
CANADA / JUDGMENT

A.K. v. J.R.J.

2019 BCSC 868

COURT

Supreme Court of British Columbia

DECIDED

26 April 2019

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2019 BCSC 868 A.K. v. J.R.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.K. v. J.R.J.,

2019 BCSC 868

Date: 20190426

Docket: E112356

Registry: Vancouver

Between:

A.K. also known as T.A.K.

also known as A. (T.) K.

Claimant

And

J.R.J. also known as J.J.

Respondent

Before: The Honourable Mr. Justice G.C. Weatherill

Oral Reasons for Judgment

Counsel for the Claimant:

N.D. Allen

Counsel for the Respondent:

J.L. Page

Place and Dates of Hearing:

Vancouver, B.C.

April 25-26, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 26, 2019

[1] THE COURT: The respondent mother in this family law proceeding seeks various orders relating to the child of the parties' relationship, D., who is now ten years old. These orders are sought by way of the following notices of application:

a) Filed September 27, 2018:

i. that her parenting time with D. be reduced to one weekday afternoon per week, picking up from school at 2:48 p.m. and dropping off at the plaintiff's home at 6 p.m., as well as alternating Saturdays, picking up from the claimant's home at 9 a.m. and dropping off at the claimant's home at 5 p.m.;

b) Filed November 26, 2018:

i. An order pursuant to ss. 148 and 214 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], s. 7 of the Federal Child Support Guidelines [Guidelines]), that para. 5.1.2 of the interim parenting and child support agreement made between the parties be replaced with a provision requiring them to share the cost of D.'s support in proportion to their respective incomes.

ii. An order that the respondent be exempt from sharing the costs of daycare for D. from September 2017 to December 2018.

iii. An order enforcing the child support provisions of the 2014 agreement.

iv. An order compensating the respondent for the overpayment of child support paid to the claimant retroactive to May 1st, 2014.

v. Orders relating to parenting time and parenting schedules.

vi. An order the parties engage the services of a parenting coordinator, the cost of which to be shared by the parties in proportion to their respective Guideline income.

c) Filed April 10, 2019

i. orders that the following individuals and organizations provide to the respondent documents relating to D.'s assessment, treatment or counselling, educational records, and incident reports:

1. Dr. Turner, a psychiatrist of child and youth mental health.
 2. Dr. Ellen Ivity, psychologist, Able Development Clinic.
 3. Mr. Tim Millard, principal of Lord Kelvin Elementary School, School District 40, New Westminster.
 4. Ms. Kim Zimmerman, teacher at Lord Kelvin Elementary School.
- [2] For his part, the claimant filed a notice of application on November 7, 2018, seeking:
- a) An order varying the order of Master Donaldson pronounced October 14, 2011. He has default decision-making authority regarding D., with the respondent having liberty to apply pursuant to s. 49 of the FLA in the event she believes the decisions of the claimant are contrary to D.'s best interest.
 - b) An order that he may travel with D. during his parenting time without the need for travel authorization endorsed by the respondent.
 - c) An order pursuant to ss. 148 and 149 of the FLA that there be a review of the appropriate amount of child support payable by the respondent for the benefit of D., including a determination of the respondent's income pursuant to the Guidelines including the imputation of income.
 - d) An order pursuant to s. 63 of the FLA that the respondent be required to reimburse the claimant for the cost of child respite care incurred as a result of the respondent's failure to exercise parenting time with D. or pay a fine.
 - e) An order that the special and extraordinary expenses for D. be defined and that the parties proportionally share the cost of same.
 - f) An order that the respondent attend parenting courses and counselling to develop the necessary skills to parent a child with special needs.
- [3] During the hearing, counsel for the claimant advised that the claimant is no longer seeking the order set out at subparagraph (f) above, which is the parenting course order.

background

- [4] The parties were married on December 18, 2007. They separated in November 2010. There is one child of their relationship, D., who was born on October 25, 2008.
- [5] Each of the parties has moved on with their lives. The respondent married a man named M.L. She and M.L. have had two children together, now age seven and four, respectively. The claimant has a new partner named J.

