
CANADA / JUDGMENT

Hayun v. Hayun

2022 BCCA 34

COURT

British Columbia Court of Appeal

DECIDED

20 January 2022

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2022 BCCA 34 Hayun v. Hayun

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hayun v. Hayun,

2022 BCCA 34

Date: 20220120

Docket: CA47622

Between:

Adi Hayun

Respondent

(Claimant)

And

Or Hayun

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Willcock

The Honourable Justice Griffin

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated June 25, 2021 (Hayun v. Hayun, 2021 BCSC 1240, Vancouver Docket E190282).

Oral Reasons for Judgment

Counsel for the Appellant

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I. Mbenza, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

January 20, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 20, 2022

Summary:

The appellant father appeals from an order allowing the respondent mother to relocate to Israel with the parties' child. Held: Appeal dismissed. The appellant's arguments seek to have the Court re-weigh the evidence and exercise its discretion differently than did the judge. The judge did not conflate the mother's best interests with those of the child; fail to consider the relevant factors; or overlook material evidence.

GRIFFIN J.A.:

Introduction

- [1] This appeal is brought from a trial judge's decision to allow the respondent mother to relocate to Israel with the parties' child, then almost age six. The appellant father wishes to have the child live primarily with him in Vancouver, BC. There is no question that both parents have good parenting skills and that the child has a strong attachment to each parent, as well as an attachment to both Israel and Vancouver.

- [2] In addition to hearing the appellant's oral submissions, before the hearing of this appeal we had the opportunity to read the parties' factums, the reasons for judgment of the trial judge, and the record.
- [3] Deciding where a child should live when the parents do not wish to live in the same jurisdiction as each other is one of the most difficult decisions judges are called upon to make. No matter what decision is made, the child cannot live in both jurisdictions at the same time. A fair decision requires listening to and coming to grips with the evidence of the two parents and other witnesses at trial, keeping in mind what is in the best interests of the child. Appeal courts do not have the benefit of hearing from the witnesses and must give considerable deference to the trial judge's decision, absent an error of law. This is also necessary in the interests of finality: see *Hsieh v. Lui*, 2017 BCCA 51 at para. 38; *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 10-12, 1999 CanLII 691; *Van de Perre v. Edwards*, 2001 SCC 60 at paras. 13-15.
- [4] It appears to me that the father is challenging findings of fact and asking this Court to re-weigh the evidence and exercise its discretion differently than did the trial judge. I am unable to find any fault in the judge's finding of the facts and weighing of the evidence.
- [5] For the reasons that follow, I would dismiss the appeal.

Legal Principles

- [6] The application by the mother to relocate with the child was filed before any order had been made as to parenting arrangements and in the situation where there was no parenting agreement in place. As established in *K.W. v. L.H.*, 2018 BCCA 204, in this situation s. 46 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] applies.
- [7] Section 46 incorporates the best interests of the child factors set out in s. 37.
- [8] Courts are instructed not to consider whether the guardian who is planning to move would do so without the child: s. 46(2)(b). Where one parent wants to move with the child and one wants to stay, the court is to consider each parent's plan and not improperly assume that either one would change their planned location if the judge approved or did not approve of the child's relocation: *Duggan v. White*, 2019 BCCA 200 at para. 20.
- [9] This means that if the status quo is that both parents currently live in the same jurisdiction in close proximity to each other, the court must not favour that status quo as being in the best interests of the child, as it presumes that the relocating parent will not move: *K.W.* at paras. 105-106. The relocation provisions of the FLA are not weighted for or against change: *Duggan* at para. 59.

- [10] The courts are instructed to consider the reason for the proposed move: s. 46(2)(a). The reasons for the move should at least meet the standards of reasonableness and good faith, which can be met where the relocating parent's reasons for moving are to better achieve self-sufficiency: Duggan at paras. 17, 61-66.
- [11] When parenting arrangements are first addressed by the court at the same time as the relocation application, as in this case, the court is to consider a "blended, in the round analysis" of all relevant factors: K.W. at para. 111; Duggan at paras. 52-53.

