CITATION: T.W. v. J.A., 2023 ONSC 3123
COURT FILE NO.: FC-21-251
DATE: 2023-05-24

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
T.W.	)	Ryan C. Baker, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
J.A.	)	Jane A. McKenzie, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** April 11, 12, 14 and 17-21, 2023

THE HONOURABLE MADAM JUSTICE PICCOLI

CORRECTED DECISION: Decision was corrected on June 9, 2023 by inserting initials for the names of the Applicant, Respondent, family members and witnesses. The birthdate of the child L.D.J.W. was changed to reflect only the birth year.

REASONS FOR DECISION

[1] The court heard a 7-day trial. On the last day of trial, the applicant (the "father") and respondent (the "mother") were able to resolve the issues with respect to sharing s. 7 expenses

equally, communicating through Our Family Wizard ("OFW"), retroactive child support and the child's piano lessons. A separate endorsement was made on that date to allow the parties to finalize the order and to have the father's criminal undertaking with respect to his outstanding charge varied to permit communication with the mother through OFW.

[2] The issues the court was left to decide are:

i. Will the child be allowed to relocate to North Bay?[1]
ii. Who will make major decisions for the child – both parents as requested by the father or only the mother as she requests?
v. Considering the finding on relocation, what will the parenting schedule be for the child?
vi. What school should the child attend?
vii. What will child support be going forward? In calculating support, what, if any, income should be imputed to the mother?
viii. If the child is allowed to relocate to North Bay, how should the costs of travel be apportioned? If the child is not allowed to relocate, how should the costs of exercising access be apportioned?
xii. What should the order for costs be, if any?

Brief Background

[3] The parties began cohabiting in January 2014 at the mother's home in Kitchener, Ontario. They separated on October 29, 2017. They have one child together, L.D.J.W., born 2015 (the "child" or "L.W."), who is 8 years old.

[4] The child currently resides primarily with the mother at the maternal grandparents' house in Woodstock. The father lives in Elmira with his wife, the child's stepmother. Both parties have remarried, and the father is expecting a second child in May 2023.

[1]. While the parties and counsel have referred to the relocation as being to North Bay, the address that the mother seeks to relocate the child to is in Callandar, Ontario. The full and actual address is not set out in these reasons in part to protect the privacy of the child.

[5] The mother intends to move to North Bay where she purchased a new home in March 2021. The mother continues to live in Woodstock with the child pending disposition of this application. Her spouse lives and works in North Bay.

[6] The mother sought to relocate with the child in February 2021 and the father objected to same. Formal notice and objections were exchanged in March 2021. As a result of his concern that mother would relocate despite his objection, the father commenced the within proceeding and brought an urgent motion.

[7] On May 4, 2021, Madsen J. granted leave for the motion to be heard and made an order that the child not be removed from the Kitchener-Waterloo region by either party without the prior written consent of the other party or court order. She further ordered that neither party was to make any major decision for the child without the other's consent or court order. The order further provided that the child reside with the mother during the week and with the father from Friday at 3:00 p.m. to Sunday at 9:00 a.m. each weekend.

[8] On June 18, 2021, Breithaupt Smith J. made orders in relation to the summer 2021 parenting schedule, such that each parent was granted one full week with the child.

[9] On July 2, 2021, on consent, the child was allowed to temporarily relocate to Woodstock where the maternal grandparents reside. In addition, child support was ordered. Timelines were set for the hearing of a long motion on the issue of school enrolment for the child.

[10] On August 16, 2021, Breithaupt Smith J. made an order permitting home-schooling of the child for the 2021-2022 academic year. She also made orders as it related to the information the mother was to provide the father in relation to schooling.

[11] On January 31, 2022, Breithaupt Smith J. made orders in relation to the right of first refusal and requested the appointment of the Office of the Children's Lawyer ("OCL").

[12] On June 2, 2022, Breithaupt Smith J. made an order on consent increasing the amount of child support and orders in relation to a settlement conference and the scheduling of a trial management conference.

[13] The OCL clinician, Glory To ("Mr. To"), completed a s.112 assessment on June 27, 2022. Mr. To confirmed in his report that the child's views and preferences were to remain in the Kitchener-Waterloo region. The following recommendations were made:

> *1. [T.W.] and [J.A.] to share equal decision-making responsibilities for L.W's well being.*
>
> *2. If [J.A.] were to move to North Bay, L.W. will primarily reside with [T.W.]. [J.A.] be given parenting time with L.W. two out of five weekends in North Bay and up to two overnights a week in an area within one hour of driving distance from Kitchener-Waterloo area. In addition, [J.A.] should have parenting time with L.W. for the entire March Break, equally shared Christmas Holidays and 5 non-consecutive weeks of summer vacation. In addition, [J.A.] may have parenting time with L.W. as agreed upon by both parties.*
>
> *3. If [J.A.] were to reside within an hour or less of travelling distance from Kitchener-Waterloo area, [T.W.] be given parenting time every other weekend from Friday to Monday morning and two overnights during the week where there is no weekend visit. Three weeks of summer vacation, with no more than 2 weeks at a time. In addition, [T.W.] may have parenting time with L.W. as agreed upon by both parties.*

[14] The mother filed a dispute to the OCL report on July 22, 2022 on the basis that it did not follow the request of Breithaupt Smith J. as it relates to the possibility of a clinician in the Kitchener-Waterloo region being able to ask an agent in North Bay to provide some investigative support and an objective appreciation of the resources and lifestyle available for the child in both locations, errors in the report itself, failure to include the interview from the child's piano teacher, failure to take into account her allegations of abuse, failure to speak with her therapist, and an allegation that the OCL clinician decided his preferred outcome and presented his version of the facts to support this outcome.

[15] A further settlement conference was held on August 8, 2022 and an order was made for questioning. During questioning on September 20, 2022, the mother's counsel asked questions in relation to comments in the OCL report about the father videotaping her in the bedroom of the home in which they resided in 2016.

[16] Following questioning, the father was criminally charged with voyeurism and entered into an undertaking and no contact order with respect to the mother. The father's lawyer advised the OCL of the charge on September 26, 2022. On October 6, 2022, the OCL confirmed that none of the additional information regarding the dispute of the OCL report or the charge would cause the OCL to change its recommendations.

[17] The father asks the court to adopt the recommendations of the OCL in full.

[18] The mother does not accept the recommendations of the OCL. She requests that the child be able to relocate to North Bay. She asks for sole decision-making. She requests that the parenting schedule for the father be similar to what is set out in paragraph 2 of the OCL recommendations but adding specifics as it relates to times and providing four weeks of summer parenting time to father regardless of whether the child is allowed to relocate to North Bay.

Witnesses and Credibility Findings

[19] The father testified and called six witnesses: his father D.W., his mother D.W., his wife R.B. (the child's stepmother), his uncle and employer D.H., his friend M.S. with whom he lived from November 2017 to late summer 2018, and his friend M.P. with whom he lived from late summer/September 2018 to March 2020. The evidence in chief of all witnesses except the father himself was by way of affidavit.

[20] The mother testified and called four witnesses: her father J.A., her mother E.A., her friend A.K.P, and her husband Mr. P (the child's stepfather). The evidence in chief was all *viva voce* except A.K.P.'s whose evidence was by way of affidavit.

[21] The OCL clinician, Mr. To, was also a witness. He is an experienced clinician and a credible witness whose evidence was thoughtful and clear.

[22] I found the father to be credible. He answered his questions consistently and with detail. He admitted when he was wrong, and he provided corroborating evidence where necessary.

