

CANADA / JUDGMENT

T.M.V.D.L. v. P.A.M.T.

2023 BCSC 1747

COURT

Supreme Court of British Columbia

DECIDED

20 September 2023

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2023 BCSC 1747 T.M.V.D.L. v. P.A.M.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.M.V.D.L. v. P.A.M.T.,

2023 BCSC 1747

Date: 20230920

Docket: E57426

Registry: New Westminster

Between:

T.M.V.D.L.

Claimant

And

P.A.M.T.

Respondent

Before: The Honourable Justice Girn

Corrected Judgment: The text of the judgment was corrected on October 27, 2023.

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

D.O.F. Cross

Counsel for Respondent:

P. Ghai

Place and Date of Hearing:

New Westminster, B.C.

July 11, 2023

Place and Date of Judgment:

New Westminster, B.C.

September 20, 2023

- [1] On September 20, 2023, I provided brief oral reasons for judgment with more detailed reasons to follow. While I reserved the right to put my reasons in a more ordered format, the substance of my decision has not changed.
- [2] In this family dispute there is one core issue, the primary residence of the child. The sub-issues argued are dependent on the court's determination of this core issue.
- [3] The Claimant and the Respondent, are the parents of B.T. ("B."), who is almost thirteen years old. Given his age, all names have been anonymized to protect the privacy of the child.
- [4] The Claimant seeks the following orders:
 - a. pursuant to s. 44 of the Family Law Act (the "FLA") that the arrangement in regards to parenting time as set out in the Parenting Agreement, filed June 27, 2022, be set aside and replaced with one that is in the best interests of the child;
 - b. pursuant to s. 37 of the FLA that B. primarily reside with the Claimant;
 - c. pursuant to s. 37 of the FLA the Claimant be allowed to register B. at Garibaldi High School in Maple Ridge, British Columbia; and
 - d. pursuant to s. 152 of the FLA that if the Claimant has the primary residence of B. child support be paid by the Respondent in accordance with the Federal Child Support Guidelines.
- [5] The Claimant submits that it is in B.'s best interests that he primarily reside with the Claimant and that the Respondent be given reasonable parenting time so that he can continue to have relationships with his mother and siblings.
- [6] Presently, B. primarily resides with the Claimant pursuant to an interim order of Justice Ker from June 27, 2023. The Respondent has supervised parenting time.

- [7] At the time of this hearing, the Claimant sought to have B. enrolled in the high school near his home where B. will be able to receive support to assist him with learning challenges. I am advised that B. has since been enrolled at Garibaldi High School in Maple Ridge.
- [8] The Respondent opposes all of the orders sought by the Claimant.
- [9] For the reasons that follow, I find it is in B.'s best interests that he primarily reside with the Claimant. The Respondent will have reasonable supervised parenting time with a supervisor agreed upon between the parties. As well, any supervised parenting time may also occur with B.'s siblings. I also order that it is in B.'s best interests that the Respondent, her children, other family members have reasonable video or telephone calls with B. The Respondent will have an opportunity to apply for a review six months from the date of this order for consideration by the court for unsupervised parenting time.
- [10] In making this determination, I have given primary consideration to B.'s physical, emotional and psychological safety, security and well-being.

Background

- [11] The parties met in high school and were involved in an on again and off again relationship for approximately one and a half years. After a year of dating, the Respondent became pregnant. The relationship ended in the middle of the pregnancy.
- [12] B. was born in September 2010. He has two siblings from the Respondent's previous relationships. They live with the Respondent. B. also has a new step sibling, who is the Claimant and his current wife's child.
- [13] For most of his young life, B. has primarily resided with the Respondent up until recently as noted above. While the Claimant has been involved in B.'s life since his birth, it was not as frequent during the first few years.
- [14] Sadly, B. has had a great deal of instability in young life.
- [15] In 2015, when B. was five years old, he was removed from the Respondent's care and placed with his paternal grandmother. This arrangement was made pursuant to a voluntary care agreement after B. and his then three-year old sibling were found naked in a parking garage. The Respondent had left the children in the care of her mother, who was found to be intoxicated. B. lived with his paternal grandmother for approximately one year. During this period, the Claimant moved in with his mother to help care for B.
- [16] Eventually, B. returned to live with the Respondent and the Claimant was able to have regular overnight parenting time with B., which began as every other weekend and progressed to every weekend.

