
CANADA / JUDGMENT

M.C.J. v. R.J.G.

2017 BCSC 465

COURT

Supreme Court of British Columbia

DECIDED

23 March 2017

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

2017 BCSC 465 M.C.J. v. R.J.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.C.J. v. R.J.G.,

2017 BCSC 465

Date: 20170323

Docket: E152090

Registry: Vancouver

Between:

M.C.J.

Claimant

And

R.J.G.

Respondent

Corrected Judgment: The judgment has been corrected on the front page on
March 27, 2017.

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

Counsel for the Claimant:

In Person

Counsel for the Respondent:

R.A. Henderson

S. Kainth

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 14-18, 2016

November 21-25, 2016

December 5-8, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 23, 2017

Introduction

- [1] The parties married on July 7, 2012 in Toronto and separated on July 15, 2015. They have one child, W.E.J., born on October 29, 2013.
- [2] The claimant filed a Notice of Family Claim on July 28, 2015 seeking orders in relation the child's residency, child support, parenting arrangements, an unequal division of family property and an order for the non-removal of the child from B.C.
- [3] The respondent filed a Response to Family Claim on August 18, 2015 and a counterclaim on November 30, 2015 seeking an order for divorce, orders relating to the residency, care and support of the child, the partition and sale of the family home and the income of the claimant.
- [4] The central issue in this trial is the residency of the child.

Background

- [5] The parties are both originally from Ontario where they met about 20 years ago. Since then they have been in what could be described as an "on again off again" relationship.
- [6] The respondent is 40 years of age and has been a teacher in Ontario since September 2001.
- [7] The claimant is 44 years of age and a self-employed software developer and project manager. He works primarily on contract for companies providing e-learning on the internet. He is able to work virtually anywhere provided that he has access to the internet and the time zone does not restrict his working hours.

- [8] The parties began working in their respective fields in 2001 while living in their family homes in Toronto. In 2002 they moved into an apartment in Toronto and cohabited there five or six times a week.
- [9] In 2003 the claimant started exploring work opportunities in Vancouver. He testified that he was not happy with his life in Toronto and wanted a change. The claimant's expressed reason for not wanting to live in Toronto is that when he is there he suffers anxiety and depression. There is no medical evidence to support this.
- [10] In December 2003, he moved to Vancouver where he had found employment with a software company. He expected the respondent to finish the school year and then join him in Vancouver.
- [11] In 2004, the respondent was diagnosed with Stargardt's disease which affected her vision. Because of the impact of the disease, the respondent did not travel to Vancouver as expected by the claimant.
- [12] Early in the summer of 2004 the respondent contacted the claimant and informed him that she was seeing a male teacher at her school. The parties ended their relationship.
- [13] Later in the same summer the parties reconciled and the respondent went to stay with the claimant in Whistler. The claimant proposed marriage and the parties were engaged.
- [14] In the fall of 2004, the respondent returned to teach in Toronto and the parties carried on a long distance relationship, seeing each other about once a month. The claimant testified that due to the uncertainty of the respondent's condition it was not clear whether she should move to B.C.
- [15] In November 2004, the claimant decided to pay a surprise visit to the respondent in Toronto. When he arrived at her apartment, there was another man there. The claimant told him to leave and asked the respondent for her engagement ring back. The claimant returned to B.C. after about a week.
- [16] About three weeks later, the parties again reconciled.
- [17] For the next three years the respondent continued to live and teach in Toronto and the claimant continued to live and work in B.C. They continued their long distance relationship, visiting with each other from time to time.
- [18] They discussed the possibility of the respondent moving to B.C. but the respondent was reluctant to move because of the uncertainty surrounding her eye condition.
- [19] The respondent took a leave of absence from the Toronto school board and taught in Korea for the 2005-2006 school year. To accommodate her eye condition she used a program called "Zoom Text" that magnified what she read in class.

- [20] In September 2006, the respondent returned to teach in Toronto. She only taught for about 3 weeks and then went on long-term disability because of her vision problems.
- [21] In addition to her salary of \$94,207, her teaching position provides the respondent with long-term disability insurance, dental insurance, extended health benefits and a pension. Except for the pension, those benefits are also available to the claimant and the child until the parties are divorced.
- [22] The respondent returned to part-time teaching in September 2007.
- [23] The Toronto school board provides a number of accommodations for the respondent to compensate for her vision problems including devices that make it easier for her to read. She is also permitted to teach only ESL classes and is not required to supervise students outdoors because of the sensitivity of her eyes to sunlight.
- [24] In the spring of 2007, while she was on long-term disability, the respondent moved to Squamish and cohabited with the claimant. While the claimant considered that to be an indefinite move, the respondent did not. At the end of the summer of 2007 the respondent broke off her relationship with the claimant.
- [25] The parties had little contact for 3 or 4 months however, they reconciled in December 2007.
- [26] The claimant said that he agreed to get back together with the respondent again on the condition that they would live in B.C. The respondent testified that she did not agree to that condition. She said her priority was to go back to work in Toronto and see if she was able to continue teaching. She ended up teaching in Toronto on a full time basis for the 2008/ 2009 school year and the 2009/ 2010 school year.
- [27] Following the end of the school year in 2010, the respondent took a leave of absence from her teaching position in Toronto. She went to visit the claimant in Switzerland in July and they travelled in Europe together for a month. In the summer of 2010, the respondent moved to Whistler to cohabit with the claimant in rental accommodation. She applied for numerous teaching positions there but did not receive any requests for an interview. In the fall of 2010, while still on her leave the respondent received employment insurance and worked as a nanny. She continued to pay for her insurance benefits as an employee of the Toronto school board.
- [28] In 2010, the parties purchased a lot in Whistler using their joint credit. Title to the lot was registered as to 99% in the name of the claimant and as to 1% in the respondent's name.
- [29] In March 2011, the respondent went to Korea to find a teaching job but failed the vision requirements and decided to return to B.C.
- [30] She returned to Toronto to teach in the 2011-2012 school year.
- [31] Around the same time, the claimant began the construction of a house on their lot. The cost was financed with about a \$500,000 building mortgage and a \$25,000 line of credit.

