

CANADA / JUDGMENT

C.C.B. v. A.V.B.

2024 BCSC 1340

COURT

Supreme Court of British Columbia

DECIDED

25 June 2024

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2024 BCSC 1340 C.C.B. v. A.V.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.C.B. v. A.V.B.,

2024 BCSC 1340

Date: 20240625

Docket: E211600

Registry: Vancouver

Between:

C.C.B. also known as C.C.F.

Claimant

And

A.V.B.

Respondent

Corrected Reasons for Judgment: These Reasons have been amended throughout to anonymize the parties and other factual information that may discern the identifies of the parties on July 29, 2024

Before: The Honourable Justice Mayer

Oral Reasons for Judgment

Counsel for the Claimant:

T.S. Brayer

Counsel for the Respondent:

J. Hansra, as agent for

S. Ahuja

Place and Date of Hearing:

Vancouver, B.C.

June 21, 2024

Place and Date of Judgment:

Vancouver, B.C.

June 25, 2024

Introduction

- [1] In this application the respondent, A.B. ("Mr. B") seeks an order varying the interim consent parenting order made by Justice Coval on March 11, 2024 (the "Coval order"). Mr. B. seeks an order under which he would receive three uninterrupted weeks of parenting time with the parties' five year-old child (the "Child") during the 2024 summer holidays and parenting time during the August 2024 long weekend - from the morning of August 2 to the afternoon of August 5, 2024.
- [2] At this time, pursuant to the Coval order, Mr. B. exercises parenting time every Friday from 8:00 am until Saturday at 4:00 pm and every Wednesday from 8:00 am until 5:00 pm. The Coval order provides that "[a]fter September 1, 2024 either party may apply for variation of the [parenting schedule] without having to show a material change of circumstances."
- [3] The claimant, respondent to this application, C.C.B. also known as C.C.F. ("Ms. F") is opposed to any change to the parenting schedule set out in the Coval order. She contends that the order was intended to remain in effect until September 1, 2024, just prior to the time when the Child starts kindergarten. In any case, she contends that it would not be in the Child's best interest to spend time with her father as sought.

Background

- [4] The parties were married in May 2016 and separated in September 2020. The Child was born in February 2019.
- [5] Before the parties separated Ms. F. was the Child's primary caregiver. Since separation the Child has resided primarily with her in Burnaby. Mr. B. resides with his mother in Abbotsford.

- [6] Since July 2021 there have been a number of orders in this high conflict family case including orders concerning supervised parenting time and a protection order which initially prohibited contact between Mr. B. and Ms. F. and the Child. The protection order has since been terminated in respect of the Child.
- [7] The parties obtained a s. 211 report from Dr. Elterman dated August 5, 2023, which had been ordered by Justice Elwood on March 14, 2022. Dr. Elterman's opinion was that Mr. B. does not represent a risk of physical harm to the Child and he did not consider that supervised parenting time was required. In his opinion Ms. F. is a loving mother, but her primary deficit is her inability to share the Child with Mr. B., which Dr. Elterman described as a "blind spot". Dr. Elterman considered that both parents were capable of providing for the Child's physical needs, but recommended that Ms. F. maintain primary residence. He recommended that Mr. B. have parenting time on Saturdays and Wednesdays.
- [8] After the report of Dr. Elterman was provided the parties obtained additional orders with respect to parenting time, the most recent being the order of Justice Elwood made December 15, 2023 and the Coval order (again - made on March 11, 2024).
- [9] Justice Elwood ordered, by consent, that Mr. B. would have regular unsupervised parenting time Fridays from 8:30 am to 4:00 pm and Saturdays from 9:00 am until 4:00pm.
- [10] Justice Coval increased Mr. B.'s parenting time, by consent, such that it currently includes an overnight from Friday at 8:00 am to Saturday at 4:00 pm and parenting time on Wednesdays from 8:00 am to 5:00 pm. Although the Coval order allocated some time over the 2024 Easter long weekend, it did not allocate parenting time during the summer. The Coval order provides that "the parties are at liberty to change the [parenting schedule consented to] by consent in writing" and that after "September 1, 2024, either party may apply for variation of the [parenting schedule which they consented to] without having to show a material change of circumstances."
- [11] On April 23, 2024, Mr. B. emailed Ms. F. requesting additional parenting time with the Child during the May, Canada Day and August long weekends and proposing that each of the parties get 3 weeks consecutive parenting time during the summer school breaks and other extended periods of parenting time. On April 29, 2024, Ms. F. responded refusing to agree to provide the additional parenting time sought by Mr. B.

