

CANADA / JUDGMENT

Y.L.M. v. J.B.M.

2022 BCSC 1522

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1522 Y.L.M. v. J.B.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Y.L.M. v. J.B.M.,

2022 BCSC 1522

Date: 20220830

Docket: E211592

Registry: Vancouver

Between:

Y.L.M.

Claimant

And

J.B.M.

Respondent

Before: The Honourable Madam Justice Tucker

Corrected Judgment: The text of this judgment was corrected at paragraphs 29, 32-35, 47, 50, 53, 56, 62, 64, 67, 68, 70, 72, 73, 75, and 77 on September 9, 2022.

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

November 16-19, 2021;

March 10, 2022;

May 17-18, 2022;

July 13, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 30, 2022

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I. Introduction

- [1] The claimant applied to enforce the terms of a separation agreement; the respondent cross-applied under s. 44(4) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], to vary the agreement. The separation agreement and portions of the respondent's notice of application were ordered to stand as pleadings and the matter was referred for trial.
- [2] The claimant seeks to enforce a term providing for the parties' children to attend school on the North Shore as of September 2022. The respondent seeks to vary that term to provide for the children to attend school in Gibsons.
- [3] A bottom-line decision was provided on July 13, 2022, to enable timely arrangements to be made.

II. Facts

- [4] The facts in this section are not in dispute except as noted.

A. Background

- [5] The claimant has Bachelor's and Master's degree in Fine Art. At present, she works for the Vancouver Israeli Folk Society teaching folk dancing.
- [6] The respondent is a physician specializing in internal medicine.
- [7] The parties met at university in Israel in 2005. They moved to New York City to further the respondent's career, and married there on December 4, 2006.
- [8] There are two children of the marriage: O. (born 2009), and N. (born 2013) (the "Children").
- [9] The parties separated on January 1, 2017. On February 1, 2018, the parties entered a comprehensive separation agreement that addressed, among other things, parenting arrangements (the "Agreement"). The parties were divorced by an order pronounced August 31, 2018.
- [10] The parties moved to BC from New York City in 2010. They had planned to reside in Vancouver, but the respondent failed to gain a licensing qualification required to work at an urban hospital. He was qualified to take a position at a rural hospital, so they moved to Gibsons.
- [11] The parties separated while living in Gibsons. Following separation, the claimant moved to Vancouver and the respondent stayed in Gibsons. That is where they respectively resided at the time of trial, although the claimant was looking for a place on the North Shore.

- [12] The Agreement provides for shared parenting with a minimum of 40% of the Children's time spent with each parent. In practice, the parties seek to establish a parenting time schedule that is equal. To date, they have come reasonably close.
- [13] The parties agreed the Children would continue to attend school in Gibsons following the separation. As of the trial, the regular school-year parenting time schedule had the Children with the claimant from Thursday evening through Sunday, and with the respondent from Sunday evening to Thursday. The schedule was made feasible by the claimant's home-schooling the Children on Fridays. In order to bring the overall annual allocation near equal, the claimant had the Children on professional development days, Monday statutory holidays, and for a majority of the time during school breaks.
- [14] The dispute centres on the following Agreement term (the "School Provision"):
- 4.4 Unless otherwise agreed to between [the parties];
- (a) [O.] will attend high-school on the 'North Shore' (i.e. North or West Vancouver) commencing in September 2022, and at that time [N.] will also attend school on the North Shore. The Parties will consult with each other and need to agree on which school the Child(ren) are to attend;
- (b) It is expected that [the claimant] will be residing on the North Shore by September 2022 so that [the Children] will be residing with [the claimant] during the school week, while still maintaining a shared parenting schedule; and
- (c) If the Parties cannot agree as to which school the Child(ren) will attend and/or how the shared parenting schedule needs to be amended to account for either Parents' possible change in residence, they will use the 'dispute resolution' provisions set out in Section 12, herein.
- [15] The claimant seeks to enforce the School Provision and the respondent seeks to vary it.
- [16] The parties re-partnered following their separation. Both new partners have children of their own.
- [17] In March 2018, the claimant began living with T. T. has a daughter: M. (born 2013). M. lives with the claimant and T. on a part-time basis under T.'s shared parenting arrangement with M.'s mother.
- [18] In March 2018, the respondent began living with K. K. has two sons: A. (born August 2009) and B. (born July 2013). The father of A. and B. also lives in Gibsons, and he and K. have a shared parenting arrangement. Under that arrangement, A. and B. live part-time with the respondent and K.

