

CANADA / JUDGMENT

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

2024 BCCA 238

COURT

British Columbia Court of Appeal

DECIDED

13 June 2024

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2024 BCCA 238 F.K.L. v. D.M.A.T.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

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

2024 BCCA 238

Date: 20240613

Docket: CA49340

Between:

F.K.L.

Appellant

(Claimant)

And

D.M.A.T.

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Harris

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated

August 31, 2023 (F.K.L. v. D.M.A.T., 2023 BCSC 1535, Nanaimo Docket E88897).

Oral Reasons for Judgment

Counsel for the Appellant:

A.M. James

H.M. Gowans

The Respondent, appearing in person:

D.M.A.T.

Place and Date of Hearing:

Vancouver, British Columbia

June 13, 2024

Place and Date of Judgment:

Vancouver, British Columbia

June 13, 2024

Summary:

This appeal concerns parenting arrangements in respect of the parties' eight-year-old daughter. Under the order that governed parenting arrangements prior to the order under appeal, the child resided primarily with Mr. T. in Gold River during the school year. Ms. L. was allocated some parenting time, most of which was exercised in Comox. The order was made on the understanding that Mr. T. would be residing and working in Gold River. Mr. T. decided to return to his previous employment, working in Northern Alberta for 14-day stints, between which he returned to Gold River for 14 days. Given the material change in circumstances, both parties applied for modifications to the parenting order, with Ms. L. proposing that the child be relocated to Comox to reside primarily with her. The judge modified the parenting order in minor respects but rejected the application to have the child move to Comox to live with the appellant. He indicated that when Mr. T. was away for work, he could authorize his wife to undertake parental responsibilities under s. 43 of the Family Law Act. Ms. L. appeals, arguing that parental responsibilities cannot be delegated in that fashion. She seeks an order relocating the child to reside with her in Comox.

Held: Appeal dismissed. The reference to s. 43 of the statute in the order was unnecessary, but it does not invalidate the order. The arrangements put in place by the judge exhibited no reversible error.

- [1] GROBERMAN J.A.: The parties to this appeal are the mother and father of an eight-year-old child. They have been and continue to be involved in high-conflict family litigation. The primary issue has been the allocation of parenting responsibilities in respect of the child. This is an appeal from a judgment allocating parenting time and, as a consequence, parenting responsibilities between the parties.
- [2] The issues on this appeal are largely limited to discrete questions of statutory interpretation. The main question is whether, when Mr. T. is away from the child for what the appellant describes as "regular, lengthy and predictable periods" for his work, it is permissible for his wife, Ms. I., to care for the child. The appellant says that this would be an unauthorized delegation of parental responsibilities under the Family Law Act, S.B.C. 2011, c. 25. She says that the judge in the court below erred in assuming that Mr. T. could delegate those responsibilities to Ms. I.

Background to the Appeal

- [3] The judge's findings of fact are not challenged, nor, at least directly, is his evaluation of the best interests of the child. Accordingly, I will outline only those facts that are relevant to the statutory interpretation issues. A much more detailed background of the case can be gleaned from the reasons for judgment in the court below.
- [4] Mr. T. resides in Gold River on Vancouver Island. He works at Imperial Oil's Kearl Lake work camp in the Athabasca oil sands north of Fort McMurray, Alberta. He travels to Kearl Lake for fourteen-day work stints, returning home for fourteen days between stints.
- [5] From the time the parties separated until 2022, the child lived primarily with Ms. L.
- [6] When Ms. L. moved to Comox from Gold River in 2022, Mr. T opposed her application to move the child from Gold River. Mr. T. had, himself, moved to Gold River to be close to the child. In a 2022 order, the British Columbia Supreme Court considered it was in the child's best interests to remain in Gold River with Mr. T. At that time, Mr. T. had plans to live and work in Gold River and to cease working in northern Alberta.
- [7] Contrary to those plans, Mr. T returned to his job at Kearl Lake in April 2023. Ms. L. again applied for permission to move the child to Comox, where the child could live with her. It is from that application that this appeal arises.
- [8] On the application, the judge made minor adjustments to the parenting schedule, but was not convinced that the child should move to Comox or reside primarily with Ms. L. He considered that it was in the child's best interests to remain in Gold River during the school year, even though Mr. T would not be physically present there for about half the time. The judge was of the view that the best interests of the child would be served by the child remaining at the residence in Gold River, with Ms. I and the child's half-brother when Mr. T was at Kearl Lake.

