

CANADA / JUDGMENT

F.K.L. v. D.M.A.T.

2024 BCSC 967

COURT

Supreme Court of British Columbia

DECIDED

4 June 2024

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2024 BCSC 967 F.K.L. v. D.M.A.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

F.K.L. v. D.M.A.T.,

2024 BCSC 967

Date: 20240604

Docket: E88897

Registry: Nanaimo

Between:

F.K.L.

Claimant

And

D.M.A.T.

Respondent

Before: The Honourable Justice MacNaughton

Reasons for Judgment

The Claimant, appearing in person:

F.K.L.

The Respondent, appearing in person:

D.M.A.T.

Place and Date of Hearing:

Nanaimo, B.C.

May 14, 2024

Place and Date of Judgment:

Nanaimo, B.C.

June 4, 2024

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Background to the Litigation

- [1] The parties never married. They cohabited for less than three years before Ms. L left their shared home in Trail, BC and, in October 2017 returned to live with her father in her childhood home in Gold River, BC. At the time, their daughter, A, was not quite two.
- [2] In November 2018, Mr. T moved to Victoria, BC.
- [3] Since separation, ongoing parenting conflict has arisen requiring repeated court intervention.
- [4] Five judges of this Court have made parenting decisions, and all have commented on the parties need for the ongoing assistance of a parenting coordinator.

- [5] Throughout, parenting of A has been complicated by the parents' work schedules and the places in which they chose to live and work. Currently, Ms. L resides and works in Comox, BC, although she spends much of her time at her fathers' home in Gold River, BC. She is a BC Ambulance paramedic. Mr. T lives in Gold River with his new partner and their young child. He works in the oil industry in northern Alberta on a schedule that requires him to be in Alberta for 14 days followed by 13 days off.
- [6] Decisions in this case are made under the Family Law Act, S.B.C. 2011, c. 25 [FLA].

The February 2024 Applications

- [7] In February 2024, the parties cross-applied for the appointment of their preferred choice of parenting coordinators and to vary their proportional shares of the parenting coordinator's costs, once appointed.
- [8] Mr. T also applies to vary the current parenting time, seeking an order that he have two weekends of parenting time each month, during the times he is at his home in Gold River and 46 percent of the parenting time during school breaks and summer vacations. Ms. L opposes Mr. T's application.
- [9] Mr. T's concern about the current parenting order is that he is not always in Gold River during his parenting time with A, and, because Ms. L schedules the parenting time, he rarely has parenting time over key days during the holiday season in December and does not have parenting time on A's birthday.
- [10] As will be discussed later in these reasons, Justice Blok dealt with the appointment of the parenting coordinator in February 2024. He adjourned Mr. T's application to vary the parenting order and it was heard by me on May 14, 2024.
- [11] A, who is now 8, attends school in Gold River. She spends roughly equal parenting time with each of her parents, and they share s. 41 parenting responsibilities. Mr. T has re-partnered and A has a stepbrother, C, who was born in March 2023.
- [12] In these reasons, I will not summarize all of the facts giving rise to the disputes addressed by the earlier decisions. Instead, I will briefly summarize the orders made.

Justice Gomery

- [13] Justice Gomery presided over the parties' five-day trial in the late summer of 2020 and, among other relief, granted final parenting orders. His reasons are cited at: F.K.L. v. D.M.A.T., 2020 BCSC 1296. I will only deal with the relevant parenting orders.

- [14] At trial, Ms. L lived in Gold River and Mr. T lived in Victoria. After contested interim applications, A lived with her mother and maternal grandfather, Mr. L, in Gold River for 11 or 12 days at a time, followed by eight or nine days with her father in Victoria. In the 18 months before trial, Mr. T commuted from Victoria to Northern Alberta for work in the oil industry. He worked eight-days-on/ eight-days-off, but had taken a leave of absence at the beginning of the pandemic, intending to find employment in Victoria.
- [15] Mr. T had parenting time with A for about 8 days out of 20.
- [16] A was about to begin kindergarten and the parties disagreed about where she was to live and attend school. The five-hour driving distance between Victoria and Gold River made the interim shared parenting arrangement unworkable: at para. 93.
- [17] While Justice Gomery was of the view that the interim shared parenting had served A well, and should continue, as a result of the distance between the parties' residences, Justice Gomery determined that it was in A's best interests to live with her mother in Gold River while school was in session but that her father would have substantial parenting time with her on weekends and during school holidays: at para. 100.
- [18] Justice Gomery ordered a parenting plan under which Mr. T had parenting time with A on long weekends, including long weekends attributable to Pro-D days, and one additional weekend a month. When school was not in session, Mr. T had two-thirds of the parenting time: para. 101. Justice Gomery also ordered that the parties share parenting responsibilities and directed the appointment of a parenting coordinator, within 30 days of trial, to assist with implementing the terms of the final order, with the costs to be shared equally.
- [19] Shortly after trial, Mr. T returned to work in Alberta, working hard to earn enough so that he could buy a home in Gold River.

