
CANADA / JUDGMENT

K.J.M. v. P.D.A.

2011 BCSC 913

COURT

Supreme Court of British Columbia

DECIDED

8 July 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 913 K.J.M. v. P.D.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.J.M. v. P.D.A.,

2011 BCSC 913

Date: 20110708

Docket: E104021

Registry: Vancouver

Between:

K.J.M.

Claimant

And

P.D.A.

Respondent

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Claimant:

M. Huberman and

I. Pietrow

Counsel for the Respondent:

T. Wright

Place and Date of Hearing:

Vancouver, B.C.

June 27, 28, and 29, 2011

Place and Date of Judgment:

Vancouver, B.C.

July 8, 2011

I. Background

- [1] This is an application by the claimant in this family case for various forms of interim relief. The respondent has a cross-application for other relief.
- [2] The materials filed in support and in opposition to this application are extensive; by my count, there were 36 affidavits, including two sworn financial statements. The matter required three full days for hearing. However, there is a pressing need for an early determination, on an interim basis, of certain of the issues and for that reason I will not be setting out the evidence in detail but instead will provide highlights or summaries only. I wish to make it clear, however, that although I may not refer to certain evidence that was before me I have taken all evidence into account in coming to my decisions on the various issues.
- [3] The parties, who were never married to one another, commenced a relationship in 1993 or 1994. Together they have two children, both girls: R, who is currently 15½ years old, and C, who is 12. I will refer to the claimant as "Ms. M" or "the mother" and to the respondent as "Mr. A" or "the father".
- [4] Mr. A is a heavy equipment operator who has typically worked in logging camps, or similar types of camps, and returned home during the off-work times. His employment income for 2010 was \$81,000.
- [5] Ms. M has had some home-based enterprises but in the last few years has worked outside the home. Commencing around 2007 she worked as a Safeway cashier and later she worked as a night shift support care worker. Her annual income in 2009 was \$34,000.
- [6] The family lived in a rural area about 25 minutes by car outside of Terrace, B.C. It is a large property, consisting of 94 acres on three titles. There is a fair quantity of merchantable timber on it. There is a log home in which the parties originally resided, but which at present may not be habitable, as well as the family home. The parties have 12 horses, one of which is valuable as a breeding horse, and at least at times they have had other animals as well. There is also some equipment left over from a lapsed contracting venture.

- [7] It is common ground that, until recently, Ms. M was the primary caregiver for the children and that she attended to most of their needs and activities.
- [8] The relationship between the parties has been a difficult one. It appears that there have been frequent arguments, some at least involving dreadful name-calling, and Ms. M alleges that some have escalated to physical violence. Mr. A denies physical violence on his part and refers instead to an incident in which Ms. M assaulted him.
- [9] In addition to these unfortunate problems, the evidence discloses that in the last few years Ms. M has had a very tempestuous relationship with her older daughter, R. There have been many arguments of an extreme nature and incidents of physical violence where R assaulted the claimant or threw objects at her. Many incidents were detailed in the affidavits. Ms. M deposed that "I did get into my vehicle to get away on some occasions when [R] assaulted me" and, on one occasion, "I locked [C] and myself in a room for protection when [R] attacked me". On two occasions in October 2010 the RCMP were called to the residence to deal with incidents of violence between R and her mother. On two other occasions, perhaps more, Ms. M has sought assistance from the Ministry of Children and Family Development (the "Ministry") to deal with the conflict between the two of them.
- [10] The materials from the files of the RCMP and the Ministry are extensive, comprising two binders of documents.
- [11] Ms. M alleges that R's behaviour was much worse when Mr. A was around and that, not only would he do nothing to help defuse the conflict between mother and daughter, instead he would make statements that undermined her parental authority.
- [12] I find it unnecessary, at this stage, to make findings concerning the causes of, or fault for, the conflict in this family. I would observe, however, that Ms. M's allegation that Mr. A's presence ignites the conflict between Ms. M and R seems contradicted by at least one incident in August 2009 when Ms. M sought the assistance of the Ministry due to R's extreme behaviours and which took place at a time when Mr. A was away at camp.
- [13] Although Ms. M deposed in one affidavit that "R's interaction with me was generally relaxed, except for arguments from time to time that I verily believe are typical between parents and a teenager", it is quite obvious that the discord and physical violence in the mother-daughter relationship was far from typical.
- [14] The relationship between Ms. M and the younger daughter, C, seems to have been a relatively normal one.
- [15] Ms. M alleges that Mr. A has verbally abused the children and that he has been physically violent to R on some occasions. She described "several occasions" in which Mr. A picked up R and shook her and one occasion in which Mr. A threw a baseball bat in R's direction, hitting her with it. Mr. A acknowledges occasions of violence but deposed that they were "for the most part as a result of my attempting to 'break up' a physical confrontation between the claimant and [R]." He explained the baseball bat incident as an accident that occurred