[23] I found the mother to be less credible. She was not always consistent and had difficulty answering some questions. She refused to provide the name of a potential witness—someone with whom she was alleged to have an "age gap relationship" whom Mr. P identified in the trial as "Wade"—because she decided his evidence would not be relevant. Though it is unlikely that much turned on the witness, this was improper and the father is correct to say that he should have been able to question the potential witness to determine whether the mother's and Mr. P's evidence were truthful as it relates to the nature and stability of their relationship. However, I am not prepared to draw an adverse inference for her failure to produce the potential witness' name, as requested by the father.

[24] I found that for the most part, and unless indicated otherwise below, the other witnesses were credible as it related to the issues to which they had firsthand knowledge.

Should the child be allowed to relocate to North Bay?

[25] For the reasons that follow, this court orders that the child shall not relocate to North Bay.

[26] As the parties were never married, they agree that their respective claims are pursuant to the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, as amended (the "*CLRA*") and the *Family Law Act*, R.S.O. 1990, c. F.3, as amended.

[27] Recent amendments to the *CLRA*, which came into force on March 1, 2021, now provide a comprehensive statutory framework governing relocation matters. In determining whether to allow a relocation, s. 39.4(3) of the *CLRA* requires the court to take into account the best interests of the child in accordance with s. 24, as well as the specific factors set out in s. 39.4(3).

[28] As the Supreme Court of Canada recently pointed out in *Barendregt v. Grebliunas*, 2022 SCC, 469 D.L.R. (4th) 1, at para. 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.

[29] In accordance with s. 39.4(3) of the *CLRA*, I will consider the factors relevant to the best interests of the child under s. 24 of the *CLRA*, followed by the enumerated relocation factors. The best interest considerations are non-exhaustive; the *CLRA* requires the court to take a holistic assessment of the child, his needs, and the people in his life: see *Phillips v. Phillips*, 2021 ONSC 2480, at para. 47.

Best Interests Factors

(a) The child's needs, given the child's age and stage of development, such as the child's need for stability

[30] The child needs to be with his parents as much as possible and remain in close proximity to the important people in his life. By all accounts, he is a happy, well-adjusted child. He has been described as "energetic" and quirky" by many of the witnesses. Although it might be that he will adjust to a move, that is not the test to be considered.

[31] The child has no connection to North Bay, other than his stepfather (who is important to him). It may be that the KIND Forest School in North Bay is a good school as proposed by the mother, but there was no independent evidence before the court that the child needs to attend such a school nor was there any evidence about whether similar schools are available in the Kitchener-Waterloo area at this time. I find that there is a need for stability in the young child's educational planning and social supports, which a move of such distance would disrupt.

(b) The nature and strength of the child's relationship with each parent, each of the child's siblings and grandparents and any other person who plays an important role in the child's life

[32] The evidence shows that the child has a strong relationship with both parents, both sets of grandparents, both stepparents, the father's friend M.S., and M.S.'s daughter A.S. He will also soon have a new sibling. L.W. loves his grandparents and has benefitted from having their care, support and guidance. The mother's proposal for Skype, phone calls, and alternating weekly visits is not equivalent to personal contact.

[33] Again, the only person who plays an important role in the child's life and who resides in North Bay is the child's stepfather, Mr. P. While undisputed that he and the child have a close bond, Mr. P lacks strong connections to North Bay himself. He did not move there until May 4, 2021 as part of the mother's plan to relocate, and he has no family and very few friends there—in fact, most of his friends and relatives live in Elmira, including his parents who live three blocks from the father's home. By Mr. P's own evidence, he has "no one up there".

(c) Each parent's willingness to support the development and maintenance of the child's relationship with the other parent

[34] Prior to the litigation, it is clear that both parents supported the development and maintenance of the child's relationship with the other. Since the litigation, however, the court is concerned that the mother will not foster a relationship with the father. Her conduct leading up to the litigation (e.g., overholding the child and imposing supervised parenting time) and her acknowledgement that, but for the court order, she would have moved irrespective of the father's non-consent are concerning to the court.

[35] I accept that the father will foster a relationship with the mother and her family. He has never overheld the child and has consented to the child attending in North Bay to see Mr. P. In the past, he supported the relationship by working around the mother's schedule and agreeing that she have the child when she wanted.

(d) The history of care of the child

[36] It is not disputed that the mother took a maternity leave and that she was the primary caregiver to the child for the first year of his life. The father's evidence is that during that time, the child was being nursed and he supported the mother and did more around the house.

[37] The parties were at odds as to who spent more time with the child from the spring of 2016 to the commencement of COVID-19 in March 2020. While the mother worked part-time for the spring of 2016, I accept she spent more time with the child. From the summer of 2016 until January 2018, when the mother started working full-time Tuesday to Saturday from 5:00 a.m. to

1:30 p.m. while the father worked full-time Monday to Friday, I accept the parties relied heavily on the paternal grandmother to provide daycare. It is undisputed that the maternal grandparents had the child in their care one overnight per week. I find that otherwise, the parties shared the care of the child on a fairly equal basis. It is undisputed after cross-examination that the parties had a 2/2/3 schedule for the time period of January to April 2018, and from February 2018 until May 2019, when the mother had a new job working 8:00 a.m. to 4:00 p.m., an *ad hoc* parenting schedule ensued similar to what was in place from the summer of 2016 to January 2018.

[38] It is clear from both parties' evidence and that of the father's friends that from May 2019 to December 2019, the parties had an *ad hoc* schedule that revolved around the mother's work as a private investigator. It is also not disputed following cross-examination that the father had the child in his care at least 50% of the time and likely more than 50% of the time.

[39] There were also periods of time where the father was unemployed, namely June 2018 to September 2018, where the child was in his care for more than 50% of the time.

[40] It is also undisputed that from March 2020 to the time of trial, the mother spent more time with the child as she homeschooled him. What is in dispute is whether this was something the father wanted or not.

[41] I accept that certainly since April 2020, the father has been very clear in his request to have more time with the child. He wanted his time with the child to return to the pre-COVID-19 schedule which he states was loosely based on a 2/2/3 schedule.

[42] A significant amount of time in this trial was spent on the issue of whether or not the father spent significant time on sporting or hunting activities or out with friends to the exclusion of the child (in particular, the mother said L.W. was the father's "third priority") and whether or not the mother engaged in social activities or trips to the exclusion of the child. Although to some extent these issues may be relevant, in this case, it is clear that both parents and both sets of grandparents, at different times, spent a lot of time with this child.

[43] It is important to note that both parents were very involved in the child's life. While the child attended junior kindergarten at One Forest Montessori School, it is clear that the father was the parent responsible for making the child's lunches and, in general, getting him ready for school. He is also the parent who organized the child's care when neither parent was available. It is clear that the mother took the child to most, if not all, of his dental appointments as they shared a dentist and she was also the parent responsible for L.W's piano lessons. There is no dispute that due to the closure of One Forest Montessori School in March 2020, the mother homeschooled the child for the final third of his junior kindergarten year, initially with the father's consent, and thereafter pursuant to a court order following a contested motion.

[44] Therefore, I find that the parties have historically shared care of the child on a roughly equal basis for most of the child's life until March 2020.

(e) The child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained

[45] In the OCL report, it is clear, and no one disputed, that L.W. wants to spend more time with his father and that his preference is to stay in the Kitchener-Waterloo region. I accept Mr. To's evidence in this regard.

(f) The child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage

[46] No evidence was given on this issue.

