

CANADA / JUDGMENT

C.E.S. v. C.N.R.S.

2023 BCSC 2167

COURT

Supreme Court of British Columbia

DECIDED

26 June 2023

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2023 BCSC 2167 C.E.S. v. C.N.R.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.E.S. v. C.N.R.S.,

2023 BCSC 2167

Date: 20230626

Docket: E63055

Registry: New Westminster

Between:

C.E.S

Claimant

And

C.N.R.S.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 32 on December 9, 2023

Before: The Honourable Justice Schultes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

M. Brandon

Counsel for the Respondent:

K.J. Walkinshaw

Place and Date of Hearing:

New Westminster, B.C.

May 1, 2023

Place and Date of Judgment:

New Westminster, B.C.

June 26, 2023

Introduction

- [1] This is an application by the respondent in this family law matter, pursuant to s. 45(1)(a) of the Family Law Act, to have the parental responsibilities for the education of the parties' child J. allocated to him on an interim basis. The pressing aspect of these responsibilities is the choice of the child's school for the coming school year, when he will begin kindergarten.
- [2] The claimant opposes his application, and although she has not brought her own application to have those responsibilities allocated to her, counsel have sensibly agreed that it is open to me to do so instead if I conclude it is in the child's best interests.
- [3] The parties were married in 2017 and divorced in 2022. J. was born in 2018 and is now six years old.
- [4] They entered into a final consent order in November of 2022, which provided for shared parenting according to a set schedule and equal sharing of parental responsibilities as set out in s. 41 of the FLA. They were unable to resolve the current issue, and so it was put aside to be dealt with in an application.

The Respondent's Position

- [5] He wishes to have J. attend a local public elementary school, rather than the Catholic elementary school where the claimant is employed part-time as a teacher. He rests his submission on two main bases: (1) the negative effect of Catholic religious instruction on his relationship with J., and (2) the deficiencies in the special education resources in the Catholic school system, when compared to the public system.

- [6] With respect to the effects of Catholic instruction, he explains that he does not adhere to the tenets of that religion. This was a source of tension during the relationship because the claimant and her family have strong ties to the Catholic community. He stopped attending church in 2021, although he deposes that after separation he went with J. once, to consider whether it was something they should continue to do together. The content of the sermon on that day convinced him that it was not.
- [7] He is opposed to J. engaging in the mandatory Catholic education that forms part of the curriculum at the claimant's school. It includes 150 minutes per week of religious instruction, as well as another program related to child abuse prevention. Student attendance at mass is highly encouraged, he says, and in later grades there will be programs on church-based events, such as the child's first communion.
- [8] In addition to his general opposition to J. being "indoctrinated" in this manner, the respondent raises the specific concern that attending a Catholic school will create a barrier between him and J. because of the disparity between the values and beliefs that he holds and those that J. will be exposed to daily at school.
- [9] His position is that he and the claimant had only vague discussions about J.'s education during their relationship, and that at that time he expressed hesitation about J. attending Catholic school. No plan or agreement was reached between them on this issue, he asserts. However, he is still content to have the claimant take J. to church and have him "participate in Catholic rituals" during her parenting time with him.
- [10] This concern links with the overall difficulty that he and the claimant have had co-parenting J. He says that the claimant has not shown an ability to encourage a positive relationship between him and J. Instead, he claims that recently she has limited their contact and created unnecessary strain in their relationship.
- [11] As examples, he refers to an incident during a scheduled video call with J. in November of last year, in which the claimant's current partner came on the call before it began and, in the presence of J., "accosted" the respondent verbally and made disparaging comments about him. This was followed by text messages to him from the claimant denying him video or audio calls over the Christmas season - the video calls after speaking to her lawyer, she told him, and the audio ones because they needed "better boundaries around the parenting relationship."
- [12] A further example of this difficulty, although the passage of time has essentially resolved the issue, is that the parties were also unable to agree on a daycare for J. following their separation in 2021.
- [13] According to the respondent, J. was initially enrolled in the only daycare that had space, but he wished to enroll him in one that had a more enriched program. With the claimant's consent he placed J. on a waiting list for it. His position is that J. was struggling at the original daycare, including being bullied by his classmates.

- [14] However, he says that when a space in the more enriched program opened up, the claimant objected to switching him to it, on the basis that it was not on her way to work and was "too regimented", according to information she had received from a friend. She also said that J. was settled in his existing daycare. This was despite the fact that the new daycare required a slightly shorter drive from their respective residences than the existing one.
- [15] As a result, J. has ended up attending two different daycares, depending on which parent was caring for him on a particular day. The respondent describes J. making a seamless transition on the days he attends the new daycare, except for an incident in which he became upset after the claimant's parents, who are his grandparents of course, disparaged it.
- [16] This leads to the second major concern expressed by the respondent - the level of support for special needs in the public school system versus the Catholic system.
- [17] As demonstrated by the dispute over the appropriate daycare, he and the claimant have different opinions about how to address J.'s particular educational and developmental issues.
- [18] As an example, he says she did not book a session with a therapist who had been recommended by J.'s pediatrician to address those issues, despite the indication that it would be beneficial for the therapist to observe their interactions with the child.
- [19] More significantly, J. is on a waiting list for a publicly-funded autism assessment, and the respondent describes there being a glaring difference in the level of funding for children with learning difficulties between the two school systems.
- [20] Reviewing the parenting handbook for J.'s proposed Catholic school, he finds that special funding from the Ministry of Education is only provided in relation to students with very acute needs, such as those with "moderate to profound intellectual disabilities or impairments", or who require "intensive behavioural interventions [or have] serious mental illness". Students who simply require learning assistance and/or who have learning disabilities will be dealt with by a special education team from within the school, and are apparently not eligible for additional funding.
- [21] He contrasts this with the "robust safety net" for any needs that J. may have that is available in the public system. This includes an extensive array of specialized staff members within the school district, and the lower student/teacher ratio and greater number of support workers within the specific proposed public school than are offered by the proposed Catholic school.