during a family argument, an explanation that was confirmed by R to a Ministry social worker who attended as a consequence of the incident.

- [16] In a "views of the child" affidavit filed in these proceedings (about which more will be said later), R is reported to have said that her father has never been physically or verbally abusive towards her.
- [17] The relationship between Ms. M and Mr. A deteriorated to the point that, in or about June 2010, Ms. M told Mr. A that she wanted to separate from him. They did not, however, separate at that time.
- [18] Tragedy struck this family in November 2010. On November 15, 2010, Ms. M was driving the children to Vancouver in order to attend a medical appointment for R. Their vehicle was hit by an oncoming vehicle and the three family members were badly injured. R was rendered a paraplegic. C suffered a broken vertebrae and a broken ankle. Ms. M suffered a broken arm, injuries to her knee and ribs, and a head injury. Ms. M and C were admitted to Prince George Regional Hospital and R was airlifted to Vancouver. Mr. A went to Vancouver to be with R and Ms. M stayed with C in Prince George. The parents traded places on November 22, 2010, and Mr. A returned to Vancouver with C around November 29, 2010. While R was at Vancouver General Hospital, and later at G.F. Strong Rehabilitation Centre, the family had the use of a condominium in Vancouver.
- [19] Ms. M filed a Notice of Family Claim on December 21, 2010. However, she did not have it served on Mr. A until March 19, 2011.
- [20] There were tensions involving visits by Ms. M to R at G.F. Strong. Mr. A deposed that the conflict stemmed from two principal causes: (1) R's desire to limit visits with her mother, and (2) because Ms. M "repeatedly refused to allow [R] any meaningful input about her rehabilitation". There was also a disagreement over what the living arrangements would be when the family returned to Terrace. Ms. M denied any conflict with R over these issues, although she acknowledged that she would wait in the reception area of G.F. Strong when R did not want to see her.
- [21] There was a discharge meeting at G.F. Strong in February 2011. Mr. A deposed that, at that meeting, R said she did not want to live with her mother. Ms. M suggests that this discussion must have taken place after the meeting concluded and she had left.
- [22] On March 10, 2011, the parties attended a meeting at Ministry offices in Terrace in an effort to resolve the dispute over the family living arrangements. It was agreed at that meeting that there would be a "nesting arrangement" whereby the parents would reside with the children in the family home on an alternating four-day cycle, with the parents utilizing the log home as the residence for the "off-duty" parent. Mr. A took the first shift with the children in the family home.

[23] According to Mr. A, on March 13, 2011 a social worker from the Ministry came to inspect the family home and, while she was there, she interviewed the children in private. In his affidavit Mr. A said:

After that interview was completed, [the social worker] told me that the nesting arrangement was cancelled and the children would not be staying with their mother. I met with the Ministry in the next day or so after that and was told the same thing and instructed to make an application in court to obtain an order for custody of both of the children. I did take steps to obtain such an order in Provincial Court but was unable to serve the claimant before she left Terrace.

[24] Ms. M said that on March 14, 2011, another social worker with the Ministry asked her to attend the Ministry office and that, at the meeting, she was asked to sign a document "saying that I promise not to hit the children any more". She refused to sign it because she maintained that these allegations were false. Subsequently, Ms. M was told by another social worker that she had advised Mr. A to get a restraining order against Ms. M and an order for sole custody of the children.