(g) Any plans for the child's care

[47] The mother's plan of care is set out in the reasons for the move. Her proposed parenting schedule has already been indicated; as an alternate, she proposes that while L.W. is attending the KIND Forest School in North Bay, he can be in his father's care one week per month. She states the school has approved this and will accommodate by sending homework with him to be worked on. She asserts that under her proposal, L.W. will still have a lot of time with his father; she has been careful to give him a similar amount of time as what he has now. He will also be in

the care of Mr. P, who has a steady job, and will be living in a mortgage-free house where L.W. has already been visiting. She also notes that during the school year, she will do the driving for L.W. to exercise parenting time with the father and it will be shared during holidays.

[48] The father's plan of care has also been articulated in his draft order. The father wants L.W. to stay in his home community near family and friends, his sibling who is yet to come and his stepmother. It is the father's position that this plan reflects L.W's views and preferences to be at a traditional school with his friends. The father's employer has confirmed that he benefits from a flexible schedule except in January of each year when he has to be at a Shot Show and another week in March when it is very busy. The father asserts that he has the flexibility required to meet L.W's needs. He also asserts that he has taken the mother's views and preferences into account in choosing a French immersion school. Meanwhile, the mother has not done the same—she wants the child to stay at a Forest School despite the father's views and Mr. To's recommendations, and her plan does not consider that all of the child's connections are in the Kitchener-Waterloo region or Woodstock, including his piano teacher, his dentist and his doctor.

(h) The ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child

[49] Both parties are able and willing to meet the child's needs. These are good parents who want to be involved in all aspects of the child's life. In many respects, L.W. is a very lucky child. He has so many people in his life that love him and want to be present.

(i) The ability and willingness of each person in respect of whom the order would apply to communicate and co-operate, in particular with one another, on matters affecting the child

[50] Following October 29, 2017, the parties to their credit cooperated and worked well together without a court order or agreement in determining parenting time. This continued until approximately February 2020 and the commencement of the COVID-19 pandemic.

[51] The father also stated that in 2019, he made it clear that he wanted a different relationship with the mother that focused on the child and not their romantic relationship. He states that she retaliated by reducing his time with the child.

[52] Since the commencement of litigation, the mother has not been as consistent in her efforts to communicate and cooperate with the father in matters affecting their child. For instance, despite receiving written notice of the father's objection to the move to North Bay on February 28, 2021, the mother listed her home in Kitchener for sale on March 10, 2021, and the home was sold by March 16, 2021. I do not accept her assertions that she could not stop the listing as "paperwork" had been signed.

[53] The mother also admitted she intended to relocate with the child to North Bay even in the face of the father's objections, and that but for the May 4, 2021 emergency order of Madsen J., she would have moved despite knowing the father did not consent.

(j) Any family violence and its impact; (k) Any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child

[54] The mother testified to incidents of family violence by the father. In addition to the father's surreptitiously recording the mother, which gave rise to criminal charge, the mother points to additional incidents or behavior as constituting family violence, all of which are denied by the father. She alleges that the father:

(1) Threw a suitcase at the wall in summer 2016 when she returned from her solo trip.

(2) Prohibited her from purchasing a new vehicle in the fall of 2016.

(3) Would park his car near her house and spy on her.

(3) Yelled at her in Costco in January 2019, which is corroborated by Mr. P.

(4) Would yell and scream at her at pick up and drop offs until Mr. P made it known that he was the man of the house.

(4) Purchased a pillow for her as a Christmas gift from L.W. in 2021 which had text on it stating: "Dear Mom, Thanks for being my mom. If I had a different mom, I would punch her in the face and go find you. love, Your favorite".

> (5) Would require her to take pictures of herself to prove to him where she was. The mother's friend Ashley corroborated that the mother would take pictures and send them to the father. She was forthright in acknowledging that she did not hear the father ask her to do this nor was she privy to conversations as it relates to this between the mother and father; she was only relaying what the mother had told her and the picture taking she witnessed.

[55] The mother is concerned that Mr. To did not give any weight to her concerns regarding family violence. She points out that he admitted in cross-examination that he has not had training in family violence for five years. Despite having provided Mr. To with a list of 32-34 alleged incidents of family violence, that list was not provided to the court nor was the mother asked any questions in relation to the list except for confirmation that it related to financial issues.

[56] In closing submissions, the mother's lawyer asserted that family violence is hard to prove, as is often the case, such that even Mr. To with all of his experience did not believe her. She also asserts that the father has not taken any steps to prevent further family violence from occurring and improve his ability to care for the child – there was no evidence that he had done any counselling or attended any Parent Assault Response programs.

[57] The father describes that in the later years of their relationship, he was plagued with the concern that the mother was cheating on him; something his friend M.S. was trying to prove to him. He was insecure, struggling in the relationship, and felt emotionally abused by the mother. He points to texts and pictures the mother sent him even after she was living with her current husband that he states were romantically and sexually suggestive in nature.

[58] Subsections 18 (1) and (2) of the *CLRA* defines family violence as follows:

> (1) "family violence" means any conduct by a family member towards another family member that is violent or threatening, that constitutes a pattern of coercive and controlling behaviour, or that causes the other family member to fear for their own safety or for that of another person, and, in the case of a child, includes direct or indirect exposure to such conduct;
>
> **"Family violence"**
>
> (2) For the purposes of the definition of "family violence" in subsection (1), the conduct need not constitute a criminal offence, and includes,

(a) physical abuse, including forced confinement but excluding the use of reasonable force to protect oneself or another person;

(b) sexual abuse;

(c) threats to kill or cause bodily harm to any person;

(d) harassment, including stalking;

(e) the failure to provide the necessaries of life;

(f) psychological abuse;

(g) financial abuse;

(h) threats to kill or harm an animal or damage property; and

(i) the killing or harming of an animal or the damaging of property.

[59] Section 24(4) outlines factors that the court must consider if family violence has occurred:

Factors relating to family violence

(4) In considering the impact of any family violence under clause (3) (j), the court shall take into account,

(a) the nature, seriousness and frequency of the family violence and when it occurred;

(b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;

(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;

(d) the physical, emotional and psychological harm or risk of harm to the child;

(e) any compromise to the safety of the child or other family member;

(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;

(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve the person's ability to care for and meet the needs of the child; and

(h) any other relevant factor.

[60] Section 24(5) requires the court to not take into consideration the past conduct of any person, unless such conduct is relevant to the issues:

> **Past conduct**
> (5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person, unless the conduct is relevant to the exercise of the person's decision-making responsibility, parenting time or contact with respect to the child.

[61] In *F.S. v. M.B.T.*, 2023 ONCJ 102, Sherr J. set out the impact of family violence on children and summarized recent jurisprudence dealing with family violence, at paras. 48-49:

> The Supreme Court of Canada in *Barendregt* made the following observations about family violence:
>
> > 1. The recent amendments to the *Divorce Act* recognize that findings of family violence are a critical consideration in the best interests analysis.
> >
> > 2. The suggestion that domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator's parenting ability is untenable. Research indicates that children who are exposed to family violence are at risk of emotional and behavioural problems throughout their lives. Harm can result from direct or indirect exposure to domestic conflicts, for example, by observing the incident, experiencing its aftermath, or hearing about it.
> >
> > 3. Domestic violence allegations are notoriously difficult to prove. Family violence often takes place behind closed doors and may lack corroborating evidence. Thus, proof of even one incident may raise safety concerns for the victim or may overlap with and enhance the significance of other factors, such as the need for limited contact or support.
>
> Justice Deborah Chappel wrote about the importance of family violence as a best interests factor in paragraph 86 of *McBennett v. Danis*, 2021 ONSC 3610, as follows:
>
> > The broad definition of family violence and the specific inclusion of this factor as a mandatory consideration in determining the best interests of children recognize the profound effects that all forms of family violence can have on children. These consequences can be both direct, if a child is exposed to the family violence, or indirect, if the victimized parent's physical, emotional and psychological well-being are compromised, since these consequences in turn often negatively impact their ability to meet the child's physical and emotional needs. [Citations omitted.]

