
CANADA / JUDGMENT

M.L.E. v. D.K.E.

2021 BCSC 1790

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1790 M.L.E. v. D.K.E.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.L.E. v. D.K.E.,

2021 BCSC 1790

Date: 20210823

Docket: E211326

Registry: Vancouver

Between:

M.L.E.

Claimant

And

D.K.E.

Respondent

Before: The Honourable Mr. Justice Coval

Oral Ruling Re Relocation Application

In Chambers

Counsel for the Claimant:

C. Lewis

J. Kabani, Articled Student

Counsel for the Respondent:

C. Linde

Place and Dates of Hearing:

Vancouver, B.C.

August 13 and 23, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 23, 2021

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Introduction

- [1] I have anonymized the parents' and children's names in case these reasons are requested and published on the court website. If I stray into actual names in my oral reasons, I will edit them out if a written copy is requested.
- [2] This is a relocation application, under s. 16 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), by the claimant, Ms. M.L.E., opposed by her husband, the respondent, Mr. D.K.E.
- [3] M.L.E. seeks orders:
- a) permitting her to relocate with the children to Hamilton, Ontario, before school begins in September; and
 - b) granting D.K.E. such parenting time as the parties may agree to from time to time by telephone or video or in person, taking into account D.K.E.'s circumstances and the children's wishes and schedules.
- [4] There is urgency to this application because it relates to where the children will live when they begin school in early September.
- [5] For the reasons to follow, I grant the relocation order sought by M.L.E. on an interim basis, pending either further agreement between the parties or further order of the court.
- [6] The other relief sought by M.L.E. for parenting responsibility and decision-making has now gone by consent. Namely, paragraphs 1, 2, 3 and 5 from the notice of application.

Status of the Proceedings

- [7] The proceedings were commenced recently, in the spring of 2021. The trial is scheduled for October 2022.
- [8] On June 7, 2021, M.L.E. served a notice of relocation pursuant to s. 16.9(1) of the Divorce Act. By consent order of June 8, 2021, M.L.E. was granted exclusive occupation of the family home for her and the children and interim without-prejudice orders that the parties communicate through counsel about the children and legal matters and through their realtor about the sale of their house.
- [9] On July 22, 2021, the parties had a judicial case conference in which an order was made for a "hear the child" report. Examinations for discovery have occurred for both parties.

Overview of the Family Circumstances

- [10] The parties were married in Hamilton, Ontario on September 15, 2001. They have three children: a 17-year-old daughter, M.A., and twin 14-year-old boys, E.A. and J.K. M.A. is beginning undergraduate studies this fall at McMaster University in Hamilton. The boys are entering grade 9.
- [11] M.L.E. is a registered nurse. She has worked part-time while being the primary caregiver raising the children. D.K.E. is a commercial realtor.
- [12] In March 2020, D.K.E. began living separately in the downstairs part of the family's home due to his stated concern regarding COVID-19 and M.L.E.'s work at a local hospital.
- [13] In December 2020, M.L.E. advised D.K.E. that she wished to terminate the marriage. Around this time, she also told him she wished to move to Hamilton with the children. In April 2021, M.L.E. and the children moved out of the family home to stay with friends because of D.K.E.'s conduct described further below. In May 2021, D.K.E. agreed to move out of the family home so M.L.E. and the children could return. The home has now been sold, with a closing scheduled on August 31, 2021.
- [14] As primary caregiver, M.L.E. has a close relationship and strong bond with her children. D.K.E.'s relationship is more complicated. The evidence indicates a good relationship with his children until around two years ago, but with serious deterioration since that time due to his conduct at home. He has not seen the children for the past few months, and at least for now they indicate through the "hear the child" report that they wish to avoid contact with him.
- [15] The children have a strong relationship with D.K.E.'s father and stepmother, who live locally and have been much involved in their lives. They also have a good relationship with M.L.E.'s mother and extended family in Hamilton, though this is less established and based more on holidays and family visits.

