
CANADA / JUDGMENT

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

2017 BCSC 1353

COURT

Supreme Court of British Columbia

DECIDED

14 July 2017

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2017 BCSC 1353 M.J.V. v. R.L.V.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2017 BCSC 1353

Date: 20170714

Docket: E112869

Registry: Kelowna

Between:

M.J.V.

Claimant

And

R.L.V.

Respondent

Before: Master S. Wilson

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

J.T. Van Allen

Counsel for the Respondent:

C. Miller

Place and Date of Hearing:

Kelowna, B.C.

July 12, 2017

Place and Date of Judgment:

Kelowna, B.C.

July 14, 2017

- [1] THE COURT: This is an application by the claimant for equal parenting time on a week-on/week-off basis with the parties' daughter, S, who is age seven. Currently the claimant has parenting time every second weekend and each Tuesday evening and overnight. The parties have another child, a son J, age 14. He is currently on an alternating week schedule by his choice and no order is sought with regard to J.
- [2] By way of background in terms of the relationship, the parties commenced cohabitation in 2002, they were married in June of 2006, and separated in June of 2015. The claimant is 43 years of age and is the owner/operator of a landscaping business. The respondent is 38 years of age and is qualified as a licenced practical nurse, although she now works in a different field.
- [3] The parties entered in a separation agreement in December 2015. As to the financial matters in that separation agreement, the respondent seeks to set it aside and the claimant seeks to uphold it.
- [4] During the relationship, the parties' roles were traditional, that is, the claimant worked long hours and the respondent assumed primary responsibility for the children. Upon separation, the claimant moved out and the children resided with the respondent. The claimant lived with his parents and then in a small rental accommodation before securing premises more suitable for children. That accommodation is shared with his girlfriend, TO.
- [5] In August 2016, J started to reside with the claimant. The events surrounding that change are, in my view, relevant and warrant some review.
- [6] Following a two-week trip with the respondent, both children went to spend time with the claimant. What followed from that was an exchange of communications wherein the claimant indicated that J was visibly upset and suggested that he had been slapped by the respondent and an allegation was made of child abuse. The claimant also accused the respondent of making up false allegations with regard to T and the claimant. The respondent responded and denied both of those matters. She specifically denied ever slapping J and said that the claimant's relationship with his new girlfriend was none of her business and she does not discuss it with the children. Twenty-four hours later, the

respondent sent the claimant an email. It read:

[M],

The best thing for everyone would be to sit down and talk about this. You and I need to talk. There is no need to make things any worse for the children. How can they be happy if we are fighting and perpetuating this animosity. It's up to us to make it better. We can only do that if we have an open and honest conversation.

Please let's work together in this.

The response from the claimant was:

[R],

At this point, there isn't anything that we need to discuss. It is important for you to seek legal advice.

[7] I will now move forward five days to August 11, 2016, for the next incident that is of some concern. On that date, the claimant, his girlfriend, T, and J arrived at the respondent's place of employment, which was at her employer's home, and said that J "wants to have a word with you." The respondent suggested meeting with J at Tim Hortons. The claimant refused to leave her place of work and sat at the end of the driveway of the respondent's employer for some two-and-a-half hours.

[8] When the respondent finally contacted them by telephone, there was a brief conversation with J, all of which was on speaker phone. The respondent deposes to the events thereafter as follows in paragraph 52 of the respondent's affidavit #2:

[M's] girlfriend [T] then started verbally attacking me and berating me in front of [J] saying things like "You have borderline personality. I know you have borderline personality" and, "I have a very good lawyer. You better watch out". She accused me of slapping my son stating "The counsellor has a record of every event. The counsellor will be in contact with Child Protective services and then you will be sorry". [T] was very abusive and loud. [J] was in the car and subjected to listening to the whole exchange which is very disappointing. The conversation ended when I heard [T] say "hang up. just hang up" and the call ended. I was not able to say anything to [T] while she was yelling at me. She yelled at me for about 3 minutes.

[9] These events are outlined, as I say, in great detail by the respondent in her affidavit and were confirmed by her the following day by way of a letter which, in my view, shows some restraint. It invited a response from the claimant, but none followed. In keeping with the threats from the claimant's girlfriend involving Child Protection Services, the Ministry of Child and Family Development indeed became involved. They concluded that the children were not in need for protection.

