
CANADA / JUDGMENT

J.N.G. v. S.C.M.

2023 BCSC 1217

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.N.G. v. S.C.M.,

2023 BCSC 1217

Date: 20230504

Docket: E134433

Registry: Kelowna

Between:

J.N.G.

Claimant

And

S.C.M.

Respondent

Before: The Honourable Madam Justice Hardwick

(appearing by videoconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant appearing by videoconference:

G.R. LeClair

Appearing on his own behalf by videoconference:

S.C.M.

Place and Date of Trial/Hearing:

Kelowna, B.C.

May 2, 2023

Place and Date of Judgment:

Kelowna, B.C.

May 4, 2023

- [1] THE COURT: These are my oral reasons for judgment in respect of two notices of application for a variety of interim relief in a family law proceeding which I heard earlier this week. The first application of the respondent was filed on March 13, 2023, and amended shortly thereafter on March 15, 2023. The cross-application of the claimant was filed on April 3, 2023. All of the relief sought pertains directly or indirectly to "R.", who is a child as defined by the Family Law Act.
- [2] Turning to the relief before the Court, the respondent's notice of application is broadly framed for document disclosure. I will detail the specifics of the disclosure sought in addressing the application on its merits. The claimant's notice of application is for, in general terms, an order that:
- a) R. attend full-time daycare at a facility located in Downtown Kelowna, British Columbia;
 - b) an order that the respondent provide full particulars of his daycare or dayhome where R. currently attends during the respondent's parenting time, including contact details and confirmation that she is listed as first alternative contact in the event of emergency;
 - c) an order for the return of certain identification documents for R. which are currently in the possession of the respondent; and
 - d) an order that a parenting coordinator be appointed with the cost to be shared equally. Both parties also seek costs of their respective application.
- [3] The background facts of this matter are relatively straightforward and generally not in dispute. The claimant is 35 years old, born in 1987; the respondent is 33 years old, born in 1989. The parties commenced living together in a marriage-like relationship on or about September 1, 2019. The parties have, as noted, one child of the relationship, R., who is approximately 27 months of age. Neither party has any other children from any other relationship. The parties separated on June 19, 2022, after a relatively short relationship of some three years. R. was very young at the time of the separation.

- [4] The circumstances of the separation and specifically the events of June 19, 2022, are clearly in dispute between the parties. I make no findings of fact in that regard other than to accept that it is clear that the parties separated on that date. The circumstances of the separation and the events of June 19, 2022 will need to be left to determination by the trial judge with the benefit of viva voce evidence and cross-examination.
- [5] During a portion of the relationship, not the entirety of the relationship, but at the time of separation, the parties lived in a residence in West Kelowna. The claimant still resides in that residence in West Kelowna. The respondent has taken up residence with his mother who resides in Summerland, British Columbia. Those are the arrangements in place for the purposes of their interim applications.
- [6] The respondent is now employed in a capacity that allows him to work from home, but as indicated he primarily resides in Summerland. The claimant is employed on a full-time basis with employment out of Kelowna, British Columbia. Although I understand it is asserted that she has to travel for work, her primary location of work is in Kelowna. There is thus a variety of communities which are engaged, which I will return to when I address the issue of child care.

Order of Proceedings

- [7] Although the respondent's application was filed first in time and he made his submissions first before the Court, I have elected to order my reasons for judgment to deal with the issue directly pertaining to R. first, and the indirect issues relating to document disclosure thereafter.

Child Care for R.

- [8] R. is only approximately 27 months of age. Leaving aside the arguments about income imputation between the parties, both parties are relatively young and need to be gainfully employed in order to support themselves and to provide for R. To facilitate this, R. requires third-party care when the parties are working. This is not to his detriment. Indeed, the evidence before me suggests that R. is benefitting from the socialization and other opportunities that are provided by third-party care whilst his parents are working and generating funds for his support.
- [9] At present, R. attends a licenced child care facility in Penticton when in the care of the respondent. More recently, R. started attending a licenced child care facility in Kelowna when in the care of the claimant. There are, even on the fairly limited evidentiary record, some slight differences between the facilities. I will simply state that one is larger and one is smaller. One might be more inclined to be described as home-based, where the other likely considered to be more of an institutional-type daycare. There is absolutely no evidence before me, however, that there are bona fide concerns about the care provided for R. in either of these facilities. The fact that they are different is not to his detriment. Both are, on the record before me, reputable child care facilities and R. has not had any identifiable

negative experiences at either facility or with any care provider at such facilities.