[62] Although initially the father did not agree that hiding a camera in someone's bedroom closet and taking videos constituted family violence, his lawyer in closing put forward a case, *E.M. v. C.V.*, 2022 ONSC 7037, that found it was. I agree that this behavior constitutes family violence. I also accept that, while wholly unacceptable, it was an isolated incident. There was no evidence that it impacted the child in any way.

[63] I do not accept the father's submission that because she waited over five years to make her complaint, the mother has weaponized the criminal justice system to gain an advantage in this litigation.

[64] I believe the mother that the father threw the suitcase at the wall in 2016. However, I do not find that the purchase of the pillow or the discussions around purchasing a car in the fall of 2016 constitute family violence. Nor do I believe either party was spying on the other. I accept that father became upset in Costco in January 2019, but I do not find this constitutes family violence. Overall, I do not find that the father's alleged conduct rises to a level of "family violence" as defined in the *CLRA*.

[65] In respect to the Costco incident in 2019 and the mother's and Mr. P's allegations of yelling and screaming at pick up and drop off, I do not accept the mother's and Mr. P's evidence. It is clear that Mr. P is a sensitive person and very devoted to the mother. In that regard, his corroboration of the mother's evidence lacked credibility.

[66] I find there were two isolated incidents of family violence in 2016. However, the evidence does not establish that there was either conduct or a pattern of conduct that amounted to coercive and controlling behaviour or that it caused the mother to fear for her safety. The voyeurism incident did not prevent the parties from communicating in a child-centric fashion and did not impact their dynamic or ability to parent or co-parent thereafter.

[67] In this case, family violence, including the incident giving rise to the father's criminal charge, is not a significant reason for allowing the mother's request for relocation: see *Barendregt*, at paras. 142-44, 46. However, the acrimonious relationship remains as a factor the court shall weigh with the other factors in respect of the relocation and parenting issues.

Relocation Factors – CLRA s. 39.4(3)

(a) The reasons for the relocation

[68] The mother submits that a relocation to North Bay will allow for better financial stability and employment opportunities. She has been able to purchase a mortgage-free home in North Bay which will allow her to work while the child is at school and otherwise be available to care for the child at home, make his meals every day, and pick him up and drop him off at school. This will prevent the child from being "bounced around" which she has wanted for him since his birth. The mother asserts that in North Bay, the child will lead a quieter life closer to nature, and hunting and fishing, which she states is not possible in the Kitchener-Waterloo region.

[69] The mother has also investigated and wants the child to attend KIND Forest School in North Bay which is approximately 20-25 minutes from the home she purchased. She states that the child's interests are best served by attending that school as it caters to his specific likes and needs.

[70] The father asserts that the mother's reasons for the move do not support the loss of a relationship between L.W. and his father, his stepmother, his soon-to-be stepsibling, his grandparents, and other family and friends. He has a close and loving relationship with the child that will be negatively impacted by a move of this distance. He maintains that for L.W. to be in the car for 8-9 hours (likely more during months of bad weather) on weekends when he has parenting time is not in his best interests. He is concerned that a move of this distance will erode the father-child relationship which he believes is something the mother has been attempting to do since he changed the dynamics of their relationship in late 2019.

[71] Although I cast no judgment on the mother's reasons for moving and only consider them to the extent they are relevant to L.W's best interests, I agree with the father. To allow the child to move in the circumstances of this case where the child has a loving and supportive father and many other family and friends in the Kitchener-Waterloo region where he wishes to remain is not in his best interests. Both the mother and her husband confirmed in cross-examination that they were not experiencing financial pressure or impediments that required them to move to

North Bay. Further, I do not accept that the child could not be and has not been exposed to nature in the Kitchener-Waterloo region. As of September 2023, L.W. will be in full-time school, and it is neither uncommon nor detrimental for him to be in a grandparent's or stepparent's care at the end of the school day when his parents are working.

[72] The child should continue to benefit from being in the care of each parent as much as possible and not being in a car for upwards of 8-9 hours per parenting visit.

(b) *The impact of the relocation on the child*

[73] The mother asserts that the impact of the relocation on the child will be positive. The child will have a more stable environment as she will not be required to work. He will also benefit from being in the consistent care of his stepfather. It is undisputed that L.W. is close to his stepfather, and he misses him. She further asserts that L.W. is a fun child and gets along well with people; he will have no difficulty adjusting.

[74] The father asserts that the impact of the relocation on L.W. would be negative and that he will lose contact with many important people in his life. For example, there is no dispute that the child is closely bonded to both his maternal and paternal grandparents, and the maternal grandparents admitted that their time with the child would be impacted if the child was relocated to North Bay. Although the maternal grandparents had firm plans to relocate with the mother in 2021, the change in the housing market has made their plans less firm.

[75] This court finds that the impact of relocation on L.W. would be significant. Until May 2021, he lived his entire life in the Kitchener-Waterloo region. There is no doubt that he has close connections to the area. He will lose out on contact with his father, his stepmother, his soon-to-be stepsibling, his friends, his grandparents (both paternal and maternal), his father's friend M.S., and his friend and M.S's daughter A.S. L.W's best interests are met by him remaining where his connections are—namely, the Kitchener-Waterloo region.

(c) The amount of time spent with the child by each person who has parenting time or is an applicant for a parenting order with respect to the child, and the level of involvement in the child's life of each of those persons

[76] The history of caregiving will sometimes warrant a burden of proof in favour of one parent. In all cases though, the inquiry remains an individual one in that the court must consider the best interests of the particular child in the particular circumstances of the case: see *Barendegt*, at paras. 117-23.

[77] Section 39.4(6) of the *CLRA* places the burden on the party opposing the re-location if the children "spend the vast majority of time in the care of the party who intends to relocate" with the children. As I find that the child has not spent the vast majority of the time in the care of either parent, the facts of this case do not warrant a burden of proof in favour of either parent.

(d) Whether the person who intends to relocate the child has complied with any applicable notice requirement under section 39.3 and any applicable Act, regulation, order, family arbitration award and agreement

[78] I do not accept the mother's assertions that she believed (based on discussions that started February 2021) that the father had consented to the move to North Bay, and that it was only days before she listed her home for sale on March 10, 2021 when it became clear he did not consent. Her own husband contradicted this when he gave evidence that the father would only consent to a move one hour from his residence. Further, even if this were true, the evidence during the trial was that the mother was given notice of the father's objection to the move before she purchased her home in North Bay on February 28, 2021.

[79] As set out in the endorsement of Justice Madsen of March 11, 2021, the mother gave written formal notice to the father on March 2, 2021 by way of a letter from her lawyer of her plan to move on May 4, 2021. The father sent his objection by way of letter dated March 11, 2021.

(e) The existence of an order, family arbitration award or agreement that specifies the geographic area in which the child is to reside

[80] No such order, agreement or award exists.

(f) The reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of decision-making responsibility, parenting time or contact, taking into consideration, among other things, the location of the new residence and the travel expenses

[81] On numerous occasions, the mother indicated that the father's actual time with the child does not change in light of her proposal. She provided charts to the OCL and spoke about this issue at length in the trial. Although that may be true, it shows a lack of insight into the father-child relationship and the impact of the long drive, which in this case, would be 4-4.5 hours each way or longer in bad weather. Further, the father and grandparents could not be part of the child's day-to-day life, whether it be school plays, sporting activities or appointments with a third party. Finally, it has no regard to the child's wishes to remain in the Kitchener-Waterloo area.

