

CANADA / JUDGMENT

Fehr v. Fehr

2024 BCSC 2374

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 2374 Fehr v. Fehr

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fehr v. Fehr,

2024 BCSC 2374

Date: 20241227

Docket: E62930

Registry: Kamloops

Between:

Timothy George Fehr

Claimant

And

Heather Fehr and Brian James Martin

Respondents

Before: The Honourable Justice B. Smith

Reasons for Judgment

Counsel for the Claimant:

J. Macdonnell

Appearing in person:

H. Fehr

No other appearances

Place and Date of Hearing:

Kamloops, B.C.

November 1 & 22, 2024

Place and Date of Judgment:

Kamloops, B.C.

December 27, 2024

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Introduction

[1] This family law dispute involves primary residence and education of two young children. Timothy Fehr and Heather Fehr are the biological parents of the children. Brian Martin is Heather Fehr's brother, but apart from being named as a respondent, he is not involved in the application, the parenting issues for determination, or my decision.

- [2] The parties began living in a marriage-like relationship in October 2008, married in August 2011, and separated in April 2023. Post-separation, the respondent relocated with the children from Clearwater to Kamloops. Since separation, the parties have maintained an informal arrangement for parenting time, on a week on/week off basis.
- [3] The claimant brings this application because he has concerns about the respondent's parenting of the children, specifically related to their health and education. His concerns are based on things he has personally observed, and what he says the children have told him.
- [4] The claimant applies for the following orders:
1. primary residence of the children;
 2. that the respondent will have reasonable and generous parenting time on a schedule to be arranged by the parties, in advance;
 3. that pursuant to s. 41(d) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], he has sole parental responsibility with respect to the children's education and participation in extracurricular activities;
 4. that he does not need to obtain the respondent's consent to register one of the children at a particular elementary school in his catchment area; and
 5. costs.
- [5] The respondent opposes all of the orders sought, because she denies the basis for the claimant's concerns.
- [6] Parenting arrangements engage the question of what is in the best interests of the children.

Discussion

- [7] Best interests of children are the subject of s. 37 and 38 of the FLA. In making an order regarding parenting arrangements, I must consider the best interests of the child only: FLA, s. 37(1). To determine what is in the best interests of a child, all of their needs and circumstances must be considered, including the factors identified in s. 37(2). An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, their physical, psychological and emotional safety, security and well-being: s. 37(3). In making an order for parenting arrangements, I may consider a person's conduct only if it substantially affects a factor set out in s. 37(2), and only to the extent that it affects that factor: s. 37(4). In assessing the family violence factors described in s. 37(2)(g) and (h), I must consider all the factors identified in s. 38.
- [8] As with the FLA, the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] contains a similar list of factors to consider: s. 16(3). I must consider only the best interests of the child of the marriage in making a parenting order or a contact order: s. 16(1); and when considering the

factors referred to in subsection (3), I must give primary consideration to the child's physical, emotional and psychological safety, security and well-being: s. 16(2). Section 16(4) pertains to factors relating to family violence and what I must consider. Section 16(5) provides that in determining what is in the best interests of the child, I must not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time decision-making responsibility or contact with the child under a contact order.

- [9] The children, James and Annabelle, are currently homeschooled. James is ten years old and is autistic. It is undisputed that the homeschool environment is appropriate for him, and that the claimant has the necessary means and capability to meet his needs. Annabelle is seven years old. According to the claimant, she wishes to attend school in a conventional setting.
- [10] The parties live in different communities, approximately two hours apart by car. The claimant says that it is appropriate that in the circumstances he should have primary residence of the children. He says he can homeschool James, and Annabelle can attend an elementary school within his catchment area, where she will have a stable schedule. He says the current parenting arrangements have not been conducive to co-parenting, and that there have been multiple incidents between him and the respondent which now necessitate formal parenting arrangements.
- [11] I begin by considering the factors identified in s. 37(2) of the FLA.