- [10] The larger issue, as I stressed to the parties at the hearing, is that each child care facility is more conveniently located to that parent's home and/or work. The claimant transports R. from West Kelowna to Kelowna and the respondent transports R. from Summerland to Penticton. Both are a manageable drive from their current respective residences. If I were to accede to the claimant's applicant, R. would spend the better part of two hours every day when in the care of the respondent commuting to and from child care.
- [11] Having regard to the Court's obligation under the Family Law Act to make orders solely in the best interests of the child, I cannot make such an order. R. needs to have the opportunity to spend time with each of his parents when they are not engaged in gainful employment. The amount of time to do so is already limited for a young child as R. needs a regular sleep schedule and routine appropriate for his age. Adding an additional driving time, which is not actually required given that there is suitable third-party child care within a reasonable driving distance, unreasonably diminishes that time in my view.
- [12] I recognize that R.'s long-term parenting plan, schooling and child care will be issues for trial. The flexibility that he has now will not exist once R. is school age. However, for the time being, R. is just over two years of age, as I have noted, and I am satisfied that both parties have made entirely adequate arrangements for third-party care for R. and that they shall each be responsible for the cost of said child care during their parenting time pending trial.
- [13] Both parties shall be required to advise the other in writing through the OurFamilyWizard app, which I understand they are already using, of the address and contact information of the child care provider they are utilizing for R. during their parenting time. They shall further be required to list the other parent as the secondary or alternate emergency contact with appropriate current contact information with the child care provider or child care agency.
- [14] Neither party shall be permitted to speak negatively about the other parent to the other parent's child care provider and shall not discuss with them any aspect of this litigation pending the trial of this action. This order that I have made pursuant to s. 225 of the Family Law Act does not preclude any party from subpoenaing R.'s child care provider or providers at trial, but subject to same, they shall not be involved in these proceedings as that would be, in my view, contrary to R.'s best interests pending trial.

Identification Documents

- [15] At the time the respondent left the former family home in West Kelowna he took with him certain key identification documents for both R. and the claimant. He subsequently returned the claimant's passport, which he deposes he took inadvertently. I accept that to be true.

- [16] He continues to be in physical possession of R.'s CareCard, birth certificate and passport. He has supplied digital copies of these documents to the claimant. There is no suggestion that either party is at a material risk of leaving the jurisdiction with R. without agreement or court order. Both have clear ties to British Columbia and neither has engaged or even attempted to engage in such behaviour to date. Further, the parties share parenting of R. on an equal basis and so there is no obvious preferred parent to maintain possession of these documents.
- [17] In my view, and in the circumstances, the appropriate compromise on an interim basis is to have the documents held by counsel for the claimant, Mr. LeClair, on the condition that they shall be stored in his safe or other appropriately secured locked cabinet unless agreed to be released either for a specific duration or generally by written agreement of the parties or further court order.
- [18] To facilitate this, I order that the respondent is to deliver or have delivered by someone authorized on his behalf the passport, birth certificate, and CareCard for R., which I shall refer to as "R.'s ID documents", to the office of counsel for the claimant, Mr. LeClair, by no later than 3:30 p.m. on May 15, 2023. Within seven days of the receipt of R.'s ID documents, counsel for the claimant shall have prepared and endorsed certified true copies, in colour, of R.'s ID documents and provide a copy to each party by email. Save for travel out of the country, I am satisfied that the certified true colour copies of R.'s ID documents will be sufficient for any purpose that either party needs to obtain health care, child care, or necessary government benefits for R. in the interim period pending trial. If travel out of the country is contemplated, the release of R.'s ID documents from counsel for the claimant, Mr. LeClair, can be secured through written agreement or, if necessary, further court order.
- [19] In the event that counsel for the claimant, Mr. LeClair, ceases to be counsel of record prior to the trial of this matter, counsel is given leave to apply to this Court for direction as to the transfer of R.'s ID documents to another member of the British Columbia Law Society in good standing, or in the alternative to be entirely relieved of the obligation to hold R.'s ID documents in accordance with this order.

