

CANADA / JUDGMENT

D.S.K. v. M.K.K.

2024 BCSC 514

COURT

Supreme Court of British Columbia

DECIDED

18 January 2024

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2024 BCSC 514 D.S.K. v. M.K.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.S.K. v. M.K.K.,

2024 BCSC 514

Date: 20240118

Docket: E65376

Registry: New Westminster

Between:

D.S.K.

Claimant

And

M.K.K.

Respondent

And

I.S.K.

S.K.K.

Respondents by way of Counterclaim

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

Counsel for the Claimant:

I.S. Dhot

Counsel for the Respondent:

M.K. Sandhu

Place and Date of Trial/Hearing:

New Westminster, B.C.

January 18, 2024

Place and Date of Judgment:

New Westminster, B.C.

January 18, 2024

INTRODUCTION

- [1] This is a written version of oral reasons for judgment rendered on January 18, 2024. Because parenting issues are discussed, I have initialized the style of cause to protect the child's privacy. The judgment as been edited to improve grammar and clarity, but nothing about the analysis or conclusions has changed. However, I have changed all references to the claimant to "father" and all references to the respondent to "mother" to improve clarity.
- [2] THE COURT (by videoconference): There are two applications before me regarding parenting issues. The claimant, father, has brought an application relating to parenting time, decision-making, and parenting responsibilities. The respondent, mother, has brought an application regarding support. The income of the parties is at issue for the purposes of child support and spousal support.

AGREED FACTS

- [3] Unfortunately, a number of facts are in dispute, with the parties making directly contradictory statements about events. It is always difficult for the court in that context to make findings or conclusions on the basis of affidavit evidence. However, I am aware that these parties have tried to appear before the court since May 2023, and have been turned away on more than one occasion due to a lack of judicial resources. It is with that factor in mind that I make this decision.
- [4] There is no dispute about some of the basic background:
- a) The parties were married in October 2016 in India. It is my understanding that it was an arranged marriage.

- b) The father was a resident of Canada, and he returned to Canada after the marriage, and then sponsored the mother to immigrate.
- c) The parties have one child who was born in India in July 2017.
- d) The mother was able to come to Canada in May 2018. At first, the parties and the child lived with the father's parents (the "Grandparents").
- e) In October 2020, the parties, the Grandparents, and the child moved to a different residence-- a two-bedroom basement suite.
- f) The parties separated in May 2021, but lived in the same residence for a period of time.
- g) The mother did not work during cohabitation, but she did work after the separation.

DISPUTED FACTS

- [5] Almost all of the remaining important facts are disputed to some degree.

Employment

- [6] The parties do not agree on what their income should be for the determination of child and spousal support.
- [7] The father operates a plumbing business, which is a corporation. In his financial statement, he claims modest income, but he has not attached any business records. Nor has he given information about business revenues, only debts. He says no further information was requested; that may very well be true, but he has an obligation to provide complete financial disclosure to the other side and to this Court. Listing only the business debts and not the revenues clearly does not meet that obligation.
- [8] The father's position is that the mother is underemployed and that income should be imputed to her, roughly at the rate that she was previously earning when she had a full-time position working for Amazon.
- [9] The mother's position is that income should not be imputed to her. There is no dispute she did not work before the date of separation, but she deposed that she started looking for work in 2019. That timing is contested by the father, but I note that it makes sense. The child was very young at the time. The mother was at that time, and still is, a recent immigrant to Canada, and the COVID-19 pandemic had an impact on people's employment prospects, especially someone new to the country.
- [10] The mother worked at Amazon from about June 2021 to September 2022. She deposed that her employment was terminated by Amazon and she has since made numerous applications to look for work. To some degree this evidence contradicts the father's allegation that the mother has not really tried to look for work and that she intentionally quit her job at Amazon. There are documents attached to the mother's affidavit, which are more consistent with her version. She found work in January 2022 in the field in which she has education and

training, working part time at an accounting firm. Her working hours are approximately 9:45 a.m. to 1:45 p.m.