- [10] I pause to comment on the material before me as it relates to these various incidents. It is not necessary for a party to respond to each and every paragraph in an affidavit, nor indeed is it necessary to respond to general allegations or aspersions that might be cast but lack sufficient particularization to respond meaningfully. However, there is risk to a party who chooses not to respond to specific detailed allegations in an affidavit of an event that may be considered significant where there can be no doubt as to what is being referred to; such evidence should not go unaddressed or be considered to have been responded to by way of a general denial as to all paragraphs not specifically addressed. It may be that a party specifically denies that an event occurred as described; it may be that the party has an explanation for the event; it may be that the party admits the event within an averment of contrition. In the absence of any response from the claimant to the respondent's very specific version of events here, I must accept that they happened as she says they did. The claimant had an opportunity to respond to the respondent's affidavit, but chose in his reply affidavit to focus on other matters.
- [11] J continued to reside with the claimant until April of 2017, when he chose a week-on/week-off schedule that neither party seeks to change. The only issue, as I say, is therefore where S is going to reside.
- [12] I will describe how this matter came before me and the events leading up to it. The notice of family claim was filed in late 2016 and a judicial case conference held in January of 2017. On May 28, 2017, the respondent asked the claimant for his proposed schedule for the summer holidays. The claimant did not respond for about three weeks, at which time he suggested a week-on/week-off schedule. The respondent advised him promptly that she did not agree with his proposal. The claimant then filed this application and set it down on less than the required notice under the Rules and refused to adjourn it citing urgency.
- [13] I adjourned the application briefly with costs to the respondent. I am satisfied that there was no urgency whatsoever in this matter. The only thing that perhaps had changed over the past several months since the judicial case conference was that the respondent works a 9 a.m. to 5 p.m. schedule and the claimant says that he can arrange his schedule to be available with the children because his landscaping work is slower in the summer. I say there was nothing urgent because the school holidays occur at the same time each year. It was the respondent who prompted the inquiry as to the proposed summer schedule and it was the claimant who was slow in responding. Further, the notice of application does not seek a summer schedule, but rather a change of the ongoing parenting schedule. The notice of application also, in addition to parenting time, included financial matters for which there was insufficient evidence and other matters for which there was little or no evidence. I adjourned the financial matters generally.

Positions of the parties

- [14] The claimant's position is that he has wanted equal parenting time since October of 2016 and that his parenting time is currently at the whim of the respondent. He says that the Divorce Act s. 16(10) presumes equal parenting time and that neither party here suggests that the other is not a capable parent, which is true. The parties are unable to communicate, he says, but fixing a schedule will assist in alleviating that concern.
- [15] The respondent's position is that this is an interim application and that the status quo should prevail pending a full hearing on the merits. She says the status quo is the present regime which is in S's best interests. The respondent refers to a number of incidents including those that I have just referred to and calls into question the claimant's ability to share parenting in a manner that is in S's best interests.

Legal Test

- [16] I will now address the principal issue on this application which is to determine where S should reside. The sole consideration on this application is the best interests of S, both under the Divorce Act s. 16(8) and the Family Law Act s. 37(1):

Divorce Act

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.

Family Law Act

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

- [17] The Family Law Act s. 37(2) outlines the factors that must be considered:

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
 - (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;

- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

[18] I do not accept the claimant's argument that the Divorce Act s. 16(10) requires me to assume equal parenting time. The section provides as follows:

16(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.

[19] Section 16(8) requires that the best interests are the sole consideration. Section 16(10) refers to maximum contact, but only as is consistent with the best interests of the child. As such, there needs to be consideration of what are the best interests of S and how that might best be determined.

[20] A cautious approach with regard to interim orders that might change the status quo is appropriate especially where the best interests of a child are concerned - see Master Bouck's decision in *K.D.E. v. J.M.E.*, 2016 BCSC 1509, and *Fawcett v. Read*, 2016 BCSC 310, a decision of Russell J.

[21] These authorities do not require that the status quo take precedence over the child's best interests. If I am convinced that the best interests of S would be better served by another arrangement, I have the authority to make such an order, and given the requirement that I must consider only her best interests, I would be required to do so. However, I must be mindful of the limitations of evidence that is untested through cross-examination and can be explored in much greater detail at the trial, along with other evidence, such as a s. 211 report, or evidence that may not be available on an interim application but could be compelled at trial.