Justice Steeves

- [20] In March 2021, Mr. T relocated to Gold River. The parties had not yet appointed a parenting coordinator as directed by Justice Gomery. The parties negotiated a change to the parenting schedule so that Mr. T would have nine overnights with A when he was at home in Gold River.
- [21] In March 2022, Mr. T applied for a shared parenting schedule and other orders. On March 30, 2022, Ms. L applied for an order that she be permitted to relocate A to the Comox Valley where she expected to accept a permanent position, with BC Ambulance, and that had a more child-friendly schedule, and other orders. Mr. T opposed A's relocation.

- [22] The parties appeared before Justice Steeves on April 27, 2022. He agreed with Justice Gomery's conclusion that, but for the distance between the parties' residences, an order for shared parenting was in A's best interests. In unreported reasons, he concluded that, because the parties now lived in the same community, the objective of equal parenting time should be maintained: at para. 15.
- [23] Justice Steeves granted a shared parenting order. In particular, he ordered that Mr. T would have two weeks of parenting time with A, save and except for one overnight with Ms. L, followed by two weeks of uninterrupted parenting time with Ms. L. He also adjusted Justice Gomery's holiday schedule. As it was premature, he adjourned generally Ms. L's relocation application and Mr. T's cross-application opposing it.
- [24] Justice Steeves referred a number of other issues to a parenting coordinator, who, as I have said, had not yet been appointed.

Justice Lamb

- [25] On June 29, 2022, Ms. L gave Mr. T written notice that, as of September 1, 2022, she intended to relocate A to Comox, BC, about an hour and a half to two hours drive from Gold River. In response, on July 20, 2022, Mr. T opposed the relocation.
- [26] On August 3, 2022, Ms. L applied for leave to relocate A and for certain other orders. Mr. T cross-applied for an order that A reside permanently with him in Gold River. Mr. T's evidence was that he intended to live in Gold River from October to December 2022 while he completed his Red Seal certification as an electrician in Campbell River. He then planned to take vacation and unpaid leave from his employment through to March 2023. He and his partner, Ms. I, were then expecting a child, and he planned to take parental leave until October 2023. He planned to look for local work after receiving his Red Seal certification.
- [27] In Justice Lamb's August 31, 2022 reasons, cited at *F.K.L. v. D.M.A.T.*, 2022 BCSC 2368, she denied Ms. L's relocation application.
- [28] As it related to parenting time, Justice Lamb ordered that A would reside with Mr. T in Gold River while school was in session and would have parenting time with Ms. L:
- i) on every long weekend, including long weekends attributable to pro-D days, from the evening preceding the long weekend until the last afternoon of the long weekend; and
 - ii) one weekend a month, to be chosen by Ms. L from the Friday evening to the Sunday afternoon, provided that Ms. L will notify Mr. T of the weekends chosen by her for parenting time by text or email at least seven days in advance.
- [29] In addition, while school was in session, Ms. L had additional mid-week parenting time with A in Gold River, as agreed by the parties in writing, or as allocated by the parenting coordinator, provided that Ms. L's parenting time did not exceed 60 percent on an annual basis.

- [30] When school was not in session, A was to spend two-thirds of her time with Ms. L and one-third of her time with Mr. T, in both cases rounded to the nearest full day, on dates to be chosen by Ms. L with notice to Mr. T by email at least 30 days in advance.
- [31] On consent of the parties, Justice Lamb ordered that within 30 days of her order, they were to appoint Joan Cotie as their parenting coordinator, with the costs to be shared 75/25, and with Mr. T paying the larger share. Justice Lamb referred parenting time disputes to the parenting coordinator. I understand that the parties have since agreed to vary their shares of the parenting coordinator's costs to 70/30.

