
CANADA / JUDGMENT

L.J.P. v. R.S.L.G.

2020 BCSC 1594

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1594 L.J.P. v. R.S.L.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.J.P. v. R.S.L.G.,

2020 BCSC 1594

Date: 20201028

Docket: E91681

Registry: Nanaimo

Between:

L.J.P.

Claimant

And

R.S.L.G.

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Claimant:

A. McMeans

Counsel for the Respondent:

C. Linde

Place and Date of Hearing:

Nanaimo, B.C.

October 22, 2020

Place and Date of Judgment:

Prince Rupert, B.C.

October 28, 2020

- [1] This is an interim application for the return of a nine-year-old girl to the care of her mother in New Mexico.

Background

- [2] The parties resided together in 1995, married August 25, 1996 and separated October 15, 2015. They were divorced September 12, 2017. They have two adult children, a son and a daughter resident in British Columbia.
- [3] The child in this application is A.A.L.G., born January 25, 2011 (the "Child").
- [4] Thee parties entered into a separation agreement dated May 14, 2019 filed under the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") (ss. 44(3) and 58(3)), in the Nanaimo registry of this Court on May 15, 2019. It appears to have been drafted by them without legal assistance. It is not as clear or as internally consistent as it should be.
- [5] On July 2, 2019, the claimant and the child moved to Albuquerque, New Mexico where the claimant now resides with her new partner. The move was made with the respondent's consent. Since then the Child's residence has been with the claimant in Albuquerque, New Mexico, where the Child is enrolled in school.
- [6] The Child has permanent residency in the United States. The parties agreed in their separation agreement of May 14, 2019: "It is acknowledged and understood that the immigration/permanent residence/naturalization process is unpredictable. Both parties agree that unexpected adaptations may need to be made in order to meet USCIS requirements. The ultimate goal is dual citizenship for both L. and A., which opens up a world of opportunities for both families."
- [7] The separation agreement also provides:

It is agreed that [the Child] will move with L. to Albuquerque, NM, USA at the beginning of July, 2019 and spend the first calendar year there living and attending school.

In September, 2020 [the Child] will travel back to British Columbia to attend school in Quesnel on a trial basis. It is agreed that options to return and continue school in Albuquerque will be made available to [the Child] in the following:

Each calendar year, starting with the beginning of the first semester of school, [the Child] will be given a limited number of opportunities to decide to live with the other parent. [the Child] shall not be asked or expected to make this decision on her own.

Times during the year when [the Child] can opt to switch households are winter break and summer break. Only one switch per calendar year is to be allowed to take place because of the disruption to [the Child's] stability, development and education. Exceptions under extreme circumstances will be discussed and evaluated as necessary. These expectations will be discussed with [the Child] and any questions she may have will be addressed.

[8] In the spring and early summer of 2020, the parties discussed via texts the Child's summer visit to Quesnel. There is no evidence before the Court that there was any expectation the Child would remain in Quesnel given the parties' agreement that retaining her U.S. residency was a mutual goal. It is clear the Child was only to visit for a portion of the summer.

[9] In May of 2020 in a series of texts the respondent stated:

I'm still not clear on the citizen process so is it that [the Child] can't leave for more than a few months or it jeopardizes her process?

[10] The claimant responded:

There's a lot to it but if someone within a green card leaves the country for more than 6 months, they question her residency and it will affect her citizenship when the time comes.

[11] To which the respondent texted:

So really to protect that then for the next while she can only come here for the summer and visits (sad face). I don't want to jeopardize that for her...as painful as that is to say thinking of the reality of what the means..but I'm willing to work with it for now I guess So can she come earlier then? Like beginning June? Then have her back for the beginning of august?

[12] Covid-related border closures complicated the summer parenting time in Quesnel. Eventually the respondent booked round trip tickets for him to pick the Child up on June 29, 2020 in Albuquerque, New Mexico and return her August 5, 2020. He also signed a Travel Consent in relation to the Child with a return date to the U.S. of August 5, 2020.

[13] The respondent confirmed with the claimant that the Child would be returned to her on August 5, 2020 and sent the claimant a flight booking information showing the Child's return flight booked for August 5, 2020.

[14] The Child travelled as arranged to Quesnel.