Although I do not find that the mother's proposal is made in bad faith, I find that she does not place as much significance on the father-child relationship as would be in the child's best interests. She simply did not accept that for father "L.W. comes first" and he is "never too busy for L.W.." Instead, she believes that she is justified in creating a new family unit and realizing her dream to be a stay-at-home parent is more important than the consistency of having the other parent involved in the child's day to day life.

(g) whether each person who has decision-making responsibility or parenting time or is an applicant for a parenting order with respect to the child has complied with their obligations under any applicable Act, regulation, order, family arbitration award or agreement, and the likelihood of future compliance

[82] I rely on my previous findings and comments under best interests factor (h) and relocation factor (d), above.

[83] In accordance with s. 39.4(4) of the *CLRA*, I have not considered in reaching my decision whether, if the relocation were prohibited, the person who intends to relocate the child would relocate with or without the child.

Conclusion

[84] On a holistic balancing of all these factors, the court concludes that relocation is not in the child's best interests.

What should the parenting schedule be?

[85] Section 24(6) of the *CLRA* discusses allocation of parenting time:

> **Allocation of parenting time**
> (6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the child.
> **Costs of relocation**
> (9) If a court authorizes the relocation of a child, it may provide for the apportionment of costs relating to the exercise of parenting time by a person who is not relocating between that person and the person who is relocating the child.

[86] In this case, to maximize parenting time consistent with the child's best interests, I accept most of the recommendations of the OCL as it relates to the parenting schedule.

[87] In the summer, regardless of where the parent is living, the child should be in the care of each parent for an equal time; this allows the child to attend family cottages, camps, etc. As the mother has said that if the child is not allowed to relocate and an income is imputed to her, she will likely need to work and as such may not be able to exercise her two overnights per week of parenting time to return within one hour of the father's residence as recommended; I have ordered that as much as possible, her weekend time should coincide with a PD Day or holiday.

Who should make decisions about this child?

[88] Section 20(1) of the *CLRA* states: "Except as otherwise provided in this Part, a child's parents are equally entitled to decision-making responsibility with respect to the child".

[89] The father requests that the parties share decision-making for the child.

[90] The mother requests that she solely make decisions in reference to the child.

[91] For the reasons that follow, I order that the parties jointly make the decisions in relation to this child. I also order that the parties attend Community Justice Initiatives' conflict coaching course, as recommended by the mother.

[92] Courts have previously ordered parties attend a co-parenting course or attend co-parenting counselling: see e.g. *Ibitoye v. Ibitoye*, 2023 ONSC 2008; *Saco v. Royer*, 2021 ONSC 2142; *G.S.W. v. C.S.*, 2018 ONCJ 286. Specific courses have been ordered as well: see e.g. *Smart v. Belland*, 2022 ONSC 5612, at para. 24. In this case, I find that the parties' communication and future co-parenting relationship would benefit from conflict coaching, and I have ordered Community Justice Initiatives' program in particular because it is geared to participants' income and accessible by Zoom.

[93] There are a number of Court of Appeal for Ontario decisions that deal with the issue of sole versus joint custody, including: *Kaplanis v. Kaplanis* (2005), 249 D.L.R. (4th) 620 (Ont. C.A.); *Ladisa v. Ladisa* (2005), 11 R.F.L. (6th) 50 (Ont. C.A); *Ursic v. Ursic* (2006), 32 R.F.L. (6th) 23 (Ont. C.A); and *Rigillo v. Rigillo*, 2019 ONCA 548, 31 R.F.L. (8th) 356. Although the terminology in the legislation has changed from custody to decision-making, the considerations remain analogous.

[94] The Ontario Court of Appeal in *Kaplanis v. Kaplanis* sets out the following principles in determining whether a joint decision-making responsibility order (formerly a joint custody order) is appropriate:

i. There must be evidence of historical communication between the parents and appropriate communication between them.

ii. It can't be ordered in the hope that it will improve their communication.

iii. Just because both parents are fit does not mean that joint custody should be ordered.

iv. The fact that one parent professes an inability to communicate does not preclude an order for joint custody.

v. No matter how detailed the custody order there will always be gaps and unexpected situations, and when they arise they must be able to be addressed on an ongoing basis.

vi. The younger the child, the more important communication is.

[95] In *Jackson v. Jackson*, 2017 ONSC 1566, Chappel J. summarized the law with respect to custody. At para. 65, Chappel J. held that the decision as to whether an order for sole custody or joint custody is in a child's best interests is ultimately a matter of judicial discretion. However, several general principles have emerged from the jurisprudence to assist the court in the decision-making process. These can be summarized as follows (citations omitted):

i. There is no default position in favour of joint custody. Each case is fact-based, and discretion driven.

ii. Joint custody should only be considered as an option if both parents are fit parents and able to meet the general needs of the children. This is a threshold issue before the court considers the question of whether the parties are able to effectively communicate on issues relating to the children.

iii. The quality of past parenting and decision-making, both during the parties' relationship and post-separation, is a critical factor in determining whether joint custody is appropriate.

iv. However, the mere fact that both parents acknowledge that the other is a "fit" parent does not mean that it is in the best interests of the child for a joint custody order to issue. The decision regarding the appropriate decision-making arrangement must take into consideration all factors relevant to the child's best interests.

v. Although some measure of communication and cooperation between the parties is necessary to support a joint custody order, the court is not required to apply a standard of perfection in assessing the parents' ability to work together.

vi. The fact that one party insists that the parties are unable to communicate with each other is not in and of itself sufficient to rule out the possibility of a joint custody order … The question for the court to be determine is whether a reasonable measure of

communication and cooperation is in place, and is achievable in the future, so that the best interests of the child can be ensured on an ongoing basis.

vii. There must be a clear evidentiary basis for believing that joint custody would be feasible.

viii. In cases involving very young children, the court must take into consideration the fact that the child is unable to easily communicate their physical, emotional, developmental and other needs. Accordingly, the need for effective communication between the parties in a joint custodial arrangement will be particularly pressing in such circumstances.

ix. The wishes of the child will also be relevant to the decision respecting the appropriate custodial disposition in cases involving older children.

x. Evidence as to how an interim custody and access order has worked, and in particular, whether the parties have been able to set aside their personal differences and work together in the best interests of the child, will be highly relevant to the ultimate decision regarding the appropriate custodial regime.

[96] In analyzing the ability of the parties to communicate, the court must delve below the surface and consider the source of the conflict. The Court of Appeal for Ontario has clearly stated that one parent cannot create conflict and problems with the other parent by engaging in unreasonable conduct, impeding access, marginalizing the other parent, or by any other means and then justify a claim for sole custody in their favour on the basis of lack of cooperation and communication: see *Ursic*; *Andrade v. Kennelly* (2006), 33 R.F.L. (6th) 125 (Ont. S.C.), aff'd 2007 ONCA 898, 46 R.F.L. (6th) 235.

[97] Although the mere suggestion of ineffective communication cannot by itself rebut joint custody of a child, the inability to communicate for the best interests of the children can: see *Lambert v. Peachman*, 2016 ONSC 7443.