Events after Justice Lamb's Order

- [32] There was a delay in the parties appointing Ms. Cotie, and it was not finalized until November 2022.
- [33] After Justice Lamb's order, Mr. T completed his Red Seal certification and took some time off work but he has been unsuccessful in finding local work at pay that can support A and his new family. He continues to work in Alberta and is away about 14 days of every 28.
- [34] The parties continued to disagree about how A was to be parented during Mr. T's regular and lengthy absences from Gold River. Ms. L took over care of A during the 15-days when Mr. T was in Alberta. Ms. L lives with her father in Gold River and commutes to work in Comox on the days she is working and A is in school. On non-school days, she takes A to her home in Comox.
- [35] When Ms. L was not available to care for A, and Mr. T was in Alberta, Ms. L took the position that A should be cared for by her grandfather, Mr. L. In contrast, Mr. T said that A should continue to live in his home and be cared for by his partner, Ms. I.
- [36] The parties sought the assistance of Ms. Cotie to resolve the conflict, but, despite her efforts, no agreement was reached. The parties sought a formal determination, and one was issued on June 9, 2023. It set out, as one of its basic facts:

[Mr. T] works away from Gold River for extended periods of time (14 days) and therefore, time at his home during these periods are not considered parenting time.

- [37] Ms. Cotie determined that each of the parties would have responsibility for A's childcare during their parenting times. If Ms. L and A's grandfather were both unavailable to care for A during Ms. L's parenting time, Ms. L was to ask Mr. T or Ms. I if they could care for A; similarly, if Mr. T and Ms. I were both unavailable to care for A during Mr. T's parenting time, Mr. T was to ask Ms. L if she or her father could provide care.

Justice Saunders

- [38] In August 2023, the parties appeared before Justice Saunders on Ms. L's second application to relocate A to live with her in Comox.

- [39] In Justice Saunders' August 31, 2023 reasons cited at: *F.K.L. v. D.M.A.T.*, 2023 BCSC 1535, he said that both parties sought clarification from Ms. Cotie about her determination. During a mid-July Zoom meeting, she directed that periods when Mr. T was working in Alberta would be considered his parenting time, and that Ms. L's parenting time would be limited to the periods specified in Justice Lamb's order.
- [40] On May 19, 2023, Ms. L provided Mr. T with formal written notice of her intention to relocate A to live with her in Comox. Mr. T applied on June 12, 2023, seeking to prohibit the relocation and to modify the parenting plan. On July 6, 2023, Ms. L sought the Court's permission to relocate A.
- [41] Justice Saunders considered whether there had been a material change in circumstances giving the Court jurisdiction to vary Justice Lamb's Order. After citing the test for what amounted to a material change in circumstances, he wrote:
- [23] Mr. T's lengthy absences from Gold River for [work] materially impact his ability to exercise his responsibility under s. 41(a) of the FLA for the day-to-day care, control, and supervision of [A], which is one of the mandatory factors in determining a child's best interests under s. 37(2). While Lamb J. did not state explicitly that she was assuming Mr. T would not return to work at Imperial Oil, and while she would have at least been aware that there was no guarantee he would be able to find work locally, both her reasons as a whole and the specific terms of her order -- in particular, that A would reside in Gold River "with [Mr. T]", and that no specific provision was made for Ms. L having more liberal parenting time when Mr. T would be away -- strongly suggest that she was presuming Mr. T would be residing in Gold River permanently, and certainly through his contemplated period of paternity leave ending in October 2023. Nothing in the evidence of Mr. T that was before Lamb J. suggested that Mr. T was planning on any other outcome. I find there has been a material change in A's circumstances.
- [42] Justice Saunders did not accept Ms. L's argument that the FLA, prevented the court from ordering that a child reside in the home of a parent who will have to regularly, but temporarily, authorize a non-guardian--in this case, Ms. L--to exercise parenting responsibilities in his or her absence. He then considered A's best interests.
- [43] Justice Saunders denied Ms. L's application to relocate A to Comox. Determining that Mr. T's work-related absences weighed in favour of Ms. L having the opportunity to exercise regular mid-week parenting in Gold River, he varied Justice Lamb's order, increasing Ms. L's parenting time by one mid-week overnight when Mr. T was in Alberta working. Justice Saunders also ordered that Ms. L have additional parenting time as agreed between them or as determined by the parenting coordinator to be in A's best interests.
- [44] Ms. L has appealed Justice Saunders' decision. The appeal has yet to be scheduled.