- [15] In mid-July the respondent texted the claimant that flights were being cancelled and changed due to Covid. As well, he raised concerns about the rise of Covid cases in the U.S. On July 22, 2020, he suggested they postpone the child's return and have her attend her school in New Mexico remotely as her school there started August 12, 2020.
- [16] However, on August 8, 2020 the claimant received by email a letter from the respondent dated August 3, 2020, advising that the respondent had decided to keep the Child and that he was going to enroll the Child in school in Canada. The reasons given were that the Child had requested to remain in Canada and that the respondent was of the view that it was in her best interests to remain in Canada because of the high Covid rates in the U.S. He closed by saying he was doing so to ensure his "rights as outlined in the Final Separation Agreement [were] honoured."
- [17] In that letter, he also addressed the immigration issue and possibility of avoiding immigration problems by limiting the Child's stay to six months. This appears to be a further confirmation of their agreement to have the Child obtain permanent residency and dual citizenship.
- [18] On August 7, 2020 the Child texted her mother that she was tired because of crying. In later texts the Child emphasized it was her choice to stay, that she was not "manipulated" and that "me and dad will fight to be here for school " and that "the agreement said that I could choose."

Relocation of Child by Respondent

[19] Section 77 of the FLA provides under the heading "wrongful removal of a child":

77 (1) This section applies if a court

- (a) may not make an order or declines to make an order under section 74 [determining whether to act under this Part], or
 - (b) is satisfied that a child has been wrongfully removed to, or is being wrongfully retained in, British Columbia.
- (2) In the circumstances set out in subsection (1), a court may do one or more of the following:
- (a) make any interim order that the court is satisfied is in the best interests of the child;
 - (b) stay an application to the court for an order, subject to
 - (i) the condition that a party to the application promptly start a similar proceeding before an extraprovincial tribunal, or
 - (ii) any other conditions the court considers appropriate;

- (c) order a party to return the child to a place the court considers appropriate and, in the discretion of the court, order a party to pay all or part of the expenses reasonably and necessarily incurred for travel and other expenses of the child and of any parties to or witnesses in the proceeding.

[20] I am satisfied the respondent's failure to return the Child to the claimant was contrary to what had been agreed.

Best Interests of Child

[21] The FLA addresses the best interests of a child as follows:

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
 - (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;
 - (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;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [22] The claimant's spouse, P.P., deposes that a few weeks before the planned trip the Child volunteered that "I'm sorta worried he [her father, the respondent] is going to make me stay and I don't want to". When asked what she meant by "make", she said, "Well, like talk me into staying, I won't know what to say because he always gets too sad".
- [23] The evidence filed by the respondent indicates the Child is well aware of the dispute between her parents and the ongoing legal proceedings. She has provided a letter addressed to the Court, allegedly created by her of her own volition, stating her mom had lied to her about Quesnel and that she chooses to live there. The respondent deposes he sought legal counsel in Quesnel to talk to the Child but they refused given her young age.
- [24] The material before the Court raises significant concerns that the Child has been drawn into the dispute between her parents by the respondent. That, in turn, is relevant to whether his actions are in her best interests.
- [25] While the agreement is not as clear as one would hope, the parties have interpreted it on the basis that the Child's immigration status was a significant matter tied to the ability of the Child to reside with her mother in the U.S. They both acknowledged that obtaining dual citizenship was desired and, in their daughter's, best interests.
- [26] The immigration issue appears complex and further evidence will no doubt be required at trial. However, on this interim application, the material provided from U.S. immigration authorities includes the direction:
- Additionally, absences from the United States of six months or more may disrupt the continuous residency required for naturalization.
- [27] The manner in which the respondent came to have the Child remain in British Columbia is concerning. He has disrupted the status quo. He clearly did not interpret the agreement as permitting the Child to remain with him in alternating years if she chose as applicable because of the immigration concerns of both parents. While the eventual consideration of the separation agreement must await trial, on this interim application the parties were in agreement respecting the need to avoid immigration problems. Additionally, the respondent provides no evidence to the contrary regarding the immigration concerns raised.
- [28] Counsel for the claimant relies primarily on two authorities.

[29] The Alberta Court of Appeal decision, *Oslanski v. Oslanski*, 2020 ABCA 297, while relating to a stay application on an appeal, is factually very similar to this matter. In *Oslanski*, the mother obtained an order that she and her nine-year-old daughter could permanently relocate to the Greater Houston Area in the U.S.

[30] The court was satisfied the mother had taken the necessary steps to protect the child from Covid, including driving to Alberta to return the child to the U.S. to avoid any risks involving airports and air travel (I note the claimant here has made a similar offer). The court found there would be no irreparable harm if the child returned to the mother's residence and found that the child's best interests were that she reside with her mother.