Childcare, Abuse, and Family Reactions

- [11] With respect to other issues, the parties' evidence does differ, and I will outline some, but not all, of the important differences:
- a) They differ on who had primary care of the child, and, regardless of that, they also differ on who actually provided care of the child after the mother started working. The mother submits that she provided more direct care of the child when she came home from her work than what the father described in his affidavit.
 - b) The mother contests the father's statements about providing care to the child. She deposed when the mother was at work, the Grandparents, rather than the father, provided care.
 - c) However, at the same time, the mother's evidence is that when she lived in the same residence as the Grandparents, the grandmother was often sick and the grandfather stayed in his room a lot. She offered these as reasons why she is not comfortable with the father getting more parenting time. This presents an incongruity in her evidence.
 - d) The father says he has a fairly consistent work schedule, which the mother contradicted in her affidavit, stating he sometimes worked very long hours. However, I am not sure that is necessarily a material inconsistency. Even if there is a difference in their evidence, it might just be a difference in perspective as to the frequency of his working long hours. I note he has a plumbing business and is self-employed. It would not be surprising if he sometimes worked long hours, but also that he perhaps has good control over his working hours, as the owner of the business.
 - e) The parties also disagree about who in the past did the majority or all of the school pick-ups and drop-offs. There is no real way, in my respectful view, to resolve that conflict in the affidavit evidence.
 - f) With regard to specific care, the mother disputes the father's evidence about the specific care he provided to the child or that he was a primary caregiver to the child, pointing out that while he makes those statements, they have insufficient detail.
 - g) They dispute whether the father actually got up in the middle of the night when the child was an infant in India. In my view, this is not particularly relevant. The mother admitted that the father was there during that time and he provided some care for the child. The parties probably have an honest difference in their recollection as to how much care the father gave in the middle of the night. However, that was when the child was a newborn, and the needs of a newborn are very different from a child who is of a young age, even as young as one year old.

- h) They also differ as to whether the mother suffered abuse at the hands of the father, both in India and in Canada. Their evidence is directly contradictory and irreconcilable on those points.
 - i) They differ on the reactions, responses, and nature of the involvement of each other's parents and extended family with respect to the allegations of family violence, but also their interactions generally in their marriage and specifically about the mother leaving the family home.
- [12] I am obliged to take into account family violence and consider how that may impact the best interests of the child when making a decision about parenting.
- [13] There is no allegation that any abuse was directed at the child. The mother does say that the child was present when she (the mother) was abused by the father. She attached photos to her affidavit of what she says were scratches on her face from the father's abuse in India.
- [14] The father denied that the pictures portray abuse. He also denied the abuse entirely. He goes further and says that the mother is making the allegations for the improper purpose of favouring her position on parenting. For her part, the mother says that father is only seeking more parenting time for the purpose of avoiding paying child support.

PARENTING ISSUES

- [15] It is well-known that the best interests of the child test applies as set out in s. 37 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The court must only consider the best interests of the child. I will address the factors under s. 37 that are relevant in this particular case as they relate to the evidence before me.

Family Violence

- [16] Section 37(2)(g) of the FLA requires me to consider the impact of family violence on the safety, security, and well-being of the child. As I have said, there is no allegation that abuse was directed at the child, but the mother alleged the child was present during an incident, and that alone may have an impact on a child. However, in the grand scheme of things, the violence in this particular case, while concerning if it is true, was on the lower end of the spectrum. The child was very young, and it is hard to say whether there would be any lasting impact, although I am not suggesting there could not be.
- [17] Given those factors, if the allegation of family violence is true, it is important, but the impact, in my respectful view, would be of lesser importance in this case with regard to making decisions about parenting.

- [18] Section 37(2)(h) tells the court to consider whether the person responsible for family violence might be impaired with regard to their ability to provide care for the child and meet the child's needs. There is no allegation that the father is incapable of caring for the child or that he has been or would be abusive towards the child.
- [19] On her own evidence, the mother describes that after the alleged abuse, family members asked her to give the father another chance, explaining that he would not do it again, and that he was reacting to a particular stress. The relevance of that evidence, if it is true, is that it does not necessarily show someone who has a long history or pattern of violence or an uncontrollable problem. There is no allegation of any violence occurring since the mother left.
- [20] Returning to my analysis on the issues, the father says the allegations are invented. He goes further by suggesting a lack of police or medical reports in both India and Canada supports the view that the mother is not being honest. He also submits I should disbelieve her because she remained in the same house while making allegations of violence.
- [21] Such reasoning is dangerous because it could perpetuate detrimental and prejudicial stereotypes about victims of abuse. I am not saying that type of reasoning can never be relevant or true, but it is important that the court be very careful in assessing those types of comments.
- [22] I do find it somewhat relevant that the mother has never made an application for a protection order. The father's lawyer says that there were no allegations of abuse in this case until after the father made the application asking for more parenting time. If that is true, it may lend legitimacy to the concern that he has raised.
- [23] More importantly, even if I were to find the allegations by the mother are true, it is difficult to see why that would impact parenting going forward. The mother admits there has been no violence since that incident, and there has never been any allegation of the child being subjected to abuse.
- [24] I am not prepared to make any finding about violence, given the state of the affidavit evidence in front of me, and given that this is not an application seeking a protection order. Additionally, it is clear there has been no violence since they stopped living together. This is an issue for trial. I am not satisfied that the allegations do or should have an impact on parenting arrangements at this time.