Summary of the Positions of the Parties

- [12] Mr. B. seeks to vary the Coval order to provide for additional parenting time with the Child during the summer of 2024, to allow the Child to spend more time with him and his mother who was diagnosed with terminal cancer on April 22, 2024, and may only have six months to live.

- [13] Although in his notice of application Mr. B. sought 3 weeks uninterrupted parenting time, during submissions his counsel acknowledged that this may be too dramatic a change to the Child's current parenting schedule. Counsel submits, in the alternative, that an appropriate order may be that Mr. B. receive an additional overnight in alternating weeks - either on Wednesdays or on the weekend or an additional weekday.
- [14] Ms. F. contends that the Coval order was intended by the parties to be in place for at least six months - until September 2024. She submits that increasing Mr. B.'s parenting time is not in the Child's best interests on the basis that the Child's overnight visits with Mr. B. are not going well. She contends that Mr. B.'s mother's ill-health has been known for some time and disputes that there has been a material change of circumstances justifying the variance of the Coval order at this time.

Legal Framework

- [15] Applications to vary interim parenting orders under the Family Law Act, S.B.C. 2011, c. 25 [FLA], must be considered under s. 216 of the FLA: B.K. v. J.B., 2015 BCSC 1481.
- [16] Subsection 216(3) of the FLA permits a court to change, suspend or terminate an interim order if (a) there has been a change in circumstances since the interim order was made, or (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
- [17] Factors to consider in varying an interim order are found in s. 216(4) and include the following:
- (a) the change in circumstances or the evidence, or both, referred to in subsection 216(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 216(3).
- [18] The material change of circumstances test set out by the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, applies in the context of an application to vary an interim parenting order: see for example, *Boychuk v. Singleton*, 2008 BCCA 355 at paras. 14-15. As stated in *Goertz* with respect to the threshold for a material change in circumstances, at para. 12, "[c]hange alone is not enough; the change must have altered the

child's needs or the ability of the parents to meet those needs in a fundamental way [t]he question is whether the previous order might have been different had the circumstances now existing prevailed earlier".

- [19] Section 37(1) of the FLA requires the Court, in making an order respecting guardianship, parenting arrangements, or contact with a child, to consider the best interests of the child only. In determining what is in a child's best interest. Section 37(2) makes it mandatory for the court to consider amongst other factors, the child's views, unless it would be inappropriate to consider them. In this case, at five years old, the Child is too young for her views to be considered.

Analysis

Has There Been a Material Change in Circumstance Since the Coval Order was Made?

- [20] For the reasons set out below, I am satisfied that there has been a material change in circumstances, the diagnosis of Mr. B.'s mother with terminal cancer, which has altered the Child's needs and the ability of Mr. B. to meet those needs since the Coval order was made.
- [21] Mr. B.'s mother, R.B. has sworn that on or about April 22, 2024, she was diagnosed with stage 4 cancer and has been advised by her doctors that she may only have approximately six months to live. Although Ms. F. contends that R.B. has been of ill health for some time there is no evidence on which this Court can conclude that R.B. is not being truthful regarding her recent diagnosis and prognosis. Further, with respect to Ms. F.'s submission that R.B.'s evidence regarding her diagnosis and prognosis is inadmissible hearsay, in family cases such as this, this Court is able to consider evidence that might in other civil cases be considered inadmissible. I accept R.B.'s evidence with respect to her diagnosis and prognosis.
- [22] R.B.'s evidence is that she began to spend time with the Child starting around September 2023, because she had previously been prevented from doing so. She says that she and the Child now have a loving relationship and spend time together at her and Mr. B.'s home in Abbotsford, doing activities such as watering flowers in the garden, playing with Barbies or watching cartoons. She says that she is hopeful that she will be able to spend as much time as possible together with the Child and with the rest of her family this summer.
- [23] Mr. B. has provided evidence that at the time that the Coval order was made he was not aware that his mother only had a few months to live. He says that he would like to plan more activities with his family this summer so that the Child can spend as much time with his mother as possible. He says that his employer is aware of the situation involving his mother, and has agreed to allow him time off to spend additional time with his family, including the Child.

