
CANADA / JUDGMENT

L.J.R. v. J.M.M.

2022 BCSC 1911

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Supreme Court of British Columbia

DECIDED

16 September 2022

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2022 BCSC 1911 L.J.R. v. J.M.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.J.R. v. J.M.M.,

2022 BCSC 1911

Date: 20220916

Docket: E58499

Registry: New Westminster

Between:

L.J.R.

Claimant

And

J.M.M.

Respondent

Before: Master Hughes

Oral Reasons for Judgment

(In Chambers)

The Claimant, appearing on her own behalf:

L.J.R

Counsel for the Respondent:

C. Alvarez Gomez

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 30, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 16, 2022

- [1] THE COURT: The respondent father, J.M.M., applies for increased parenting time with the parties' two children, and a declaration that he has been wrongfully denied parenting time. The claimant mother, L.J.R., opposes that application.
- [2] This application was set for a full day hearing on the father's application, filed on May 25, 2022, which had already been adjourned from July 15, 2022, due to lack of hearing time.
- [3] The mother also had an application before the court, filed on July 4, 2022, dealing primarily with financial issues. She also seeks a "views of the child report" with respect to the older child. The mother had previously been represented by counsel, but was self-represented on the day of the hearing before me.
- [4] It was clear from the outset that one day would be insufficient to hear both applications. As the father's application was filed earlier, and deals with more time-sensitive issues, I determined that the father's application would proceed and that we would only deal with some aspects of the mother's application, if there was sufficient time to do so. Unfortunately, there was not sufficient time to deal with any part of the mother's application and that application was adjourned generally.
- [5] This decision is being delivered as oral reasons soon after the application was heard. If these oral reasons are transcribed, I may edit them to include references to additional background information and to clarify the judgment in written form. The result and the core analysis will not change. In addition, if these reasons are published, I will anonymize the names in order to protect the privacy of the children.
- [6] By way of brief background, the parties were married in 2011, separated in September 2019, and were divorced by order dated March 29, 2022. They have two children: C.X.M., age nine; and C.Y.M., age six. Following the separation, and until about April 2021, the father had infrequent parenting time, not more than once per month and often supervised.

The parties disagree as to the reason for the father's limited involvement at that time. The mother says that the father was not interested and essentially dropped out of the children's lives for a significant period of time, even hiding the fact that he was living only a few houses away from where she and the children were living. She says that she repeatedly offered parenting time, but

that he was not interested. She says that the reason for the supervision was that the father showed up intoxicated several times for parenting. The father says that the mother did not allow him to spend time with the children other than occasional last-minute offers. He vehemently denies the allegations that he is or was an alcoholic or that he arrived intoxicated.

- [7] The parties finally negotiated a parenting time agreement in April 2021, by which the father had three hours of parenting time on Tuesdays and Thursdays. They then attended mediation and reached a tentative agreement, which included increasing the father's parenting time by extending the Thursday visit overnight to Friday morning. The minutes of settlement from the mediation were not signed, which resulted in the parties appearing before Master Cameron on August 5, 2021, at which time he granted a parenting order in the terms agreed to by the parties at mediation. The balance of the father's application was adjourned to September 9, 2021.
- [8] On September 9, 2021, Master Robertson made an interim consent order with respect to parenting time. That consent order, which I will refer to as the "Robertson Order", provides that the children were to reside primarily with the mother and have parenting time with the father twice per week, from 3 p.m. Thursday overnight to 9 a.m. Friday and from 10 a.m. Sunday overnight to 9 a.m. Monday. The Robertson Order also provided that the parties were to review the parenting schedule in January 2022, with a view to increasing the father's parenting time to a third overnight. That review did not happen.
- [9] I am advised that the parties attempted to negotiate a revised schedule through counsel, but without success; thus the application before me.
- [10] The trial of this matter is set for March 2023 for three weeks. The father says that a change in the parenting arrangements should not wait for trial, as it is already eight months overdue, and there is no reason that he should not have more parenting time.
- [11] Counsel argued that the considerations on this application are to be found in s. 16 of the Divorce Act. However, the existing parenting arrangements that the father seeks to vary are those in the Robertson Order, which are explicitly stated to be pursuant to the Family Law Act.
- [12] Accordingly, the relevant statutory provisions regarding variation of interim orders are those found in s. 216 of the Family Law Act, specifically ss. 216(3) and (4).
- [13] Subsection 216(3) says:
- (3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:
- (a) a change in circumstances has occurred since the interim order was made;
- (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.

