
CANADA / JUDGMENT

I.L.M. v. C.J.E.

2016 BCSC 2091

COURT

Supreme Court of British Columbia

DECIDED

3 October 2016

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2016 BCSC 2091 I.L.M. v. C.J.E.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

I.L.M. v. C.J.E.,

2016 BCSC 2091

Date: 20161003

Docket: E130130

Registry: Vancouver

Between:

I.L.M.

Claimant

And

C.J.E.

Respondent

Before: The Honourable Madam Justice H. Holmes

Oral Ruling

In Chambers

Counsel for the Claimant:

Carla R. Lewis

Taruna Arora

Counsel for the Respondent:

Natasha Bulatovic

Zoe Si

Place and Date of Hearing:

Vancouver, B.C.

September 27, 2016

Place and Date of Ruling:

Vancouver, B.C.

October 3, 2016

[1] THE COURT:

INTRODUCTION

- [2] S., who is now five years of age, is the child of the parties' two and a half year marriage, which ended in May of 2012. Since September of 2015, S. has lived primarily with C.J.E. ("Mr. E.") and his fiancée, L.C., and he spends alternating weekends (from Friday evening to Sunday evening) with I.L.M. ("Ms. M."). Before September 2015, Ms. M. had primary care of S. for a period of time, and over substantial different periods the parties had approximately equal parenting time with him. Mr. E. and Ms. M. are S.'s joint guardians.
- [3] Mr. E. now seeks orders appointing L.C. as an additional guardian for S., and allocating to himself and L.C. all of the parental responsibilities associated with guardianship, as listed in s. 41 of the Family Law Act.
- [4] Mr. E. also seeks orders that would have the effect of preventing Ms. M. from taking S. to Nanaimo, where she now lives, for the alternating weekends S. spends with her. Instead, Mr. E. proposes that Ms. M. spend her parenting time, which he proposes be slightly reduced (to alternating Saturdays from 10:00 a.m. to 7:00 p.m. and Sundays from 10:00 a.m. to 5:00 p.m.), in the Lower Mainland closer to Mr. E. and L.C.'s home in New Westminster.

THE CONTEXT OF THE APPLICATION

- [5] No divorce has yet been granted. No trial date has yet been set.
- [6] The existing order governing the parenting arrangement is a consent order made by Master Dick at a judicial case conference on January 19, 2016.
- [7] The order names Ms. M. and Mr. E. as S.'s joint guardians, and requires them to share and jointly exercise the s. 41 parental responsibilities for S. S.'s primary residence is with Mr. E., with parenting time for Ms. M. as I indicated earlier, and a standard sharing of holiday times and special occasions.

- [8] Through the order, the parties agreed to various restrictions on their own conduct and communication. They also agreed to each notify the other when taking S. outside the Metro Vancouver Regional District within British Columbia, and to seek the consent of the other to take S. outside British Columbia.
- [9] I agree with the submission Ms. Bulatovic, made on behalf of Mr. E., that, by the terms of the JCC order (not all of which I have mentioned), it is clear that the order contemplated that Ms. M. would be exercising her parenting time in the Lower Mainland, where she lived at the time.
- [10] I should note before continuing that despite Ms. Lewis's valiant and capable efforts to assist the Court on the following point, it is difficult to determine, for some of the orders made at the JCC, whether they were made under the Divorce Act or under the Family Law Act, or to determine whether they were intended to be interim or final orders. These characterisations affect the test for a variation.
- [11] I have concluded, however, that it is unnecessary in this application to determine how the various orders made at the JCC should be characterized, whether made under the Divorce Act or the Family Law Act, and whether interim or final. For various reasons, the characterization of the orders was not the subject of submissions by both parties. More fundamentally perhaps, both parties agree that Ms. M.'s move to Nanaimo is either a material change or a compelling change in circumstances, if such is required for a variation.

THE ISSUES

- [12] In its essence, Mr. E.'s application asks the Court to determine two main issues:
1. whether L.C. should be appointed as an additional guardian for S.; and
 2. whether Ms. M.'s parenting time should be exercised in the Lower Mainland and slightly reduced, as Mr. E. proposes.
- [13] Each of those two main issues has some subsidiary issues.
- [14] Both of the main issues turn on S.'s best interests. I will turn directly to those best interests, and how they are best protected, in relation to each of the two main issues.
1. SHOULD L.C. BE AN ADDITIONAL GUARDIAN?
- [15] Mr. E. asks that L.C. be appointed as an additional guardian for S., and L.C. submits her own request as well by way of her affidavit filed in this application. They ask for this to reflect the role she has taken in S.'s life for many years, and to allow her to handle guardianship responsibilities that Mr. E. cannot when he is working. Mr. E. submits that Ms. M. is unavailable to handle those responsibilities because she lives a distance away, in Nanaimo.

