
CANADA / JUDGMENT

J.C.L. v. S.J.L.L.

2019 BCSC 2052

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Supreme Court of British Columbia

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2019 BCSC 2052 J.C.L. v. S.J.L.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.C.L. v. S.J.L.L.,

2019 BCSC 2052

Date: 20191129

Docket: E48873

Registry: New Westminster

Between:

J.C.L.

Claimant

And

S.J.L.L.

Respondent

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Claimant:

K.K. Brar

Counsel for the Respondent:

K.J. Gammon

Place and Date of Hearing:

New Westminster, B.C.

August 27, 2019

Place and Date of Judgment:

New Westminster, B.C.

November 29, 2019

- [1] This family matter involved cross-applications regarding parenting time and choice of school filed by the claimant and respondent. For purposes of these reasons, I will refer to the claimant as "the mother" and to the respondent as "the father".
- [2] At the outset of the September 27, 2019 hearing, some of the relief sought was adjourned by agreement of the parties and two of the orders sought were consented to on agreed terms. This effectively narrowed the matters before me for adjudication to two issues: (1) whether the parties' separation agreement ("Agreement") should be varied to make their child, who I will refer to as A, primarily resident with the father; and (2) where A should attend middle school. As will become evident below, the two issues are closely inter-related.
- [3] Given the imminent onset of the school year, I made an order on September 3, 2019. The order dismissed the application to vary the Agreement, ordered that A attend school in Coquitlam, and provided for the parties to bear their own costs. These are the reasons for judgment with respect to the September 3, 2019 order.
- [4] The evidence before me consisted of two affidavits from each party. A July 2016 report ("Report") under s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [Family Law Act] was provided as an attachment to one of the affidavits.

Background

- [5] The parties married on October 4, 1997, and separated on February 1, 2014. There are two children of the marriage: D, who turned 16 years old this September, and A, who is 11 years old.
- [6] The parties moved to Coquitlam shortly after D's birth and resided together there until their separation in 2014. On separation, the mother relocated to another house in Coquitlam, located not far from the former family home, and the children began to reside primarily with the mother.
- [7] On July 22, 2015, an interim consent order providing for the children to reside primarily with the mother was made.

[8] In April 2017, the mother moved to Langley to live with a new partner and his two children. She continues to live there. The father stayed in Coquitlam, where he now resides with his new partner.

[9] On April 2, 2019, the parties entered into the Agreement. The Agreement stipulates that the children's parenting time is primarily with the mother and establishes the following regular schedule (with a separate holiday schedule) for the father's parenting time:

Week 1: From Wednesday at 3:00 p.m. until Friday at 3:00 p.m.;

Week 2: From Thursday at 3:00 p.m. until Monday at 3:00 p.m.

[10] The Agreement increased the father's parenting time, resulting in a 60/40 split in parenting time in favour of the mother.

[11] The Agreement also includes the following term:

Notwithstanding the above paragraphs, the parties will at all times maintain a reasonable and flexible position respecting the parenting time arrangements for the Children and at all the times the best interests of the Children will prevail. Therefore, the parties may change the parenting time schedule by agreement.

[12] In relation to A, the parties are following the parenting time schedule set by the Agreement. This is not the case in relation to D. In March of 2019, D chose to increase his time with the father. In July of 2019, D chose to reside full-time with the father. Both of D's choices were acceded to by the parents, effectively changing the parenting time schedule by agreement.

[13] The father says he encourages D to communicate with the mother now that he is residing full-time with the father. The mother says D has anxiety issues and she wants him to be where he feels more comfortable. She believes D is old enough to decide that for himself. She does not, however, consider D's current choice of residence to be a permanent decision. She says she has historically had a very good relationship with D. Her assertion is supported by the Report, which indicates that in 2016 D preferred the mother's parenting style and felt more comfortable with her.

[14] As the mother's parenting time with D is not an issue before me for determination, I will not review the evidence relating to D's 2019 decisions increasing his time with the father. For purposes of the issues that are before me, it is sufficient to state that there is no evidence of an irreparable break in the relationship between D and the mother.

Orders Sought

[15] On August 8, 2019, the mother filed a notice of application seeking an order under Family Law Act, ss. 37(1) and 43(1), that A "register and attend Peter Ewart Middle School in Langley".

