

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chiu v. Chiu*,  
2021 BCSC 281

Date: 20210223  
Docket: E201562  
Registry: Vancouver

Between:

**Ernesto Tadad Chiu**

Claimant

And

**Leilani Pasok Chiu aka Leilani Matildo Pasok**

Respondent

Before: Master Muir

## Reasons for Judgment

In Chambers

Counsel for the Claimant, appearing by  
teleconference:

B. Walkinshaw

Counsel for the Respondent, appearing by  
teleconference:

M. Dyonisius

Place and Date of Hearing:

Vancouver, B.C.  
February 1, 2021

Place and Date of Judgment:

Vancouver, B.C.  
February 23, 2021

**INTRODUCTION**

[1] There were cross applications before me, dealing primarily with parenting issues. The parties have not yet attended a Judicial Case Conference, but obtained an exemption for the purposes of these applications.

[2] The respondent seeks an order pursuant to the *Family Law Act*, S.B.C. 2011, c. 25 [FLA], that the claimant have parenting time with the child of the marriage from Friday at 3 p.m. to Sunday at 3 p.m. every week. She also seeks an order that the child be primarily resident with her and the parties have joint parenting responsibilities, with her having the final decision if there is a dispute.

[3] Some of the relief sought by the respondent in her notice of application was granted in a prior hearing, specifically, that the parties are guardians of the child and that the proceeding be transferred to the Supreme Court Registry at New Westminster for all purposes.

[4] The respondent adjourned her applications for disclosure and for a *FLA* s. 91 restraining order.

[5] The claimant seeks orders under the *Divorce Act*, R.S.C. 1985, c. 3 and the *FLA* for joint custody, shared residence, and shared parenting time on a one-week-on/one-week-off basis. In addition, he sought an order that the child remain enrolled in the Junior Einstein’s Academy. The claimant adjourned his application for make-up parenting time.

**BACKGROUND**

[6] The parties were married on May 21, 2012 in the Philippines. They have a daughter together, Elena, born May 30, 2016.

[7] Apparently, the parties separated for a short time in 2018, but reconciled.

[8] They finally separated in or about January 2020, but remained residing in the same house. The respondent alleges that she finally had to leave the house on August 28, 2020 due to incidents of family violence perpetrated by the claimant. The

claimant denies that he was violent to the respondent and asserts that she was aggressive and verbally abusive with him, yelling and complaining, and blocking his path.

[9] The claimant has four adult children from prior relationships. One of the adult children lives in Japan. The other three are from the claimant's former marriage and reside in BC. Two of these three adult children, Fiona and Elijah, live with the claimant and the claimant's sister, Alicia. The other son, Ernest, lives in his own apartment.

[10] There are affidavits from all three of the children who reside in BC.

[11] Ernest deposes that he is a registered massage therapist working in private practice and that he also works for CDI College as a primary instructor and program coordinator for the massage therapy program. He is 31 years old. His evidence is that he has regularly cared for Elena and enjoys playing with her and taking her on outings. He says they have a strong bond and he loves her dearly.

[12] Fiona deposes that she is a registered nurse employed by the Fraser Health Authority. She is 28. She too, deposes to an involved and loving relationship with Elena, including providing sole care for her on occasions. She also brings evidence that Elena has a great relationship with both of her brothers, Ernest and Elijah.

[13] Elijah is the youngest of the adult children at 24. He is presently enrolled at Kwantlen Polytechnic University and works for a food courier business. He too has looked after Elena by himself, including at the request of the respondent. Elijah deposes that he and Elena have a great relationship that is active and loving.

[14] The respondent brought considerable negative evidence about these children. Particularly about Elijah, who she paints as depressed, insular, irresponsible, and unclean.

[15] I accept that Elijah was depressed in the past. I do not accept the picture that the respondent paints of him now. Nor do I accept that any of these children would

neglect or intentionally harm Elena. They are all adults, they have all looked after Elena by themselves on more than one occasion, including at the request of the respondent.