- [32] They discussed marriage. The claimant says that it was agreed that the respondent would move permanently to B.C. and take continual leaves of absence from her Toronto teaching position. The respondent says that it was understood that she would never resign from her job and if she had a baby she would spend time with him in Whistler but not give up teaching in Toronto.
- [33] It appears that their plan was outlined in an email from the respondent to the claimant dated May 16, 2012 which is Tab 35 of Exhibit 3 in these proceedings. In essence, she planned to teach in Toronto until their child was born and then take her maternity leave in Whistler. After maternity leave she would take an unpaid leave and look for work in Whistler. She, or they, would return to Toronto if she received notice from the Toronto school board that she could no longer remain on leave. She would then take another leave when possible and they would try and have a second child.
- [34] The respondent taught in Toronto for the 2012-2013 school year. She spent time with the claimant in Whistler in the summer of 2013 and began teaching again in Toronto in the fall of that year. Their child was due to be born in December but was prematurely born on October 29, 2013. On that day the respondent started her one year of maternity leave. The parties stayed in the respondent's condo in Toronto and the claimant helped care for the baby until he returned to B.C. on December 26, 2013, to be with his best friend who was dying from cancer.
- [35] The respondent obtained an extension of her parental leave until the end of the 2014/2015 school year.
- [36] In January 2014, the respondent went to Florida with the child and stayed with her parents. On January 27, 2014, she and the child moved to Whistler in accordance with their plan. She arranged to find a tenant for her Toronto condo. In Whistler, the house was partially finished and they were able to move into a suite in it.
- [37] The respondent applied for and obtained a position in Whistler as a teacher on call and a part-time position teaching ESL. Notwithstanding the problems with her eyesight, she was able to cope with the demands of teaching and did not request special equipment to assist her.
- [38] She worked on a contract basis at an elementary school in Whistler from November 2014 until June 2015. During that time her total earnings in Whistler were about \$27,000.
- [39] Sometime late in 2014 and in the early part of 2015, the relationship of the parties started to deteriorate. Both parties accuse the other of using bad language with each other and in front of their child. The claimant admits to calling the respondent names such as "bitch" and worse on occasion. The respondent denies using bad language in front of the child. Tensions seemed to escalate with the stresses of them both working and raising their young child.

- [40] In the spring of 2015, they discussed taking their child to England to see the claimant's parents.
- [41] On June 18, 2015, the claimant travelled to England to visit his family. The respondent and the child followed one week later at the end of the school year. They all stayed there for three weeks and then returned to Toronto to visit friends and her family.
- [42] On July 15, 2015, the claimant returned to Whistler while the respondent stayed in Toronto telling him that she wanted to stay another week. While travelling to Whistler he received an email from the respondent to the effect that she was not able to continue with their relationship.
- [43] When he arrived at their house in Whistler the claimant testified that he was shocked to find that the respondent's and their child's belongings had been removed from the house. During the week that he was in England before the respondent joined him, her mother had travelled to Whistler and helped the respondent remove all of those items from the house using a moving van that they had rented. The respondent testified that she did not tell the claimant about her plan to move from Whistler because she was afraid of what his reaction would be.
- [44] Unbeknownst to the claimant, the respondent had commenced legal proceedings in Ontario on February 13, 2015 and filed an application in the Ontario Superior Court March 26, 2015. She sought a declaration that Ontario had jurisdiction to determine the issues of custody and access with respect to the child, sought sole custody and an order that the child could not be removed from Ontario without her consent.
- [45] The respondent explains an email to the claimant in April 2015 asking for his help in updating her resume so that she could apply for another position in Whistler as only for the purpose of demonstrating to the claimant how difficult it would be for her to obtain employment in B.C.
- [46] Upon realizing that the respondent intended to keep the child in Ontario, the claimant filed a Notice of Family Claim in this court on July 27, 2015, seeking various orders including an order that the child be returned to B.C. The claimant then learned for the first time that the respondent had brought proceedings in Ontario.
- [47] In *Gillespie v. Jones*, 2015 ONSC 5265, released on August 20, 2015, Kiteley J. decided that Ontario did not have jurisdiction. In the course of her reasoning, Kiteley J. made some comments about the approach of the respondent in moving to Ontario with the child. At para. 49 she said:
- [49] In later June, the Applicant surreptitiously removed her belongings and those of the child. In emails that begin on July 14, 2015 (before she announced the separation), the Applicant began her investigation into the Montessori school and in August, she tentatively confirmed that he would attend in September. The Applicant has rented accommodation in Toronto. Such steps are irrelevant to this motion since they occurred as a result of the strategy of the Applicant to attempt to secure Ontario as the jurisdiction. It would be unfair to the

Respondent and not in the best interests of the child to allow the Applicant to rely on steps she took in order to achieve the jurisdictional upper hand.

