

CANADA / JUDGMENT

A.M.S. v. M.D.P.

2023 BCSC 1640

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Supreme Court of British Columbia

DECIDED

18 September 2023

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2023 BCSC 1640 A.M.S. v. M.D.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.M.S. v. M.D.P.,

2023 BCSC 1640

Date: 20230918

Docket: 31747

Registry: Cranbrook

Between:

A.M.S.

Claimant

And

M.D.P.

Respondent

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Claimant:

D.F. Collins

Counsel for the Respondent:

B.L. Veenstra

Place and Date of Hearing:

Cranbrook, B.C.

August 21, 2023

Place and Date of Judgment:

Cranbrook, B.C.

September 18, 2023

Introduction

- [1] This is an interim application in a family law dispute which is not yet set for trial. The respondent seeks a variation of a previous interim order restricting his parenting time with the parties' two children.
- [2] The parties lived together in a marriage-like relationship commencing in September 2011. They separated on or about November 4, 2022. There are two children of their relationship; J.T.P., who was born in 2012, and J.A.P., who was born in 2018. When the relationship began, the respondent was living in Sparwood, BC. During the relationship the parties purchased a second townhouse in Sparwood. Both units are registered in the respondent's name only. The parties purchased a third property in Sparwood which was the family residence until the they separated.
- [3] The claimant is a pharmacy technician now residing in Sparwood. In neither of the respondent's two affidavits filed on this application has he indicated where he resides. There is some suggestion he might reside in Cranbrook, BC, but the circumstances of his housing are uncertain.
- [4] On January 6, 2022 the respondent went on disability. Although the reasons for this change in status are not disclosed in the affidavits, around that time he was subject to criminal charges concerning pornography which have since been stayed. The respondent has been an alcoholic for 26 years. He was able to function at an acceptable level for many years, despite his alcoholism being serious. From time to time, he would drink while the children were awake.
- [5] In November 2022, the respondent had a mental breakdown following an unusually severe argument with the claimant. He consumed alcohol to the level of intoxication and took an excess of sleeping pills. This attempt at the respondent's life happened while he was alone with the parties' children. Their son J.T.P. called 911 to summon ambulance attendants.
- [6] The claimant enrolled J.A.P. in a psycho-educational support program for children who have been exposed to violence due to his experience around the respondent's attempted suicide.

- [7] There is a dispute in the evidence concerning which parents were providing care to the children during their relationship. The respondent contends he was providing care at a level that increased after he went on disability in 2022. He contends his depression and alcoholism kept him from shouldering an equal level of care and responsibility for the children, but since January 2022, he has greater capacity to care for the children.
- [8] The respondent acknowledges he has been actively working with a counsellor in relation to an alcohol and pornography addiction problem. He said that he is dealing with generalized anxiety relating to his addiction history and has worked with a healthcare team in order to maintain a safe environment for the children.
- [9] In 2022, the respondent was charged with possession of child pornography. These charges have since been stayed.
- [10] In the respondent's August 4, 2023 affidavit, he said the following:

I have continued to participate in weekly counselling sessions up until this past week. During my last counselling session, my counsellor and I agreed that my intensive counselling sessions to this point have been successful at addressing my previous struggles with alcoholism, and that there will be little value to continuing.

- [11] The respondent did not address his March 6, 2023 affidavit wherein he said he was also working with a counsellor in relation to difficulties with addiction to pornography.