[16] On August 14, 2019, the father filed a notice of application seeking the following orders under ss. 37, 44(4) and 45(1)(b) of the Family Law Act:

- 1) the 2019 Agreement be varied such that A reside primarily with the father and have reasonable parenting time with the mother;
- 2) in the alternative, an order that a Views of the Child Report be prepared with regard to A's views regarding what school he attends and what parenting time schedule he wishes to have in place;
- 3) an order that A attend Montgomery Middle School in Coquitlam.

[17] With regard to the father's alternative request for an order that a views of the child report be prepared for A, the mother opposed that order. The mother asserts that nothing less than a full s. 211 report is sufficient, but further asserts that a s. 211 should not be done at this time.

The Middle School Issue

[18] There is no order or agreement determining where A should attend school.

[19] The Agreement obliges the parties to attempt to deal with important education matters by agreement. Failing agreement, unless both parties consent to mediation, an application may be made to the courts. The middle school issue is before me as such an application. Accordingly, the question of where A should attend school is to be determined solely on the basis of A's best interest.

[20] Under s. 37(1) of the Family Law Act, the only thing to be considered in making an order regarding parenting arrangements is the best interest of the child. Section 37(2) mandates the court to take into account all of a child's needs and circumstances in determining what is in the child's best interest.

[21] The non-exhaustive list of considerations set out in section 37(2) include:

- (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; and
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities.

Facts & the Parties' Positions

- [22] Following the parties' separation in 2014, the children continued at their respective Coquitlam schools. D completed grades six through eight at Montgomery Middle School ("Montgomery"), and moved on to the high school he presently attends. A continued at his elementary school, Miller Park Community School ("Miller Park").
- [23] In April 2017, the mother moved to Langley. She raised the possibility of the children attending Langley schools at that time, but the father objected and she did not pursue the issue further. For the 2017-18 and 2018-19 school years, the mother drove the children between her home in Langley and their Coquitlam schools as required during her parenting time.
- [24] In the spring of 2019 A completed elementary school and thus must move on to a middle school. The fact that A must attend a new school in any event drives the timing of the mother's present application.

Peter Ewart Middle School

- [25] The mother argues that A resides primarily with her and is at her home for the majority of days in a full school week. She wants A to go to Peter Ewart Middle School ("Peter Ewart") in Langley. She describes Peter Ewart as within walking distance of her home, noting that one of her partner's children attends Peter Ewart and the other goes to an adjacent school. She says that since A has to start a new school and make new friends regardless, it is in his best interest to do that in Langley, where he spends the majority of his time.
- [26] The mother says that A will spend less time commuting to and from school if he attends Peter Ewart, and that she can be home when A returns from school as her employment is part-time and her employer accommodates her childcare responsibilities.
- [27] She says that going to school in Langley will provide A with stability, a consistent daily routine and more independence.
- [28] The father objects that it is not practically possible for him to take A to and from Peter Ewart on his parenting time due to his work schedule. He works downtown Vancouver at an animation studio and uses public transit to go between Coquitlam and Vancouver for work. His hours of work are 9:00 a.m. to 6:00 p.m. and he attests that those hours are both inflexible and near uniform in his profession.
- [29] The father lives with a new partner and they have one household vehicle between them, but the father says his partner needs the vehicle for her work and to attend classes. He attests that they cannot afford a second vehicle to enable him to drive to and from work, let alone the cost of gas and downtown parking. He says that even with a vehicle, he would still be unable to get A to and from Peter Ewart at school times without having to arrive late for work and leave early.

- [30] In response, the mother says that in light of the father's fixed work schedule and his resulting difficulties doing pick ups and drop offs at Peter Ewart, she is prepared to agree to adjust the parenting schedule. She does not, however, indicate what adjustments she will agree to in order to address these difficulties. Her affidavit attaches an email proposal she made to the father when she wanted the children to attend school in Langley in 2017. In that email, the mother acknowledges that pick up and drop off will be difficult for the father and proposes schedule changes to give the father one less Langley drop off each week. She also suggests that she might drive the children out to Coquitlam after school on Fridays.

