

CANADA / JUDGMENT

Harper v. Harper

2025 BCSC 11

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Supreme Court of British Columbia

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2025 BCSC 11 Harper v. Harper

IIN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harper v. Harper,

2025 BCSC 11

Date: 20250106

Docket: E220011

Registry: Vancouver

Between:

Jason Richard Harper

Claimant

And

Miranda Taylor Harper

Respondent

Before: The Honourable Justice Loo

Reasons for Judgment

Appearing on his own behalf:

J.R. Harper

Counsel for the respondent:

J. Kang

Place and Date of Hearing:

Vancouver, B.C.

November 22, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 6, 2025

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Introduction

[1] The claimant seeks to vary a final order as to parenting arrangements made by this Court on December 6, 2022 (the "2022 Order").

- [2] In broad terms, the 2022 Order provided that the child of the marriage would reside with the respondent in Kelowna and that the claimant would have parenting time every other week for three nights at a time, alternating between Kelowna and the Lower Mainland. In these reasons, I will refer to the blocks in every four-week period that are required by the 2022 Order to be in the Lower Mainland as the "first parenting blocks," and the blocks that are required by the 2022 Order to be in Kelowna as the "second parenting blocks."
- [3] The claimant seeks an order that the child will reside primarily with him in Langley, and that the parents will have, roughly, a one week on, one week off parenting schedule.
- [4] The primary issue before the Court is whether the 2022 Order ought to be varied in the manner sought by the claimant, or in some other way.

Background

- [5] The parties were married in May 2019 in Vancouver, and separated in September 2021.
- [6] They have one child together, Harrison, born in November 2021.
- [7] They attended a trial of this action in December 2022. They reached the 2022 Order by consent, granted by Justice Crerar.
- [8] In the 2022 Order, the parties were granted a divorce from each other. Further, the 2022 Order includes the following terms:
1. The child, Harrison, will reside with the Respondent Ms. Harper in Kelowna.
 2. The Claimant, Mr. Harper, will have parenting time every other week for 3 nights per block. Every other block of parenting time with Mr. Harper will occur in Metro Vancouver, with Ms. Harper to handle the drop off and pickup of Harrison from Vancouver to Kelowna. Mr. Harper's remaining parenting time will occur in Kelowna.
 7. The parties may travel with Harrison in and out of BC and Canada provided that they give the other party reasonable notice and travel itineraries. Trips will be limited to their individual parenting time schedule unless otherwise agreed between the parties.
 8. Parenting time with Harrison on holidays will be shared as agreed between the parties.
 10. The respondent shall facilitate contact between Harrison and his paternal grandparents upon reasonable notice and the request shall not be unreasonably denied.
 11. The parenting schedule will be reviewed on an annual basis on December 1st of every year.
 12. If the parties cannot come to an agreement on any matter, they will first attend at mediation prior to coming to court, unless it is agreed between the parties that mediation is not [an] appropriate course of action

Issues

- [9] I will assess the claimant's application by considering the following sub-issues:
- a) Is this application barred by paragraph 12 of the 2022 Order (the "mediation provision")?
 - b) Does paragraph 11 of the 2022 Order (the "review provision") allow for a variation of the Order without a material change in circumstance?
 - c) If not, was there a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child which materially affects the child and which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order?
 - d) If the review provision allows for a variation of the Order without a material change or if there was such a change, what parenting arrangements are in the best interests of the child going forward?
- [10] In addition, the parties have raised issues regarding travel and holidays that will be discussed at the end of these reasons.
- [11] Further, the respondent seeks an order under s. 221 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] prohibiting the claimant from advancing further proceedings without leave of the Court.

Discussion

Is this application barred by the mediation provision?

- [12] As stated above, para. 12 of the 2022 Order provides:
12. If the parties cannot come to an agreement on any matter, they will first attend at mediation prior to coming to court, unless it is agreed between the parties that mediation is not [an] appropriate course of action.
- [13] The respondent relies on this provision in support of an argument that this application ought to be adjourned pending mediation of the issues before this Court. However, the documentary evidence shows that the claimant has suggested mediation approximately five times since the 2022 Order was finalized. While the respondent never refused mediation, and the parties never agreed that mediation was not an appropriate course of action, no mediation ever occurred.
- [14] In my view, given the attempts that the claimant made to suggest mediation and given the positions taken by the parties on this application, which indicate that mediation probably would not have been successful in any event, it would not be appropriate to bar the claimant from advancing this application on the basis of the mediation provision.