Trial Reasons for Judgment

- [12] The trial took place over 16 days in the spring of 2021, with the judge delivering reasons for judgment on June 25, 2021, indexed as 2021 BCSC 1240.
- [13] In summary, the judge found that both parents were good parents and had a strong bond with the child.
- [14] Both parents were born and raised in Israel and retain Israeli citizenship. They met in Israel and that is where their relationship began. They both did their post-secondary education in Israel. The father moved to Canada, but returned to Israel to be with the mother. They married in Israel in 2014, and later that year the mother became pregnant. The father returned to Canada but the mother stayed in Israel during her pregnancy, and the child was born there in accordance with both parties' wishes. After the parties moved to Canada in October 2015, the mother returned to Israel with the child each year, sometimes for months at a time, with the father's agreement. One such visit was for a surgery for the child, even though the surgery could have been performed in Canada.
- [15] As for the parties' connection to Canada, the judge found that the father began living in Canada when he was 18½ years old and both of his parents live in Vancouver. The father has a brother living in Canada and a brother living in Israel. Although he has some English language limitations, the father is more proficient in English than is the mother. He is employed in Vancouver by an IT company as manager of operations.
- [16] The mother did not have a strong desire to live in Vancouver, but the father did. Her understanding of the initial plan was that the couple would live in Vancouver for only three years before returning to Israel.
- [17] The child was comfortable in both countries and had family ties in both Israel and BC.
- [18] The judge found that the mother was not skilled in the English language and was not financially independent in Vancouver, nor did she have the psychological and emotional supports that she had in Israel. The father and his father had described her to others in their religious community in Vancouver as a kidnapper, making things difficult for the mother within the community. In Israel, the mother's professional qualifications were recognized and she was able to earn a good living in her chosen career and to live in an apartment provided by her parents. The judge found that the mother would be better able to provide

for the child in Israel than in BC, due to better financial stability and social supports. As well, the child would be able to attend Jewish school without additional cost, unlike in BC. The mother was also likely to cooperate in co-parenting long distance.

- [19] In comparing the parents' circumstances, in summary, the judge's findings acknowledge that only the father was thriving in BC. He found that the inequity in the parent's circumstances, if both remained in BC, would impact negatively on the child.
- [20] While the judge found the father to be a good parent, the judge found that the father was less likely to cooperate in co-parenting if the child remained with him in BC and the mother moved to Israel. The judge was also concerned that the father's negative attitude toward the child's mother would influence the child's own views of the mother.
- [21] In the result, the judge allowed the relocation application and set out terms for a parenting arrangement, addressing important holidays and who would pay the costs of flights, that would allow the father continued and frequent access with the child.

Issues

- [22] Mr. Hayun does not suggest that the judge erred in his understanding and application of the law and does not challenge most of the judge's findings of fact. Instead, he asserts that the judge made the following three errors:
- a) treating the mother as the primary residence parent and treating her best interests as synonymous with the child's best interests;
 - b) failing to assess the child's best interests in the context of the possible scenarios; and
 - c) overlooking material evidence and drawing erroneous conclusions that were relevant to the child's best interests and could have reasonably affected the result.

Discussion

Alleged Error #1: Did the judge treat the mother's best interests as synonymous with the child's best interests?

- [23] The father submits that the judge erred in treating the mother as the primary residence, or custodial parent, and treating her best interests as synonymous with the child's. The father relies on the case of *Stav v. Stav*, 2012 BCCA 154 at para. 59, where it was found that these errors were made by the trial judge.
- [24] It is important to note that the facts and circumstances of the family in *Stav* were different from the present case. As but one difference, there was a 14-year-old child in *Stav* who was attached to his friends and doing well in high school in BC, and he was not fluent in Hebrew. He opposed moving with his mother and younger siblings to Israel.

