

CANADA / JUDGMENT

G.S.R. v. R.E.R.

2023 BCSC 504

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 504 G.S.R. v. R.E.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.S.R. v. R.E.R.,

2023 BCSC 504

Date: 20230302

Docket: E211932

Registry: Vancouver

Between:

G.S.R.

Claimant

And:

R.E.R.

Respondent

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

K. Santerre

Counsel for the Respondent:

L. Newby

Place and Date of Hearing:

Vancouver, B.C.

February 16 and 23, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 2, 2023

Introduction

- [1] THE COURT: The claimant applies to vary the order of Master Elwood made October 29, 2021 (the "Elwood Order") to provide that, commencing immediately, the claimant and the respondent share access to their recreational property at [address redacted] Tynebridge Lane, Whistler, BC (the "Whistler Property"), such that on any day that either of them has parenting time with their youngest child, L., they be permitted to use the property, including unrestricted use of all areas inside the property, including but not limited to all bedrooms.
- [2] The respondent says there is no compelling change in circumstances which would warrant varying the Elwood Order. I have made minor edits to these reasons to enhance readability. The substance and outcome have not changed.

Background

- [3] The parties began living together in February 2006. They married in January 2013 and separated in February 2021. They have three children, including twin boys, A.J.R. and G.S.R., both born [date redacted], age 14, who I will refer to collectively as the "Twins", and a daughter, L.S.R., born [date redacted], age 11, who I will refer to as "L."
- [4] The parties own several properties, including:
- a) Their former family home at [address redacted] Phillips Avenue, Burnaby, BC (the "Family Home");
 - b) The Whistler Property;
 - c) A rental property on Barnet Road in Burnaby; and
 - d) A commercial property in Langley.
- [5] They own a holding company ("Hold Co") which in turn owns two other companies, one of which the respondent operates and the other which the claimant operates.
- [6] The Whistler Property is described as having four bedrooms. One is the disputed master bedroom. The respondent says there are three more, with six beds among them.

- [7] Shortly after the start of the COVID-19 pandemic, the parties had an informal separation, during which they agreed that for the 2020-2021 school year, the respondent would reside in the Whistler Property and home school the children there during the week. The claimant says prior to separation, he drove to Whistler every weekend to spend time with the family.
- [8] The parties separated in February 2021. At that time the claimant was living in the Family Home and the respondent in the Whistler Property. The claimant says that through Hold Co he has been paying all mortgage payments and strata fees associated with the Whistler Property since separation.
- [9] On April 26, 2021, there was an incident of some kind between the Twins and the respondent which resulted in the respondent calling Whistler RCMP. Thereafter the twins refused to return to the respondent's care. They have resided with the claimant at the Family Home ever since. It is my understanding that the Twins and the respondent are essentially estranged. L. initially remained primarily with the respondent during the school year and they parties had week-on / week-off shared parenting of her during summer break.
- [10] On August 1, 2021, Dr. LaTorre issued a s. 211 Family Law Act ("FLA") report.
- [11] On August 4, 2021, the parties attended mediation with Stephanie Fabbro to address parenting issues. They reached a final agreement with respect to L. and an interim without prejudice agreement with respect to the Twins (the "Parenting Plan"). Its relevant terms include:
- a) The parties are guardians of the children pursuant to s. 39(1) of the FLA;
 - b) The parties share parental responsibilities;
 - c) Both parties will reside no more than 15 kilometres away from L.'s school, and commencing September 3, 2021, the parties begin shared parenting of L. on a week-on / week-off basis. Transition time is Friday after school;
 - d) On an interim basis, the Twins reside with the claimant and have parenting time with the respondent as agreed upon between the parties and with guidance from the reunification team, following successful reunification therapy, the parenting schedule for the Twins will be reviewed;
 - e) The parties share Spring Break with L. equally;
 - f) Summer holidays with L. are shared, with each parent entitled to take her for two x two-week [blocks] of vacation;
 - g) Winter holidays with L. are shared.

