

CANADA / JUDGMENT

Link v. Lenskyj

2022 BCCA 341

COURT

British Columbia Court of Appeal

DECIDED

7 October 2022

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2022 BCCA 341 Link v. Lenskyj

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Link v. Lenskyj,

2022 BCCA 341

Date: 20221007

Docket: CA47961

Between:

Jeremy Gordon Link

Appellant

(Respondent)

And

Adele Jelena Lenskyj

Respondent

(Claimant)

Before:

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated

December 14, 2021 (A.J.L. v. J.G.L., 2021 BCSC 2429, Kelowna Docket 127877).

Counsel for the Appellant:

M.M. Sinclair

C.M. da Luz

Counsel for the Respondent:

S.L. Booth, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

September 12, 2022

Place and Date of Judgment:

Vancouver, British Columbia

October 7, 2022

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Willcock

Summary:

The appellant father appeals an order authorizing the respondent mother to relocate with their son to Australia. He submits that the trial judge erred in law by not applying s. 16.93(1) of the Divorce Act, which would have placed on the respondent the burden of proving that the relocation was in the best interests of the child, and by exercising his discretion under s. 16.94 to place the burden on both parties. The father also submits that the trial judge erred in finding that the mother had a slightly stronger relationship with the child, and in finding that the mother was more willing to support the appellant's relationship with the child than the father was in return. Held: Appeal dismissed. The trial judge correctly exercised his discretion under s. 16.94 of the Divorce Act in looking to family law principles regarding when an interim order for shared parenting should not be given deference. The trial judge's findings of facts were also supported by the evidence.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

- [1] The appellant is the father of a five-year-old boy. He appeals an order allowing the respondent mother to move with their son from Kelowna to Boolaroo, New South Wales, Australia.
- [2] For judges, relocation cases are among the most difficult they are called upon to decide. For parents, such cases are far more difficult. No matter what decision is made, the child will not have day to day contact with one of his parents. When the distances are as great as they are in this case, it is inevitable that one parent's relationship with their child will be diminished. Despite the importance of the issue, however, this Court's role on appeal remains limited to error correction. We cannot retry a case. Unless there is an error of law or a palpable and overriding error of fact, the decision of the trial judge must be afforded deference. In this case, I can find no error that would allow us to interfere with the judge's decision. I would accordingly dismiss the appeal.

Background

- [3] The respondent is originally from Australia. She has family and potential job opportunities in that country. The appellant is a businessman whose work is conducted from Kelowna, British Columbia. He has family in this province.
- [4] The parties met in 2016 when the respondent was visiting Calgary on a vacation. The appellant then traveled to Australia to see her in July 2016. By September 2016 the respondent had moved from Australia to Toronto to live with the appellant. They were married and have one child, B., who was born in July 2017.
- [5] The parties moved to Vancouver, and then in the late summer of 2019 to Kelowna, where they were living at the time of trial. They separated in May 2020 and the respondent filed a notice of family claim seeking to relocate to Australia. In July 2020 they agreed on a parenting schedule whereby the father had parenting time with B. on Wednesdays and Saturdays from 9am to 5pm and every second weekend from Friday at 5pm to Sunday at 5pm.
- [6] On October 14, 2020, an order was made directing that the relocation issue should be tried first ahead of the other issues raised in the family proceeding. On October 16, 2020, following a contested chamber's application, Justice Gomery made an interim order for equal shared parenting time which remained in place until the conclusion of the relocation trial in October 2021.