Children's Health and Emotional Well-Being: s. 37(2)(a)

- [12] The claimant deposes to his concerns about the children's basic hygiene and whether they are receiving their medication properly while in the respondent's care. He cites a number of concerns, such as instances of the children having wax in their ears, untrimmed fingernails, not having toothbrushes or toothpaste, not attending the dentist for regular checkups, not having appropriate seasonal clothing or properly-sized clothing, and James' medication not being packed when the children transition parenting time.
- [13] The respondent denies the claimant has any basis for concerns. As I understood her oral submission on this point, it was generally to the effect that the things the claimant is concerned about are simply part of normal child-rearing, and that the respondent's inability to recognize this indicates more about his own parenting abilities than it does about hers.
- [14] The respondent's aunt, Brenda Sykes; and her mother, Crystal Martin, provided affidavits, the content of which speak in glowing terms of the respondent's abilities as a parent. According to them, whenever they have seen the children, they are clean, given healthy foods and appear happy. Crystal Martin also expresses concerns about the claimant, deposing that she has seen him arguing with James while James has been dysregulated. She alleges the claimant has allowed another adult to inappropriately discipline James. While her affidavit does not indicate the source of this information, I infer from other material that

the respondent is the source. She also expresses concern that the children will be around the claimant's friend "Andrew", due to "what I know of his past drug use and lifestyle". While her affidavit does not indicate the source of her knowledge, I infer from submissions at the hearing that "Andrew" is an adult man who lives with the claimant.

- [15] The respondent also provided an affidavit from Marcie Mutch, who is identified as the C.O.O. and Events Manager of Kamloops Art Party, and someone who has known the respondent since July 2024. Ms. Mutch deposes to various positive character traits that the respondent possesses, including in regards to her dealings with children generally, as well as her own.
- [16] The claimant says I should view these affidavits with caution: in the case of Brenda Sykes and Crystal Martin, because they are aligned with the respondent; in the case of Marcie Mutch, because it is vague. The claimant denies any inappropriate conduct involving the children, whether by him or somebody else.
- [17] The parties are currently in a shared parenting arrangement, with parenting time on a week-on/week-off basis. They are equally responsible for ensuring the children engage in proper physical and dental hygiene.
- [18] I am satisfied that occasional parental failures to ensure their children do not accumulate ear wax or untrimmed fingernails can be overlooked as simply part of the normal child-rearing process. Children's ears accumulate wax, and their fingernails grow, all the time. The claimant and the respondent share responsibility for these aspects of the children's care.
- [19] I am not satisfied that the children's dental hygiene or care has been sub-standard. The claimant's concern about the children not having toothbrushes or toothpaste at exchanges does not automatically lead to the conclusion that the respondent is not ensuring the children engage in proper day-to-day dental hygiene while they are in her care, which is not corroborated in the material.
- [20] The claimant's assertion that the children have not been attending the dentist for regular checkups, and not having appropriate seasonal clothing, or properly sized clothing, are also things for which he and the respondent share responsibility.
- [21] The claimant's allegation that James' medication not being packed when the children transition parenting time is of some concern. This should not be happening.
- [22] The respondent's affidavit in response to the application does not address the claimant's concerns, although they are partially addressed in the affidavits of Ms. Sykes, Ms. Martin and Ms. Mutch.
- [23] I do not discount that Ms. Sykes and Ms. Martin may be aligned with the respondent, as they are her family members. That said, I cannot discount their affidavits on this basis alone. I also recognize the limits of their evidence. They do not live with the children and their observations are necessarily limited by that. I do however give them some weight.

