expresses concern about his increasing hostility of communication and his controlling nature.

[98] The evidence here of the 9 to 10 months leading up to this application shows a marked deterioration, as I have already noted, in the co-parenting relationship. I fear that, at this time, a joint custody order will escalate and increase the conflict and expose the children further to it. I find that the best interests of the children are met at this time by the mother having sole custody.

[99] Looking at the best interests' factors set out at s. 30(1) of the *Children's Law Act*, first, the bonding, love, affection, and emotional ties between the children and each parent, I recognize that both parents are bonded to R. and L., and both parents love the children very much.

[100] There is some strain in the relationship between the father and R. The father appears not always able to meet the emotional needs of R., which is reflected in R.'s preference that at the time of hearing of this application the current schedule not change and to move to New Brunswick.

[101] The mother, through her work with schoolteachers and educational assistants as well as with the therapists and counsellors for R., has been more successful at meeting

R.'s needs and reducing his aggression and conflict with others as well as his self-regulation.

[102] The father's relationship with L. is good. The mother acknowledges the natural and easy relationship they have without the strain or conflict that exists in the relationship with R. While the mother states that L. has separation anxiety when away from her for more than 48 hours, the father denies this and says there is no evidence of such concerns. Without independent evidence, I find it difficult to assess but I am not prepared to accept at this time that L. has significant separation anxiety from her mother. She has been forthright with the children's lawyer that she enjoys her time spent with her father.

[103] Given her age, however, and her closeness to her brother and the importance of siblings remaining together, I find that the mother should have sole custody of L. as well.

[104] I must also assess the emotional ties with the children and other members of the family who reside with them. While the mother's new partner, J.R., is not technically family, he does live with the children. The evidence from the mother, which is uncontradicted, is that the children like J.R. very much and he is involved in their lives. Since November 2022, he has played games or done crafts with them regularly, he has attended school field trips, he has helped with school pick-ups and drop-offs and other child-care responsibilities. The evidence from the mother is that both children are comfortable around him and enjoy his stabilizing presence in their lives.

[105] The evidence does not demonstrate such a close bond between the children and their grandparents who live with the father. While there is no evidence that the

relationship as a whole is negative or unhealthy, there is also no evidence of the same level of involvement of the grandparents in the lives of the children as there is evidence of J.R.'s involvement either through regular activities or emotional connection.

[106] The children's views and preferences, to the extent they can be ascertained, are that they are happy with the mother as the primary caregiver and with seeing the father on weekends and Wednesday evenings. This is a stable arrangement for them and R.'s behaviours have improved. Things seem to be working.

[107] As noted earlier, the mother has worked very hard to provide for the unique emotional, psychological, and physical needs of both children, and particularly R. The evidence from friends who have children at the same school and from family members and workers at the schools about her level of involvement with both children demonstrates her tremendous efforts to ensure their well-being.

[108] The mother has put more conditions on the father's access and has shown less flexibility in recent months than she had in 2022 after separation. She has not, however, attempted to deny access to the father as of the date of this hearing. However, continued reasonable access as noted above is an issue that will need to be addressed and be made clear by court order.

[109] For these reasons, I will grant the mother sole custody at this time, but I will add as a term to the order that although she will have final decision-making authority, she shall provide all information related to these decisions to the father before making them and discuss and obtain the father's input before making decisions. For example, any information obtained about Westfield Primary School in New Brunswick, any information

about the counsellors, any other medical/professional information should be shared with the father.

[110] As I said at the outset, relocation and related custody decisions involving children are the most gut-wrenching and difficult in family law. After considering the voluminous material filed in this case, I have concluded it is in the best interests of the children to move with their mother to New Brunswick and for her to have sole custody. This is because the evidence has persuaded me that she is best able to meet their emotional, physical, psychological needs and create a secure and stable environment for them.

[111] However, in coming to this decision, I want to be clear. I am not saying the father is a bad parent. On the contrary, the evidence has shown he has excellent parenting skills with both children, even with the strain in the relationship with R. It is clear he has strong bonds with them and loves them very much and loves being with them and they, for the most part, love being with him. This is what has made this decision so excruciatingly difficult, because his relationship with them will inevitably be altered as a result of the mother's move.

[112] But my concern stems from the evidence that the father does not always put the children first and may not always think of their best interests in the heat of the conflict with the mother. Some examples of this are: promising on his weekend to take them to Skagway while he ran a half marathon but at the last minute leaving them at home with the grandparents while he went to Skagway; leaving R. alone during his weekend visits to play video games for long periods of time; delaying consent to matters he ultimately agreed to as a result of the conflict with the mother; involving the children in scheduling

change discussions; putting R.'s photo on his online dating profile while acknowledging R. would not like it.

[113] On balance, from my review of the evidence, the mother has shown more willingness to put the children's needs ahead of her own and not to let the conflict with the father interfere with meeting these needs.

[114] The order will go as follows. This is not the precise wording. This is the essence of what needs to go in the order. I will ask counsel to draft it and I would like to review before it is finalized.

[115] The mother will be permitted to relocate with the children to Grand Bay-Westfield, New Brunswick. This relocation shall not happen until the summer and it will be after R.'s birthday in July, so around the end of July or early August to allow the children to get settled before school.

[116] The mother shall have sole custody of the children.