- [6] On October 14, 2011, Master Donaldson ordered that the parties had joint custody and guardianship of D. At that time, the claimant was living in New Westminster and the respondent was living with M.L. in Nanaimo, BC. The parties shared custody of D. on a 3-4, 3-4 basis.
- [7] In late 2012, when D. was approximately four-and-a-half-years old, the parties began contemplating where he would attend school in September 2013. After attending mediation, the parties signed a parenting and child support agreement in January 2013 which contemplated, among other things, that D. would attend school in Nanaimo, that the respondent would have primary care of D., and that the claimant would have parenting time on three out of four weekends (the "2013 Agreement").
- [8] In the fall of 2013, the respondent asked the claimant whether he would assume primary care of D. with him attending school in New Westminster. The claimant agreed.
- [9] In early 2014, after further mediation, the parties signed an "interim parenting and child support agreement," which provided, among other things, for a parenting schedule such that the claimant had primary care of D. and the respondent had parenting time on three out of four weekends (the "2014 Agreement").
- [10] The respondent paid the claimant child support of \$97 per month based upon her then Guideline income of \$15,000.
- [11] In the summer of 2014, the respondent and M. moved from Nanaimo to Vancouver. The parties agreed that they would each have parenting time with D. on a week-on/week-off basis. The claimant began paying the respondent child support of \$400 per month based on his then Guideline income.
- [12] In May 2017, the parties attended further mediation in an attempt to resolve the issues between them regarding the parenting of D. The mediation resulted in a memorandum of understanding being prepared by the mediator (the "MOU"), but it was never signed due to various disagreements with it. The parties have, however, since been adhering to the parenting arrangement which was set out in the MOU whereby the claimant continued to have primary care of D. and the respondent has parenting time alternating weekends commencing on Fridays after school until Sunday evenings.
- [13] Parenting time during the summer months and holidays were shared, including with the respondent having had parenting time with D. for the month of July and the claimant having the month of August.
- [14] D. began demonstrating behavioural issues at the age of two. He was subsequently diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. He has had a long history of defiant, aggressive, and oppositional behaviour at school, daycare, and with family members.

- [15] In the summer of 2018, D. was asked to leave three different summer camps due to his behaviour. He has exhibited defiant and oppositional behaviour towards the respondent, M.L., and their two children. He has snuck out of his bedroom at night, broken into neighbourhood cars and property, been caught stealing, has exhibited excessive rudeness. He argues, yells, and uses inappropriate language. He also intentionally harms the respondent's younger children. The respondent deposed that her younger children are displaying symptoms of anxiety and trauma when D. is at their home.
- [16] D. currently attends Lord Kelvin Elementary School in New Westminster. Since January 2019, he has been seeing a counsellor, Elizabeth Partridge, provided by the Child and Youth Mental Health Services in New Westminster.
- [17] Also since January of 2019, D. has been seeing Dr. Ellen Ivity, a psychologist at Able Clinic in Surrey, BC. Dr. Ivity has recently referred D. to Dr. Turner, a psychiatrist at Child and Youth Mental Health Services in New Westminster. D.'s first appointment with Dr. Turner is scheduled for early May 2019.
- [18] In February of 2019, both D.'s teacher, Ms. Kim Zimmerman, and his school principal, Mr. Ken Millard, expressed concerns about D.'s behaviour at school. The parties have been advised by Mr. Millard that the level of support from school resources needed to deal with D. is unsustainable. As a result of some of the support services being shifted to other needy students, D.'s behaviour has worsened.

analysis

Guideline Incomes

- [19] The claimant is employed as a software engineer. His employment income is set out in T4s each year. In 2018, his income was \$113,000.
- [20] During the course of the hearing, it became clear that insufficient information was available to enable the fulsome determination of the respondent's income for Guideline purposes. She and her new husband, M.L.'s ownership of and association with various business enterprises appear to be inextricably intertwined. The respondent's involvement in those enterprises and her income earning capacity from them raises, at least in my mind, significant questions and concerns that require further investigation.
- [21] I am satisfied on the evidence that her income is likely greater than what she has claimed it is. However, in the circumstances, I do not consider it would be appropriate to make a final determination of what the respondent's income for Guideline purposes ought to be.