[14] And subsection 216(4):

- (4) In making an order under subsection (3), the court must take into account all of the following:
- (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
 - (b) the length of time that has passed since the interim order was made;
 - (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
 - (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
 - (ii) would not necessarily reflect the final arrangement between the parties;
 - (d) whether a trial has been scheduled;
 - (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

[15] The father now seeks equal parenting time, on an alternate week basis, with exchanges on Thursdays. He says that a simple schedule with fewer exchanges will benefit the children. They would be exposed to less conflict between the parents with one exchange per week rather than four. The exchanges could be primarily at school, eliminating the need for direct contact between the parties.

[16] It is notable that the Robertson Order includes terms that the father is to remain in his vehicle when dropping the children off at the mother's residence; that the parties are not to communicate with each other verbally; and that they are not to communicate with each other except via text, email, or the OurFamilyWizard application and only regarding parenting arrangements.

[17] I was taken through a number of incidents between the parties, which I will not detail today. Suffice it to say that the parents have not been communicating in a reasonable manner. Both acknowledge that the children have witnessed considerable conflict between them and that the conflict continues to occur in the presence of the children, despite the provisions of the Robertson Order.

[18] The mother wants the parenting exchanges to be at her home rather than in a public place, so that the children will not be embarrassed in public. This alone speaks volumes about the behaviour of the parents in the presence of the children. Ironically, the mother also says that she does not feel safe in the father's presence. It is difficult to reconcile these two positions. It is also difficult to reconcile the mother's allegations that the father has not been as involved in parenting as he should be, while at the same time she opposes his application for any additional parenting time.

- [19] On July 15, 2022, Justice Shergill ordered that the parties were to forthwith retain a parenting coordinator. She set out a process for choosing a parenting coordinator, which, if followed, should have resulted in the parties having retained a parenting coordinator within approximately three weeks from the date of her order. Unfortunately, I was advised on August 30th that a parenting coordinator had not yet been chosen. It was clear to me, as I expressed to the parties, that the immediate appointment of a parenting coordinator is imperative.
- [20] Returning to the application before me, the onus is on the father to establish that there has been a compelling change of circumstances or evidence of a substantial nature not available at the time of the interim order that was made. Interim orders are stopgap measures designed primarily to maintain the status quo and to provide short-term solutions until the issues can be fully canvassed at trial. (*M.A.F. v. J.C.F.*, 2021 BCSC 1447 at paras. 64 and 69).
- [21] Here, the Robertson Order specifically provides for a review of the parenting arrangements in January 2022, with the view of increasing the father's parenting time to a third overnight. That order was made by consent. As Master Elwood, as he then was, noted in *Burchhardt v. Geismayr*, 2019 BCSC 1850:
- [30] Interim consent orders that are made on a "without prejudice" basis are approached on a somewhat different basis than contested orders or consent orders that are not expressly without prejudice to the parties' rights to take a different position at a later date. . .
- [22] At para. 33, he said:
- [33] . . . the requirement from Earle of a material change that is significant and long lasting is moderated in the context of a consent order which is made expressly without prejudice. There must still be a real basis in the evidence justifying a change, and the resulting interim order must be consistent with the principles that would apply as if the application were an initial application, but the court will be more flexible with regard to the requirement of a change [of] circumstances.
- [23] In my view, the same policy considerations apply where the interim order expressly provides for a review with a view to increasing parenting time. It is relatively common for parents to have what is known as a "step-up parenting plan", which increases the parenting time with the non-primary care parent over a gradual period of time as the child gets older and their comfort level increases. This is often used where there has been a period of time, as there was in this case post separation, where the child has had limited or no contact with one parent for a period of time. Sometimes the "steps" are planned out in advance and sometimes the details of each step are negotiated one at a time.