At trial

- [7] The judge began his reasons for judgment by correctly identifying the issue before him: what parenting arrangement is in B.'s best interests, and in particular whether it is in B.'s best interests to relocate to Australia with his mother, or to remain in Kelowna with his father.
- [8] The judge began by determining whether the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) or the Family Law Act, S.B.C. 2011, c. 25 relocation provisions governed. He thoroughly reviewed the provisions under each statute, ultimately accepting the appellant's position that the application should be decided under the Divorce Act in light of this Court's decision in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20.
- [9] Applying the Divorce Act, the judge chose to exercise his discretion under s. 16.94 not to impose on the applicant mother the burden of proving that the move was in B.'s best interests. That burden, under s. 16.93(2), generally applies where there is an order for substantially equal parenting time in place at the time of a relocation application.
- [10] The judge began his assessment of B.'s best interests by identifying the factors listed in s.16(3) of the Divorce Act, noting that, in considering these factors, the court must give primary consideration to the child's physical, emotional and psychological safety, security and well-being: at para. 48. The judge observed that s. 16.92 of the Divorce Act required him to consider additional factors when determining whether a proposed relocation is in the child's best interests and to disregard whether the mother would relocate without the child if she did not succeed on the application: at paras. 49-50.
- [11] The judge considered the additional best interest factors under s. 16.92(1), including the reasons for the relocation. He found that before the respondent met the appellant, she had lived and worked in New South Wales, Australia, that her mother lives in Boolaroo, New South Wales and that her brother and his family live nearby. He found that the respondent's desire to return to Australia pre-dated the parties' separation and that she had a bona fide desire to return to Australia in order to take up a teaching position there and to have the benefit of the support of her family and friends.
- [12] The judge acknowledged that the s. 211 report prepared by Dr. England did not recommend relocation. However, he gave Dr. England's conclusions and recommendations little weight, as her analysis had wrongly incorporated the assumption that the respondent would remain in Kelowna if B. were not allowed to move to Australia with her: at para. 47.
- [13] The judge assessed each factor under the Divorce Act, concluding that two factors favoured B.'s move to Australia with his mother: first, the nature and strength of his relationship with his mother (s. 16(3)(b)); and second, the willingness of each parent to support the development and maintenance of the child's relationship with the other parent (s. 16(3)(c)). He noted the absence of clear answers in the case, and the extremely difficult task before him, but concluded it was in B.'s best interests to allow his relocation.

On appeal

[14] The appellant raises three grounds of appeal. First, he contends the judge erred in law by not applying the presumption against relocation where there is an order in place giving the parents equal parenting time. Second, he says the judge erred in finding that the respondent had a slightly stronger relationship with B. Third, he submits the judge erred in finding that the respondent was more willing to support the appellant's relationship with B. than the appellant was in return.

[15] I turn now to consider each ground of appeal.

1. Did the judge err in deciding not to invoke the presumption against the move?

[16] The relevant provisions of the Divorce Act are set out below:

Best interests of child

16 (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

Relocation authorized

16.91 (1) A person who has given notice under section 16.9 and who intends to relocate a child may do so as of the date referred to in the notice if

(a) the relocation is authorized by a court; or

Burden of proof -- person who intends to relocate child

16.93 (1) If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

Burden of proof -- person who objects to relocation

(2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

Burden of proof -- other cases

(3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

Power of court -- interim order

16.94 A court may decide not to apply subsections 16.93(1) and (2) if the order referred to in those subsections is an interim order.

[Emphasis added.]

- [17] The relocation provisions of the Divorce Act provide for shifting onuses depending on the parenting arrangement in place for the children. Where parties share "substantially equal time" under an order or agreement, the relocating parent bears the onus of establishing that the relocation is in the child's best interests. Where the parties have an order or agreement in place that provides the relocating parent with the "vast majority" of parenting time, the parent opposing the move has the onus of proving that it would not be in the best interests of the child to allow the relocation. Where the order in question is an interim order, the court may decide not to apply these presumptions.
- [18] The appellant does not dispute that the judge had discretion under s. 16.94 not to apply the presumption in s. 16.93(1), given that the order governing parenting time was an interim one. But he says that in exercising that discretion, the judge made an error in principle by applying the test to be used under the Family Law Act, which has distinct relocation provisions, rather than applying the considerations proper to s. 16.94 of the Divorce Act. This error is said to be found in para. 31 of the reasons, where the judge said:
- [31] For the same reasons that I concluded that s. 46 of the FLA is the relevant section to consider in this analysis rather than Division 6 of Part 4 of the FLA, I have decided not to apply the onus of proof provisions in s. 16.93(1). There is no basis upon which I can afford any deference to the Interim Order in this case. I have no evidence that satisfies me that the Interim Order addressed the merits of what is in the best interests of the child. I find support for this decision in *Joseph v. Washington*, 2021 BCSC 2014, where Warren J. chose not to apply s. 16.93(1) of the DA for the following reasons at para. 116:
- [116] Although K.W. concerned the FLA, the question in that case was an analogous one; specifically, whether an interim order qualifies as an order that would place a relocation application into Division 2 [of] the FLA rather than Division 6, the latter of which assumes that an existing agreement or order has been made in the best interests of the children such that deference should be given to that pre-established arrangement. The Court held that when an initial application is brought for an order respecting parenting arrangements and the applicant indicates in his or her pleadings or by written notice an intention to change the child's residence, a subsequent interim order does not change the fundamental nature of the claim; it remains a claim for an initial determination of the parenting arrangements that will best serve the children's interests. In those circumstances deference to the interim order is not warranted.

