

CANADA / JUDGMENT

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

2024 BCSC 1112

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1112 E.F.K. v. R.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2024 BCSC 1112

Date: 20240627

Docket: E201215

Registry: Vancouver

Between:

E.F.K.

Claimant

And

R.J.

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Appearing in person:

E.F.K.

Appearing in person:

R.J.

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 20, 2024

Place and Date of Judgment:

Vancouver, B.C.

June 27, 2024

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Introduction

- [1] These are my reasons for judgment ("Reasons") with respect to a notice of application filed by the claimant on January 19, 2024, in what I will describe as a high-conflict family law matter. This is probably self-evident from the fact that the parties have filed affidavits #16 and #23, respectively.
- [2] A parenting coordinator was engaged. There have already been two s. 211 reports prepared, which I will return to. This matter has also been case managed by Justice Crerar and he has made various orders.
- [3] One thus need not have practiced family law as I did prior to my appointment, to draw this conclusion as to the high-conflict nature and the associated challenges for the court in managing same.
- [4] I will state at the outset and will return, in due course, to the proposition that from a parenting perspective the court approaches this matter solely in accordance with the best interests of the children.

- [5] The parties were in an approximately five-year relationship, from 2014 to 2019.
- [6] Both parties are employed.
- [7] The claimant is a resource teacher.
- [8] The respondent is a licensed realtor.
- [9] Both parties, I accept, are fortunate to have some flexibility in their work schedules.
- [10] The claimant has a child from a prior relationship, "C.", born in April 2009, who is currently age 15. There is a shared parenting arrangement between the claimant and C.'s biological father. C.'s circumstances are not at issue in this application.
- [11] The parties are also the biological parents of two children:
1. A son, "N.", born in 2016, who is currently age 8; and
 2. A daughter, "A.", born in 2019 (after the parties separated), who is currently age 4. A.'s birthday is in September, so she will be reaching school age shortly.
- (the "Children").
- [12] This is the driving force of the present application; although, as I will articulate, there are other ancillary issues.

Relief Sought--Summary

- [13] Specifically, the relief sought in the notice of application (which I have paraphrased slightly, but used the same paragraph numbers for the benefit of the record) is as follows:
1. An order varying paragraph 2(b)(iii) of the consent order attached to the order made by Justice Crerar on May 15, 2023, such that the claimant will have sole parental responsibility with respect to the Children's education and participation in extracurricular activities, under s. 41(d) of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
 2. The respondent will take N. to and from L.B.E.S. (the "School") on instructional days, unless N. is medically unable to attend or otherwise an excused absence is agreed on between the parties.
 3. The respondent will refrain from speaking to the Children about the choice of school or otherwise critiquing the School in front of the Children.
 4. The claimant is dispensed from needing to obtain the respondent's consent in respect of registration of the Children at the School and in programs run by the School. Or, in the alternative, the respondent will immediately provide and execute all necessary forms to have A. enrolled at the School.

5. Pursuant to s. 228 of the FLA, a finding that the respondent has breached the conduct order set out in the order of Justice Crerar made May 15, 2023, by discussing school-choice related issues with the Children or in their presence, and requiring the respondent to pay the claimant an amount to be determined by the court for the benefit of the claimant and/or the Children.
 6. Pursuant to R. 9-1 of the Supreme Court Family Rules [Rules] an order that on or before February 2, 2024 (a date I note is practically impossible at this juncture), the respondent will provide to the claimant an amended list of documents, to include various what I will broadly describe as a large number of financial documents, as set out at paragraph 6 of the application.
- [14] There is a claim for costs, as is usually expected, and a generic basket relief clause.
- [15] The respondent takes no position on paragraph 3 of the relief sought. He also consents to the above referenced basket clause in paragraph 8 of the application, namely "[s]uch further and other relief as this Honourable Court may deem just", to the extent that is required in the exercise of the court's discretion. All other relief is opposed. In particular, and most importantly, the respondent opposes A.'s registration at the School for Kindergarten commencing in September 2024.