The Claimant's Position

- [22] She maintains that from the beginning of their relationship she and the respondent planned to have any children they had attend school in the Catholic system. J. was baptized in the church, and one of the vows that accompanied the parties' wedding was to raise their children in that faith.
- [23] Notably, she says the respondent was a practicing Catholic throughout their marriage, including serving as a godparent to another child and, until recently, was supportive of J. attending this particular Catholic elementary school. She asserts that he formerly took J. to church during his parenting time on an ongoing basis, rather than just the single instance that he describes.
- [24] Her description of the parenting difficulties that have arisen since separation also differ from the respondent's. She describes J. as thriving at the original daycare and clarifies that she was only open to switching him to one of the daycares operated by the organization that the respondent prefers if it was in the Fleetwood area of Surrey, not in one of its other locations. Despite her position, the respondent unilaterally enrolled J. at the Guildford location, and stopped paying his former share of the costs of the original daycare. Notwithstanding her opposition to these actions, she denies that her parents ever made disparaging remarks in J.'s presence about the new daycare.
- [25] In addition, she denies having interfered with the respondent's parenting time. The situation, according to her, is that the respondent travels extensively and discloses his travel plans to her only at the last minute, leaving her responsible for J.'s care in what should be his parenting time. She ended the audio and video calls that were previously taking place due to the written and verbal abuse that the respondent was engaging in towards her.
- [26] In support of her position on these general parenting time issues, the claimant has provided an affidavit from her partner, Mr. K. He deposes that he was asked by her to speak to the respondent after the respondent disclosed at the last minute that he was taking a vacation, requiring a change in the parenting arrangements, and did not respond to her text message on the subject. A copy of her message is attached to his affidavit.
- [27] Mr. K. has also attached the "script" that he prepared for the conversation, in which he told the respondent not to switch parenting dates without checking with him and the claimant first, and asked him to try to limit his extended trips in the future because his absences were having an adverse emotional effect on J. He denies having provided this information to the respondent in J.'s presence.
- [28] As to her supposed unwillingness to attend a session with J.'s therapist (as of the date of the respondent's first affidavit), the claimant points out that she met with the therapist for an initial intake meeting but had not booked any further sessions, because she was unaware that the respondent had also had his intake meeting. When she found out that he had, she took J. to a session as the therapist requested.

- [29] Addressing the ability of the Catholic school to respond to any special needs that J. may turn out to have, she refers to a letter from J.'s pediatrician, who concluded that while there were some "red flags" for autism, there were also several other factors that weighed against such a diagnosis. The pediatrician actually left the question of a referral for an assessment to the parents, and it was only the respondent who decided to pursue it.
- [30] Despite her confidence that J. will not be diagnosed as being on the autism spectrum, the claimant has received assurances from the principal of the school at which she teaches, which has been confirmed in a letter from him, that J. will receive all necessary support if he requires it. The principal writes that all children who have an identified need or disability will have an individual education plan created for them, which is done with the input of the child's entire support team at the school, including learning support teacher, education assistant, and any therapist whose assistance may be required. The principal further explains that "whether or not additional funding is given for a particular diagnosis, our school is obligated to provide each child with the support that they require."
- [31] Additional benefits of attending that school are that she will be present on the days each week that she is teaching, and that it has a before- and after- school care program, which will also assist the respondent on his parenting days. It is also close to both parties' homes. More generally, she describes her school as "an excellent learning environment with outstanding teachers and staff."

Discussion

- [32] In general, the allocation of parenting responsibilities under the FLA should be of the entire responsibility under a particular subsection, leaving the parent to whom the responsibility has been allocated (or both parents, if it is to be jointly exercised) to work out specific details, either themselves or with the assistance of a parenting coordinator. Despite this general rule however, there will be occasions where a court is called upon to resolve a dispute about a particular matter within the parenting responsibilities: *N.R.G. v. G.R.G.*, 2017 BCCA 407, at para. 40, and *Reda v. Birch*, 2022 BCCA 60, at para. 36.
- [33] Counsel have followed this guidance by framing the application as being for the entire responsibility for decisions about J.'s education, rather than the specific choice of a school.
- [34] To state the obvious, the determining factor in allocating responsibility for decisions about his education will be J.'s best interests, not the parties' own wishes with respect to his education.
- [35] Although it is not possible on the current evidence to resolve the factual disputes about the parties' actions in parenting J. thus far, it is clear on any version of events that their views about his needs differ, and that the arrangements that were envisioned by the consent order are not operating as smoothly as would be ideal.