- [9] Ms. L. contends that such an arrangement is contrary to the provisions of the Family Law Act. She describes it as an impermissible delegation to Ms. I of Mr. T's parental responsibilities. She seeks to have this Court set aside the parenting arrangement ordered in the court below in favour of one in which the child resides primarily with her in Comox.

The Statutory Framework

- [10] The Family Law Act introduced major reforms to both the language and substance of the law. Courts used to speak of parental authority over children and used terms such as "custody", "access" and "primary residence". In contrast, Part 4 of the Family Law Act speaks of "care of and time with children", "parenting time", "guardianship", "parental responsibilities" and "parenting arrangements".
- [11] Among the goals of the legislation is to reduce the degree to which a parent's control over a child is seen as a parental right or a prize to be won, and to increase the degree to which such control is viewed as a responsibility. There are, of course, limits on the degree to which the nomenclature influences human behaviour.
- [12] "Guardianship" is a key concept under the statute. Section 39 provides that a child's parents are generally the child's guardians. There are exceptions to that principle, but none are applicable here. The appellant and respondent are the child's guardians.
- [13] Other persons can become guardians only in specific circumstances. Section 50 of the statute provides that a person, other than a parent, cannot become a child's guardian by agreement except as provided by the Act (or certain other statutes). A step-parent will not, typically, be a guardian unless a court has specifically appointed them to be one by court order under s. 51 of the Act.
- [14] Ms. I., then, is not a guardian of the child.
- [15] Section 40(1) of the statute provides that "Only a guardian may have parental responsibilities and parenting time with respect to a child". Thus, Ms. I. does not have parental responsibilities or parenting time with respect to the child.
- [16] Parental responsibilities and parenting time are discussed in greater detail in ss. 41 to 43 of the statute:

Parental responsibilities

41. For the purposes of this Part, parental responsibilities with respect to a child are as follows:
- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
 - (b) making decisions respecting where the child will reside;
 - (c) making decisions respecting with whom the child will live and associate;

- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;
- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
- (l) starting, defending, compromising or settling any proceeding relating to the child, and
- (m) identifying, advancing and protecting the child's legal and financial interests;
- (n) exercising any other responsibilities reasonably necessary to nurture the child's development.

Parenting time

42(1) For the purposes of this Part, parenting time is the time that a child is with a guardian, as allocated under an agreement or order.

- (2) During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.

Exercise of parental responsibilities

43(1) A child's guardian must exercise parental responsibilities in the best interests of the child.

- (2) If a guardian is temporarily unable to exercise any of the parental responsibilities described in section 41 (a), (c), (d), (f) to (j) or (l), the child's guardian, in writing, may authorize a person to exercise, in the best interests of the child, one or more of those responsibilities on that guardian's behalf while the guardian is unable to do so.

[17] The appellant's position, both in the court below and on this appeal, is that Mr. T. is unable to exercise his parental responsibilities (or some of them) when he is at the Kearl Lake camp, and that those responsibilities cannot be delegated to Ms. I, who is not a guardian.