Health and Emotional Well-Being of the Child

- [25] I turn then to s. 37(2)(a) of the FLA, which considers the health and emotional well-being of the child. There are no serious allegations of mistreatment of the child in any way by either parent.

- [26] Neither parent alleges that the other parent harms the child's health or emotional well-being. This is evidenced by the fact that both parties are committed to allow the other parent significant parenting time. In other words, if there was a significant concern about the ability of the other parent to provide for the emotional well-being and health of the child, I would expect that each party's position would be not to allow the other parent significant parenting time. However, both say shared parenting is appropriate.
- [27] There are some very minor issues about the child's appearance as being unkempt. There was an allegation about the child not being well fed, but on the basis of the affidavit evidence, I am not prepared to make a finding on that. I do note that it is difficult to believe it is true. If one parent truly was not feeding the child, why would the other parent agree to that parent having significant parenting time? I am not suggesting it is not possible, but on the state of the evidence before me, I am not prepared to take that allegation into account.

Relationships with Significant Persons and History of Child's Care

- [28] I turn to the other factors under s. 37 of the FLA that are of particular relevance in this case--namely, the nature and the strength of the relationships of the child with other significant persons in their life and the history of the child's care.
- [29] The father submits that the mother "abandoned" the child when she left the family home. The mother denies that and deposed that she found another place to live because she was forced to do so. Her evidence is that she actually came and got the child the next day. She says she was forced to leave the family home, which is denied by the father and the grandmother.
- [30] The father says the mother quit working at Amazon in order to bolster her claim of being the primary parent and her position with regard to the child tax benefit from Revenue Canada. She deposed that she was fired from Amazon and stated that she applied for several jobs, which I have already accepted is supported by the evidence that she has filed. I also find it completely reasonable that she would want to find a job that is in her field, which is what she has done.
- [31] She denies the allegation that the timing of her enrolling the child at the Martha Jane school in New Westminster was coincidental with the end of her job as alleged, and she attached documents to her affidavit, that, in my view, make her assertion reasonable.
- [32] The parties differ on who paid for the preschool. The father said that he provided those funds. The mother denies that. I find that the mother has adduced evidence that it was most probable that she put those payments on a credit card. However, I am not sure how important that is, as it is an expense that needs to be sorted out between the parties on more thorough proof at a later date.

- [33] I will say, however, that the history of care of the child in the presence of the father's extended family for a period of time does favour his position. There is no dispute that the child lived together with the Grandparents in the same residence, even when the parties were separated, and certainly before separation.
- [34] Even by the mother's own evidence, the grandmother took on some parenting responsibilities. The father suggests it is easier for the child to have contact with his nieces and nephews when in his care. These factors do tend to favour the father's position.
- [35] The mother alleges that the Grandparents are aged (they are in their mid-sixties) and they both have high blood pressure making them unsuitable to provide child care. However, with the greatest of respect, those factors describe a lot of people. She alleged the grandfather is in his room all day, but gives no other detail. She alleged the grandmother was sick a lot of the time. The father attaches a letter from the doctor speaking to his parents' health. So, the evidence is somewhat inconsistent.
- [36] In any event, as I said before, the mother's claims about the Grandparent's capacity to provide child care are somewhat incongruous with her then claiming that they actually did most of the child pick-up, as opposed to the father himself.
- [37] I am not satisfied there is sufficient evidence of the Grandparents having any kind of infirmity or capacity issue to justify not giving the father more parenting time.

The Child's Need for Stability, the Ability of the Parents to Parent and Cooperate

- [38] A few other factors are also important: the child's need for stability given the child's age and stage of development, the ability of each of the parents to exercise their parenting responsibilities, as well as the appropriateness of an arrangement that would require the parents to cooperate: FLA, s. 37(2)(e)-(f), (i).
- [39] The mother says that stability is the important factor, and that the child should stay at the same school where the child has been for kindergarten and Grade 1. The mother says the child is looking forward to Grade 2 at the same school. Her position is that factor favours not having the child attend a different school or having equal parenting time with the father. She says the school is near her house, which makes it convenient, especially given her current working hours.
- [40] The father says the mother unilaterally changed the child's living arrangement and/or plan of where the child was going to attend preschool or kindergarten without consultation, and that is relevant to her capacity to co-parent, provide stability, and work with him.
- [41] It is true on the facts that the mother left the home and she took the child with her, although the parties dispute when that happened and why. There may be reasons why it happened in that manner. The mother says the parties communicate through the grandmother, but it is also true that she did not consult the father. On the mother's version of the facts, she felt she was forced to leave, and she was suffering in the home. She said she first had to find a place

to live, which explains how she left. It is difficult to know how much weight to put on the circumstances of how and when she left the home.

