
CANADA / JUDGMENT

E.F.K. v. R.J.

2020 BCSC 1390

COURT

Supreme Court of British Columbia

DECIDED

3 September 2020

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2020 BCSC 1390 E.F.K. v. R.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.F.K. v. R.J.,

2020 BCSC 1390

Date: 20200903

Docket: E201215

Registry: Vancouver

Between:

E.F.K.

Claimant

And

R.J.

Respondent

Before: Master Elwood

Oral Reasons for Judgment

In Chambers

Counsel for Claimant:

S.G.L. Label

Counsel for Respondent:

S. Jamal

Place and Date of Hearing:

Vancouver, B.C.

August 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 3, 2020

- [1] THE COURT: The father in this family law case applies for a number of interim orders prior to a judicial case conference. The most pressing matters concern parenting arrangements and daycare for two young children of the marriage.

BACKGROUND

- [2] The parties are in their early 40s. The father is a real estate agent. The mother is a teacher. The mother is currently nearing the end of a maternity leave.
- [3] The parties married in May 2015. They had two biological children together, a son, N., who is five years old, and a daughter, A., who is just under one year old. The mother also has a daughter, C., from a previous marriage, who lived with the parties. C. is 11 years old.
- [4] The parties separated in May 2019, but continued to live in the same condominium in the Coal Harbour neighbourhood of Vancouver. In July 2019, they moved to a rental house in Richmond and continued to live separately under the same roof. A. was born in September 2019.
- [5] On July 15, 2020, the parties moved to separate accommodations. The father returned to the condo in Coal Harbour; the mother moved with the children to a rental apartment in Steveston.
- [6] The parties have had difficulty agreeing on a parenting schedule following their physical separation. Their current arrangements are that the father cares for N. three days and three nights per week, from Wednesday morning to Saturday afternoon, and he cares for A. during the day for four hours three times a week, on Monday, Wednesday and Saturday.
- [7] The current arrangements are not satisfactory to either party. Disagreements have led to the involvement of legal counsel and this application. The father seeks an order for equal parenting time with the children, beginning immediately with N. on a four-day/three-day alternating weekly schedule, and introduced on a graduated basis with A. starting with a three-day/two-day alternating week schedule.

- [8] The mother opposes equal parenting time. She proposes two options, the common denominators of which are that the children will remain in her primary care and attend a daycare called Busy Bees full time when the mother returns to work in September.
- [9] The father's parenting time under the mother's proposed schedules will be after daycare and on weekends. It includes two or three overnights with N. and no overnights with A.

ANALYSIS

- [10] Section 37 of the Family Law Act requires that, in making an order with respect to parenting arrangements, the court must consider only the best interests of the child. Section 37(2) mandates that, in determining the best interests of a child, certain specific factors must be considered. Section 37(3) stipulates that an order is not in the best interests of the child unless it protects to the greatest extent possible the child's physical, psychological and emotional safety, security and well-being.
- [11] Section 16(8) of the Divorce Act also provides that the court must only consider the best interests of the child. Section 16(10) of the Divorce Act provides that the court shall give effect to the principle that the children should have as much contact with each parent as is consistent with their best interest.
- [12] There is no presumption under either Act that parenting time should be shared equally. In my view, the legislation subordinates the so-called maximum contact principle to the best interests of the child.
- [13] The mother argues that the status quo must be maintained in the absence of evidence the children are at risk. She relies on law set out in *Prost v. Prost*, (1990) 30 R.F.L. (3d) 80; *Leung v. Leung*, (1998) 44 R.F.L. (4th) 121; and *W.G.H. v. J.L.H.*, 2008 BCSC 1007.
- [14] While it remains true that the primary purpose of interim orders in family law cases is to maintain the status quo and provide short-term solutions, any general rule that the status quo must be maintained in the absence of evidence the children are at risk is, in my view, subordinated by the current legislation to the best interests of the child. However, evidence of the status quo may inform the court's consideration of a number of the best interest factors set out in s. 37(2) of the Family Law Act, including the child's need for stability.
- [15] In this case, the current status quo reflects an unhappy compromise reached by the parties prior to any judicial determination of the best interests of the children, prior to any reports being obtained, prior to any cross-examination on the affidavits, and prior to any judicial case conference.
- [16] Spouses should have the ability, in my view, to make temporary compromises without the risk of creating a status quo the court will then affirm on an interim application pending a trial that may be a year or two away. For these reasons, I place no special weight on the arrangements the parties entered into following their physical separation on July 15.

[17] It is important, however, to recognize, as the Court of Appeal instructed in *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403, that disputed issues concerning the best interests of a child are generally better decided at a trial rather than on interim applications, especially where there are conflicts in the affidavit evidence. See also *Fawcett v. Read*, 2016 BCSC 310, para. 65.

[18] I turn then to the mandatory factors set out in s. 37(2) of the Family Law Act:

A. The children's health and emotional well-being

[19] A. is still an infant. She nurses every three hours and throughout the night. She is closely bonded to her mother, particularly for the purposes of breastfeeding. The mother intends to nurse A. until the age of two. The mother does not pump breast milk, and A. does not take a bottle.