- [19] As it stands, A. and B. are at the respondent's house from Sunday afternoon through to Tuesday at 6:45 PM and every other Thursday, Friday and Saturday. Thus, at present, O., N., A. and B. are all together at the respondent's house from Sunday evening through Tuesday dinner and during the day on every other Thursday.
- [20] As it stands, M. is at the claimant's house every Wednesday and Thursday and on every other weekend. Thus, at present, O., N. and M. are all together at the claimant's house every Thursday evening and every other weekend.
- [21] O. and N. get along well with A., B. and M.
- [22] O. and N. have positive relationships with K. and T.
- [23] The respondent works Monday through Friday and his hours vary. He also has 10 on-call days each month, and during those days can be called in for emergency work at any time (24 hours a day).
- [24] The claimant works approximately four hours a week. Those hours are flexible and generally spread over two evenings a week.
- [25] O. has Crohn's Disease. He takes medication and has a restricted diet. O.'s medication recently changed to include an injection every two weeks. He suffers some anxiety about the injections.
- [26] O. is quiet and studious by nature. N. is a social child who makes friends easily. O. and N. both excel in academics. O. has a keen interest in film-making, stop-motion production and similar subjects.
- [27] A. is an outdoorsy and outgoing child. Notwithstanding their contrasting personalities, O. and A. have developed a close friendship.
- [28] O. and A. were in the same class in middle school. They will both enter high school in September 2022. Class schedules are idiosyncratic at the high school level in Gibsons.

B. Bolgar Report

- [29] The parties entered a consent order dated November 18, 2021 ("Consent Order"). The Consent Order required an "evaluative" Views of the Child Report regarding the possible implementation of the School Provision. The terms of the Consent Order specifically required the report to include an assessment of whether the Children's views had been influenced.
- [30] Dr. Ellie Bolgar filed a report under s. 211 of the FLA on February 28, 2022 ("Bolgar Report"). The trial reconvened to enable Dr. Bolgar to be cross-examined and to hear argument on her report and testimony. (As the respondent ultimately endorsed the Bolgar Report, his questions were in the nature of direct examination.)

- [31] I do not intend to canvas the claimant's objections to the Bolger Report. I do note that the cross-examination sought was warranted and that the clarification obtained by having Dr. Bolgar testify was of assistance to the Court.
- [32] The essentials of Dr. Bolgar's evidence are as follows: The Children love and respect both parties and are happy at both of their homes. The Children expressed concern about attending schools where they did not know anyone, about not knowing where they would be living on the North Shore, and about negotiating the route between home and school. O. expressed particular concern about losing his connection with A. Both Children said they would prefer to attend school in Gibsons, but indicated a willingness to accept whatever decision was made.

III. Positions

A. The Claimant

- [33] The claimant submits that the Children are both very bright and academically inclined and will significantly benefit from attending any of the strong academic schools in West Vancouver and North Vancouver proposed. She says that O., in particular, will benefit from attending a school offering advanced preparation and advanced placement courses for university. She proposes he attend a high school offering significant Advanced Placement courses or an International Baccalaureate program. She notes that the proposed schools offer diverse extracurricular programs, including in the subject area of film production. The claimant also submits that her work schedule enables her to be home with the Children after school hours.
- [34] The claimant also contends that residing on the North Shore during the school week will enable the Children to more fully interact with the Vancouver Jewish community and culture. Her evidence is that they would be able to take Jewish education, participate in Jewish youth programs, and observe and participate in more Jewish ceremonies and celebrations.

B. The Respondent

- [35] The respondent submits that attending school on the North Shore will be disruptive and destabilizing for the Children. He posits that it will be difficult for them to adapt to new schools, to adapt to living on the North Shore on school days and, for O. in particular, to make new friends. He stresses that Gibsons is the option the Children themselves prefer.
- [36] The respondent maintains the Children have built strong relationships with K., A. and B., and that it is against their best interests to alter those relationships. With regard to O. and A. in particular, the respondent portrays the boys as closely bonded. He attests that they play together constantly and that this has been helpful to O., describing him as having become more outgoing and confident under A.'s influence.