- [18] The judge appears to have relied on s. 43 of the Act as authority for Ms. I. to assume Mr. T's parental responsibilities:
- [27] Contrary to Ms. L's submission, the FLA does not require that parenting responsibilities can only be exercised by biological parents. Section 40 provides that "[o]nly a guardian may have parental responsibilities and parenting time with respect to a child". That provision would appear to be a bar to a court formally assigning parenting responsibilities to a non-guardian; see *R.V.S. v. J.D.H. and S.A.H.*, 2017 BCPC 311. However, s. 43(2) makes allowance for a guardian temporarily authorizing a non-guardian to exercise parenting responsibilities in their stead
- [19] For her part, Ms. L. says that s. 43(2) has no application, as Mr. T's absences from Gold River are regular, lengthy and predictable, and are not the sort of situations that are properly thought of as "temporary" under s. 43(2).
- [20] The judge noted that there is very little judicial authority in respect of the scope of s. 43(2). He mentioned the *R.V.S.* case, which does not assist very much in the analysis, and was, in any event, not a precedent binding on him. He also mentioned *L.J.G. v. N.B.*, 2017 BCSC 350, and *M.J.P. v. A.E.*, 2020 BCSC 647, which he recognized stood only for the proposition that non-guardians cannot be assigned parental responsibilities. He noted that neither case considered s. 43(2).
- [21] In respect of s. 43(2), the judge mentioned a commentary on the Family Law Act:
- [28] John-Paul Boyd, *JP Boyd on Family Law*, 3rd ed (Vancouver: Clicklaw Wikibooks, 2019) at 321 gives three examples of situations where temporary authorizations under this subsection are commonly used: when a child has to go somewhere else to attend school; and, when a guardian is seriously ill but is expected to recover, or is temporarily able to discharge their duties due to surgery or other medical treatment. While those may be the more common uses to which the delegation power is put, I find nothing in the language of the subsection that bars written assignment of parenting responsibilities to someone functionally serving as a step-parent in the parent's absence. If, as suggested in the Boyd text, the delegation power is appropriately used when a child may be absent at a boarding school for an entire school year, there would appear to be no issue with a functional step-parent exercising responsibilities for two weeks out of every month during the school year.

Section 43(2) of the Family Law Act

- [22] On appeal, Ms. L. says that the judge erred in treating Mr. T's "regular, lengthy and predictable periods" of time away from Gold River as times when Mr. T. is "temporarily unable to exercise any of the parental responsibilities". She says that they are not "temporary" in nature.

- [23] Counsel has advised us that this is a matter of first impression. Apart from the authorities referred to by the chambers judge, she cites only the Alberta case of *DPN v. Toews*, 2013 ABQB 445, on this issue, which she rightly characterizes as being of limited assistance. In that case, the child's father was accused of murdering the child's mother, and was incarcerated. When incarcerated, he signed a document purporting to delegate his powers and duties as the child's guardian to his own parents. The validity of the delegation was not an essential question in the case, and is dealt with only in a footnote, which states that the situation was an "emergency" and that under the Alberta legislation, a guardian can appoint a person to act on their behalf in an emergency situation. The British Columbia legislation, though modelled, to some degree on the Alberta statute, does not contain the "emergency situation" language. In any event, we are not, here, dealing with an emergency situation.
- [24] As I read s. 43(2), it has limited application to this case. I say this because Mr. T. is not, by being away from Gold River, "unable to exercise parental responsibilities". There is no suggestion in the evidence that Mr. T. is incommunicado when he is at the Imperial Oil facility at Kearl Lake. Indeed, while the issue is not directly addressed in the documents in the Appeal Record, there is at least one indication that Mr. T. sent Ms. L. a text message while he was at the camp, suggesting that the camp must be served by a cellular network. I am prepared to assume from the evidence that Mr. T. can have access to both cellular services and the Internet when at the camp. He is, thus, able to communicate his decisions readily to others who can ensure that they are acted upon. Most of the parental responsibilities set out in s. 41, then, can clearly be met while Mr. T. is away from Gold River.
- [25] The only responsibility that can be said to raise any concerns is "having day-to-day care, control and supervision of the child" as set out in ss. 41(a) and 42(2) of the Act. In my view, however, those sections do not preclude a guardian from exercising "care, control and supervision" of the child by leaving the child in the hands of competent, trusted individuals. I say that because it is impossible for a guardian to personally care for, control, and supervise a child at all times. No one is omnipresent. Children may be in day care for significant proportions of their days, or in school. Older children may live remotely from their guardians. In my view, there is nothing that prevents Mr. T. from caring for, controlling and supervising the child while he is away from Gold River, though he will have to rely on others to assist him in doing so.
- [26] Unless the Act is read as allowing a person to rely on the assistance of others to care for, control and supervise a child, a guardian would have to prepare s. 43(2) authorization every time a child went to day care or school, visited a friend's house, had an appointment with a doctor, dentist, or hairstylist, or simply went for a recreational hike with others.
- [27] John-Paul Boyd is a very knowledgeable and respected commentator on the Family Law Act, and I believe that the examples he gives of situations where temporary authorizations under s. 43(2) are typically given are apt. In cases where a guardian is seriously ill, undergoing surgery, or in medical treatment such that they are actually disabled from exercising their parental responsibilities, they may have to have another person perform them. Similarly,

because a parent may have to give up control and supervision for an extended period while a child is at a boarding school it may be essential to assign parental responsibilities in the short term.

