

CANADA / JUDGMENT

Toda v. Dorsey

2023 BCSC 2232

COURT

Supreme Court of British Columbia

DECIDED

11 August 2023

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2023 BCSC 2232 Toda v. Dorsey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Toda v. Dorsey,

2023 BCSC 2232

Date: 20230811

Docket: E48338

Registry: Penticton

Between:

Kristen Colleen Toshiye Toda

Claimant

And

Benjamin James Dorsey

Respondent

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

K.M. Robinson

Counsel for the Respondent:

V.J. Bonga

Place and Date of Trial/Hearing:

Kelowna, B.C.

August 11, 2023

Place and Date of Judgment:

Kelowna, B.C.

August 11, 2023

- [1] THE COURT: This is an application for relocation being brought by a mother. The parties were married and are now separated. They have a child who is going to start kindergarten soon. Given the time available, I am not going to be able to give full references to the material as I would normally do while pronouncing judgment. I thank counsel who have been able to go through the material and provide me with sufficient assistance to resolve the matter in the time that we had, which is always a difficult task.
- [2] Relocation cases are some of the most difficult matters this Court hears because it is often a dispute between two very reasonable people, wanting the best for their child, who are not be able to come to a decision. I appreciate in this case the parents have different views about the other party's parenting capacities and the history of parenting. That is not something that I need to comment on.
- [3] The cases, which I am not going to have time to identify, are very clear that relocation is a dramatic decision. It involves an important decision, and courts must take great care when deciding the issue.
- [4] There are cases that say, if possible, it should not be decided on an interim basis before trial. However, counsel for the claimant is correct in pointing out there are where the Court will decide the issue before trial. However, those cases are typically only where there exists a serious concern about protection of someone, circumstances involving urgency, or some other factor that would not actually result in a significant change in the amount of time that is spent with the non-relocating parent.
- [5] For a number of reasons, I have decided this is not a case that I can decide on an interim basis given the affidavit evidence before me.
- [6] A significant issue between these parties is whether they have always known that they were going to move to California. Their evidence on that differs in terms of whether they had an agreement, or whether it was just discussions, and if so, how serious those discussions were. It is unclear to me what the resolution to those disputes should be given the material; therefore, it is not something that should be decided based on affidavit material.

- [7] As counsel points out, there were unanswered emails and texts where the issue was raised, and it appears the relocating parent may not have responded. There may be a good reason for that, but that lack of response does not sit well with other facts, such as: they bought a house after those messages; facts about the permanent residency status, and; lack of indication that the mother has applied for the child to have U.S. citizenship. Those facts also seem inconsistent with there having been an agreement between the parties about relocating to California.
- [8] I am not suggesting those factors would necessarily be fatal to an application for relocation. However, whether they had an agreement, if that was well know, and if relocation was something they were planning for may affect how that evidence is perceived, and that is important to the resolution of the issue.
- [9] I am not satisfied that the Court can come to a conclusion on the issue based on the evidence filed. That is not a criticism; it is perhaps an inevitable difficulty when one party asserts the existence of an agreement and the other says there was no agreement. It is very difficult in that situation to determine that issue on the basis of their different interpretation and recollection of events in affidavits. Even when there are objective facts and events that are not disputed, the parties interpret and place different significance on those events.
- [10] The other complicating factors is the history of parenting is in dispute. I acknowledge that the primary caregiver has been the mother. She asserts that the father had minimal time, but he counters that by saying he attempted to get more parenting time which the mother rejected. They disagree about whether her denial of more parenting time was appropriate or not. She raises issues about what she says was his questionable judgment and that he complains about her refusing him parenting time without good reason.
- [11] What is positive in this case is that they got a parenting coach and they both agree things improved after that. Not enough time has passed with that parenting coach for the parenting situation to gel. In my view, the issue as to which parent should be the primary caregiver to respect the best interests of the child is highly relevant to whether relocation is in the best interests of the child.
- [12] I am not satisfied at this stage of the litigation that it is appropriate to make that decision on the basis of the evidence in front of me. Were I to order relocation, I would be essentially agreeing with the claimant that she should be the primary caregiver. That decision should be made on the basis of a holistic review of all the evidence relevant to the best interests of the child.
- [13] I appreciate that the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), stipulates that if the person opposing relocation does not have the majority of time, they have the burden to persuade the court that relocation is not in the child's best interests. However, on the particular facts in this case, I do not find it appropriate to decide the application on the basis of that reverse burden of proof. The reason is this case has come on very quickly. The parties have not even had a judicial case conference ("JCC"). There are cases where it may be justified to make a