[48] And at para. 57:

[57] That sort of surreptitious attempt to gain forum advantage is to be discouraged. It is not fair to the Respondent nor fair and efficient to the working of the Canadian legal system to engage in litigation behaviour such as this.

[49] The respondent's application was stayed by the Ontario court and she was ordered to return the child to Whistler.

[50] Cross-applications by the parties for various interim orders were heard by Master Muir on September 25, 2015. Master Muir considered the affidavit evidence of both parties and concluded that it was in the best interests of the child to allow the respondent, on an interim basis, to move with the child to Ontario. The facts referred to by Master Muir are consistent with the evidence before me.

[51] After Master Muir's decision, the claimant began representing himself in these proceedings.

[52] The claimant sought to appeal Master Muir's decision however the time limit for an appeal expired and on January 5, 2015. Saunders J. declined to extend it.

[53] On April 13, 2016, Loo J. imputed income to the claimant for child support purposes and ordered that a s. 211 report under the Family Law Act, S.B.C. 2011, c. 25 [FLA] be prepared to provide an opinion on the needs of the child.

The Interests of the Child in B.C. and in Ontario

[54] The parties agree that they both love the child and that the child loves both of them.

[55] The outcome of this case will of course be that the child will reside in either B.C. or Ontario. In this part of the reasons I review the evidence regarding how the interests of the child will be addressed in each of B.C. and in Ontario. While I accept that both parents have the child's best interests at heart, the evidence indicates that his interests will be addressed somewhat differently in each jurisdiction.

[56] If the child were to live in Whistler the claimant says that he will awake at 5:00 a.m. and work until about 8:00 when the child awakes. His work as a software specialist is done on his home computer. He has worked this way in the past when the respondent and child were living with him. After the child awakes the claimant expects to get help from his mother who currently lives in England. She testified that she would move to Whistler to help with the child's care and says that she faces no restrictions if she wishes to travel to Canada. She is 73 years old and in relatively good health.

[57] Daycare for the child is about 5 minutes from the Whistler residence compared to about ½ hour in Toronto.

- [58] The Whistler residence is a large, attractive house with a self-contained suite. It is situated in an area where other families with young children reside.
- [59] As the child grows up he will have access to the amenities available in Whistler such as skiing and hiking.
- [60] Neither party have any family members who live in B.C. The respondent's family and extended family reside in the Toronto area.
- [61] The claimant has rented an apartment in Toronto where he has spent his parenting time with the child.
- [62] The respondent currently resides with the child in a two bedroom condominium in Toronto. The child has resided there since Master Muir's orders on September 25, 2015 or about one and a half years. The condo was purchased with financial assistance from her father.
- [63] The condo is in a family friendly neighborhood which is a short transit ride from the child's school and walking distance from many of the child's activities such as gymnastics, playing at the park, visiting the zoo and tobogganing.
- [64] The child will be able to start junior kindergarten in Toronto in September 2017. The respondent has arranged daycare nearby where the child would be dropped off before she goes to work, stay for one-half hour and then walk across the street to his school. He would then return to daycare after school where the respondent would pick him up. The claimant has applied for daycare in Whistler but as of the time of the trial it had not been confirmed.
- [65] The respondent's father and mother reside in Toronto. Both testified in these proceedings. The respondent's mother described having a close relationship with the child. She says that she spends a lot of time with him.

Economic Considerations

- [66] The economic circumstances of the parties are relevant to their ability to care for the child in their respective locations.
- [67] The claimant's employment status is somewhat uncertain. At the time of trial he worked under contract with Pulse Learning and his income was expected to be about \$114,000 last year. In addition he has rented out the suite in the Whistler house for \$2,000 per month.
- [68] The claimant testified that if his contract with Pulse was not renewed for 2017, another large on-line learning company that he referred to as Sage, wanted to hire him, however he was not able to confirm his future employment at the time of trial.
- [69] The claimant's financial plan involves remortgaging the Whistler house. The current mortgage is about \$500,000. He also has other debt of about \$57,000 of which he says that \$47,000 is a joint debt with the respondent.

- [70] He plans to remortgage the Whistler house for \$560,000 and pay off his outside debt. He has spoken to a mortgage broker about this and the broker says that a new mortgage cannot be considered until his support obligations are determined.
- [71] If the respondent were to move to Whistler, the claimant says that if it is assumed that she can earn \$50,000 teaching in Whistler and that she can live in the suite in the Whistler house, the income equivalent to her would be \$82,000.
- [72] The respondent's teaching position in Toronto appears to be quite secure. The evidence indicates that in Whistler she would not be able to earn anywhere near what she earns in Toronto and would likely not enjoy the benefits she has with the Toronto school board. I accept that the benefits provided to the respondent in her employment with the Toronto school board are important to maintain. In particular the long term disability insurance may become very important if her eye condition deteriorates to the point that she is unable to teach. In all likelihood, even if she were able to obtain disability insurance in B.C. it would not cover that pre-existing condition.
- [73] Being self-employed, the claimant does not have any of the benefits that the respondent currently has.
- [74] Although the claimant has always been self-employed while working in his field his job security appears to be less than that of the respondent and does not afford the benefits that the respondent enjoys with the Toronto school board.