Montgomery Middle School

- [31] The father wants A to go to Montgomery in Coquitlam. He says if A takes grade six at Montgomery, his teacher will be Mr. Price, a teacher D had for three grades and for whom the father has high regard. The father says that A has done well in Montessori and should continue with what is familiar to him. He says the Montgomery staff know the family history and suggests this might benefit A should he encounter difficulties in middle school. He acknowledges that A's closest friends from Miller Park will not be in grade six at Montgomery, but says there will be other children with whom A is "friendly". He states that some of A's close friends will join him at Montgomery the following year, explaining that A was in a split grade class at Miller Park.
- [32] If A goes to Montgomery, he will have to walk or bicycle about 2.5 km between the father's home and the school, but D will be able to accompany him for about half of that before turning off to his high school. The mother objects to A traversing the second half of the route alone and also to his taking transit or going to a friend's home after school. She also expresses concern that there will be no adults at the father's home when A gets home from school.
- [33] In response, the father attests that D was permitted to take transit when he was 11 years old. He argues that D, as a 16 year old, is capable of providing after school supervision and says his partner arrives back at the house by 4:30 p.m. on weekdays.

A's Views

- [34] A has told both parties that he wants to go to Montgomery. Most of the evidence about A's statements as to his wishes is found in the father's affidavits, but the mother does not dispute that A made the statements attributed to him. To the contrary, her evidence is that A made some of the same statements to her. She attests that A told her that he wants to go to Montgomery, but that the only reason A provided for his preference was that D had gone there.

- [35] The father attests that A said he wants to go to Montgomery both in order to continue in Montessori and because D went there. The father indicates that A attended various events at Montgomery while D was a student there. He also explains that A is familiar with Mr. Price not only because he taught D, but because Mr. Price taught at Miller Park before moving to Montgomery.
- [36] The father's evidence is that A has stated his wish to go Montgomery repeatedly and emphatically, and that A frequently becomes distraught when the matter of middle school is under discussion. The mother does not dispute the accuracy or fairness of the father's evidence in this regard.
- [37] The mother says she believes A's views have been influenced by the father (which the father denies), but has provided no evidence in support of that belief. In particular, there is no evidence that A was ever, at any point in time, even mildly receptive to the idea of attending a school other than Montgomery.

Decision on Middle School Issue

- [38] Both parties made arguments relating to their abilities to support A's studies. I am satisfied that both parents will do their very best to help A succeed, in the short and long term, regardless of which middle school he attends.
- [39] The mother expresses concern about A going between the father's home and Montgomery even though D would be with him for half of the route. For a number of reasons, I have concluded that the mother's concerns in this regard are overstated. First, D attended Montgomery for middle school and there is evidence that D was permitted to take transit at the age of 11. Second, the mother's evidence implies that she would permit A to walk the route between her home and Peter Ewart. Third, I find the following statement from the mother's second affidavit very telling:

If any of [A]'s friends would have enrolled in Montgomery with [A], I would not have pursued [A] to go to Peter Ewart in Langley.

- [40] Similarly, I find the mother's concern about A being at the father's house after school without an adult present is overstated. At 16 years of age, D is capable of providing supervision until the father's partner arrives home. An assertion that D is not would be inconsistent with the mother's evidence that she believes D is mature enough to make important decisions.
- [41] The mother has identified benefits that would be obtained if A went to Peter Ewart, such as reducing A's travel time and A being under her direct supervision after school. However, those benefits would only be realized in relation to school days within the mother's parenting time. As the parenting time schedule under the Agreement is 60/40, those benefits would only be proportionally achieved. Further, taking into account the father's parenting time on school days and his lack of a vehicle, attending Peter Ewart might well increase the

amount of time A actually spends travelling to and from school.

