

CANADA / JUDGMENT

T.A.H. v. B.J.S.

2023 BCSC 1626

COURT

Supreme Court of British Columbia

DECIDED

4 August 2023

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2023 BCSC 1626 T.A.H. v. B.J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.A.H. v. B.J.S.,

2023 BCSC 1626

Date: 20230804

Docket: E222791

Registry: Vancouver

Between:

T.A.H.

Claimant

And:

B.J.S.

Respondent

Before: Master Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant (by video):

R. McQueen

F. MacLean

L. Ledesma (A.S.)

Counsel for the Respondent:

M. A. Magnusson

K. P. Matthews (A.S.)

Place and Date of Hearing:

Vancouver, B.C.

August 2, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 4, 2023

[1] THE COURT: These are my oral reasons for judgment delivered shortly after the application was heard. I have made some minor edits to make these reasons more readable in written form. The core analysis and the result have not changed. I have also redacted parts of these reasons to protect the privacy of the child involved.

Introduction

- [2] There were four notices of application before me, two from each party. The issue at the heart of this flurry of paperwork is where the parties' 13-year-old daughter, K., will live and attend school for the upcoming school year starting in September. As counsel for both parties articulated, this is a situation of two loving and capable parents who have a significant disagreement as to what is in K.'s best interests. There were several other issues raised in the respondent's applications, but the most contentious is that of K.'s schooling.
- [3] Since the parties separated in June 2021, they have been living separate and apart in the same home. They have had a shared parenting arrangement whereby K. has been spending alternating two-week periods with each of her parents. During the respondent's two-week parenting time, the claimant has largely been travelling to Ontario to spend time with her fiancé. The family home has now been sold, with a possession date of September 30, 2023.
- [4] After the sale of the family home, the respondent plans to move in with his father in [redacted] on a temporary basis until the parties resolve the division of their family property. The parties were divorced a couple of months ago, and the claimant is planning to marry her fiancé in September 2023 and move in with him in Midhurst, Ontario.

- [5] K. has just completed grade 8 at [redacted] secondary school. Both parties agree that K. did not have a good experience at [redacted] secondary school and that a change of school is appropriate. The respondent has enrolled K. at a new public secondary school, which is close to where he will be living and where some of K.'s elementary school friends attend. The claimant applies for an order that K. attend Pickering College, a private boarding school which is about a 45-minute drive from where the claimant will be residing in Ontario.
- [6] This matter is set for a nine-day trial in October 2024. A full report pursuant to s. 211 of the Family Law Act, SBC 2011, c 25 (FLA) has been agreed to, but not yet commissioned as the parties have not yet determined who the author will be.

Is this a relocation?

- [7] The respondent argues that the claimant's application for K. to attend Pickering College is really a thinly disguised relocation, without the claimant having complied with the relocation requirements of the Divorce Act, RSC 1985, c 3 (2nd Supp).
- [8] The claimant frames her argument as an application for directions under s. 49 of the FLA. She says that K.'s wish to attend Pickering is the impetus for this application. K. is not moving in with her, and K.'s principal residence will remain in BC.
- [9] Neither counsel provided any case law in which a court has considered whether a child going away to boarding school would be considered a relocation under either the Divorce Act or provincial legislation.
- [10] Section 2 of the Divorce Act provides that:

relocation means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility or who has a pending application for a parenting order that is likely to have a significant impact on the child's relationship with:

- (a) a person who has parenting time, decision-making responsibility, or an application for a parenting order in respect of that child pending; or
- (b) a person who has contact with a child under a contact order;

- [11] On a plain reading of that definition, this is a relocation. Having K. attend a boarding school where she will live, conveniently close to the claimant's new residence, will clearly have a significant impact on K.'s relationship with her father. The claimant proposes that she will pay for K. to return to BC for one four-day weekend per month plus holiday time. That is still a significant difference from the alternating two-week periods that she has been spending with her father for the past two years. As noted by the Supreme Court of Canada in *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 8:
- [8] Geographic distance reduces flexibility, disrupts established patterns, and inevitably impacts the relationship between a parent and a child .

Relocation

- [12] It is undisputed that the claimant has not complied with s. 16.9 of the Divorce Act regarding the notice to be provided of an intended relocation, either with respect to K. or with respect to the claimant's own relocation. The federal government has mandated both a process to be followed and a specific form to be used for giving such notice. It is important that the legislative framework be complied with.
- [13] That being said, s. 16.9(3) of the Divorce Act provides that the court may, on application, modify or waive the notice requirements for a relocation. The claimant has not made any such application, although I note that the respondent has had de facto notice of the intent to relocate.
- [14] The respondent invites the court to dismiss the claimant's application simply on the basis of her non-compliance with the relocation provisions, which I am inclined to do.
- [15] Were I to undertake the relocation analysis, the best interests of the child are the only consideration. In addition to the best interest factors set out in s. 16-3, in a relocation case the court is to also consider the additional factors set out in s. 16.9(2).
- [16] I am not going to go through each of the factors in detail. In my view, some of the important considerations are as follows.

The child's needs, such as her need for stability

- [17] Both parties acknowledge her need for stability. She has lived all her life in BC, close to where the father will be residing. She has been described as having experienced loneliness but has three friends in the area who attend [redacted] secondary school. The father's family is here, as is her equestrian trainer. K. has a mild learning disability with an individual education plan (IEP), and supports are available through the public school system.
- [18] K. has not previously lived away from home, and a boarding school environment away from both her parents would be new for her. The claimant's evidence is that Pickering College can provide an excellent education, including accommodating her IEP, and it also provides an equestrian program. I have no doubt about the quality of education that Pickering can provide, but that is not the only consideration. Attending Pickering would require considerable and frequent travel for K., both to and from her mother's home on weekends and to and from British Columbia once a month to see her father. Such travelling can take a toll, particularly on a child who also has homework and extracurricular interests.

