**Court of Queen's Bench of Alberta**

**Citation: Onishenko v Cholowski, 2017 ABQB**

**Date:** 20170223
**Docket:** FL03 38983
**Registry:** Edmonton

Between:

**Kathryn Onishenko**

Plaintiff

- and -

**Thomas Cholowski**

Defendant

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**Oral Reasons for Judgment**
**of the**
**Honourable Mr. Justice L.R.A. Ackerl**

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## Introduction

[1] The main issue in this trial concerns parenting of the parties' two young children Gage and Vada. Determination of parenting at this time is important as the parents reside in different cities about 90 kilometres apart and the children start Kindergarten this September.

[2] Both Kathryn Onishenko and Thomas Cholowski seek primary parenting of these twins who turn five years old in March. Both agree the other parent should receive generous access.

[3] A related issue involves assessment of s 3 child support and s 7 expenses under the Child Support Guidelines.

[4] Determination of future parenting rests entirely upon what is in the best interests of the children in all the circumstances – both old and new.

[5] As plaintiff, Ms. Onishenko argues the children's best interests are met by returning them to her primary care in Edmonton. This was the arrangement before August 2014 when she secretly relocated with them to Kelsey, Alberta. That move occurred against a backdrop of alleged family violence and concerns about the children's safety when in Mr. Cholowski's care. She emphasizes her primary care reflects the history of child care, recognizes existing family relationships and offers the children safety and stability.

[6] While seeking primary parenting, Ms. Onishenko contends that shared parenting is workable notwithstanding the parties reside about one hour drive from each other.

[7] Mr. Cholowski submits this case does not raise a family violence issue. Instead, it involves a pattern of parental alienation from Ms. Onishenko. His primary care of the children would best reflect child care history, invite future stability and ensure their physical, emotional and psychological needs are addressed. He emphasizes that as the only friendly parent, court orders would be obeyed and child/parent relationships nurtured.

[8] Mr. Cholowski argues shared parenting, in the circumstances of this case, is impossible. In particular, he points to travel distance, impending school enrollment and the parties' inability to communicate and cooperate.

[9] The parties tendered multiple trial witnesses, most notably family members. However, they both suggest that credibility of Ms. Onishenko and Mr. Cholowski should largely determine what parenting regime best addresses each of the children's best interests.

[10] Neither party structured their position to focus on a mobility issue. Indeed, counsel for Ms. Onishenko observed "it may not be a big issue". However, she, in effect is arguing the children should be relocated to a different city, approximately 90 kilometers distant from their present and primary home. Under the circumstances the factors cited in ***Gordon v Goertz***, [1996] 2 SCR 27, as well as the *Family Law Act* of Alberta, SA 2003, c F-4.5 require consideration.

**Factual Background**

**The Parties Relationship**

[11] Kathryn and Thomas began dating in July 2011. They started cohabitating about one month after the children's birth on March 4, 2012.

[12] The parties separated on May 18, 2013.

[13] On June 9, 2014, Kathryn obtained an ex parte Emergency Protection Order against Thomas.

[14] On February 7, 2014 Kathryn applied for a Queen's Bench Protection Order. A hearing was scheduled for June 26, 2014.

[15] On June 26, 2014 the Court directed a "Mutual No Contact Order", for a one year period.

**Parenting Time**

[16] The children were in Kathryn's primary care, in Edmonton, from separation until August 21, 2014. By court order Thomas received six hours interim parenting time each Saturday beginning June 29, 2013.

[17] An August 12, 2013 order increased his access to three weekends per month from 10:00 a.m. Saturday to 6:00 p.m. Sunday. This was effective August 17, 2013.

[18] An August 26, 2013 order repeated these access periods. It also provided that should Kathryn fail to provide access she would, upon application, be required to personally attend and show cause why she should not be cited in contempt.

[19] On October 7, 2013 the Court granted specified access for certain Fall weekends and confirmed the existing weekend parenting schedule. It also directed the children now be exchanged at the Millwoods Police Detachment. Third parties were prohibited from being present during that exchange.

[20] Finally, the order addressed the parties communication and required:

i) Kathryn to unblock Thomas from her communication devices;

ii) Thomas to contact Kathryn by text only and "only regarding parenting time";

iii) Kathryn to promptly acknowledge receipt of any text from Thomas.

[21] A February 10, 2014 order further detailed the parties' communication and child exchange. It provided that texts from Thomas were to address "only parenting time and other direct parenting issues that are exclusively known only by Kathryn ... and require immediate attention". During any child exchange the parent, leaving without children, was required to wait 10 minutes before departing.

[22] On July 10, 2014 Thomas was granted summer holiday access from 10:00 a.m. Saturday, August 2, 2014 to Sunday, August 10, 2014. The order provided the children be secured in car seats when in the motorhome. It also required they remain in Alberta.

[23] The undisputed trial evidence is that Kathryn moved with the children to Kelsey, Alberta in late July, 2014. Thomas had no advance knowledge of the move or where they relocated. His summer access did not occur.

[24] An August 21, 2014 ex parte order varied all prior parenting orders and directed Thomas have sole custody of the children. It also prohibited Kathryn from having access or contact with the children absent further court order.

[25] On September 5, 2014 Kathryn was granted daily telephone contact with the children. She also received supervised access for eight hour periods on two separate dates pending a Case Management Hearing.

[26] On December 19, 2014 a Consent Order granted supervised access to Kathryn for 12 hours on Christmas Eve Day.

[27] On January 21, 2015, Pentelechuk J., as Case Management Justice, authorized a Practice Note 7 Intervention Order. Kathryn was granted supervised access with the children three Saturdays per month beginning. Telephone access on Wednesday and Sunday evenings was also directed.

[28] On April 2, 2015 a Consent Order directed Kathryn have Mother's Day access to the children.