[16] My conclusions regarding the three adult children are important, as the claimant's evidence is that when he is at work, Elena is taken care of by her half siblings (the claimant's three adult children), her aunt (the claimant's sister), and the Junior Einstein's Academy (when COVID-19 precautions allow) where she is enrolled in a daycare/pre-school program.

[17] Just prior to the respondent leaving the former family home in August 2020, the claimant advised that he wanted one-week-on/one-week-off parenting time with Elena. The respondent did not agree with this parenting time arrangement, but said she went along with it in order to avoid antagonizing the claimant.

[18] Just prior to separation, as she says her work schedule was not uniform, the respondent enrolled Elena in the Junior Einstein's Academy. The claimant agreed with this decision. I gather there is a government subsidy available to the parties for this program.

[19] In October 2020, the person who the respondent was covering for returned to work and the respondent's work schedule is now such that she consistently works weekends. I note her evidence, however, that:

A week on/week off parenting arrangement would be difficult for me to manage financially because I cannot change my work schedule week to week without losing shifts, I need to commit to a regular fixed weekly schedule.

[20] Thus, it appears that different schedules might be available to her and she has selected the present schedule to suit her needs.

[21] In any event, due to her changed shifts, the respondent sought to change the parenting time schedule and, in particular, unilaterally sought to terminate Elena's enrollment in the Junior Einstein's Academy. The claimant did not agree.

[22] Although the Junior Einstein's Academy is not active at the moment due to the COVID restrictions, the claimant wants to keep Elena enrolled for three reasons:

- to provide daycare for Elena when he is working;
- so that Elena can maintain relationships with the children she has met there; and
- because the Junior Einstein's Academy will provide Elena with a routine schedule and a strong educational foundation for attending kindergarten and eventually school.

[23] The respondent has suggested that if she had Elena during the week, daycare/preschool would not be necessary and she would take her to the School Board's Strong Start program instead. The claimant does not believe that the Strong Start program is as educationally advantageous for Elena.

[24] During November and December 2020, I gather that the respondent unilaterally withheld Elena from the claimant for some periods of time. It is not clear to me on what basis she did so, although she herself may have tested positive for COVID in December 2020.

[25] Her position seems to be that Elena should be "with a parent", i.e., with her, rather than with a sibling or in pre-school. Her view is that the parenting time schedule should therefore revolve around her present work schedule. She argues that the claimant just wants shared parenting time to minimize any child support obligation or to satisfy his ego.

[26] The claimant disagrees. He seems to suggest that the respondent is intentionally underemployed and is using Elena as a rationale for keeping her shifts to a minimum. He argues that Elena is entitled to as full a relationship with him and his family as with the respondent.

[27] In her counterclaim, the respondent succinctly sets out her views of the claimant as a parent:

The claimant is not able to care for the child as he has added responsibilities towards his three children by his first marriage; they had issues when the claimant cared for the child; one of them is addicted to video games and suffers from depression and on medication. The claimant works seven days per week in two different jobs. During the weekends, he is busy drinking and gambling/cockfighting; he had not taken care of the child while living together. When the child is with him, he leaves her to play with “Tablet” while he goes to sleep. Also, he relies on his depressed/unemployed son to care for the child. Based on his drinking/gambling habits and busy work schedules, leaving the child with him on a full-time basis on alternate weeks is detrimental to the best interests of the child.

[28] These views, along with allegations of family violence, were echoed and amplified in her affidavit materials.

[29] For his part, the claimant responds:

The current 50% one-week-on/one-week-off parenting time schedule is not an unsafe plan for the child.

The respondent was not the primary caregiver for the child as the Parties shared care of the child during the relationship.

The Claimant is able to care for the child.

The Claimant’s three children by his first marriage are all adults.

None are addicted to video games.

The Claimant’s youngest son was depressed when his mother died. He received treatment and is doing well. He is in school at Kwantlen Polytechnic University.