- [37] The respondent contends that the proposed North Shore schools are not significantly better than the schools in Gibsons. He notes that the Gibsons high school does offer one advanced placement class (calculus), that children go on to university from the Gibsons high school, and that there are some film-related activities in Gibsons.
- [38] The respondent testified that there are now several Jewish families in Gibsons, and they often join together to celebrate Jewish holidays. He maintains that the Children can observe the holidays and participate in Jewish culture during their time in Gibsons.
- [39] He notes that the Children's physician and dentist are located in Gibsons.
- [40] Finally, the respondent argues that the uncertainty as to where the claimant will reside on the North Shore and what the schools the Children would attend render it impossible to conclude that enforcing the School Provision would be in the Children's best interests.

IV. Legal Framework

- [41] Section 44 of the FLA includes the following:

Agreements respecting parenting arrangements

44 (1) Two or more of a child's guardians may make an agreement respecting one or more of the following:

- (a) the allocation of parental responsibilities;
- (b) parenting time;
- (c) the implementation of an agreement made under this section;
- (d) the means for resolving disputes respecting an agreement made under this section.

...

- (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

[Emphasis added.]

- [42] Section 37 of the FLA addresses the assessment of best interests. It provides:

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.
- [43] The parties differ as to whether the Agreement itself can be considered as a factor in the s. 44(4) analysis.
- [44] The claimant, relying on *Dosch v. Wimmer*, 2021 BCSC 2167 at para. 22 (citing *Leiding v. Leiding*, 2016 BCSC 2567), argues that deference can be extended to the Agreement in the analysis:
- [22] In *Leiding*, at para. 29, Justice Harris noted a degree of deference for the agreement parties negotiate and enter:
- [29] While I accept that the Family Law Act does not expressly incorporate the "material change in circumstance test" for variations of an agreement regarding parenting arrangements, in my view, it does not follow that the courts have an unbridled authority to vary such agreements at the request of one party. In *Miglin v. Miglin*, [2003] 1 S.C.R. 303, and

subsequent jurisprudence, the courts have emphasized that separation agreements, even in the unique circumstances of separation and divorce, are nonetheless contracts and should be given effect to: the courts should set aside the wishes of the parties as expressed in an agreement only where it is shown that the agreement fails to be in substantial compliance with the applicable legislative scheme. Although Miglin was decided in the context of spousal support, the principles expressed therein indicate that there must be compelling circumstances for overriding what the parties agreed to.

[Emphases added.]

[45] The respondent disagrees.

[46] In a case cited by neither party, *B.A.C. v. K.C.*, 2018 BCSC 2111, Gomery J. expressly considered *Leiding*, paras. 29-32 (see *B.A.C.* at para. 65). In *B.A.C.*, those paragraphs were argued to support the proposition that "the court should be reluctant to change a parenting arrangement contained in an agreement absent a material change of circumstances." Gomery J. concluded that those paragraphs of *Leiding* were obiter dictum. He went on to reject the argument that the court should be reluctant to change an agreement, instead adopting the reasons given in *Nijjar v. Gill*, 2017 BCSC 1362 at paras. 102-113, and *S.C.B. v. K.M.B.*, 2018 BCSC 1148 at paras. 51-53.

[47] I agree that *Leiding* para. 29 is obiter dictum. With respect to *Dosch*'s citation of it, neither *Leiding* nor the concept of deference were referred to in determining the variance application in *Dosch* (see paras. 24-25). Thus, even assuming that the citation in *Dosch* amounted to an implicit approval of *Leiding*, para. 29, that approval would itself constitute obiter dictum.

[48] In my view, s. 37 does not allow the Court to extend any deference of any kind to the Agreement as part of the s. 44 analysis.

[49] In *Nijjar*, Griffin J. (as she then was), stated as follows:

[111] ... The Respondent does not need to show a material change in circumstances. I accept that the Respondent has framed the legal test correctly in respect of the issues surrounding guardianship and parenting, namely: what are the best interests of the Child.

[112] The fact that the Parenting Agreement was entered into and the parties operated under it for several years is one of the background facts I can take into account when considering the best interests of the Child. But no court has yet passed on the issue of the best interests of the Child and that is the paramount consideration for this Court.