[29] The November 9, 2015 Interim Consent Parenting Order replaced all previous parenting orders. It provides, in part,

> ...
>
> 2. The parties shall have Joint Guardianship of the children.
>
> 3. On an interim "without prejudice" basis, the children shall remain in the primary residential and day-to-day care of the Respondent father (hereinafter "the father"). The Applicant mother (hereinafter "the mother") shall have liberal and generous parenting time with the children as set out herein.
>
> 4. Commencing on Friday, October 2, 2015, the parties shall have parenting time with the children on a 3-week rotation, wherein the week runs from each Friday to the next, as follows:
>
> a. Week 1 – the mother shall have the children from Friday 7pm with the exchange to occur curbside at the father's residence in Camrose, Alberta to Sunday 6pm with the exchange to occur at the Esso station in Looma, Alberta;
>
> b. Week 2 – the mother shall have the children from Monday at 6pm with the exchange to occur at the Esso station in Looma, Alberta to Friday at 7pm with the exchange to occur curbside at the father's residence in Camrose, Alberta; and
>
> c. Week 3 – the father shall have the children this week and at all other times when the children are not specifically with the mother.
>
> ...
>
> 25. The mother shall have telephone access between the other parent and the children on the Sunday of week three (3); the children shall initiate the call between 3pm and 7pm by the father calling the mother's known cell phone number, but not speaking directly to the mother at all.
>
> 26. The parents shall facilitate telephone access between the other parent and the children at any time when the children request to speak with the other parent during that parent's time; the children shall initiate the call by the parent calling the other's known cell phone number, but not speaking direct to the other parent at all.

[30] This Order also requires the parties use the 2Houses communication tool for necessary contact and addresses expected communication conduct.

## The Trial

### Evidentiary Admissions

[31] The parties tendered certain documentary evidence by agreement. These documents included an Agreed Statement of Facts describing the parties' historical relationship and litigation chronology. They also admitted the Practice Note 7 Report of Annie Mirza-Syed, Registered Psychologist, dated February 27, 2015.

### *Viva Voce* Testimony

[32] Both parties testified and called current partners (Dylan MacKowetzky and Amanda Wallace) as witnesses. Collectively, they spoke to the past, current and future parenting of Vada and Gage. Their evidence, especially that of Kathryn and Thomas, is central to my decision.

[33] The parties also tendered family members (including parents) as witnesses. The evidence of this group of witnesses carries little weight in discussing the parties history. Their emotional investment in the respective parties was apparent and raised concerns about bias, or at least, lack of objectivity. However, I accept these family witnesses have a true interest in ongoing bonding with Vada and Gage.

[34] Certain other witnesses, including former partners, addressed collateral issues such as parenting of other children and housing. Their evidence was largely peripheral to the main trial issues.

[35] Doctor's Pierse and Lorrain also testified. Their evidence surrounding the children's health was not materially disputed. Dr. Pierse was the children's pediatrician. At Kathryn's instigation he referred them to Dr. Lorrain, a child psychiatrist. She concluded the children did not require further psychiatric counselling at that time. Dr. Lorrain also gave each parent specific written recommendations to promote common parenting practices that would benefit the children.

[36] Both counsel properly submitted witness credibility was a significant factor in this case. Determination of witness credibility largely involves assessment of witness honesty. Reliability of a witness concerns accuracy of their testimony. Witness reliability is the paramount consideration.

[37] As a general observation, I am concerned about both the credibility and reliability of Kathryn's evidence.

[38] In example, she initially and repeatedly denied refusing Thomas access to the children immediately following their separation. She then offered not recalling this occurred and suggested police were responsible.

[39] She repeatedly testified to not recalling later denying access for three consecutive weekends because of car seat issues. She however, acknowledged a partial but not full recall of deliberately leaving home with the children in August, 2013 to frustrate court ordered access.

[40] Kathryn also gave varying, if not contradicting, evidence about her motivation for relocating the children to Kelsey. She stated her actions were not "malicious" but arose from her motherly need to protect the children from their father. Kathryn also testified the move was not secretive and was prompted by more suitable, more affordable housing. She defensively added the only secret was Cholowski's violent, aggressive behaviour. Kathryn also denied "Mr. Cholowski was not the reason I moved out to Kelsey". Her professed rationale for failing to advise Thomas of the move was existence of a mutual no contact order.

[41] Kathryn also admitted to first raising certain abuse allegations against Thomas at trial. She acknowledged a backdrop of protracted litigation involving multiple appearances, multiple counsel and multiple affidavits.

[42] Kathryn is an intelligent, articulate and focussed adult. Her explanation that prior vulnerability and maturing, comfort finally permitted this disclosure is, under all the circumstances, incomprehensible.

[43] Kathryn's responses suggest difficulty in accurately recalling significant events. More troubling is the pattern of shifting, if not contradicting, content of her evidence. Resulting concern about her honesty is amplified by her implausible explanation for disclosing certain abuse allegations only at trial. I conclude her entire testimony is undermined by these concerns.

[44] Ms. Onishenko called her partner, Dylan MacKowetzky, as a witness. He presented as an intense, passionate and self-serving witness. I have significant concerns about his credibility.

[45] He was previously employed as political staff and later as a lobbyist. As a witness, he presented as advancing a personal agenda rather than objectively answering counsel questions.

[46] His evidence was coloured by both a clear bias favouring Kathryn's interests and hostility against Thomas. In illustration, he stated Kathryn "respects" Court Orders. This, in effect, ignores her abduction of the children and relocating them to his leased Kelsey home. During that time he did not inform police of Kathryn's location, explaining the "criminal law makes broad allowances when trying to keep themselves or children safe". He was simply trying to keep Kathryn safe. He "would rather go to the mat" than abide by future court orders if, in his view, child harm was a concern.

[47] When initially questioned about Thomas, he launched into his policy background involving domestic violence. While admitting he has not witnessed violence from Thomas, he described Thomas as dangerous, abusive, misogynistic, condescending and threatening.

[48] Mr. MacKowetzky repeatedly speculated about Mr. Cholowski's behaviour. For example, he stated it is "only a matter of time before he hurts [the children] deliberately or unintentionally". He also suggested Thomas "has tightened up his behaviour in anticipation of Court as you would expect".

[49] His animosity towards Thomas is clearly signalled by their March 2, 2015 conversation and email. At that time he confronted Thomas about interfering with the children's telephone contact with Kathryn. He threatened to post "two dick photos of Cholowski on-line and make it awful uncomfortable" for him.
Mr. MacKowetzky then emailed Mr. Cholowski two related photographs.