[98] As correctly pointed out by counsel for the mother, a finding of family violence may well impact the parties' ability to communicate. For the purposes of the parties' ability to communicate, I find that despite the findings of family violence which occurred in 2016, including the incident which resulted in the 2022 voyeurism charge which remains outstanding, the parties have been able to communicate effectively since that time and continuing until February 2021. As stated by Carter J. in *E.M. v. C.V.*, at para. 77, wherein the father was granted sole decision-making:

> On the issue of family violence, I find that there was one incident within the meaning of the *CLRA* – the surreptitious recording of the Mother engaging in sexual activity by the Father. This activity represents an invasion of privacy, and it is understandable why the Mother would have concerns about trust afterwards. However, the Father received an absolute discharge, the violence was not directed toward the children nor were they exposed to it. There is no evidence of harm or risk of harm to the children as a result. There are no current safety concerns for the children that stem from the incident. It carries little weight in determining the best interests of the children at this point in time.

[99] Since the criminal charge, the parents have been communicating through a communication book. Oddly, neither party proffered that communication book as evidence in the trial. The court asked each party how they proposed to address the animosity that exists between them since that time. The mother's lawyer recommended counselling and the father's lawyer pointed to the consent reached by the parties on the last day of trial that they are to communicate through OFW. The mother's evidence is that she and Mr. P took conflict coaching and invited the father, but he did not attend. The father was not asked this question nor was he called in reply to address the issue.

[100] Although the mother asserted otherwise, it is clear from the evidence at the trial that prior to the mother advising that she was going to relocate to North Bay with the child, the parties communicated well in relation to the child. I do not accept the mother's assertions that her positive responses and communications towards the father were merely because she felt she "had to" communicate with him in a kind and at times even "flirty" fashion to avoid upsetting him. She put forward no written communication that supported this.

[101] The mother's lawyer confirmed in closing submissions that neither party has said the other is a bad parent and they have been able to cooperate up to a certain point; noting their main dispute is the move and the logistics around the move.

[102] In this case:

i. OCL confirmed that he did not ask the child his views and preferences in relation to joint decision making.

ii. No one disputed that each parent is fit.

iii. The parents, up until the mother's proposed relocation to North Bay, communicated well in relation to the child whether it be exchanging information about the school, childcare, toilet training, swimming, clothing or events. They were also flexible in their approach to the day-to-day parenting schedule working around each parents' availability.

iv. Texts from August 2018 to March 2020, which showed that day-to-day decisions and major decisions in reference to L.W. were discussed in a healthy, detailed and child-focused manner, were put to the parties. No one questioned the veracity of the texts. The mother indicated the texts were not the full picture, but she did not put forward any texts or written communication except one email dated February 12, 2018, that showed any different type of communication.

v. It is undisputed that prior to the mother putting in place her relocation plan, there was no child welfare or police involvement. There was no conflict as it related to medical, extracurricular or schooling decisions.

vi. The mother was not able to provide any examples of strained communication nor major decisions that they were unable to make in relation to the child prior to her putting in place her plan of relocation. I do accept that the incident in Costco in January 2019 was not healthy communication, but it is far from clear who instigated the conflict. I do accept that the father was upset and angry after finding the mother with her boyfriend in Costco when she had told him that she was too ill to care for the child that day.

vii. Both parties agree that since this litigation started, communication has been strained. It is clear the issue of relocation has caused each party to be suspicious of the other. I am concerned that the mother has not kept the father properly apprised of the child's schooling. Other than the documents provided by father, she proffered no evidence in support of her contention that she has done so. I am also concerned that when the father was offered a piano by the mother so the child could properly practise in his home, he declined for his own emotional reasons.

viii. I find that a reasonable measure of communication and cooperation was in place prior to this litigation and that it is achievable in the future so that the best interests of the

child can be ensured on an ongoing basis. They do not have to be best friends: see *Kaplanis*, at para. 12.

ix. I also accept that this child is able to express his wishes to his parents and that they will respect those wishes; by all accounts he is an intelligent and thoughtful child.

x. I also find that at times the mother has engaged in unreasonable conduct, e.g., school information, the sale of her home in Kitchener knowing the father objected to the move, not allowing the child to see the father the weekend of March 5, 2021, insisting he exercise supervised parenting time after he refused to consent to the move (in that regard I do not accept that there was an objective fear that the father would overhold the child), allowing him to attend on March 5, 2021 to the home without telling him in advance the child would not be present and leaving a train set for pick up on the front porch.

xi. The court is concerned that the mother will not consult with the father if she has final say as since this litigation there is evidence that she has not done so (e.g., school records, field trips, school activities).

xii. Although this court accepts that the taping in the bedroom constitutes family violence, it occurred in 2016, was reported to police in 2022 and was an isolated incident, as was the throwing of the suitcase at the wall in 2016. Although I do not diminish the seriousness of these incidents, I find that they did not impact the party's ability to make decisions together from 2016 to February 2021.

[103] As the mother's lawyer pointed out in closing, none of the parties' family members or witnesses gave evidence disparaging the other parent. It is noteworthy in this case that neither party is alleging the other as being a bad parent.

[104] These parties communicated well in advance of the litigation, and they have complied with court orders. They both love their child. I expect their communication will be in the best interests of the child going forward in making decisions for L.W. I expect that attendance at Community Justice Initiatives will have a positive effect on their communication.

What school should L.W. attend?

[105] While both parents agree that L.W. should no longer be homeschooled and will need to be registered in school effective September 2023, they do not agree on the choice of school. In this case, I have ordered that the parents have shared decision-making. Given that they do not agree on the issue of schooling, it is necessary for the court to make this determination. Regardless of what order is made, the child will be changing schools as he is no longer going to be homeschooled and the One Forest Montessori School he previously attended is now permanently closed.

[106] It is the mother's position that L.W. should attend the KIND Forest School in North Bay. If the court does not allow the child to relocate, it is her position that the child should attend a Montessori school in the area in which he resides. She asserts that the child should attend a Forest Montessori School until grade 6, at which time he can transition to a public school. She has not had an opportunity to research the schools. In the alternative, if the court were not to order that the child attend a Forest Montessori or Montessori school, the mother asserts French immersion is a better option than public school.

[107] It is the father's position that L.W. should attend the French immersion school which is 500 meters from his home in Elmira: John Mahood Public School. He has no plans for what school the child should attend if he is not able to gain entry to the French immersion school.

[108] For the reasons that follow, the child shall attend school in Elmira at the French immersion school, John Mahood Public School, starting in September 2023, unless the mother's residence remains one hour or less from the father's residence, in which case the child shall attend public school in her area. The child already has to make a change this year, and it is not reasonable that he make a change now and then again when he starts grade six to transition to public school. Waiting until he is in sixth grade to do so would be more difficult for him and impact his stability.

[109] L.W's school history is as follows:

i. From the end or March 2019 to June 2019, he attended One Forest Montessori School in Kitchener one half day per week (Monday afternoons).

ii. From September 2019 to March 2020, he attended the same school four days per week. As a result of COVID-19, this school did not reopen.

iii. From March 2020 to the current time, he has been home schooled. When he lived in Kitchener, L.W. was homeschooled by his paternal grandmother, his mother and to a lesser extent his father. Since March 2021, L.W. has been homeschooled by his mother with assistance from the maternal grandparents.

[110] Broad J., in the decision of *Dauber v. Dauber*, 2021 ONSC 5489, at para. 15, citing Audet J. in *Thomas v. Osika*, 2018 ONSC 2712, at para. 37, summarized the law with respect to the guiding principles on the choice of school.

[111] The cases are very fact driven. The courts are not pronouncing on what is best for all children in a general sense but rather deciding what is in the best interests of the child before the court: see *Deschenes v. Medwayosh*, 2016 ONCJ 567.

[112] Factors which may be considered by the court in determining the best interests of the child include assessing any impact on the stability of the child. This may include examining whether there is any prospect of one of the parties moving in the near future; where the child was born and raised, whether a move will mean new childcare providers or other unsettling features: see *Askalan v. Taleb*, 2012 ONSC 4746.