[25] On March 18, 2011, Ms. M left Terrace altogether. She said that the children were refusing to see her and that she did not want to engage in conflict with them and Mr. A. Also, she felt her health was suffering as she had not fully recovered from the accident and its emotional effects, as well as the emotional effects from the family discord and what she felt were false allegations that she was abusing the children. Both her physician and a counsellor suggested that she go elsewhere for some period of time.

[26] Since that time, the children have lived with Mr. A in the family home. Ms. M lives in Vernon. Neither party is working. Mr. A has survived financially through a combination of EI benefits and cashed-in RRSPs. Ms. M has had, fortunately, free housing (a bachelor's suite) made available to her in Vernon. Her only income comes from no-fault benefits being paid as a result of the car accident, although recently she was paid \$50,000 through her injury claim, perhaps by way of an advance.

[27] Both parties filed affidavits from other persons familiar with the family or the children. Ms. M's affidavits were from friends, music teachers and a relative. Generally, they describe the good parenting skills of Ms. M and her positive interactions with her children, negative interactions involving Mr. A, observations that question Mr. A's diligence with his care of the children, and suggestions that the children's attitudes towards their mother have changed for the worse since they have been in Mr. A's care. The three affidavits filed on Mr. A's behalf were from friends of Mr. A, and, very generally, they described Ms. M's volatile temperament (to the point of questioning her mental stability), poor housekeeping, the extreme arguments and other negative interactions between Ms. M and R, and threatened or actual violence by Ms. M against R. I would note that the affidavits from Ms. M's supporters expressed no concerns about her mental stability.

- [28] Ms. M has significant concerns that the children's ongoing needs are not being met. She is critical of what she regards as Mr. A's tardy response to R's need for residence modifications to accommodate her disability. She also feels that Mr. A has not attended to such needs as counselling for the children, vehicle modifications to allow for better access by R, recreational programs suggested by G.F. Strong, an exercise program for C, proper follow-up with medical professionals, and so on.
- [29] Mr. A responded to these various allegations by saying that he continues to work with the various health care providers who are assisting the children. On two occasions he has met with an occupational therapist retained by ICBC (the "OT") at the family home. The OT's report of June 14, 2011 identified no issues with R's personal care, home management (wheelchair access issues), personal management or communication. As for ongoing counselling, the OT said:
- [R] has adapted to her injury and change in function without any reported or observed coping difficulties. She was receiving counselling services at GF Strong prior to her discharge. Continuing with counseling [sic] services following her return home was discussed, however [R] wanted to have a break from services at that time while she adjusted back into a regular routine. Occupational therapy was supportive of this as [R] did not demonstrate [any] difficulties coping with the transition or her injury. At this time [R] continues to demonstrate and report no significant emotional concerns. It will be important to keep this option open to her should she experience any difficulties in the future.
- [30] At the outset of this matter Ms. M's proposal was that, because she was historically the parent who was better able to see that the children received necessary care and who attended to their needs and activities, she should be given interim sole custody and guardianship and the children should live with her in Vernon, although she was open to living elsewhere with them. She argued that access to medical and rehabilitation services is far better in Vernon, either by travel to Kelowna or to Vancouver. As the hearing of the application unfolded she modified her position to that of a nesting arrangement in the family home in Terrace. In order to put this into effect, however, she would need both spousal and child support, as well as a place to stay during non-parenting times.
- [31] Mr. A's proposal is that the children continue to reside with him in the family home, but that Ms. M have liberal and generous access in a manner that takes the children's wishes into account, an issue that has proved problematic in the past. He suggested that there be counselling for the family through a local psychologist, Dr. Altar. As for income, Mr. A proposes to log and sell the timber on the family property, a venture that will permit him to remain close to home and be better able to attend to the children's needs.