[50] While acknowledging he acted inappropriately, Mr. MacKowetzky characterized this as his only "misstep" and gratuitously observed Mr. Cholowski's phone call antics subsequently ceased.

[51] Thomas Cholowski testified in a direct, candid and, at times, emphatic manner. He responded evenly and responsibly during both examination in chief and cross-examination. For example, he acknowledged his communication style is sometimes demanding. He agreed to occasional anger especially when he believed parenting time was denied.

[52] Thomas also candidly acknowledged inappropriate texts to Joseph Mirage (Kathryn's former partner). He similarly accepted force feeding Kathryn's oldest son hot peppers was not his "best parenting moment".

[53] Additionally, he agreed to not being concerned with the children's physical safety when abducted. Finally, although requesting primary parenting, Thomas also stated shared parenting was "absolutely possible" if the parties lived in proximity.

[54] I conclude Thomas was a credible witness.

[55] I also find he was a reliable witness. Thomas testified with certainty and detail about his interactions with Kathryn and the children. His testimony is also plausible. For example, his denial of either himself or brother's vehicle stalking Kathryn's residence is consistent with their respective residence locations and his self-interest in protecting already contentious child access.

[56] Mr. Cholowski called his partner, Amanda Wallace, as a witness. She testified in a genuine, cautious and thoughtful manner. Her answers to questions from both counsel were directly responsive. Amanda testified honestly.

[57] While portraying the "whole situation as very sad" she offered there has been improvement in the last year. While disputing aggressive behaviour, she also volunteered Thomas could be both "opinionated and stubborn".

[58] Her honesty is also illustrated by her express recognition of the significant role Kathryn should have in the children's lives. Additionally, her motivation for photographing numerous family events entered as trial exhibits supports her objectivity. She emphasized they were not taken for litigation use. Rather, they reflect her background as an active photographer. These photos were to be used in preparing family photographic collages.

[59] I also conclude Ms. Wallace was a reliable witness. Her evidence was consistent and detailed. It was not meaningfully impacted during cross-examination.

[60] She provided specifics of their interactions with the children which, in part, was supported by photographic evidence. Amanda also detailed Thomas's business routine and income stream. Her precise evidence illustrates both her ability to both accurately recall and articulate events.

[61] She was a fair and impressive witness.

[62] I note these general witness observations are supplemented by specific findings and observations discussed in addressing the best interests of the children.

**The Legal Framework**

[63] The *Family Law Act* stipulates factors the Court must consider and balance to determine the children's best interests. As a mobility case, the Court must also address the ***Gordon v Goertz*** criteria. Many of these are, in essence, captured under s 18 of the *Family Law Act*. Duplicative factors will be considered within the framework of *Family Law Act* language. However, certain criteria are unique to mobility cases. These include the custodial parent's reason for moving and disruption to the child occasioned by relocation. Such factors will be addressed separately.

[64] In ***Gordon v Goertz***, [1996] 2 SCR, the Court articulated a threshold to consider an application for changing existing custody and access arrangements. The judge must be satisfied:

i) there is a change in the conditions, means, needs or circumstances of the child or in the ability of the parents to meet the needs of the child;

ii) the change is material and affects the child;

iii) the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[65] In this case, a final Parenting Order has not issued. Indeed, the last and governing order of November 9, 2015 was expressly recognized as an interim ruling. Accordingly, it is not necessary to prove a material change in circumstances. Even assuming this threshold is triggered, I conclude the children's imminent enrollment in Kindergarten and related transportation issues satisfies this review standard.

**The *Family Law Act*, 2003 Chapter F-4.5**

[66] This legislation mandates exclusive consideration of the child's best interests in considering parenting issues. It also requires consideration of specific factors in determining those interests:

**18(1)** In all proceedings under this Part except proceedings under section 20, the court shall take into consideration only the best interests of the child.

**(2)** In determining what is in the best interests of a child, the court shall

(a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and

(b) consider all the child's needs and circumstances, including

(i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,

(ii) the history of care for the child,

(iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,

(iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,

(v) any plans proposed for the child's care and upbringing,

(vi) any family violence, including its impact on

(A) the safety of the child and other family and household members,

(B) the child's general well-being,

(C) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and

(D) the appropriateness of making an order that would require the guardians to co-operate on issues affecting the child,

(vii) the nature, strength and stability of the relationship

(A) between the child and each person residing in the child's household and any other significant person in the child's life, and

(B) between the child and each person in respect of whom an order under this Part would apply,

(viii) the ability and willingness of each person in respect of whom an order under this Part would apply

(A) to care for and meet the needs of the child, and

(B) to communicate and co-operate on issues affecting the child,

...

[67] ***Gordon v Goertz***, [1996] 2 SCR 27 established the legal principles guiding mobility applications. They are summarized in paras 49 and 50:

**49** 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, inter alia:

(a) the existing custody arrangement and relationship between the child and the custodial parent;

(b) the existing access arrangement and the relationship between the child and the access parent;

(c) the desirability of maximizing contact between the child and both parents;

(d) the views of the child;

(e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

(f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

**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?

**The Children's Physical, Psychological and Emotional Needs**

[68] Both parents recognize each other's ability and willingness to meet the respective basic physical needs of their children. The evidence supports their confidence.

[69] However, Thomas alleges Kathryn's conduct constitutes parental alienation behaviour and impacts the children's' safety. He points, in particular to repeated denials of his early access ultimately culminating in Kathryn's abduction of the children. Kathryn argues parental alienation is only found if Kathryn's conduct was intended to deny Thomas access. She also argues there is no evidence of alienating behaviour following that event in August 2014.

[70] In examination in chief, Kathryn offered multiple reasons for relocating the children to Kelsey.

> I was scared, and I did not show up for his Court granted vacation time. I felt the children were at risk, a Judge had ordered something that was illegal and I was concerned for their safety and their well-being to bring them home.