[Emphasis added.]

- [50] Griffin J.'s reasons in support of that conclusion included a consideration of FLA, ss. 37(1) and (3) (see Nijjar at para. 113(f)). Section 37(1) makes the best interests of the child the only consideration on an application under Part 4 of the FLA (which includes s. 44). Section 37(3) expressly reinforces that focus.
- [51] Giving weight to the parties' contractual expectations, in the guise of extending "deference" to the agreement in the s. 44(4) analysis, would be inconsistent with s. 37(1)'s use of the word "only". To paraphrase Griffin J., the existence of an agreement is a background fact, not a factor.
- [52] The existing agreement is relevant to the s. 44(4) analysis to the extent it may assist the court with the identification and assessment of needs and circumstances in considering best interests.
- [53] Should the court, following a fresh and full consideration of best interests, conclude that the available options present a "dead heat" in terms of best interests, the tie will go to the agreement. That is not due to any deference within the s. 44(4) best interests analysis. It is simply the consequence of failing to discharge the s. 44(4) onus to satisfy the court that the agreement is not in the best interests of the child.

V. Decision

- [54] I will begin by clearing some matters out of the way.
- [55] First, both parties addressed *N.R.G. v. G.R.G.*, 2017 BCCA 407 at paras. 39-41, in their submissions. The circumstances here are not akin to those in *N.R.G.*, where the trial court was found to have exercised parental responsibilities by making specific decisions at first instance. Here, the parties negotiated the School Provision. The matter before me is a particular dispute under s. 44(4) regarding the enforcement of that term.
- [56] Second, the status quo is not an option. The agreement to split parenting time during the school week depended on the claimant's ability to home-school. That arrangement cannot continue when O. is in high school. As of September 2022, the Children need to attend school five days a week, and thus must be in one place during school hours on school days. The issue is which of the two possible versions of enabling that is in the Children's best interests.
- [57] Finally, there are no family violence issues, the parties are capable parents, and they are both capable of the cooperation needed to co-parent. The best interests analysis here will focus on the FLA, s. 37(2)(a)-(c) and (e) considerations.

A. The Bolgar Report

- [58] I find the Bolgar Report of assistance, albeit in a rather indirect manner.

- [59] Surprisingly, the Children were only told that they might go to school on the North Shore shortly before their interviews. Further, given the respondent's position on the implementation of the School Provision, the called for consultation did not take place, no North Shore schools were settled upon and the claimant did not know where on North Shore she should live.
- [60] In the result, the Children were asked to express a preference between a vague hypothetical and something familiar. Dr. Bolgar agreed those circumstances would likely have a significant impact on their expressed preferences.
- [61] What is informative, however, is that even in those circumstances the Children's preferences were tempered and both indicated a willingness to comply with the decision ultimately made. All things considered, I find the Children's views on the matter to be fairly neutral.
- [62] I would not be inclined to place much weight on the preferences expressed in any event. The Bolgar Report failed to address whether the Children had been influenced. Dr. Bolgar testified that she would have commented had she concluded the Children were influenced. That does not satisfy me she turned her mind to the issue and explored it adequately with the Children. I note that I share the claimant's skepticism given the respondent's knowing disregard of my witness exclusion order.

B. The Resiliency of the Children

- [63] Much of the respondent's argument rests on his assertion that the Children will find it difficult to deal with change. The evidence does not bear out that assertion.
- [64] The Children adapted to the separation, to the claimant's move to Vancouver, and to moving out of the previous family home in Gibsons. O. saw a counsellor very briefly following the separation, but had no need to continue. N. did not have any counselling. The Children readily accepted their parents' new partners, as well as those partners' children. They have successfully merged into two new blended families and now happily reside in two households where step-siblings come and go over the course of each week. Throughout these many changes, the Children have thrived.
- [65] O. has a circle of friends in Gibsons. While he has not made friends in Vancouver to date, he has neither attended school in Vancouver nor been involved in regular programs and activities there, which are common opportunities to make friends. While O. is a naturally quiet child, he has become more confident and more social in recent years. N. is a quite social child who interacts with ease, and neither party has concern about her ability to make new friends at a new school.
- [66] In my view, the Children are very resilient and deal well with change.