- [17] The Ministry of Child and Family Development ("MCFD") became involved once again in April 2019 in regards to concerns around school attendance, lack of focus at school, hygiene and the kids playing with rat poison. That file did not result in any action by the MCFD.
- [18] On April 24, 2019, an application was heard by Justice Marzari wherein the Claimant's main order was adjourned generally pending the results of an investigation by the New Westminster Aboriginal Child and Family Service Circle Community. Justice Marzari made an interim order providing specific parenting time for the Claimant. As well, a conduct order was made which included that the parties not talk to B. about the other parent.
- [19] In June 2019, the Claimant filed a notice of family claim in which he sought primary residence of B.
- [20] On June 23, 2022, the Claimant and the Respondent entered into a Parenting Agreement addressing parenting time, responsibilities and child support, among other things. The Claimant argues that since then there have been numerous breaches of this agreement.
- [21] Unfortunately, the MCFD once again became involved in regards to safety concerns surrounding the Respondent's children including B. These concerns arose as a result of the Respondent's younger child being in a car with the Respondent's mother while intoxicated. As well, there were issues relating to violence as a result of the Respondent's then boyfriend assaulting her. The Claimant says that despite a police order for the boyfriend not to attend her residence, the Respondent continued to allow him in her home in the presence of the children. This led to an incident during which her boyfriend was alleged to have thrown a chair at the Respondent's younger son with B. also present in the home. The Respondent says she is no longer in a relationship with the boyfriend.
- [22] As a result of these two incidents, the parties entered into a safety plan agreement with MCFD on November 8, 2022.
- [23] The safety plan also included conditions that there would be no one under the influence of drugs and/or alcohol in the presence of the children; C.T. (the Respondent's mother) was not to be left unsupervised with the children; and there would be no physical or verbal violence in the presence of the children.
- [24] After the safety plan was signed, the Claimant sought the Respondent's agreement for a s. 211 Views of the Child Report in respect of parenting arrangements. It appears that through correspondence between the Respondent and Claimant's counsel, the Respondent advised that she required time to research who would be best suited to write the report given B.'s learning disabilities. This took some three months. In January 2023, the Respondent proposed Lisa Low ("Ms. Low") to author the report. The Claimant agreed.

- [25] In addition to questionnaires completed by both parties, Ms. Low reviewed a school psycho-educational report from December 2022; the Parenting Agreement from June 2022; and a "safety concerns and parenting violations" chart created by the Claimant. Home visits were conducted, which included interviews with both parents. Finally, Ms. Low interviewed B. twice in her office with each parent present separately. Ms. Low's report indicates that B. understood that he could express his feelings about time spent in both parents' homes.
- [26] Ms. Low completed her report on May 15, 2023.
- [27] Having reviewed the Report, it is clear that the home environment provided for B. by each parent is very different as are the activities they do with B. while in their care. More notably, the Report reveals that each parent has very different parenting style, which the other parent disapproves.
- [28] However, in my assessment of what is in B.'s best interests, I must only consider the factors set out in s. 37 of the FLA. Although not determinative, it includes considering B.'s home environment at each parent's residence, the activities B. does with each parent, his interactions with his siblings and parenting styles of each parent.
- [29] In my analysis concerning B.'s best interests, I note the following points in Ms. Low's report as being relevant:

At his mother's homes he likes to spend time with his brother, and they play games together and talk about things. He likes his sister too. There are lots of cats and dogs at P.'s house. She has had boyfriends and one who was scary.

P. works at barns and B. sometimes goes with her and sits in the car.

B. said his two houses are different. He says there is no TV at his mother's living room, just couches. He often loses toys at P.'s house because it is messy and his siblings or the dogs take his stuff.

[30] Ms. Low also noted the following comments from B.:

P. has lots of technology at her house and "we are on it lots, for as long we want, sometimes six hours in the night.

[31] She noted that B. stated that his mother rests a lot, so "they all just go on their devices" and wasn't sure what time he goes to bed or gets up.

[32] B. also told Ms. Low that he and his siblings spend a lot of time at Granny's house [the Respondent's mother] and he likes it there. Although B. could not relay how many nights a week they spend at Granny's home, he thought they spent more time at Granny's than his mother's house.