- [12] By September 3, 2021, the respondent began renting a residence in Burnaby which was situated within 15 km of L.'s school, so she could exercise shared parenting of L. in accordance with the Parenting Plan. Since that date, the parties have had week-on / week-off shared parenting of L.
- [13] The respondent had not been allowing the claimant to use the Whistler Property since their date of separation. With the respondent now living at least part time in Burnaby, the claimant wished to resume using the Whistler Property with the children. On October 29, 2021, he made an application which resulted in the Elwood Order. The relevant terms are:

THIS COURT ORDERS that on an interim and without prejudice basis:

1. Commencing November 29, 2021, the Claimant will be permitted to use the [Whistler Property] during any weekend in which the Respondent is in Burnaby and such other times when she is on vacation at which the Claimant will have the right of first refusal to the property.
 2. The Respondent will have sole access to the [master bedroom] and her office in the Whistler Property, which she may secure with a lock.
 3. The Claimant will have sole access to a designated storage area in the Whistler Property with said area to be agreed on between the parties (the "Claimant's Designated Area").
 4. In the event the Claimant leaves any personal belongings behind in the Whistler Property his items will be left in the Claimant's Designated Area.
 5. The Claimant will leave the Whistler Property clean and undisturbed after he uses the Whistler Property.
 6. The Claimant will not attend the Whistler Property outside of the times provided in this Order.
 7. The Respondent will not attend the Whistler Property during the times in which the Claimant is using the Whistler Property.
 8. The Claimant's use of the Whistler Property will be reviewed at the same time as the Respondent's parenting time with [A.J.R.] and [G.S.R.], both born [date redacted] and is reviewed pursuant to the Parenting Plan entered into by the parties on August 4, 2021.
- [14] Shortly after the Elwood Order was pronounced, the respondent decided to rent a different property in Whistler to use with L. The claimant says the respondent told him she did not want to live in the Whistler Property if he was going to be using it. The respondent alleges there was family violence and controlling behaviour during the parties' relationship, and ongoing hostility and disdain since separation. She felt too emotionally fragile to share the Whistler Property with the claimant.

- [15] As a result, the respondent did not use the Whistler Property from November 2021 to November 2022. During this period, the claimant enjoyed unrestricted use of the property, including the office and master bedroom spaces. He and the Twins, and L. when he had parenting time with her, spent almost every weekend during ski season and several weekends during the fall, spring and summer at the Whistler Property.
- [16] In November 2022, the respondent notified the claimant she was resuming her use of the Whistler Property and indicated the Elwood Order terms would apply. On December 5, 2022, the respondent began using the Whistler Property again.
- [17] The claimant alleges the respondent removed all of his clothing and personal belongings from the master bedroom and installed a lock on the door. She also took some of the children's clothing and donated them to charity without prior notice or the children's consent. The respondent says she only donated a couple of items that the Twins had outgrown.
- [18] On December 14, 2022, the parties attended a second mediation. They agreed to "Minutes of Settlement", which include the following terms relating to the Whistler Property:

Whistler

- 7) [Claimant] and [respondent] will have access to [Whistler Property] during their holiday time as set out in the [Parenting Plan] dated August 4, 2021, whenever they have [L.].
 - 8) [Claimant] will have access to [Whistler Property] on weekends he has [L.]
 - 9) [Respondent] will have access to [Whistler Property] on weekends she has [L.]
 - 10) [Claimant] and [Respondent] will have access to the office in the [Whistler Property] during their time at the [Whistler Property] pursuant to these minutes of settlement or the order of Master Elwood dated October 9, 2021.
 - 11) If either party is not using the [Whistler Property] on their weekend, they will notify the other parent by Thursday at 9:00 a.m. and the other parent will have the option of using the [Whistler Property] that weekend.
 - 12) [Claimant] is at liberty to vary the order of Master Elwood with respect to access to the property and usage during the week.
- [19] The import of this was that the claimant would gain more use of the Whistler Property relative to what was contemplated in the Elwood Order, but the respondent continued to have exclusive use of the master bedroom.

[20] During argument, the respondent asked the claimant to clarify what changes he was seeking in terms of the respondent's ability to use the Whistler Property on weeks the claimant has L. in Burnaby during the school year. The language in the application appeared to request that the respondent not be allowed to use the Whistler Property during those weeks. The claimant would not be able to use the Whistler Property during such times.