Discussion

[22] The status quo is clearly that S resides primarily with the respondent. During the marriage, the respondent was a stay-at-home mother until S was three years old. She worked part-time thereafter. After separation, S resided primarily with the respondent and sees the claimant on the schedule that is currently in place which is every second weekend and one overnight during the week.

[23] The claimant says that this is the arrangement only because the respondent dictates that it be so. However, in the separation agreement of December 2015, it is clear from a review of that agreement as a whole that both children were residing primarily with the respondent and although the claimant says that his living circumstances precluded more regular parenting time, there is nothing in the separation agreement that contemplates any change to those schedules.

[24] I will now address the best interests of S; because the notice of application contemplates the Family Law Act, I will address the s. 37(2) factors.

37(2)(a) The child's health and emotional well-being

[25] S is doing well by all accounts. She is doing well in school and is also enjoying and doing well in her extracurricular activities. There is no evidence that would suggest that the present circumstances are not working well for S.

(b) The child's views, unless it would be inappropriate to consider them

[26] The child's views are not a factor for a seven-year-old and statements and affidavits from the parties as to what a seven-year-old might have said are not helpful and I do not take those into account.

(c) The nature and strength of the relationships between the child and significant persons in the child's life.

[27] I assume that S has a strong relationship with both parents. There is certainly no evidence otherwise in that regard.

[28] The claimant submits that it is in S's best interests that her schedule be aligned with J's schedule and that it is in the best interests of the children that they spend as much time as possible together. However, when J moved to live with the claimant last August, this significantly reduced the time that the siblings were spending together as S was primarily with the respondent. The children spent less time together then than they do now since J went to a week on/week off schedule this spring. The time the children spend together appears to be a new concern for the claimant.

- [29] Finally, the parties have agreed that J is in a position to determine where he resides. J has within the last 12 months changed his living arrangements twice, from primarily with the respondent to primarily with the claimant, and now equal time with each parent. There is therefore some uncertainty surrounding J's arrangements. J's decisions are not determinative of where S will reside.
- (d) History of the child's care
- [30] This is essentially the status quo that I have outlined earlier in that S has resided primarily with the respondent since birth.
- (e) The child's need for stability, given the child's age and stage of development
- [31] This being an interim application, it may well be that a trial judge upon fulsome consideration of all of the evidence would reach a different conclusion than I on an interim application. This factor favours the status quo because it means that there is at most one change to the routine as opposed to two.
- (f) The ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities
- [32] It is at this point in the analysis that I return to the incidents deposed to by the respondent. The claimant's response to the respondent's invitation to discuss the problems that J was having arising out of the parties' separation was to say there is nothing to discuss and that the respondent should get a lawyer. In my view, this demonstrates a lack of insight and an unwillingness to address matters properly. The speakerphone incident at the end of the driveway is perhaps more troubling. To wait at the end of the respondent's employer's driveway for two-and-a-half hours and then put the respondent on speakerphone, then permit his girlfriend to accuse the respondent of having a borderline personality disorder and to threaten her with Child Protection Services all in front of J is simply not appropriate. It shows a lack of understanding of appropriate parenting and gives rise to concerns about the claimant's ability to co-parent with the respondent effectively.
- [33] The claimant says it is irrelevant because it was a year ago and also because this application deals with S and not with J. I do not agree. As to the timing, 11 months ago, frankly, is not that long ago. More significantly, a lack of remorse or an explanation that would demonstrate that the claimant now realizes that the August 11 events were completely inappropriate is not reassuring. At worst, the claimant orchestrated this confrontation. At best, he lacked the insight to prevent it or at least to end it. The suggestion that because it was in front of J and not S means I should ignore it is a curious argument because at issue here is the ability of the parties to co-parent their children.