[31] In *Brazeau v. Lejambe*, 2020 ONSC 3117, the parties had an order for shared joint custody of an 11-year-old and eight-year-old daughter and son, but the children resided primarily with their mother. The children refused to visit their father because, according to the mother, they had Covid concerns because their father's partner worked in a long-term care facility. The court rejected the mother's belief she could disobey the existing court order because of safety concerns and the views of the children.

[32] The claimant relies on these comments of the court at paragraph 20:

20 As the party who does not wish to comply with the terms of the governing court orders, it was incumbent upon the mother to bring an urgent motion to address her concerns. She did not. Instead, the mother chose to engage in unilateral self-help by simply disregarding the court-ordered terms and imposing her own will. That unilateral self-help has now been applied for a period of two months. Courts do not look favourably upon self-help actions of litigants, even in times of a health crisis: see for example *McCumber v. Barnes*, 2020 ONSC 2706 at para. 14. Court intervention is necessary in order to correct the Respondent mother's actions.

[33] I agree with these comments. Court orders are to be obeyed. In this case, while there is potentially an argument that the separation agreement/order was not breached given the clauses referred to earlier about fall exchanges of the child, that clearly was not the basis for the respondent's unilateral action.

[34] The explanations originally advanced by the respondent for his action relates to the Covid situation. As the court also noted in *Brazeau*:

25 On review of the materials filed, I am satisfied that this is one of the unfortunate situations wherein one parent is seeking to capitalize on the public health crisis in order to marginalize the children from the other parent. I have considered both of the arguments advanced by the mother in support of her position, namely the wishes of the children and COVID-19 safety concerns, and I reject both on the facts of this case.

- [35] Regarding the Covid concerns raised by the respondent, the material leads me to find the government in New Mexico is actively addressing Covid related concerns including permitting remote attendance at school. In addition, the mother confirms her adherence to safety protocols and notes that she is a stay-at-home mother and her husband works from home. I am satisfied the alleged Covid concerns of the respondent are without merit.
- [36] Indeed, they no longer appear to be the basis for his position as he now emphasises the alleged views of the Child and her Metis heritage. While both are significant factors, they must await final determination.
- [37] Regarding the best interests of the Child including consideration of the Child's wishes under s. 37 I note:
- a) the Child's health and emotional well-being with the mother who has been her primary caregiver raise no concerns, particularly given the respondent in the agreement agreed to the mother's move with the Child and raised no concerns when planning the Child's return after her visit;
 - b) while the Child has allegedly voiced her views, I note firstly her age and secondly the way matters have unfolded raises concerns regarding their origin and reliability;
 - c) the immigration concern remains as, if the Child's status under the U.S. immigration requirements changes, she may not be able to in future reside with the mother; and
 - d) for the reasons given, I have concerns respecting the Child's psychological and emotional safety.
- [38] Finally, the unilateral conduct of the respondent is not to be condoned as it has undermined what apparently was a co-operative and amiable relationship between the Child's parents, which is something clearly in the Child's best interests. Instead, they are now in an adversarial relationship and the Child has been drawn into the middle, apparently of the impression it is her decision. While her decision is a factor, it is only one of many.
- [39] For the reasons above, I reach a similar conclusion to that in Brazeau both with respect to the alleged wishes of the Child and the alleged Covid concerns. I also agree with the court's observations in Brazeau at para. 31:
- 31 I note that the 'evidence' of the children is not properly before the court. To allow the views and preferences of the children to disrupt a long-standing regime of regular and generous time between the father and children, the court would require more than the mother's account of the children's wishes. In my view, far too many red flags are present in this case to accept the evidence of the mother on this point. Specifically, even on Affidavit evidence alone, this court has concerns that the children are being unduly influenced by the views of the mother.
- [40] I make the following orders:

- a) Pursuant to s. 45 of the FLA, an order that the respondent, R.S.L.G., return the Child to the custody of the claimant, L.J.P. by November 5, 2020, at noon.
- b) If the Child is not returned to the custody of the claimant by November 5, 2020 at noon, the claimant has leave to seek orders pursuant to ss. 231(4) and 231(6) of the Family Law Act that a police officer apprehend the Child, and take the Child to the claimant, and for the purpose of locating and apprehending the Child in accordance with this order, a police officer may enter and search any place he or she has reasonable and probable grounds for believing the Child to be.
- c) An order for lump sum costs payable to the claimant by the respondent in the amount of \$2000 plus disbursements for the application and taxes thereon, payable forthwith.

"The Honourable Mr. Justice Punnett"

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