The S. 211 Report

- [75] A s. 211 report was ordered in this case by Loo J. It was prepared on October 17, 2016, by Dr. Peggy Koopman. While some of the opinions of Dr. Koopman go beyond the scope ordered by Loo J., the claimant invited some of those by writing to Dr. Koopman that the two primary issues to be determined were which location would provide a better life for the child and which parenting arrangement would be best for the child. I found the following opinions of Dr. Koopman to be helpful:
- a. The parties should share 50/50 parenting time with the child.
 - b. The child is too young to spend 50% of his time in Toronto and 50% of his time in Whistler and this will not become less arduous when the child begins school.
 - c. Because of the past hostile communication with each other, a specific and rigid parenting schedule should be developed.
 - d. After observing each of the parties with the child, the child does not seem disturbed or anxious with either parent, has adapted to their different personalities and enjoys the activities that they both presented to him.

- e. The claimant and the respondent love the child equally and both appear to be parents with the capacity to fulfill their child's daily needs and those he will require over time.

Analysis

- [76] The statute law for determining the custody of the child and parenting arrangements is found in s. 37 of the Family Law Act and s. 16 of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.).
- [77] The claimant says that the FLA applies. The respondent argues that because she is claiming a divorce, any orders should be made under the Divorce Act.
- [78] It has been held that where orders in family matters can be sought under either the provincial legislation or the Divorce Act, and where there is no operational incompatibility, a court has discretion to use either act, but it is preferable to make the order under the Divorce Act and under the FLA only in the alternative. (*Vaandering v. Vaandering*, 1988 CanLII 3092 (BCSC)). Where operational inconsistency exists, the doctrine of paramountcy applies and the order should be made under the Divorce Act. (*Spiers v. Spiers*, 1995 CanLII 2945 (BCSC)).
- [79] In each statute, the only concern is the best interests of the children. (*Hansen v. Mantei-Hanson*, 2013 BCSC 876 [Hansen]).
- [80] In *Hansen*, the Court said, at para. 96:
- [96] Since both federal and provincial legislation are pleaded in this case, I am of the view that the course of action suggested in *Hejzlar* is the appropriate one - that is, there should be an order for joint custody under the Divorce Act, with consideration given to primary residence. Thus I will address the best interests of the children under the Divorce Act.
- [81] The considerations under s. 37 are essentially the same as under the Divorce Act and the case law. One difference between the statutes is that s. 69(4)(a) of the FLA incorporates a good faith test where there is an application by a party to relocate a child.
- [82] S. 69(4)(a) is in Division 6 of the FLA. It must first be determined whether Division 6 applies in the circumstances of this case.
- [83] S. 65(2) provides:
- 65(2) This Division applies if
- (a) a child's guardian plans to relocate himself or herself or the child, or both, and
 - (b) a written agreement or an order respecting parenting arrangements or contact with the child applies to the child.

- [84] The requirements of S. 65(2) are conjunctive. Division 6 applies if both a child's guardian plans to relocate and a written agreement or an order respecting parenting arrangements or contact with the child applies to the child.
- [85] In my view Division 6 does not apply here. Firstly, the relocating guardian has already relocated to Toronto pursuant to the order of Master Muir. The scheme of Division 6, and in particular s 69 appears to contemplate a guardian who "plans to relocate" and applies to court for permission. Secondly, there is no written agreement respecting parenting arrangements and the orders by Master Muir and this Court respecting parenting arrangements are only interim orders. I agree with Punnett J. who held that an interim order is not sufficient to invoke the provisions of s. 65. At para. 53 of *S.J.F. v. R.M.N.*, 2013 BCSC 1812, Punnett J. wrote:
- [53] In my view a reading of the FLA with attention to its scheme, objects and the intention of the legislature leads to the conclusion that the orders referred to in s. 65 are final orders not interim orders. I note that the FLA makes reference to interim orders in a number of sections (for example, s. 77(2)(a) and s. 89). Sub-sections 216(4)(c)(i) and (ii) expressly refer to the possibility that interim orders may create arrangements that do "not adversely affect the position of either party during negotiations, during family dispute resolution or at trial" and do "not necessarily reflect the final arrangement between the parties." Had the legislature intended that interim orders suffice for s. 65 they would have said so.
- [54] Secondly, a potential absurdity arises if the court accepts that an interim order suffices to invoke s. 65. It is well established that interpretations which lead to absurd results should be avoided: *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031 at para. 65. An interpretation is absurd "if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions" (*Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 27). (Emphasis added)
- [55] Absent any agreement between the parties, when an initial application is brought for an order respecting parenting arrangements under s. 45 and a guardian indicates that they intend to change the child's residence, s. 46 will apply. If an interim order is then issued during those proceedings -- as one was in this case, and as they commonly are in family proceedings -- then Division 6 would apply. This would render the situation that s. 46 is intended to address irrelevant. That is not in my opinion the intention of the FLA. "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage": *R. v. Proulx*, 2000 SCC 5 (CanLII), para. 28.
- [Emphasis in original.]
- [86] If I am wrong in my interpretation of S. 65 and it applies then good faith must be considered. In *L.J.R. v. S.W.R.* 2013 BCSC 1344, Betton J. wrote at para. 81:

- [81] A failure to establish good faith and/or the proposal of reasonable and workable arrangements to preserve relationships will suggest the proposed relocation is not in the child's best interests. However, that will not always be determinative. It may be that in other cases, a relocating guardian will not act in good faith, but the proposed relocation is nevertheless in the best interests of the child.
- [87] And at para. 85:
- [85] The FLA simply does not allow for the possibility that the relocating guardian could have improper motives for a move that is still in a child's best interests.
- [88] S. 69(4)(a)(i) requires that the relocating guardian must satisfy the court that the "proposed relocation is made in good faith". In the circumstances of this case while the means by which the respondent chose to relocate to Toronto may have exhibited bad faith on her part, in my view her evidence regarding her motives for wanting to relocate in Toronto are not improper and do not amount to bad faith. I accept her evidence that her move was in part motivated by the verbal abuse she endured from the claimant but also because of her financial concerns. The prospects of employment for her in B.C. in comparison to what was available to her in Toronto, were bleak. I accept that the life of the parties and the child in Whistler had become unsustainable both emotionally and financially.
- [89] I will proceed only under the provisions of s. 16 of the Divorce Act.
- [90] S. 16 deals with custody orders. The provisions most relevant to the relocation of a child are as follows:
16. (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
 - (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
 - (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.
- [91] The seminal case in this area is *Gordon v. Goertz*, [1996] 2 S.C.R. 27 [Gordon]. I have considered the following factors from Gordon.
- a. The existing custody arrangement and relationship between the child and the custodial parent.

- [92] The child is closely bonded with both the claimant and the respondent. Since his birth the respondent has been the child's primary caregiver and that continues now that the child is in Toronto.
- b. The existing access arrangement and the relationship between the child and the access parent.
- [93] Since their separation, the respondent has tried to facilitate parenting time for the claimant. Of necessity, access by the claimant was more limited when the child was an infant and breastfeeding. In addition to the claimant's overnight parenting time with the child it appears that if the claimant wished to be with the child apart from his overnight access the respondent accommodated that request. Since separation the claimant says that he has seen the child almost every day when he has been in Toronto. The claimant has maintained an apartment in Toronto to use when he is with the child. An interim order provides for 3 days and overnights of parenting time for the claimant and 4 days and overnights for the respondent.
- c. The desirability of maximizing contact between the child and both parents.
- [94] To achieve the accepted benefits to the child of maximum contact with each parent, residency of the child in Whistler would afford significantly less contact between the child and the respondent. Because of her teaching position in Toronto, the respondent would likely only be able to travel to Whistler during school holidays. In contrast, if the child were to reside in Toronto, the claimant has shown that he is able to travel frequently to Toronto to be with the child. Indeed the interim orders made for parenting time in Toronto for the claimant contemplate that his work allows him to travel there frequently.
- [95] The flexibility that the claimant has with his work coupled with his ability to travel regularly to Toronto should allow for him to maximize his contact with the child.
- d. The custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child.
- [96] In this case the respondent is now living in Toronto with the child because of the order by Master Muir in September 2015. The reasons for the respondent wanting to remain in Toronto were partly financial, partly due to the verbal abuse she had experienced from the claimant and partly because she wanted to be closer to the support of her family. The respondent has always maintained close ties with Toronto. It is also highly unlikely that she could find employment that would even come close to matching the income and benefits of her employment in Toronto. Her employment in Toronto improves her ability to meet the needs of the child.
- e. The disruption to the child of a change in custody.
- [97] It does not appear to me that a change in custody will be necessary in this case as the parties can continue to have joint custody.

- f. The disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
- [98] The child attends Montessori School every day, gymnastics every Saturday and participates in other activities in his neighbourhood. During his time in Toronto, the child has spent more time with his extended family. The respondent has testified that the child is thriving and making friends. The parties have no extended family in Whistler. Although he is too young to have become attached to the community, it is my view that a removal of the child from Toronto to Whistler would be disruptive. There would be no disruption to the child if he were to continue to reside primarily with the respondent in Toronto.
- [99] In view of the child's age it is also my view that being in Toronto with the respondent would offer him more stability. The respondent has a secure teaching job with an excellent salary and significant benefits. She has shown herself able to provide for the child while they live independently from her extended family. While I expect that he will have found employment this year, the claimant was not able to give evidence with certainty as to what his job would be. The claimant's plan for refinancing the house in Whistler appears to be shaky particularly because he will be facing child support obligations that he had not considered. He will also require someone to co-sign for new mortgage and he was not able to identify who the co-signer would be.
- [100] Using the approach suggested by our Court of Appeal in *S.S.L. v. J.W.W.*, 2010 BCCA 55 [S.S.L.], it is clear that wherever the parties reside, the respondent should have primary residence. This is reflected in the decision of Master Muir in this case. When I then consider the scenario of the respondent remaining in Toronto with the child and the scenario of the respondent remaining in Toronto without the child it is clear to me that it is in the child's best interests to be resident with the respondent in Toronto.
- [101] I agree with the respondent that even if I considered all four scenarios contemplated in *S.S.L.*, the continued residency of the child in Toronto is in his best interests.
- [102] In my view the claimant's desire to have the child reside in Whistler is of course motivated by his love of the child but apart from that it is because he prefers the lifestyle in Whistler over that in Toronto. His arguments that Whistler is a better place for the child to reside, particularly at his young age, are not persuasive.
- [103] Having considered the evidence and the factors referred to I have concluded that it is in the child's best interests to reside primarily with the respondent in Toronto.

Child Support and S. 7 Expenses

- [104] The claimant is obligated to pay base support on his guideline income and his proportionate share of s. 7 expenses.
- [105] Retroactive child support based on the increase in the claimant's income in January 2016 must also be determined.

