

CANADA / JUDGMENT

B.D.K. v. D.M.W.

2024 BCSC 2385

COURT

Supreme Court of British Columbia

DECIDED

31 December 2024

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2024 BCSC 2385 B.D.K. v. D.M.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.D.K. v. D.M.W.,

2024 BCSC 2385

Date: 20241231

Docket: E62874

Registry: Kamloops

Between:

B.D.K.

Claimant

And:

D.M.W. and A.M.W.

Respondents

Before: The Honourable Justice Hori

Reasons for Judgment

Counsel for the Claimant:

C.A. Molloy

Counsel for the Respondents:

C.E. Johnson

Place and Date of Hearing:

Kamloops, B.C.

August 21, 2024

Place and Date of Judgment:

Kamloops, B.C.

December 31, 2024

Introduction

- [1] The claimant, B.D.K., and the respondent, D.M.W., have known each other since 2010. B.D.K. met the respondent, A.M.W., about seven or eight years ago when she became part of B.D.K.'s and D.M.W.'s group of friends.
- [2] A romantic relationship developed between D.M.W. and A.M.W. which eventually resulted in a marriage proposal in the fall of 2019. They were married on July 11, 2020.
- [3] After the marriage proposal, the respondents asked B.D.K. to donate his sperm for the respondents' children. After some consideration and discussions, the parties entered into an agreement (the "Multi-Parent Agreement") whereby the parties expressed their intentions with respect to children conceived through sperm provided by B.D.K. The parties signed the Multi-Parent Agreement in June 2021.
- [4] The intentions of the parties expressed in the Multi-Parent Agreement include the following:
 - a) All parties are able to care and provide for their children;
 - b) The parties will be the legal parents of the children pursuant to s. 30 of the Family Law Act, S.B.C. 2011 c. 25 [FLA];
 - c) The parties will be joint guardians of the children;
 - d) The parties will equally share parenting time with the children; and
 - e) The parties will all live together or in close proximity to each other.
- [5] B.D.K. began residing in the same house as the respondents in January 2021. The parties then started the process of medical testing with a fertility clinic in Vancouver, which included counselling.
- [6] The parties executed the Multi-Parent Agreement on June 15 and 16, 2021.
- [7] In February 2022, D.M.W. tested positive for pregnancy. In March 2022, A.M.W. also had a positive pregnancy test. On or about March 7, 2022, D.M.W. had a miscarriage but became pregnant again in August 2022. Unfortunately, D.M.W. had another miscarriage on September 29, 2022.

- [8] By October 6, 2022, the relationship between the claimant and the respondents had deteriorated to the point that the respondents suggested that he leave their house and reside elsewhere. The reason for the failing relationship is unclear. The claimant blames the respondents and the respondents blame the claimant.
- [9] The child conceived by A.M.W. with the claimant's sperm was born approximately one month after the claimant left the respondents' house.
- [10] Since the child's birth, the respondents have limited the claimant's time with the child and have required the plaintiff to have supervised parenting time. The respondents' reason for limiting the claimant's contact with the child is their concern for the child's safety. Those reasons continue to form the foundation for the respondents' opposition to the claimant's application to increase parenting time.

Status of the Parties

- [11] The parties entered into the Multi-Parent Agreement before the child was conceived. The terms of the Multi-Parent Agreement establish that the parties intended that the claimant and the respondents be the parents of any children conceived from the claimant's sperm.
- [12] Accordingly, all parties to this action are parents of the child pursuant to s. 30 of the FLA.

Applications Before the Court

- [13] The claimant filed a notice of application on May 22, 2024, seeking the following orders:
- an order that the respondents retain a qualified divorce coach to provide co-parenting counselling; and
 - an order increasing the claimant's parenting time with the child.
- [14] The respondents filed a notice of application on June 24, 2024, seeking the following orders:
- an order appointing a qualified assessor to prepare a report pursuant to s. 211 of the FLA addressing the ability and willingness of the claimant to satisfy the needs of the child, including the impact of the claimant's mental health, if any;
 - an order that the claimant pay the costs of the s. 211 report;
 - an order that the parties jointly retain a counsellor for the purpose of counselling the parties as a group and that each of the parties pay one-third of the counselling costs;
 - an order for child support payable by the claimant; and
 - an order that the claimant pay the respondents the sum of \$1,000 for failing to mediate the issues pursuant to the terms of the Multi-Parent Agreement.