C. Maintaining Relationships

- [67] The respondent contends that a move from the present parenting schedule to a North Shore school parenting schedule will fundamentally alter his relationship with the Children. I do not accept that. The Agreement provides for a 40% minimum allocation. The practice of trying to set an annual 50/50 overall allocation will continue. The respondent failed to explain how or why it is that he would be unable to maintain his connection to the Children and his involvement in their lives if they do not spend mid-week evenings with him during the school year. Since separation, both parties have fully maintained their relationships with the Children.
- [68] No matter where the Children attend school, the change to the parenting-time schedule required for full-time attendance will impact the present pattern of overlap with A., B. and M. No matter where the Children attend school, the changed schedule will continue to result in significant overlapping household time with A., B. and M. (There is also the reality that A., B. and M.'s shared parenting arrangements may themselves vary over time.)
- [69] The respondent overstates the impact that a North Shore school schedule would have on the Children's relationships with A., B. and K. The Children and A. and B. have only ever had partially overlapping days in the respondent's house. They will continue to have overlap, albeit on different days. K. will continue to be in the household whenever the Children are in Gibsons.
- [70] Even if O. went to high school in Gibsons, he and A. would not be in the same classes. A North Shore school schedule would give O. and A. the ability to socialize on weekends, which is in keeping with peer socialization at the high school level. Further, given that A.'s father lives in Gibsons, O. and A. will likely be able to spend time together even on weekends when A. is at his father's house. There is a good chance that a North Shore school schedule would allow O. and A. to actually spend more time together than a Gibsons school schedule would.
- [71] Finally, K. is a teacher at a middle school in Gibsons. She does not work on weekends or school breaks. Under a North Shore school schedule, the Children's time on Gibsons would be weighted toward weekends, school holidays and school breaks, all periods when K., A. and B. would have time to socialize.

D. Jewish Community and Cultural Involvement

- [72] I accept the respondent's evidence that some Jewish families in Gibsons now observe Jewish holidays together. That experience is different, however, from the more involved type of Jewish education and youth programs experience addressed in the claimant's evidence.

- [73] I am satisfied that it would be beneficial for the Children to have the experience of participating in the more in-depth cultural and community activities described by the claimant. Those activities will enable them to more fully experience the Jewish culture and to better relate to their extended family, many of whom continue to live in Israel. I note that the Agreement specifically provides for the Children to visit Israel and their family there.

E. Attending a School with Advanced Academics

- [74] The claimant and respondent are university educated. The Children are being raised in families that value post-secondary education. Both parties have academic and educational expectations for the Children. I am satisfied that these shared expectations informed the agreement to include the School Provision in the Agreement.
- [75] Without doubt, many children from the Gibsons high school will go on to post-secondary education. The issue is not the comparative quality of the school programs in the abstract. The question here is particular: what is in O. and N.'s best interests?
- [76] O. is a very bright child, is studious by nature and enjoys academic pursuits. He also has a keen area of interest - film-making - that lends itself to group work, including through clubs and programs. Those facts persuade me that O., as a high school student, would be better-served attending a school with a focus on academic achievement, that offers advanced courses and programs, and has specialized extra-curricular activities.
- [77] While N.'s interests and strengths are less clear at this time, she is also a bright child and will likely benefit from an academic focus in turn. She will, in any event, benefit from having a parenting-time schedule that matches O.'s.
- [78] Although specific schools have yet to be identified, that is because the respondent's position displaced the School Provision consultation. The claimant has identified the type of schools under contemplation and the type of programs they offer. She will choose a North Shore neighbourhood depending on the selected schools. That is sufficient to enable the best interests assessment to be made in the circumstances of this case.

F. Health-related Matters

- [79] O. has a serious health issue. Both parties are very attentive to it. The respondent, as a physician, is well-positioned to monitor O.'s condition and continuity of care. His anxiety about injections is being addressed and is not a factor here.
- [80] If it is necessary for the Children to continue to see their present physician or dentist in Gibsons, the claimant's employment enables her to take the Children to Gibsons during the school week. If that continuity is unnecessary, and it is more convenient for the Children see more conveniently located health-care providers during the school week, replacement providers can be agreed upon through consultation.

VI. DISPOSITION

[81] On consideration of all of the above, I am satisfied that it is in the Children's best interests for the School Provision of the Agreement to be enforced.

"Tucker J."

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