- [42] I understand the parties to agree that the child would not be moved during the current school year. The issue is where the child would attend school next year.
- [43] As I said, one of the factors I have to consider is the appropriateness of arrangements that require the parents to cooperate. Here, the parties do not communicate well and at times each of them accuses the other of providing absolutely no communication. It appears that allegation may be true on both of their parts. Again, they provide their own reasons for not communicating, but those do not really justify the behaviour.
- [44] Unilateral decision-making by parents is not good parenting in a shared parenting regime, and both of them want a shared parenting regime. The issue is the allocation of time.
- [45] I find it most likely that the parties living with the father's parents in small living quarters was probably the source of a lot of tension. However, the reasons for the marital breakdown in this case are not stark in a way that should affect the parenting. In my respectful view, even if the father's parents wrongly or inappropriately interfered in the parties' marriage, that is not a reason that they should not still be involved in the child's life.
- [46] The mother says there are no real details about how the father performed parenting and that he simply makes bald statements. I find this is not entirely true. In his affidavit, he does give some detail. Again, their evidence contradicts one another as she denies certain aspects of his evidence.
- [47] By the same token, while the mother gives some detail as to the specific duties and care she provided, a lot of the evidence relates to when the child was an infant and was being breastfed; the mother's evidence focused on feeding and basic care. I am not sure how that weighs heavily in favour of or against either parent. I take it as a given that either parent is capable of looking after an infant. If one parent did more caregiving when the child was an infant to age one, I do not think that should affect a decision as to the parenting arrangement going forward. They were not actually living together until 2018 as they were in different countries. This was an arranged marriage. All of these factors suggest that the history of the care prior to actually living in the home together does not weigh as heavily as in other cases.
- [48] The father referred me to the section in the FLA that talks about informal parenting arrangements. He also referred to the fact that there was a draft separation agreement with the involvement of counsel that provided for equal parenting time. The father was consistently asking for the mother's response to the draft agreement, but none was given, and no real reason has been provided for that lack of response.
- [49] I also note that, barring anything else, in general, the court favours maximizing the child's contact with both parents.

- [50] The parties are not actually that far apart in terms of what they say the other's parenting time should be. The larger issue seems to be the schooling. I accept as relevant, the fact that the mother currently has a job where she can easily pick up her child close to her home, but that is not necessarily going to be the case all the time going forward .
- [51] I am not sure I agree that the consideration of stability favours the child staying at the same school between kindergarten, Grade 1, and Grade 2. The child is young. There is no evidence that there is any kind of attachment, friend groups, peer groups, or activities that would make it detrimental to the child to switch schools.

Conclusions on Parenting

- [52] Looking at all of the factors, I find it is in the best interests of the child that the parties have equal parenting time.
- [53] The father has suggested what I will call a 4:3 alternating week schedule, and that sounds like a good arrangement unless, given my finding that it should be equal parenting time, counsel have a different suggestion. In other words, I grant the order as per the father's submissions:
- a) Parenting time of one parent to the child shall be from Friday at 2:30 p.m., when the child is picked up from school, to Monday at 8:30 a.m. when the child is sent to school;
 - b) Parenting time of the other parent to the child shall be from Monday at 2:30 p.m., when the child is picked up from school, to Friday at 8:30 a.m. when the child is sent to school; and
 - c) This schedule will alternate.
- [54] The parties should take into account what works for them in terms of their work schedules going forward.
- [55] If there is a drastic reason why that schedule does not work for the mother, she has leave only until the start of June 2024 to seek a brief appearance before me by way of filing an online request to appear. If such circumstances arise, the parties have leave to file one brief affidavit each, only addressing the proposed schedule. I am seized on this one issue up until June 2024.
- [56] I order that the mother and the father are the joint guardians of the child under s. 39(1) of the FLA.
- [57] By consent, I grant the order that the parties shall not remove the child from the Lower Mainland without the written consent of either party or without a court order authorizing the removal.
- [58] With regard to parenting responsibility, they are to equally share those responsibilities and make their absolute best efforts to come to an agreement.