- [24] I agree with counsel for the claimant that the affidavit of Ms. Mutch is vague, which I attribute to the fact that she has only known the respondent for a few months. I am unable to give it much weight.
- [25] The claimant says Annabelle has struggled with the learning environment of homeschooling. He says that allowing Annabelle to have a consistent and stable home life and the ability to learn with peers in her age group would assist in relieving her anxiety and promote her adaptation to new situations and environments. He says Annabelle requires the socialization which public school offers and can thrive, by having friends to learn and play with, while developing social and other skills which will contribute positively to her mental and intellectual development.
- [26] While I agree with all of these propositions, it does not follow that Annabelle must attend any particular school. The claimant wishes to re-enroll Annabelle in an elementary school within his catchment. In the respondent's affidavit, she deposes that she is not opposed to Annabelle attending public school in Kamloops, which she says the claimant is opposed to.
- [27] The claimant says Annabelle has regularly expressed anxiety, especially surrounding transitions during parenting time. This is not something which militates one way or the other on the question of whether the claimant should have primary residence of the children. Irrespective of whether the claimant has primary residence of the children, there will still be transitions during parenting time.

Children's Views: s. 37(2)(b)

- [28] The children are old enough that is appropriate for me to consider their views.
- [29] The affidavits are silent concerning James' views.
- [30] In the claimant's affidavit, he deposes that Annabelle has a strong desire to attend a particular elementary school within his catchment area. He says she already has friends who attend there, and he takes her there when students are on recess, so she can socialize with them.
- [31] While Annabelle's apparent views support the claimant's application, in the sense that she could not attend school in Clearwater while the parties maintained a shared parenting arrangement, that is not dispositive of the issue.

Nature and Strength of Relationships Between Child and Significant Persons in Child's Life: s. 37(2)(c)

- [32] It is undisputed that the claimant and the respondent are both significant persons in the lives of the children.

- [33] I understand the claimant's family are in Clearwater, while the respondent's family are in and around Kelowna. I am satisfied it would be desirable for the children to foster relationships with both extended families. In my view, whether the parties continue to have shared parenting, or the claimant has primary residence, will not necessarily affect the nature and strengths of the relationships between the children and their extended families.

History of Care: s. 37(2)(d)

- [34] Since separation, the parties have had an informal shared parenting arrangement in place.

Child's Need for Stability: s. 37(2)(e)

- [35] It is undisputed that the children have a high need for stability in their lives. They are both young. James is autistic. Annabelle may be autistic, but testing has yet to determine whether she is or not.

Ability to Exercise Responsibilities: s. 37(2)(f)

- [36] The claimant works in his family's property management business and says he has flexibility in his daily routine. The respondent currently does not work outside her home.
- [37] In the claimant's affidavit, he deposes that he has the necessary means and capabilities of meeting James' special needs. He deposes that he has a stable home for the children, and is able to meet all of their needs in a healthy and consistent way.
- [38] Given the amount of detail the claimant provided about various aspects of the respondent's lifestyle, both past and present, I find his failure to provide detailed information about his own lifestyle and home situation somewhat concerning. For example, during the course of the hearing, in response to a question I put to claimant's counsel, it came to light for the first time that an adult male friend of the claimant's lives in his home too. The respondent asserts this man to be a drug user. The claimant denied the man has any current drug issues. The claimant said the man is disabled, and suffers from ADHD and depression.
- [39] There is no reliable evidence that the claimant has any physical, mental or emotional challenges which could prevent him from exercising his parental responsibilities. The claimant denies any suggestion by the respondent to the contrary.
- [40] The respondent's application response material, and her oral submissions on the application, indicate she has had and continues to have a number of medical challenges in her life, including with PTSD. The claimant does not dispute these challenges.
- [41] In my view, while the respondent's medical challenges have the potential to affect her ability to exercise her parental responsibilities, this is not something that should be afforded much weight in the decision I have to make. The respondent has sought out, received, and continues to receive treatment for PTSD, although the extent to which she is receiving other treatment is unclear.

- [42] Currently, the claimant picks up the children and returns them, alleviating the need for the respondent to travel between Kamloops and Clearwater. The claimant is prepared to continue travelling between the two communities to facilitate transitions in parenting time.

