

CANADA / JUDGMENT

## A.L.P. v. C.J.V.

2020 BCSC 922

### COURT

Supreme Court of British Columbia

### DECIDED

19 June 2020

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2020 BCSC 922 A.L.P. v. C.J.V.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.L.P. v. C.J.V.,

2020 BCSC 922

Date: 20200619

Docket: E0722

Registry: Powell River

Between:

A.L.P.

Claimant

And

C.J.V.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph [10] on July 27, 2020.

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Claimant

appearing via telephone:

B. Henderson

Counsel for the Respondent

appearing via telephone:

L. Ridgway

Place and Dates of Hearing:

Nanaimo, B.C.

June 9, 2020

Place and Date of Judgment:

Nanaimo, B.C.

June 19, 2020

## INTRODUCTION

- [1] The parties to this family law litigation have been separated for over a decade. They have two children together, a daughter and a son. Years ago they consented to an order by which the respondent was designated the primary residence parent, but the parties' son J.L.P., date of birth December 7, 2004, now lives primarily with the claimant.
- [2] The claimant is a dual Canadian/U.S. citizen. On March 13, 2020 he gave the respondent written notice of his intention to relocate with J.L.P. to San Diego, CA. I understand that this is the claimant's home town and where J.L.P. was born. The respondent objects to relocation. She says that J.L.P.'s best interests will be served by remaining in Powell River, BC, where he has lived for most of his life.
- [3] On May 6, 2020, I granted an order preventing J.L.P.'s removal from this jurisdiction until the claimant's formal relocation application can be heard and determined under s. 69 of the Family Law Act, S.B.C. 2011, c. 25 ("the Act"). A hearing date has not yet been set for this. The parties now seek different orders for independent assessments to be done to assist the court in determining the child's best interests.

## BACKGROUND

- [4] J.L.P. is now 15.5 years old. He turns 16 on December 7, 2020. There is no doubt that his views about relocation must be received and carefully considered. To that end, while he was representing himself, the claimant ill-advisedly had J.L.P. write a letter on the subject which he attached as an exhibit to a recently sworn affidavit. The claimant says that he thought this would be the most direct and expeditious means of getting the child's views before the court. He now recognises that involving J.L.P. on his side of the dispute was wrong. The respondent, for her part, believes that J.L.P. was influenced to write this letter and that the views expressed in it are the claimant's rather than his own. She alleges that the claimant is in the midst of efforts to alienate J.L.P. from her.

- [5] The claimant denies that he has lobbied or manipulated his son or done anything other than encourage him to express himself freely and honestly. He says that J.L.P.'s desire to move with him to San Diego is informed and voluntary. He denies disparaging or undermining the respondent or exerting undue influence on J.L.P., either to bolster his case for relocation or to cause a rupture with the respondent. In the claimant's mind the present acknowledged coolness between J.L.P. and the respondent has to do with her obstruction of J.L.P.'s desire to participate in the claimant's relocation plans. It has nothing to do with alienation, he says, but amounts to a conflict of wills between mother and son of the sort that crops from time to time in all families, especially divided ones.

## COMPETING APPLICATIONS

- [6] The claimant has now brought an application for the appointment of "a mediator or counselor" to perform a "Voice of the Child" report for J.L.P. He drafted the pleadings himself and did not specify the legal basis for this request. After pre-hearing discussions, I thought it likely that he meant a report typically ordered under s. 37(2)(b) or s. 224(1)(b) of the Act prepared by a neutral professional from the BC Hear the Child Society. In such a case the interviewer does not assess the child or the parents, but simply takes the child's views, usually verbatim, for use in court.
- [7] By the time of the hearing, however, the claimant had retained counsel who argued that the appropriate legal basis for the order sought was s. 211(1)(b) of the Act. This subsection permits the court to appoint a family justice counsellor, social worker, or other person approved by the court, to assess and report upon the views of the child in relation to a family law dispute. Counsel submitted that the report should be restricted in scope to J.L.P.'s views concerning relocation. He argued that this would be a fair, proportionate, expeditious and cost-effective approach to creating an objective record of evidence to assist the court in determining the issue in the child's best interest.
- [8] The respondent has filed a counter application seeking what is sometimes referred to as a "full" s. 211 report. This would comprise not only an inquiry into J.L.P.'s views about the proposed relocation, but also a comprehensive investigation into all matters concerning the child's care, a generalised assessment of his needs, and the overall ability and willingness of the respective parties to satisfy those needs. The respondent has raised issues concerning the claimant's parenting skills and practices in addition to her claims of alienation. She seeks an order in the following terms taken directly from her pleadings:
1. An expert Assessor to be determined by this Court, is appointed to prepare a written report concerning the arrangements for the parenting of [J.L.P.], born 07/Dec/2004 (the "Child" ).