relocation decision before a JCC, but there would need to be a demonstration that the relocation is urgent and, with respect, there is no urgency here.

- [14] School starts in September. This application was filed in June. Unfortunately, with the state of the Court now, that was an insufficient passage of time for the application to be heard. However, the child will be starting kindergarten, and that is not the same situation as needing to know where the child is going to attend high school, for instance. If it turns out that relocation is in the best interests of the child, and in a year the child starts Grade 1 somewhere else, I am not persuaded that change would have a detrimental impact on the child.
- [15] Therefore, I am not prepared to make a decision on the basis of the evidence in front of me. However, I am not suggesting a decision about relocation necessarily has to wait until trial, because I am aware that it is very difficult to get trial dates. I am also aware that it is very difficult to get a two-day hearing.
- [16] Accordingly, I am going to adjourn the relief sought in the application. The claimant, if she wants to, can have the matter set down again, and I will discuss later the time frame for that.
- [17] However, I find it is important that there be cross-examination on the affidavits before that hearing can take place, or, at the parties' choice, examinations for discovery. I also order that the parties must attend a JCC. These things have to occur before this matter is set down again.
- [18] I am not giving the parties leave to file new affidavits. They can cross-examine one another on the existing affidavits, and that could occur outside of the Court, in which case, the parties need to produce transcripts. I am giving them option because I am cognizant it is difficult to get two days in front of the Court in any jurisdiction on an urgent or on a quick basis.
- [19] Accordingly, I have said I am not going to make a decision on the basis of the evidence before me, and I have ordered certain processes that must occur first. I have made that decision because I am unable to determine if the parties had an agreement about relocation. This necessarily means I have not made a finding one way or another on the existence of the agreement, or the sincerity, or validity of the claimant's assertion that she needs to move sooner and cannot wait.
- [20] Unfortunately, I cannot bind Scheduling to give you any particular days for a hearing. I want the parties to know that I spoke with the head trial scheduler for the province for this Court and I spoke with the person responsible for Scheduling in this region. They will do their very best to find you a presider soon, but I know the situation is very difficult.

- [21] In terms of time frame, I order that if the claimant chooses to have the application for relocation set down again, that application cannot be set down before the beginning of January 2024. That should give enough time for there to be a cross-examination on the affidavits that have already been filed. I do not give leave for new affidavits, absent a court order.
- [22] I leave it to counsel to decide if they prefer to have cross-examination done outside the presence of the Court, and if that is done and you have transcripts, I would think you only need one day in court for this application. If you do not do that and you want cross-examination before the judge that hears the application, you need to schedule two days. I will leave that to counsel to discuss. I trust you will come to an agreement on that. If you cannot come to an agreement on that one singular issue, you can request a very brief hearing in front of me for 20 minutes, and I will resolve it, but I will go on counsel's representations. Do not file affidavits. You complete the online form for a request to appear before me. However, I strongly encourage you to come to an agreement.
- [23] I have also decided that if the parties prefer, you may schedule examinations for discovery instead of cross-examination, but I leave that in counsel's hands.

[DISCUSSION ABOUT ORDERS PRONOUNCED]

- [24] I confirm there cannot be any new affidavits filed on the issue of parenting absent a court order, for instance in the case of emergency. Counsel have confirmed they already have a date set for a JCC in October, and I am happy to hear they are continuing to see the parenting coach. I also confirm that I am not seized.

"Sharma J."

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