She added:

> My purpose was to keep them safe. My intention was to protect them and keep them safe, as I should as their mother, from someone that when he was saying he

> was going to take them and with escalating behaviour of following me in vehicles, threats, threat after threat during the relationship, and after, and off the wall behaviour that was not safe for two year old children.

[71] I do not accept Kathryn's testimony that the Cholowski brothers conducted drive-by surveillance. Her evidence, even if accepted, was based upon minimal incidents which she described as "at least two occasions". It also appears she did not disclose this concern before trial because, in her view, it was not relevant to "Family Court matters". There were also justifiable reasons for either brother to be in that immediate neighbourhood. Their parents resided minutes away from Kathryn's residence which she characterized as "quite a ways away'. Matthew Cholowski was a long time area resident. It was his neighbourhood.

[72] I also accept the testimony of Thomas that he did not request his brother to drive by the residence or do so himself. Thomas was aware of the mutual restraining order and was experiencing access difficulty. Violation of the order could have further exacerbated that situation. Moreover, as he observed "I lived in Camrose, Alberta ... I work five days a week driving a truck all over western Canada. I have no time to do that during the day time. I have a new relationship ..."

[73] In effect, it was both impractical and contrary to his best interests to participate in the alleged "circling like sharks" of Kathryn's home.

[74] Kathryn disagreed her concerns about the upcoming camping trip prompted the Kelsey move. She stated this decision had been initiated by expiry of their existing lease in June/July. The Kelsey home was chosen because of the affordability and suitability. She twice denied the move to Kelsey was "secretive". She did acknowledge no information about the move was communicated to Thomas.

[75] I find Kathryn honestly had safety concerns for the children during this time. However, the evidence does not objectively support her belief.

[76] Although motivated by her parental concern, Kathryn acted with intent to deprive Thomas of his court ordered parenting time. She ignored a clear court order describing certain content as "illegal". Under all the circumstances, Kathryn's abduction of Vada and Gage in August 2014 clearly constituted parental alienation.

[77] Both parties have testified about alleged alienating behaviour after this date. For example, Kathryn suggests there was ongoing interference with phone calls and disparaging comments voiced in the children's presence. Thomas points to Kathryn's emotional outbursts during child exchanges.

[78] Based upon the totality of circumstances, I conclude neither parent engaged in alienating behaviour after August 2014. However, they remain in a high conflict situation.

[79] The Practice Note 7 Report summarizes clinical impressions concerning the children's psychological and emotional needs:

> The Report concludes in part:
>
> - In my clinical observation for the most part, Vada and Gage exhibited age appropriate willingness, language and non-verbal behaviors at the time of the interview.

- Vada appears to be advanced in her understanding of the situation for her developmental level. Gage appears to be managing well age appropriately and appears to lean on his twin sister at times. He also answers some questions by saying what my sister said, (meaning – what Vada is saying is the same as what he would say on certain topics).
- Gage appears to be showing signs of stress. The next stage may be that, to be safe, he starts distancing himself emotionally from both parents. He is already whinnying, cranky, with all the care givers including his grandparents. He seems to calm down if Vada is around him and she distracts him with play activities. In other words, Vada takes over the role of an emotional caregiver to her brother which should not be her job. In the end both children are suffering in a different manner due to the choices their parents are making.
- Gage and Vada are emotionally attached to both parents and they appear to be attached to each other. Some of the attachment seems to be out of necessity and one of the few consistent threads in their lives, being together and therefore rely on each other for emotional comfort. This attachment has the potential of becoming dysfunctional if the twins do not feel safe emotionally and psychologically due to the high conflict situation becoming an everyday part of their lives.

[80] I note for clarity that I accept the findings contained in the Practice Note 7 Report summary. I conclude this statutory factor, on balance, favours Mr. Cholowski.

**History of Care of the Children**

[81] While residing together, it is clear Kathryn was the children's primary caregiver. The children were infants and were being breastfed. Additionally, during this approximately one year period, Kathryn did not work outside the home. Thomas, as a distance truck driver, was regularly absent for multiple consecutive days. Kathryn suggests Thomas did "very little" parenting during this time. Thomas points to a more active role. I accept Thomas was engaged as a parent with the children during this period. That prior involvement is consistent with his current active parenting role.

[82] Kathryn's role as primary parent continued after separation for a further period of about 15 months. During this period, Thomas obtained five court orders formalizing and quickly increasing access to three weekends per month. He diligently attempted to exercise that access which Kathryn thwarted on various occasions. Indeed, a court order issued to protect his parenting time.

[83] As a result of Kathryn's abduction of the children, the parents' primary parenting roles reversed by Court Order effective August 21, 2014. Thomas became the primary and residential parent. This currently represents the status quo.

[84] In the last year following a limited supervised access and a consent order, the parties have employed a three week parenting rotation. This involves Thomas having physical custody of the

children for two of those weeks and Kathryn receiving the children for one week and one weekend.

[85] The existing parenting arrangement is not determinative of a future parenting order. However, the status quo is a principle the Court may properly consider in assessing best interests of the children. In general, it recognizes the benefits of certainty and stability for children experiencing their family's disintegration. Here, both parents recognized the childrens' need for continuity and stability. It was also emphasized in the Practice Note 7 Report:

> As mentioned previously, these two children have gone through tremendous amount of change and transition, and therefore, deserve structure and stability in the future. This should be utmost in the plans for parenting going forward.

[86] Mr. Cholowski has been the primary parent for these children for the last two years and four months. It is a substantial window - especially as the children are not yet five years old.

[87] While both parents have always been involved in parenting, the status quo favours the best interests of Vada and Gage.

**The Children's Cultural, Linguistic, Religious and Spiritual Upbringing and Heritage**

[88] I recognize Kathryn has enrolled the children in a Ukrainian preschool "because we're Ukrainian". There is no suggestion of other heritage ties involving Vada and Gage or her other children. Under the circumstances, I conclude this placement was substantially driven by that school's close proximity to their home. It also appears neither parent is "religious in any way". I conclude this factor is immaterial.

