

CANADA / JUDGMENT

C.G.R. v. J.L.R.

2020 BCSC 790

COURT

Supreme Court of British Columbia

DECIDED

28 May 2020

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2020 BCSC 790 C.G.R. v. J.L.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.G.R. v. J.L.R.,

2020 BCSC 790

Date: 20200528

Docket: E46559

Registry: New Westminster

Between:

C.G.R.

Claimant

And

J.L.R.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 29(c) where changes were made on September 29, 2020;

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Claimant:

T.E. Watkins

Counsel for the Respondent:

P.R. Evans

Place and Date of Written Submission:

New Westminster, B.C.

May 22, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 28, 2020

Introduction

- [1] This is an application by Mr. R. for a variation of a parenting order with respect to his two daughters.[1] By way of background, the claimant Ms. R. and the respondent Mr. R. were in a relationship of some five and one half years, which ended with their separation in January of 2014. The parties have two children, who are six and eight years old respectively. Under the existing order, the children reside primarily with Ms. R., and are supposed to have parenting time with Mr. R. on Tuesdays, Thursdays, and Saturdays.
- [2] Mr. R. applies to vary the existing parenting order. In his written submission, he has focused his position on a proposal for parenting time on two weekdays per week and overnight stays every second weekend, as an interim step in a transition toward shared parenting. Thus, what is sought is an interim order, pending a trial on all outstanding issues which is now set for 30 November 2020.
- [3] Ms. R. opposes the application on procedural and substantive grounds. Procedurally, Ms. R. says the matter is not suitable to be dealt with by written submissions. On the merits, Ms. R. is opposed to the children having overnight stays with Mr. R. for several reasons, including the contention that Mr. R. has in the past put other interests ahead of parenting time with the children, the need for the children to have stability, and concerns about COVID-19. Ms. R. is "willing to consider proposals to gradually increase" parenting time, but say the order sought by Mr. R. would involve a drastic change for the children, who are eight and six years old respectively.

Facts

- [4] The claimant Ms. R. and the respondent Mr. R. began to live in a marriage like relationship in August of 2008. They were married on 13 November 2009, and separated on 19 January 2014.
- [5] The parties have two children, J. who is now eight years old, and T., who is six years old.

- [6] The current parenting arrangement, as provided for in an interim order made by Williams J. on 18 December 2014, is for the children to reside with Ms. R., with Mr. R. having parenting time on Tuesday, Thursday, and Saturday afternoons each week.
- [7] In fact, due to a change in his work arrangements in March of 2015, Mr. R. has been exercising the Saturday parenting time, but not the Tuesday and Thursday parenting time.
- [8] I have read the affidavits of the parties and I am not going to recount many additional details, other than to describe the current circumstances and living arrangements of the parties.
- [9] I would summarize Mr. R.'s current situation as follows:
- (a) Mr. R. has two other daughters from a separate relationship, Q. (age 14), and E. (age 13), who have parenting time with Mr. R. every second weekend.
 - (b) Mr. R. has a house with sufficient space for all four of his daughters to stay with him when exercising his parenting time. There is a room for Q. and E., and a separate room where J. and T. could sleep if overnight parenting time is ordered.
 - (c) Mr. R. generally works from 8 am to 4 pm, though his hours are flexible, and he could work extra hours to be available for the proposed weekday parenting time with J. and T.
- [10] With regard Ms. R., her current situation is as follows:
- (a) The two children, J. and T., currently reside with Ms. R. and her new partner.
 - (b) Ms. R. is currently working from home, during the COVID-19 crisis.
 - (c) The children are being home schooled during the COVID-19 crisis. Ms. R. has arranged her own work schedule so that she can help the children with their studies from 8 am to 12 pm each weekday.
 - (d) Ms. R. says the children have more or less been in self-isolation with her family unit, and their only outside contact has been for their Saturday parenting time with Mr. R.
- [11] There was a brief disruption of Mr. R.'s parenting time in February of this year. This was apparently precipitated by a request for Mr. R. to give his approval for the children to travel with Ms. R. to Nicaragua. Mr. R. responded to the request by asking to have overnight parenting time. Ms. R. replied, "I'm not discussing sleepovers right now, we aren't even close to there yet". Thereafter, Mr. R. did not have any parenting time with the children from 20 February 2020 through to 4 April 2020, when counsel became involved.
- [12] With regard to the COVID-19 crisis, the parties have had some general discussions about distancing and self-isolation practices, and at some point agreed in principle that each of them will limit their contact with third parties in order to avoid unnecessary exposure to the Coronavirus. Ms. R. has expressed some concern about Mr. R.'s other two daughters, Q. and E. They live primarily with their mother and there are people in the mother's household who

work in what Ms. R. refers to as "high risk" occupations, although the particulars are not spelled out in the materials.