[21] Claimant's counsel clarified that what is sought is as follows:

- 1) The claimant will have access to the Whistler Property during:
 - a. The Holiday Schedule as set out in the Parenting Plan dated August 4, 2021, whenever he has L.;
 - b. The weekends that he has L.;
 - c. Professional development ["PD"] days or days off from school that he has L.
- 2) The claimant and the respondent will both have complete use of all areas in the Whistler Property, including but not limited to the office and all bedrooms during their time at the Whistler Property.

The effect is that during the school week when the claimant has parenting time with L., the respondent may use the Whistler Property (unless there is a PD day or other day off from school; then the claimant gets to use the Whistler Property).

[22] The claimant says that if he is allowed to use the master bedroom, he has no intention of doing anything with the respondent's personal items in the room and he is prepared to consent to an order to that effect.

[23] Counsel have agreed to a tentative trial date in October 2024.

Applicable Law

[24] Section 199(2) of the FLA is as follows:

- (2) If a child may be affected by a proceeding under this Act, a court must
 - (a) consider the impact of the proceeding on the child, and
 - (b) encourage the parties to focus on the best interests of the child, including minimizing the effect on the child of conflict between the parties.

[25] Section 216(1) is as follows:

Court may make interim orders

216 (1) Subject to this Act, if an application is made for an order under this Act, a court may make an interim order for the relief applied for.

[26] Section 218 is as follows:

Terms and conditions of orders

218 Subject to section 183 (3) (e) [orders respecting protection], a court may include in an order any terms or conditions the court considers appropriate in the circumstances.

[27] The claimant stresses that the Whistler Property is family property and presumptively both parties have an undivided half interest in it. Neither party has or is seeking exclusive possession of the property.

[28] Section 216(3) and (4) address variation of interim orders:

(3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:

- (a) a change in circumstances has occurred since the interim order was made;
 - (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
- (4) In making an order under subsection (3), the court must take into account all of the following:
- (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
 - (b) the length of time that has passed since the interim order was made;
 - (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
 - (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
 - (ii) would not necessarily reflect the final arrangement between the parties;
 - (d) whether a trial has been scheduled;
 - (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

[29] The respondent argues that interim orders should only be varied if there is a compelling change in circumstances, citing *Hama v. Werbes*, [1999] B.C.J. No. 596, 66 B.C.L.R. (3d) 120 (S.C.) at para. 12:

[12] If trial judges are not to get bogged down on interim applications, they certainly should not get bogged down on applications to vary interim orders. Therefore, interim orders, once made, should only be varied when there is a compelling change of circumstances, such that one or both parties would be seriously prejudiced by waiting until trial.

[30] One aspect of the Elwood Order that neither party addressed in argument is the fact that it is framed as an interim without prejudice order. Recently, in *R.A.B. v. T.L.B.*, 2022 BCSC 2244 at paras. 39-40, I reviewed authorities which consider the significance of an interim order being "without prejudice":

[39] In this case, Master Robertson's order was framed as a "without prejudice" order. In *D.P.G. v. V.M.G.*, 2015 BCSC 1038 at para. 37, Justice Rogers describes the significance an order being "without prejudice":

37 In my view, the proper interpretation to put on the phrase "without prejudice" in the December 2014 consent order is that its terms, and the parties' agreement to them, are not to be taken as the parties' once and forever commitment to them. The terms of the order are not to be used as either a sword or a shield in later litigation on the same issues. As one of my colleagues has helpfully put it: a without prejudice JCC order is no more than a Band-Aid provision. The parties are free to argue for a different result on a different day without being hampered by earlier agreements made extemporaneously and for purposes of expediency.

[40] In *Burchhardt v. Geismayr*, 2019 BCSC 1850 at paras. 30-31, Master Elwood, as he then was, stated as follows:

30 Interim consent orders that are made on a "without prejudice" basis are approached on a somewhat different basis than contested orders or consent orders that are not expressly without prejudice to the parties' rights to take a different position at a later date. As Mr. Justice Pearlman explained in *Sandhu v. Bhullar*, 2016 BCSC 59:

[42] In *D.P.G. v. V.M.G.*, 2015 BCSC 1038, the parties attended a JCC where they consented to an order which expressly provided that on an interim without prejudice basis they would equally share parenting time. Mr. Justice Rogers heard an application by the claimant father for an interim order varying the consent order pronounced at the JCC by granting him exclusive parenting responsibilities. The Court considered whether it should treat the claimant's application as a motion to vary an existing order, or deal with it as an initial application. At paragraph 37, Rogers J. held the "without prejudice" term of the consent order meant the order was not to be used as either a sword or a shield in later litigation on the same issues. A without prejudice JCC order was "no more than a Band-Aid provision" which did not impede the parties' freedom to argue for a different result without being hampered by "earlier agreements made extemporaneously for purposes of expediency". Accordingly, the court approached the application as if it were an initial application. [underlining by Master Elwood]

31 The same point was made in *I.J.G.P.G. v. K.M.*, 2016 BCSC 1072, at para. 156. More recently, in *Bartch v. Bartch*, 2018 BCSC 1583, Madam Justice D. MacDonald held that:

- [48] From a policy perspective, holding parties to their without prejudice consent agreements for years on end will discourage consensual resolution between parties. This Court should be encouraging settlements, not putting roadblocks in the way of litigants. This is not to say that consent orders should be easily set aside. However, different considerations are necessary when the parties have made agreements based on assumptions that, due to no fault of their own, are factually inaccurate or for which the underlying facts have changed.

Claimant's Position

- [31] The claimant says the Whistler Property is 1680 square feet, which includes a two-car garage. There are about 1200 square feet, if one excludes the garage. It is a two-storey townhouse. The master bedroom and its ensuite bathroom take up roughly half the upper floor. Not having access to the master bedroom means that when he uses the property with the children, he sleeps on a couch.
- [32] The claimant is 6'2" and 240 pounds. Sleeping on the couch has a detrimental impact on his physical health. He suffers from chronic neck and back issues due to multiple car accidents and various childhood injuries. He also has very little privacy there.
- [33] There is an empty bedroom which has bunk beds, but he does not fit in those. L. sleeps in a bedroom which has a queen bed, but he does not want to displace her. He fears this would cause the children to resent the respondent and make them feel displaced.
- [34] The master bedroom has a television. When the children have guests over, which he says is common, they usually go up to the master bedroom to hang out. Since losing access to the master bedroom, the children have told him they feel they have nowhere to hang out and are on top of each other when guests visit.
- [35] The claimant argues that after the Elwood Order was pronounced, the respondent made it clear through her words and actions that she was choosing not to abide by the order and preferred to rent separate accommodation in Whistler rather than share with the claimant. By doing so, she established a new home in Whistler. The status quo for the past year has thus been the claimant having exclusive and unrestricted use of the Whistler Property and the respondent residing elsewhere. It is the respondent who seeks to change the status quo by unilaterally returning to the Whistler Property and insisting the parties abide by the Elwood Order.
- [36] The claimant also argues that allowing him and the children to use the master bedroom in the Whistler Property necessarily engages the best interests of the children. Allowing them access to the master bedroom to hang out with friends and watch television maximizes their enjoyment of the property. Allowing the claimant to use the bedroom prevents him from potentially having to displace one or more of the children from their present bedrooms, which could cause them to question the change and become resentful towards the respondent.

- [37] The claimant has no objection to sharing the Whistler Property with the respondent, but he and the children should be able to continue using and enjoying the entire property. Both parties now have residences in Burnaby and can maintain their privacy and keep private documents and information there.