"Hear the Child" Report

- [16] This report, authored by Andrea Yeo, a registered clinical counsellor, was prepared under BC Family Law Act, S.B.C. 2011, c. 25, ss. 37, 202 and 224(1)(b).
- [17] Both parents consented to these interviews taking place. M.L.E. paid for the report.
- [18] The interviews occurred on July 26 and August 2, 2021, by MS Teams. The questions the parents requested Ms. Yeo to ask were:
 - a) The mother would like to know the children's experiences of the home life prior to the separation of their parents.
 - b) The mother would like to know the children's experiences of the home life after the separation of their parents.

- c) The mother would like to know the children's thoughts about relocating to Ontario.
- d) The mother would like to know the children's preferred parenting arrangements.
- e) The mother would like to know if the children have any concerns about physical or emotional safety, substance misuse, mental health issues and the conditions of the home.
- f) The father would like to know if the children would be interested in working on an establishing a good relationship with him after everything settles down.

[19] The report describes the interviews in detail and summarizes the children's views. For present purposes, the key points are:

- a) Regarding M.A., she reports she does not want to have any contact with her father at this time. She says she does not feel safe around him. She says:

He is a big guy, and he would put his finger in my face and point at me and be really mean. He has a problem, and I think he needs to get help. I do not want to be around him right now. I am also really scared from what he has done to my mom. He and my mom stopped sleeping in the same bed, and my dad moved downstairs, and I was downstairs too. And I heard a big bang, and I ran around the corner and saw my mom on the ground and my dad hovering over her. Her finger was bleeding. I did not see him push her to the ground, but I have seen him be aggressive and push her before. He has pushed me too, so I feel unsafe. He is also very violent because he throws things and kicks things. He has thrown photo albums and the telephone, and I just feel really scared.

M.A. also says that the problems with her father's drinking started many years ago and became really scary and unsafe in the past year. She reports she wants to live with her mother and not visit her father at this time. She would be open to seeing a counsellor with him to have closure about what has happened, but she feels her father needs to participate in counselling on his own first.

- b) Regarding E.A., he reports that he has not seen his father since his father left because he does not really want to see him right now because of the way his father acts and because he is drunk all the time. He states:

Sometimes I feel really scared because he gets angry all the time. It has been like that for about four years, and this year was the worst. For example, he throws tons of stuff, like a phone, and it is really scary. And he pushed my mom, and her finger got caught in the door or something and it started to bleed.

He reports that, if his father changes, then he would like to spend some time with him during special holidays.

He also reports that he feels fine about possibly moving to Hamilton, Ontario, and attending school there. He does not feel like counselling with his father at this time but might later.

- c) J.K., the third child, reports that since his father moved out things have been a lot less stressful because he believes his father is an alcoholic. He reports that when his dad would drive him to hockey, he could tell he was drunk because he would blast the music and dance and take his hands off the wheel. He has been feeling really scared because his father has been throwing things and pushed his mother.

He reports that he feels attending a new school would be a good opportunity to make new friends and expand his curiosity with other people and that he would feel good to move to Ontario with his siblings and mother because it would make sure they could feel a lot safer than being in Vancouver. He reports that a possible move to Ontario would be a great start.

He does not want counselling with his father right now but may in the future and needs to see a lot of changes in his father first.

D.K.E.'s Conduct

- [20] Before describing these recent difficulties, it is important to point out the positive steps D.K.E. is making to improve his situation. For his difficulties with alcohol and drugs, he is seeking treatment from Stepping Stones Concurrent Disorder Services. Its nurse clinician has written a letter of support, August 10, 2021. It states in part:

I have noted a significant positive change in his behaviour, demeanour, attitude and mental health status from when we first met. Clearly the ongoing strife with him and his wife has played into his declining mental health and related substance misuse. He reports that the subsequent consequences and changes in his life, not the least of which has been to lose contact with his children, have been traumatic for him. In the face of all this, there has been a notable decrease in his denial around his past substance use and the tendency to minimize the gravity of his choices.

- [21] I do note, however, that the letter suggests that D.K.E. has not yet agreed to the treatment plan that Stepping Stones wishes him to commit to.