[15] At the hearing of the applications, the parties informed the court that they had reached an agreement on the respondents' counselling application and their child support application. Therefore, the remaining issues for the court to determine are:

- a) whether it is appropriate to order the preparation of a report pursuant to s. 211 of the FLA;
- b) whether it is in the best interests of the child to increase the claimant's parenting time;
- c) whether the claimant should pay compensation to the respondents for failing to mediate the issues under the Multi-Parent Agreement.

Orders by Consent

[16] The parties have resolved the counselling issue and the child support by consent. Accordingly, I made the following orders with the consent of the parties:

- a) Pursuant to s. 224(1)(b) of the FLA, the parties will retain Sandy Hawkins and Shelly Dean as co-parenting coaches for the claimant and the respondents respectively. The parties will attend a minimum of six co-parenting sessions at the direction of the co-parenting coaches unless otherwise directed by the court;
- b) The claimant's income pursuant to the Federal Child Support Guidelines, SOR/97-175 for 2024 is \$76,291 per year;
- c) The claimant will pay child support to the respondents in the amount of \$729 per month commencing on September 1, 2024, and continuing on the first day of each month thereafter until further order of the court or agreement between the parties. The child support payments will be made to the respondents by e-transfer.

Section 211 Report

[17] The respondents apply for the preparation of a report pursuant to s. 211 of the FLA. The respondents seek a report concerning the ability and willingness of the claimant to satisfy the needs of the child with a specific assessment of how the claimant's mental health will impact the needs of the child.

[18] At the root of the respondents' application for a s. 211 report is their suggestion that the claimant suffers from depression and has, in the past, had thoughts of suicide.

[19] The respondents rely upon the claimant's admission that he has suffered from depression and has had thoughts of suicide. However, the claimant deposes that;

- a) His depression is under control;
- b) His physician prescribed depression medication which he took as prescribed;
- c) His mental health improved through working with a counsellor, Rebecca Wedel;
- d) He no longer takes the prescribed medication and is able to manage without it;

e) He continues to work with his counsellor.

[20] The state of the claimant's mental health is set out in a letter from the claimant's counsellor, Ms. Wedel, dated September 17, 2023, which states as follows:

[B.D.K.] presented with self-reported depression, isolation, and rare suicidal ideation. At the time, he had already engaged a physician and started on medication for depression and had no active plan for self-harm to himself.

[]

[B.D.K.] is currently gainfully employed, active in his family & community, and seeking many means of emotional support. He has reengaged with his extended family, his community, and is currently mentoring several journeymen in his position as an electrician. He also has shown progress in that he purchased a permanent home to be closer to his son.

[]

[B.D.K.] has never, by deed or action, followed thru on any self-harm. He has never talked about harming others by physical deed, or knowingly caused mental distress. He is very aware of his actions and takes steps to acknowledge and accept responsibility for his behaviors.

[21] In my view, the respondents' concern about the claimant's mental health are out of proportion when compared to the direct evidence of the claimant's counsellor. Further, the respondents' impressions are based on the unverified and vague impressions of others. One example of this type of evidence from the respondents is in the 2nd Affidavit of D.M.W. sworn June 14, 2024, where, at paragraph 21, she deposes:

21) All the counsellors and supervisors that have met [B.D.K.] and [A.M.W.] and I; Cole, Shawn, Lolina, Shari, and Sarah, have all identified that [B.D.K.] has something going on mentally which is undiagnosed. Many have suggested it is something on the autistic scale, and some have mentioned the term personality disorder. All of them have stated that they are not qualified to diagnose [B.D.K.] and the counsellors have said that counselling without diagnosis is very difficult.

[22] After measuring the evidence of the claimant about his mental health against the evidence tendered by the respondents, I prefer the claimant's evidence. In my view, the respondents' impressions about the claimant's mental health are not reliable.

[23] The court has a broad discretion in deciding whether or not to order a report pursuant to s. 211 of the FLA. The threshold for exercising the discretion in favour of ordering a report is low. However, as held in *S.M.C. v. C.B.*, 2020 BCSC 994, at para. 33, the court should not order a s. 211 report if the purpose for the report is an attempt to create parenting controversies where none exist.

[24] In this case, I find that the evidence does not support the respondents' concern about the claimant's mental health or about his willingness or ability to satisfy the needs of the child. In that regard, I find that the respondents' application for a s. 211 report is an attempt to create parenting controversies where none exist.

[25] Therefore, the respondents' application for a s. 211 report is denied. However, if the circumstances change, the parties have leave to re-apply for a s. 211 report.