[Emphasis added.]

- [19] I see no error in the judge's reasoning on this point. Although the reasoning in Joseph relies on *K.W. v. L.H.*, 2018 BCCA 204, a case decided under the Family Law Act, the trial judge looked to these cases to draw from them principles applicable to the issue before him under the Divorce Act.
- [20] In *K.W.*, this Court adopted the analysis of Justice Punnett in *S.J.F. v. R.M.N.*, 2013 BCSC 1812, to the effect that interim orders for shared parenting, issued after the commencement of a proceeding in which relocation was sought, should not invoke a presumption against relocation because such orders are not a final determination of the parenting arrangements best-suited to meet the needs of the child.
- [21] The appellant contends that "the rule established by this Court in *K.W.* was based on a statutory interpretation of the wording in the Family Law Act that cannot be reasonably applied to s. 16.94 of the Divorce Act". He asserts that, to apply the *K.W.* analysis "fails to give effect to the intent and purpose of section 16.94," which he says should go beyond simply asking whether there is an interim order in place and requires consideration of:
- i. the length of time that it had been in place;
 - ii. how well the child was doing under that parenting schedule;
 - iii. the circumstances through which that parenting plan came into existence;
 - iv. whether the interim order had been complied with; and
 - v. any recommendations from experts.
- [22] Additional considerations may well be relevant to the exercise of a judge's discretion under s. 16.94--for example, where the interim order has been in place for a significant period of time, or reflects a status quo that had been in place for a long period of time before the interim order was made. But interim orders are generally designed to be short-lived and to preserve the status quo until the best interests of the child can be fully canvassed and determined at trial: *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403 at para. 22. That was the situation in the present case. The judge found that he could not afford the interim order any deference, both because it was made when the issue of the respondent's intention to relocate was known to the parties and was yet to be determined, and because the court did not yet have the benefit of all of the evidence and argument necessary to make a decision on B.'s best interests.
- [23] I see no error in the judge--having considered the context of the interim order--exercising his discretion under s. 16.94 to place the evidentiary burden on both parents, rather than to place the burden on the mother to prove that it was in the best interests of the child to relocate with her to Australia.
- [24] The presumptions in both the Family Law Act and the Divorce Act are intended to bring clarity to relocation disputes. But in all cases, the inquiry remains an individual one--the judge must consider the best interests of the child: *Barendregt v. Grebliunas*, 2022 SCC 22 at

para. 123. In the present case, the record before the judge allowed him to consider the best interests of B. and conclude that it was in B.'s best interest to be allowed to move to Australia with his mother. The analysis of the best interests factors, based on the available evidence, would have remained the same even if the respondent had been required to shoulder the burden of establishing that fact. In the result, nothing turned on the absence of a presumption in this case in any event.

2. Did the judge draw an impermissible inference in concluding that the mother had a closer relationship with the child?

[25] The appellant submits that the judge's finding that the respondent had a slightly stronger relationship with B. is not supported by the evidence. He points to the s. 211 report by Dr. England as the best evidence of the relative strength of each party's relationship with B. Dr. England found that B. "appears to have attachment relationships with both of his parents" and did not make a finding that B. had a stronger relationship with his mother. The appellant further submits that the judge misconstrued the evidence of Dr. England by interpreting it to support the respondent's position that she had a stronger relationship with B.