[113] Neither parent provided information as to the resources that each school offered in relation to a child's needs, rather than on their proximity to the residence of one parent or the other, or the convenience that his attendance at the nearest school would entail. This information would have assisted the court: see *Wilson v. Wilson*, 2015 ONSC 479.

[114] It is clear that the child enjoyed his time at the One Forest Montessori School; it met his needs, aptitudes and attributes at the time when he was four and five years old. However, it is not reasonable or necessary that he return to a similar school in the September 2023 school year.

[115] The costs associated with attending a Forest School is expensive. It is undisputed that the father was initially reluctant for the child to attend One Forest Montessori School, and that part of what swayed him to agree was the mother's assertion that she would receive one third of the tuition costs back as a tax refund, she would then apply that amount to the child's school costs, and the remainder of the tuition would be divided equally between the parties. When the parties discovered they would not be receiving a tax refund, it is clear from the text messages between the parties that they agreed to revisit the issue; the mother for her part indicated that she would pay for more than 50% of the cost.

[116] The cost of a Forest School is between $8,600 and 10,000 per annum. This is not a reasonable or necessary expense given the father's current income of approximately $62,000 and the mother's current income of approximately $17,000. In *Karim v. Mohamed*, 2021 ONSC 860, the court found that private school tuition of $11,894 per year for the five-year-old child was not reasonable having regard to the incomes of the parties. After paying child support and private school tuition, the father would have been left with approximately $2,800 per month for his own living expenses: at paras. 10-15. In *Pomozova v. Mann*, 2010 ONCA 212, the mother sought contribution from the father towards expensive private school tuition for the three-year-old child, and the court deemed it was not a necessary s. 7 expense. The court noted that there was no evidence, aside from the mother's own wishes, to suggest that private school was necessary, or that the child had any particular needs that required her attendance at private school at this young age, or why the child's needs could not be met at a public school. See also *Fiorino v. Fiorino*, 2013 ONSC 2445, at paras. 29-30, 35-36.

[117] Although the mother has raised a problem with how the father's proposed school is ranked, I have not been provided with evidence nor would I consider third party ranking systems for schools when deciding what is best for this particular child: see *Askalan v. Taleb*; *Wilson v. Wilson*.

[118] Both parents show a preference to French immersion even though there is no evidence that either of them speaks, reads or writes in French. The father has indicated that despite this, he will be able to assist the child with homework.

[119] In this case, this court finds that it is in the child's best interest that he commences public school in September 2023. My order reflects that the child will attend the school proposed by the father if the mother chooses to relocate. If the mother returns to live within one hour of the father's residence, then the child will go to an equivalent school where the mother resides.

Child Support

[120] The father commenced paying guideline support on May 1, 2021, and the parties agree there is no amount owing from that date.

[121] On the last day of trial, the parties were able to resolve the arrears of child support. That order has now been made. For clarity, the parties have been using the prior year's income to child support for the current year.

[122] The parties have agreed that the Mother's Line 150 income is:

- 2018 – $39,166
- 2019 – $50,531 ($48,764.00 employment income and $1,714 RRSP income)
- 2020 – $44,344 ($32,273 employment and $10,050 employment insurance)
- 2021 – $34,441 (partly comprised of CERB)
- 2022 – she works part time approximately 4 days per week from 9:00 p.m. to 1:00 a.m. at Home Depot and earns $17.50 per hour.

[123] The parties have agreed that the father's Line 150 income is as follows:

- 2018 – $46,475
- 2019 – $52,458
- 2020 – $52,511.94
- 2021 – $105,811 ($56,724 in employment income and $56,813 in taxable capital gains)
- 2022 – $62,004.04 ($147.04 being interest income)

<u>Should an income be imputed to the mother?</u>

[124] The father requests that an income of $50,000 be imputed to the mother. He asserts that the mother can and has earned that income. The mother's line 150 income for 2019 exceeded $50,000. The father asserts that her 2019 income represents the last year of her employment where the pandemic did not impact her employability and the last year before she made the decision to be intentionally underemployed. Her choice to be a stay-at-home mother is a voluntary one and should not be visited on the father. The father also points out that the mother admitted that she can earn approximately $50,000 working as a private investigator.

[125] The father points out that under his proposed plan for the child, the mother would not pay him child support as she will need to spend the money on gas to drive to and from North Bay. I note that child support is the right of the child. He further notes that on the last day of trial, the parties were able to agree that they share their expenses 50/50 for this year, so it is not relevant to determine her contribution this year, but it may be in coming years. He states though that if the mother remains in the region and the parenting schedule recommended by the OCL is implemented, there should be a set off of the child support paid as the child will be in his care more than 40% of the time.

[126] It is the mother's position that staying at home to be available for L.W. is in his best interests. She does not agree that an income should be imputed to her as she is a loving and caring mother and just wants to do what is best for L.W. She requests that if an income is imputed to her, it not commence until after this school year given that she is homeschooling L.W. pursuant to the August 16, 2021 order of Breithaupt Smith J., and cannot work full-time.

[127] For the reasons that follow, an income of $50,000 is imputed to the mother; the start date of the imputation of income will be August 1, 2023.

[128] Section 19 of the *Child Support Guidelines*, O. Reg. 391/97 permits the court to impute income to a party if it finds that the party is earning or is capable of earning more income than they claim. The circumstances listed in s. 19(1) are not exhaustive. They are simply examples of situations in which the imputation of income to a spouse may be appropriate: see *Bak v. Dobell*, 2007 ONCA 304, 86 O.R. (3d) 196; *Korman v. Korman*, 2015 ONCA 578, 126

O.R. (3d) 561; *Riel v. Holland* (2003), 67 O.R. (3d) 417 (C.A.); *Hawas v. Ibrahim*, 2021 ONSC 3713.

[129] The leading case regarding the imputation of income to a support payor remains the decision of the Ontario Court of Appeal in *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (Ont. C.A.). At para. 32 of that decision, the court described the imputation of income as:

> ... [O]ne method by which the court gives effect to the joint and ongoing obligation of parents to support their children. In order to meet this legal obligation, a parent must earn what he or she is capable of earning.

[130] At para. 23 of *Drygala*, the court set out the three-part test for the imputation of income, as follows:

1. Is the party intentionally under-employed or unemployed?
2. If so, is the intentional under-employment or unemployment required by the needs of any child or by the reasonable educational or health needs of the parent or spouse?
3. If not, what income is appropriately imputed?

[131] A parent is intentionally underemployed within the meaning of this section if they earn less than they are capable of earning having regard for all of the circumstances. In determining whether to impute income on this basis, the court must consider what is reasonable in the circumstances: see *Drygala*, at para. 45. There is no requirement of bad faith or an intention to evade support obligations inherent in intentional underemployment: see *Lavie v. Lavie*, 2018 ONCA 10; *Drygala v. Pauli*, at paras. 24-37. The reasons for underemployment are irrelevant. If a parent is earning less than she or he could be, he or she is intentionally underemployed.