- [34] I do not intend to refer in any detail to other subsequent events including the efforts to pursue counselling or the suggestion that the claimant was not prepared to take S to her gymnastics classes. I will simply say that I have concerns about the claimant's ability to work with the respondent to exercise his responsibilities in a co-parenting-type of arrangement. The consideration of this factor favours preservation of the current regime.
- [35] As for subsections 37(2)(f). and (g), I do not consider family violence to be a factor in this case.
- (i) The appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members
- [36] This factor, again, favours the respondent on an interim basis because of the concerns I just discussed under subparagraph (f). Although the claimant says that there is an inability to communicate on the part of these parties, which is certainly true to some extent, a review of the evidence overall would suggest some willingness on the part of the respondent to communicate and a refusal on the part of the claimant.
- [37] I do not consider the various text messages to be particularly useful and I do not attach a lot of weight to them. Text messages are often sent in the heat of the moment and therefore are not drafted carefully. People often send text messages they wish they could recall or at least reword. I would not criticize the claimant for his initial letter in August when he suggested that he had been told about the slapping of the child. However, I note that there was a recurrent theme in the claimant's communications with the respondent which is to threaten consequences if she does not accede to his point of view.

Disposition as to S's interim living arrangements

- [38] I now return to whether it is necessary to change the status quo in order to ensure that S's best interests are being met pending the trial. S is doing well under the current arrangement which is that she lives primarily with the respondent and sees the claimant regularly. In my view, there is no justification or requirement to implement a different arrangement on an interim basis. S's best interests can be canvassed fully at a trial. There is significant risk in making a change in the status quo when everything seems to be going well.
- [39] It follows from my consideration of the factors under s. 37(2) that S should continue to reside primarily with the respondent and the claimant's application to change the parenting arrangements with regard to S on an interim basis is therefore dismissed.

Other relief sought

- [40] I turn now to the remainder of the relief sought in the notice of application. Section 2 of the orders sought seeks an order dealing with holiday time on a rotating basis. The claimant seeks an order that he have the children for Christmas Day in 2017. The only evidence I have with regard to Christmas is the respondent's affidavit and she says that half of Christmas Day in 2015 was spent with the claimant and that he had all of 2016. In my view, it is, therefore, the respondent's turn to have Christmas Day in 2017 unless she agrees otherwise.
- [41] As for Thanksgiving in 2017, which is item (b), the respondent does not oppose the relief sought in the application.
- [42] As for Good Friday in 2018, I have no idea what happened in 2017. The separation agreement stipulates that the holidays be shared. I do not know whether Good Friday is within the spring break next year. I am simply not going to make any order because I do not have enough information to do so.
- [43] Item 3 seeks an order that the respondent be restrained from removing the children from the Province of British Columbia without the claimant's permission, such permission not to be unreasonably withheld. I am not going to make that order simply because the parties have already addressed that issue in their separation agreement. At paragraph 3.5, it reads:
- The parties will advise each other of any proposed travel outside of Canada with the Children and the parties shall endorse any travel consent authorizations provided to them.
- [44] On the basis of the fact that the parties have already agreed to the above, there is no need for the order under paragraph 3 of the notice of application.
- [45] Item 4 of the notice of application sought an order to compel production of copies of birth certificates and passports. The respondent's evidence was the claimant had never asked for them before and she simply included them in her affidavit in response. That application is, therefore, dismissed as it was unnecessary.
- [46] There is no application before me for summer parenting time. I do note, however, that the separation agreement provides that the parties will equally share holiday parenting time with the children. It also says that the parties will make future arrangements for parenting time including vacations as are appropriate given the ages, needs, and wishes of the children. I am not going to make an order for the summer schedule, as I say, because no order was sought and neither party proposed a schedule. However, given that the parties have already agreed that it would be shared equally, I assume that those arrangements can be made.
- [47] The other items of the notice of application were previously adjourned.
- [48] In the circumstances, the respondent is entitled to her costs of this application.
- [49] Is there anything I have not addressed?

[50] M.J.V.: I believe that is it, Your Honour.

[51] MR. MILLER: Your Honour, with respect to the costs, is that possible to have those payable forthwith once they are established by the registrar?

[52] THE COURT: No, costs can be in the cause -- sorry, they are not payable forthwith. They are not costs in the cause, I misspoke. The respondent is entitled to her costs but they are not payable forthwith.

[53] M.J.V.: I would say my friend can draft the order since he was successful.

[54] THE COURT: I do not determine that.

[55] M.J.V.: Okay.

"Master S. Wilson"

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