Purpose of assessment and due date

2. Pursuant to section 211 (1) of the Family Law Act, the Assessor will assess and prepare a report concerning:

- (1) the needs of the child in relation to this family law dispute;
  - (2) the views of the child in relation to this family law dispute; and
  - (3) the ability and willingness of [the claimant] and [the respondent] to satisfy the needs of the child.
3. The Assessor will make their best efforts to complete the report by a date to be specified by the Court. If circumstances arise such that the Assessor will not be able to complete the report by the expected completion date, the Assessor will forthwith advise the parties and the court in writing.
  4. The Assessor will concurrently give a copy of the completed report to each party, and give a copy of the completed report to the court.

### **Cooperation and communication of parties**

5. The parties will meet with the Assessor, and take such steps as may be required for the child to do so, when and where requested by the Assessor.
6. The parties will promptly provide to the Assessor any information and documentation the Assessor requests.
7. The parties will promptly sign and return to the Assessor any releases of confidentiality or authorizations the Assessor may require, including for the release of the records of, or to speaking to, any professionals who have direct knowledge of the child or the parties, including any counsellors, therapists, doctors, teachers, social workers and other professionals.
8. Except when meeting with the Assessor as requested or otherwise directed by the Assessor, all communications between a party or their lawyer and the Assessor must be in writing and be copied to the other party or their lawyer.
9. For the purposes of the preparation of the report, any expectations or entitlements of confidentiality as between the Assessor and the parties and the Assessor and the child are waived, and the parties will promptly execute consents to this effect at the request of the Assessor.

### **Preparation of report**

10. The Assessor may interview any counsellors, therapists, doctors, teachers, social workers and other professionals who have direct knowledge of the child or the parties and who, in the opinion of the Assessor, are likely to have information that will assist the Assessor in the preparation of the report.
11. The Assessor may interview one or more people identified by the parties for the preparation of the report.

12. The Assessor may obtain and review the records of any counsellors, therapists, doctors, teachers, social workers and other professionals who have direct knowledge of the child or the parties for the preparation of the report. The Assessor may, subject to any agreements between the parties or the further order of the court, review only the following additional documents for the preparation of the report:

- 1) the Notice of Family Claim, Response to Family Claim and Counterclaim;
- 2) all Notices of Application and Application Responses;
- 3) all filed affidavits;
- 4) all orders, awards and agreements;
- 5) any further documents enumerated by the Court;

as well as such further and other documents as may be requested by the Assessor.

13. The Assessor must address in the report the following specific issues and allegations, and their impact, regarding:

- 1) family violence, as defined by section 1 of the Family Law Act, in light of the factors identified at section 38 of the Act;
- 2) the alienation or estrangement from, or attachment disruption between, the child and a party;
- 3) the relocation of the child;
- 4) substance abuse;
- 5) other mental health considerations/concerns; and
- 6) any further points deemed relevant and enumerated by this Court.

14. The Assessor will observe [J.L.P.], and [J.L.P.] and the parties, for the purposes of the report, in a manner as comparable as possible, unless in the opinion of the Assessor an observation would be unsafe or is contraindicated. The observations will take place in an environment or environments in which [J.L.P.] is most likely to be comfortable, where practical and appropriate in the opinion of the Assessor.