- [106] The claimant has testified that his income last year was \$114,000 plus \$24,000 in rental income. The base child support on his total guideline income is \$1,230 per month assuming that the claimant will continue to be resident in B.C. That amount should have been paid from January 2016 to December 2016 (when the trial was held). From September 2015 until December 2015, the claimant stated that his income was \$75,000 and that amount should be used to determine his child support obligations during that period.
- [107] I consider that the respondent's guideline income for the entire period referred to is \$95,000 which represents her salary and the child care benefit.
- [108] Although the claimant said that he gave the respondent \$5,000 to assist her in travelling to B.C. with the child, the respondent will accept that as a prepayment of child support.
- [109] On this basis, after being credited with the payment of \$5,000, the claimant owes \$7,239 in child support for the period ending December 2016 and \$9,428 for s.7 expenses (Montessori School fees) for the period ending June 2017. The claimant is also obligated to pay 59.2% of any other s.7 expenses incurred by the respondent including the cost of the child's gymnastics.
- [110] Going forward the claimant's parenting time may qualify under s. 9 of the Guidelines. As he will incur travel expenses in exercising his parenting time they may be deducted from his support obligation for as long as he qualifies under s. 9. I am also of the view that the travel required will impose undue hardship on the claimant under s. 10 of the Guidelines and the deduction of travel expenses is justified under that section.
- [111] The claimant shall continue to pay the base amount of child support of \$1,230 per month from January 1, 2017 and on the first day of each month and every month thereafter.
- [112] If the parties agree that s. 9 applies then the necessary adjustments in the amount of child support shall be made. If the parties cannot agree then either of them are at liberty to apply to court for a determination of that issue.

Division of Property and Debt

- [113] Legal title to the Whistler real property is registered as to 99% in the name of the claimant and 1% in the name of the respondent. The respondent always understood that she was to be a 50/50 owner with the claimant. The claimant did not produce the lawyer's file regarding the purchase. It may or may not have confirmed the respondent's position. As she co-signed on the mortgage to acquire the property and the construction mortgage I think the respondent's position is reasonable and I find that she is beneficially a one-half owner of the property.
- [114] The parties were engaged to be married in August 2010. The lot in Whistler was purchased in December 2010 for \$123,200 with a mortgage of \$80,080 and a down payment of \$43,120. It therefor appears that the amount of \$43,120 is excluded property.

- [115] On the date of marriage, July 7, 2012, the assessed value of the property was \$266,000 and the mortgage remained at \$80,080. The increase in the equity in the property to \$185,200 would have been attributable to market forces as construction had yet to occur on the property.
- [116] The claimant submits that the value of the Whistler property at the time of trial should be \$569,393 based on the value determined by the WHA when an occupancy permit has not been issued. It was apparent in April 2016 when the house was substantially completed that the claimant had not taken the steps necessary to obtain an occupancy permit. On April 13, 2016, Loo J. ordered that the claimant take all necessary steps to obtain an occupancy permit for the property within 30 days. That was not done. The claimant's reason for not attending to the permit appears to be that he was spending his time in Toronto because of the order of Master Muir. That does not justify non-compliance with Loo J's order.
- [117] In my view the claimant should not be able to use the lower value of the Whistler property after failing to obtain an occupancy permit in accordance with Loo J.'s order.
- [118] Using the value attributed to the Whistler property by the Whistler Housing Authority (WHA), which was based in part on information provided to it by the claimant, I find that the value of the property at the time of the trial was \$865,757.79.
- [119] As the mortgage on the property was about \$500,000, the equity in the property at the time of trial was about \$365,758.
- [120] When the excluded portion of \$43,120 is deducted from the equity the divisible equity is \$322,638. Although the claimant has not provided evidence of how he could buy the respondent's interest in the property, if a buyout were possible he would have to pay the respondent \$161,419. If the claimant is not able to buy the respondent's interest then a sale of the property will be necessary.
- [121] Although the respondent may be entitled to a share of the rent received by the claimant for the suite in the Whistler property she is not seeking that.
- [122] The initial mortgage on the Whistler property of \$80,080 was converted into a construction mortgage in November 2011 and required only payments of interest until February 2013. The construction mortgage was then converted into a conventional mortgage and monthly payments became \$2,242. Although the claimant denies this, the evidence satisfies me that the claimant used the advances on the construction mortgage to make the monthly payments. From December 2010 until December 2015, the claimant paid \$210 per month from his earnings. Since January 2016, the mortgage payments have been paid primarily from the rent received by the claimant for the suite in the house of \$2,000 per month.

- [123] The balance of the line of credit is about \$21,000. In March 2015, the claimant used \$19,000 of the line of credit together with a vehicle loan to purchase a vehicle. In the end result I think that the claimant should keep the vehicle and be solely responsible for the line of credit.
- [124] The claimant has also incurred debt with the Canada Revenue Agency. He incurred this debt without the consent of the respondent. As the respondent will need to buy back her pension entitlement for the years that she lost those contributions and also had to rely on her mother to make payments for her long term disability insurance I agree with the respondent's position that it is reasonable and fair for the claimant to be solely responsible for those tax debts.
- [125] The respondent has a registered disability savings plan (RDSP) as a result of her disability arising from Stargardt's disease. The respondent's mother has made the only contributions to the respondent's RDSP and the plan has also received a government grant of \$10,500. The pre-marriage contributions totalled \$23,252. The grant money has to be returned to the government if the funds are accessed before the maturity date of the plan.
- [126] On October 31, 2015, the value of the RDSP was \$38,111. After deducting the pre-marriage exclusion and the total amount contributed by the respondent's mother for 2013, 2014 and 2015 of \$4,500 along with the companion government grants totalling \$10,500, there is no amount to which the claimant is properly entitled.
- [127] The claimant's interest in the respondent's pension has been valued at \$20,474 on a pre-tax basis. Applying a discount for tax of 35%, the net value of the claimant's interest is \$13,308.
- [128] The respondent has agreed that the claimant may retain 100% of his RRSP.
- [129] The condominium in Toronto where the respondent and the child now reside is registered in her name however, the evidence satisfies me that the condo is held in trust by the respondent for her father. He provided the funds for the purchase of the condo; there is a written deed of trust prepared at the time the condo was purchased indicating that he is the beneficial owner; he placed a mortgage on the condo for its full value at the time it was purchased and the respondent has paid rent to her parents of \$885 per month for the use of the condo.
- [130] With regard to TD account #0523-627993, the joint bank account currently in the name of the respondent's mother and father but previously in the respondent's name with her mother, although I agree with the claimant that the removal of the respondent's name from that account as well as the withdrawal of funds by her mother are suspicious, the respondent testified that the funds in the account were her parents and not used by her for personal purposes. The evidence did not satisfy me that this account should be treated other than that of the respondent's parents.