The Issues

- [12] The respondent contends that since November 2022 he has abstained from the use of alcohol. He has offered to take alcohol testing measures if the claimant pays for the costs.
- [13] The respondent fears that the claimant is alienating the children from him based on some earlier comments that the claimant refers to him as "your alcoholic father" in the presence of the children.
- [14] He states the children have communicated to him a desire to spend more time in his home, including overnight visits. He admits that his relationship with J.T.P. is more difficult but believes J.T.P. will also spend more time with him.
- [15] The order made by Justice Groves on March 6, 2023 (the "March Order") provides that the respondent has parenting time from 9:00 a.m. to 4:00 p.m. on Saturdays.
- [16] The respondent proposes that his parenting time should be expanded to include the first, second and fourth Fridays of each month, from 12:00 p.m. on Friday, until 4:00 p.m. on Saturday. The respondent further proposes that after October 6, 2023, his parenting should be expanded from 12:00 p.m. on Friday to 4:00 p.m. on Sunday of the first, second and fourth Fridays of each month. He wants to have this access at the former family home at 1304 Wildwood Drive, Sparwood, BC.

- [17] Further, he seeks an order that the claimant be prohibited from posting about him on social media, citing examples of things she has posted. Those posts do not actually identify the respondent by name.
- [18] The claimant argues that the respondent's proposal would deprive her of weekend time with the children except for one weekend out of four each month.
- [19] The claimant works as a pharmacy technician; the respondent is not working because of his ongoing disability. He was previously employed by Teck Corporation, earning approximately \$90,000 per year.
- [20] The claimant contends that she has accommodated additional parenting time to the respondent beyond what was set out in the March Order, but he has not taken up all of those opportunities. I was not provided with Groves J.'s reasons for judgment on the March Order.
- [21] The claimant is concerned that the respondent does not have a permanent residence, has not provided corroborative evidence concerning his addiction and discontinuance of alcohol use, has not addressed his addiction to pornography, and is in a more flexible position to take parenting time on midweek days.
- [22] Another of the claimant's concerns is a lack of trust between J.T.P. and the respondent. Keeping in mind that J.T.P. discovered his father after his attempted suicide, it is understandable he may lack confidence in the respondent. The respondent acknowledges that J.T.P. has a more difficult relationship with his father.

Analysis

The Legal Framework

- [23] Sections 216(3) and (4) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] address variation of interim orders:
- (3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:
- (a) a change in circumstances has occurred since the interim order was made;
- (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
- (4) In making an order under subsection (3), the court must take into account all of the following:
- (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
- (b) the length of time that has passed since the interim order was made;
- (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement

- (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
- (ii) would not necessarily reflect the final arrangement between the parties;
- (d) whether a trial has been scheduled;
- (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

[24] In *K.S. v. H.S.*, 2023 BCSC 888 at paras. 47-48, Justice MacNaughton summarized principles applicable to variation of interim orders under the FLA. She said:

- [47] A change in the child's needs or circumstances must: (a) represent a clear and distinct departure from what the court knew of the circumstances or could reasonably have anticipated, when making the interim order: *Canning v. Fearn*, 2000 BCSC 362 at para. 4; (b) be material and a change will not be material unless it was not foreseen or could not reasonably have been contemplated by the judge making the original order: *B.D. v. L.K.*, 2004 BCSC 455 at para. 20; and (c) if known at the time, it would have resulted in a different order: *R.P. v. R.C.*, 2011 SCC 65 at para. 25.
- [48] Preservation of the status quo pending trial is normally considered to be in a child's best interests unless there is a compelling reason to change the existing parenting arrangement.
- [25] In *M.A.F. v. J.C.F.*, 2021 BCSC 1447 at para. 68, Justice Crabtree affirmed the proposition that applications to vary interim orders should be rare; there is a heavy onus on an applicant to demonstrate why a variation of an interim order is in the children's best interests.
- [26] Apposite to this case is the decision in *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403, where Justice D. Smith said at para. 22:
- [22] Interim orders are primarily designed to maintain the status quo and to provide short-term solutions until issues regarding the best interests of a child can be fully canvassed at trial: *Johnson v. Jessel*, 2012 BCCA 393 at para. 48; *Leung v. Leung* (1998), 44 R.F.L. (4th) 121 (B.C.C.A.) at para. 10; *Eaton v. Eaton* (1987), 11 R.F.L. (3d) 92 (B.C.C.A.); and *Prost v. Prost* (1990), 30 R.F.L. (3d) 80 (B.C.C.A.). In this case, the best interests of the child was at issue. The incident that gave rise to the supervision order was disputed. This raised issues of the parties' credibility. The forum to resolve these issues and whether there is an ongoing need for supervision of the child are best resolved at trial and not by repeated interim applications. Appeals from interim orders on issues regarding the best interests of a child generally have been discouraged absent a compelling reason: see *Haigh v. Haigh* (1987), 9 R.F.L. (3d) 301 (B.C.C.A.).

