

CANADA / JUDGMENT

C.M.S. v. M.M.S.

2025 BCSC 2352

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2352 C.M.S. v. M.M.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.M.S. v. M.M.S.,

2025 BCSC 2352

Date: 20251128

Docket: E57848

Registry: New Westminster

Between:

C.M.S.

Claimant

And

M.M.S.

Respondent

Before: The Honourable Justice Loo

Reasons for Judgment

Counsel for the Claimant:

K. Thauli

Counsel for the Respondent:

R.S. Roxborough

Place and Date of Hearing:

New Westminster, B.C.

October 29, 2025

Place and Date of Judgment:

New Westminster, B.C.

November 28, 2025

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Introduction

- [1] In this family proceeding, the claimant C.M.S. seeks an order requiring the respondent M.M.S. to sign a consent order containing the terms of an agreement made between them in 2022. The respondent seeks an order that the parenting arrangements be varied from those agreed to in that agreement.
- [2] I have decided that an anonymization order is appropriate to protect the privacy of the family and, more particularly, the child. The style of cause has been amended, and these reasons have been prepared in accordance with that order.

Background

- [3] The parties were married on April 5, 2013, and separated on August 17, 2017. They have one child (the "Child") who was born August 5, 2015, and is presently ten years old. The claimant is the Child's mother and the respondent is her father.
- [4] The parties executed a separation agreement on August 30, 2017. That agreement dealt with child support, spousal support and the division of family property and debt, among other issues.
- [5] In August 2022, the parties negotiated an agreement (the "2022 Agreement") which included a parenting arrangement. Although both parties agree that they reached a binding agreement, they never consolidated the 2022 Agreement into a single document; rather the agreement consists of a series of letters and emails between counsel.
- [6] In the 2022 Agreement, the parties agreed that the respondent would have parenting time on the following schedule (the "Parenting Arrangement"):
- a) 1st week: from Thursdays pick up after school (or 2:30 p.m. if school is not in session) to Monday drop off at school (or 4:00 p.m. if school is not in session); and
 - b) 2nd week: from Thursdays pick up after school (or 2:30 p.m. if school is not in session) to Friday drop off at school (or 4:00 p.m. if school is not in session).
- [7] The result of this schedule is that the Child currently stays with the respondent five nights out of every 14 nights: four nights in the first week and one night in the second week. The respondent seeks to increase that amount by one day per week to seven nights out of every 14 nights.
- [8] In the settlement correspondence exchanged between counsel in August 2022, both lawyers referred to and appeared to contemplate the preparation and filing of a consent order; however, they never signed or filed one. The claimant seeks an order requiring the parties to sign and enter a consent order now.

Issues

- [9] There are two broad issues to be determined by this Court:
- a) Ought the Court compel the parties to enter into a consent agreement incorporating the terms of the 2022 Agreement and, if so, when should the consent order be effective?
 - b) Regardless of the answers to the questions above, what should the parenting arrangement be going forward?

Discussion

Is there a binding agreement requiring the parties to sign a consent order and, if so, when should the order be effective?

Legal principles

- [10] This Court's determination of whether two former spouses have reached an agreement with respect to a particular term is subject to the same principles applicable to any contract.
- [11] In *Angus v. CDRW Holdings Ltd.*, 2022 BCSC 1001, aff'd 2023 BCCA 330, Justice Mayer (then of this Court) set out the legal framework to establish a contract as follows:
- [7] Parties must intend to be legally bound by their agreement for it to bind them. As well, the essential terms of the agreement must be settled. Finally, the terms agreed upon must be sufficiently certain. Whether these three requirements have been met must be determined from the standpoint of the objective reasonable bystander and not the subjective intentions of the parties. The determination is contextual and must take into account all material facts including communications between the parties and conduct before and after the agreement is made: *Oswald v. Start Up SRL*, 2021 BCCA 352, at para. 34.

Analysis

- [12] As indicated above, the 2022 Agreement consisted of a series of emails and letters between counsel. The first settlement offer from the claimant's lawyer, delivered on August 25, 2022, set out nine proposed terms and then stated: "we hope that we may proceed with drafting a final consent order based on these terms".
- [13] The response from the respondent's lawyer addressed the proposed terms but did not refer to a consent order. It proposed that a "new agreement shall be drafted and will replace the prior agreement".

- [14] The next letter from the claimant's lawyer, dated August 29, 2022, stated in part as follows:

We are unclear as to why a new agreement would be drafted when a consent order varying the current agreement and including the terms of the divorce would be sufficient. Is counsel proposing that an entirely new agreement be drafted updating only the terms agreed to in this offer? Or that all of the terms of the current separation agreement be placed into a divorce and updated consent order?

