
CANADA / JUDGMENT

FMJ v. HKJ

2020 BCSC 1926

COURT

Supreme Court of British Columbia

DECIDED

29 September 2020

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2020 BCSC 1926 FMJ v. HKJ

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

FMJ v. HKJ,

2020 BCSC 1926

Date: 20200929

Docket: PEN-E-40154

Registry: Penticton

Between:

FMJ

Claimant

And

HKJ

Respondent

Before: The Honourable Justice Crerar

Oral Reasons for Judgment

In Chambers

Counsel for Claimant

Appearing by teleconference:

V. Bonga

Counsel for Respondent

Appearing by teleconference:

M. Welsh, Q.C.

Place and Date of Hearing:

Kelowna, B.C.

September 29, 2020

Place and Date of Judgment:

Kelowna, B.C.

September 29, 2020

- [1] THE COURT: These will be my brief oral reasons in this matter.
- [2] It is September. It is a new school year. The daughter of the parties -- the mother (the claimant) and the father (respondent) -- needs stability and direction in her life and education.[1] Both the mother and the father need a brief, clear, immediate answer on this issue. Most importantly, it is in the best interests of the daughter for a clear answer, now.
- [3] That said, as these are brief oral reasons, I reserve the usual right to expand and edit and clarify these reasons if a transcript is ordered or for any other reason.
- [4] Before the Court today are two mirror applications. One is filed by the father, on July 20, 2020. One is filed by the mother, on September 10, 2020. The essential issue of both applications is whether the daughter is to continue living and studying in Penticton or move with her mother to West Kelowna.
- [5] The daughter is seven years old. She has just started grade two.
- [6] On June 18, 2020, the mother wrote to the father, indicated her desire to move with the daughter to West Kelowna. The specific reason for moving to West Kelowna from Penticton is that the mother wishes to live with her new partner and blend their two families. She has been with her new partner since approximately May 2017. Her new partner is an RCMP officer.
- [7] In the father's application, he seeks an order prohibiting the mother from relocating their daughter from Penticton to West Kelowna. In the mirror application filed by the mother, she seeks, essentially, the Court's confirmation that she may move with her daughter from Penticton to West Kelowna. She also seeks specific orders with respect to her daughter's education. The primary education order sought is that she be at liberty to enroll the child in online classes at the Hudson Road Elementary School in West Kelowna. Alternatively, she seeks an order that she may at first enroll her daughter in in-person classes at the Hudson Road Elementary School, and that, ultimately, she may enroll her in a school referred to as

KLEOS Open Learning. KLEOS is a predominantly online learning institution. It hosts occasional meetings with classmates and teachers in what are essentially field trips focused on education at various locations around the Okanagan. At present, in the 2020 September school year, the daughter is essentially auditing the KLEOS classes online, while not being formally enrolled in those classes.

- [8] The present parenting arrangement is that the daughter predominately resides with her mother in Penticton. The father, also in Penticton, has parenting time from Thursday to Sunday every second week and on Wednesdays overnight in the alternate week. The father has indicated a desire to apply for a 50/50 parenting arrangement. In August 2019 he applied for that arrangement; his application was denied. He states that he intends to renew the application.
- [9] I will now turn to the applicable law, which is largely uncontroversial.
- [10] Division 6 of the Family Law Act, SBC 2011, c 25 ("FLA"), governs a relocation application such as the present. Section 65 defines "relocation" as "a change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with (a) a guardian, or (b) one or more other persons having a significant role in the child's life." This definition is an important component of the mother's argument.
- [11] Section 69 governs relocation orders. It applies where, as in the present, one of the guardians indicates a desire to relocate the child. The parties agree that s.69(4) applies to the present circumstances:
- (4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,
- (a) the relocating guardian must satisfy the court that
- (i) the proposed relocation is made in good faith, and
- (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and
- (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise.
- [12] Under s.69(4)(a)(i), the guardian seeking relocating, that is, the mother, must satisfy the court that the proposed relocation is in good faith. With respect to this first prong, Mr Welsh, for the father, fairly concedes that the mother's application is made in good faith.

- [13] The second condition is that the relocating guardian must propose reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life.
- [14] If the applicant seeking to relocate satisfies the court of these two pre-conditions, then there arises a presumption under s. 69(4)(b) that the proposed relocation is in the best interests of the child. The onus then shifts to the guardian who is resisting the relocation to satisfy the court that the relocation is not in the best interests of the child.
- [15] The parties agree that the mother and the father do not have "substantially equal parenting time" and thus, the process that I have just described applies to the present dispute.
- [16] Other legal principles from the statute and the case law guide the decision.
- [17] The predominant consideration, of course, is the child's best interests. In determining the child's best interests, the court must look at all factors, including the list of factors set out in FLA, s. 37(2):
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