[45] In January 2024, Ms. Cotie terminated her contract as the parties' parenting coordinator. In her reasons delivered to the Court, she indicated that Mr. T was barely communicating with her, failing to follow the terms of the parenting coordinator agreement, and not paying his share of the cost. Both parties apparently threatened to formally complain about Ms. Cotie.

Justice Blok

[46] Both parties sought the appointment of a new parenting coordinator, but proposed different individuals.

[47] In February 2024, Justice Blok heard those applications. In unreported reasons, Justice Blok appointed Anna Perry as the parties' parenting coordinator. He wrote that, in part, the parties' court appearances on parenting issues is due to the "persistent inability of the parties to cooperate for the benefit of [A].": para. 57.

[48] On consent, Justice Blok varied Justice Saunders' order to permit Ms. L to exercise additional parenting time in Gold River during the school week, so long as that time is when Mr. T was not at home in Gold River on his days off, and that the additional time does not result in Ms. L's overall parenting time exceeding 60 percent annually. Justice Blok adjourned Mr. T's late-filed application to vary parenting time to May 14, 2024. He explained that when that application was heard, Mr. T would have the onus of showing a material change in circumstances to justify a variation.

The application before me

[49] The issue before me is Mr. T's application to vary the parenting arrangements. He seeks an order that he have two weekends of parenting time a month at times when he is at home in Gold River and 46 percent of the parenting time during school breaks and summer vacations. In effect, he submitted that there should be a return to the parenting arrangements ordered by Justice Steeves.

[50] Attached to Mr. T's materials is a draft proposed final order that would vary Justice Saunders' order. In particular, he proposed that at the end of his next two-week work period, the parenting schedule would be:

- a) During the 13 overnights a month in which Mr. T is at home in Gold River, the parties would have parenting time with A on the following schedule:
 - i. six overnights with Mr. T;
 - ii. one overnight with Ms. L;
 - iii. followed by six overnights with Mr. T.

- b) During the two weeks a month in which Mr. T is working away from Gold River, A would reside with Ms. L. After seven consecutive overnights with Ms. L, on the first Tuesday, Ms. I would pick A up after school and take her to spend time with her stepbrother. Ms. I would return A to her maternal grandfather's home in Gold River by 7 p.m. the same day.
 - c) Exchanges would occur at A's school. Mr. T would drop A off at school on the morning of his last parenting day, and Ms. L would pick A up from school at the start of her parenting time.
 - d) On days on which a parenting exchange did not occur on a school day, the parent starting their parenting time would pick A up from the other parent's home, or at another agreed location. Pick-up and drop-off times to remain the same.
- [51] In addition, Mr. T sought a variation of the holiday parenting time ordered by Justice Saunders. In particular, he proposed:
- a) During July and August in each year, the regular parenting schedule would be adjusted so that Mr. T would have parenting time with A for 13 days without interruption.
 - b) During December, the regular parenting schedule would be adjusted so that Mr. T would have parenting time with A for 13 days without interruption. Mr. T's 13 days in December would fall on Christmas Day in alternating years and, in any event, would not exceed more than half of the winter school break.
 - c) During March, the regular parenting schedule would be adjusted so that Mr. T would have parenting time with A for 13 days without interruption. Mr. T's 13 days in March would not exceed more than half of the spring school break.
- [52] Ms. L does not consent to Mr. T's proposed order and argues that there has been no material change in circumstances warranting a variation.
- [53] In his submissions, Mr. T described the variable and unpredictable nature of the current parenting arrangements and the stress it is causing him and Ms. I. He largely blamed that on Ms. L's variable work schedule and conflicts that have arisen because of it.
- [54] Throughout this file, all of the judges who have interacted with the parties agree that an essential component of the parties' parenting schedule is the involvement of a parenting coordinator. Most recently, Justice Blok said in his unpublished reasons:
- [62] There is an element of self-fulfilling prophecy to a situation where a parenting arrangement does not work because one key component is absent, or where one party refuses to cooperate with or pay for the services of a parenting coordinator who was appointed to help the parties resolve their conflicts.
- [55] Justice Blok then commented on the parties' duty to take all reasonable steps to make the existing arrangement work, including having a parenting coordinator in place as ordered by the Court.

