

CANADA / JUDGMENT

J.D.M. v. S.M.M.

2020 BCSC 971

COURT

Supreme Court of British Columbia

DECIDED

30 June 2020

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2020 BCSC 971 J.D.M. v. S.M.M. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: J.D.M. v. S.M.M., 2020 BCSC 971 Date: 20200630 Docket: E78599 Registry: Nanaimo Between: J.D.M. Claimant And S.M.M. Respondent Corrected Judgment: The text of the judgment was corrected at paragraph [5] on July 27, 2020. Before: The Honourable Mr. Justice Baird Reasons for Judgment The Claimant appearing in person, via telephone: J.D.M. Counsel for the Respondent appearing via telephone: S. McPhee, Q.C. Place and Date of Hearing: Nanaimo, B.C. June 22, 2020 Place and Date of Judgment: Nanaimo, B.C. June 30, 2020

INTRODUCTION

- [1] The parties to this child relocation application began living together on May 1, 2007, were married June 12, 2010 and separated in January 2015. They negotiated and signed a separation agreement on August 7, 2015 which included parenting arrangements for their daughter A.E.M., born March 9, 2011. The separation agreement was filed in court on May 13, 2016. The parties were ordered divorced on February 20, 2017. PARENTING ARRANGEMENTS
- [2] The parenting arrangements in the separation agreement are as follows:
1. The child will live primarily with the respondent.
 2. The parties are joint guardians of the child and share parental responsibilities.
 3. The claimant will have reasonable, generous, and liberal parenting time with the child.
 4. Each parent will have reasonable contact with the child by telephone, text messaging, and electronic communication when the child is with the other parent.
 5. The parties will make future arrangements for parenting time, including overnight visits and vacations as are appropriate given the age, needs, and wishes of the child.
 6. The parties will attempt to structure their work hours so that one of them is usually available to care for the child when she is not in school so that daycare or babysitters are not necessary.

- [3] Since separation both parties have lived in Nanaimo, BC. On January 30, 2020, the respondent gave the claimant notice of her intention to relocate to Campbell River, BC, which is about 150 km north of Nanaimo and takes an hour and a half or so to reach by car. The claimant opposes the relocation. On February 7, 2020, he filed an application in Provincial Court under s. 68 of the Family Law Act, S.B.C. 2011, c. 25 ("the Act") for an interim order preventing it. This order was granted on March 9, 2020.
- [4] The claimant now acknowledges that, under the terms of the separation agreement, he should have brought his interim application in Supreme Court. The parties agree that the matter is properly before me for determination. I will deal with the Provincial Court order in due course. In the meantime, the respondent applies under s. 69 of the Act for permission to relocate notwithstanding the claimant's objections. As it relates to the situation at hand, this provision reads as follows:
- (1) In this section, "relocating guardian" means a guardian who plans to relocate a child.
 - (2) On application by a guardian, a court may make an order permitting or prohibiting the relocation of a child by the relocating guardian.
 - (3) Despite section 37 (1) [best interests of child], the court, in making an order under this section, must consider, in addition to the factors set out in section 37 (2), the factors set out in subsection (4) (a) of this section.
 - (4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,
 - (a) the relocating guardian must satisfy the court that
 - (i) the proposed relocation is made in good faith, and (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and
 - (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise. ...
 - (6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following:
 - (a) the reasons for the proposed relocation;
 - (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
 - (c) whether notice was given under section 66 [notice of relocation];