- [22] Rather, I find that based upon the evidence as a whole, and the submissions of counsel, an interim order should be made that commencing May 1, 2019, child support and s. 7 expenses be paid based upon D. being primarily in the care of the claimant, the claimant having Guideline income of \$113,000, and the respondent having Guideline income of \$50,000.
- [23] Each of the parties has leave to apply to vary those amounts both retroactively and prospectively once counsel has had an opportunity to conduct further examination and analysis of the financial circumstances of the respondent and M.L.
- [24] The parties' respective applications for orders regarding the quantum and payment of retroactive child support and s. 7 expenses are adjourned sine die.

Parenting schedule

- [25] The circumstances the parties find themselves in is unfortunate. D. plainly has special needs and challenges that require as much accommodation as is reasonably obtainable, taking into consideration the parties' respective circumstances.
- [26] Despite the differences between the parties in how they perceive the seriousness of D.'s behavioural problems, the evidence is overwhelming that his problems are extant and continuing that include disobedience, disrespect, lying and engaging in unsafe conduct. It is apparent that foremost among D.'s needs is some form of stability in his life and predictability in his parenting, neither of which he has had the benefit of virtually since birth.
- [27] It is obvious to me that D. craves inclusion and attention by his parents, in particular his mother. While I appreciate the respondent's concerns with having D. in her home given his propensity to misbehave, there is no question in my mind that a stable, structured, and predictable parenting schedule is in D.'s best interests.
- [28] Once a parenting schedule has been agreed by the parties or set out in a court order, it must be followed. One parent is not entitled to thereafter dictate changes to the schedule and expect the other parent to accept those changes. Respect and cooperation is the key to avoiding unnecessary difficulties, unhappiness, distrust, and court appearances. What has to be remembered at all times is the best interests of the child.
- [29] The parties are in agreement that, on an interim basis, the current parenting schedule for D. should continue with a slight variation. Accordingly, there will be an order that the respondent will have parenting time every alternate weekend commencing at 6 p.m. on Fridays, with the respondent picking D. up at the claimant's home, until 6 p.m. Sundays, with the claimant picking D. up at the respondent's home.

- [30] With respect to parenting rights and obligations during the summer months when D. is not in school, although for the past several years the respondent has had parenting time with D. during July and the claimant during August, the respondent proposes that D.'s behaviour and interaction with her new family at her home is such that having him full-time in her home during the month of July is not tenable.
- [31] On the basis of the evidence as a whole, I conclude that it is in D.'s best interests that the summer and holiday schedule set out in the MOU be maintained; in other words, the respondent having parenting time during July and the claimant during August, and the holiday parenting schedule set out in the MOU will continue. There will be an order to that effect.

Daycare and Nanny Expenses

- [32] D. has been attending afterschool daycare at Golden Sunshine Daycare in New Westminster. The claimant has also arranged for a nanny to assist with D.'s care in his home during the evenings and occasionally overnight in order to provide respite for him and his partner.
- [33] If the respondent is unable or unwilling to exercise her parenting of D. during July, the claimant is not adverse to her proposal that the alternate weekend parenting time schedule currently in place continue during July, but relies on the provisions of s. 63(1)(b) of the FLA to seek an order requiring the respondent to reimburse him for expenses he recently and necessarily incurs as a result of her failure to exercise that parenting time. He submits that given the challenges involved in the parenting of D., any daycare and/or nanny expenses he will incur during the time that the respondent would otherwise have been parenting D. ought to be recoverable by him.
- [34] The respondent does not dispute that in such event, she has an obligation to contribute to D.'s daycare expenses, but submits that the expenses should be shared by the parties proportionate to their respective incomes. The respondent also submits that any expenses associated with a nanny would be in respect of respite, which is not an s. 7 expense: *Estes v. Estes*, 2014 BCSC 2086 paras. 37 and 38; *Johnstone v. Johnstone*, 2018 BCSC 297 at para. 27.
- [35] In my view, fairness dictates that all daycare and nanny expenses reasonably and necessarily incurred by the plaintiff for D.'s care during times when the respondent would otherwise have been responsible for his care be paid by the respondent, and where she has failed to exercise her parenting time without reasonable excuse. The claimant is entitled to a declaration, rather than an order, to that effect because s. 63(1)(b) of the FLA contemplates reimbursement of expenses actually incurred rather than those that may be incurred in the future. The claimant will be required to demonstrate that the expenses he incurred were "reasonable and necessary".