II. The Children's Views

- [32] In order to place the views of the children before the court, counsel for Mr. A arranged for another Terrace lawyer, Wade MacGregor, to interview the children and set out the results of those interviews in an affidavit. The instructions to him were to "conduct yourself as if you had been appointed as a Family or Child Advocate".
- [33] The resulting evidence was vigorously criticized and contested by counsel for Ms. M. The criticisms included the failure to obtain Ms. M's consent, bringing the children into the litigation and the shortcomings of "views of the child" reports in general. Ms. M contends that Mr. A has worked to alter the attitudes of the children against her, including blaming Ms. M for the car accident, such that their stated views are not necessarily their true feelings. She relied on various observations or incidents that were said to be evidence that this negative conduct was taking place. Finally, Ms. M argued that to accept the children's views would effectively make them the decision-makers, a situation that is neither healthy nor desirable.
- [34] I accept that there may be some shortcomings in relying on "views of the child" reports in some circumstances and for some children, particularly younger children. However, I bear in mind that (1) this is an application for interim relief only, and (2) in any event, a s. 15 custody and access report will be prepared in this matter in the months to come. As well, I take into account evidence that R seems to have been greatly frustrated in the past because her views were ignored. For the court to also ignore her views would only pile further frustration onto a teenager who has to cope with many other difficulties.
- [35] Mr. MacGregor seems to have approached his task professionally and independently. It is the best evidence of the children's wishes that is presently available. I conclude that it is proper for me to take this evidence into account.
- [36] Mr. MacGregor reported that the children told him the following:

R

- R has had a closer relationship with her father than with her mother, for as long as she can remember, whereas C has been closer to her mother.
- Her mother has been displaying increasingly erratic behaviour for years. She believes her mother has psychological problems.
- During the father's first shift in the nesting arrangement, she and C discussed the situation between themselves and concluded they did not want to be in the care of their mother. R emphasized that she and C came to this conclusion on their own.
- In the time after her mother left Terrace, R would switch off her cell phone for the day while in school, and when she turned it back on she would find that her mother had called as many as forty or fifty times during the day.

- R and her mother did talk to each other until recently when R cut off contact; the calls were seldom pleasant. Her father has never interfered in any way with her contact with her mother.
- Her mother has a hair-trigger temper, swears at R at the slightest provocation and has regularly asserted that R chooses to be confined to a wheelchair.
- R has told her father that her mother abused her, although the abuse was "not serious" -- her mother would frequently slap her or pull her hair as punishment and often used hurtful or insulting language towards her.
- R does not feel that she is presently in need of rehabilitation services, although she has resumed counselling, just in case.
- Her mother's behaviour caused concern with the staff at G.F. Strong, and her discharge was delayed because of those concerns.
- R has never heard her father say that the accident was her mother's fault.
- R has never heard her father say that her mother abused either or both R and C. R has, however, told her father that her mother has abused her and C, and she has told Ministry social workers the same thing.
- Her father has never been physically or verbally abusive towards her.

R does not wish to have any contact with her mother and would vigorously resist any attempt to force her to live with her mother.

C

- For about two years prior to the car accident her mother and R have been fighting more and more, and C was getting caught in the middle.
- When the nesting arrangement was implemented R suggested that they should talk to a social worker about their concerns about their mother. She told the social worker that she wanted to live with her father because she thought her mother had a bit of an illness, and she felt safer with him.
- After her mother left Terrace she phoned C as often as one hundred times per day. These have tapered off but she still speaks to her mother at least once per day. The calls are often unpleasant because her mother insists on talking about R or her father. C has a cell phone but has not given the number to her mother because of the volume of calls to R's cell phone and to the home telephone.
- C said that her mother ruined both a slumber party and her birthday party by phoning her friends' parents and telling them that their children would not be safe if her father was the only adult present. The result was that many of the invited friends did not attend either event and "most of my friends now won't even come over".

- C was clear that her father made no effort to influence her choice of custodial parent.
- C has never said that her mother abused her, nor has she ever heard anyone else say that her mother has abused her or R.
- Her father has never been physically or verbally abusive to her.
- C said "I want to see her, but at the same time I don't because she's not the same person I grew up with. I do want to see her but just not right now". She thought that their father should look after them and that she would like visits with her mother once or twice a week.