- [27] Section 217 of the FLA gives the court authority to alter an interim order only if it is satisfied that a change in the circumstances has occurred since the order was made, and the hardship to a party of denying an application outweighs the hardship to the other party of granting the application.

The Respondent's Position

- [28] The respondent argues that there has been a material change in circumstances since the making of the interim order. Firstly, he submits that the claimant's flexibility in allowing him access beyond the terms of the order, and in particular overnight access, demonstrates that she is not concerned with the children's welfare if they spend more time with him.
- [29] Secondly, he argued that in March 2023, he was facing serious charges for possession of child pornography and those charges are now stayed. He contends that if those facts had been known to Groves J., the March Order would not have been made. It is unfortunate that the reasons for judgement of Groves J. are not available, as this Court is consequently unable to assess the basis upon which the March Order was made.
- [30] He contends it is in the children's best interests to have an expanded parenting role that will result from an increase in his time with the children.

The Claimant's Position

- [31] the claimant submits that the status quo should remain in place pending further inquiry into the children's needs that could be addressed by a section 211 inquiry and report.
- [32] She points out that the respondent's history of alcohol consumption and mental health issues are not fully resolved on the evidence presented on this application. She has relented on some occasions to permit the respondent additional time with the children but notes he has admitted and addiction to pornography that does not appear to have been addressed by the counsellors. The respondent's history was in evidence before Groves J when the order was made. Notwithstanding that the charges have been stayed, the evidence is inconclusive concerning his recovery from his disability.
- [33] The claimant contends there has not been a sufficient change in the circumstances to constitute a "material change". She said the respondent's circumstances are still uncertain; he lives in a trailer in Cranbrook and is unemployed.

Application

- [34] In considering the best interests of the children, I am required to consider each subparagraph in s. 37 of the FLA.

- [35] For the reasons that follow, I am not satisfied the respondent has established it would be appropriate to make an order varying the March Order. I recognize that it is important for children to have the optimum time in the care of both parents. However, Groves J. presumably had sufficient reservations concerning the respondent's parenting abilities, given that the respondent's parenting time was quite restricted. I do not have the benefit of a copy of the reasons given by Groves J. on the March Order.
- [36] On the state of the evidence in this case, I am not satisfied it would be in the children's best interests to accede to a variation of the March Order.
- [37] There are multiple factual issues referred to by each party that are denied by the other. The respondent filed two affidavits on this application and the claimant filed one.
- [38] In the respondent's second affidavit he disagrees with the claimant's assertion of facts on multiple points indicating that her assertions were "completely false" and "not accurate". He disagreed with her concerning his involvement with the children. Needless to say, these types of discrepancies in the affidavit material are difficult to reconcile, and underscore the challenges in dealing with applications to vary interim orders.
- [39] There are concerns that the respondent is not ready to assume a substantially altered parenting schedule with the children. He acknowledges that there are difficulties with J.T.P. and recognizes that he has some ongoing issues with pornography, albeit not criminal.
- [40] The respondent relies on his assertion concerning his previous alcohol addiction:
- During my last counselling session, my counsellor and I agreed that my intensive counselling sessions to this point have been successful at addressing my previous struggles with alcoholism, and that there will be little value to continuing.
- [41] This statement highlights the concern that the evidence as presented leaves significant doubt about the respondent's recovery status. An opinion from the counsellor in the form of an affidavit would have been more persuasive in establishing the dramatic change in circumstances he alleges in contrast to his assertion that the counsellor and he agreed that he did not require further intervention. Absent that confirmation, and viewed in light of the respondent's history with addiction to alcohol and pornography, I am not satisfied that the evidence of the respondent's change in circumstances is sufficiently compelling to make the change in the interim order.
- [42] Moreover, insofar as there are continuing concerns regarding J.T.P. and his comfort level with the respondent, I am not persuaded that it would be in the best interests of the children to grant a variation of this order in the terms requested by the respondent. As noted in Fitzgibbon, the forum to resolve these issues will be at trial. At that point, the trial judge will have the benefit of opinion evidence and cross-examination of the parties to inform them of the optimum parenting regime that will serve the best interests of the children.