Does the review provision allow for variation without a material change?

[15] Absent the review provision, variations to the 2022 Order would be governed by s. 47 of the FLA which provides:

47 On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

[16] Although the section does not use the word "material," the law is clear that before this Court may change or terminate an order respecting parenting arrangements, the claimant must establish a material change in circumstances. In *Williamson v. Williamson*, 2016 BCCA 87, the Court of Appeal cited with approval the following paragraphs from the Supreme Court of Canada's decision in *Gordon v. Goertz*, [1996] 2 S.C.R. 27:

[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.

[13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[17] In *Williamson*, the Court held:

[34] Absent a material change in the needs or circumstances of the child, the inquiry can go no further. It is only after this threshold is met that the judge on the new application can embark on a fresh inquiry into the best interest of the children.

[18] These principles have been cited and applied with approval by this Court - for example, recently in *B.K.N. v. H.S.N.*, 2024 BCSC 1576 and *F.K.L. v. D.M.A.T.*, 2024 BCSC 967.

[19] As indicated above, there is a question in this case as to whether the review provision allows a party to seek a variation of 2022 Order without establishing a material change in circumstances. To reiterate, the review provision states:

11. The parenting schedule will be reviewed on an annual basis on December 1st of every year.
- [20] The intention behind the review provision is unclear. It is possible that the intention was to create a process analogous to reviews in respect of spousal support that are provided for in s. 168 of the FLA. Section 168(3) states expressly that the material change provisions in the FLA do not apply to such reviews.
- [21] However, spousal support reviews are fairly straightforward reassessments which turn largely on the parties' incomes. The parties typically submit revised or updated income information and the support obligation between the parties is reassessed based on that information.
- [22] By contrast, the Court is required to consider only the best interests of the child when making decisions respecting parenting arrangements. Section 37 of the FLA requires an assessment of a broad array of factors when determining what arrangements are in the best interests of the child, and those factors must be the subject of evidence. As in this case, the evidence on applications regarding parenting arrangements is often voluminous.
- [23] In these circumstances, it would be extremely onerous both on the parties and on the Court to have parenting arrangements determined anew every 12 months. In my view, that is not what must have been intended by the review provision in the 2022 Order.
- [24] In my view, the review provision was probably intended to permit an application regarding parenting arrangements to be brought once a year without the other party complaining that the applications are too frequent. Alternatively, it may have been intended to allow for minor changes to the parenting schedule - but not to the parties' respective entitlements.
- [25] Either way, in my view, in order for there to be a significant variation as to parenting arrangements, a material change in circumstances must be demonstrated, and the variation sought must be linked to the change. Complaints about the original process before Justice Crerar are not sufficient to warrant a variation. As stated in *Gordon*, an application to vary parenting arrangements cannot serve as an indirect route of appeal from the original parenting order.

Was there a material change in this case?

- [26] The most important material change in circumstances alleged by the claimant is that he lost his job approximately four months after the 2022 Order was made. Although he ultimately replaced his former job with a new position that paid him more, his new position has much less flexibility than the one that he had when the 2022 Order was made. As a result, he is no longer able to fully utilize two three-night parenting blocks every month, particularly given the time required to drive from Langley to Kelowna in respect of the second block.

- [27] The second material change alleged by the claimant is that at the hearing that led to the 2022 Order, the respondent represented to the Court that she was moving to Kelowna for consistent Monday to Friday work. However, it appears that she has continued with shift work and that the child has been enrolled in daycare that he attends every weekday. To the extent that this change means that the respondent has less ability to exercise her parental responsibilities than expected, it has some relevance.
- [28] Third, the claimant spent some time, both in submissions and in his affidavits, alleging that he had been threatened on various occasions by the respondent's father and that the respondent's father is openly hostile towards him. While this evidence ought not to be minimized, the claimant has not demonstrated how the father's conduct towards the claimant ought to impact this Court's assessment of the best interests of the child. I note that the respondent has agreed that her father will not be present at pick-ups and drop-offs of the child.

If there was such a change, what parenting arrangement is in the best interests of the child going forward?