- [16] There is no disagreement that L.C. has taken a large and loving role in S.'s life. L.C. does not work outside the home, and she has generously taken up many of the day-to-day responsibilities for S., providing much of his care. L.C. is clearly an important figure in S.'s life and he undoubtedly benefits from her love and her guidance.
- [17] However, I do not view it as being in S.'s best interests that L.C. be appointed as an additional guardian at this time. It is clear from the evidence that, while the parties have made progress since the separation, there remains a power imbalance in their relationship that leaves Ms. M. vulnerable.
- [18] In his affidavits Mr. E. himself displays an open disrespect for Ms. M., often exceeding the proper bounds of affidavit evidence by expressing his opinion of her conduct or speculating as to her motives. Some of Mr. E.'s comments indicate a discomfort with situations in which he lacks control. His own evidence shows that he sometimes communicates with Ms. M. on matters concerning S. in a somewhat dictatorial fashion.
- [19] In these circumstances, appointing L.C. as an additional guardian would, in my view, diminish Ms. M.'s perceived and actual role as S.'s guardian, a result which would not serve S.'s best interests.
- [20] For the same reasons I would not allocate all of the s. 41 parental responsibilities to Mr. E. either with or without L.C. as guardian.
- [21] I am not persuaded that practical concerns require that L.C. be appointed as an additional guardian. L.C. has done an admirable job thus far of caring for S. and participating in his life without having status as a guardian. Either with Mr. E. or alone, she has looked into daycares, preschool, and now kindergarten for S., and arranged to enrol him, and has assisted in various other ways. It has been no real hindrance that she is not S.'s guardian.
- [22] S. and the parties are fortunate that L.C. is a part of S.'s life. However, as I have said, I would not appoint L.C. as a guardian. In my view S.'s best interests will be furthered much more by the parties working toward better and more respectful communication with each other about the important decisions in S.'s life than by effectively marginalizing Ms. M.'s role. Both parties need to find ways to ensure that they help each other fulfil their parental responsibilities for S. Their role is shared, not adversarial. The role is to be exercised in a cooperative fashion.
2. SHOULD Ms. M.'S PARENTING TIME TAKE PLACE IN THE LOWER MAINLAND, AND BE REDUCED?
- [23] I do not consider it helpful to determine whether, as Mr. E. submits and Ms. M. denies, Ms. M. misled him and the Court at the JCC by failing to disclose that she expected imminently to move to Nanaimo or possibly had already done so. The evidence on this point is quite extensive, and a detailed examination of it either during the hearing or by way of these reasons would take the focus away from the true substance of Mr. E.'s application.

- [24] Such a detailed examination would also have prevented the application being heard within anything even close to the time scheduled for it -- an hour was estimated by Mr. E.'s counsel to be sufficient, two hours by Ms. M.'s counsel. Both estimates were far short of what was necessary for hearing the issues I am now addressing, and were nowhere near the time necessary for examining all of the issues that could potentially arise from the extensive materials filed with the application.
- [25] Mr. E. provides evidence of troubling behaviour by S. both at home and as reported and documented by the preschool he attended until recently. As described in the evidence, the troubling behaviour appears to coincide with S.'s trips to Nanaimo. Mr. E. and L.C. report changes in S.'s energy, well-being and general spirits after, and sometimes before, trips to Nanaimo, as well as certain comments S. has made that lead them to believe that he may not be happy in Ms. M.'s Nanaimo home or with Ms. M.'s new partner there.
- [26] Mr. E. and L.C. depose that, at Mr. E.'s insistence, Ms. M. came to the Lower Mainland for the last three parenting visits, and that things went much better for S.: he did not display the conduct and other signs that had troubled him and L.C. before. On the evidence, S. appeared to very much enjoy his time with his mother during those more recent visits in the Lower Mainland.
- [27] The evidence of negative behaviour by S. and of adverse effects on his energy and wellbeing is troubling and must be taken very seriously. However, on a close examination of the evidence these effects appear to be attributable to the late hour at which S. arrives in Nanaimo on alternating Friday nights and at which he returns to New Westminster on Sunday nights.
- [28] Initially, Ms. M. was to pick up S. and begin their journey at 3:00 p.m. on alternating Fridays, and return S. to Mr. E.'s home at 5:00 p.m. on the following Sunday. However, for reasons that are unnecessary to comment on, those times shifted to two hours later on Fridays and on Sundays, alternating Fridays and Sundays.
- [29] Ms. M. provides evidence about how the typical journey to Nanaimo plays out. Evidently it involves some time when Ms. M. is occupied with driving, but it also allows for play or learning time on the ferry as well as some valuable interaction time in the car.
- [30] As to the negative comments S. has made about the situation in Nanaimo, on all the evidence I consider that they were not intended to communicate a concern but rather were invitations to Mr. E. and L.C. to guide S. in his attitude toward the parties' separation and toward his own life in two different homes. S. needs to understand that his life is enriched by having a strong relationship with both of his parents and by experiencing a diversity of experiences in their two homes. It is the responsibility of both of his parents to help him reach this understanding.

- [31] There seems to be no reason that the pickup and return times cannot revert to 3:00 p.m. on alternating Fridays and 5:00 p.m. on Sundays. These times will allow S. to make the journey in each case without running late into the evening or past his bedtime and will, I expect, avoid the negative effects that were seen before.
- [32] Those are the times specified in the JCC order. For the reasons I have given, I would deny Mr. E.'s application for orders that would prevent Ms. M. exercising her parenting time in Nanaimo. The parenting time should take place at the times specified in the JCC order.

DISPOSITION

- [33] Mr. E.'s application is denied, except as follows.
- [34] In item 6 of his application, Mr. E. seeks an order for the sharing of S.'s extraordinary expenses in proportion to their incomes. As the parties agreed, that matter is adjourned generally.
- [35] I have not addressed at all Ms. M.'s separation application, since there was not time to hear it. The parties agreed that Mr. E.'s application should be heard first, and it occupied all of the available time.

"The Honourable Madam Justice H. Holmes"

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