**The Children's Views and Preferences**

[89] Both children are currently only four years old. Their age would marginalize any articulated views. In any event, the Practice Note 7 report contains no relevant child commentary or clinical observations. Any evidence (even if accepted) about children's reluctance during child exchanges merely reflects expected transition behaviour.

**Proposed Plans for Children's Care and Upbringing**

[90] Neither parent presented a developed plan addressing future parenting of Gage and Vada. It appears both parties, each currently experiencing meaningful parenting time, propose to continue current practices.

**Family Violence**

[91] Section 18(4) of the *Family Law Act* requires that alleged family violence be proven on a balance of probabilities.

[92] As stated in ***Young v Young***, "harm is an important element in determining the best interests of the child."

[93] In this case, Kathryn's counsel accepts family violence is not a current concern but argues Cholowski has a history of family violence requiring consideration. Cholowski denies any such violence.

[94] Kathryn alleges there was "a lot of instances of violence". She acknowledged no violence has occurred with Vada or Gage but has involved her other children.

[95] In illustration, she pointed to Cholowski bruising her three year old Amy' back and legs, forcing her oldest son to eat a hot pepper in punishment and, on another occasion, placing that child in an aggressive headlock.

[96] Cholowski, with one exception, emphatically denied any physical discipline of any children in their household. He acknowledged forcing a hot pepper into Brandon's mouth as a lesson for Brandon deceiving young neighbourhood girls into eating hot peppers. He admitted his action as "not the best parenting"; however, his treatment of Brandon involved the active participation of Kathryn. I accept his detailed and candid version of what occurred during that incident.

[97] Mr. Cholowski had no recollection of aggressively placing Brandon in a headlock. Any similar contact would have occurred while playing touch football. This allegation lacks meaningful detail – including time frame. I find, that even if it did occur, it was a minor event, explained by innocent backyard play.

[98] I also accept he did not physically harm Amy. It is consistent with Kathryn's willingness permitting Thomas to frequently solely parent the children and, with her agreement, to have them accompany Thomas in her absence, on camping outings.

[99] Kathryn's testimony surrounding multiple alleged family violence incidents generally lacks credibility given her disclosure only arose at trial. She agreed her earlier extensive affidavits while represented by counsel did not disclose physical assaults or resulting bruising. I do not accept her explanation that such omissions occurred because counsel encouraged brevity and she had concerns about personal vulnerability. Against a backdrop of protracted litigation, including active case management, her evidence on this issue is suspiciously convenient.

[100] Kathryn also submitted Thomas was physically violent to her. She referenced a May, 2013 incident where Thomas punched her, breaking her eyeglasses during a child exchange. Thomas agreed there was a physical encounter. However, his behavior was reactionary where he attempted to strike Kathryn after she spit in his face and slapped his face. Her eyeglasses broke after she tripped running from their altercation.

[101] I accept the evidence of Thomas surrounding this incident. Both parties were emotionally charged during this time immediately following their separation. His evidence volunteers his participation and is considerably more detailed than Kathryn's.

[102] Based upon the totality of evidence, I conclude the parties were openly antagonistic. However, family violence involving either children or parents did not occur. The opinion of Dr. Lorrain that the children did not require further psychiatric counselling buttresses my conclusion that the children's safety or welfare was not an issue.

**The Children's Relationship with Each Parent and Household Members**

[103] The Practice Note 7 Report observes "Gage and Vada are emotionally attached to both parents...". I accept this finding which reflects the real involvement of both parents in their children's lives.

[104] Both households involve a blended family. Kathryn, her other children from other relationships and Dylan have forged strong and reciprocated bonds with Vada and Gage. A similar assessment applies to the home of Thomas, Amanda and her daughter from another marriage.

[105] It also appears all children are treated equally and the parties' partners, Amanda and Dylan, have embraced their step parent roles. In turn, Vada and Gage have adapted to their dual families. They have formed rewarding bonds with their siblings, enjoying Grace's bed time stories, and sibling enthusiasm when at Kathryn's home.

[106] Kathryn observed her parents are nearby and readily available. Currently, the children have ongoing contact with their paternal grandparents who reside in Edmonton. Logically, relocation to Kathryn's home may facilitate easier contact with these grandparents. However, I conclude given grandparents prior involvement and abiding interest in their grandchildren, that residency will not impact future engagement with Vada and Gage.

[107] The Practice Note 7 Report emphasizes the importance of the relationship shared by Vada and Gage. Both households support that bond. I also find Vada and Gage are nurtured by the inclusive family relationships in each home. These family relationships have a sound foundation. A future parenting arrangement, involving at a minimum generous access, will invite their continued maturation.

[108] This statutory factor has a neutral impact on my decision.

**The Parent's Ability to Care For and Meet the Children's Needs**

[109] Kathryn's bus driving assignments include her children's school route and permit her to be home with children when school day ends. It also allows her to attend extracurricular activities such as school functions. Mr. MacKowetzky provides parental care in any absences and is actively involved in providing daily family structure and routine.

[110] They supervise children's outdoor activity and their home offers appropriate and diverse reading and play opportunity. The children are now enrolled in gymnastic classes.

[111] Kathryn, when primary parent, was active in ensuring the children attended necessary medical appointments. For example, the child psychiatrist appointment occurred because of her concern about their psychological well-being.

[112] Kathryn acknowledged she has the children "selectively vaccinated" because certain vaccines, in her view, have not been suitably tested. She also pointed to Amanda's "severe reaction" following one vaccination.

[113] Gage and Vada currently share a bedroom in their rented Edmonton home. The children have separate beds and clothing dressers.

[114] After securing primary child care in 2014, Thomas requested and received significantly reduced driving route responsibilities to permit more time with the children. In July 2016 he resigned from this position to pursue a home based vehicle tinting business. He also continues local truck driving on an occasional basis scheduled to minimize absences from the children. This change was motivated by his wish to be consistently present and daily parent his children. His partner, Amanda Wallace, parents the children when he is attending work appointments. Their home offers a wide array of appropriate toys, books and child learning opportunities. This is undoubtedly informed by Amanda's extensive experience as an early childhood educator.

[115] As primary parent, Thomas has ensured the children's regular medical and dental visits. He has had both the children fully vaccinated.