- [13] I have not been given any evidence that anyone in either household is in a vulnerable group or has underlying medical conditions posing an increased risk of serious illness from the Coronavirus. Nor is there any evidence that either party has ignored or failed to respect recommendations of public health officials with respect to distancing and self-isolation practices during the COVID-19 crisis.
- [14] Ms. R. has expressed concern in her affidavit that Mr. R. has not been exercising the parenting time allotted to him under the existing order. In particular, he has not been exercising weekday parenting time since 2015, and he has only exercised his Saturday parenting time about 60 to 70% of the time. On this basis, and in light of certain comments Mr. R. has made in text message communications, Ms. R. is suspicious that the current parenting application is merely a tactical response by Mr. R. to her pending application for child support, which Mr. R. has not been paying for some years now. Ms. R. refers to text communications where Mr. R. makes comments implying he is using parenting time as a bargaining chip or a tactical measure, by suggesting a fictional shared parenting regime to reduce his child support obligations.
- [15] I have considered this evidence but in the end I cannot accept that Mr. R. has brought this application for improper or tactical purposes. His affidavit sets out his reason for not exercising the weekday parenting time allotted to him under the existing court order, and his efforts to obtain additional parenting time prior to bringing this application. I am satisfied that Mr. R. has a genuine interest in increased parenting time with his children.

Analysis

Suitability for Determination by Written Submission

- [16] Counsel for Ms. R. submits that this matter is not suitable to be dealt with in writing under COVID-19 Notice #14. Counsel submits that there is no urgency to the matter. Counsel further submits that Ms. R. has been forced to respond to a "moving target", in that the original application record did not include a written submission, and that when filed, Mr. R.'s written submission contains a further variation of the proposed parenting arrangement. Thus, counsel complains that Ms. R. is being forced to respond to a "moving target", in the context of procedure where there is no opportunity for her counsel to make oral submissions or answer questions about the alternative parenting arrangement now being pursued by Mr. R.
- [17] I respectfully disagree with the submission that this matter is not suitable to be dealt with in writing. Urgency is not a pre-requisite under the COVID-19 Notice #14. The parties are unable to agree on parenting time and require a determination on that issue. I see no reason why they should have to wait when the matter can be dealt with on the basis of a written

record and submissions. This is a straightforward application dealing with a single, discrete issue. The affidavit evidence is focused on the point in issue. There is no particular legal or factual complexity.

- [18] Nor do I see any merit in the complaint that Ms. R. is being forced to deal with a "moving target". Although Mr. R.'s written submission was not filed at the same time as the rest of the material, it was filed in sufficient time for Ms. R. to file a responsive written submission. The proposal set out in Mr. R.'s written submission is a minor variation of the proposal set out in his notice of application, based on the affidavit material already in the record. The key components of the proposal - weekday parenting time and overnight parenting time on every second weekend - remains the same. Ms. R. has had an opportunity to respond to both the affidavit evidence and the written submission of Mr. R.

Best Interests of the Children

- [19] Mr. R. seeks an order for parenting time under s. 42 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Under s. 37(1) of the FLA, the sole consideration in determining whether to vary the existing interim order is what parenting arrangement is in the best interests of the children.

COVID-19 Concerns

- [20] I will deal first with the COVID-19 concerns raised by Ms. R. There have been a number of recent cases in which courts in both British Columbia and Ontario have discussed the implications of the COVID-19 pandemic on parenting arrangements. See, for example, J.W. v. C.H., 2020 BCPC 52; N.J.B. v. S.F., 2020 BCPC 53, and Ribeiro v. Wright, 2020 ONSC 1829. I will not quote directly from the cases but the following principles are basically my synthesis of points made in recent case law discussing COVID-19. First, COVID-19 concerns should not be used as a justification for denying parenting time under an existing parenting order absent some specific concern that the health of the child or someone else in the child's household is at risk. Second, absent some specific concern, the mere fact that a child has to go from one household to another during the COVID-19 era is not a basis for refusing to comply with or even applying to vary an existing parenting order. Third, each parent is expected to show some flexibility by making every effort to work with the other parent and to comply with recommendations of public health officials regarding things such as self-isolation, physical distancing, and proper hygiene. Fourth, case-specific evidence that a particular parent is not adhering to the recommendations of public health officials regarding COVID-19 may be a basis for variation of an existing parenting order. Fifth and finally - and this is really my synthesis of the law rather than a point explicitly made in any of the cases - there may be situations where a child or a member of one parent's household is subject to heightened risks associated with COVID-19, and in such circumstances, the court must look for an arrangement that minimizes those risks to the greatest extent possible in a manner consistent with the best interests of the child.

- [21] In the case at bar there is no evidence that either parent has flouted or failed to adhere to recommendations of public health officials. Nor is there any evidence that any member of either party's household is subject to heightened risks associated with COVID-19. In these circumstances, there is no reason to believe that an arrangement where the children go from one household to the other would put the children themselves or anyone in either party's household at increased risk of illness from COVID-19.
- [22] I would not dismiss the concerns expressed by Ms. R. with respect to COVID-19. Ms. R. is obviously concerned about the well-being of the children and the other members of her household. However, on the facts of this case I do not find that these concerns provide any basis for curtailment of Mr. R.'s parenting time with J. and T. I stress that both parties have an obligation to consult with each other regarding physical distancing, self-isolation, and hygiene practices in their households, on an ongoing basis.