The Claimant does not work seven days per week. He works Monday to Friday, either 7 am to 3 pm, or 8 am to 4 pm.

The Claimant is not busy on the weekends with drinking.

The Claimant does not attend cockfights on the weekends.

The Parties shared care of the child during the relationship.

The Claimant does not leave the child to play with a Tablet while he goes to sleep.

Facilitating a full parenting time schedule between the child and her father is in the best interests of the child.

[30] Again, all echoed and amplified in his affidavit material.

**ANALYSIS**

[31] The law is not in dispute. The application of the respondent is governed by the provisions of the *FLA* and, in particular, s. 37, which provides:

- 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.

[32] As the claimant also relies on the *Divorce Act*, the provisions regarding custody in that *Act* are relevant, particularly:

Order for custody

16 (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

Interim order for custody

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

...

Factors

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

...

Maximum contact

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[33] As instructed by the *Divorce Act*, s. 16(8) and the *FLA*, s. 37, it is only the best interests of the child that are important here.

**A. FLA s. 37 Considerations**

[34] Although the respondent appears to consider the COVID-19 precautions and ordinary childhood sniffles as precluding regular parenting time, this is not so. The residents of the claimant’s house would be considered to be a part of Elena’s “bubble” for COVID-19 precaution purposes. The cases are clear that COVID-19 precautions are not to be used as an excuse for pre-empting parenting time.

[35] Other than that, Elena appears to be healthy and happy.

[36] Although Elena is too young to consult on her views—and I caution that the parties should not do so—it seems clear that she loves both her parents and enjoys

spending time with both of them. Elena also appears to have a strong bond with her adult half siblings. It is clear from the affidavits of the claimant's adult children that they have a loving and caring relationship with Elena.

[37] As to the history of child care and the ability of each of the parties to care for Elena, obviously, the parties' evidence completely diverges on this point. I cannot conclude, however, despite urging particularly from the respondent, that either party is an unacceptable or incapable caregiver. Elena has been in the care of both the respondent and the claimant before and since their separation. I see no reason why she should not continue to do so.

[38] As to family violence, it is not possible for me to determine whose version of events is accurate. What I do conclude is that if there was family violence, it was situational and not directed at Elena. Nor was Elena the initiating factor. Thus, I conclude that family violence is not a factor in my decision.

[39] The parties appear to be able to cooperate sufficiently that this is not a major concern.

[40] Although there are no civil or criminal proceedings relevant to this decision, there is a criminal issue that is of concern. The evidence satisfies me that the claimant has, at the very least, participated in cockfighting as a spectator and gambler. He may well have raised or kept chicks or roosters used in cockfighting. He has what he calls "souvenir cockfighting spurs" in his bedroom. He has friends who seem to own cockfighting arenas and raise cockfighting roosters.

[41] The claimant's lawyer dismissed this as a cultural interest. That, however, is not acceptable. Cockfighting is vicious and cruel. In Canada, it is a criminal offence. Simply being present at a cockfight might be sufficient to be convicted of an indictable offence punishable by up to five years in prison, or to a summary offence with a fine of up to \$10,000 and up to two years less a day in prison.

[42] The *Criminal Code of Canada*, R.S.C. 1985, c. C-46, provides:

- 445.1 (1) Every one commits an offence who
- (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;
  - (b) in any manner encourages, aids, promotes, arranges, assists at, receives money for or takes part in
    - (i) the fighting or baiting of animals or birds, or
    - (ii) the training, transporting or breeding of animals or birds for the purposes of subparagraph (i);

Punishment

- (2) Every one who commits an offence under subsection (1) is guilty of
- (a) an indictable offence and liable to imprisonment for a term of not more than five years; or
  - (b) an offence punishable on summary conviction and liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years less a day, or to both.

...

- (4) For the purpose of proceedings under paragraph (1)(b), evidence that an accused was present at the fighting or baiting of animals or birds is, in the absence of any evidence to the contrary, proof that he or she encouraged, aided or assisted at the fighting or baiting.