- [36] I will deal now with s. 7 expenses. The parties seek an order clarifying what constitutes s. 7 expenses in this case. I find that the following expenses qualify and will be shared by the parties in proportion to their respective Guideline incomes as I have determined them:
- a) reasonable and necessary daycare expenses;
 - b) that portion of medical and dental insurance premiums attributable to D.;
 - c) health-related expenses that exceed insurance reimbursement, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy, and prescription drugs, hearing aids, glasses and contact lenses; and
 - d) the karate fees and uniforms, maximum one per year, and karate belt tests.
- [37] The party who pays the s. 7 expense will provide proof of payment to the other party, who will, within ten days of receipt of proof of payment, either pay his or her proportionate share to the other party or provide the other party in writing with fulsome reasons why the payment ought not to be made, in which case the other party has liberty to apply.
- [38] The s. 7 expenses incurred by the parties will be shared in proportion to their respective interim Guideline incomes as I have determined them after taking account of any subsidies, benefits or income tax deductions or credits relating to the expense and any eligibility to claim subsidy, benefit or income tax deduction or credit relating to the expense. The parties have leave to vary this order if I have failed to include any s. 7 expense that ought to have been included.

Parenting Coordinator

- [39] I am not satisfied that the circumstances warrant the appointment of a parenting coordinator. I agree with counsel for the claimant that the parties have largely been able to cooperate and agree on all material decisions relating to D. and that the cost of a parenting coordinator is unjustified. In any event, the appointment of a parenting coordinator in this case would be premature.
- [40] D. has only recently begun receiving a benefit of sessions with a psychologist, Dr. Ivity, and will shortly begin seeing a psychiatrist, Dr. Turner. I am reluctant to impose a court order on the parties that may hamstring that counselling process.
- [41] The respondent's application for an order that a parenting coordinator be appointed is dismissed, with leave for the parties to reapply if, in the future, either deems it to be appropriate.

Document Disclosure

- [42] The claimant does not oppose the respondent's application for disclosure of documents from D.'s school and Drs. Ivity and Turner. Accordingly, the orders sought by the respondent in that regard in her notice of application filed April 10, 2019, are granted.

Application by the Claimant for Default Decision-making Authority

- [43] The claimant seeks an order that he have the authority to make decisions concerning the parenting responsibilities set out in s. 41 of the FLA in the event that, after consultation, the parties are unable to agree, in which case the respondent would have the right to apply to Court if she believed the claimant's decision was not in D.'s best interests.
- [44] The Court may make an order apportioning parenting responsibilities between guardians under s. 40(3) of the FLA. Section 49 of the FLA entitles a guardian to apply to Court for direction respecting an issue affecting the child.
- [45] In making an order respecting a parenting arrangement, the Court must take into account only the best interests of the child. It does not consider the parents' rights in doing so: *North v. North*, 2014 BCSC 1591 at para. 49.
- [46] The evidence shows that, in recent years, the claimant has been the parent responsible for D.'s care roughly 90% of the time. He has been regularly responsible for taking D. to his activities, appointments, and his school. Despite the respondent's opinion that the claimant tends to minimize D.'s behavioural problems, there is no compelling evidence that the claimant has not or will not exercise parenting responsibilities consistent with D.'s best interests.
- [47] Each of the parents is well versed with D.'s behavioural issues and, in my view, each is doing his or her best to cope with them, with the assistance of the various professionals who have been and are involved.
- [48] I accept the submissions of counsel for the claimant that it is appropriate in this case to order that henceforth, in the event of a disagreement between the claimant and the respondent, the claimant, after consultation with professional advisors and consultants where appropriate, and after reasonable consultation with and disclosure to the respondent, has the authority to make final decisions regarding the parenting responsibilities for D. as set out in s. 37 of the FLA. If the respondent is not in agreement with such final decision, the respondent may bring an application for directions pursuant to s. 49 of the FLA.
- [49] I am also ordering that, subject to further order of this court, each of the parties is entitled to travel both inside and outside of British Columbia during his or her parenting time without the consent of the other, provided the travelling party communicates to the other reasonably and in advance of travel exceeding 100 kilometres from that party's home the planned itinerary, contact information at the destination or destinations and, while away, affords the other party with a reasonable opportunity to communicate with D. via telephone,