Parenting Time

[131] The parties shall share parenting time with the child as follows:

Regular Parenting Schedule

[132] The regular parenting schedule contemplates the claimant being in Toronto frequently or perhaps choosing to reside there.

[133] The regular parenting schedule in Toronto shall be as follows:

[134] The claimant shall have parenting time with the child:

- a. from after school on Tuesday and then overnight until Wednesday when school starts,
- b. from after school on Thursday and then overnight until Friday before school, and
- c. from after the child's gymnastics class on Saturday and then overnight until Sunday at noon.

[135] The respondent shall have parenting time with the child:

- a. from noon on Sunday until school starts on Tuesday,
- b. from after school on Wednesday until school starts on Thursday, and
- c. from after school on Friday until the end of the child's gymnastics class on Saturday.

Exchanges

[136] The exchanges for the child on school days shall occur at his school or day care as the case may be.

[137] On non-school days, (except the months of July and August), the parent that has had the child in their care shall take him to the other parent's residence for an exchange at noon.

[138] If both parties are visiting at cottages north of Toronto, the exchanges shall occur at Green Lane and the 404.

[139] In the months of July and August, the exchange time shall be 9 a.m. in contemplation of the claimant working.

No Make-Up Time

[140] Unless expressly agreed, if a party does not have their full parenting time as contemplated by any of these orders, no make-up time shall be provided.

Holiday Parenting Schedule

- a. In odd numbered years, commencing in 2017, the claimant shall have parenting time with the child from 10:00 a.m. on December 24 until 12:00 p.m. on December 25 and the respondent shall have parenting time with the child from 12:00 p.m. on December 25 until 12:00 p.m. on December 26.

- b. In even numbered years, the respondent shall have parenting time with the child from 10:00 a.m. on December 24 until 12:00 p.m. on December 25 and the claimant shall have parenting time with the child from 12:00 p.m. on December 25 until 12:00 p.m. on December 26.
- c. In odd numbered years, the claimant shall have parenting time with the child from 10:00 a.m. on December 31 until 12:00 p.m. on January 1.
- d. In even numbered years, the respondent shall have parenting time with the child from 10:00 a.m. on December 31 until 12:00 p.m. on January 1.

Specified Parenting Time

[141] Notwithstanding the regular parenting schedule and the holiday parenting schedule, the parties shall have the following specified parenting time with the child:

- a. Commencing October 31, 2017, in odd numbered years, the respondent shall have parenting time with the child on Halloween from 9:00 a.m. and overnight until 12:00 p.m. the following day. In even numbered years, the claimant shall have parenting time with the child on Halloween from 9:00 a.m. and overnight until 12:00 p.m. the following day;
- b. Each year on Mother's Day, the respondent shall have parenting time with the child from 9:00 a.m. until 5:00 p.m.
- c. Each year on Father's Day, the claimant shall have parenting time with the child from 9:00 a.m. until 5:00 p.m.
- d. Each year on the respondent's birthday, the respondent shall have parenting time with the child from 9:00 a.m. until 5:00 p.m.
- e. Each year on the claimant's birthday, the claimant shall have parenting time with the child from 9:00 a.m. until 5:00 p.m.
- f. Each year of the child's birthday, the party who does not have parenting time with the child overnight shall have parenting time with the child from after school until 5:30 p.m. If the child's birthday falls on a weekend day, then the party who does not have parenting time with the child overnight shall have parenting time from 2:30 p.m. to 5:30 p.m.

School Break Schedule

[142] When the child commences regular full-time school on September 5, 2017, the parties shall share parenting time during school breaks as follows:

- a. Spring Break: each year, the respondent shall have parenting time with the child during Spring break and the claimant shall have parenting time with the child for one week in April.

- b. Summer Break: each party shall have a one week block of parenting time with the child in each of the months of July and August provided that the weeks are not consecutive. Commencing July 2017 and every odd numbered year thereafter, the respondent shall have the first choice of one week blocks for each of July and August and she shall provide written notice of her choice by May 15 of the relevant year. In each even numbered year, the claimant shall have first choice of one week blocks for each of July and August provided that the weeks are not consecutive and he shall provide written notice of this choice by May 15 of the relevant year.