- (d) any restrictions on relocation contained in a written agreement or an order.
- [5] My chief concern is whether the proposed relocation is in A.E.M.'s best interest. Of the non-exhaustive list of factors on this subject in s. 37 of the Act, in my view the following must be considered:
- a) the child's health and emotional well-being;
 - b) the child's views ;
 - 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 his or her responsibilities; PROCEDURE
- [6] As a preliminary matter I would stress that the parties' separation agreement has the force and effect of a final order. Their present differences arise from circumstances that have evolved gradually in the operation of parenting arrangements settled conclusively almost 5 years ago. This is not a family law dispute in its incipient stages where an interim order is being sought pending a determination at trial. The case authorities cited by the claimant emphasising the maintenance of the status quo on interim parenting applications are of limited assistance.
- [7] I do not agree with the claimant's argument, furthermore, that relocation applications are seldom determined on chambers applications or that, in any event, a conventional trial is required in this case. The statute specifically provides for determination of relocation proposals by application, and in my view the matter should only be adjourned to the trial list if there are issues of credibility that cannot be properly evaluated on a written record, or because for any other reason I am unable to find the facts necessary for the just, expeditious and proportionate resolution of the issue.
- [8] The claimant's objection to the proposed relocation is that it will have a significant impact on his relationship with A.E.M. The respondent has conceded this point and a trial on the issue is not required. There is a factual dispute between the parties concerning the precise extent to which the claimant has been involved in A.E.M.'s life since separation, but no trial will be necessary on the point because I intend, for present purposes, to rely on the claimant's evidence about it.
- [9] The claimant submits that a report under s. 211 of the Act is a necessary precondition for the proper determination of this dispute. The relevant provisions are as follows:

- (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:
- (a) the needs of a child in relation to a family law dispute;
 - (b) the views of a child in relation to a family law dispute;
 - (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.
- (2) A person appointed under subsection (1)
- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
 - (b) unless each party consents, must not have had any previous connection with the parties.
- [10] Before I put the parties to the significant cost and delay of such a report, however, there must be evidence to persuade me that it will be necessary or helpful: see *D.A.F. v. R.D.F.*, 2017 BCSC 873. There is no such evidence here. First of all, there is no material dispute about A.E.M.'s needs, which are quite plainly being met within the long-established arrangement whereby she lives mostly with the respondent but sees the claimant regularly. Secondly, there is no issue concerning A.E.M.'s views: she is excited about moving to Campbell River with her mother but wants to maintain a strong and consistent relationship with her father. Finally, there is no basis for an inquiry into either party's parental fitness or ability and willingness to meet A.E.M.'s needs.
- [11] In my view, therefore, the present dispute may be resolved justly and proportionately in its present summary form. The facts are plainly established on the evidence before me. The delay and expense of a conventional trial would serve no useful purpose. RELOCATION
- [12] Turning to the various factors set out in s. 69 of the Act, the parties have never had substantially equal parenting time or anything close to it. The evidence is clear that the respondent has been A.E.M.'s primary parent and caregiver throughout her life. Since separation especially she has been in charge of all aspects of the child's upbringing. She has fed, clothed and housed her, dealt with teachers, doctors and dentists, organised the activities, supervised the homework, and all the rest of it. The claimant has been an enthusiastic, capable, and involved parent throughout, but there is no doubt that the respondent has spent a great deal more time with A.E.M. and has borne most of the responsibility for raising her.
- [13] The evidence satisfies me, moreover, that the claimant's more limited parental involvement has had much to do with his employment obligations, which seem to take priority over other aspects of his life, and which apparently involve variable hours and fairly frequent changes of schedule. This has been the source of much frustration between the parties over the years. They have never been able, as agreed on separation, to organise their respective schedules so that one of them is available to care for the child when the other is at work. Instead the respondent has had to hire a succession of nannies to look after A.E.M. This has

cost a lot of money and been the cause of consistent logistical headaches.