- [33] In regards to his father's house, Ms. Low notes that B. likes to spend time with his father because he helps B. build his games and plays Lego with him. B. told Ms. Low that he likes to go for walks with his father. B. noted that he likes his father's house because "we do more stuff".
- [34] During both meetings with B., he told Ms. Low that he prefers to live with his father but that he would miss his brother. He noted that his father's house is clean and that his "father is around lots, is not tired and does not need to rest". Ms. Low's view is that neither parent influenced B. in terms of what to say to her.
- [35] Ms. Low notes that B.'s view is influenced by several factors including lack of structure and routine at the Respondent's home, time spent at Granny's house, B.'s relationship with his brother and his special needs.
- [36] It appears that despite the safety plan, Granny is still permitted to have the children unsupervised numerous times a week.
- [37] In her recommendations, Ms. Low noted that B. needs structure, consistency, and routine in order to flourish especially given his special needs. She does not believe the Respondent is able to offer B. the support he needs unless she were to make significant changes and offer long term commitment to this.
- [38] Ms. Low does not recommend shared parenting arrangement given the distances between the parents' homes. She also does not recommend home schooling.
- [39] Ms. Low recommends that B. live primarily with the Claimant but that there would need to be thought given to ensure he is able to maintain a relationship with his mother and siblings. Ms. Low also suggested that holidays be shared equally.

S. 211 Views of the Child Report

- [40] I acknowledge that children, particularly those under the age of 16 do not have a right to determine their living arrangements. It is the responsibility of the court to make that determination with regard to their best interests: D.J.S. v. J.M.D., 2014 BCSC 1143 at para. 39.
- [41] Section 211 reports, while not binding on the court, do act as the "eyes and ears" of the court and are an invaluable tool: D.L.M. v. A.L.F., 2022 BCSC 1874 at paras. 37-39. However, the trial judge should not abdicate its role in determining the best interests of a child in favor of the recommendations made by the s. 211 report writer: M.F.W. v. M.A.H., 2020 BCCA 284 at para. 22.
- [42] Facts set out in a s. 211 report are prima facie evidence of the truth of those facts: J.A.F. v. J.J.F., 2016 BCSC 300 at para. 113 and K.M.W. v. L.J.W., 2010 BCCA 572 at para. 50. As well, s. 202 of the FLA provides that hearsay evidence of a child that it considers reliable is admissible, having regard to the best interests of the child.

- [43] The Claimant submits that the court should give strong consideration to the recommendations made in the s. 211 report in assessing the best interests of B. in regards to parenting arrangements.
- [44] The Respondent does not agree with the findings in Ms. Low's report. Although she does not provide specific details, the Respondent submits that it is biased and that Ms. Low did not take into account the Respondent's concerns.
- [45] The Respondent says that right after she consented to the report being filed, she found an online review from a mother who had similar complaints and negative experiences with Ms. Low. The Respondent says she did not see this woman's reviews until after the report was completed. I note that it was the Respondent who proposed Ms. Low after spending months researching for the appropriate report writer having regard to B.'s unique needs.
- [46] Having reviewed the report in detail, I cannot agree with the Respondent. I find that Ms. Low considered the views of both parents which included the parents having to complete comprehensive questionnaires, visits at both parents' home with interviews conducted separately and with B. present. Ms. Low reviewed independent and objective reports from both B.'s school as well as MCFD. I find that Ms. Low's 18-page report was considered and balanced.
- [47] I am unable to agree with the Respondent that Ms. Low's report was biased and did not take into account her concerns. In fact, Ms. Low specifically relays both parents' concerns at pages. 12-13.
- [48] In regards to Ms. Low's report, I find B.'s statements to Ms. Low to be reliable. The evidence is consistent with observations made by Ms. Low during her visits to the parties' homes and with independent evidence.
- [49] Accordingly, I accept B.'s statements in the s. 211 Report as prima facie evidence as to the truth of their contents.
- [50] Given Ms. Low's recommendations, the Claimant proposed a change to the parenting time. The Respondent did not agree.
- [51] However, that did not end the matter. The Claimant once again became concerned about B.'s well being and brought an application without notice on June 27, 2023. Justice Ker made an interim order, without prejudice, that B. reside primarily with the Claimant until further order of the court. The Respondent was given reasonable supervised parenting time.
- [52] Justice Ker also provided for the Respondent to have any opportunity to vary or set aside the terms of this interim order. The Claimant's application was adjourned to July 11, 2023 when the parties appeared before me. The Respondent was also at liberty to apply to vary or set aside this interim order. Justice Ker also made certain conduct orders which included that the parties not speak to B. about time spent with the other parent, court or legal matters, and not blame, criticize or disparage the other parent to the child.