[117] The mother shall provide all details related to the move to the father, including her place of residence; contact numbers and addresses; details of schooling, including educational assistance, learning plans, modifications to the school schedule, reports and progress; and ensure that the father has an opportunity to be involved in every meeting with the school.

[118] The mother shall also provide details of the counsellors for the children (who, how often, their progress) and any other professionals that are required for the physical and mental health of the children (who, how often, the progress).

[119] Any child-care arrangements outside of the home shall be shared with the father.

[120] While the children are still in Whitehorse, the mother shall continue to keep the father up to date on a regular basis on all of these things and continue to involve him in decisions.

[121] The communication between the parties shall be civil; relate to the children only; there will be no discussion of the litigation process or any issues arising with the children or in their presence; and there will be no disparaging of each other in front of the children.

[122] The father shall have a right of access to the children for eight weeks in the year — either in the Yukon or New Brunswick — and this will include Christmas, Easter, summer, and one other time during the year to be decided by the parties and their counsel. If any of these arrangements cannot be agreed upon through counsel, then the parties will return to court for a decision.

[123] The father shall have access through video and phone calls of up to two times per week with the children once they move to New Brunswick.

[124] One question I had for Ms. Stikeman — but she is not here — is the issue of s. 7 expenses. When I reviewed my notes, I saw from Ms. Lavidas a request that the s. 7 expense issue be adjourned. I am going to leave that for now because I have not made a decision on that because I wanted to speak to Ms. Stikeman to get her views on what the Court was asked to do. I will leave that for now and Ms. Stikeman can come back, either in a family law case conference or another format, to advise on what we do about that.

[125] I am now going to turn to the check-in with respect to the father's interim access based on the decision that was made in November of last year, and the check-in was done on January 8th last week.

[126] The father's interim access was changed as a result of concerns expressed primarily by R. through his mother and the child lawyer to the Court that he wanted reduced access with his father because of certain incidents:

- pinching by the father and the grandmother;
- the father pinning him against a wall while reprimanding him; and
- the father telling him he did not have to keep coming to his father's house.

[127] The father and the grandmother denied the pinching. The pinning against the wall, the father said did not happen. Instead, it was a response to a punch by R., that he moved R. away from him. The father admitted that he did say to R. that he did not have to come over to his house anymore, but this was, he said, a mistake said in the heat of the moment.

[128] I ordered reduced access: six hours, twice a week, on a temporary basis, to be reviewed in January, based on concerns that the father might not have sufficient insight into how his words, actions, and behaviours may affect R., and reports that L. would not want to visit her father by herself.

[129] The review occurred on January 8<sup>th</sup>. I was advised that R. has not seen or spoken with his father since this order of November 20<sup>th</sup> — almost two months. L. has visited her father approximately 14 times and the visits have been good, reported by both L. and her father.

[130] The mother says she has encouraged R. to visit and speak with his father but he has refused. The mother says that R. does not trust that the visits would occur as planned or suggested by the father. The mother also said that the father and the grandmother were inappropriately making L. the messenger about Christmas presents for R. at his dad's house. The mother says that R.'s behaviour at home and at school continues to improve, and he will try longer school days in the new semester.

[131] My decision is that, first, I do not see any reason to continue to limit L.'s access with her father. She was included in the last order because of my acceptance of concerns expressed by the mother and the child lawyer that she would not want to see her father on her own without R., but this has not proven to be the case.

[132] The previous access schedule will be returned for L.

[133] For R., I would like a gradual re-establishment, if possible, of the relationship to occur, especially now that a move to New Brunswick will occur. It is important to attempt to repair and improve the relationship as much as possible before the move.

[134] The father said at the review that he was not opposed to supervised access, which the mother had required but I felt was unnecessary, if it would allow him to see his son. This is a reasonable compromise at this stage to start.

[135] I will order that the father have supervised access with R., starting with six hours a week, to be divided either between the two days on the weekend or during the week and the supervisor to be agreed upon by the parties. If these visits go well from R.'s perspective then after one month, the time and the need for supervision on an ongoing basis will be reviewed and decisions to increase the time will be made.

[136] What I would like to do is set another case conference to review that situation. Again, I will leave that to Ms. Stikeman to organize with the trial coordinator.

[137] I also encourage both parents to speak with counsellors to determine whether there are ways to facilitate the repairing of this relationship.

[138] The order will be:

- that the access schedule will return for L.: weekends with the father and Wednesdays during the week unless otherwise agreed by the parents through their counsel;
- supervised access with the father with R. for six hours a week, the schedule to be worked out by counsel and the child lawyer; and then a check-in review in one month's time.

[139] Finally, the grandparents' application.

#### **Grandparents' application for access**

[140] In December, the grandparents commenced an application for access to the children for six hours every two weeks and eight hours over Christmas and Easter holidays. The grandparents said they brought this application of their own accord and did not involve or advise the father.

[141] Given my decisions on the relocation and the custody and interim access applications, I will not grant this application. The decision on the relocation application provides that access with the grandparents over Christmas and Easter holidays may occur if the children are in the Yukon during that time, something I hope will be able to be worked out through the lawyers but will return to court if not.

[142] The change to the interim access with L. means that L. will be coming to the father's home on weekends and will be able to see the grandparents.

[143] And we will have to see how it goes with R. His most recent instructions to the child lawyer on January 12<sup>th</sup> were that he does not want to visit with his paternal grandparents, that he feels he was never close to them.

[144] At this time, the grandparents' application is denied.

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DUNCAN C.J.