General Factual Overview

- [16] As noted, the claimant and the respondent were in a relationship from 2014 to 2019 and have two biological children together.
- [17] Shortly before separating, the parties took up residence in the Municipality of Richmond.
- [18] Following their separation, the respondent moved to West Vancouver while the claimant remained in Richmond which, as noted, is where the parties lived prior to their separation. This point factors significantly into the overall factual matrix and the prior adjudication over the issue of schooling for the Children.
- [19] The claimant has since moved to a different residence, but remains in the Richmond municipality. The respondent remains in West Vancouver. Each of their respective employment is tied to their place of residence in some regard.
- [20] I take judicial notice of the fact that Richmond and West Vancouver are two separate municipalities and there is clearly a notable commute time involved. However, it is not a commute time which is uncommon, I accept, for persons who live in the Lower Mainland area.

Procedural History

- [21] In June 2021 a s. 211 report was prepared by Ms. Leanne Harder. This s. 211 report made recommendations that the claimant have sole responsibility over the educational-related decisions.
- [22] After a multiple-day hearing conducted in August 2021, Justice Crerar ordered that the claimant have the parenting responsibility for determining where N. would attend Kindergarten (the "August 2021 Crerar Order").
- [23] The respondent appealed the August 2021 Crerar Order, but leave to appeal was denied.
- [24] Notwithstanding the refusal for leave, in April 2022 the respondent sought to have the parties' parenting coordinator reconsider the issue of school choice (then only for N., as A. was not school age). For obvious reasons, this approach was not successful.
- [25] The respondent then took out a notice of trial for the purpose of variation, or perhaps more accurately reconsideration, of the school choice issue. The trial was scheduled for June 2023. N. was already attending the School at that time.
- [26] In May 2023 a second s. 211 report was prepared by Dr. Simon Elterman. Dr. Elterman recommended that N. continue to attend the School and that A. attend there once she reaches the appropriate age.
- [27] On May 15, 2023, the parties, who then had counsel, entered into a final consent order (the "Final Consent Order") which provided, inter alia, that:
- a) N. shall attend the School in Richmond until he completes Grade 7;
 - b) A. shall enter the School for Kindergarten and remain there until the completion of the contemplated review; and
 - c) the parties shall not discuss with the Children any court or legal matters.
- [28] The Final Consent Order contains various other terms. Again, I have paraphrased the terms very slightly in the above recitation. However, the Final Consent Order is included in the record and speaks for itself.
- [29] Of note, the Final Consent Order was reached after a mediation with a very experienced family law mediator.
- [30] Notwithstanding the terms of the Final Consent Order, the respondent continues to take issue with the choice of school for the Children. Stated in very simple terms, the respondent is clearly not a fan of the School. The respondent wants the Children to attend a school near his residence in West Vancouver. The respondent has repeatedly involved school officials in this dispute about the school choice, which I note does not reflect well on the respondent.

- [31] Being an educator is a challenging and important role in society. Those efforts are intended to be directed to the children and not to refereeing disputes between parents unless there is an actual risk of harm to a child where mandatory reporting obligations are engaged. That is not the case here.
- [32] Certain correspondence sent by the respondent to educators at the School very clearly, in my view, cross the line on appropriateness. They are not attempts by an actively involved parent seeking information, which the respondent is absolutely entitled to do as a guardian. Rather, they are critical and, I accept, verging on confrontational. That is probably a generous description, to the respondent's benefit.
- [33] Moreover, the correspondence supports the assertion that the respondent has been communicating with and/or discussing the school selection issue in front of the Children, despite their young age. These are not teenagers who may have legitimate input into schooling decisions for themselves, based upon their relative maturity, extracurricular commitments, friend groups and so forth. These are very young children who should not be involved in disputes between their parents.