Parenting Arrangements

[26] The claimant seeks to increase his parenting time with the child. The claimant has produced a spread sheet in this application showing the parenting time he has had with the child from November 2023 to March 2024. The records indicate that from February 2024 to March 21, 2024, the claimant's parenting time was three and a half hours per week.

[27] The claimant seeks to incrementally increase his parenting time until he shares parenting time equally with the respondents with each party having one-third of the parenting time.

[28] The respondents oppose any increase or change in the parenting time for the claimant. They oppose a change in parenting time on the basis that the child will not be safe in the care of the claimant because:

- a) The claimant is unable to parent the child on his own;
- b) The claimant has mental health issues; and
- c) The claimant has perpetrated family violence toward the respondents.

Claimant's Ability to Parent Alone

[29] The evidence does not persuade me that the claimant is incapable of caring for the child alone or that placing the child in the care of the claimant would create a risk to the child. The most reliable evidence about the claimant's ability to care for the child comes from a report prepared by the parenting time supervisors dated February 16, 2024. The parenting time supervisors report positively on the care received by the child from the claimant. They report positively on the interactions between the claimant and the child. They also report an improvement in the claimant's parenting knowledge and confidence over time in the following passage from the report:

[The claimant] appears open to feedback and coaching, and each week has been observed using strategies that have been suggested the week before. He asks questions when he isn't sure about something, and applies what he learned if the opportunity arises. Although he appeared very stiff and awkward initially, he has steadily become more confident, relaxed, and natural in his interactions with [the child] over the course of the visits. Since the move to visits in the house this has continued, especially in the levels of playfulness he shows.

[30] The concerns raised by the respondents appear to be related to criticisms that would apply to any new parent. For example the respondents' concerns include:

- a) The claimant has been in a vehicle with the child only once;
- b) The claimant has no real-life experience of taking a toddler to a store, classes, restaurant, or completing life tasks with a child;
- c) The claimant held the child awkwardly; and
- d) The claimant would not accept the respondents' advice on how to hold the child and interact with him.

According to the parenting time supervisors, the claimant appears to have overcome these types of concerns.

[31] The respondents also raise concerns that would not impact on the child's day-to-day care such as:

- a) Being unable to answer questions about how many teeth the child had, how his doctor's appointments were going and what milestones the child was working on;
- b) Not asking about the child's immunizations, his daycare, or his activities; and
- c) Not asking the respondents about the child's clothing size, his clothing preferences or about other items that a toddler may need.

[32] Based on the nature of the concerns raised by the respondents and the contents of the report from the parenting time supervisors, I find that the respondents' concerns about the claimant's ability to care for the child are an exaggeration and are misplaced.

[33] Therefore, I find no concerns with respect to the claimant's ability to care for the child on his own.

Claimant's Mental Health Issues

[34] In my analysis of the respondents' application for a s. 211 report, I found that the evidence did not support the respondents' concerns about the claimant's mental health. For those same reasons, I find that the evidence does not establish that the claimant's mental health creates any risk to the child when he is under the claimant's care.

Family Violence

[35] The respondents allege that they have been victims of family violence from the claimant. They summarize the allegations of family violence in the second affidavit of D.M.W. I am not satisfied that the evidence is sufficient to conclude that the allegations amount to family violence. However, assuming that the allegations constitute family violence, the allegations do not justify depriving the claimant of more parenting time.

[36] Section 38 of the FLA, sets out the factors the court must consider when assessing the impact of family violence on the best interests of the child. The allegations do not compel me to deny the claimant parenting time because:

- a) The nature and seriousness of the alleged family violence is on the low end of the scale;
- b) The evidence of a pattern of coercive and controlling behaviour is weak;
- c) None of the alleged family violence was directed toward the child;
- d) There is no evidence of serious harm to the child's physical, psychological or emotional safety, security or well-being; and
- e) The family violence alleged against the claimant is not likely to impair the claimant's ability to care for the child and meet his needs.

[37] Accordingly, family violence is not a reason to deprive the claimant of parenting time.

General Assessment of Parenting Arrangements

[38] Section 37 of the FLA provides that in making an order respecting parenting arrangements for a child, the court must consider the best interests of the child only. Section 37(2) of the FLA provides that all of the needs and circumstances of the child must be considered, including a specific list of factors set out in that subsection.

[39] The Multi-Parent Agreement provides that all three parties are the legal parents of the child and their intention is that they will share parenting time equally between them. Unless there is evidence upon which I can conclude otherwise, I am compelled to find that the child's health and emotional well-being will be enhanced by increasing his time with the child.