15. The Assessor must identify in the report all persons they have interviewed and all documents they have reviewed in the preparation of the assessment.

16. The Assessor must identify any person whose statements are referenced in the report.

17. The Assessor will address in their report all of the factors identified in section 37(2) and (3), section 38, and section 41(a) to (h), (j) and (i) of the Family Law Act that are, in the opinion of the Assessor, relevant to the arrangements for the parenting of or contact with [J.L.P.].

### Payment of Assessor's fees and disbursements

18. Both parties will be equally responsible to pay any retainer or deposit requested by the Assessor to secure payment of the Assessor's fees for the report no later than the date specified by the Assessor.
19. The parties are at liberty to apply at the final determination of this matter for a reallocation of the cost of the report.
20. The Assessor is entitled to be compensated for their time, including for any time required to prepare for or to attend court to be cross-examined, at the Assessor's ordinary hourly rate. Subject to agreement between the parties or a court order, the party requiring the Assessor to attend court to be cross-examined will be responsible for the fees and any disbursements of the Assessor incurred.
21. If a party requires the Assessor to produce a copy of some or all of their file on the report, the Assessor is entitled to be compensated for the Assessor's time spent reviewing the file as necessary to comply with their professional standards and for the reasonable cost of photocopying. Subject to an agreement between the parties or further court order, the party requiring the production of the file will be responsible for the fees and disbursements of the Assessor to do so.
22. Neither party may require the Assessor to produce copies of any psychometric tests that were administered to a party or to a child, and any materials related to those tests, that are protected by copyright, except to provide these materials to a registered psychologist qualified in British Columbia to administer and interpret those tests.

### Bar on reports and complaints

23. The parties will be and are hereby restrained from:
  - 1) making complaints or reports about the Assessor to the Assessor's governing professional body, consumer protection bureaux and similar organizations;
  - 2) posting complaints, comments or reports about the Assessor on social media of any kind; and
  - 3) posting complaints or reports about the Assessor to review websites, professional rating websites and similar websites;

without leave of the court until such time as a final order or agreement addressing the arrangements for the parenting of or contact with the child is made and, in the case of a final order, until any appeals or appeal periods have concluded or expired.

- [9] The parties have agreed that, whether I order a limited or a full s. 211 report, the assessor that I appoint should be Dr. Rebecca England of Vancouver, B.C.

## DISCUSSION

[10] The overall purpose of a s. 211 report is to assist the court in making orders that are in the best interests of the child. Of the non-exhaustive list of factors on this subject in s. 37 of the Act, in my view the following should be the subject of evaluation in the report to be prepared in the matter:

- a) the child's health and emotional wellbeing;
- b) the child's views;
- 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; and
- e) the child's need for stability, given the child's age and stage of development.

[11] In *D.A.F. v. R.D.F.*, 2017 BCSC 873, Smith J. noted that the court may determine the appropriate scope of a s. 211 report:

[36] The claimant argues that the Views of the Child Report is insufficient and says there should be a "full" s. 211 report. In ordering a report under s. 211, the court determines which of the issues listed in the section are to be addressed in the report. In this case, the Court ordered a report limited to one issue-the views of the child. That is what the claimant consented to. If the claimant thought such a report would be too narrow and a broader inquiry was required, that issue should have been raised at the time of the order.

[37] Of course, there is no bar to the Court ordering a further, broader report if it will provide further assistance in determining the child's best interests. But before the Court imposes the significant cost of that report on the parties, there should be some evidence on which the Court can conclude it is necessary or likely to be sufficiently helpful.

[12] I have been reliably informed that a "full" s. 211 will cost in excess of \$20,000 and take months to complete. The expense and delay of these reports is a persistent problem in family law disputes, and the significant intrusion into family life inherent in such wide-ranging inquiries is often mentioned. In this connection, I must bear in mind the overall objectives set out in R. 1-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009 as follows:

### Object

- (1) The object of these Supreme Court Family Rules is to
  - (a) help parties resolve the legal issues in a family law case fairly and in a way that will
    - (i) take into account the impact that the conduct of the family law case may have on a child, and
  - (ii) minimize conflict and promote cooperation between the parties, and

- (b) secure the just, speedy and inexpensive determination of every family law case on its merits.