- [42] The practical difficulties the father would encounter in getting A to and from Peter Ewart while still attending his work as required are significant. The only way he could make pick ups and drop offs in Langley and still meet his required work hours would be to drop A off in Langley long before school starts and pick him up long after the school day ends. That process, even if workable and sustainable as a routine, would create extremely long school days for A. Further, presuming an age appropriate bedtime, A would have little opportunity to interact with the members of the father's household once he arrived back there at the end of the school day falling within the father's parenting time. The loss of this time is significant in light of A's attachment to D and D's decision to live full-time with the father.
- [43] The mother asserts that she might agree to changes in the parenting schedule to make pick ups and drop offs in Langley less onerous for the father, but she has not identified what those changes would be. The proposal she made in 2017 would not have substantially assisted the father then, and the father's parenting time has increased since. No proposal has been made and it is difficult to imagine one that would significantly address the father's difficulties without also significantly impacting his parenting time and the amount of time that A and D are together.
- [44] The mother has the time and ability to drive A to and from school in Coquitlam as required during her parenting time. She also takes the position that D's current full-time residence with the father is not a permanent arrangement. If D does resume spending part of the school week with the mother, she will have to drive D back and forth to high school in Coquitlam.
- [45] Finally, A wants to attend Montgomery. I am satisfied that A's wish to attend Montgomery is not merely a simple wish to follow his brother, but a reflection of the fact that D had a positive middle school experience and A's familiarity with the school and with Mr. Price. Further, A's wish to continue with Montessori, a program he knows and has done well in, is rational and reasonable. While at age 11, A's wishes are not determinative, I find they are reasonable and informed and should be accorded some weight.
- [46] In all circumstances, I find it is in A's best interest to attend Montgomery.

Primary Residence

- [47] Section 44(4) allows the court to set aside an agreement with respect to parenting time if it is not in the best interests of a child:
- (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

- [48] There is no material change threshold under s. 44(4), however the party seeking to set aside terms of the agreement bears the onus in demonstrating that different terms are in the child's best interest: S.C.B. v. K.M.B, 2018 BCSC 1148, paras. 51-53 and 58. Where the court is satisfied that the terms are not in the best interests of a child, the court can set replacement terms by order under s. 45(1)(b).
- [49] Accordingly, the burden is on the father to establish that the allocation of parenting time established under the Agreement, which results in the mother's home being A's primary residence, is not in A's best interests.
- [50] A's wishes on the point, as in evidence before me through the father's affidavit, indicate that his wish to reside primarily with the father is fundamentally intertwined with his wish to attend Montgomery. The father's affidavit reads: "On March 7, 2019 [A] said to me that he would like to reside primarily in Coquitlam at my home if the Claimant continues to refuse to allow him to attend Montgomery Middle School."
- [51] A's views on primary residence are reactive to the mother's desire for him to attend school in Langley. The mother asserted that A should attend Peter Ewart because Langley is his primary residence, so A expressed a wish to change the fact that grounds her position.
- [52] The father also indicates A wants a parenting time schedule that will give him more time with D. This may be a secondary basis for the wish, but as above it is likely also influenced by A's wish to attend Montgomery.
- [53] D's full-time residence with the father is a choice D made for himself and in light of his assessment of his own interests. The parties have agreed to allow D's wishes on the point to govern because of his age. Further, D's decision-making has been fairly fluid to date. In 2016, D resisted increased time with the father. In 2019, he has so far altered the status quo twice in favour of time with the father. I agree with the mother that D may well change his mind yet again.
- [54] A's best interests in terms of primary residence do not ride tandem behind D's personal choices. A's best interest must be determined by consideration of all of A's needs and circumstances, including A's greater need for stability given his age. A's best interest does involve due consideration of the value of his sibling relationship with D, and of fostering their attachment to one another. I note that having quality family time together was a factor in determining which school it would be in A's best interest to attend.
- [55] I am not satisfied that A's best interest is not served by the Agreement. Continuing with the Agreement will provide him with stability. A has established positive relationships with the mother's partner and his children and these should be fostered, especially in light of the fact that he will be attending middle school in Coquitlam. It is in A's interest to continue as an integrated member of the mother's household. As already noted, the fact that A will be attending Montgomery will make it possible for A, in turn, to also spend quality time as a member of the father's household on school days as well as on weekends.

- [56] The following statement is found in the father's affidavit: "[A] is reporting having some difficulties in the Claimant's home". The statement is neither supported nor explained. I am not prepared to give it any weight. The only creditable evidence of conflict between A and the mother relates to their competing views on middle school. That matter has been resolved.
- [57] I am satisfied that the parenting time terms in place under the Agreement serve A's best interests and should not be varied. The father's application under s. 44(4) is dismissed.

Costs

- [58] Although the mother did not succeed in obtaining the relief sought under her own application, she was successful in resisting the father's application to vary the Agreement. In effect, each party has succeeded on one of the two issues determined by this hearing. As overall success on the matters heard was mixed, the parties will bear their own costs.

"Tucker, J."

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