- [18] In addition to those Family Law Act principles, cases such as *Kowalchuk v. Dass*, 2016 BCSC 1857 at para. 37 confirm that considerations in cases decided under the Divorce Act, RSC 1985, c 3 (2nd Supp) may also guide the court. These considerations include the desirability of maintaining maximum contact with each parent, and the disruption to the child's life from removal from her community.
- [19] I will now turn to the discussion of those factors, and my decision in this matter.
- [20] The mother makes a preliminary argument under s. 65. She argues that the proposed change does not fall under the FLA definition of "relocation." She says that the proposed move from Penticton to West Kelowna cannot "reasonably be expected to have a significant impact on the child's relationship with [the father] or one or more other persons having a significant role in the child's life."
- [21] The mother cites *Chin v. Hegarty*, 2017 BCSC 1321 and the cases cited therein at paras. 29-36. Those cases hold that a move within the Greater Vancouver area, such as, for example, in the *Chin* case, from South Vancouver to White Rock, does not constitute "relocation" under s. 65. In reaching that conclusion, *Chin* cites two other cases, both of which concern similar moves by one guardian within the Greater Vancouver area: *Berry v. Berry*, 2013 BCSC 1095; *McCaw v. Hawkey*, 2014 BCSC 765.[2]
- [22] I am satisfied that those cases are distinguishable. The *Chin* line of cases turns on the reality that Greater Vancouver is, in effect, one large interconnected interurban area. It also turns largely on the pragmatic recognition of the idiosyncratically high cost of living, and specifically, the high real estate prices in and scarcity of rental arrangements in Vancouver. *Chin* at para. 35 refers to the "current reality of family life in Greater Vancouver."
- [23] I appreciate that in rush hour traffic, a drive from the initial Greater Vancouver locations to the relocation locations in those cases may, in fact, be longer and slower compared to West Kelowna versus Penticton: a drive of some 55 km down Highway 97, lasting about 40-60 minutes.
- [24] The *Chin* Greater Vancouver cases are further distinguishable from the present facts. Here, Penticton and West Kelowna are distinct communities, rather than a continuous metropolitan area. Instead of a commute along predominately urban roads with slower speed limits, here the proposed travel back and forth with the daughter to accommodate the proposed change is along a long, winding highway with seasonal safety variations. I am satisfied for these reasons, and those set out below, that the proposed move of the daughter does constitute a relocation under the s. 65 definition under the Act, as it would have a significant impact on the daughter's relationship with her father and other important people in her life.
- [25] I turn to s. 69(4)(a)(ii) of the Act which requires the parent or the guardian who seeks to relocate the child to establish a reasonable and workable arrangement to preserve the relationship between the child and the child's other guardians.

- [26] I am satisfied that the mother has fulfilled this second requirement in order to place the onus onto the father, albeit just barely. Her evidence in this regard is sparse. It is a single paragraph in her affidavit. That paragraph does not focus so much on the preservation of the relationship between the child and the father. It does not focus on the preservation of the relationship between the child and, for example, her relatives and friends in Penticton. The mother's affidavit addresses the logistics of shuttling the daughter back and forth, as well as some accommodations that the mother would make with respect to her own commuting back and forth. That said, I am satisfied that those sparse arrangements have satisfied, albeit barely, the s.64(4)(a)(ii) condition.
- [27] I turn to the predominant issue in this case: has the father convinced the Court that it would be in the best interests of the daughter to stay in Penticton rather than to move to West Kelowna?
- [28] In reaching a decision in this matter, I look at both sides of the ledger -- West Kelowna versus Penticton -- all through the lens of what is in the best interests of the daughter.
- [29] On the West Kelowna side of the ledger, as stated earlier in these reasons, the mother has expressed her desire to blend her family with that of her new partner. That, in itself, is presumably a benefit to the daughter, although we do not have any substantial evidence about the relationship between the daughter and the children of the mother's new partner. The mother has also provided little evidence of the daughter's relationship with her new partner or his children, or whether she is enjoying her time in West Kelowna with that family.
- [30] I also recognize the mother's evidence and the argument that a blended family arrangement would free up income for other expenses, and that would provide a benefit to the daughter. Finally, I recognize the obvious point that a happier mother will likely be reflected in a happier relationship with her daughter and a reduction in stress from the mother commuting back and forth between her daughter and new partner.
- [31] I turn to the Penticton side of the ledger. The daughter has lived in Penticton for all of her life. She has always attended school there. Her friends are predominantly in Penticton. Her extended family is predominantly in Penticton. Most of the father's side of the family lives in Penticton. She has cousins of roughly her same age living in Penticton.
- [32] This extended family is not simply the father's side of the family. All maternal grandparents also live in Penticton. The mother's mother and stepfather live in Penticton. Her grandfather, the mother's natural father, lives in Penticton. The mother's brother and his wife live nearby at the Apex Ski Resort. The maternal aunt and her husband also live in Penticton. Those family members are all on the mother's side of the family tree.
- [33] I do not have extensive evidence about the depth of the relationship between the daughter and these family members. But I am satisfied that the overwhelmingly majority of both the immediate and extended family of the daughter live in Penticton, and that she has an

ongoing positive relationship with many of them. I also recognize the important role that the grandparents either do or could play in the daughter's upbringing. Given the re-partnering of the maternal grandmother, there are multiple grandparents in Penticton. I also note in this COVID time, and generally, that it will be difficult for the grandparents to spend time with the daughter going forward: time will be at a premium.