- [28] I do not see this case as one that raises those concerns. Mr. T. is not "delegating" his parental responsibilities to Ms. I. Rather, he is relying on her to assist in the care, control and supervision of the child. In having her do that, Mr. T. is not giving her his responsibilities as a guardian. The person who is entrusted with a child does not thereby acquire the powers of a guardian under the Act. Nor does a guardian relinquish their own powers or absolve themselves from fulfilling their responsibilities by engaging the assistance of other people.
- [29] There may be instances, particularly when Mr. T. is away from Gold River when he is genuinely disabled from fulfilling his parenting responsibilities, and in those instances, s. 43(2) would be applicable. Such situations would clearly be temporary, and clearly fall within the subsection. I expect such situations will be rare.
- [30] The formal order issued in this case includes the following provision:
4. Pursuant to s. 43(2) of the FLA, if either the Claimant or the Respondent is temporarily unable to exercise the parental responsibilities described in ss. 41(a), (c), (d), (f) to (j), or (I), including either party being absent from Gold River for employment reasons, they may in writing authorize a person to exercise, in the best interests of the child, one or more of those responsibilities on their behalf while they are unable to do so, including but not limited to the Respondent authorizing Ms. [I.] during his work-related absences from the home, and including but not limited to the Claimant authorizing [her father] for the duration of any period of the Claimant's parenting time provided for in this Order, when for work-related reasons she is unable to be in Gold River. The Claimant and Respondent shall promptly provide each other with a copy of any such authorization made by them.
- [31] Apart from the requirement to provide a copy of the authorization to the other parent, I do not see this provision as going beyond the statutory provision.
- [32] While the powers described would have existed even without the order, I see no harm in their inclusion in the order. The provision certainly does not invalidate the order.
- [33] I turn then to the argument that the judge made palpable errors in his analysis of the best interests of the child. Section 37(2) of the Act sets out factors that a judge must consider in making an order under Part 4. I do not suggest that the presence or absence of Mr. T. from the family home in Gold River is excluded from these considerations. It is clear, however, that the judge took that factor into account in making his order. He also gave proper consideration to the other factors enumerated.

- [34] Counsel for Ms. L. says that the judge erred by giving too much weight to preservation of the status quo, and by defaulting to the position of the child remaining in Gold River. I do not read the judgment that way. At least two judges who heard aspects of the case had made findings about the child's attachment to Gold River. It would have been an error for the judge not to take those findings into account. The reasons do not suggest that the judge blindly adopted the status quo as opposed to fully considering the evidence.
- [35] Other errors alleged are not, either alone or together, either palpable or overriding. Counsel says that the judge overestimated the amount of time that the child will be physically with one parent or the other by overestimating the number of professional development days. The evidence in support of that submission is lacking, however, so it cannot be said that the error is palpable. In light of the overall tenor of the reasons, it also cannot be said to be overriding.
- [36] Similar observations can be made with respect to other alleged errors. For example, counsel points out that the judge overlooked the possibility of Mr. T. spending a few hours with the child when his flight from Kearl Lake to Comox landed before heading home to Gold River. If that was genuinely possible (and the evidence, again, appears to me to be equivocal), it is of so little importance in the scheme of the judgment that it cannot form the basis for a successful appeal.
- [37] Finally, it is contended by Ms. L. that the judge failed to attach sufficient weight to certain factors, and attached too much weight to others. Weighing the factors was a function for the trial judge, and I am not persuaded that he made any reversible error in either his methodology or conclusions.
- [38] In the circumstances, I am not persuaded that the order contravenes the Family Law Act or was otherwise flawed. I would dismiss the appeal.
- [39] HARRIS J.A.: I agree.
- [40] SKOLROOD J.A.: I agree.
- [41] GROBERMAN J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Groberman"

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