Further Factual Background Regarding the Children

- [34] Returning to the Children, I confirm that at the time of the hearing N. was attending Grade 2 at the School, as he has done since Kindergarten in 2021. He will complete Grade 2 shortly and enter Grade 3 in September.
- [35] I accept that N. has generally had a positive experience at the School to date and has friends in his class. He also has connections to other peers in the catchment area who may not specifically be in his class, as it is not uncommon, given class composition changes annually and children may seek out different peers with whom they share interests.
- [36] The claimant raises a concern that the respondent is keeping N. out of school during his parenting time without a bona fide reason, notwithstanding that the respondent has limited school day parenting time responsibilities.
- [37] On the face of the evidence, I would be inclined to conclude that the claimant is acting in a gatekeeping role on this issue. Namely, she is unnecessarily looking for fault in the respondent's parenting. There are quite a modest number of absences, especially considering N. is in Grade 2 and does not have specifically documented learning challenges or documented neurodiversity which would possibly cast a different light on the issue.
- [38] In saying this, I do not accept the hearsay evidence regarding the absences having an impact on N.'s literacy skills at this juncture. Beyond being inadmissible, it's probative value would be extremely low as the number of absentee days are not sufficient to conclude that they have had a material impact on N.'s educational progress at this point.

- [39] My greater concern is that there is a correlation between absences and the respondent's issues with the School and that this, combined with the commute required, may have resulted in N. missing school, not due to illness or exceptional family circumstances. This is a problem that will compound both as N. ages and with A. entering school.
- [40] Given the flexibility of his career, the respondent should ensure punctual attendance of the Children at school on his educational parenting days unless there is a legitimate reason due to illness or exceptional family circumstances. General reluctance to make the commute or dislike of the chosen school, which is confirmed by this court order, does not constitute exceptional family circumstances.
- [41] Moreover, if the respondent has some work obligations that interferes with his ability to facilitate the commute to school, the respondent is able to exercise his parenting responsibilities to hire a responsible third-party caregiver to transport the Children. Many children ride the school bus, many attend after-school programs, many have nannies, and so forth. This necessary delegation of parental responsibility does not, as a general rule, reflect poorly on a parent. It is a practical reality for most working parents. In this case, there is greater flexibility in work schedules but even with that flexibility, responsible third-party child care may be required.
- [42] In this same vein, I do not accept the argument that the respondent has acted inappropriately in not facilitating N.'s attendance at certain after-hours school events. These are not mandatory events, and how the respondent elects to spend his evening parenting time with the Children is within his right as a guardian unless the parties have agreed on a specific extracurricular activity that crosses over into both parties' parenting time. I use, for example in this regard, the family movie night on June 9, 2023. That would, when combined with the commute back to West Vancouver, be a very long night for a child of then A.'s quite young age. As a parent of more than one child, there will inevitably be occasions where one has to balance the competing interests of those children and may occasionally have to prefer the interests of one child, not out of favouritism but out of practicality.

A.'s Schooling Plan

- [43] Given that the parties are self-represented, I will set out my specific orders in detail at the end of my Reasons. I am satisfied in these circumstances that it is consistent with the Final Consent Order and A.'s best interests, as defined in the governing legislation, that A. attend the School along with her brother N. There has been no material change in circumstances whatsoever.

- [44] Specifically, the respondent has, to use my description above, "not been a fan" of the School from the outset. He is entitled to his opinion in this regard; however, the respondent did agree to the terms of the Final Consent Order. Nothing has occurred since that time, on the basis of the evidentiary record before me, which establishes that there have been significant events prejudicial to the Children which could constitute a material change in circumstances.
- [45] I will thus make the necessary orders to facilitate A.'s registration forthwith as she is entitled, even at her young age, to know where she will be attending school. Starting Kindergarten is a true milestone event and one that A. should have the opportunity to look forward to and be excited for. It is not fair for the conflict between her parents to deprive her of that opportunity.
- [46] Moreover, despite the respondent's views about the School, the respondent will need to ensure that during his parenting time the Children attend school unless they are ill or there are extenuating circumstances, as I have articulated above.