### Proportionality

- (2) Securing the just, speedy and inexpensive determination of a family law case on its merits includes, so far as is practicable, conducting the family law case in ways that are proportionate to

- (a) the interests of any child affected,
- (b) the importance of the issues in dispute, and
- (c) the complexity of the family law case.

[13] In my view it is not necessary in the present case to order a report as broad and exhaustive as the respondent has demanded. I agree with the claimant that after a decade and more of consensual post-separation co-parenting, whatever difficulties there may have been along the way, and I accept that they have sometimes been substantial, there is no need for an overall evaluation of the ability or willingness of either party to meet J.L.P.'s needs.

[14] By this reasonably advanced stage of J.L.P.'s childhood, to the contrary, it is well-established that both claimant and respondent are fit and capable parents. A "full" s. 211 work-up, including, essentially, an historic and far-reaching forensic investigation into parental behaviour, competence and capacity is not required. I also agree with the claimant that there is no evidentiary basis for inquiries concerning family violence, substance abuse, or mental health problems.

[15] The allegation of parental alienation is a serious one which in my view requires more than bare assertions before a lengthy and expensive investigation of the issue should be commissioned by the court. It may be that the threshold for ordering a s. 211 report is low, but to include within its scope an assessment of parental alienation requires more than the surmise and suspicion that the claimant has raised only recently after receiving notice of the claimant's plans to relocate and J.L.P.'s apparent willingness to go with him. I am not satisfied on the evidence that an inquiry into alienation would be proportionate, necessary, relevant, sensitive or helpful.

[16] It seems clear that J.L.P. is not getting on particularly well with his mother right now. I infer that, in significant measure, this is because he perceives her to be interfering in a relocation plan of which he approves. It may be that the claimant ought not to have broached the subject of a move to California before having good faith discussions with the respondent about whether or not it would be in the child's best interests. Then again, the parties apparently have serious difficulties communicating, and it was probably always going to be the case that the matter would have to be determined in litigation. Whether or not it is to be condoned, I can understand on a basic level why the claimant, before initiating the process, should have raised the possibility of relocation with J.L.P. and asked for his views about it.

- [17] The child is almost 16 years old, after all, and he lives with the claimant full-time. If the claimant relocates, it is easy to see why he would like to take J.L.P. with him. It was certainly wrong to get J.L.P. directly involved in the dispute by asking him to write the letter referred to earlier, but I am satisfied that this was a blunder and not a stratagem. The claimant has apologised and attempted to correct his mistake by means of the present application for a proper evaluation of J.L.P.'s views to be taken by an objective assessor. What the court will require, however, especially given the history of the matter and respondent's strongly expressed concerns, is an inquiry into whether these views are informed and voluntary or the result of coercion, manipulation or undue influence. A non-evaluative transcription of J.L.P.'s views on the matter, if this is what the claimant had in mind, will not be enough.
- [18] I should like to stress, as well, that the respondent's opposition to the proposed relocation is perfectly reasonable. It is based on factors that would occur to any parent. She does not wish to be deprived of her 15 year old for the last years of his childhood, of course. But more than this, the status quo in Powell River is long established. J.L.P.'s friends and his relatives on the respondent's side, including his older sister, all live locally. The respondent wants J.L.P. to graduate with his lifelong classmates. He is presently having some difficulties at school that require consistent monitoring. Moreover the claimant's relocation plans are vague and unformed. He seems to have looked into a suitable school for J.L.P., but he has not arranged employment for himself or any long-term accommodation. Why move the child on a whim, the respondent asks, especially right at the end of his high school career? Why in the middle of a pandemic?
- [19] These are legitimate questions and doubtless there are others. It is likely that the claimant's ambitions will fall flat if he has no compelling answers to them. He is free to move back to San Diego on his own, of course, but before this court will authorise him to take J.L.P. with him, he will have to establish, not only that it is in J.L.P.'s best interests, but also that the relocation proposal is made in good faith: see s. 69(4) of the Act.
- [20] The claimant is confident that, when the time comes, he will be able to discharge this burden of persuasion and he is determined to make the attempt. All I can say at this early stage is that he has his work cut out for him. In the meantime, for the issue to be properly and fairly evaluated, in my view the s. 211 assessment must not be limited to the origin and nature of J.L.P.'s views on the matter. There must also be an independent and objective assessment of whether relocation to San Diego would meet J.L.P.'s material, developmental, emotional, and educational needs.
- [21] In legal terms, in other words, the report under contemplation should cover the factors addressed in s. 211(1)(a) as well as s. 211(1)(b) of the Act, such that the court will have the benefit of a detailed report focussed on J.L.P.'s needs and views as they relate to the proposed relocation, but without, as I have previously said, the necessity of an investigation or assessment of parental conduct or capacity under 211(1)(c). This will be a more complex and nuanced exercise, certainly, than merely taking down the child's views, but it will be limited to the specific dispute before the court which, succinctly put, is whether J.L.P. will