[26] With respect, I see no such error. The judge's finding of a slightly stronger relationship with the respondent was linked to the parenting history and the respondent's role as primary caregiver for the first three years of B.'s life. The inference that a relationship may be slightly stronger based on relationship history is not an "impermissible inference" as submitted by the appellant. It is an inference that may be open to a judge on the facts of a given case. Nor was that inference inconsistent with the s. 211 report. Dr. England said only that B. was bonded to both parents, noting that while B. may have had a stronger bond with his mother in infancy, "it appears that the nature of his bond with both parents has become more even". She made no finding that the mother's relationship did not continue to be slightly stronger.

3. Did the judge make a finding of fact in the absence of evidence that the respondent was more willing to support the appellant's relationship with B.?

[27] The appellant contends there was no evidence to support the judge's finding that the respondent was more willing than the appellant to support B.'s relationship with the other parent. The critical portion of the judge's reasons is set out below:

[83] The respondent had very little to say about what he would do to foster and maintain B.'s relationship with the claimant if she were to move to Australia without B. On cross-examination, the respondent testified that if B. stayed in Kelowna and the claimant moved to Australia, then B. would have to be in his primary care.

[84] The respondent did not suggest that he would be prepared to travel to Australia with B. to facilitate parenting time with the claimant. He testified that the school calendar in Australia would give the claimant much more time off than him. I interpret this evidence as the respondent suggesting that the claimant could use her time off to travel to Canada to exercise parenting time with B.

[85] The evidence on this issue leads me to conclude that the claimant exhibits more willingness to support B.'s relationship with the respondent than the respondent is willing to undertake for the claimant.

[Emphasis added.]

[28] The appellant says both parties put forward proposed schedules for parenting time, and that the judge misconstrued his evidence in drawing the conclusions reached at para. 84. The evidence referred to by the trial judge in that passage occurred during the cross-examination of the appellant:

Q. And if Ms. Lenskyj moved, [B.] spending time with her would require [B.] to travel to and from Australia, correct?

A. Correct.

Q. Likely much the same travel as if [B.] was allowed to move to Australia and you remained in Canada, correct?

A. I think that would be a reasonable schedule. What I put forth is like a possibility, was travel based on the academic calendar of Australia, so that would make sense that it would be something similar for her because she would have similar time off, although I guess she would have tremendously more amount of time off because they close the schools for mid-December and they go until the close of January. So, she has much more time off than -- than I do.

[29] The appellant argues that this evidence is equally consistent with him suggesting that the respondent would have opportunities to spend time with B. in Australia if B. were to remain in Kelowna with his father. However, the judge must be taken to have considered the entire record before him. That included the evidence of the respondent in-chief describing how she would support a relationship between B. and his father if B. were permitted to relocate to Australia. She proposed a shared parenting schedule if the appellant moved to Australia, and said she would travel with B. on an annual basis to accompany him to Canada to visit his father until he was of age and able to travel independently. She also testified that she would support the appellant visiting during the school year at any point, proposing a three-month period during the Canadian summer and being flexible around school holidays to support their interaction.

[30] The appellant says that he had no burden to establish that he would make reasonable arrangements to facilitate the mother's access, whereas the mother did have such a burden under the Family Law Act which she asserted at trial should be the governing legislation. He

says it is not surprising, therefore, that the respondent provided such evidence and he did not. However, evidence of this kind is also relevant under the Divorce Act which identifies "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse" as a factor to be considered in determining the best interests of the child: s. 16(3)(c). Other than his submissions on an appropriate parenting schedule, the appellant has not pointed to any evidence given by him in-chief or reflected in the s. 211 report indicating how he would support B.'s relationship with his mother and facilitate her parenting time if the court were to disallow the relocation.

[31] In my view, it was open to the judge on the evidence before him to conclude that the respondent exhibited more willingness to support the child's relationship with the appellant. I would accordingly not accede to this ground of appeal.

Disposition

For the reasons given, I would dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

I AGREE:

"The Honourable Mr. Justice Willcock"

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