In any case, our client does not agree to incur the further costs of drafting an entirely new agreement reiterating the same terms; however, she is agreeable to signing a new agreement if counsel would like to present us with a draft that combines the same terms from the initial agreement with the updated terms contained in this correspondence.

- [15] Responding the same day, the respondent's lawyer then wrote:

We write further to your letter of August 29, 2022. It appears that an agreement has been reached, however we would like to clarify two issues

[discussion of those issues]

Please advise as to your client's position by 3:00 pm today so that, if necessary, we can take the appropriate steps to adjourn our client's application scheduled for tomorrow.

We will provide you with a draft Consent Order reflecting the agreement reached between our respective clients for your review.

[16] The claimant's lawyer then wrote back agreeing to the points raised by the respondent's lawyer, stating:

The same terms from the original agreement will be updated with our agreed upon terms and put into a Consent Order, which your firm will be drafting.

Our firm will then proceed with the filing of the divorce

You will be adjourning your client's applications.

[17] On September 1, 2022, in response to a query from the respondent's lawyer, a staff member at the office of the claimant's lawyer wrote:

I apologize for the delay in responding, Ms. Kahlon has been in and out of court and has not been able to respond to Ms. Butler's email.

We did not proceed with our client's application on August 30, 2022, and we are in the process of drafting a Consent Order.

[18] On March 23, 2023, the respondent's lawyer wrote to the claimant's lawyer, attaching a draft consent order.

[19] On June 26, 2023, the claimant's lawyer wrote to the respondent's lawyer seeking four changes to the draft consent order.

[20] On August 15, 2023, the respondent's lawyer responded, agreeing to only one of the four changes sought by the claimant.

[21] On October 4, 2023, the claimant's lawyer wrote again, agreeing to the respondent's position regarding one of the three contested points, but maintaining her client's previous position on the other two points. The parties never resolved those two points.

[22] One of those points concerned the circumstances in which childcare expenses would be valid expenses under s. 7 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. The respondent took the position that only childcare expenses incurred as a result of the claimants' employment would qualify. The claimant took the position that childcare expenses incurred as a result of her illness, disability or education or training should also qualify. As I understand the correspondence, the respondent was of the opinion that if the claimant were unable to care for the Child, it would be preferable for the Child to stay with him and not to go to childcare.

- [23] The second point concerned the review of child support. The claimant took the position that there should be a yearly review, and that the amount of child support should be adjusted annually to accord with the parties' incomes in accordance with the Guidelines. The respondent took the position that a term requiring the adjustment of child support in accordance with the parties' reported incomes was inappropriate because a higher income ought to be imputed to the claimant.
- [24] As indicated above, the parties do not dispute that they reached the 2022 Agreement by means of correspondence between their lawyers. Further, it appears clear, from that correspondence, that the lawyers contemplated the execution of a consent order formalizing the terms of the 2022 Agreement.
- [25] However, it also appears clear, in my view, that the parties were subsequently unable to agree on the terms to be included in the consent order. The question thus arises: should this Court decide for the parties what terms ought to be included in a consent order to be executed by them?
- [26] I note that neither party is suing to enforce either of the disputed terms. If one of the parties were doing so, then this Court might have to determine whether that term was agreed to in August 2022. Whether it could do so on the evidence before the Court on this application appears doubtful but, regardless, in the absence of a live dispute based on one of the terms, it is not this Court's role to create a contract for the parties.
- [27] In any event, given the passage of time since August 2022, in my view it would not be appropriate to compel the parties to execute a consent order now. While the claimant argues that the Court ought to "backdate" the consent order to September 2022, she has provided no authority to support her position on this issue. When a consent order regarding parenting arrangements is placed before the court for its approval, the court must be satisfied that the terms of the consent order are appropriate, and in the child's best interests: see in this regard *S.D.N. v. E.G.N.*, 2025 BCSC 1733 at para. 45. In my view, because the assessment as to whether the order is in the child's best interests must occur in the present, any order that might be granted by this Court by consent or otherwise could only be effective as of the date of these reasons.
- [28] The respondent takes the position that the Parenting Arrangement is no longer in the Child's best interests. Because I would not be prepared to backdate any consent order that might be signed by the parties, and because the terms in any consent order would have to be reassessed in view of the child's best interests, it would be inappropriate, in my view, to compel the respondent to sign a consent order based on the 2022 Agreement now. To formalize parenting arrangements negotiated in 2022 in an order made in 2025 would ignore the fact that three years have passed, and that it is the Court's obligation to assess the parties' parenting arrangements with a view to the child's best interests today.

[29] For these reasons, the claimant's application to compel the respondent to sign a consent order based on the 2022 Agreement is dismissed.