Family Violence: s. 37(2)(g)

- [43] The respondent's affidavit is replete with allegations of long-standing sexualized violence, including by the claimant during the course of their relationship. The claimant denies these allegations.
- [44] There is no evidence of the claimant ever having been criminally charged with any criminal offences, including sexual offences, against anyone.
- [45] I find there is an insufficient evidentiary basis to find family violence by the claimant or the respondent, either involving each other, or the children.

Impairment of Ability: s. 37(2)(h)

- [46] Given my findings concerning the family violence factor, this factor is not applicable.

Appropriateness of Arrangements for Co-operation: s. 37(2)(i)

- [47] There is no evidence that requiring co-operation between the parties on issues affecting the children will increase any risks to the safety, security or well-being of the children.
- [48] The claimant raised a concern about the respondent discussing the conflict between them with one or both of the children. The claimant's affidavit material included transcripts of recordings he made during a transition in parenting time in May 2024. Having reviewed those recordings, I am not satisfied that they lead to the conclusion urged upon me by the claimant.

Civil or Criminal Proceedings: s. 37(2)(j)

- [49] The respondent previously obtained protection orders against the claimant, which have all since expired. There are no current civil or criminal proceedings involving the parties. There are no child protection proceedings.
- [50] On October 12, 2023, the respondent appeared ex parte before a Provincial Court Judge and was granted a protection order with an expiry date of December 15, 2023 ("Protection Order #1"). The claimant's affidavit material includes a transcript of the proceedings, in which the respondent accused him of being physically violent towards her, engaging in serious criminal activity, and having anti-social or criminal family, friends and acquaintances. The claimant asserts the respondent's allegations were fabricated, and that he vehemently denied them.

- [51] On December 13, 2023, the parties and their counsel appeared before a different Provincial Court Judge, who terminated Protection Order #1, and granted a protection order with an expiry date of December 20, 2023 ("Protection Order #2"). The transcript of the proceedings is not in evidence.
- [52] On February 2, 2024, a Ministry of Children and Family Development social worker sent the claimant a letter indicating that she had completed her assessment as required by legislation regarding concerns that the children may have needed protection. In the letter she said that based on the results of her investigation, the children did not need protection.

Indigeneity: s. 16(3)(f) of the DA

- [53] Section 16(3)(f) of the DA requires me to consider the children's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage.
- [54] During the course of the hearing, in response to a question I put to claimant's counsel, the claimant said that he is Metis. I have no information, and nor is there any evidence, about how the claimant's indigeneity pertains to the circumstances of the children, if at all.

Decision

- [55] Having carefully considered the relevant statutory factors, I find it is not in the best interests of either James or Annabelle to make any orders now concerning primary residence of the children, or their education.
- [56] It is undisputed that James is autistic, and that the homeschooling environment is appropriate for him. Based on my review of the material, it appears he is doing well in homeschooling.
- [57] Concerning Annabelle, I do not have sufficient current information, such as would be contained in a psycho-educational report, upon which to assess what is in her best interests as it pertains to her education. I am told simply that she may be autistic, without any current information about what remains to be done to determine this issue. While I acknowledge her apparent desire to attend school in a conventional environment, if she is autistic this may not currently be in her best interests. It is completely understandable that Annabelle wishes to go to school and make friends, but more information is required. The claimant's assertion that he is able to homeschool James, and have Annabelle attend a public school in his catchment, is not enough.
- [58] Both children are in an extremely vulnerable situation. They are young: James is ten, Annabelle is seven. Their parents are engaged in a family law dispute, and their father would now have them live with him in a household which apparently includes another adult man about whom I know almost nothing, other than at some point he has apparently struggled with drug use, and has mental health issues.

[59] Simply put, I cannot be satisfied that disrupting the status quo on the basis of this evidentiary record is in the best interests of either James or Annabelle.

Orders

[60] The claimant's application is dismissed.

Costs

[61] The respondent is entitled to her costs.

"B. Smith J."

B. SMITH J.

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