[20] A. is also forming a bond with her father. She appears comfortable in his arms. However, she dislikes being late for a feeding and dislikes being in the car, especially if she cannot reach her mother.

[21] N. appears to be a healthy and well-adjusted little boy. He enjoys activities with both parents. He appears to have a close relationship and a strong bond with both parents.

B. The children's views

[22] A. and N. are both too young to have views on their parenting arrangements.

C. Relationship between the child and significant persons in his life

[23] The most significant people in the lives of both children are of course their parents. Although N. participates in activities with other children, it is unlikely given his age that he has formed close friendships yet. For the moment, his little sister A. is likely the most significant person in N.'s life after his parents.

D. History of child care

[24] On my view of the evidence on this application, the mother has been and remains the primary caregiver for both children. The mother took maternity leave to be home for the children. Even while the father was at home during a period he was not working, the mother took the lead in child care. The father also participated in caring for the children. He assisted the mother with parenting chores, like changing diapers and nap time. He has been primarily responsible for the religious upbringing of the children. But much of the father's focus on the children has been recent, and, in particular, since the parties' separation on July 15, 2020.

E. The child's need for stability

[25] There is no question that A. and N. need stability in their lives. The current shuffling back and forth is disruptive. Both children have been upset during transitions. The parents now live some distance apart, with some notoriously difficult traffic between them. It is important in my view that any schedule minimize the driving time and the number of transfers.

F. Ability of the guardians to exercise parenting responsibilities

[26] Both parents in this case appear capable of exercising parenting responsibilities. The father is a realtor. This job provides him with flexibility during the day on weekdays. The mother is a teacher. This job allows her time as well to devote to parenting and feeding A. Both parents live in accommodations that are appropriate for the children. The affidavits and photographic evidence demonstrate that both parties are capable of being loving and responsible parents.

G. Impact of family violence

[27] Unfortunately, there is also evidence the parties' marriage was marred by family violence. The mother deposes that the father would yell at her, demean her, and call her hurtful and cruel names. She deposes that the father threatened to throw her out of the family home on more than one occasion, including once when she was pregnant with A.

[28] The mother deposes that the father also argued with C., yelled at C. inappropriately for her age, and once pushed C. to the floor in anger. The mother also describes instances in which the father's anger and yelling appeared to frighten N.

[29] The father's conduct as alleged by the mother is family violence within the meaning of s. 1 of the Family Law Act. The mother and C. were both family members during the marriage.

[30] Many of these allegations are denied by the father. They are untested by cross-examination. Objective truth is very difficult to determine on an interim application. However, the mother's evidence must be taken seriously. She says she is scared of the father, and her conduct affirms this fear.

[31] The father's anger may have been situational. I note that the father deposes the mother also treated him with hostility in the family home. There is no evidence the father was verbally or physically abusive towards N. or the baby A. However, in my view the evidence that the father yelled at family members in the presence of the younger children cannot be ignored in determining the question of the best interests of those children.

H. Whether actions of a person responsible for family violence impairs their ability to care for the child and meet the child's needs

- [32] The father denies having a quick temper generally; however, the evidence suggests otherwise. I am most concerned by the evidence that the father was verbally, and on one occasion physically, abusive towards C. Although the father does not seek parenting time with C., his anger and treatment of a vulnerable young girl in his household speaks poorly of his parenting abilities generally at this time.
- [33] The father deposes that he is committed to responsible parenting for his own children. But the evidence of his treatment of C. cannot be forgotten. It remains a factor in determining the best interests of N. and A. on this interim application.

I. Ability of guardians to cooperate

- [34] While the parents have different views on parenting, I do not believe there will be any risk to the safety, security or well-being of the children if the parenting arrangements require some cooperation.

PARENTING SCHEDULE

- [35] I agree with the father that the parenting schedule should have as its objectives: reducing conflict, minimizing the involvement of lawyers, providing clarity and stability for the children, and allowing the children as much contact with each parent as is consistent with their best interests.
- [36] My concerns with the father's proposed schedule are:
- a) My analysis of the s. 37(2) factors has led me to conclude that equal shared parenting time is not in the best interests of the children at this time.
 - b) I am specifically concerned that lengthy separations or overnight stays away from her mother would not be good for A.'s health and well-being at this time.
- [37] My concerns with the mother's two proposed options are:
- a) They do not allow sufficient contact between N. and his father.
 - b) They are too complicated and may only result in further conflict, which is not in the best interests of the children.
 - c) They involve too much travel and too many transfers. The schedule should be as simple as possible, in my view, having regard to the residences of the parties.

DAYCARE

- [38] In general terms, I agree with the father that it is preferable for the children to spend time with their father when he is available, rather than for them to be placed in the care of third-party caregivers like daycare facilities.