- [29] The Court may consider only the best interests of the child when parenting arrangements are assessed or reassessed. The focus is on the best interests of the child, not the interests and rights of the parents: Gordon at para 49.
- [30] As in many parenting cases, the parties in this case have spent much time making allegations regarding the conduct of the other. The claimant spent significant time during the course of the hearing attacking the general credibility of the respondent. However, pursuant to s. 37(4) of the FLA, a court may consider a person's conduct only if it substantially affects one of the factors relevant to the child's best interests, and only to the extent that it affects that factor.
- [31] Section 37 of the FLA provides as follows:
- (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.
 - (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
 - (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 the person's 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 the person's 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.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [32] The 2022 Order provides that the claimant shall have a three-night parenting block every other week. As stated, any variation of the 2022 Order must be linked to a material change. Simply demonstrating a limited change in circumstances will not result in a complete reassessment of the parenting arrangements.
- [33] The change sought by the claimant - that the child will reside primarily with the claimant in Langley and that the parties will transition to a 50/50 shared parenting arrangement - would be a drastic variation. That variation is not warranted by the material changes described above, nor is it justified by the evidence that has been advanced regarding the best interests of the child.
- [34] The reality that must be reflected in any parenting order in this case is that the mother and father live in different communities almost four hours apart by car. The fact that the respondent has moved to Kelowna and the claimant lives in Langley cannot be revisited for the purposes of this application.
- [35] That fact, and the fact that the child is going to day care and has connections in Kelowna, are critical to this analysis. This is not to say that the child does not have important connections in the Lower Mainland, but stability in one place and the nature and strength of the relationships between the child and significant persons in the child's life are important: s. 37(2)(c) and (e).

- [36] Accordingly, it is not appropriate to grant the order sought by the claimant on this application. Having said that, it is my view that the material changes which have occurred since the making of the 2022 Order do support some changes to the parties' parenting arrangements.
- [37] It appears on the evidence that the claimant presently has only one three or four day block off from work every four weeks. Due to this change to his work flexibility, the claimant has sought to have both of his parenting blocks occur in the Lower Mainland. This variation has been and is resisted by the respondent. The respondent cites the transcript from the December 2022 hearing in which Justice Crerar was concerned about the child being a "ping pong," in the sense that he might be transported back and forth between Langley and Kelowna too frequently.
- [38] It is undoubtedly important to try to limit the child's travel, all other things being equal. However, given that the claimant is entitled to only two three-night parenting blocks every four weeks, and given that he is now unable to spend the second parenting blocks in Kelowna, there are additional and different considerations to be balanced.
- [39] In my view, there is benefit to the child being, as much as possible, in a home environment in Langley, in surroundings and with possessions known to him, rather than in a hotel room or Airbnb unit in Kelowna. Permitting more parenting time in Langley would also be consistent with paragraph 10 of the 2022 Order, which states that the respondent shall facilitate contact between the child and his paternal grandparents.
- [40] Further, the child will benefit by spending more time with his father than three nights per month. At present, the claimant is not exercising most of his second parenting blocks. The claimant explains that if he is permitted to take the child back to Langley from Kelowna for his second parenting blocks, the child could stay with other family members - including his grandparents - during the times when work commitments prevent the claimant from being at home.
- [41] The respondent suggests that if the claimant has only one-three or four-day block off from work every four weeks, he could use that block to parent the child in Kelowna, and that, during the other block, the child could be in the Lower Mainland, where he may be cared for by others when the claimant is working. However, this arrangement would mean that the claimant would never have a three-night block at home with the child uninterrupted by work.
- [42] Overall, it is my view that it is the best interests of the child to allow the claimant to return to the Lower Mainland with the child for his second parenting blocks. This change does not impact the respondent directly, as the claimant will be responsible for picking the child up in Kelowna for these blocks.

[43] Paragraph 2 of the 2022 Order shall be varied to provide that the claimant may spend his second parenting blocks with the child at his home in the Lower Mainland, with pick-up and drop-off in Kelowna.

Other issues

Travel and holidays

[44] Paragraphs 7 and 8 of the 2022 Order provide:

7. The parties may travel with Harrison in and out of BC and Canada provided that they give the other party reasonable notice and travel itineraries. Trips will be limited to their individual parenting time schedule unless otherwise agreed between the parties.
8. Parenting time with Harrison on holidays will be shared as agreed between the parties.