[116] Vada and Gage have separate bedrooms in their rented Camrose home. Vada's room is pink; Gage has a themed pirate bedroom.

[117] I conclude both parents have the ability to care for and meet the children's needs. They have met that responsibility. Their differing views on lifestyle issues (such as vaccinations) do not counter that ability. Commendably, they have each chosen employment permitting them to best meet the children's needs. Although less significant, the bricks and mortar, toys and books in their respective homes are equally child suitable.

[118] Under the circumstances, this factor is evenly satisfied by both parents.

**Parents Ability to Communicate and Cooperate on Child Issues**

[119] After separation, the parties' exchange of the children proved regularly confrontational and dysfunctional. On numerous occasions Kathryn delayed or denied court ordered access. This was initially motivated by her concerns about the children's safety because of Thomas' perceived aggression. I do not accept that perception. Revealingly, during Cholowski's initial visits to retrieve personal effects, she confined Vada and Gage to the house. However, she allowed her other children (alleged to be the only targets of Cholowski's aggression) to remain outdoors during that time. This selective placement speaks not to protective insulation but to a deliberate effort to prevent interaction between Gage, Vada and their father.

[120] Police were present, usually at Kathryn's request, for many child exchanges. Both parents frequently were accompanied by family members to witness these interactions. As a protective measure, Thomas regularly video recorded exchanges.

[121] Disputes over car seat use fuelled existing tension. Kathryn did not recall (or dispute) denying Thomas three full weekend visits because of her educated car seat safety concerns. I accept the unqualified evidence of Thomas that, on occasion, parenting time was denied on that basis. I also find, based upon his detailed recollection that in August and September 2013, Kathryn, and perhaps family, prevented his parenting time by their deliberate absence with children during his weekend approved access time.

[122] Child exchange issues moderated following an October 7, 2013 Court Order directing they occur at the Millwoods police station, prohibiting presence of other parties and mandating police enforcement.

[123] The parties' difficulty in facilitating Court ordered telephone access with the children also illustrates their inability to cooperate on parenting issues. Mr. MacKowetzky testified to Mr. Cholowski's active interference with telephone contact between the children and Kathryn. I have previously expressed real concern about his credibility.

[124] Mr. Cholowski and Ms. Wallace testified to multiple, creative efforts to engage the young children's telephone call participation. I accept their evidence on this issue. It is detailed, consistent and plausibly fits with the limited attention span of toddlers.

[125] It appears telephone call facilitation has improved. However, the parties mutual recording of these conversations, in itself, evidences mistrust.

[126] A further example of the parties inability to interact involve Mr. Cholowski's request for the children's Alberta Health Care cards and hospital attendance during Vada's tonsillectomy.

[127] An October 7, 2013 Consent Order directed that Thomas contact Kathryn only via text and "only regarding parenting time".

[128] The parties agree Thomas repeatedly texted Kathryn requesting copies of the children's health care cards. Indeed, Thomas candidly responded he harassed her with this request. Kathryn "felt this was not an appropriate reason to be contacting me because he could have gone to the registries". This information, she reasoned, was not in her exclusive possession. Kathryn defined "parenting time" content to mean "anything related to the children and parenting time – scheduling". She requested that police enforce the Order. Thomas was arrested for violating this particular clause. No charges were laid.

[129] I find Kathryn's objection to be unreasonable. The requests for health care cards, were placed by Thomas who then had primary care of the children. Ready access to basic health care data was in their best interests. There is no suggestion the requests were improperly motivated. In effect, she purposefully and narrowly interpreted Court Order language to frustrate Mr. Cholowski. That clause was used as a sword rather than a protective shield against unnecessary contact. Her response speaks to an unwillingness to reasonably and responsibly communicate on parenting issues.

[130] Incremental improvement occurred following the November 9, 2015 Consent Parenting Order. However, their engagement on child issues remains sadly dysfunctional.

[131] Recently, in April 2016, Vada was hospitalized for a tonsillectomy. The parties mutually attended most of the preceding consultation appointments. However, differences arose surrounding hospital visitations.

[132] A series of text messages dated April 18 – 20 relay their communications about hospital attendance. Kathryn testified these were selective excerpts and did not actually depict Thomas' attempts to dictate related scheduling. She did not tender, or reference, other texts in support. Thomas testified these messages included their entire direct communication. I find these 2House hardcopy messages are unedited and reflect the entirety of their communication during that time.

[133] These communications prove a repeated willingness from Thomas to directly arrange agreeable scheduling and to avoid any potential probation order violations by Kathryn. Contrastingly, Kathryn's emails reveal a preference to involve lawyers and ultimately dictate her

attendance. As stated in her April 18, 10:09 p.m. email "I will be there for Vada when and as she sees fit. Period. End of discussion. I will not dance circles with you anymore".

[134] This exchange occurred less than one year ago. It involved surgery for their daughter. Circumstances presented an opportunity to selflessly cooperate in their daughter's best interests. That did not occur for which I find Kathryn responsible. She was unwilling or unable to engage directly with Thomas in satisfying a basic need of their child. Her communications and conduct frequently suggest brinkmanship, his communications and actions regularly offer compromise.

[135] A total of 12 Court Orders directly concerning parenting have issued in this case. Ultimately, it was referred to Case Management where it was actively administered.

[136] Thomas has made best efforts to honour the spirit and content of these orders. There is no basis to suggest this will not continue. This conclusion recognizes that an Emergency Protection Order issued against Mr. Cholowski. However, that exparte order was not confirmed by review and ultimately transformed into a consent mutual non-contact order between the parties. I also am aware Mr. Cholowski was arrested for texting Kathryn in alleged violation of a parenting order. I have earlier observed that Kathryn's complaint was unreasonable. I also note no charges resulted. Indeed, despite the constant presence of police during early child exchanges, invariably at Kathryn's request, no allegations of his misconduct arose.

[137] Contrastingly, Kathryn's history necessitated a potential contempt sanction in 2013 for future parenting order violations. Her July 2014 abduction of the children violated a parenting order issued earlier that month. A criminal conviction resulted. Her repeated disregard causes concern about her future willingness to follow court orders issued in the children's best interests. It also illustrates her inability to cooperate on child issues even when court ordered.