General Provisions Regarding Parenting Time

- [143] The Holiday Parenting Schedule, Specified Parenting Schedule and the School Break Schedule are superimposed on and supersede the Regular Parenting Schedule.
- [144] During the Specified Parenting Schedule, all exchanges shall occur at Montessori, daycare or school if applicable. For exchanges on non-school days, the parent that has had the child in their care will take him to the other parent's residence for an exchange at 12:00 p.m.
- [145] During the Holiday Parenting Schedule, exchanges shall occur at the residence where the child is at that time.
- [146] Any changes to a party's parenting time must be requested by email or text message a minimum of 48 hours in advance of the requested change.
- [147] The parties may agree on any changes to the parenting time provided such agreement is evidenced in writing, by email or by text message.
- [148] Special events, including school functions, may be attended by both parties. The party wishing to attend a special occasion while the child is in the care of the other party shall give at least 48 hours' notice to the other party that they wish to attend a particular special event or school function.
- [149] If a party wishes to travel with the child, the trip shall take place during that party's scheduled parenting time. The travelling party shall provide the following to the non-travelling party:
- A minimum of one month's notice by email or text;
 - A complete itinerary including flight information, address of where the child will be staying during the trip and a contact telephone number where the child can be reached;
 - Confirmation of safe arrival within 12 hours of arriving at the travel destination; and
 - A set time every second day when the non-travelling party can speak to or Skype with the child on a computer or tablet to ensure that each party is able to see the child during the Skype call.

- [150] When either party travels with the child, or has the child in his or her care, he or she will keep his or her cell phone on at all times to facilitate the non-traveling party's contact with the child.
- [151] If requested by the travelling party, the non-travelling party shall provide the other party with a notarized travel authorization.
- [152] The respondent shall retain the child's passport. The respondent shall provide the child's passport to the claimant within 7 days upon receipt of confirmed travel details from the claimant. The claimant shall return the passport to the respondent at the next parenting exchange after returning from the travel.
- [153] Should a party be unable to care for the child during his or her parenting time, that party shall provide the other party with at least 48 hours' notice by email or text together with a first right of refusal to care for the child and only arrange for secondary care if that party is unavailable to care for the child.
- [154] Provided the claimant keeps the Whistler house or otherwise has suitable accommodation, he may spend his one week blocks of parenting time in the Summer and his one week in April in Whistler with the child. Other than that, the claimant's parenting time shall be in Toronto unless the respondent otherwise consents expressly in writing.
- [155] The parties shall share joint custody and guardianship of the child and the child's primary residence shall be designated by the respondent.
- [156] Each party shall make day-to-day decisions affecting the child when the child is in his or her care and with respect to all other parental responsibilities, the parties shall discuss those responsibilities and try to reach a decision. If they cannot, the respondent shall make the decision subject to the claimant's right to have the decision reviewed by the Court in Ontario.
- [157] In the alternative to para. 156, the parties shall discuss parenting responsibilities and try to reach a decision. If they cannot, the parties shall retain a parenting coordinator to facilitate same with the cost of the parenting coordinator to be initially based on the proportionate income of the parties with liberty to the parenting coordinator to allocate a different proportion should he or she determine that to be a fairer result.
- [158] The claimant shall have 90 days from the date that this judgment is released within which time to purchase the respondent's ½ share in the Whistler property. If the parties have not executed a binding contract for the purchase by the claimant of the respondent's ½ interest in the Whistler property, the claimant shall forthwith list the Whistler property for sale with a real estate agent to be agreed upon by the parties. Upon the sale of the property, the net sale proceeds, after the deduction of the mortgage and the normal conveyancing fees and adjustments, shall be divided equally subject to the following:

a. From the respondent's share, she shall pay to the claimant $\frac{1}{2}$ of the net after tax value of her RDSP and pension.

b. From the claimant's share, he shall pay to the respondent retroactive child support in accordance with these reasons for judgment.

[159] Child support shall be paid until further review which should occur each year no later than June 1 with any adjustment to child support being made commencing July 1 of the year.

[160] The parties shall exchange their respective tax returns and assessments issued to them by the Canada Revenue Agency no later than May 1 of each year commencing in 2017 and continuing for as long as child support is payable.

[161] The claimant shall indemnify and save the respondent harmless in respect of any liability attaching to her as a result of his current or future indebtedness to the Canada Revenue Agency.

[162] The following expenses shall be considered to be section 7 expenses:

- a. The tuition fees payable in respect of the child's attendance at the Montessori school;
- b. The cost of future pre or post school care when the child begins school;
- c. The cost of the child attending a gymnastics class;
- d. That portion of medical and dental insurance premiums attributable to the child's coverage;
- e. Health related expenses that exceed those reimbursed by insurance by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker or as well as physiotherapy, occupational therapy, speech therapy, prescription drugs, hearing aids, glasses and contact lenses;
- f. Extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- g. Expenses for post-secondary education;
- h. Extraordinary expenses for extracurricular activities; and,
- i. Such other expenses which the parties agree are s. 7 expenses with liberty to either party to apply for that declaration should a dispute arise regarding that issue.

[163] The parties shall share s. 7 expenses in proportion to their incomes based on the claimant's income of \$138,000 and the respondent's income of \$95,000 such that the claimant shall be responsible for 59.2% of those expenses and the respondent shall be responsible for 40.8 % of those expenses. Each July the parties shall adjust their respective contribution to section 7 expenses based on the exchange of income tax information and the determination of their guideline income.

[164] Costs shall be payable by the claimant at Scale B within 90 days from the date this judgement is released provided that if he lists and sells the Whistler property as contemplated in these orders costs shall be paid from his share of the net proceeds of sale thereof.

"Bowden 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/17/04/2017BCSC0465cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/m-c-j-v-r-j-g-2017>

Prepared on 29 October 2026 · Esheria