What should the parenting arrangements be going forward?

Legal principles

[30] Section 44(4) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] provides:

44 (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

[31] In *B.A.C. v. K.C.*, 2018 BCSC 2111 at para. 65, this Court held that while the variation of a court order requires a material change of circumstances, a material change of circumstances is not required in respect of a parenting arrangement contained in an agreement, even if the agreement has been filed with the court under s. 44(3): *Nijjar v. Gill*, 2017 BCSC 1362 at paras. 102-113; *S.C.B. v. K.M.B.*, 2018 BCSC 1148 at paras. 51-53.

[32] In *Nijjar*, the Court held:

[112] The fact that the Parenting Agreement was entered into and the parties operated under it for several years is one of the background facts I can take into account when considering the best interests of the Child. But no court has yet passed on the issue of the best interests of the Child and that is the paramount consideration for this Court.

[33] As a result of these authorities, the fact that the parties entered into the Parenting Arrangement in August 2022 and have been operating under it since then is a "background fact" to be taken into account when considering the Child's best interests. The respondent does not need to demonstrate a material change in order to obtain a variation of the Parenting Arrangement.

[34] That said, there is an onus arising from the language of s. 44(4) on the party seeking an arrangement different than the one set out in an agreement. In order to succeed, that party must satisfy the court that the agreement is not in the best interests of the child: *Y.L.M. v. J.B.M.*, 2022 BCSC 1522 at para. 53.

[35] Section 37(1) of the FLA requires the court to consider only the best interests of the child when making an order respecting parenting arrangements. Section 37(2) requires the court, in determining the child's best interests, to consider all of the child's needs and circumstances, including the ten specific factors set out in that subsection. Section 37(4) provides that in making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

Analysis

- [36] In support of their positions on this application, each party has filed lengthy affidavits which I have reviewed. The affidavits contradict each other on many points, and I do not propose to refer to the details at length.
- [37] Broadly speaking, the respondent deposes that it would be in the best interests of the Child to spend more time with him. He deposes that extra time with her would allow him to become more involved with the Child's friends and to have a stronger relationship with the people close to her. He deposes that expanding his parenting time to include Wednesdays would allow her to have greater overlap with his current spouse and her children.
- [38] He cites previous occasions in which he has had "make-up" time with the Child to compensate for time missed when the claimant went on vacation and deposes that the Child "thrived" with the extra time at his residence.
- [39] The respondent deposes that the Child "regularly expresses to me that she wishes that she could spend more time at my residence".
- [40] The evidence sworn in response by the claimant is comprised mostly of expressions of concern regarding the respondent's conduct. She accuses him of neglect, expresses concerns about the Child's safety and wellbeing while in the respondent's care, and alleges physical, verbal and emotional abuse.
- [41] Regrettably, much of this evidence advanced by the claimant is unhelpful, for several reasons.
- [42] First, the most serious allegations advanced by the claimant, some involving family violence, concern events that are said to have occurred prior to the making of the 2022 Agreement. Indeed, some of the allegations concern incidents that allegedly occurred years before the Child was born. In my view, none of these allegations is relevant to the Court's decision on this application.
- [43] These alleged events were known to the claimant at the time that she made the 2022 Agreement. If the alleged events were not sufficient to dissuade her from agreeing to the Parenting Arrangement in 2022, it is difficult to understand the basis on which they should be considered by the Court now in determining parenting arrangements going forward.
- [44] Second, some of the evidence advanced by the claimant is, on its face, either inadmissible or irrelevant, because it is speculative and argumentative. As one example, she refers to "suspicions" that the respondent "may have engaged in family violence" against his current spouse "as he had done in his last two relationships". She deposes that it appeared to her on one occasion that the current spouse "was in a rush to get out of the family home". She refers to a family law action between the current spouse and the respondent and she seeks to have the Court draw an inference from the existence of that action and her observation of the current spouse's "rush" from the house that there has been family violence between the

respondent and his current spouse.