[43] While the claimant admits that he has gone to cockfights in the past and there are text messages evidencing that, he says that that is behind him and he has not attended any since 2019. He has not taken Elena to cockfights, although it appears that he may have taken her to a farm or farms where such fights are staged.

## DISPOSITIONS

[44] Suffice it to say, it is not in Elena's best interests to be exposed to cockfighting or any other criminal activity.

[45] Thus, I will make a conduct order under s. 227 of the *FLA* as follows:

1. The claimant shall not expose Elena to any birds or paraphernalia associated with cockfighting and he shall not allow others to do so;
2. The claimant shall not allow Elena to be on any property where cockfighting has occurred or may occur, whether or not the cockfighting takes place when she is present on the property;

3. The claimant is not to keep or raise roosters to be used in cockfighting or to be given to persons associated with cockfighting;
4. The claimant will not allow Elena to have contact with roosters or chicks intended for cockfighting; and
5. The claimant will store any cockfighting paraphernalia, including “souvenirs”, safely and in such a manner that Elena cannot access them.

[46] With those conduct orders, I do not consider that there is anything in the past conduct of the parties that is particularly relevant.

[47] What is important is to protect Elena and see, as best as it can be, that she has as productive, loving, and fulfilling a relationship with each party as possible.

[48] I do not agree with the respondent that unless Elena can be looked after by the claimant himself, that Elena should be with her. The respondent almost seems to view the claimant’s other children as strangers to the family unit, but they are Elena’s half siblings. I do agree that she is entitled to a full and rewarding relationship with the claimant and her half siblings.

[49] Given that the respondent is presently working weekends, it makes no sense to have a standard shared parenting order of one-week-on/one-week-off or 5/2/2/5. That may be appropriate at a later date.

[50] It may be that the respondent has structured her work week in order to deny parenting time to the claimant. I cannot conclude that on the evidence, but I would not condone that.

[51] I have concluded, however, that it would be in Elena’s best interests for the parties to have shared parenting and interim parenting time as follows:

1. The claimant will have parenting time with Elena each week from either 3 p.m. or after pre-school or school on Thursday until 3 p.m. on Sunday. If Monday is a holiday, his parenting time will extend to 3 p.m. on Monday.

2. The respondent will have parenting time with Elena each week from 3 p.m. on Sunday, unless Monday is a holiday, in which case it will be 3 p.m. on Monday to 3 p.m. or after pre-school or school on Thursday.

[52] These parenting times may be varied either for specific days or generally, but only by agreement in writing between the parties or further court order.

[53] This order is made under the *FLA* and is reviewable as set out therein. In particular, should the respondent's days of work change, there is liberty to apply.

[54] I also conclude that Elena's experiences in the Junior Einstein's Academy will be beneficial for her transition into kindergarten and eventually school. She will be five years old in May, so those transitions are imminent. I understand that the Junior Einstein's Academy is not presently active due to COVID precautions. When it returns to regular functioning, I believe that it would be in Elena's best interests to attend regularly and I so order. The parties should share daycare and preschool costs, as s. 7 special and extraordinary expenses, in accordance with their incomes.

[55] Other than that, the parties shall, on an interim basis, share the parenting responsibilities pursuant to s. 41 of the *FLA*. In addition:

1. Each of the parties is obliged to advise the other of any matters of a significant nature affecting Elena;
2. Each party is obliged to discuss with the other any significant decisions that have to be made concerning Elena, including significant decisions about health (except emergency decisions), education, religious instruction and general welfare;
3. The parties are obliged to discuss significant decisions with each other and to try to reach agreement on those decisions;
4. In the event that the parties cannot agree on a significant decision despite their best efforts, the parties have leave to apply for directions or orders from the court; and

5. Each party will have the right to obtain information concerning Elena directly from third parties, including but not limited to, teachers, counsellors, medical professionals and third party caregivers.

**COSTS**

[56] Given the mixed success, costs of the applications will be in the cause.

“Master Muir”