- [43] I recognize that in the interim, the claimant is prepared to concede some additional overnight parenting time but she does not want that schedule to deprive her of an equal share of the children's weekend time. The end goal of a restructuring of the respondents parenting role should take place after a trial of the issues. At this stage, it would not be in the best interests of the children that weekends could be divided as requested by the respondent.
- [44] I am satisfied that there remain risks to the children's emotional well-being if the respondent is granted extended parenting time. The views of J.T.P. must be taken into account. Those views must be put into evidence at trial and cannot be adequately assessed at this stage.
- [45] I am satisfied that the children's care and stability during the respondent's parenting time cannot be assured based on the evidence before me.
- [46] I am not satisfied that the respondent has proven his ability to safely exercise parenting responsibilities beyond the parties' current parenting schedule.
- [47] In my view, a variation of the interim parenting order could be implemented if the respondent is able to obtain the opinion from his treating counsellor addressing the concerns surrounding his mental health issues, and addiction to alcohol and pornography.
- [48] The respondent is still on disability and not working. I am confident that measures could be taken to expand his parenting time to include some holiday time, midweek time and weekends. I am not prepared to make an order at this time until sufficient other evidence becomes available.
- [49] Moreover, the Groves J was made only six months ago. As noted, I do not find that the respondent has proven that the change in circumstances since the interim order have sufficiently changed to warrant variation of the order.
- [50] Additionally, until a trial date is scheduled, the duration of this interim order will not be known. The parties should move expeditiously to obtain a trial date; in this registry those dates will likely be available within 4 to 6 months.
- [51] In the result, I dismiss the respondent's application for a variation of the interim parenting March Order. The respondent has liberty to make further application once he obtains additional evidence obviating the risks existing in March 2023. The respondent must be aware that it may be necessary to have all of these issues resolved at trial. The parties should move expeditiously to obtain a trial date to ensure that the interests of the children can be addressed by a trial judge as soon as possible to ensure that any parenting changes will be in their best interests.

[52] Concerning variation of the interim parenting March Order, I would add one term to permit the respondent to exercise additional parenting time, wholly in the discretion of the claimant, pending receipt of the further application on evidence that may become available to the respondent.

Other Claims

[53] The claimant consents to an order requested by the respondent that he have a reasonable time to access the former matrimonial home for the purposes of removing his personal belongings before completion of the sale of the matrimonial home. I will make that order provided that both parties and a supportive friend of the claimant be present during the respondent's attendance at the home.

[54] The respondent also asked for an order prohibiting the claimant from posting about him on social media. It appears from his affidavit that she has sent messages critical of the respondent. I was not provided with any authority to inform a decision to grant that order. The postings referred to by the respondent do not mention him by name. Although there may be an inference that the relate to him, there is no direct implication of the respondent in the messages.

[55] Section 222 provides the purposes which should guide conduct orders:

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending final determination of a family law dispute.

[56] Under s. 227(c), a court may make an order requiring a party to do or not do anything, as the court considers appropriate, in relation to a purpose referred to in s. 222.