Variation--The Law

- [47] I have already articulated by factual conclusion but will, for the record, briefly outline the legal basis upon which that conclusion is founded.
- [48] Pursuant to s. 215(1) of the FLA, a court on application by a party may change, suspend or terminate an order, if there has been a change in circumstances.
- [49] The importance of this "change in circumstances" is underscored in the recent Court of Appeal decision in *L.D.B. v. A.N.H.*, 2024 BCCA 61 (which is a very high-conflict family matter). I specifically refer to para. 45 of that decision where Justice Griffin states:
- [45] As a matter of principle, and especially in high conflict family law disputes where court orders are frequently contested, the court must identify some change in circumstances that justifies the variation of a previous order of this nature.
- [50] As I will again articulate when I summarize my orders: there has been no material change. The respondent consented to the School as the school of choice. Nothing since then has occurred that could meet the above threshold.
- [51] I also note that by virtue of the Final Consent Order, this is not a situation where the analysis on school choice and allocation of parental responsibilities, as discussed by the Court of Appeal in *Reda v. Birch*, 2022 BCCA 60, is engaged.

Document Disclosure

- [52] The parties have not yet resolved their financial matters.

- [53] There is merit to some of the claimant's demands for document disclosure. Under no circumstances should the respondent's T1 personal income tax returns not have been produced. This, along with accompanying notices of assessment and financial statements for any closely-held corporations the respondent controls is basic first-tier level of disclosure.
- [54] The respondent is further required, as are all family law litigants, to list all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, pursuant to R. 9-1(1) of the Rules.
- [55] The law is not, however, that a party can demand every document that has come into a party's possession or control because they are suspicious of wrongdoing. They have to specify what document or class of documents they are requesting and tie it to an issue in the proceedings: *Mossey v. Argue*, 2013 BCSC 2078 at para. 15.
- [56] Document disclosure is absolutely critical in family law matters as per the often cited and followed decision in *Cunha v. da Cunha* (1994), 99 B.C.L.R. (2d) 93, 1994 CanLII 3195 (S.C.). However, as per *Mossey*, as referred to above, the threshold is higher than searching the proverbial underwear drawer of the other party.

Conclusion Regarding Orders

- [57] I dismiss the relief at paragraph 1 of the notice of application to vary paragraph 2(b)(iii) of the order of Justice Crerar made May 15, 2023, such that the claimant will have sole parental responsibility with respect to the Children's education and participation in extracurricular activities under s. 41(d) of the FLA.
- [58] This relief is, in my view, inappropriate having regard to the fact that there will be a specific order, set out below, regarding A.'s school registration and attendance.
- [59] To grant the claimant sole parental responsibilities in this regard unnecessarily limits the respondent's ability to exercise his role as a guardian.
- [60] As I have noted above, attending school is not a purely discretionary decision. The Children should be in school during the respondent's parenting time except by agreement or due to illness or exceptional circumstances, but having regard to the parenting schedule, the distance between the parties' residences, and particularly given the Children's ages at this time, the respondent is entitled to exercise discretion about what activities the Children participate in whilst in his care. His role ought not be limited to being a "taxi dad".

- [61] I thus order that, unless otherwise agreed by the parties for there to be an excused absence, the respondent will take N. to and from the School on instructional days during his parenting time, unless N. is medically unable to attend or there are extenuating family circumstances. I add a further provision that in the event of an absence not previously agreed between the parties, the respondent must notify the claimant in writing by no later than 8 a.m. on that day as to the reason why N. will be absent from school.
- [62] I further order that unless agreed by the parties for there to be an excused absence, the respondent will take A. to and from the School on instructional days during his parenting time, unless A. is medically unable to attend or there are extenuating family circumstances. I add a further provision that in the event of an absence not previously agreed between the parties, the respondent must notify the claimant in writing by no later than 8 a.m. on that day as to the reason why A. will be absent from school.
- [63] I order that the respondent will refrain from speaking to the Children about choice of school or otherwise critiquing the School in front of the Children.
- [64] It is not in the Children's best interests to be involved in these matters, given their ages. As I have sought to underscore, these are parental decisions not child decisions. School should be an enjoyable place for the Children and they should not feel like they are in a parental tug-of-war that undermines that school experience.
- [65] Consistent with my findings above, I order that the respondent shall, within seven business days, provide and execute all necessary forms to have A. enrolled at the School for Kindergarten starting in September 2024.
- [66] If the respondent fails to do so, the claimant shall be granted the limited permission under s. 39 of the FLA to exercise sole parental responsibilities to complete those registration forms without the respondent's signature and submit them when registration for the 2024/2025 school year is available.
- [67] I include that caveat because I am aware that the window for registration will close for a period of time over the summer months and in the event this order cannot be entered and the registration documents submitted before that window closes, the claimant shall hold the documents and submit them forthwith when the window again opens.
- [68] My reasons for this order ought to be manifestly clear from my above comments. It was agreed that the Children would attend the School; their attendance is compatible with the parenting schedule; there is nothing but conjecture as to the School not being a suitable school; N. has been there since Kindergarten and has established positive social contexts; and it makes practical sense, where possible, to have siblings attend the same school.
- [69] Pursuant to s. 228 of the FLA, I conclude that the respondent has breached the conduct order provisions of Justice Crerar set forth above by discussing school-choice related issues with the Children or in their presence.