Discussion

[53] In family proceedings, I am guided by the three core purposes in modern family law:

- a) to assure the best interests of the child;
- b) to reduce conflict; and
- c) maintain, restructure and encourage family relationships

[54] As the parties were never married these applications are governed by the FLA.

Parenting Arrangements

[55] Pursuant to s. 37 of the FLA, the court may only consider the best interest of the children in making an order for parenting arrangements including parenting time.

[56] In arriving at my decision on the parenting arrangements being sought, I must apply the factors set out in s. 37 of the FLA.

[57] Section 37 of the FLA in its entirety reads:

Best interests of child

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.
- [58] Section 37(3) of the FLA provides that an order is not in the best interests of the children unless it protects, to the greatest extent possible, the children's physical, psychological and emotional safety, security and well-being.
- [59] While the factors set out in s. 37(2) must be considered separately, the evidence must ultimately be assessed as a whole: *M.W.B. v. A.R.B.*, 2013 BCSC 885 at para. 254.
- [60] Maximum contact with each parent is preferred as long as it is in the best interests of the child: *Young v. Young*, [1993] 4 S.C.R. 3. Maximum contact gives the child the opportunity to know both parents and benefit from a relationship with each: *A.P. v. S.T.*, 2019 BCSC 1780 as cited in *Gill v. Kaur*, 2023 BCSC 178 at para. 38
- [61] While not every factor in s. 37 of the FLA is relevant in this case, I will now address those factors I consider to be relevant in determining the best interests of B.

The child's health and emotional well-being

- [62] B. has special needs. He is on the autism spectrum and receives ongoing counselling and support at school. Having reviewed the evidence including Ms. Low's report, I am not satisfied that the Respondent has been able to adequately address B.'s health and emotional well-being while primarily residing with her.
- [63] This includes the Respondent's unwillingness to adhere to the parenting arrangement she and the Claimant entered into in June 2022. The Claimant's summary contains a long list of breaches of the parenting arrangement.
- [64] This includes multiple occasions where B. has been exposed to conversations between the parties surrounding parenting arrangements and the Claimant's desire to have B. reside with him. This has created unnecessary stress on B. where he is caught in the middle and feels he must choose one parent over the other. This is not conducive to B.'s emotional well-being.

The child's views

[65] I accept B.'s views as conveyed to Ms. Low as reliable. B.'s preference to live with the Claimant is an important but not a determinative factor in assessing his best interests.

The nature and strength of the relationships between the child and significant persons in the child's life

[66] While B. seems to have a close bond with both parents, I am of the view the time and effort the Claimant devotes to his relationship with B. is significant and important.

[67] It is clear that in addition to his parents, the other most significant person in B.'s life is his brother. In my view, it is important that B. be able to continue to maintain this relationship. However, in my view, it will need to be fostered outside of B. living with the Respondent. While his maternal grandmother plays an important role in B. life, any contact must be in a supervised setting.

[68] I am of the view that the Claimant is best suited to foster and encourage B.'s close bond with his siblings and maternal grandmother.

[69] B. also has close bonds with his paternal grandmother and his stepmother and baby step brother. These relationships are important and should also continue. In my view, the Respondent's opinion of the Claimant's spouse could sabotage B.'s relationship with his stepmother. I encourage both parents to understand the importance of working together and being positive role models for their child.

The history of the child's care

[70] While I accept that the Claimant was not as involved in B.'s life in the first five years and B. has primarily lived with the Respondent, it has certainly not been a stable one. As I have noted when B. was five years old, he was removed from the Respondent's care and went to live with his paternal grandmother for a year. At that point, the Claimant moved in with his mother and became more involved eventually leading to increased and regular parenting time. Since June of this year, B. has lived primarily with the Claimant.