III. Other Records

- [37] Ministry records show that Ms. M called the Ministry on March 4, 2011 to report threats by Mr. A that he was going to kill the children and that he had threatened to kill her as well.
- [38] A Ministry worker or workers met with Mr. A on March 7, 2011. Mr. A emphatically denied the allegations. Two Ministry social workers interviewed Ms. M and the children in Vancouver on March 8, 2010. The children expressed views and observations that were very similar to those outlined in the previous section, although C also indicated that her mother had thrown things at her and had recently pushed her. Ms. M is reported to have told the social workers that Mr. A would kill her and "she is not sure if [Mr. A] would kill the girls". Ms. M also told the social workers that she had post-traumatic stress disorder and had suffered a brain injury as a result of the car accident.
- [39] The social workers concluded that neither child was in need of protection. The nesting arrangement was put in place. However, the Ministry records indicate that this arrangement was changed on March 14, 2011 "due to [Ms. M's] concerning behaviours".
- [40] On March 26, 2011 Ms. M called the police to have them check on the safety of R and C because she had telephoned them and heard screaming in the background. The police attended and found that everyone was fine. They spoke to the girls and both said that C was screaming because "she did not want to speak with her mother who keeps calling". The police reported their findings to Ms. M, who did not welcome this response. Ms. M then reported to police that Mr. A beats the children, that the children were lying to protect him and that Ms. M was not being allowed to contact them. The police officer noted that he or she knew these allegations to be false due to past involvement with the family.
- [41] The Ministry records include Facebook postings attributed to Ms. M and her children. In these entries, Ms. M posted that the children are not safe, that Mr. A has harmed everyone in the past, has threatened to kill the children, is "extremely dangerous" and "somebody... anybody... please help them". R's posts in response are to the effect that they are fine, safe and do not need help and that her mother is lying and "causing drama" -- to which Ms. M responded "[R] please stop lying". C's one post is to the same effect as her sister's.

IV. Discussion

(a) Interim Custody, Guardianship and Access

[42] This is a very troubled family and a very troubling case. I am comforted somewhat by the fact that both parties agree that there should be a s. 15 custody and access report prepared in this matter, although there was some disagreement on the details, a topic I will address later. That process should assist greatly in the task facing the court when considering the long-term custody and access arrangements for this family. My task is limited to the shorter term.

[43] I conclude that it is not in the best interests of the children to live with their mother at this time. On the evidence presently available I am satisfied that the children are safe while in the care of their father, that he poses no risk to them and that their needs are being reasonably met. It is also a matter of some weight -- though it is not determinative -- that the children express a preference to live with their father. In the case of C, who is 12 years old, I place far less weight on her preference, but in the case of R (who is 15½) her views are a relatively strong factor, though the strongest factor in R's case is the history of extreme conflict with her mother. It is certainly not in R's best interests to be thrust back into a situation where conflict with her mother may well resume, without the presence of another adult to intervene, and where R is less able, emotionally and physically, to deal with it.

[44] I have given careful consideration to the mother's allegation that the father is not attending to the children's needs. Certain of these complaints are exaggerated. For others, it may be that the father could have done better. All in all, however, I am satisfied that the father is attending to the needs of the children satisfactorily.

[45] I have also considered Ms. M's proposal that a nesting arrangement be re-implemented. I conclude that this is undesirable at this time because I am of the view that interaction between Ms. M and Mr. A should be limited to the greatest extent possible, for now at least. The shared household associated with a nesting arrangement would provide more opportunities for conflict and confrontation. Also, it seems that the log home, which was to have been part of the prior nesting arrangement, is not presently habitable. Assuming that to be the case, in order to implement the proposed nesting arrangement the parties would require three residences: one for Ms. M for her off-days, another one for Mr. A for his off-days, plus the family home (collectively, a requirement that Ms. M confirmed in submissions) in circumstances where the present incomes of both parties are minimal. The parties have enough problems with their present finances without imposing more.

[46] Ms. M should have liberal and generous access to the children, with such access implemented on the recommendations of the psychologist, Dr. Altar, who both parties agreed should be involved in assisting and counselling the family. The relationship between Ms. M and the children is very much damaged at present. Ms. M maintains that this damage is entirely due to persistent false and derogatory comments by Mr. A, an allegation that he firmly denies, but, again, it is not important to identify the cause at this time. Instead, what is needed is the normalization of the relationship between Ms. M and the children, to the

extent reasonably possible, carried out with professional guidance.