- [36] On the effect of Catholic schooling on the respondent's relationship with the child, the claimant's counsel has referred me to decisions holding that a child should attend public rather than a religious private school in order to enable both parents, not just the more religiously-inclined one, to participate fully in the child's schooling; or to preserve the balance between the parents in this contentious area that had been achieved by a previous order: *Retallick v. Retallick*, 2010 BCSC 1458, at para. 66, and *Schloegl v. McCroary*, 2012 BCSC 1606, at para. 46. In *Retallick* the court also noted that, as in the present case, the more religiously inclined parent would still be able to expose the child to her religion during her parenting time.
- [37] I think that the outcomes of those decisions were determined by their individual facts - for example, the ongoing family tension about the child already attending a religious school in *Retallick* and the finding in *Schloegl* that it was reasonable for the father to anticipate being excluded from participating in his child's schooling at the school that the mother preferred - and not by any principle of general application.
- [38] In this case, the sticking point is that the respondent no longer accepts the church's teachings, despite formerly having been an adherent of them. Despite this, he is content to have J. continue to be exposed to those teachings through his church attendance and, I assume, a version of Sunday school, while he is in the claimant's care. The respondent does not refer to a competing set of religious beliefs or a general anti-religious perspective that he seeks to inculcate in J. instead.
- [39] Standing alone, I am not convinced that the additional religious instruction that is provided at the Catholic school will add any perceptible risk of distance developing between J. and the respondent, beyond that which is already provided by the claimant's intention to bring him up in a religion that the respondent no longer believes in.
- [40] If that is truly the sticking point, then s. 41(e) of the FLA, dealing with decisions about the child's religious upbringing, would have had to be addressed, which it has not been in this application. Put more simply, the issue of whether raising J. as a Catholic is in his best interests is not before me.
- [41] While I accept that beyond the additional religious instruction attending Catholic school eventually involves J. being immersed more fully in the culture surrounding the Catholic faith, as long as the claimant does not disparage the respondent's lack of involvement in that religion to J., which there is no evidence of at this point, I do not see why the relationship between the respondent and J. should suffer as a result of his attendance at that school. Therefore, I see the religious nature of the school proposed by the claimant to be a neutral factor in the analysis -it does not weigh in favour of a public school.
- [42] With respect to the alleged benefits of the public system if special education is required, I see this concern as being premature. The pediatrician offered a balanced indication of the possibilities to be inferred from J.'s behaviour, and did not make a diagnosis of him being on the autism spectrum. The assessment has been pursued at the respondent's request, rather

than at the pediatrician's recommendation. If something surfaces that requires learning support in the school system, whether from that assessment or otherwise, then the adequacy of the Catholic school's resources to address it will be better understood.

- [43] At this point, I do not find the statistics concerning class sizes or the number of available district-wide specialists referred to by the respondent to be indicative of the ability of either system to accommodate any learning issues that might arise. If they do arise, and the evidence of actual practical responses is that the Catholic system is lacking in some respect, that could be the basis for a further application, particularly given the fact that only interim orders are being sought here.
- [44] Like the effect on the respondent's relationship with J., I find this ultimately to be a neutral factor, the net effect of which is that I am not satisfied on a balance of probabilities that the factors relied on by the respondent demonstrate that a public elementary school is necessarily in J.'s best interests.
- [45] In light of those inconclusive arguments, what tips the balance in favour of the Catholic school, in my estimation, is the fact that the claimant herself is employed there as a part-time teacher. Although there is no specific evidence on the point, it seems obvious as a matter of common sense that her presence on at least some school days will lend greater support to his adjustment to kindergarten and the primary grades, and that her role within the school itself will place her in a better position to advocate on his behalf and access any additional support that he might require than a parent who has no professional relationship with it.
- [46] This, in combination with the positive but less decisive factors of available before- and after-school care and its proximity to the parties' homes, as well as the claimant's uncontradicted assertion about the quality of the learning environment it provides, satisfy me that on an interim basis it is in J.'s best interest to attend there.
- [47] Accordingly, pursuant to s. 45(1)(a) of the FLA, I allocate the parental responsibilities to making decisions respecting J.'s education set out in s. 41(d) to the claimant, on an interim basis.
- [48] Of course, the allocation of decision-making authority in an area to one parent does not exclude the participation of the other. The respondent remains entitled to request and receive information from the school concerning J., pursuant to s. 41(j) of the FLA. In addition, the claimant will inform him of any significant matter relating to J.'s education that requires a decision by her pursuant to the allocation of responsibility, and she will seek and consider his input with respect to that matter before reaching any such decision. The respondent will also be free to convey his views to the school with respect to any matter related to J.'s education, independently of the claimant.
- [49] In my estimation, the claimant has had substantial success in this application and will receive costs in the cause.

"Schultes J."

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