be better off going to San Diego or staying where he is. Such a limited inquiry, I apprehend, can be completed within a reasonable time at a cost proportionate to the question to be determined.

## ORDER

[22] With all of the foregoing in mind, and with the object of resolving this family law dispute in J.L.P.'s best interests in a just, convenient, relevant and proportionate manner, I hereby make the following orders:

1. On authority of s. 211 of the Act, Dr. Rebecca England is appointed to prepare a written report ("the Report") concerning the claimant's proposal to relocate to San Diego with the parties' son, J.L.P., born December 7, 2004 ("the Child").
2. Specifically, in accordance with ss. 211(1)(a) and (b) of the Act, Dr. England will perform an assessment and report to the court concerning:
  - a) the needs of the Child in relation to the proposed relocation; and
  - b) the views of the Child in relation to the proposed relocation.
3. The "needs of the Child" addressed in the Report must include J.L.P.'s material, physical, developmental, emotional, and educational needs.
4. The "views of the Child" addressed in the Report must include an evaluation of the source and quality of the views expressed by the Child, such that the court may determine whether they are free and voluntary views unmediated and uninfluenced by either the claimant or respondent.
5. The parties will meet with Dr. England, and take such steps as may be required for the Child to do so, when and where requested by Dr. England.
6. Dr. England will make best efforts to complete this Report by August 1, 2020.
7. Dr. England will concurrently give a copy of the completed Report to each party and the court.
8. Except when meeting with Dr. England as requested or otherwise directed, all communications between a party or their lawyer and Dr. England must be in writing and be copied to the other party or their lawyer.
9. For the purposes of the Report, any expectation or entitlement of confidentiality as between Dr. England and the parties or between Dr. England and the Child are waived.
10. Dr. England may interview one or more people identified by the parties for the preparation of the Report, bearing in mind that the dispute in issue is the proposed relocation and not parental behaviour, capacity or fitness.

11. Dr. England must identify in the Report all persons interviewed and identify all documents reviewed in the preparation of the Report.
  12. Dr. England will address all of the factors listed in s. 37(2)(a)-(e) of the Act not already specifically mentioned above.
  13. Both parties will be equally responsible to pay any retainer or deposit required by Dr. England to secure her fees for the Report no later than July 1, 2020, or on any other date specified by Dr. England.
  14. The parties are at liberty to apply at the final determination of this family law dispute for a reallocation of the cost of the Report.
- [23] The parties may also apply for additional directions should they be necessary to give effect to these orders. I will also entertain any amendments or modifications that Dr. England might suggest to assist her in completing her work to my specifications.

"Baird J."

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Prepared on 24 October 2026 · Esheria