- [39] The current risk of exposure to the coronavirus provides a further reason to prefer family care over unnecessary time with other children and adults. Daycare is also expensive.
- [40] However, in the circumstances of this case, daycare at Busy Bees in particular can provide some needed stability for the children. Busy Bees is a licensed daycare facility located close to the mother's apartment in Steveston and the school at which the mother teaches.
- [41] C. attended Busy Bees. N. began attending Busy Bees at 15 months. N. appears to have enjoyed attending Busy Bees. Such was her view of its importance for his stability and happiness that when she went on maternity leave, the mother kept N. in Busy Bees at least one day per week.
- [42] The mother intends to enrol A. in daycare with her brother. In the future, companionship and support between N. and his little sister will be important as these children navigate their parents' separation. Busy Bees may provide them with a safe space together.
- [43] For these reasons, I think Busy Bees should be incorporated into the parenting schedule.
- [44] Another important consideration for maintaining stability for the children is to allow the father to take them to the mosque on Friday for evening prayers and on the weekend for religious activities.

DECISION ON PARENTING ARRANGEMENTS

- [45] In my view, the parenting schedule should include three consecutive overnights for N. with his father, including Friday night. The father will pick up N. on Wednesdays after daycare, which I understand to be 3:30 p.m., and return him to his mother on Saturday at 3:30 p.m.
- [46] In my view, there should be no overnights for A. with her father for the time being. Instead, A. will spend up to four hours at a time up to three times per week with her father, to correspond on Wednesday and Saturday with the transfers for N. I suggest that the father's third block of time with A. be Friday evening, returning to her mother before bedtime, but I will not require that it be Friday evening. The details of the transfers for A. that do not correspond with those for N. are left to the parties.
- [47] The children may be enrolled in Busy Bees during the mother's parenting time. The mother has offered to pay the full amount for Busy Bees. The parties should discuss this further at a JCC. I suggest that the father also make use of Busy Bees on his parenting days when he is working, but I will not order him to do so. However, the father must keep the mother apprised of where the children are if they are not in his care.
- [48] This schedule must be reviewed at a JCC or in six months' time, whichever is sooner.

PARENTING COUSELLOR / COACH

- [49] The parties shall appoint a parenting counsellor or coach to assist with parenting arrangements. The parties may also each appoint their own parenting counselor / coach, if that arrangement is preferable to them or recommended by the counselor / coach.
- [50] I will not order the parties to retain Alyson Jones. Instead, I will direct that, if the parties intend to use a single parenting counselor / coach, the mother suggest three names. If none of the three names proposed by the mother is acceptable to the father, he will propose three names. If none of those three people is acceptable to the mother, the parties will each ask one person from their list to confer with a person from the other party's list and recommend a single counselor or coach. That counselor /coach will be appointed if he or she is available and willing to act.
- [51] The cost of the parenting counsellor or coach will be paid equally in the first instance, subject to reapportionment by the trial judge. The arrangements shall be revisited at a JCC.

SECTION 211 REPORT

- [52] The father seeks an order for a full s. 211 report by Dr. Elterman. A s. 211 report may be necessary in this case. However, little time was spent on the issue during oral submissions on this application.
- [53] I agree with the mother that a s. 211 report should first be discussed at a JCC. At a JCC, the parties and their lawyers can discuss the evidentiary value, scope and cost of such a report in this case, as well as the author and its timing. In the meantime, prior to the JCC, the parties will exchange names of potential authors using the process I have established for appointing a counselor or coach, and, if they agree prior to the JCC that a s. 211 report should be obtained, ask the author to start work immediately.

PARENTING APP

- [54] The use of technology to improve the parties' communication should also be discussed first at a JCC. The mother raised concerns with online privacy that I must say I do not understand. However, those concerns should be taken seriously and discussed between the parties. The app will not serve its intended purpose if there is not buy-in from the mother. It should not be imposed on her by the court without further discussion.

GUARDIANSHIP

- [55] In accordance with s. 39 of the Family Law Act, the mother and father are each guardians of N. and A. Any further guardianship issues should be discussed at a JCC.

PARENTING RESPONSIBILITIES

- [56] Apart from Busy Bees Daycare, I will not make any orders at this time concerning parenting responsibilities or decisions. These are matters on which the parties need to communicate and make collaborative decisions if it all possible without the intervention of the court. If the parties cannot agree, their concerns should first be discussed at a JCC before an application is brought.
- [57] Likewise, with respect to conduct orders, I am not convinced there is an urgent need for the court to intervene at this time. Hopefully, with the involvement of experienced counsel, a parenting counselor / coach and an interim court order for a parenting schedule, the parties' communications will improve.

COSTS

- [58] With respect to costs, the circumstances around parenting arrangements were such that the parties legitimately required a neutral third party to determine which of the competing options was in the best interests of the children and to achieve some degree of interim stability. Neither party was clearly successful on the application.
- [59] Accordingly, there will be no costs of this application.

[Discussion with counsel]

- [60] THE COURT: The mother's application for a parenting schedule and related relief is adjourned generally. If the mother intends to re-set that application, she must give the father eight days notice. The mother is not granted leave to re-set the application prior to a JCC. Costs related to responding to the mother's adjourned notice of application are reserved to the judge or master who hears the application, if it is brought.

"Master Elwood"

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