- [22] As I understand it, D.K.E. is also obtaining family counselling or has committed to doing so.

- [23] Although D.K.E. has a different perspective regarding the nature and severity of some of the events in 2021, M.L.E.'s version is consistent with the children's descriptions in the report.

- [24] To summarize these events, first, on an evening in early February 2021, it appears he was verbally abusive and violent with M.L.E., who fell to the ground while they were struggling over the closing of a door. He then drove his sons to hockey having had too much alcohol to drink.

- [25] In February and April 2021, he demonstrated suicidal ideations and threats and spent a brief time in hospital on both occasions.

- [26] On February 24, 2021, he came home intoxicated and had a serious yelling match with his daughter. On March 14 and 30, 2021, he was again violent in the family home, throwing and breaking photographs. M.L.E. again fell to the ground, causing her to cut her hand in what D.K.E. says was another incident regarding struggling over the closing of a door.

M.L.E.'s Reasons for Moving to Hamilton

- [27] M.L.E. submits that moving with her twin sons to Hamilton is important for rebuilding the family's financial security. She plans to work full-time as a nurse. She and the boys can live in the upper floor of her mother's house at no cost. The local high school is grade 9 to 12, and so M.L.E. views this as an optimal time for her sons to change schools.
- [28] M.A. will be 17 and attending McMaster and can live with the family or in residence, as she chooses. The boys are 14. They want to be with their mother and are open to moving to Hamilton and starting a new high school there.
- [29] The family is in precarious financial circumstances due to D.K.E.'s personal issues and the marital breakdown. M.L.E., working part-time while primary caregiver, has earned an average of approximately \$40,000 per year since 2018 in nursing. D.K.E. earned a good income in 2016, 2017, and 2019. His income was low in 2018 due to health issues. Due to his personal issues described above, he earned only \$25,000 in 2020 and in 2021 is not providing any financial support to the family. Boiling down the financial evidence, after selling the family home, they will have approximately \$450,000 after paying off the mortgage and other debts. They have little other assets or savings, and D.K.E. is currently not earning any material income, though he says he plans to do so.
- [30] M.L.E. submits that she also wishes to move the family to Hamilton because of safety concerns due to D.K.E.'s conduct, and the children voice similar concerns in the report. As I understand the evidence, D.K.E. has not continued any threatening or dangerous behaviour since the family ceased living together.
- [31] M.L.E.'s evidence is that she wishes to help rebuild her children's relationship with their father and will endeavour to do so from Hamilton.
- [32] Both sides appear to agree that D.K.E. needs professional counselling for his mental health and addiction issues and parenting skills, and that the children also need counselling support about what has occurred with their father and how to rebuild the relationship. M.L.E. submits that she wishes to cooperate with D.K.E.'s effort to rebuild his parental relationship so long as it is done patiently and is coordinated with professional counselling. She says this can initially be done by teleconference and then hopefully progress to personal visits.
- [33] D.K.E. opposes the move to Hamilton. He wishes to rebuild his relationship with his children, which will be much harder if the boys are in Hamilton.

- [34] D.K.E. also makes much of an alleged hoarding problem for M.L.E., which he says is harmful to the children, and of her alleged hostility towards him that he fears will hinder his efforts to reconnect with the children from afar.
- [35] I do not give significance to the hoarding allegation because it is denied and nothing in the evidence suggests it poses any harm or difficulty for the children. Particularly I note there is nothing about it in their extensive interviews in the "hear the child" report.
- [36] Regarding M.L.E.'s alleged hostility, this has obviously been a very bad family situation for approximately two years, and there is hostility in both directions. There is no evidence in the "hear the child" report or elsewhere, however, of M.L.E. turning the children against D.K.E. She claims she will support reconstruction of D.K.E.'s relationship with the children, and her actions in that regard may well be assessed by this court later in these proceedings.