Parenting Coordinator

- [20] As may be apparent from the preceding portion of these oral reasons for judgment, this case has various indicia of being a high-conflict parenting case despite the fact that the parties currently share parenting of R. on an equal basis. It has been before Master Schwartz and Mr. Justice Veenstra of this Court, both on a contested basis, in addition to the mandatory judicial case conference.
- [21] Given R.'s age and this level of apparent conflict, they need the assistance from a third party in managing parenting issues, at least for the time being. At present they are utilizing the services of Jody Bekhuys as a parenting coach. Prior to that they had been using the services Sharla Schofield in the same capacity. Between these two individuals, they did consult

another person who was apparently available through benefits offered to the claimant pursuant to his employment. This individual recognized after initial consult that they did not feel they had the necessary skill set to assist the parties and declined to be engaged further. I do not consider the decision of this person to not be engaged to be the fault of either party; it was probably appropriate recognition of their skill set and the circumstances between these parties.

- [22] There is a distinct difference between the role of a parenting coach and a parenting coordinator. Without going into a detailed review of the statutory mandate under the Family Law Act, the corresponding regulation and subsequent case law, the role of the parenting coordinator is effectively equivalent to an arbitrator who has the authority to make determinations in accordance with the terms of the parenting coordination agreement that the parties execute and subject to the limits of the governing regulation. A parenting coordinator would have, for example, been able to resolve the child care issue for R. without need for a court application based upon the standard retainer terms of a parenting coordinator in British Columbia. Ms. Bekhuys tried to facilitate consensus but was not able to do so and thus the matter ended up in court.
- [23] There may be similar issues that may arise in the future regarding schooling and extracurricular activities and travel unless the parties' communication and co-parenting skills significantly improve. For these reasons, I think that ultimately a parenting coordinator may be a very prudent choice for the parties to either appoint voluntarily or for the Court to order. The concern I have with the claimant's application is solely related to timing. I have no evidence of the availability of the three individuals proposed by the claimant. I am prepared to take judicial notice that parenting coordinators are a sought after commodity in British Columbia. The B.C. parenting coordinator roster used to circulate a list of qualified individuals who are actually accepting new clients from time to time. They may still do so but I do not have access to that information now as a member of the judiciary.
- [24] Further, even if the individuals proposed by the claimant are generally available to accept the retainers, it will take time to get the parenting coordination agreement signed, complete intake interviews and so forth. Realistically I do not see any parenting coordinator having much if any time to meaningfully assist the parties prior to the currently scheduled October 2023 trial date. In contrast, Ms. Bekhuys is already familiar with the parties and R. and their circumstances. She is likely to be able to assist more meaningfully prior to trial than a parenting coordinator even though she cannot make determinations that bind the parties.
- [25] There are also no significant parenting decisions that should realistically need to be made prior to the trial that I can foresee on the evidence before me. There is a court order setting out R.'s parenting plan. The parties are complying with it. I have settled the issue of R.'s child care pending trial. The parties, I understand, will comply with that. School choice for R. is several years in the future given his age. Participation in extracurricular activities is certainly beneficial for R., but it is not required given his young age. The parties can choose

to participate in what activities with R. they consider to be in his best interests during their parenting time. There likely does not need to be a great deal of cooperation at this point.

- [26] For these reasons, I am dismissing the application for the appointment of a parenting coordinator on the basis that it is premature given the closely approaching trial date. I am specifically not dismissing this application on its merits as I do see the value of a parenting coordinator going forward and this relief shall thus not be *res judicata* either at trial or at some other time in the event that the trial does not proceed as presently scheduled. I am simply dismissing it on the basis that I do not think that there is adequate time for a parenting coordinator to be engaged and to be of any meaningful assistance between now and the time of trial.