Respondent's Position

- [38] The respondent says she did not stay in the Whistler Property after the Elwood Order was pronounced because she felt too emotionally fragile. She did not want to share the space with the claimant. After a year of paying for separate accommodation at a cost of \$3,300 per month, she could no longer afford to rent two homes. She is now emotionally strong enough to share the Whistler Property more fully, with the exception of the master bedroom. She needs a safe and private space at the property.
- [39] The respondent says the Whistler Property was her home when the Elwood Order was made and it continues to be such. It is her main residence and is the place where she conducts business. She estimates she spends 75 percent of her time there. She rented the residence in Burnaby for purposes of sharing parenting of L. during the school year.
- [40] There are six beds and three bedrooms in addition to the master bedroom. It is not necessary for the claimant to sleep on a sofa. He can either purchase another bed that is suitable for him to substitute for one of the bunk beds or take over that room entirely. The children have historically had flexible sleeping arrangements, and there are no assigned sleeping spaces. L. in particular is flexible about her sleeping space at Whistler.
- [41] With regard to children needing to watch television in the master bedroom, this can be resolved by moving that television into another room in the townhouse. This is a simple process given the current technology. In any event, there are already two other televisions in the property, on the main floor and in the office.
- [42] The respondent objects to any order which would prevent her from using the property during weekdays when the claimant has L. and she is attending school in Burnaby. It makes no sense to exclude her and have the property sit vacant. She has the ability to use it roughly 75 percent of the time, while the claimant can only use it 25 percent of the time. The claimant cannot use the property more than the parties have already agreed upon.
- [43] The respondent says Master Elwood carefully considered all of the facts and crafted a reasonable and appropriate shared-use regime with the intent of providing the claimant and children time there while allowing her a zone of privacy. The circumstances when the order was made are the same as they are now. There is no compelling change which warrants changing the arrangement ordered, as modified by the Minutes of Settlement.
- [44] The respondent says that sharing the master bedroom is not in the best interests of the children given the high level of conflict between the parties. She has alleged family violence on the claimant's part, which he denies, but he does acknowledge there is a high level of

conflict. The claimant's hostility and disdain towards her have not changed. Sharing the space with him would jeopardize her sense of safety, emotional stability and not allow her any privacy. It would be unworkable and lead to further conflict. The children would invariably be exposed to this to some extent. Sharing the master bedroom is not necessary given there is ample space for the claimant without this.

Analysis

- [45] Between the terms of the Elwood Order and portions of Minutes of Settlement relating to the Whistler Property, it is clear that Master Elwood's intent was to make the property a shared space which also preserved a modest amount of privacy for the respondent. The Minutes of Settlement, which I note the parties agreed to after the respondent returned to the Whistler Property after a year away, also embraced and expanded upon the shared-use model, focused on time periods when each party had parenting time with L.
- [46] While the claimant's request for access to the master bedroom is understandable, I do not accept his argument that the request is based in and necessary for the best interests of the children. I accept that it would undoubtedly be more comfortable and convenient for the claimant. It would also deprive the respondent of the modest amount of private space she currently has in the property. She maintains that she continues to reside there roughly 75 percent of the time. The claimant disputes that, suggesting she regularly travels to Greater Vancouver for her work. I am not in a position to resolve that dispute based on conflicting affidavit evidence. That will have to be resolved at trial.
- [47] The claimant raises issues relating to sleeping arrangements and television location, but I am not persuaded that these issues and the claimant's proposed solution to them engage the best interests of the children. There frankly appears to be sufficient space at the property for the claimant to come up with a creative temporary alternative solution pending trial.
- [48] Given that the Elwood Order was made as an interim without prejudice order, it is technically not necessary for the claimant to show there has been a change in circumstances. Despite this lower threshold, I find myself in agreement with the spirit and intent underlying the arrangement Master Elwood created through his order. There is clearly a high level of conflict between the parties, which continues unabated since the order was made. In my view, it is important that the respondent continue to have some protected private space within the Whistler Property. I agree the master bedroom should continue to be that space pending trial.
- [49] As for the variation the claimant seeks in terms of days he is entitled to use the Whistler Property, the language in the application appeared to seek to exclude the respondent from using the property during times when the claimant has L. even if he was not able to use the property. At the continuation of the hearing before me, claimant's counsel clarified that the claimant was actually seeking more modest relief, most of which appears to already be addressed between the Elwood Order and Minutes of Settlement. The only substantial

change appears to be the addition of PD days or days off from school when he has L. Given that the order and minutes are based on a child-centred approach to use of the Whistler property, I agree that adding PD days is in the children's best interests and appropriate.

Conclusion

- [50] The claimant's application to vary the Elwood Order to allow him full use of the master bedroom at the Whistler property is dismissed.
- [51] If the parties wish to incorporate the Minutes of Settlement relating to the Whistler Property as a consent variation of the Elwood Order, they have leave to include that in the formal order. There will be one modification to what is set out in the Minutes of Settlement, namely that each of the parties is entitled to have access to the Whistler Property on professional development days at L.'s school on days that each of them has parenting time with her.
- [52] Regarding costs, the respondent has largely been successful in resisting the application and she is entitled to costs of the application.

"Master Bilawich"

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