- [47] The parties should begin this process with Dr. Altar as soon as possible. Although I do not wish to tread unduly on his area of expertise, in general terms I have it in mind that he will meet with the family members, as he sees fit, and make some early recommendations for Ms. M's access to the children, taking into account the children's wishes (as well as, of course, their best interests), and with the general goal of equalizing C's time with both parents, if that accords with his recommendations. R may be another matter as it seems unlikely that living with her mother even on a part-time basis would be in her best interests in this interim period.
- [48] Should the parties agree with Dr. Altar's access recommendations then these will be implemented. If not, the parties have leave to speak to the matter of access on any weekday morning at 9:00 am, by telephone. I will be seized of this aspect.
- [49] Counsel for Ms. M pressed hard for an order setting a defined access schedule but I decline to make such an order. This situation calls for a cautious approach, one that is crafted properly with professional input. In any event, defined access will be difficult to establish until Ms. M returns to Terrace and establishes a residence there.
- [50] There will be an order that the parties have, on an interim basis, joint custody and guardianship of the children, with liberal and generous access to Ms. M, as discussed above, and with the primary residence of the children with Mr. A in the family home. Implicit in the term "joint guardianship" is the right of the mother to obtain information from, and provide input to, all medical practitioners, caregivers, counsellors, therapists, teachers and the like, bearing in mind that there is some limitation on this right insofar as the mother is a defendant in a personal injury lawsuit brought on behalf of the children and, of course, cannot have access to privileged medical, etc. information generated for the purposes of that lawsuit.

(b) Section 15 Report

- [51] As adverted to earlier, there will be an order that a s. 15 custody and access report be prepared by Dr. Mary Korpach, or such other psychologist agreed upon by the parties. The cost of this report is to be borne equally by the parties irrespective of the ultimate result at trial or otherwise.
- [52] Mr. A's initial position was that a s. 15 report ought to be prepared, but that it should be prepared by or through the offices of the Family Court Counsellors. I conclude that this option is impractical in this case. I recognize that a private report will be expensive but the cost is not prohibitive when one considers the overall capital of the parties.

(c) Interim Spousal Support and Child Support

- [53] Ms. M seeks interim spousal and child support; Mr. A seeks interim child support in the event that the children remain with him.

- [54] Ms. M's child support application is based on the assumption that the children would reside with her in the interim. This has not transpired. Her application for interim child support is therefore dismissed.
- [55] Ms. M's application for interim spousal support is based on her submission that the present annualized incomes of the parties are \$11,400 for her and about \$72,000 for Mr. A. The figure for Ms. M is correct; the figure for Mr. A is not. For Mr. A's income Ms. M has included amounts derived from cashed-in RRSPs (about \$48,000), the apparent assumption being that he will continue to cash in RRSPs at the same rate. In these circumstances, I do not consider it appropriate to assume -- and, indeed, effectively require -- a party to continue to erode capital to maintain a level of income. Instead, I consider the appropriate income figure to be \$24,000, the approximate amount of Mr. A's current EI income.
- [56] At present, Mr. A. is paying the mortgage on the family home (\$1,100 per month), \$500 per month on a CRA debt and \$250 per month on a line of credit that I understand to have been for the benefit of both parties. He is paying these out of his present income, but he is also liquidating capital in order to meet all obligations.
- [57] In these circumstances I consider it inappropriate to order that he pay interim spousal support to Ms. M at this time. There is a need on Ms. M's part, certainly, but both parties are presently in need and the family's living arrangements and employment prospects are very much in a state of flux.
- [58] Mr. A's application for interim child support was not pressed with any vigour. In any event, I dismiss it. At Ms. M's present income level the Guidelines child support amount presumptively owed to Mr. A is \$118 per month. However, Ms. M now has to secure living accommodations of some sort in Terrace and will have costs associated with that, and her income -- like Mr. A's, when one takes into account the family debt payments he is shouldering -- is really quite minimal.
- [59] Given the numerous uncertainties outlined above I decline to make any interim support orders at this time.
- [60] As I said during the hearing, however, this situation cannot continue in the long term, perhaps not even for the medium term. Both parties have an obligation to return to reasonable, remunerative employment or self-employment as soon as they are able. In the case of Mr. A, he must either get employment or carry out his logging plan, and in view of the outstanding family litigation it is obvious that he will have to be prepared to give an economic justification for his choice. In Ms. M's case, she is duty-bound to resume employment when she is sufficiently recovered to do so.
- (d) Sale of Family Home & Properties