Form 8 Financial Statements

- [27] Both parties have sworn Form 8 financial statements in this action. The claimant's Form 8 was sworn in October of 2022. In accordance with the British Columbia Supreme Court Family Rules, they will each be required to prepare updated Form 8 financial statements in advance of the scheduled trial date in October of 2023. I do not have any evidence before me that supports a conclusion that the claimant's Form 8 financial statement is inaccurate or incomplete by reason of a material change in circumstances since the time it was executed in October of 2022.
- [28] As I noted at the hearing, the claimant will presumably have filed her T1 personal tax return for 2022 at this time and that is clearly a relevant and disclosable document given that Guideline incomes will be an issue. However, that document can be produced in an updated list of documents and does not, in my view, require a full updated Form 8 financial statement ahead of the already required Form 8 financial statement for trial. Such a requirement would make family law litigation even more expensive than it already is and would be contrary to the proportionality principle in the British Columbia Supreme Court Family Rules.
- [29] I thus dismiss the application for an updated Form 8 financial statement. In so doing, I will say that I do not agree with the submission of counsel for the claimant that the British Columbia Supreme Court Family Rules only contemplate two Form 8 financial statements in a family law case. This is not accurate in a complicated and lengthy matter. I have simply concluded that in this case, where the financial issues appear to be relatively straightforward and there is no evidence of any material change apart from the filing of a tax return, that an updated Form 8 financial statement is required at this time.

Document Disclosure

- [30] The respondent seeks additional document disclosure from the claimant in what I will describe as four different categories:
- a) cell phone records for her work phone for the months June 2022 to January 2023;

- b) copies of her sales force account records including but not limited to her quarterly sales targets and quarterly visit targets for the years 2019, 2020, 2021 and 2022;
- c) copies of her monthly expense reports submitted to her employer for the months of June to December of 2022; and
- d) copies of credit card statements for an MBNA Mastercard and an RBC WestJet Mastercard for the last three years.

[31] The numbers of these cards listed in the application have, I understand, potentially changed recently but I did not hear any argument which suggested that the claimant was unclear of what was being sought to be produced. There are only two credit cards in issue and, even if the credit card numbers have changed due to expiry or having been compromised, the claimant is on proper notice of what is being sought by the respondent in this regard.

[32] Although not perhaps precisely framed, the application of the respondent is made pursuant to R. 9-1(8) of the Supreme Court Family Rules, which provides as follows:

(8) If a party who has received a list of documents believes that the list should include documents or classes of documents that

- (a) are within the listing party's possession, power or control,
- (b) relate to any or all matters in question in the family law case, and
- (c) are additional to the documents or classes of documents required under subrule (1) or (6),

the party, by written demand that identifies the additional documents or classes of documents with reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed, may require the party who prepared the list to

- (d) amend the list of documents,
- (e) serve on the demanding party the amended list of documents, and
- (f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (12) and (13).

[33] Document disclosure is key in family law litigation. Without necessary disclosure, the ability of the parties to pursue the resolution of matters without the assistance of the court is inhibited. If parties do not resolve matters, incomplete document disclosure can complicate the role of the trial judge as the finder of facts. It is also an ongoing obligation as disclosure needs to be updated in the course of virtually all family files. This is what differentiates family files in some respects from civil files.

[34] As stated in *Cunha v. Cunha* (1994), B.C.L.R. (2d) 93, [1994] B.C.J. No. 2573, nondisclosure of family financial information "is the cancer of matrimonial property litigation".

[35] That statement is tempered by the statement of this Court in *Mossey v. Argue*, 2013 BCSC 2078:

[18] However, gone are the days of the full underwear drawer disclosure, unless the demand is made with specificity and justification.

[36] Balancing these two objectives and considering the Rules, I make the following findings.

(a) Cell phone records

[37] This is a corporately paid cell phone and I am thus satisfied that the statements for it are in the control of the claimant even if she is not in physical possession of them. There is no evidence at all that she has requested copies of the statements and that her employer denied this request.

[38] The relevance of these documents to a material fact in issue in these proceedings is generally quite tenuous. However, the respondent raises a concern that R. exhibits a disproportionately upset or anxious reaction upon hearing his cellular phone notification which has resulted in a referral to a pediatrician.

[39] In my conclusion, this slightly tilts the disclosure lever in favour of the respondent such that these records shall be produced. Whether they are prohibitive and thus admissible will be a decision for the trial judge but I am satisfied that they do meet the initial threshold for disclosure. They are also sought for a relatively limited period of time period.

(b) Copies of sales force account records

[40] The claimant is an employee of an arms-length employer. Her remuneration, subject to an argument about potential personal benefits which has enhanced her Guideline income, is set out in her T4 and then reported in her corresponding T1 personal income tax return.