- [25] The father points to two statements in the reasons in support of the argument that the judge treated the mother as a custodial parent:
- [27] The family was traditional in the sense that Mr. Hayun was the sole financial provider (he worked his day job and then a night job for a time) and Ms. Hayun was a full time homemaker and primary caregiver of N until he was placed in daycare at the Jewish Community Centre in August 2017.
- [83] It is apparent from the evidence that the primary caregiver for N was Ms. Hayun up until about 2019, when the Myers J. order was put in place. I say this not to unfairly minimize Mr. Hayun's role in N's life, but rather because my sense of the family was that it was a traditional one in which husband and wife took on traditional roles. Mr. Hayun was the sole or primary income earner and Ms. Hayun was primarily a homemaker, though she later took on part-time work and N was placed in daycare.
- [26] The Myers J. order was made on June 14, 2019, installing an equal parenting schedule: at para. 50.
- [27] The judge carefully reviewed the history of the child since birth, including the many trips and stays back and forth between Israel and Canada. It was not necessary to quantify how much time the child spent with each parent and the judge did not attempt to do so, although it certainly appears clear that in his early life the child spent more time with the mother. The judge noted that the mother was primary caregiver for a time because it was a traditional marriage. Also, after the parties separated in September 2018, the child spent more time with the mother until the Myers J. order on June 14, 2019. By the time of trial, the shared parenting regime had been in place for almost two years, and the judge clearly understood this.
- [28] I see nothing wrong in the judge's review of the history of the parties. He did not suggest that the mother had a stronger bond with the child than the father, or that the fact it was a traditional marriage should weigh more heavily in favour of the mother having custody of the child. It was simply part of the background to understand the situation of the family members during the marriage and upon the marriage breakdown.
- [29] As for the criticism that the judge conflated the mother's well-being with the child's best interests, I disagree that the judge did so. The judge carefully considered the mother's financial and social instability in Vancouver, the inequality of those circumstances compared to those of the father, and how this inequality could negatively impact the child in the future if the mother remained living in BC. The judge was entitled to take these matters into account, as is made clear in Duggan.
- [30] In Duggan, this Court found it important to the relocation analysis to consider the unequal circumstances of a mother who, if not allowed to relocate, would remain in a low-income situation and not be able to attain financial security. Justice Saunders noted:

- [63] It is difficult to see, absent evidence particular to the case, how the prolongation of such unequal circumstances can be in the best interests of the child, as he grows to understand the relative placement of his parents in his family structure.
- [65] I would observe that although this case concerns the living arrangements of a child and not spousal support, the stance of family law in Canada has long been to promote the economic self-sufficiency of each party within a reasonable time: e.g., Divorce Act, s. 15.2(6)(d). That stance recognizes the general advantages of individual financial independence in the family context, including the stronger safety net for the child to protect against the unexpected, consistent with the best interests of children caught in the breakdown of family relationships. This consideration, too, goes into the round.
- [66] The Family Law Act directs a court to consider "the best interests of the child", "the child's ... psychological and emotional safety, security and well-being," and "all of the child's needs and circumstances". It seems to me that a full understanding of these phrases provides room for considering the concepts of equal opportunity, review of the present disparity between the economic circumstances of the parents, and recognition of the potential prolongation of that disparity consequent on the decision made by the judge on the application before him. Such considerations surely inform, to borrow a phrase from Justice L'Heureux-Dubé, "the conditions which are most conducive to the flourishing of the child": *Young v. Young*, [1993] 4 S.C.R. 3 at 65 (dissenting in the result), quoted favourably in *Manitoba (Director of Child and Family Services) v. C.(A.)*, 2009 SCC 30 at para. 88. I consider that in narrowing his review to the "necessity" of the move, the judge fell into error in failing to give a large consideration of the best interests of the child.
- [31] The father suggests that before a judge may consider the inequality between the parents, it is necessary first to have evidence that the inequality is having a negative impact on the child, citing *Hellberg v. Netherclift*, 2017 BCCA 363 at para. 88.
- [32] As explained subsequently in *Hellberg v. Netherclift*, 2018 BCCA 404 at paras. 65-67, the earlier *Hellberg* appeal decision does not stand for the proposition that a parent wishing to relocate must show that current living arrangements are having an adverse impact on a child. This is also clear from the analysis in *Duggan* set out above.
- [33] I would not accede to the first ground of appeal.

Alleged Error #2: Did the judge fail to consider all relevant factors?