- [61] I adjourn generally Ms. M's application for the sale of the family properties. The court will have to know more about Mr. A's plan to log the merchantable timber, and more information about the alternative of selling the properties (and whether the value of the timber can instead be realized through a sale of the properties) before an application for the sale of the properties can be properly considered.
- (e) Sale of Horses
- [62] During the course of the hearing I made an order that the horses be sold, with joint conduct of sale, with the net proceeds to be divided equally between the parties. I left it to counsel to work out any necessary details.
- (f) Retrieval of Personal Items/Household Items
- [63] This issue, too, was resolved at the hearing. Through counsel, the parties will make arrangements for the retrieval of items from the family home by Ms. M. At the hearing, the scope was expanded somewhat from mere personal items, as it became apparent that Ms. M will be setting up a household in Terrace and may need items for that purpose. A list of items to be retrieved is to be agreed upon in advance, with leave to apply in the event of disagreement.
- (g) Order Restraining Disposal of Assets
- [64] Ms. M seeks an order that Mr. A be restrained from disposing of any assets, arguing that he had liquidated RRSPs and should be restrained from further RRSP withdrawals or other asset dissipation. Mr. A responded by asserting that he needed access to capital to pay the bills. He acknowledged that one large withdrawal was made to pay a lawyer's retainer, but said that any withdrawals that are found to have been for personal use can be adequately addressed as part of the distribution of realized equity in the family properties (thought to be \$300,000) after they are sold (it is acknowledged that they will have to be sold at some point).
- [65] Little or no legal argument was made on this issue. Because the parties were never married, s. 67 of the Family Relations Act does not apply. Accordingly, the remedy sought by Ms. M is essentially an interlocutory injunction. The onus is therefore on Ms. M to show (1) there is a fair question to be tried; (2) the further liquidation of RRSPs by Mr. A would cause irreparable harm; and (3) the balance of convenience favours the granting of an injunction. The onus being on Ms. M is the reverse of the situation with s. 67 orders, where the onus is on the respondent to show that an applicant's claim to property will not be defeated or substantially impaired by the disposition of family property: *Lovick v. Brough* (1998), 36 R.F.L. (4th) 458 (B.C.S.C.).

- [66] Ms. M meets the "fair question to be tried" portion of the test, but she has not met the burden of showing that irreparable harm will ensue if the order is not made. There is sufficient equity available in the real properties to redress any harm caused by further liquidation by Mr. A of RRSPs for non-family use. I have concerns, as well, as to the balance of convenience, but my conclusion on the second aspect of the test is sufficient to dispose of this issue.
- [67] There is a minor problem with the claimant's application insofar as she did not offer or provide an undertaking as to damages, but I would not have dismissed the application for that reason alone. It is something of a technicality (though an important one) and had the claimant met the onus on her in all other respects I would have allowed her the opportunity to file an undertaking to remedy the omission.
- [68] The application for an order restraining the disposition of assets is dismissed.
- (h) Police Assist Clause
- [69] Ms. M applied for a so-called "police assist clause". In light of the earlier determinations I have made, such a clause would neither be suitable nor appropriate.
- [70] I do recommend, though I do not order, that the parties limit their direct interactions with each other and, where possible, that they have another adult present when they do expect direct interaction.
- (i) Change of Venue/Transfer of File
- [71] Mr. A seeks an order transferring this matter to the Terrace registry for all purposes. He submitted that this matter has no connection with Vancouver except for the fact that Ms. M has Vancouver counsel. While conceding that this would result in the loss of the January 2012 trial date in Vancouver, his counsel submitted that the present trial date might actually be too soon for these parties given the uncertain state of their affairs. Counsel surmised that a trial date would be available in Terrace in the spring or late spring of 2012.
- [72] It should be noted that the trial date was set at a Judicial Case Conference on June 2, 2011 but, according to counsel, it was made subject to the change of venue application.
- [73] Counsel for Ms. M opposed the application, arguing that the delay in the trial associated with a change of trial venue to Terrace ought itself to be determinative of the issue, as it was unacceptable that the parties should have to delay the final resolution of their disputes. In any event, counsel argued that effect ought to be given to Ms. M's choice of venue and, in any event, some of the witnesses would be from Vancouver, those being certain medical witnesses, as well as the psychologist, Dr. Korpach.
- [74] The test to be applied on an application for change in venue has been set out in a number of cases. In *Schuler v. Schuler*, 2000 BCSC 1498, Bennett J. (as she then was) summarized the applicable law as follows:

- [27] The law is clear that a court can change the venue of a trial if it is in the interests of justice or "a great preponderance of convenience" justifies such a change. [See *Armstrong v. Revelstoke* [1927] 2 D.L.R. 223 (B.C.C.A.), *Lindholm v. Lindholm* (Vancouver Registry) 16 July 1998 #D104108 (B.C.S.C.), *Smith v. Nicholson* [1992] B.C.J. No. 917, *Sadler v. Sadler* [1991] B.C.J. No. 153, *Tadko Enterprises Inc. v. Non-Marine Underwriters (Lloyd's)* [1994] B.C.J. No. 1134.
- [75] In *Schuler v. Schuler*, the case had a strong connection with the Williams Lake area. The parties both resided there, all the assets that were the subject of the family litigation were there, all of the witnesses were there and counsel for the defendant practiced there. The only connection with the place of trial (Vancouver) was that the plaintiff's counsel practiced in Vancouver. In that case, the evidence was that a Vancouver trial would take place earlier than would a trial in Williams Lake. Bennett J. found that the applicant had met the onus on him and had established that the great preponderance of convenience weighed in favour of Williams Lake as the appropriate venue for trial.
- [76] In this case I am satisfied that the great preponderance of convenience favours a trial taking place in Terrace instead of Vancouver. By the time of trial both parties will be residing in Terrace and, of course, both children reside there (and no mention was made by either party as to arrangements for the children if both parents had to be in Vancouver for the two weeks of trial). Most of the likely witnesses are from Terrace, including Dr. Altar, the children's family physician, an appraiser (if needed), Ministry social workers and perhaps RCMP officers, and of the 11 or so individuals who filed affidavits supporting one party or the other, eight are from Terrace or that general area. It would be very expensive indeed to have all of the Terrace-area witnesses flown to Vancouver for a trial and it seems that, by the time of trial, medical professionals from Vancouver will less likely be needed since their involvement with the children will be, by that time, somewhat dated. Dr. Korpach is an obvious exception.
- [77] I am, of course, mindful of the additional cost to Ms. M of bringing her counsel from Vancouver to Terrace for the trial, as well as the cost to one or both parties of bringing Dr. Korpach to Terrace, but these costs are far outweighed by the costs associated with a Vancouver trial. If, as seems likely, there are to be witnesses from the Ministry, there is also the matter of inconvenience, both to the witnesses themselves and to those members of the public who will be deprived of their important services for a longer period of time for a Vancouver trial than in the case of a Terrace trial.
- [78] I do not consider that the probable several-month delay in trial is a determinative factor, particularly since I agree that there is a substantial likelihood that a January 2012 trial would, in fact, be too soon given the number of uncertainties surrounding this family.
- [79] I order that the trial take place in Terrace. Although Mr. A framed his application in terms of transferring the action to Terrace for all purposes, I see no need to make such an order.

(j) Other

[80] I order that the parties not make derogatory comments about one another in the presence of the children and, as well, they are not to discuss the family litigation with the children.

[81] I am seized of the interim access issue and the issue concerning Ms. M's retrieval of personal and household items, but only those two issues.

"Blok J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/09/2011BCSC0913.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/k-j-m-v-p-d-a-2011>

Prepared on 28 October 2026 · Esheria