[41] Her sales targets are not relevant or probative in my conclusion. What matters is what she actually works and what her remuneration is. That information is included in the documents which she is already required to produce. I thus dismiss the application for copies of her sales force account records, the particulars of which I have detailed more fulsomely above.

(c) Copies of the claimant's monthly expense reports

[42] The respondent seeks the copies of these monthly expense reports on the basis that they will provide evidence as to alcohol consumption by the claimant. In my view, the evidence to establish relevance in this regard on the application is woefully lacking. There is evidence that the event that gave rise to separation may have had some connection to alcohol, and that alcohol use or misuse was something discussed by the parties during the relationship prior to separation. That is as far as the evidence goes on the basis of the record before me.

- [43] There is no evidence on the record before me of alcohol use or misuse being a current issue with respect to parenting as the parties share parenting of R. equally. Notably, none of the affidavits speak to any issues which have arisen during this shared parenting regime, the schedule of which has changed slightly but which has been a shared parenting with mild exceptions since the date of separation, due to alcohol use or misuse.
- [44] That said, I am going to order the disclosure of these reports as in my view they are potentially relevant to the determination of the claimant's Guideline income. Specifically, and as I have described at the hearing of the application, if the claimant is paying for hotel accommodation for a work-related purpose and is reimbursed for that cost, it does not form part of her income. It is a true reimbursement for a work-related expense. It is an in and out, in simple terms. Other expenses, such as the payment of a cellular phone or payment for fuel, may potentially have a personal use component. In order for the respondent to at least be able to canvass these issues on examination for discovery, the expense reports are in my view relevant.
- [45] Further, the time period for which they are sought is very precise and the effort of disclosing these reports on the claimant is minimal. Had they been sought for years instead of months, I might have needed to apply the proportionality principle, but the order is quite specific, and in my view will provide the necessary ability for the respondent to canvass on discovery whether or not there is additional income that could or potentially be imputed to the claimant. Alternatively, they may confirm the respondent's position, as I understand it, that she is reimbursed for expenses that she incurred on behalf of her employer and thus do not form part of her Guideline income. It is frankly to the benefit of both parties that this issue be canvassed ahead of trial. It may not require any trial time in that regard.
- (d) Credit card statements
- [46] For the reasons set out above, and which I will not repeat, I am not satisfied that these statements are required in order to provide evidence of alcohol consumption or alcohol purchases by the claimant. There simply just is not any evidence that indicates that this is an ongoing live issue.
- [47] However, I am ordering the production of these statements because there is a live issue between the parties as to whether or not these form family debt as defined by s. 86 of the Family Law Act. Again, it will be necessary for the purposes of trial for the parties to canvass this issue on examination for discovery, and the respondent is not in a position to make those arguments or advance his case without information as to what the credit card debt that existed at the date of separation was comprised of.
- [48] As I also noted at the hearing, an argument of unequal division places a substantial burden given the significantly unfair test in s. 85 of the Family Law Act. However, the respondent needs to be able to review these statements in order to consider whether or not he even wants to make such an argument at trial.

[49] Accordingly, the credit card statements are ordered disclosed. They will be the numbers that are listed in the notice of application, which I will not read into the record, or any replacement cards for those credit cards that may have been obtained since the filing of the notice of application or the filing of the claimant's Form 8 financial statement.

Costs

[50] There has clearly been divided success between the parties on the applications before the Court. What may come of my orders is highly dependent upon the outcome of the trial unless the parties can negotiate a resolution without the need for same pending trial.

[51] I am thus going to order that each party is entitled to costs in the cause of their respective applications on the basis that each constitutes a one-half day application under the British Columbia Supreme Court Family Law Rules tariff.

[52] For the benefit of the respondent, who may not be familiar with this language as a self-represented litigant, I confirm that this means that the costs of these applications will be dealt with after the trial on its merits unless the parties otherwise agree and no costs are payable forthwith.

[53] I am going to ask you, Mr. LeClair, to draft a copy of the order for review by the respondent. Once you have agreed on it and if there is not any dispute, it may be submitted directly to me for review through Supreme Court Scheduling. If there is a dispute about the form of the order, it does have to be settled by the registrar, but if you and the respondent can agree upon it, it can come to me directly and I can electronically sign it which will expedite the process of having it entered.

"Hardwick J."

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