- [24] Here, the parties and the court anticipated an increase in the father's parenting time commencing in January 2022, with the addition of a third overnight each week. The father now seeks alternate weeks for reasons I have already mentioned, due in part to the delay in implementing the additional time. His goal is to have equal parenting time and he is essentially asking to skip some of the steps that would have been part of a step-up plan, due to the delay in getting this matter before the court.
- [25] The father says that he was a very involved parent prior to the parties' separation in September 2019. Following the separation, he says that the mother restricted his parenting time. She would offer him parenting time on very short notice and then complain if he did not accept. There was no set schedule and the parenting time was sporadic. It was supervised for a period of time, either by the mother or her parents. He did not have time with the children for holidays or special occasions, other than occasionally being invited to the mother's family celebrations.
- [26] As noted previously, the parties finally agreed on a parenting schedule in April 2021, in which the father had parenting time twice per week for three hours. This was subsequently increased by the orders of Master Cameron and Master Robertson. The father has outlined a number of occasions between June 2021 and August 2022 when the mother has denied the parenting time that the father was entitled to, pursuant to either the parties' agreement or court order. When I say that this is parenting time that the father was entitled to, it is really parenting time that the children were entitled to spend with their father.
- [27] In his application, the father seeks orders, pursuant to s. 61 of the Family Law Act, that the mother pay the sum of \$5,000 to the father for her wrongful denial of parenting time pursuant to the Robertson Order.
- [28] The mother disagrees with the father's characterization of the nature of his involvement as a parent when they were still together. She claims that she was always the children's primary caregiver, both before and after the separation. I accept that the father was less involved in parenting than was the mother during their relationship, as he worked full-time and travelled periodically for work. The mother took maternity leave after the birth of each child and also had periods of time when she was not employed or was employed part-time. However, this does not mean that the father's role was unimportant or insignificant.
- [29] The mother says that, despite her efforts, the father has been distant and disengaged since separation. She says she repeatedly offered a parenting schedule, but that he was absent for much of the first year. She says that she reached out in an attempt to involve him in all special occasions, but his parenting time was limited because he showed up intoxicated several times. This resulted in the mother requiring the father's parenting time to be supervised, and they ultimately agreed, in mediation, that he would take a breathalyzer test prior to each of his scheduled parenting times.

The father says that he only agreed to the breathalyzer in order to get some parenting time, but denies that the step was necessary. As stated earlier, he denies abusing alcohol and denies the allegations that he showed up intoxicated.

- [30] The mother also says that she has tried to involve the father in decision-making regarding the children's health, daycare, activities, education, and spiritual growth, without success. She says that the father does not respond to third parties and leaves all decision making to her by default. She also says that the father refuses to accommodate the children's activities when they fall during his parenting time.
- [31] Many examples of the parties' written communications by email, text message, and via the OurFamilyWizard app were attached to the affidavits before me. A review of these communications shows that the mother's efforts to involve the father in decision-making were often more in the nature of short-notice ultimatums, where the mother says that if the father does not respond by a specific time, often the same day, she will make the decision. When the mother wants to change parenting time, rather than negotiating, she simply informs the father that the parenting arrangements will be changing, be it early or late exchanges or an outright cancellation of the father's parenting time.
- [32] The mother has planned activities for the children during the father's parenting time without consulting him, and then accuses him of not accommodating activities that she says are in the children's best interests. This includes online spiritual classes and swimming lessons on Sundays. No explanation or suggestion is offered as to why these activities cannot occur at other times during the week rather than on the father's limited parenting time. One would expect reasonable parents to be able to agree on scheduling activities such as swimming lessons, but this again is a clear example of the need for a parenting coordinator to assist with improving the parties' cooperation and communication.
- [33] The parties' communication issues have deteriorated to the point where the father describes the mother's repeated attempts to communicate with him as harassment. He points to examples where she has texted or phoned multiple times in a short period, sometimes insisting on a telephone call without explaining the reason or the urgency. The father's response is to ignore the calls or messages. In order to get his attention, the mother will then send a text saying "emergency" or "9-1-1". The mother says that there have been times that there has been an actual medical emergency with one of the children and the father has not answered. Due to the mother's indiscriminate use of this terminology, the father has not always answered at times when it has been urgent. This is the result of the proverbial "crying wolf" on the part of the mother. Both parties bear some responsibility for the poor state of their communications.
- [34] Before moving on, I must comment on the second and third affidavits sworn by L.J.R.'s father, Dr. R. His affidavits are replete with opinion and exaggeration. For example, paragraph 6 of his second affidavit says, "I find [J.M.M.'s] behaviour towards [L.J.R.] to be egregious, vindictive, and devious". He also deposes to various things that can only be