[45] These paragraphs provide for travel and holiday time but only in imprecise and vague ways.

[46] Paragraph 7 requires the respondent's agreement before the claimant may take the child on a trip other than during the claimant's two three-night parenting blocks.

[47] Paragraph 8 appears to provide for holiday time with the child, but the respondent has taken the position that since the child is not in school, he does not have holidays, and therefore no holiday time is warranted. In my view, this position is unreasonable. It seems clear that even though the child may not have holidays, the claimant has holiday time during which he would want to spend time with his child.

[48] In my view, the fact that the parties have not been able to work out arrangements for holiday time with the child under paragraphs 7 and 8 was not foreseen by Justice Crerar. Therefore, in my view, it is appropriate to vary the 2022 Order to expressly allow for holiday time.

[49] I order that the claimant shall be entitled to take the child for one or two holiday blocks, totalling two weeks per year, between June and August, inclusive. The weeks may be, but do not have to be consecutive. The claimant shall advise the respondent of the dates on which he wishes to take these holiday blocks by March 1 of each year, and he shall provide the respondent with a travel itinerary at least 21 days in advance of each holiday week.

[50] These holiday weeks are in addition to and may be attached to the claimant's regular parenting blocks. However, if a holiday week overlaps with a regular parenting block, there shall be no extra time provided as a consequence.

[51] During submissions, the respondent took the position that the holidays must be spent other than in the Lower Mainland. However, there was no valid rationale advanced for this position. The claimant is not precluded from spending any or all of his holiday weeks with the child at his home.

Paragraph 7 of the 2022 Order

- [52] The correspondence demonstrates that the parties have been engaged in a dispute regarding the interpretation of paragraph 7 of the 2022 Order, which is set out above.
- [53] The claimant took the position that this provision allowed him to travel with the child to the Lower Mainland during his Kelowna parenting blocks. The respondent took the position that paragraph 7 only permitted the claimant to take the respondent to destinations other than Kelowna and the claimant's home in the Lower Mainland.
- [54] Given the orders that I have made above with respect to paragraph 2, and given that paragraphs 7 and 8 will be replaced, it is not necessary to address this issue. Nonetheless, I will say that, in my view, paragraph 7 as it read before this decision permitted the claimant to take the child to the Lower Mainland on occasion.
- [55] To interpret paragraph 7 as the claimant wished, to allow him to take the child home to the Lower Mainland during every second parenting block, was inconsistent with paragraph 2, which stated that the claimant's "remaining parenting time will occur in Kelowna."
- [56] On the other hand, there was nothing in paragraph 7 that barred the claimant from taking the child to the Lower Mainland from time to time. Further, paragraph 7 expressly contemplated that the claimant may parent the child during his parenting blocks other than in Kelowna: it expressly allowed for travel and stated that trips would be limited to the parties' individual parenting time schedule, unless otherwise agreed. It is difficult to see how taking the child to Langley to visit his extended family would be less in the child's best interests than, for example, taking him on a camping trip alone somewhere else in the province.

Paragraph 5

- [57] Paragraph 5 of the Order requires that the claimant's parenting time in Vancouver will occur at his partner, Tajana Hemming's, residence. As I understand it, the claimant and Ms. Hemming are no longer partners. Therefore, this provision is to be deleted from the order.

Special days

- [58] There was some discussion during submissions about apportioning parenting time between the parties in relation to statutory holidays and other special days: for example, Christmas and Halloween. I made a general direction that these holidays and special days ought to be apportioned equally, alternating from year to year, but I do not have sufficient information or evidence to make a detailed order. The parties are directed to undertake mediation in the next three months, online if necessary, to finalize the arrangements between them in this regard.

Section 221 order and the conduct of the parties

[59] Section 221(a) of the FLA provides:

Misuse of court process

221 (1) A court may make an order prohibiting a party from making further applications or continuing a proceeding without leave of the court if satisfied that the party

- (a) has made an application that is trivial,
- (b) is conducting a proceeding in a manner that is a misuse of the court process, or
- (c) is otherwise acting in a manner that frustrates or misuses the court process.

[60] The respondent seeks an order under s. 221 that the claimant not be permitted to advance further applications without leave. In support of this part of her application, she cites the large number of affidavits made by the claimant, and what she characterizes as a constant barrage of materials that has been filed and served by him. In response, the claimant submits that he has been desperate to have more parenting time with his child, and that his filings have reflected that fact.

