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Mah v. Mah

2020 BCSC 1630

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2020 BCSC 1630 Mah v. Mah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mah v. Mah,

2020 BCSC 1630

Date: 20201005

Docket: E190702

Registry: Vancouver

Between:

Alan Kar Fei Mah

Claimant

And

Patricia Karen Mah

Respondent

Before: Master Cameron

Oral Reasons for Judgment

Counsel for the Claimant appearing by teleconference:

R. Gallo

Counsel for the Respondent appearing by teleconference:

S. Sihota

Place and Date of Hearing:

Vancouver, B.C.

August 7th & October 5, 2020

Place and Date of Judgment:

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INTRODUCTION

[1] This is an interim application in a family law case respecting parenting time.

BACKGROUND

- [2] The parties began to live together in a marriage-like relationship in 2000 and married on July 10, 2004. They have two children together, twin boys, born December 1, 2007, J.D.M. and R.L.M.
- [3] The claimant is employed with the Vancouver City Police as a school liaison officer and the respondent is employed as a payroll coordinator.
- [4] The parties separated in September of 2018. The claimant now resides with his new partner and her adult son in Burnaby. The respondent also continues to reside in Burnaby at the former family home.
- [5] The affidavit evidence filed by both parties confirms that they are committed, active, and thoughtful parents. They have both been actively involved with their children and have, until separation, participated equally in the day-to-day activities with the children.
- [6] After separation, the respondent reacted negatively to the fact that the claimant had started a new relationship. In her view, that was something that did not need to and should not have happened and she does not wish for the children to spend more than one overnight with the claimant each week as a consequence.

Unfortunately, it appears that her upset about the claimant's new relationship has interfered with her objective consideration of the best interests of the children.

- [7] Following separation, the parties could not agree on parenting time and Master Taylor heard an application in July 2019. Master Taylor made an order that Mr. Mah would have parenting time with the children commencing Sunday at 1:00 p.m. until Monday at 6:00 p.m., on Tuesday from 9:00 a.m. until 10:00 p.m. during the summer, and 8:00 p.m. during the school year, and Wednesdays from 6:00 p.m. until 9:00 p.m. His Honour also ordered that the above schedule would reflect the status quo until the completion of Dr. Elterman's s. 211 report. The parties had agreed that Dr. Elterman would be selected as the author for that report.
- [8] There remains a difference of opinion between the parties as to whether or not the Wednesday evening parenting time was to be for an indefinite period, or whether it was only to run for the summer months in 2019. Nonetheless, the Wednesday evening parenting time has continued since the order was made.
- [9] The affidavit evidence also confirms that the children continued to do well during the latter half of 2019 and into early 2020. Dr. Elterman conducted his investigation and interviews and delivered his report to the parties on December 11, 2019.
- [10] Dr. Elterman concluded that both parents were very active and engaged with the children and that they both encouraged them to participate in a range of activities, although they differed with each other as to what those specific activities ought to be.

- [11] The report also confirmed that the parenting philosophy of the parties differ one from the other. Mr. Mah's partner was interviewed and Dr. Elterman considered her to be a positive influence on the children.
- [12] Importantly, the two children, who are bright and thoughtful, as it appears from the evidence, were interviewed by Dr. Elterman and both expressed attachment to both of their parents. They were not concerned about spending overnight time with their father although they may need some additional time to adjust to his new relationship. They do not complain of any lack of attention, support, or other concerns while they are with their father and his new partner.
- [13] The children both expressed a continuing interest in spending time with their father, including overnight time. In the course of the report and the interviews, they suggested to Dr. Elterman that they would, at this stage, wish to have two overnights with their father, but no more for the time being.
- [14] There is a suggestion in Dr. Elterman's report that Ms. Mah may be worried with the financial impact to her from a true-shared parenting arrangement as it may bear on child support. For the purposes of this application, it would not be appropriate to make any determination as to whether or not that is a concern and this may or may not be an issue if the matter proceeds to trial.
- [15] The collateral parties that Dr. Elterman interviewed in respect of each parent were all positive with their comments about each parent and their relationship with the children and their ability to provide them with support with their schooling and extra-curricular activities.

Dr. Elterman makes the following recommendations:

My recommendation in this case is for the parents to share joint guardianship and joint parenting responsibility. As I anticipate that there might be issues around the amount of the children's activities and other problems, I would recommend that they consider retaining a parent coordinator who can assist them by mediating and possibly arbitrating any disagreements. I anticipate that one of the things that a parent coordinator might do is either speak to the children or have someone else speak to the children to find out their level of comfort with each of the parents' views on the level of activity and thereafter draft a Determination to this effect. Other adjustments can be made by a parent coordinator.