unattributed hearsay from the claimant, such as, "After [J.M.M.] left (referring to the parties' separation), he was absent from family life, sometimes going for months at a time when he didn't see C.X.M and C.Y.M. He consistently stonewalled [L.J.R.'s] communication". Such comments have no place in an affidavit.

- [35] L.J.R.'s affidavits, likewise, make a number of bald assertions, with no facts or examples to back them up. She alleges things such as "I believe that {J.M.M.] is an alcoholic" and "he does not follow doctor's orders in treating his own depression". Despite his denials, there is some evidence that the father may have used alcohol to excess in the months leading up to the parties' separation in 2019. He acknowledges drinking a few beers over the course of an evening, on a regular basis, after the children were asleep, as part of his efforts to avoid engaging in conflict with the mother.
- [36] The mother has provided printouts of the parties' bank account statements showing significant alcohol purchases during the period January to June 2019. However, that was over three years ago and there is no evidence of more recent or current issues with alcohol.
- [37] Section 37 of the Family Law Act provides that the court's only consideration on an application regarding parenting arrangements is the best interests of the children. Section 37(2) provides a non-exhaustive list of factors to be considered.
- [38] The health and emotional well-being of these children requires an order that minimizes their exposure to the conflict between the parents.
- [39] There is no independent evidence of the children's views. I am not prepared to consider the reports of the children's views as espoused by either party or their family members.
- [40] With respect to the nature and strength of the relationship between the children and significant persons in their lives, both parents are clearly important. The children deserve to have strong relationships with each of their parents. The children's relationship with their father is being eroded by the limited parenting time he currently has, and even more so by the mother's history of unilateral changes to that parenting time. In addition, the children have extended family members on both sides. Based on the evidence before me, the father is the parent most likely to foster the children's relationships with their extended family members.
- [41] With respect to the history of the children's care, the mother has played the primary role in this regard, both before and after separation. The parents disagree as to the reason that the father has not played a more significant role, and I cannot resolve that divergence on an interim application.
- [42] Both children are under the age of ten, and have need for stability. That does not mean, however, that the status quo should be maintained where it has been very one-sided and not in their best interests when taking into consideration the other factors.

[43] I am satisfied that each parent is able to exercise their parental responsibilities. The difficulty here is that they are not able to do so together. Each parent has made some allegations of family violence against the other. Each appears to have acted inappropriately, even childish at times. However, this is not a significant factor in this case.

[44] In considering each of the factors set out in s. 37(2) of the Family Law Act regarding the best interests of the children, both at present and with a longer term view, I find that it is in the best interests of the children to spend more time with their father and that such increased time ought not wait until trial.

I am not satisfied, however, that an immediate switch from two overnights per week to alternate weeks is in the best interests of the children. A week is a long period of time for them to be away from either parent on a regular basis. Alternate weeks may be where the parties end up, but it is too drastic of a change for these children at this time. The parties were on the path to increasing the father's parenting time in phases, and that is what will be implemented. It is also important that the children are able to spend important holiday time with each of their parents and extended family members.