- [34] The main focus of the second ground of appeal is the argument that the judge did not give any consideration to the father's proposal that the child remain with him in Vancouver.
- [35] Here, the father repeats some of the same arguments from the first ground of appeal, suggesting the judge focused on the best interests of the mother, not the child. I have already noted that I disagree with this characterization of the judge's reasons.

- [36] In my view, the judge did consider the father's proposal that the child remain with him in Vancouver. However, as already set out above, the judge had two significant concerns: that given the father's past behaviour, he would not cooperate in co-parenting and would not foster communication between the child and the mother; and that his negative attitude toward the mother would negatively impact the child's relationship with the mother.
- [37] The judge noted that there were instances of the father's behaviour that raised questions about his willingness to cooperate in a co-parenting arrangement. These were numerous and need not be repeated here. The fact that these were in the past did not mean that the judge was not entitled to consider them, as they were significant incidents.
- [38] The judge noted his concern that the father's "financial and social 'upper hand' relative to [the mother] in Canada, along with his family's severely negative views of [the mother], will be marshalled (or may operate unintentionally) to drive a wedge between N and his mother": at para. 125(f). He observed that the disparity between the parents in BC at present, in terms of income, economic opportunity, social support, community perception, self-sufficiency, and stability, operates against the child's best interests: at para. 130.
- [39] There was evidence to support these findings by the judge.
- [40] The father suggests that it is speculative to say he would not cooperate in a long-distance parenting relationship if the child lived with him and the mother lived in Israel.
- [41] One cannot prove what will happen in the future with certainty, but there was abundant evidence to support the judge's concerns, and these were proper factors to consider when determining the child's best interests.
- [42] I would not accede to this ground of appeal.

Alleged Error #3: Did the judge overlook material evidence?

- [43] The father submits that the judge failed to consider evidence relevant to the child's best interests, including the child's healthy attachment to both parents, the absence of concerns about the father's parenting skills, and the opinion evidence of Dr. Elterman.
- [44] Respectfully, I see no merit to this ground of appeal.
- [45] Dr. Elterman was a witness who prepared two s. 211 reports. The judge considered his evidence, citing it at length at paras. 71 and 72.
- [46] Dr. Elterman's reports gave the opinion that both parents were good parents and the child has a strong bond with both of them.
- [47] The judge expressly noted that the child was healthy and happy and was attached to both parents as well as to extended family on both parents' sides. He noted that both parties were engaged parents who love their child and whose child loves them: at paras. 82, 90.

- [48] Otherwise, Dr. Elterman's reports expressed the view that the best interests of the child would be for the parents to live in the same location, which he appeared to assume would be BC. I pause to note that Dr. Elterman did what the law does not permit judges to do: favour the status quo. This aspect of Dr. Elterman's opinion was therefore of quite limited value.
- [49] The judge correctly observed:
- [120] It is clear that having both parents proximate and available to N would be optimal. However, this fact cannot be viewed in a vacuum, otherwise relocation would never be an option. Any analysis that attributes too much weight to this consideration would amount to an improper presumption in favour of the status quo. What needs to be considered is whether relocation would enhance the child's emotional, physical, and psychological support, as well as his security and stability, not just in the present but over the longer term, given the alternatives.
- [50] The father also submits that the judge did not take into account some of the mother's behaviour when the marriage broke down in September 2018. Here, he points to steps that the mother took in litigation in Israel and in Canada. Again, respectfully, the judge was clearly aware of the full litigation history between the parties and referred to it in his reasons. After considering all of the evidence, the judge concluded that the mother "would support and foster the relationship between N and his father with sincerity": at para. 133. This finding was supported by the evidence.
- [51] I would not accede to this ground of appeal.

Disposition

- [52] I would dismiss the appeal.
- [53] It is unnecessary to consider the mother's fresh evidence application, which I would dismiss.
- [54] WILLCOCK J.A.: I agree.
- [55] GRAUER J.A.: I agree.
- [56] WILLCOCK J.A.: The appeal is dismissed.

"The Honourable Justice Griffin"

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Prepared on 28 October 2026 · Esheria