With regard to the actual parenting time arrangement, I believe that it is unrealistic and not in the children's best interest, to limit the overnights in accordance with Ms Mah's views. I believe that her views are colored by the types of financial considerations that she has related to the boys which they have adopted. Also, I think that her resentment at Mr Mah is something that she needs to work through because she makes it clear that had he moved out on his own, she would have no concerns about overnights but the fact that he lives with Ms Sandri leads her to conclude that it is best for the children to have no overnights with Mr Mah. While the boys certainly take

into account their mother's views and preferences, I don't think that this necessarily resembles what they would independently choose or what is in their best interest.

It would be my recommendation, therefore, to consolidate the current arrangement and take into account Ms Mah's desire to have the children attend church on Sunday morning. I would, therefore, recommend that every week the children be with Mr Mah from Sunday at 1pm until Tuesday at 7pm. He would also have the children on Thursday from 6pm until 9pm. This would continue until the end of the school term in June 2020. In the summer I would recommend that they continue with the previous arrangement where he has the children from 1pm on Sunday until Tuesday evening but now that the Thursday will be from 6pm until Friday morning at 9am. This would then continue through the summer and start up again in September 2020 where the overnight on Thursday was added and he would take the children to school on Friday morning. I would recommend that in the summer each parent has the ability to select 10 days in July and 10 days in August when they will be off work and can have the children with them.

I would recommend that at the Christmas Break the transfer be done at noon on Christmas Day and that the parents alternate from first half to second half. The first half is the day after school ends until Christmas day and the second half is from noon on Christmas Day until 6pm on the day before school starts again. I would recommend that through Spring Break they continue with the arrangement as it exists during the school term. Any further adjustments can be made by the parent coordinator whom I have recommended be retained.

[16] Counsel for Mr. Mah submitted that these recommendations be implemented immediately.

[17] Counsel for Ms. Mah submitted that a far more cautious approach should be taken and that the recommendations ought not to be implemented pending a trial of this action, which is now set for five days commencing November 1, 2021.

THE LAW

[18] In making a determination regarding parenting arrangements , s. 37 of the Family Law Act governs and it reads as follows:

[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.

(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.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [19] Both counsel referred to a number of cases that comment on whether or not an s. 211 report and its recommendations ought to be implemented in advance of trial. In *M.D.L. v. P.T.M.*, 2012 BCSC, Master MacNaughton, as she then was, reviewed some of the matters that can be taken into consideration when deciding whether a then s. 15, now s. 211, report recommendations should be implemented in advance of trial. Her Ladyship noted:
- [10] Section 15 contemplates that a family counsellor, social worker, or other person approved by the court, who has had no previous connection with the parties to a proceeding, may conduct an investigation into a family matter (in this case, custody and access). The results of that investigation are reported to the parties and the court. As Justice Nathan Smith said, in *Johnson v. Skillen*, 2009 BCSC 209 at para. 8, such a report is a recommendation intended to assist the court but is not a binding determination of the matters reported on.
- [11] In some cases, the Court may decide to implement the recommendations contained in a s. 15 report in advance of trial. For example, advance implementation was ordered in *D.S.W. v. D.A.W.*, 2005 BCSC 1822. It was declined in *Johnson v. Skillen*, *supra* and in *McConachie v. McConachie*, 2008 BCSC 130. Each case is very much dependent on its own facts but, the following considerations are among those that can be taken from the cases:

- a) the time between the delivery of the s. 15 report and the date of trial;
- b) whether a party has concerns about the s. 15 recommendations and the seriousness of those concerns;
- c) whether the s. 15 report recommends a change in the status quo and the significance of that change; and
- d) whether there are other concerns about the reasonableness of the recommendations in the s. 15 report and the child's best interests.

DISCUSSION

[20] I will address the best interest factors I consider most pertinent, as follows.

- (a) The children's health and emotional well-being

[21] It is clear from Dr. Elterman's report and from the evidence relied upon by both parties that there is no issue but that each parent is engaged and has the children's health and emotional well-being top of mind.

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

[22] Dr. Elterman, in his interview with both of the children, discerned that they had a close attachment with each parent and reported that the two children wished to spend more time with their father than what is provided for in Master Taylor's order.

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

[23] As I have said, the children wish to continue to have a close relationship with both parents.

- (d) The history of the children's care

[24] The evidence discloses that prior to separation, both parents were equally and actively involved in the lives of both children. Unfortunately, that equality has changed since separation.

- (e) The children's need for stability, given their age and stage of development

[25] The children entered high school in September 2019 and are very active outside of school. It is clear that both parents will ensure that they are given the opportunity to participate in activities they enjoy within the limitations that must exist, both financially and in terms of not over-scheduling them.