[45] The following schedule has been created in such a way as to eliminate the need for the parties to be in the same location for the majority of the parenting exchanges. Most pick-ups and drop-offs will be at school. This should reduce the children's exposure to parental conflict. On an interim basis, commencing on Monday, September 19, 2022, and continuing until Monday, October 31, 2022, in addition to the parenting time as set out in the Robertson Order, the father shall also have parenting time each week from Tuesday afternoon pick up from school until Wednesday morning drop off at school.

[46] Effective Monday, October 31, 2022, the Robertson order is varied to delete para. 3(1) and replace it with the following:

On an interim basis, the parties will share parenting on the following two-week rotating schedule:

Week 1:

- a. Monday afternoon pick-up from school until Tuesday morning drop-off at school with J.M.M.;
- b. Tuesday afternoon pick-up from school until Friday morning drop-off at school with L.J.R.;
- c. Friday afternoon pick-up from school until Monday morning drop-off at school with J.M.M.;

Week 2:

- d. Monday afternoon pick-up from school until Tuesday morning drop-off at school with L.J.R.;
- e. Tuesday afternoon pick-up from school until Friday morning drop-off at school with J.M.M.;
- f. Friday afternoon pickup from school until Monday morning drop-off at school with L.J.R.

- [47] In the event that the Friday of any week is a statutory holiday or professional development day, the parenting exchange that was to occur on the Friday will occur on the immediately preceding Thursday instead.
- [48] In the event that the Monday is a statutory holiday or professional development day, the parenting exchange will be at 3 p.m. on the Monday.
- [49] Any parenting exchanges that fall on a day when the children are not in school will occur at the [redacted] parking lot or another mutually agreed neutral location. During such parenting exchanges, each parent will remain in their vehicle and will allow the children to walk to the other parent's vehicle by themselves. Neither parent will approach the other or speak to the other during parenting exchanges.
- [50] On an interim basis, and notwithstanding the regular two-week rotating parenting schedule already described, the parties will have parenting time for holidays according to the following schedule:
- Spring break: Each party will have the children for one week during the school spring break. The party who would ordinarily commence their parenting time after school on the last Friday before spring break begins, will have the first week, and the other parent will have the second week. The parenting exchange will be at 3 p.m. on the Saturday after the first week has ended. The parent having the children for the second week will have the children from 3 p.m. on the Saturday until return to school on the Monday after the end of second week, after which the regular parenting schedule will resume.
 - Christmas: In 2022, the respondent will have parenting time from December 24, 2022, at 3 p.m. until December 25, 2022, at 3 p.m.; the claimant will have parenting time from 3 p.m. on December 25, 2022, until 3 p.m. on December 26, 2022; and the regular parenting schedule will resume thereafter.
- [51] As the parties have a trial scheduled to commence in March 2023, I am not making any other orders for holiday parenting time. In the event that the trial does not proceed as scheduled, either party can apply for further interim holiday parenting time, if they are not able to reach an agreement.
- [52] Neither party may travel outside British Columbia with the children without the prior written consent of the other parent, such consent not to be unreasonably withheld, or court order.
- [53] The respondent's application for a declaration that the claimant has wrongfully denied parenting time and for a financial penalty, as sought in paras. 8-9 of his notice of application, are adjourned generally. Although I am concerned about the claimant's apparent pattern of conduct in her dealings with the respondent's parenting time, there was not sufficient time during the hearing to allow the claimant to respond to each allegation of a denial of parenting time.

- [54] The respondent seeks conduct orders pursuant to s. 225 of the Family Law Act. Those set out in paras. 10-13 of the respondent's notice of application are indicated as being consented to in the claimant's application response and they are, accordingly, granted, with the provision that they will apply equally to each party. The balance of the relief sought in the respondent's notice of application dated May 25, 2022 is adjourned generally.
- [55] Counsel for the respondent shall draft this order and the signature of the claimant as to the form of the order is dispensed with.
- [56] And as the respondent was largely successful, he shall have his costs in any event of the cause.
- [57] All right. Madam Clerk will give you the summary of the orders that I have just made. There is one for each of the parties.
- [58] Anything arising, L.J.R.?
- [59] L.J.R.: I'd like to present the following schedule that was offered for costs.