- [45] The respondent deposes that the court proceeding related to the filing of a co-habitation agreement that he and his current spouse had made. However, it ought not to have been necessary for the respondent to respond to these allegations. It was inappropriate and irresponsible, in my view, for the claimant to make them, as they are unsubstantiated and speculative.
- [46] Third, it is notable that despite all of her expressions of concern regarding the respondent's behavior, the claimant sought on this application to have a consent order signed which would include a term providing the respondent with five days of parenting time during every two week period. It is difficult to understand how, if all of her concerns were valid, they could be reconciled with the respondent having parenting time for five days out of every two weeks but not for seven.
- [47] In light of the content of her affidavits and the points set out above, it is evident to me that the claimant's expressions of concern regarding the respondent's conduct and parenting abilities are focussed more on trying to limit the time spent by the respondent and the Child together, rather than having regard to the best interests of the child. As a result, I must view the claimant's evidence with caution.
- [48] Even so, however, not all of her evidence on the issue of parenting can simply be disregarded. There is some evidence advanced by the claimant that is of similar quality to the respondent's evidence, and which directly contradicts the respondent's evidence, particularly with respect to the Child's wishes. According to the claimant, the Child told her in December 2023 that "she does not want to go to her dad's house because she misses me and because her dad never hangs out with her as he is too busy with work, video games and chores." The claimant also alleges that the respondent makes negative remarks to and around the Child, and that the Child is left alone at times without meaningful interaction or social engagement while in the respondent's care.
- [49] While I am not inclined to accept the claimant's evidence regarding the Child's wishes without corroboration, I observe that much of the conflicting evidence advanced by both parties consists of hearsay from the Child.
- [50] The authorities are clear that when the court is faced with a triable issue on a family law application, it may refer the matter to the trial list but it may also give the parties the opportunity to use hybrid procedures, such as cross-examination or the preparation of expert or independent reports, to assist in determining the issues: *K.A.B. v. P.D.M.*, 2023 BCSC 1156 [K.A.B.] at paras. 62-75, citing *Cepuran v. Carlton*, 2022 BCCA 76.

- [51] It is also clear that it is open to the court, despite the existence of a triable issue, to determine the matter on the basis of the affidavit evidence contained in the application record, consistent with the objects of R. 1-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules]: *M.D.W. v. T.T.W.*, 2022 BCSC 770 at para. 60. In determining whether to do so, the Court must be as pragmatic as possible in providing a just determination on the merits as efficiently as may be practicable: *K.A.B.* at para. 68.
- [52] In the circumstances of this case, I have considered whether on the evidence before the Court I can be satisfied that the Parenting Arrangement is not in the best interests of the child. I have concluded, reluctantly, that I cannot.
- [53] I say that I reach this conclusion reluctantly because R. 1-3 states that the object of the Rules is to secure the just, speedy and inexpensive determination of every family law case on its merits, and to minimize conflict and promote cooperation between the parties. Further, I am aware that further proceedings on this issue may have a negative impact on the child.
- [54] Nonetheless, given the conflicting evidence before the Court, even after discarding the irrelevant and inadmissible evidence proffered by the claimant, I have concluded that I cannot be satisfied whether seven days of parenting by the respondent out of every two weeks would be better for the Child than five days. To simply pick one of the two positions, in light of the present evidentiary record, would be impermissibly arbitrary. As a result, at least for now, the parties are fixed with the Parenting Arrangement to which they agreed in 2022.
- [55] To be clear, I am not finding that it is in the best interests of the Child to have five days rather than seven days with her father out of every 14; rather, I have concluded that the respondent's application cannot be determined on the material before the Court.
- [56] Moreover, I am not prepared to refer the matter to the trial list as sought by the claimant. I regard the proposed change to the Parenting Arrangement to be a minor one and, in my view, it would be unfortunate and disproportionate to the magnitude of the dispute if several days of the Court's time, and the time and resources of the parties, were taken up by a trial of this issue.
- [57] The parties made no specific submissions on hybrid processes that might be employed to resolve the parenting issue, and so I will not order any, but it is possible that an independent report, such as a Views of the Child report, could assist the Court in determining whether an increase in the respondent's parenting time is warranted, and it is possible that the issue could be resolved by way of summary trial, perhaps combined with some limited oral discovery or cross-examination.
- [58] Of course, the parties would most fully achieve the objects of the Rules by agreeing on a parenting arrangement going forward. While the present relationship between the parties is clearly acrimonious, it would be best for both of them, and more importantly their child, if they could resolve the issue without further intervention of the Court.

[59] It should be obvious to the parties that if they are genuinely concerned about the Child's best interests, they should be making decisions regarding her parenting together, reasonably, with her best interests in mind. To assist them in this regard, they should consider retaining the assistance of a mediator. It should also be obvious to the parties that spending enormous amounts of time, money, and emotional energy on public court proceedings because of a minor difference between them regarding parenting time is not at all in the child's best interests.

Conclusion and costs

[60] The claimant's application for an order requiring the respondent to sign a consent order, and the respondent's application for a variation of the Parenting Arrangement, are both dismissed.

[61] The parties are not precluded from applying to change the Parenting Arrangement going forward, but if they do so they ought to advance either independent evidence or evidence obtained by further court processes that will assist a judge in determining whether an order under s. 44(4) of the FLA is warranted.

[62] I am not seized of future proceedings in this action.

[63] The parties shall bear their own costs of the applications.

"Loo J."

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