- [14] The respondent alleges that A.E.M. has often been disappointed by the last minute cancellation of visits with the claimant brought on by changes in his work schedule. That may be, but I prefer to emphasise that A.E.M. enjoys her frequent visits and activities with the claimant, even if they are somewhat improvised or irregular. According to the claimant's records kept over the last 13 months, moreover, he has had an average of just over 5.5 overnight visits with A.E.M. per month, and I am satisfied that these are always happy and successful occasions.
- [15] In short, while the respondent has always been the primary residence parent and caregiver, there is a solid, wholesome and indispensable bond between A.E.M. and the claimant that must be fostered and maintained. The respondent recognises and endorses this, and she concedes, as previously stated, that her proposed relocation to Campbell River will impact on A.E.M.'s relationship with the claimant. She argues, however, that the impact does not need to be negative. She is not going far, she says, and her post-relocation parenting proposal is such that A.E.M. and the claimant will be able to see as much or more of each other than at present, assuming, of course, that the claimant can adjust his priorities to take full advantage of it.
- [16] I have no doubt that the respondent's relocation proposal is made in good faith. She is not trying to remove A.E.M. from the claimant's life. She merely wishes to improve her circumstances as well as A.E.M.'s. It has been five years since separation, after all. She has re-partnered with a man who lives in Campbell River. She has a network of family support in the Campbell River area that is missing in Nanaimo. A.E.M. is looking forward to spending more time with these relatives, some of whom are on her father's side, and they are keen to welcome and care for her. The respondent works for BC Ferries and has secured a position in Comox with better hours and a more generous vacation allotment. This will allow her to spend more time with A.E.M., and combined with caregiving assistance available from local family members, it is hoped that there will be no further need for nannies. She has found a good school for A.E.M., and all of her extra-curricular activities and other needs can be satisfied in Campbell River.
- [17] Addressing the specific factors set out in s. 69(6) of the Act I conclude that the respondent's reasons for the proposed location are sound and sincere, the relocation will enhance the overall quality of A.E.M.'s personal and family life, notice of the proposed relocation has duly been given, and there is nothing in the separation agreement restricting or forbidding relocation. As for the factors in s. 37(2)(a)-(f), in my view the relocation will be good for A.E.M.'s health and emotional well-being; her views about the move are positive; it will improve and strengthen her relationships with family in the Campbell River area without compromising her family and other connections in Nanaimo; she will continue to live primarily with her mother, as she has throughout her life, while maintaining a strong and consistent relationship with her father; the arrangement will thereby satisfy the child's need for stability; and each parent will be able, as always, to have a full and meaningful

relationship with the child.

- [18] A key consideration, of course, is that while the proposed relocation will impact on A.E.M.'s customary routines and activities with the claimant, it will not compromise or diminish the strength or quality of their relationship. The claimant has suggested the following parenting schedule if relocation is permitted:
1. alternating weekends with the claimant in Nanaimo with the addition of professional development days and public holidays when they fall on either side of his parenting weekends;
 2. half of the two-week Spring and Christmas breaks; and
 3. a shared summer vacation or as close to it as can be arranged with their respective working schedules.
- [19] The result of this proposal, if it can be worked out, will be substantially more parenting time for the claimant than he has ever exercised since separation. The only loss will be the sort of brief mid-week visits, some of them arranged at the last minute, that have been possible in Nanaimo but will not be practicable, at least not as often, in Campbell River. This is a fair trade in all of the circumstances. I am persuaded that the respondent's proposed parenting arrangements are reasonable and workable. They have the potential not only to preserve but to enhance A.E.M.'s relationship with the claimant.
- [20] In short, I have decided on all of the evidence that the proposed relocation to Campbell River is in A.E.M.'s best interest. It is made in good faith in circumstances where there are reasonable parenting arrangements available to preserve and even improve A.E.M.'s relationship with the claimant. I will leave the parties to agree or go to mediation about a specific schedule, transport issues, transitions, and so on. DEMAND FOR PAYMENT UNDER SEPARATION AGREEMENT
- [21] The respondent has asked me to enforce a provision in the separation agreement calling for the claimant to pay her \$5,000 on his failure to participate in mediation concerning the proposed relocation before filing an interim application to prevent it. I decline to do this. In my view, given the parties strongly held and opposing views, this matter was destined for a contested hearing. Neither party was represented in Provincial Court and no legal costs were incurred. There was no financial harm done. It would be far better if the \$5,000, along with the money saved on nannies, were used for regular excursions to Campbell River and to pay for A.E.M.'s activities.

CONCLUSION

- [22] For the foregoing reasons, on authority of s. 194(4) of the Act I hereby terminate the order made in Provincial Court on March 9, 2020, and order instead under s. 69(2) of the Act that the respondent is forthwith permitted to relocate with A.E.M. from Nanaimo to Campbell River, BC. The respondent's claim for payment of \$5,000 under the separation agreement is dismissed.
- [23] The respondent has been successful on this application. She is entitled to costs on Scale B. "Baird J."
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