[40] The child is two years old. Since the claimant's time with the child has been limited to date, the relationship between the child and the claimant may not have developed to the extent it may have if there had been more contact. However, based on the report of the parenting time supervisors, I anticipate that the relationship between the claimant and the child will grow stronger with more parenting time with the claimant.

[41] The child has been predominantly in the care of the respondents because of limitations placed on the claimant's parenting time by the respondents. In my view, this factor does not eliminate an increase in parenting time for the claimant. However, it may require a graduated increase in the claimant's parenting time to allow the child to become comfortable with a new routine.

[42] A more structured parenting time schedule with the claimant playing a more significant role will enhance the child's need for stability.

[43] As I explained earlier in these reasons, I have no concerns about the ability of any of the parties to care for the child and to meet his needs.

[44] Accordingly, I find that it is in the best interests of the child to have more parenting time with the claimant in a structured schedule. I also find that the increase in the claimant's parenting time should occur over time to allow the child to become comfortable with more time with the claimant.

Parenting Schedule

[45] Based on the foregoing, I am prepared to increase the claimant's parenting time as follows:

- a) Commencing on January 9, 2025, and continuing for a period of three months, the claimant will have parenting time with the child weekly on Thursdays from 10:00 am to 4:00 pm and on Sundays from 12:00 pm to 6:00 pm.;
- b) Commencing on April 10, 2025, the claimant will have parenting time with the child weekly on Thursdays from 10:00 am to 4:00 pm and commencing on April 12, 2025, the claimant will have parenting time with the child from Saturday at 12:00 pm to Sunday at 12:00 pm every other week;
- c) Commencing on July 9, 2025, the claimant will have parenting time with the child from Wednesday at 5:00 pm to Thursday at 5:00 pm every other week and commencing on July 19, 2025, the claimant will have parenting time with the child from Friday at 5:00 pm to Sunday at 5:00 pm every other week.

[46] The parenting arrangement from July 9, 2025, will continue until further order of the court or agreement between the parties.

Compensation for Failing to Mediate

[47] The Multi-Parent Agreement sets out, in less than satisfactory terms, that where the parties are "in dispute to any terms of this Agreement they agree to attempt to resolve the dispute through negotiation, counselling or mediation". The Multi-Parent Agreement provides three options for resolving disputes and mediation is only one of them.

[48] There is evidence that the parties attended counselling for parenting and relationship issues. It is clear that the counselling did not resolve the parenting or relationship issues between the parties. Therefore, in that sense, the parties engaged in a dispute resolution process contemplated by the Multi-Parent Agreement.

[49] The correspondence between the parties also indicates that both sides were engaged in trying to arrange a mediator and mediation dates. However, mediation did not occur for one reason or another.

- [50] The respondents seek compensation from the claimant for failing to participate in a mediation of the issues before proceeding to this action and this application. The respondents seek compensation pursuant to s. 230 of the FLA. However, s. 230 provides only for the payment of compensation for the purposes of enforcing an order of the court under the FLA. It does not provide for penalties for failing to comply with an agreement. Therefore, the court has no jurisdiction under s. 230 to award compensation to the respondents.
- [51] In the alternative, the respondents seek compensation pursuant to the terms of the Multi-Parent Agreement. Section 69 of the Multi-Parent Agreement provides that if court proceedings are required to resolve a dispute, the party who refused to mediate must pay \$1,000 to the other party as contribution towards the legal fees incurred by the other party. I am not satisfied that compensation to the respondents is warranted in this case for the following reasons:
- a) I am not satisfied that the claimant refused to mediate. The claimant was the party who initially proposed mediation. The mediation discussion continued for quite some time without success in arranging a mediator and a mediation date. Further, the purpose of the \$1,000 payment is to encourage the resolution of disputes and the Multi-Parent Agreement provides three dispute resolution options. There is evidence that the parties attended counselling in order to resolve their issues.
 - b) The dispute before the court is not a dispute about any terms of the Multi-Parent Agreement. It is a dispute about the child's best interests with respect to parenting time with the parties and the child's entitlement to support. This dispute is not about the parties' entitlement under the Multi-Parent Agreement.
- [52] Therefore, the respondents' claim for compensation pursuant to the Multi-Parent Agreement is dismissed

Costs

- [53] If the parties cannot agree on costs, they have leave to file written submissions on costs.
- [54] The claimant will file submissions within 14 days of the release of these reasons. The respondents will file response submissions within 14 days of receiving the claimant's submissions. Once the claimant receives the respondents' costs submissions, he will file any reply within seven days.

"D.K. Hori J."

HORI J.

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