[138] At trial Kathryn updated their current relationship, noting "It's still quite high conflict". She wishes that decision making "should be something that's more or less shared" adding it is "kind of difficult because we can't seem to come to agreements".

[139] Thomas stated they have had no "adult discussion" about the children. "Flat out no" is invariably Kathryn's response to suggestions. He observed "we are like oil and water". "We butt heads about everything".

[140] Their views accord with the Practice Note 7 Report that "high conflict exists between the parents. The conflictual nature of their interaction is in the advanced stages of progression".

[141] While recognizing some moderation in behaviour, the parent's communication and cooperation difficulties sadly continue to persist. Facts surrounding this issue prove Kathryn is primarily responsible for this impasse.

[142] The parents' inability to communicate and cooperate on child issues plays a significant role in both my determination of parenting and assignment of decision making authority.

[143] It is abundantly evident that shared decision making is not a viable option in this case. The parents' demonstrated inability to collaborate in their children's best interests, their continuing conflict, exacerbated by physical distance precludes that possibility.

**The Parent's Reason for Moving**

[144] Mobility cases typically involve an application by a custodial parent wishing to relocate with the children. This case does not involve the prospect of a future relocation.

[145] Here, the parents resituated to separate communities following separation. Thomas moved to Camrose primarily to distance himself from Kathryn. He did not have primary parenting responsibilities at that time.

[146] Kathryn, in turn, relocated twice. The initial Kelsey move occurred, ostensibly, for various reasons. These included affordability, suitability, family safety. Kathryn also suggested improved proximity to Camrose could possibly ease child transition difficulties. The timing and explanation for her subsequent return to Edmonton was not explored.

[147] The move to Camrose by Thomas did not impact his ability to exercise then existing parenting time. Kathryn's initial relocation to Kelsey is best analyzed and weighed as prior alienating behaviour. There is no suggestion her current residency was similarly motivated. It is a reasonable inference it represented a return to her familiar community.

[148] In the result, I conclude this statutory factor is immaterial.

**Benefit of Children Developing and Maintaining Relationships with Each Parent**

[149] A parenting regime should maximize contact with each parent that is consistent with the child's best interests. Both parties admitted the Practice Note 7 conclusion that Vada and Gage have bonded with both parents. They similarly accept each other's ability to satisfy the children's basic needs. They also agree that an equally shared parenting arrangement would be acceptable if residing in the same community.

[150] I conclude that maximum contact with each parent by Vada and Gage is in their best interests. However, the realities of geography and need for stability necessarily restricts maximum contact.

**Disruption to the Child from Custody Change and Removal from Current Family, Schools and Community**

[151] Kathryn submits her primary residency is required to recognize existing maternal and sibling bonds. It would also extend their established relationship with Dylan. She notes the existence of more diverse extracurricular activities in Edmonton.

[152] It is evident an established daily home routine has been established for the children when in her care. .In requesting primary parenting, Kathryn also cited a need for the children's consistent exposure to "schools, sports and extra-curricular activities.

[153] While residing with Thomas and Amanda, the children have been enrolled in weekly ballet and Taekwondo lessons. They have had daily interaction with Grace, sibling bonds have forged. Ongoing and healthy routines have developed. Regular family outings, including fishing, quading and school events by Thomas are their norm. Disruption of this family cadence would undoubtedly result if Kathryn becomes primary parent.

[154] In addressing this factor, I note the children are of tender age. Geographic change would not meaningfully interfere with child friendships or impending formal education. Disruption concerns primarily involve the children's home routines and regular family contact. While primary residency impacts sibling relationships these bonds, in both homes, appear healthy and developing.

[155] Amanda Wallace expressed concern that, the children's relationship with Thomas would go "backwards" if Kathryn became primary parent. Her concern is properly placed given Kathryn's historical pattern of interfering with parenting time. The prospect of unnecessary and damaging turmoil raises concern.

[156] Significantly, both parents and the child psychologist recognize the children's need for stability. Substantial change is contrary to their best interests. They currently reside with Thomas and have done so for most of their young lives. Under the circumstances, disruption of their current world would be contrary to their best interests.

**Conclusion: The Best Interests of the Children**

[157] The parents' high conflict history continues. They remain unable to genuinely cooperate and communicate about their children. They also remain separated by mutual mistrust and geography.

[158] The parents currently reside about 90 kilometers apart. Travel time occupies at least one hour. Under a shared parenting regime, assuming constant schooling, the children, bi-weekly, would be in transit each weekday for a minimum of two hours. This scenario is both impractical and inappropriate. It ignores transition time and difficult weather conditions and disrespects the children's best interests.

[159] Under the circumstances, an Order for shared parenting is inappropriate. Instead, it is in the best interests of Vada and Gage that one parent have primary responsibility. For similar reasons, that primary parent must have sole decision making authority.

[160] I find the children's best interests are served by naming Mr. Cholowski as their primary parent.

[161] As the friendly parent, he has preferred their best interests over his self-interests. He has best abided by the spirit of a multitude of parenting court orders. In particular, Thomas has respected scheduled parenting time and facilitated and encouraged bonding with Kathryn's family. This history, and his enthusiastic adoption of Dr. Lorrain's parenting recommendations, offer examples of his friendly parent presentation.

[162] In effect, designation of Thomas as primary parent continues the status quo. This, emphatically, does not arise from a presumption favouring that status. However, it does recognize the real and universally acknowledged need to afford Vada and Gage stability.

[163] Ms. Onishenko will receive regular and generous parenting time with the children. Specifics will be found in the Order issuing from this case. She will receive parenting time with the children every weekend of a month save for the last weekend. During summer holidays the children will be in her care every second full week. The option of annually extending parenting

time to two weeks is available for vacation purposes. Provision for parenting on special occasions and holidays is also provided in the order.

[164] Ms. Onishenko will also have the ability to skype or phone the children when outside her care.

[165] Finally, the parties upon advance, written and mutual consent may vary terms of the order.