- [70] This conduct, as I have addressed above, is key example of the Children being inappropriately involved in adult issues. Although the substantive issue of enrollment has been revolved, a fine is necessary in order to deter further behaviour in this regard. The Children are already involved in a highly contested dispute as between their parents. School should be a safe place for them. Regardless of whether the respondent likes the school or not, he needs to support their attendance.
- [71] Accordingly, pursuant to s. 228(1)(c)(iii) of the FLA, I order that the respondent pay a fine of \$2,500. I have ordered a fine versus an order to the benefit of the claimant as this is a situation where the claimant has not been directly financially impacted by the conduct in issue.
- [72] The relief sought under s. 228 is being granted simply in order to deter further conduct of this nature. I genuinely hope that the respondent takes some time after receiving these Reasons to reflect on my comments in this regard. Specifically, I want the respondent to understand that I am not financially benefitting the claimant. I am issuing a sanction to deter conduct contrary to what this Court has clearly previously ordered. Court orders are not mere recommendations.
- [73] As it relates to document disclosure, I have made clear that the first tier of disclosure must absolutely be provided. Namely, I order the respondent shall within 14 days produce his T1 personal income tax returns for the years 2019, 2020, 2021, 2022 and 2023, together with any notices of assessment or reassessment. The respondent must also produce financial statements for any corporations he controls (as that term has been defined in accordance with the Federal Child Support Guidelines, SOR/97175).
- [74] Consistent with the above, I further order that the respondent provide an updated Form 8 financial statement within 14 days of this order, which I consider in accordance with R. 5-1 of the Rules, given that the respondent's last amended financial statement was filed October 29, 2020.
- [75] I am not satisfied that there is an established evidentiary basis at this juncture for the remaining disclosure. It may be that certain specific documents can be established to be relevant after the production which I have ordered above but, at present, this has the hallmarks of a Mossey-type demand.
- [76] In my view, the appropriate way to deal with this situation is to adjourn the relief sought in paragraph 4 in the notice of application with the exception of the specified disclosure set forth above.

Costs

- [77] Costs of an action are in the discretion of the presiding justice, whether in chambers or at trial.

[78] Pursuant to R. 16-1(7) of the Rules, the general principle is that costs are awarded to the successful party:

Costs to follow event

(7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[79] The standard of "success" required to be awarded costs of an action under R. 16-1(7) is "substantial success". The Court of Appeal in *Harras v. Lhotka*, 2016 BCCA 246 describes the substantial success standard as follows:

[48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:

Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:

[45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.

[80] In this case, I conclude that the claimant was substantially successful. The primary issue was obviously A.'s schooling and facilitating that registration accordingly. The ancillary issues do not overcome that substantial success threshold, particularly given that I have not actually dismissed the all of the disclosure issues but rather adjourned a portion of them pending the first-tier disclosure.

[81] Accordingly, the claimant is entitled to her costs of this application as ordinary costs in any event of the cause. The costs are not payable forthwith.

"Hardwick J."

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