[132] In *Szitas v. Szitas*, 2012 ONSC 1548, Chappel J. in reviewing the caselaw cites the following principles that apply to the imputation of income, at para. 57:

1. There is a duty on the part of the payor to actively seek out reasonable employment opportunities that will maximize their income potential so as to meet the needs of their children.
2. Underemployment must be measured against what is reasonable to expect of the payor having regard for their background, education, training and experience.
3. The court will not excuse a party from their child support obligations or reduce these obligations where the party has persisted in un-remunerative employment, or where they have pursued unrealistic or unproductive career aspirations. A self-induced reduction of income is not a basis upon which to avoid or reduce child support payments.
4. If a party chooses to pursue self-employment, the court will examine whether this choice was a reasonable one in all of the circumstances and may impute an income if it determines that the decision was not appropriate having regard for the parent's child support obligations.
5. When a parent experiences a change in their income, they may be given a "grace period" to adjust to the change and seek out employment in their field at a comparable remuneration before income will be imputed to them. However, if they have been unable to secure comparable employment within a reasonable time frame, they will be required to accept other less remunerative opportunities or options outside of the area of their expertise in order to satisfy their obligation to contribute to the support of their children.
6. Where a party fails to provide full financial disclosure relating to their income, the court is entitled to draw an adverse inference and to impute income to them.
7. The amount of income that the court imputes to a parent is a matter of discretion. The only limitation on the discretion of the court in this regard is that there must be some basis in the evidence for the amount that the court has chosen to impute.

[133] As Gillese J.A. wrote for the court at para. 44 of *Drygala:*

> Section 19 of the Guidelines is not an invitation to the court to arbitrarily select an amount as imputed income. There must be a rational basis underlying the selection

> of any such figure. The amount selected as an exercise of the court's discretion must be grounded in the evidence.

[134] The mother, by her own evidence, is capable of working full-time. She was earning approximately $50,000 as a full-time employee with Blackberry before her maternity leave. She wants to be a stay-at-home parent for L.W. as this is child-focused and child-centered. Although the mother's desire is not considered blameworthy, it is clear that she is intentionally underemployed. She has an obligation to work to her maximum capability which she is not doing.

[135] The mother's work history since the separation is as follows:

1. From October 2017 to January 2018, she worked at Home Depot from 5:00 a.m. to 1:00 p.m. Tuesday to Saturday;
2. From January 2018 to June 2018, she worked at Independent Supply Company from 8:00 a.m. to 4:00 p.m. 4 days per week;
3. She started her private investigator courses in November 2018 and became a private investigator in May 2019;
4. She worked as a private investigator until her move to Woodstock in 2021. Her hours fluctuated depending on the season.

[136] In this case, it is clear by past history and her own evidence that the mother can earn $50,000 per year. In 2019, which is the only year she has worked full-time since the separation, she earned over $47,000. By her own evidence, she can earn approximately $50,000 working as a full-time private investigator.

[137] I find that the father has provided sufficient evidence to seek imputation on a *prima facie* basis and the mother has failed to rebut that imputation as required: see *Homsi v. Zaya*, 2009 ONCA 322, at para. 28; *Tahir v. Khan*, 2021 ONCJ 1; *E.D. v. J.S.*, 2020 ONSC 1474; *Abumatar v. Hamda*, 2021 ONSC 2165. I agree that an income of $50,000 should be imputed to the mother.

[138] Given that she is homeschooling L.W. and given that both parties agree that this will continue to June 2023, the imputation of income will commence August 1, 2023. This allows the mother ample time to find employment.

Child Support Obligations

[139] Depending on which of the below orders is enforced, the obligations are as follows:

i. If the mother chooses to relocate one hour or less than the father's residence in Elmira, the father will pay guideline support adjusted yearly. The amount is currently $576.00 per month. I do not agree with the father's assertion that he will have the child in his care 40% or more of that time if the mother moves within an hour or less from his residence in Elmira and the schedule in paragraph 3 of the OCL recommendations is followed. Two days one week and three days the second week of parenting time is not 40%.

ii. If the mother chooses to relocate one hour or more from the father's residence in Elmira such that the child lives with the father more than 60% of the time, the mother will pay $461.00 per month based on her imputed income of $50,000 commencing August 1, 2023, and on the first of each and every month thereafter.

Costs of exercising access

[140] The father asserted that the court is to look to s. 10 of the *Guidelines* to reduce child support in this case. The mother asserts that the court should simply subtract the cost of gas from the amount of child support owing. The provision is s.39(4) of *The Children's Law Reform Act.*

[141] Neither parent provided any evidence of the cost of exercising access. The mother made some reference to cost in her dispute to the OCL report.

[142] Given this court orders that the child not be allowed to relocate, the issue arises should the mother decide to relocate to North Bay or surrounding area where her husband currently resides. In that instance, the cost of gas shall be shared equally by the parties.

Orders Made:

1. The parties shall share decision making responsibility for the child, L.D.J.W.

2. The parties shall forthwith enroll and attend conflict coaching through Community Justice Initiatives.

3. The child shall not be allowed to relocate further than one hour from the father's residence in Elmira, Ontario.

4. If the mother moves more than one hour from the father's residence in Elmira, Ontario, the parenting schedule during the school year shall be as follows:

> *L.W. will reside primarily with the father. The mother shall have parenting time two out of five weekends which will coincide as much as possible with a long weekend. She shall also have parenting time up to two overnights a week in an area within one hour of driving distance from the father's residence in Elmira.*

5. If the mother moves within one hour from the father's residence in Elmira, Ontario, the parenting schedule during the school year shall be as follows:

> *L.W. will reside primarily with the mother. The father shall have parenting time with L.W. every other weekend from Friday after school or 3:00 p.m., as the case may be, to Monday before school or 9:00 a.m., as the case may be. In addition, he shall have two overnights during the week where there is no weekend parenting time.*

6. If the mother moves more than one hour from the father's current residence in Elmira, Ontario, the child shall reside with the father and attend John Mahood Junior Public School.

7. If the mother moves within one hour of the father's current residence in Elmira, Ontario, the child shall attend a school in the mother's jurisdiction which shall be a traditional school whether it be French immersion or otherwise; for clarity, unless the parties agree in writing otherwise, the child shall not attend a school where tuition is required to be paid.

8. Regardless of the party's residence, the child shall be in the care of each parent on holidays as follows:

    (a) An equal sharing of the summer school holidays on a week about basis;

    (b) Alternate March breaks with the father in even numbered years and the mother in odd numbered years for one week;

    (c) Equal time during the Christmas holidays with Christmas Eve and day and New Years Eve and day to be alternated;

    (d) Equal sharing of Family Day long weekend, Easter long weekend, Thanksgiving long weekend;

9. Depending on the residency schedule, child support shall be as follows:

    i. If the mother relocates such that the parenting schedule in paragraph 4 above is in place, commencing August 1, 2023, and on the first of each and every month thereafter she shall pay child support based on the greater of her actual income or an imputed income of $50,000.

    ii. If the mother does not relocate and the parenting schedule in paragraph 5 above is in place, the father shall pay child support based on his Line 150 income for the previous year which is currently $576.00 per month.

10. If the mother choses to relocate to North Bay, the cost of gas shall be shared equally.

11. I strongly encourage the parties to resolve the issue of costs. If the parties are unable to do so, the Applicant may file written submissions on costs within 14 days. The Respondent may file responding written submissions within 10 days thereafter. The Applicant may provide brief reply 4 days thereafter. Submissions are not to exceed 4 pages, plus a detailed bill of costs which must be submitted and copies of any offers to settle. If a party does not serve and file submissions respecting costs in accordance with these deadlines, there shall be no costs payable to that party,

although costs may still be awarded against that party. Cost submissions shall be sent to Kitchener.SCJJA@ontario.ca and Beth.Anderson@Ontario.ca.

Justice Piccoli

Released: May 24, 2023

CITATION: T.W. v. J.A., 2023 ONSC 3123
COURT FILE NO.: FC-21-251
DATE: 2023-05-24

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

T.W.

Applicant

and –

J.A.

Respondent

REASONS FOR JUDGMENT

D.P.

Released: May 24, 2023