- [56] In this case, despite Justice Gomery's trial order, the parties have only had a parenting coordinator in place from November 2022 to January 2024, the date on which Ms. Cotie was appointed and then terminated the contract. Ms. Perry's contract has not yet been signed by Mr. T, and I ordered him to do so by a fixed date. As a result, the parties have not had the benefit of working with a parenting coordinator to advance their own conflict resolution skills--one of the goals parenting coordination seeks to achieve.
- [57] Justices Gomery, Lamb, and Saunders were all critical of Ms. L's somewhat "rigid" parenting approach.
- [58] On the evidence before me, some of that rigidity continues. Rather than have A spend time with her step-mother and step-brother, Ms. L commutes to and from Gold River to Comox to work. She does so on the basis that she believes that A needs to have a parent there for her. She acknowledges that the commute between Comox and Gold River is stressful, expensive, and time consuming, but is not open to other arrangements that would reduce the stress, cost, and time.
- [59] There is also evidence of a strained relationship between Ms. L and Ms. I. Ms. L seems reluctant to acknowledge the significant role that Ms. I plays in A's life. Ms. I was removed as a member of a school-based Facebook group managed by Ms. L. School activities are posted on the group page.
- [60] I am hopeful that the parenting coordinator can assist the parties to address these issues and achieve a more flexible parenting arrangement.

Analysis and Conclusion

- [61] However, for the reasons that follow, I decline to vary the current parenting order.
- [62] Mr. T has the burden of showing that there has been a material change in A's needs or circumstances since the last order was made.
- [63] Pursuant to s. 47 of the FLA, a court has jurisdiction to change, suspend, or terminate an order as it relates to parenting arrangements. The court may change, suspend, or terminate an order for parenting arrangements if satisfied that there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person, since the order was made (s. 47). The Court of Appeal has interpreted the term "change" in s. 47 as a material change in circumstances as applied under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 1996 CanLII 191. Justice Stromberg-Stein wrote in *Williamson v. Williamson*, 2016 BCCA 87:

- [31] [T]he Supreme Court has consistently interpreted this provision as requiring a material change in circumstances: see for example, *Gilmour v. Herrick*, 2013 BCSC 1591 at para. 13; *Bradley v. Bradley*, 2015 BCSC 1587 at paras. 21-23; and, *J.D.C. v. K.L.M.F.C.*, 2014 BCSC 2182 at paras. 261-262. Given the reasoning of this Court in *Boychuck and M. v. M.*, and the similarities between s. 47 of the FLA and s. 20 of the FRA, I conclude that a material change in circumstances is required under s. 47 of the FLA.
- [32] The first step in the analysis in *Gordon v. Goertz* is to "determine whether there has been a material change in circumstances since the making of the prior order": *Boychuck* at para. 14. The Court in *Gordon* explained what is necessary to establish a material change in circumstances:
- [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued...
- [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way ...The question is whether the previous order might have been different had the circumstances now existing prevailed earlier...Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.
- [Emphasis in original.]
- [64] A material change in circumstances is one that, if known at the time, would likely have resulted in different terms in the initial order (*L.M.P. v. L.S.*, 2011 SCC 64). If the matter relied on as constituting a material change was known at the relevant time, it cannot be relied on as the basis for a variation. The test is subjective. As explained by the Court of Appeal in *Moazzen-Ahmadi v. Ahmadi-Far*, 2016 BCCA 503 at para. 21, a "material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered".
- [65] I have considered all of Mr. T's submissions to determine whether he has established that there has been a material change in circumstances since Justice Lamb's order, as varied by Justice Saunders' order, and conclude that he has not met his onus. There has been no material change in circumstances permitting me to vary either order. The parents continue to work and live in different communities.
- [66] The parties knew when they appeared before Justice Lamb that her order contemplated Ms. L exercising parenting time in Gold River while Mr. T was out of town. That remained the case when they appeared before Justice Saunders.

- [67] The parenting time remains shared, and Ms. L's time is not to exceed 60 percent annually.
- [68] The fact that Mr. T and Ms. L have a child, a step-brother to A, was clearly contemplated when the parties were before Justice Lamb, and the child was born when they appeared before Justice Saunders.
- [69] What Mr. T appears to really be objecting to is Ms. L's selection of her parenting days and the fact that she has chosen to parent A, in Gold River, while Mr. T is away for work. Addressing the implications and possible inequities of Ms. L's choices is something that should be addressed with Ms. Perry. I cannot find that the parenting orders are unworkable such as to create a material change in circumstances.
- [70] For these reasons, Mr. T's application is dismissed, and Ms. L is entitled to her costs of this application.

"MacNaughton J."

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