The Test for Relocation

- [37] The governing law for this application is s. 16 of the Divorce Act. In determining whether to authorize relocation of children under the Act, the court must focus exclusively on the children's best interests. Under s. 16.92(1), in order to determine the best interests of the children, the court must take into consideration the factors referred to in s. 16 and 16.92(1).
- [38] The case law recognizes that relocation is one of the most impactful decisions a court is asked to make, potentially having a long-term impact on children's relationships with the non-relocating parent (*Nolie v. Reece*, 2016 BCSC 2201). That is especially so in a situation like this where the proposed relocation is far away.
- [39] The cases recommend particular caution regarding a relocation such as this, at the early stage of the proceedings and significantly different from a status quo which is serving the children well. By this of course I mean the current status quo rather than the status quo a few months ago. At such an early stage, before a s. 211 report or a trial, the court may not have sufficient understanding of the situation to assess what is in the best interests of the children.
- [40] Despite heeding these warnings, in my view the particular circumstances of this case make it appropriate for relocation. Consideration of the evidence in light of the statutory considerations strongly suggests it is in the children's best interests to move to Hamilton with their mother now.
- [41] By way of overview, and before turning to the specific statutory considerations, D.K.E. concedes that at least for now the children should reside with M.L.E. and she should have parental responsibility for them. The "hear the child" report indicates an entirely positive relationship between M.L.E. and the children. She has always been the primary caregiver.

- [42] M.L.E.'s reasons for moving are reasonable and serve the best interests of the children. She needs to rebuild the financial circumstances and security of the family. There is significant financial savings from free accommodation in her mother's home in Hamilton. Having live-in support from her mother while she takes on full-time work is a good situation for the children.
- [43] The children are of an age where their views carry weight. The report indicates them to be mature and insightful. Although the move will no doubt be disruptive for the boys, it appears it may be less so than is often the case in similar circumstances. The report indicates they are positive about the move. They will have each other and their sister will also be in Hamilton. They will have the live-in support of their mother's mother. Grade 9 is the beginning of high school and so they will be on a more even footing with their new peers.
- [44] Having the children move so far from their father is, of course, a highly concerning and weighty consideration, and in this case threatens to increase the difficulty of rebuilding these relationships. Given the children's views in the report, however, it is difficult to predict what would happen to those relationships even if the children were to stay here.
- [45] In my view, in these difficult circumstances, the children's best interests are served by relocating with their mother for the reasons described above. Hopefully with the benefit of time, patience and counselling, they will be willing to rebuild their paternal relationship with D.K.E., and can do so, at least initially, remotely by video and then with frequent visits. Fortunately, we are dealing with teenagers who are adept and experienced with such communications and can travel on their own.

Section 16.92(1) Factors

a) Reasons for Relocation

- [46] By the end of this month, the parties will have no home and little savings other than the proceeds of sale that they have not yet agreed how to divide. The most that counsel for D.K.E. offered in that regard was that the proceeds secured M.L.E.'s potential entitlement to child support. But, as counsel for M.L.E. pointed out, his position will likely be that little support is warranted due to his low income. D.K.E. earned very little in 2020 and is not supporting the family in 2021. M.L.E. fears she cannot count on support from him in the future.
- [47] M.L.E.'s after-tax income is expected to be approximately \$6,000 per month. Based on her financial statement, her expenses will likely exceed that. Living rent-free in Hamilton will go a long way to providing more financial means and security for the short- and long-term needs of the children. It will go some way to reducing the financial pressure on M.L.E., which will also be good for the whole family including the children. It will also be good for the family while M.L.E. is moving into full-time work to have live-in support from her mother.

b) Impacts on the Children

[48] I have addressed that in the overview above. To summarize, there will be disruption, but M.A. is going to university in Hamilton and the boys are supportive of the move.

c) Time Spent with Each Parent

[49] In the past two years, as D.K.E.'s mental health and substance abuse issues worsened, his involvement with the children decreased. Currently, they are unwilling to spend time with him though hopefully this will change in the near future.

d and e) Compliance with Notice Requirements and Any Orders

[50] M.L.E. complied with the notice requirements under s. 16.9. There are no orders about where the children are to reside.

f) Reasonable Proposal About Decision-Making and Parenting-Time for D.K.E.