Skye, FaceTime, or similar means.

Previous Orders

[50] The order of Master Donaldson pronounced October 14, 2011, the order of Master Muir pronounced October 5, 2018, and the order of Master Cameron pronounced December 10, 2018, are varied and/or vacated to the extent they are inconsistent with the orders I have made.

Anonymization of the Pleadings

[51] The parties are in agreement that they and D. should be referred to in all pleadings and judgments by their initials only. There will be an order to that effect.

costs

[52] After having considered the matter of costs, it is my view that there should be no order as to costs in this case.

conclusion

[53] I want to thank counsel for their professional presentations and respectful submissions on this difficult matter. I also wish the claimant and the respondent my sincere hope that they will learn from what they have seen and heard in this courtroom over the past two days and will take what has been said to heart. D. came into this world because of the two of you. The fact that your relationship did not work out is not his fault. No matter what you may think of the other parent, the more you think about D. and the less you think about yourself and the other issues you may have, the more you cooperate and you get along, the more selfless love you will show to him. That will be a good thing. I am confident that if you do so you will reap the rewards. Thank you.

[54] Is there anything further?

[55] MS. ALLEN: There's just one point concerning the remainder of the holiday time. We did speak of spring break and Christmas but -

[56] THE COURT: I think I included that, did I not?

[57] MS. ALLEN: I understood the summer holiday was to be shared pursuant to the existing schedule. I just wasn't clear on whether the spring break and Christmas were the same.

[58] THE COURT: Well, it is as set out in the MOU. I thought I had said that.

[59] MS. ALLEN: Okay. It may be that you did and I missed it. I apologize.

[60] THE COURT: I will just double check. Yes, I say on the basis of the evidence as a whole, I conclude that it is in D.'s best interests that the summer and holiday schedule set out in the MOU be maintained. Is there anything further?

- [61] MS. ALLEN: Just one last question, My Lord. Given that there may be a need to apply to address income at a later date if the parties aren't able to resolve that issue, I was wondering if Your Lordship would be seized of that one matter given that you have heard the evidence to date on that.
- [62] THE COURT: Well, I am happy to help out in whatever way I can. Being seized of the matter could be problematic for you because I may not be around. So what I will say, subject to anything Ms. Page wants to add -- I do not know whether you are in agreement with this or not.
- [63] MS. PAGE: I take no position, My Lord.
- [64] THE COURT: To the extent that it is necessary and I am reasonably available, I am happy to hear it.
- [65] MS. ALLEN: Thank you, My Lord.
- [66] MS. PAGE: My Lord, could that be extended then to any application?
- [67] THE COURT: Well, again, yes.
- [68] MS. PAGE: Thank you.
- [69] THE COURT: But I do not want to tie your hands, because we do the entire province and we are all over the place. So if I am available within a reasonable time of when you need something heard, I am happy to, and we can do it at 9:00 in the morning if that works out, if it is a relatively short matter.
- [70] MS. PAGE: Thank you.
- [71] THE COURT: Now, in reading my draft reasons, I have detected more than one or two typos, so I am going to just simply quickly make these typographical corrections and then I will have the clerk provide you with a copy. So just hang around. This will take five minutes max. Thank you all. Wish you all the best of luck. Thank you.

"G.C. Weatherill J."

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Prepared on 29 October 2026 · Esheria