- [59] They clearly have a dispute regarding schools in the next year. I find that having grandparents close-by who can walk to a school to help with pick-up is not only in the best interests of the child, it is also in the best interests of both parents.
- [60] If in the future the mother has a job with longer hours, it would presumably be of assistance to her that there are loving grandparents close-by that can attend the school on her behalf, or pick up and care for the child until she is available.
- [61] Therefore, until agreement between the parties or further court order, with respect to s. 41(d) of the FLA regarding the child's education and extracurricular, the parties must make their best efforts to come to an agreement. Failing that, on an interim without prejudice basis, the father has final say. The mother could ask the court to review his decision in that event. All other responsibilities are to be shared, with no direction as to who has final say.
- [62] I will offer this comment: with the greatest of respect, these parents have not really made a decent effort yet at co-parenting. I do not mean to be critical. They had a traditional arranged marriage. They were living with in-laws. These circumstances obviously created resentment and other problems. I will offer the opinion that there was probably meddling in their relationship by others, and that was difficult. The parties need to put that behind them, and they need to turn a new page.
- [63] I know turning a new page is harder in light of a failed marriage. They both love their child and want the best for their child. They need to try harder going forward to be equal parents. I am not sure they have actually had that opportunity yet. I appreciate there are allegations of violence that would make that naturally difficult. If they are true, it is more difficult for the mother; if they are false, it is more difficult for the father. The parents need to move forward for the sake of their child.

CHILD AND SPOUSAL SUPPORT

- [64] With regard to child and spousal support, child support requires the determination of the parties' income. The mother filed her application only four days after the father's application. He has had over eight months to fulfil his financial disclosure. He has failed to do so.
- [65] I acknowledge that he was not asked for certain business records, but I find relying on that for non-disclosure to be difficult, in any court case. I am sure he was given adequate legal advice and told that the courts do not look kindly on people who do not fulfil their disclosure obligations.
- [66] I note there is evidence of very large cash deposits being made to a bank account with no explanation.

- [67] I observe that he has cashed out or withdrawn from RRSPs. That may not change his income, but it gives him a source of funds that she clearly does not have, given that she is a recent immigrant.
- [68] The mother said the father has not paid any child support. He did not resist that suggestion. The father said he made one cash payment. Most importantly, the evidence is consistent with the mother's allegation that, despite his income tax records, he is sometimes paid for work in cash. I am not making that finding. I am simply saying there is some evidence to support her assertion.
- [69] Even though this was a short marriage, the mother is at a considerable disadvantage. Her living standard is very different from the father's. She moved half-way around the world to come here, to live and to make an effort at a marriage. She does not have her parents here. The father himself says she has nobody else, and he gives that as a reason why she should not get the majority of the parenting time.
- [70] She was unable to work in her field until recently. She has an obligation to improve her situation, and it is clearly to her advantage not to continue to get dead-end jobs, but to actually work in the field of accounting. This job is ultimately going to be to her and the child's financial benefit. I am satisfied that she needs financial support to continue to improve her situation.
- [71] Based on the evidence before me, I conclude, on an interim without prejudice basis, that:
- a) the claimant father earns \$50,000 per year;
 - b) I am not imputing any additional income to the mother as I do not find a sufficient evidentiary basis to do so;
 - c) the respondent mother is entitled to spousal support in the mid-range based on the incomes as stated; and
 - d) my findings on income apply to both child support and spousal support.
- [72] In effect, I have granted the orders as sought by the mother that the father must pay her child support and spousal support each month on an interim basis using his salary of \$50,000, so long as the mother and child remain eligible for such support under the FLA, the guidelines on support, or further court order.

FINANCIAL DISCLOSURE, INTERIM APPLICATIONS, AND COSTS

- [73] I order that the father provide complete financial disclosure of his business records for the last three years. I will set a deadline, but I will hear submissions from counsel first on that.

[SUBMISSIONS BY COUNSEL ON DEADLINE TO PRODUCE RECORDS]

[74] THE COURT: The deadline for the father to produce the financial disclosure is March 8, 2024, end of business day. He must produce everything. If there are no financial statements prepared by an accountant, he has to swear to that effect. If there are, he has to produce those statements. He has to produce all bank accounts statements, a business ledger, and invoices during the course of the marriage in order that there can be an accurate determination of his income.

[75] In the meantime, there can be no interim application by either party until the end of June 2024, regarding parenting or support, except in the case of an emergency relating to these matters, and except with regard to leave I granted earlier regarding the schedule for equal parenting time.

[76] I am directing, in as strong as possible terms, that these parties get a trial date as soon as possible. I would consider conduct orders, but none were asked for.

[SUBMISSIONS BY COUNSEL ON JOINT PARENTING SCHEDULE AND OTHER PARENTING ISSUES]

[77] THE COURT: Each party bears their own costs given the divided success.

"Sharma J."

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