[SUBMISSIONS REGARDING COSTS]

- [60] THE COURT: I will retract the order I made as to costs. This is fairly close to what I have just ordered, not exactly the same. So, Madam Clerk, remove the order as to costs, and that can come out of the written summary that I have just handed to you. If you wish to make submissions as to costs, then you can -- would you prefer to do that in writing or schedule a half-hour appearance before me?

[ADDITIONAL SUBMISSIONS]

- [61] THE COURT: In fairness to L.J.R., I should have considered whether or not offers were made prior to making my order for costs. I am prepared to accept submissions as to costs. We can either do it orally now, if you are prepared to speak to it, or you can schedule time through scheduling for -- I do not think it will take more than half an hour. Or we can do it in writing, if you would prefer to do it in writing.
- [62] CNSL C. ALVAREZ GOMEZ: Writing would be my preference.
- [63] THE COURT: Are you prepared to make written submissions as to costs, L.J.R.? It gives you more time and more flexibility to --
- [64] L.J.R.: Sure.
- [65] [DISCUSSION REGARDING TIMING OF WRITTEN SUBMISSIONS]
- [66] THE COURT: So, I am going to give the respondent until Friday, September 30th --
- [67] L.J.R.: Okay.

- [68] THE COURT: -- to send written submissions as to costs into the court, and a copy will be provided to you. If I then give you another week after that --
- [69] L.J.R.: Mm-hmm.
- [70] THE COURT: -- to respond. So, you can start working on it now, and then that gives you a further week to respond to anything that arises out of the respondent's submissions.
- [71] L.J.R.: So we each get equal time?
- [72] THE COURT: Well, you get an extra week, because --
- [73] L.J.R.: Okay.
- [74] THE COURT: -- you are going to --
- [75] L.J.R.: That's fine.
- [76] THE COURT: -- you are going to prepare your submissions and respond to theirs, so by Friday, October 7th; and that should be sufficient. I do not think there needs to be back and forth. Written submissions not to exceed five pages, and that gets submitted through Scheduling.
- [77] CNSL C. ALVAREZ GOMEZ: Okay.
- [78] THE COURT: All right. Thank you.
- [79] CNSL C. ALVAREZ GOMEZ: Oh, pardon me.
- [80] THE COURT: Yes.
- [81] CNSL C. ALVAREZ GOMEZ: One issue as to -- we -- I do expect there to be a further application for the -- to require the payment of a retainer to the parenting coordinator, as well as for disclosure.
- [82] THE COURT: Mm-hmm.
- [83] CNSL C. ALVAREZ GOMEZ: May we seek that Your Honour be seized of this matter?
- [84] THE COURT: I will tell you, I am going to have very limited availability between now and the end of October. I am not here next week, I am only here for a couple of days the following week, and then I am not here for the last three weeks of October. So, it depends on how time sensitive the application is. You are going to have difficulty finding time before me before November.
- [85] CNSL C. ALVAREZ GOMEZ: Okay.
- [86] THE COURT: So, given that, because I do have the familiarity, I am prepared to seize myself, if that is not going to mess up your time schedule.
- [87] CNSL C. ALVAREZ GOMEZ: May I briefly convene with my client about that?

- [88] THE COURT: Why do I not just say that I will be seized of applications with respect to the parenting coordinator and disclosure, unless those applications are time sensitive, in which case they can be heard by any presider.
- [89] CNSL C. ALVAREZ GOMEZ: Thank you.
- [90] THE COURT: We will just leave it at that, and that gives you flexibility.
- [91] CNSL C. ALVAREZ GOMEZ: And is that part of the order at this point, then?
- [92] THE COURT: Yes.
- [93] CNSL C. ALVAREZ GOMEZ: Yes. Thank you.
- [94] THE COURT: All right. Thank you. That concludes matters. Madam Clerk will give you your binders back.
- [95] THE CLERK: Order in chambers. Chambers is adjourned.

"Master Hughes"

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