The child's need for stability, given the child's age and stage of development and the ability of each parent to exercise his or her responsibilities

[71] As I have discussed above, B. has special needs. I am not satisfied the Respondent is able to provide the structure and stability B. requires in light of these special needs. This is particularly concerning when it comes to B.'s education.

- [72] I agree with the Claimant that as B. enters high school regular and timely attendance will become increasingly more important. The Claimant points to B.'s attendance for the 2022-2023 school year (during which time he lived with the Respondent). During this school year, B. was absent, late or dismissed early 74 out of 156 instructional days. This simply cannot continue if B. is to take advantage of the support he receives through one on one support and to thrive in high school.
- [73] I am also concerned with the Respondent's ability to carry out her parenting responsibilities in light of the fact that B. and his siblings spend a great deal of time being cared for by their maternal grandmother, which is a clear breach of not only the safety plan but also of the parties' amended parenting agreement of November 2022. It is also concerning that B. and his siblings are often left to occupy themselves while the Respondent is "resting" with no structured routines for bedtime, attending school and other activities.
- [74] On the other hand, I agree with Ms. Low's comments and accept that the Claimant is able to provide the stability, structure and support B. requires.

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

- [75] While there are no other incidents of family violence with the exception of the one involving the Respondent's former boyfriend, it is troubling that the Respondent chose to expose her children to him in direct contravention of a court order. I note that the Respondent does not deny this. In my view, choosing to put herself and the children in this situation demonstrates a disregard for the safety and welfare of her children.

Conclusion

- [76] In my view, B.'s young life to date has had tremendous instability. While the Claimant was not as involved in B.'s life in the early years, he is now in a position to provide the stability and structure B. will require as he enters his teenage years.
- [77] Accordingly, I conclude that it is in B.'s best interests that he primarily reside with the Claimant. It is important for him to maintain his relationship with his mother and siblings. This can be accomplished through supervised parenting time as set out in the order of Justice Ker from June 27, 2023.
- [78] In arriving at my decision on the parenting arrangements being sought by the Claimant, I have considered the relevant factors set out in s. 37 of the FLA. In doing so, I have also taken into account past parenting history of both parties and their relationships with B. I have also considered B.'s relationships with his extended family members, including his siblings and grandparents.
- [79] I have also considered the s. 211 Report including B.'s wishes.

- [80] While the parties may have agreed that the Parenting Agreement dated June 27, 2022 was appropriate at the time, it is not in B.'s best interests that it continue as it relates to parenting time. Accordingly, I will set aside those portions of the Parenting Agreement that address parenting time and will replace it with a new order.
- [81] Finally, I acknowledge that the Respondent is entitled to make improvements with the goal of unsupervised parenting time with B. Accordingly, I make an order that there will be a review in six months for this purpose.

Child Support

- [82] Section 147 of the FLA states that each parent and guardian of a child has a duty to provide child support, subject to exceptions, none of which are applicable in this case. The amount of child support must be determined in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines]: FLA, s. 150, Family Law Act Regulation, B.C. Reg. 347/2012, ss. 7, 8, subject to exceptions, none of which are applicable in this case.
- [83] Accordingly, given that B. will primarily reside with the Claimant, the Respondent will pay child support in accordance with the Guidelines.

Conclusion

[84] I make the following orders:

- pursuant to s. 44 of the Family Law Act (the "FLA") the portions relating to parenting time in the Parenting Agreement, filed June 27, 2022, are set aside. The remaining portions of the Parenting Agreement will remain in tact;
- pursuant to s. 37 of the FLA B. will reside primarily with the Claimant;
- The Respondent will have reasonable supervised parenting time with a supervisor agreed upon between the parties and any supervised parenting time may also occur with B.'s siblings;
- The Respondent, her children and other family members will have reasonable video and telephone calls with B.;
- The Respondent is at liberty to apply for a review six months from the date of this order for consideration by the court for unsupervised parenting time. I am seized for this review;
- pursuant to s. 37 of the FLA, B. will continue to be registered at and attend Garibaldi High School in Maple Ridge, British Columbia unless by agreement of both parties or court order;
- pursuant to s. 152 of the FLA child support will be paid by the Respondent in accordance with the Federal Child Support Guidelines.

Costs

[85] Given that the Claimant has had substantial success, he is entitled to his costs to be assessed on scale B.

"Girn J."

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