The history of care

- [19] K. has been in the shared care of both her parents throughout her life, including equal parenting post-separation. If she attends Pickering, K. would be largely on her own and only with a parent on weekends and holidays.

The child's views and preferences

- [20] The claimant's argument is largely based on this point. Justice Iyer ordered that a "views of the child" report be conducted for the purpose of this application. I have read it carefully, and Mr. McQueen quoted from it extensively. K. has expressed to the report writer, Andrea Yeo, her very clear desire to attend Pickering College, and K.'s expressed views as an articulate 13-year-old have weighed heavily in my deliberations.
- [21] Ms. Yeo also says that K. seems to have taken on the burden of sorting out where she should live and what the visitation arrangements should be, and that this has put an immense amount of pressure on K.. Ms. Yeo also opines that K. may not fully understand the magnitude of moving from a two-week-on/two-week-off schedule to only seeing her father on holidays and summer vacations and how that will impact her current close relationship with her father.
- [22] Relocation is one of the most serious decisions the court is asked to make. It can have a lifelong impact on a child and her relationship with the non-moving parent. When granted at the interim stage, it can be tantamount to a final order. Courts are reluctant to grant relocation applications at the interim stage, particularly where the move would significantly reduce the non-moving parent's time with the child.
- [23] Making a relocation decision on an interim application is made all the more difficult by the lack of a complete picture before the court. In the case at bar, there is conflicting affidavit evidence with no opportunity for the assessment of credibility that occurs at trial when the court has the opportunity to hear from witnesses directly and under cross-examination. I have only a "views of the child" report, not the full evaluative s. 211 report that the trial judge will have.
- [24] On balance, after considering all statutory factors relating to the best interests of K., I have concluded that it is not her best interests to order her attendance at Pickering College at this time. K. has been in the middle of this dispute between her parents for two years. She is about to lose her family home, and her mother is remarrying. Additional changes such as moving away to live in a boarding school without either parent, several provinces away from her father who has played a significant role in her life, is not something I am prepared to order on an interim basis. Accordingly, the claimant's notice of application filed on July 20, 2023, is dismissed.
- [25] I recognize that K. will likely be disappointed with this decision, although counsel advised at the hearing that K. is currently on a waitlist for Pickering and may not even be offered a spot for this school year. I will reiterate my suggestion that counsel attempt to move up the trial date, if Supreme Court Scheduling can accommodate that, so that the trial completes in time for a decision to be made in advance of the next school year.

Counselling

- [26] The only other issue that was really in dispute was the respondent's application for an order for counselling, both for K. and co-parenting counselling for the parties. Both parents appear to agree that K. would benefit from counselling, and they have encouraged her to attend. However, in the "views of the child" report, K. has clearly expressed to Ms. Yeo that she would strongly prefer not to go to counselling now, but possibly in the future. I am not going to order counselling for K. against her wishes, as I see no benefit in that.
- [27] I hope that the parties follow Ms. Yeo's recommendations and continue to encourage counselling for K., including trying to find a counsellor who was a better fit than her previous counsellor. Ms. Yeo has also suggested journaling for K., which she may be more amenable to given her expressed interest in writing.
- [28] With respect to co-parenting coaching, limited submissions were made, and I am not ordering it at this time.
- [29] The remaining issues were largely resolved by agreement during the course of the hearing.

Disposition

- [30] In summary, I am making the following orders.
- [31] As indicated previously, the claimant's notice of application filed on July 20, 2023, is dismissed.
- [32] With respect to the respondent's notice of application filed on June 19, 2023, the orders sought in paragraphs 1 through 3 and 5 are duplicated or slightly changed in his subsequent notice of application filed on July 20, 2023. Paragraph 4 is moot as the camp dates have passed and was not spoken to. The applications for counselling for K. in paras. 6 and 7 are dismissed with liberty to reapply. Paragraph 8 was not spoken to. Paragraph 9 is granted as sought, as are paras. 10 and 11. Paragraph 12 is dismissed. Paragraph 13 regarding a parenting coordinator was only mentioned in passing and not really spoken to. Paragraph 14 was already addressed by Justice Iyer.
- [33] With respect to the respondent's notice of application filed on July 20, 2023, I make the following orders:
- Paragraph 1 is granted, except that it will be mutual, such that neither party is to change K.'s residence outside of the Lower Mainland except by mutual agreement or a further court order.
 - Paragraphs 2 and 3 are granted.
 - Paragraph 4 is granted by consent. In addition, each party will have the right to make day-to-day decisions and emergency decisions during the time that K. is in their care. In the event of an emergency, the parents making a decision will promptly notify the other parent.

- d) Paragraph 5 is granted such that K. will attend [redacted] secondary school for the 2023/2024 school year unless otherwise agreed between the parties.
- e) Paragraph 6 is granted by consent, with the modifications that the respondent's counsel described in submissions and are that if the planned travel is not more than a three-hour drive away from that parent's residence and the travel is to occur during that parent's parenting time, then notice only needs to be provided prior to the travel. The provision for 14 days' notice would only apply if the travel is more than a three-hour drive away, or if it impinged on K.'s school time or the other parent's parenting time.
- [34] Finally, with respect to costs, the respondent has been largely successful and in my view is entitled to his costs of these applications in the cause, unless counsel wish to make further submissions as to costs. Is there anything requiring clarification, or do either party wish to make submissions as to costs?

(SUBMISSIONS ON COSTS)

[35] THE COURT: I am still going to disagree with you, Mr. MacLean. I think the respondent has been largely successful, and costs are to the respondent in the cause. Thank you.

"Master Hughes"

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