[166] This parenting arrangement, in my view, recognizes the children's best interests as previously analyzed. It also properly reflects the clinical conclusion of the Practice Note 7 Report stating:

- From an emotional and psychological perspective, it appears that Vada and Gage would grow up emotionally grounded and strong if both parents are actively involved in their lives. Children feel supported and stable when there are routines in place in both homes.

**Child Support**

[167] I understand the parties agree upon the quantum of child support payable in the years 2013 and 2014.

[168] That time frame saw each parent entitled to child support while acting as primary parent. From separation in June 2013, until August 2014, the children were in Kathryn's primary care. Effective September 2014, the children were in the primary care of Thomas. Kathryn became the support payer at that point. Based upon accepted Line 150 incomes and a global calculation of their respective support obligations, Mr. Cholowski accumulated a net shortfall of $3,934 by December 31, 2014. That amount owing in child support is not disputed.

[169] However, the parties disagree on the amount of guideline income properly attributable to Kathryn beginning in 2015.

[170] Kathryn's reported Line 150 income for 2015 is $9,983. Counsel wishes to impute higher income based upon a minimum wage attribution.

[171] Counsel acknowledge there is no evidence of intentional underemployment to evade child support as required in ***Hunt v Smolis-Hunt***, 2001 ABCA 229. However, she argues Ms. Onishenko was aware her work commitment placed her below the financial threshold triggering child support obligations. Given that knowledge, she elected not to seek additional and available bus driving opportunities. Accordingly, at a minimum, income should be imputed at $11,872 based upon a 20 hour work week. That amount, presuming full-time employment, increases to $23,744.

[172] Ms. Onishenko argues against any income imputation. Alternatively, her counsel contends annual income imputation should not exceed "about $20,000". He notes Kathryn's employment involves split shifts. There is no realistic opportunity to obtain additional work in the intervening time. Evening employment would involve child care costs and compromise parenting time with her children.

[173] I conclude the governing test is determined by our Court of Appeal in ***Hunt v Smolis-Hunt***. There is absolutely no evidence Kathryn was deliberately underemployed to evade child support obligations. Indeed, there is no evidence she engineered a work schedule while aware it would negate child support payments under the guidelines. Her employment as a bus driver corresponds with her background, education and experience. Kathryn's employment is also entirely consistent with her demonstrated wish to be a stay at home mom for her young children.

[174] However, this parenting order formalizes Kathryn's availability to assume additional work which on the evidence, is available. The children in her primary care are now approximately ages 7 through 15. Mr. MacKowetzky is, based upon testimony, available to assist with child care. It is also reasonable to infer her other children will similarly assist. Accordingly, effective March 1, 2017, I impute an annual guideline income to her based upon a part-time 25 hour work week at an anticipated minimum wage of $12.20 per hour.

**Special or Extraordinary Expenses**

[175] Mr. Cholowski seeks proportionate sharing from Ms. Onishenko for childcare, medical and dental and extracurricular expenses he has incurred. He argues these are special or extraordinary expenses as defined under s 7 of the *Divorce Act*.

[176] Ms. Onishenko accepts childcare and medical/dental costs are properly classified as s 7 expenses. However, she submits her minimal income during the relevant time period exempts her from contribution. Additionally, she notes characterization of extracurricular activities is fact specific but does not specifically contest the submitted expenses are extraordinary.

[177] Section 7 allows courts to assess additional child support for special or extraordinary expenses. In this case, special expenses include childcare and health related costs. The children's extracurricular costs are extraordinary expenses.

[178] The childcare expenses totalling $8,899.40 arose between 2014 and 2016. Section 3 child support payable by Kathryn during this time was nominal. It was also insufficient to address these legitimate child care expenses. Her annual Line 150 income suggests she has the ability to financially contribute to these expenses. In assessing her financial situation, I note Ms. Onishenko also receives child support and related tax benefits from three fathers for children in her family. These amounts properly inform her ability to fund these expenses.

[179] In my view, the child care expenses were necessary expenses. Both adult members of the Cholowski household were employed full time. The young children required adult care and supervision. The related costs covering multiple years are reasonable for two children. Ms. Onishenko will proportionally contribute on the basis of annual income as set for s 3 child support purposes.

[180] Health related expenses, including eyeglasses properly constitute s 7 special expenses where they annually exceed insurance reimbursement by at least $100. Here a total of $858 involving two pairs of eyeglasses for Vada meets that definition. These expenses are reimbursable in the same manner and for similar reasons applicable to child care expenses.

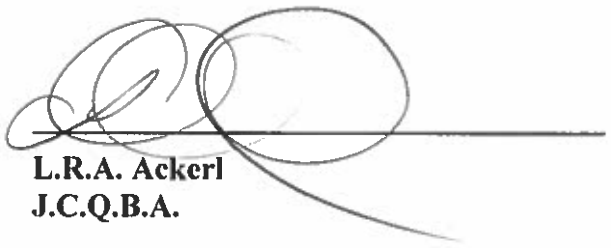
[181] The extracurricular expenses totalling $863.92 were all incurred in 2016. In determining whether an activity is extraordinary it is necessary to consider the expense involved, not the activity itself.

[182] Other factors include the necessity of the expense, the parties means and family spending history before separation. The parties consultation about such expenses is also relevant.

[183] The amount expensed is relatively insubstantial. I find these limited activities necessary to the children's development. Evidence suggests Kathryn supported Brandon's participation, in a similar fashion, in football programs. She also acknowledges the need for Vada and Gage to engage in activities. The means to subsidize such involvement exists. However, enrollment in these elective activities occurred without meaningful consultation. Under the circumstances, I decline to award s 7 support for extracurricular activities.

[184] I direct that the parties be equally responsible for the costs of the Practice Note 7 Report. That Report was ordered by a Case Management Justice and produced for the Court's benefit. The Report, by consent of both parties, was admitted as trial evidence. Given the Report's purpose, acceptance and use, it is appropriate that costs be evenly shared.

Heard on the 28th day of November, 2016.
**Dated** at the City of Edmonton, Alberta this 23rd day of February, 2017.



**L.R.A. Ackerl**
**J.C.Q.B.A.**

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