- (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 children, to exercise his or her responsibilities

- [26] There is nothing in the evidence that would suggest either parent has had or will have any difficulty managing their parental responsibilities.
- [27] Family violence is not a consideration in this case and those factors need not be addressed.
- [28] Turning then to whether or not this is a case to implement the s. 211 report, I return to the factors that I enumerated from M.D.L. v. P.T.M.
- a) the time between the delivery of the s. 15 (now s.211) report and the date of trial
- [29] The s. 211 report in this case was delivered in December 2019 and the trial is set for November 2021. The delay in this matter coming on for hearing is as a result of the parties' failure to be able to come to a consensus about implementation of the recommendations, and since the application was initially filed in February of this year, the onset of the COVID pandemic.
- [30] The trial is 13 months hence.
- b) Whether a party has concerns about the s. 15 (now s. 211) recommendations and the seriousness of those concerns
- [31] Although counsel for Ms. Mah said that there may be a critique offered at trial of Dr. Elterman's recommendations there was very little offered in the written submissions or the oral argument that took any serious issue with any of the opinions and recommendations provided by Dr. Elterman or any concern about whether or not he had considered all of the relevant matters or had misunderstood any of the factual background from any of the witnesses, including the parties and their children.
- c) Whether the s. 15 report recommends a change in the status quo and the significance of that change
- [32] The report does recommend that the parties move to an equal parenting arrangement. The children have, prior to the separation, had the benefit of the care, guidance, and nurturing of both their parents in an equal fashion. Since separation, they have lost some of that support and contact with their father.
- [33] There has been in place for over one year an order that provides for one overnight visit with Mr. Mah, and there have been no reports of any issues that have arisen during that period of time. Dr. Elterman reports positively on the home environment that both parents provide for their children.
- [34] While any order that is made to vary the order of Master Taylor would, by its very nature, be a change in the status quo, that order itself provided that the matter would be reviewed afresh the s. 211 report had been provided. That makes this application appropriate and timely.

- d) Whether there are other concerns about the reasonableness of the recommendations in the s. 15 report and the child's best interests
- [35] I do not discern anything in the evidence or the submissions that were made to suggest that these recommendations would do anything but foster the best interests of the children.
- [36] Since the report was written, there has been, by virtue of the COVID-19 pandemic, a voluntary reduction in parenting time for Mr. Mah with the children.
- [37] Taking a careful and unselfish approach, , he chose not to exercise his parenting time in close physical proximity with them once his duties as a police officer required him to assist in community policing after the schools were closed in March 2020. Beginning in June 2020, he has resumed his work as a high school liaison officer, and he no longer would present a physical risk to the children and has not experienced any health issues during his parenting time since resuming them on and after June 2020.
- [38] Taking all of this into account, I am satisfied this is a case where the s. 211 report ought to be implemented at this time. The parties have limited resources and the children need to immediately resume a relationship with both of them that provides them with stability and predictability.
- [39] Whether or not the parties are able to resolve their other differences, it is not entirely clear to me that this matter will proceed to trial and it is necessary for the children to know over the course of the next 13 months pending trial that they will have a nurturing, supportive, and stable environment in both homes.
- [40] Accordingly, I make the following orders:
- [41] Effective Sunday, October 11, 2020, the children will be with Mr. Mah from Sunday at 1:00 p.m. until Tuesday at 7:00 p.m. They will also be with Mr. Mah on Wednesday from 6:00 p.m. until 9:00 p.m. That latter term deviates from what was recommended by Dr. Elterman, but takes into account the status quo, that is, the children have been spending Wednesday evening from 6:00 p.m. until 9:00 p.m. with their father, and not Thursday evening. I would not change the status quo in respect of that evening parenting time.
- [42] Dr. Elterman recommended that there be approximately six months with that parenting schedule from December 2019 until the end of the school year in June 2020. Commencing in July of 2020, Dr. Elterman opined that it would be in the children's best interest to spend an additional overnight with their father on Thursday evening from 6:00 p.m. until Friday morning at 9:00 a.m.
- [43] In the present circumstances where the children have not been spending as much time with their father as they had wished, and recognizing that they would both wish to spend two evenings with their father I will not order that recommended further overnight with their father immediately.

[44] I would encourage the parties to review and reflect objectively on how this revised parenting schedule has worked in the children's best interests by the end of this year and if the children have fared well then to implement the balance of Dr. Elterman's recommendations. If they cannot agree to do so, Mr. Mah has liberty to bring a further application before any presider.

COSTS

[45] I have concluded that this application was made necessary by a misapprehension by Ms. Mah of what is in the children's best interests. Bearing in mind that there was no real challenge raised by her to the recommendations of Dr. Elterman, and thus there was substantial success by Mr. Mah, he will have his costs of the application as a matter of ordinary difficulty.

"Master Cameron"

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