- [34] The evidence also established that the daughter's activities have been predominantly in the Penticton region: dance, gymnastics, and pottery in Penticton and skiing at Apex Mountain.
- [35] With respect to the mother, I have already set out her predominant familial ties to Penticton. Fortunately in these circumstances, the mother has idiosyncratically strong ties to Penticton and idiosyncratically flexible work arrangements. She presently owns a house in Penticton: specifically, she co-owns it with her father. It is her intention to keep that house and from time to time work in that house. She thus has a home base in Penticton. She is also blessed with a flexible work schedule, and is self-employed. She is a registered massage therapist and she also conducts online yoga classes. Again, in contrast to many relocation decisions, it is not a Hobson's Choice where one parent will be effectively put out of work or denied a significant work opportunity unless the relocation is granted.
- [36] I turn, finally, to the specifics of the daughter's education. The daughter has had difficulty in school. Her first year, in a French immersion programme, was unsuccessful. She is now significantly behind her peers in many areas, particularly reading. She has difficulty focusing on and completing her school work independently. The father assists her with reading and ensures that she does her homework during her time with him, after work. He will not be able to provide that assistance to the same extent if she moves to West Kelowna.
- [37] Her parents both recognize, responsibly, her need for a stable learning environment and for focused education that will address her learning challenges. All of the proposed education arrangements sought by the mother would remove the daughter away from, presumably, a circle of friends gathered in grade one. The parents agree that she will leave the French immersion programme. That said, Penticton is a small enough community that she would presumably, if she so wished, be able to preserve some of the friendships and relationships that she formed in her important primary year in school.
- [38] Any of the three education proposals put forward by the mother would involve the daughter being introduced into a new circle of classmates. Turning first to the KLEOS proposal, that programme is not provided as a school or a specific location. It is predominantly an online programme. The students do have occasional personal meetings with teachers and other students, but not in one specific geographic location. Specifically, KLEOS is not tied to the specific geographic location of West Kelowna. KLEOS is also a hypothetical proposal: the daughter is not presently enrolled at KLEOS, and given the waiting list, it is unlikely that she will be enrolled until next year at earliest. Similar observations could be made with respect to the Hudson Road Elementary School. Under COVID restrictions, that school's classes will also be delivered online for the immediate and perhaps long-term future. Thus that

educational proposal does not require the daughter to live in West Kelowna.

- [39] I am satisfied that a consideration of all factors set out in FLA s.37(2), and generally, it is in the best interests of the daughter to remain in Penticton. I have considered the applicable individual considerations set out in s. 37(2) of the Family Law Act. Remaining in Penticton continues the lifetime history of her care (s. 37(2)(d). Remaining in Penticton will best facilitate her emotional well being s(a), and a stable educational environment (e). It will better allow the father to continue his contact with her and continue assisting her with school (f).
- [40] With respect to 37(2)(c), there is little evidence of the actual nature and strength of her relationship with the individual family members discussed above, but given the overwhelmingly large number of close family members that live in Penticton, including multiple grandparents, it is in her best interests to remain close to those people. As the two Kowalchuk considerations, remaining in Penticton will better promote maximizing contact with each parent, and minimizing disruption in the child's life. In contrast, a relocation to West Kelowna will have the opposite effect.
- [41] I take heart in the fact that although this ruling may require the mother, and possibly her new partner, to drive more in order to accommodate their ongoing relationship, it will ultimately reduce the amount of time that the daughter is spending being shuttled back and forth along that windy highway. I also note from her affidavit that the mother appears to be comfortable with that commute. Her new partner, an RCMP officer, likely has vocational comfort and competence in driving. He likely would have little problem driving more 40-60 minute commutes in order to foster his relationship with the mother.
- [42] To summarize, it is in the best interests of the daughter to keep the status quo of her living in Penticton, where she has lived all of her life. The mother's application is dismissed.

"Crerar J"

- [1] In these transcribed and edited reasons, the initials in the style of proceeding have been changed from those of the parties, to protect the privacy of the daughter, whose name has also been removed from the judgment.
- [2] Berry v. Berry: Surrey to North Vancouver; McCaw v. Hawkey: Surrey to Coquitlam area.

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