[51] Given the current relationship between the children and D.K.E., M.L.E.'s proposal is reasonable.

[52] D.K.E. accepts that he needs parental counselling and is pursuing it. Although there appears to have been some denial, he now apparently accepts he must take responsibility by getting appropriate treatment and he is doing so.

[53] The plan, when the children are ready, is to use counselling and video communication to assist with the re-introduction of D.K.E. into their lives. Hopefully this will progress into visits for D.K.E. with his children. M.L.E. indicates her willingness to support and participate in this.

Additional Factors in s. 16

a) Needs of the Children

[54] It is undisputed that the boys need to live with their mother. She needs to be able to build her financial situation to meet the family's short- and long-term financial needs. She can do this best from Hamilton.

[55] Hopefully D.K.E. will assist financially by rebuilding his career to its former levels and supporting his children and their mother.

[56] The children are old enough that they should be listened to regarding their needs. This has occurred in the report. They feel their needs will be best met in Hamilton with their mother.

b) Relationship with Other People in Their Lives

[57] The children have a strong relationship with their mother and each other. All four will be in Hamilton. The complexity of their current relationship with their father has been described.

- [58] Their relationships with maternal relatives have been fostered by summer and holiday visits. M.L.E. deposes to a list of her family members with whom the children have enjoyed time over the years.
- [59] As mentioned, they have a strong relationship with their paternal grandfather and his wife, and also with friends and sports and other activities in their community. In my view, however, such considerations are mitigated by their stated openness, and indeed support, for the move.
- c) Willingness to Support the Development and Maintenance of the Children's Relationship with the Other Spouse
- [60] I have described above M.L.E.'s willingness to support the children's relationship with their father in conjunction with professional help.
- [61] Finally, regarding ss. 16(3)(d)-(i), I have dealt with these considerations in detail above. Regarding s. 16(3)(f), cultural or religious considerations, these do not appear to be relevant.
- j) Family Violence
- [62] As described, M.L.E. and the children describe family violence and being afraid of D.K.E.
- [63] There have been no episodes of threats or violence in the past few months since D.K.E. stopped living with the family. However, if such issues continue in any way, this will obviously be of grave concern to the court going forward.

Falvai v. Falvai

- [64] In *Falvai v. Falvai*, 2008 BCCA 503, which was also a case in which a parent sought to relocate in an early application, the court held at para. 27:
- [27] In considering the application of *Gordon* to an initial application for custody, Saunders J.A. modified the analysis by limiting the application of the *Gordon* factors to those relevant to an initial custody application where one parent proposes relocating. In so doing, the Court considered the following factors from *Gordon* as being relevant to an initial application:
- (c) the desirability of maximizing contact between the child and both parents;
 - (d) the views of the child;
 - (e) 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;
 - (f) disruption to the child of a change in custody;
 - (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[65] In my analysis above, factors (c), (d), (e) and (g) have been given prominent weight and (f) does not apply. Factors (d) and (e) weigh strongly in favour of relocation. Factor (g) is very much mitigated in these circumstances by the children's current desires. Factor (c) is also complicated by the children's current desires regarding contact with their father and uncertainty regarding how they will feel about this in the future. Though it will likely be more difficult for them to rebuild their relationships from afar, this certainly can be done, and the parents both appear to have willingness and plans to do so.

Section 16.92(2)

[66] Finally, it is important to point out that, under s. 16.92(2), I am not to consider whether, if the relocation of the children were denied, M.L.E. would or would not relocate anyway without them.

[67] Currently there is no alternative to the children living with her. In these circumstances, s. 16.92(2) appears to virtually require that they be allowed to relocate with her because I cannot assume that, if relocation were denied, she would remain here.

[68] For the reasons already described, however, I have found that relocation is in the best interests of the children, even before taking into account this mandate not to consider whether M.L.E. would stay or go without them.

Conclusion

[69] For these reasons, the relocation orders sought by the plaintiff are granted.

"Coval J."

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