Determining the Arrangement that is in the Best Interests of the Children

- [23] Turning, then, to the other considerations bearing on Mr. R.'s application, the question is what parenting arrangement is in the best interests of the children. Here, the court must consider the factors relevant to assessing best interests of the children under s. 37(2) of the FLA.
- [24] Although the principle of maximum contact as set out in s. 16(10) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) is not a factor listed in s. 37(2) of the FLA, I accept the submission of counsel for Mr. R. that meaningful parenting time with both parents is "a natural adjunct" to the goal of maximizing a child's health and emotional well-being as set out in s. 37(2)(a). I find that establishing and maintaining a meaningful relationship between the children and Mr. R. is something that would be in the best interests of these two children.
- [25] I also accept, based on the evidence in the record before me, that Mr. R. is interested in building a more meaningful relationship with his daughters, and that in order to have a meaningful relationship with their father, the children should have some regular degree of time with him, beyond mere afternoon visits. Thus, an arrangement where the children would stay overnight with Mr. R. on a regular or predicable basis would, in my view, be in their best interests.
- [26] Such an arrangement would also foster and encourage the relationship between J. and T. and Mr. R.'s other two daughters, Q. and E. This is relevant to the nature and strength of the relationship between J. and T. and other significant persons in their lives as contemplated in s. 37(2)(c) of the FLA.
- [27] I also accept the submission of counsel for Ms. R. that the history of care for these children as contemplated in s. 37(2)(d), and their need for stability as contemplated in s. 37(2)(e) are significant factors. Counsel submits that granting Mr. R.'s request for overnight parenting time would represent a sudden and radical change for J. and T., who are still quite young. Counsel for Ms. R. points to evidence indicating that the children are not comfortable

sleeping away from their home. Specifically, last fall J. had to return home from a sleepover at a friend's house due to anxiety, and T. had a somewhat similar experience on an occasion when she was supposed to stay overnight with Ms. R.'s aunt.

- [28] I would not attach any particular significance to the fact that both children have been uncomfortable staying overnight with friends or extended relatives. I would not view staying overnight for a sleepover at a friend or extended relative's house to be at all indicative of how the children would be expected to react to staying overnight, together at the same time, with their father. Nonetheless, I do see some merit in Mr. R.'s submission that it could be viewed as a somewhat drastic change for the children to go from spending a few hours every Saturday with their father to spending two weekdays per week and every second weekend with him.
- [29] Taking all of this together, in my view it is in the best interests of the children to have a graduated increase in parenting time with Mr. R., in an arrangement that works towards and actually contemplates overnight stays within a reasonable time. I would accordingly grant Mr. R.'s application in part. I would order, on an interim basis pending a trial on all outstanding issues on 30 November 2020, that Mr. R. shall have parenting time with the two children of the marriage, J. and T., as follows:
- a) Commencing on 18 June 2020, Mr. R. will have parenting time with J. and T. every Wednesday, from 1:00 pm until 7:00 pm. This arrangement will continue until the children return to school, at which point Mr. R. will have parenting time every Wednesday from the end of the school day until 7:00 pm.
 - b) Commencing on 13 June 2020, Mr. R. will have parenting time with the children every Saturday, from 10:00 am to 7:00 pm. This arrangement will continue up to and including 3 July 2020.
 - c) Commencing on 9 July 2020, Mr. R. will have parenting time with the children every other weekend, from Friday at 1:00 pm until Saturday at 7:00 pm. This arrangement will continue until the children return to school, at which point Mr. R. will have parenting time every other weekend from Friday after school until Saturday at 7:00 pm.
 - d) Commencing on 2 October 2020, Mr. R. will have parenting time with the children every other weekend, from Friday after school until Sunday at 7:00 pm.
- [30] I appreciate that the parenting arrangement set out above does not accord with that proposed by either party; it is something in between the arrangement proposed by Mr. R. and the one proposed by Ms. R. This is somewhat awkward in that the application was dealt with in writing, with no opportunity for a dialogue with counsel regarding the feasibility or suitability of this arrangement with regard to the calendars of the parties. For this reason, the parties would be at liberty to adjust this arrangement to suit their calendars or weekly routines, by consent, so long as the order placed before the court corresponds in its structure to the parenting arrangement I have found to be in the best interests of the

children as described above.

Costs

[31] Mr. R. was substantially successful inasmuch as I have ruled in his favour in granting overnight parenting time, albeit on a graduated schedule. Accordingly, I would grant Mr. R. costs of the application in the cause.

"Riley J."

[1] This application is being dealt with by written submissions pursuant to a Practice Directive issued by the Chief Justice on 27 April 2020, entitled COVID-19: Expansion of Civil and Family Matters - Applications by Written Submission, and indexed as COVID-19 Notice #14.

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