[57] Finally, s. 225 gives specific authority to make orders restricting communication:

225 Unless it would be more appropriate to make an order under Part 9 [Protection from Family Violence], a court may make an order setting restrictions or conditions respecting communications between parties, including respecting when or how communications may be made.

- [58] Restrictions as to communications under these sections of the FLA are not bound to take into account the Charter. However, Charter values can be considered in the type of restriction requested by the respondent in this case, for instance, the right to freedom of thought, belief, opinion and expression. The principles underlying such an application were addressed in *A.B. v. C.D.*, 2020 BCCA 11.
- [59] In *C.A.M. v T.C.H.*, 2023 BCSC 1283 at paras. 113-116, Justice Schultes addressed this issue directly in light of the decision in *A.B.*:
- [113] That said, I am not convinced that the claimant posting negative comments about the respondent on Facebook, or posting pictures of herself that he considers inappropriate, are the proper subject of conduct orders.
- [114] The degree of caution that attaches to such proposed restrictions was well explained in *A.B. v. C.D.*, 2020 BCCA 11:
- [189] Sections 222 and 227 have been interpreted as giving the court "broad discretion to craft appropriate conduct orders": see *R.A. v. W.A.*, 2018 BCSC 1910 at para. 219. However, in crafting appropriate conduct orders, particularly orders that restrict a party's ability to communicate with others, courts should take into account a party's right to freedom of expression. In *Chellappa v. Kumar*, 2016 BCCA 2 , a conduct order was described as "a complete gag on either party discussing the case with anyone" (at para. 30). This court (in obiter) expressed considerable doubt as to whether a trial judge has jurisdiction to make a conduct order that so broadly restricts a party's freedom of expression, but if such jurisdiction does exist, "it should only be invoked in the clearest of cases on a full evidentiary record" (at para. 30).
- [115] It is worth noting that the form of restriction on the father's public communications that was imposed in *A.B.* was found to be necessary to prevent the harm to the child that was being caused by the father publicizing his dispute with that child. The Court also emphasized that when applying these sections, the governing consideration is the best interests of the child. In other words, in cases involving parenting conduct orders are not primarily a means of protecting the parents' interests.
- [116] I think that in this case the law of defamation, and the respondent's ability to request social media platforms remove any material that violates it, sufficiently protect him against false and injurious statements being made by her on social media, without restricting the claimant's general right to communicate about matters of interest to her, including this case, as she sees fit.

- [60] I am satisfied that these principles are applicable to the circumstances of this case. The order requested is that "the claimant [be] prohibited from posting about the respondent on social media". In my view, this request falls squarely within the principles outlined by the Court of Appeal in A.B. As noted in C.A.M., if there are any false or injurious statements being made by the claimant regarding the respondent, the respondent has the ability to request those platforms remove the material.
- [61] In this case, the comments attributed to the claimant in the respondent's affidavit do not name or specifically identify the respondent. The comments do not implicate or directly relate to the children. In the circumstances, I decline to make the order.

Conclusion

- [62] The respondent's application for a variation of the interim parenting March Order is dismissed. The respondent has liberty to make a further application once he obtains additional evidence obviating the risks existing in March 2023.
- [63] The respondent may exercise additional parenting time, in the sole discretion of the claimant, pending receipt of any further application on evidence that may become available to the respondent.
- [64] The respondent's application for an order that he have a reasonable time to access the former matrimonial home for the purposes of removing his personal belongings before completion of the sale of the matrimonial home is allowed. Both parties and a supportive friend of the claimant shall be present during the respondent's attendance at the home.
- [65] The respondent's application for an order prohibiting the claimant from posting about him on social media is dismissed.
- [66] The issue of costs was not addressed at the application. Unless the respondent makes submissions within 30 days to the contrary, the claimant will have costs of this application

"Armstrong J."

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Prepared on 27 October 2026 · Esheria