[61] In my view, the parties both bear fault in these proceedings.

[62] On one hand, it is frankly remarkable and unfortunate that the claimant has made 28 affidavits himself in this action, and has filed many other affidavits made by others. That volume of affidavit material in a proceeding such this is unnecessary and is not helpful to the Court. Excessive and redundant or superfluous filings will eventually constitute an abuse of the Court's process.

[63] On the other hand, it appears from the positions taken by the respondent that her primary objective has been to limit the time spent by the claimant and his son together, either at the claimant's home or at all, rather than having regard to the best interests of the child. For example, in correspondence with the claimant regarding potential adjustments to the parenting arrangements, she refused to depart from her strict reading of the 2022 Order, whereas some flexibility on her part regarding paragraphs 2 and 7 may have avoided this application altogether. Further, as discussed above, her position taken before this Court that there should be no holiday time allotted to the claimant because the child is too young was unreasonable. Further, I find the respondent's insistence that the claimant not spend holiday time with the child at the claimant's home to be inexplicable.

[64] In light of the conclusions that I have reached regarding the parties' conduct, I will not make any orders under s. 221. However, in my view, the parties would both benefit from successfully completing the "Parenting after Separation" course offered by the Ministry of the Attorney General and available for free online: see <https://parenting-after-separation.jibc.ca/courses/>.

- [65] I direct that the parties shall both take the course, separately, within three months of the date of these reasons. If either or both parties have already taken the course, they shall take it again. Unless expressly relived of this obligation by the Court, proof of successful completion of the course shall be filed by each party as part of any materials next filed by either of them in this proceeding.
- [66] It is hoped that the course will assist the parties in resolving future parenting disputes between them without further litigation. Whether they like it or not, the parties are bound together for the next 14 years by their obligation to care for and to raise their child. It would be tragic if the parties were to spend those years battling each other in this Court. It should be obvious to the parties that if they are truly concerned about the best interests of the child, they should be making decisions together, reasonably, with the child's best interests in mind, with the assistance of a mediator if necessary. It should also be obvious to the parties that trying to cause anguish to each other and spending enormous amounts of time, money, and emotional energy on public court proceedings is not at all in the child's best interests.

Summary and conclusions

[67] The 2022 Order shall be varied as follows:

- a) Paragraph 2 shall be varied to provide that the claimant may spend his second parenting blocks, with pick-up and drop-off in Kelowna, at his home in the Lower Mainland.
- b) Paragraph 3 shall be varied to remove the requirement that the additional parenting time described in this paragraph must be in Kelowna.
- c) Paragraph 5 shall be deleted.
- d) Paragraphs 7 and 8 shall be deleted and replaced with provisions that state:
 - i. The parties may travel with the child during their regular parenting time provided that they give the other party reasonable notice and travel itineraries.
 - ii. If the respondent wishes to take the child on a holiday which would intrude on the claimant's regular parenting time, she may do so only with the claimant's agreement, and upon three months' notice and with the provision of travel itineraries at least 21 days in advance. The claimant's consent shall not be unreasonably withheld. If the respondent exercises this entitlement, the claimant shall be provided with replacement parenting time to make up for the regular parenting time lost by him, as soon as practically convenient to the claimant and the child.
 - iii. The claimant shall be entitled to take the child for one or two additional holiday blocks, totalling two weeks per year, between June and August, inclusive. The weeks may be, but do not have to be consecutive. The claimant shall advise of his intentions as to the holiday dates by March 1 each year, and shall provide the respondent with a travel itinerary at least 21 days in advance of each holiday week. These weeks are in addition to and may be attached to the claimant's regular parenting blocks. However, if a holiday week overlaps with a regular parenting

block, there shall be no extra time provided as a consequence. There is no prohibition against any or all of these holiday blocks being spent at the claimant's home.

e) Paragraph 13 shall be deleted.

[68] In addition, the parties are directed to undertake mediation in the next three months, online if necessary, to finalize the parenting arrangements in respect of holidays and special days between them, and they shall take the Parenting after Separation course as directed.

[69] As success on this application has been mixed, and given the conclusions that I have expressed above regarding the conduct of the parties, there shall be no order as to costs.

"The Honourable Justice Loo"

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