[24] I conclude that R.B.'s condition has reduced the amount of time she has left to spend with the Child, thereby impacting both her and Mr. B.'s circumstances and the circumstances of the Child. Further, I conclude that as a result of R.B.'s deteriorating health and the agreement of Mr. B.'s employer to allow him to take more time off in the summer, that Mr. B.'s circumstances have changed in that he will have more time than expected this summer to spend with the Child and his family.

Is It in the Child's Best Interests to Vary the Parenting Time Order set out in the Coval Order?

[25] As I have already stated s. 37(1) of the FLA requires this Court to consider only the best interests of the Child in making an order with respect to parenting arrangements. The relevant factors set out in s. 37(2) in determining what is in the Child's best interests include the following:

- (a) the child's health and emotional well-being;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities.

[26] In my view, given the evidence that the Child enjoys spending time with Mr. B.'s mother, R.B., I find that will be beneficial to her to be able to spend additional time with her this summer, which may be her last.

[27] Ms. F. has been the primary caregiver for the Child throughout the first five years of her life. At this time, Mr. B. exercises overnight parenting time only one night per week. Making an order that Mr. B. receive uninterrupted parenting time of three weeks would be a dramatic change.

[28] In general, on an interim application the court is reluctant to make orders which substantially alter the status quo to avoid making an order which will be unduly disruptive or stressful to a child. In my view, this is more important in the case of a young child. It is preferable that changes to an existing parenting schedule are made incrementally, in consideration of a child's need for stability.

[29] Ms. F. has provided evidence that her father is in hospital and is either unwell or terminally ill and that she and Child visit him regularly. I accept her submission that an extended period of parenting time with Mr. B. would prevent the child from seeing her maternal grandfather regularly - which would not be in her best interest.

- [30] To the extent that family violence occurred in the past s. 16(5) of the Divorce Act, R.S.C. 1985, c. 3 (2ndSupp.), provides, in summary, that in determining what is in the best interest of the child, past conduct should not be considered unless it is relevant to the exercise of parenting time going forward . Based on the evidence before the court I am not satisfied that any alleged past conduct is relevant to the application before the court for increased parenting time. Based on the s. 211 report findings of Dr. Elterman and the other evidence before the Court I am not satisfied that if Mr. B.'s parenting time is increased, that there is a risk of family violence directed towards the Child.
- [31] I am also not satisfied that the Child's health and emotional well being will be negatively impacted if there is an incremental increase in parenting time with Mr. B. Ms. F.'s evidence that the Child returns home lethargic from overnight visits with Mr. B., has on one occasion wet the bed at Mr. B.'s home, has come back hurt on one occasion after attending at a trampoline park with Mr. B. and has expressed unwillingness for overnights does not rise to the level of suggesting that the Child is at risk of suffering physical or emotional harm if Mr. B. is provided with some additional parenting time.
- [32] Ms. F. has provided evidence that the Child is currently participating in activities during her parenting time on Sundays (church and soccer), Monday (dance), Tuesdays (music and gymnastics), Wednesdays (Tae Kwan Do) and Thursdays (Take Kwan Do and Jiu Jitsu). My understanding is that it is Ms. F.'s position that given this schedule, providing Mr. B. with additional parenting time would deprive the Child of the opportunity to participate in her current activities.
- [33] In my view, simply because a Child's "dance card" has been filled with pre-scheduled activities by one party does not justify the denial of additional parenting time to the other. As always, the overriding consideration is whether a proposed change to a parenting schedule is in the whole, in the child's best interests.

Conclusion

- [34] I am satisfied that there has been a material change in circumstances since the Coval order was made. I am not satisfied that the parties agreed, or that the Coval order required, that the parties would not seek to vary this order if a material change in circumstances occurred.
- [35] I am satisfied that is in the Child's best interests to have additional parenting time with Mr. B. during the summer of 2024 - primarily so that she can spend more time with Mr. B. and his mother, R.B. I do not find that an uninterrupted three week period of parenting time would be appropriate given that the Child has never spent this amount of time with her father. The circumstances are not analogous to those in *Bellamy v. Bellamy*, 2016 BCSC 1484, in which there was a history of longer periods of parenting time with the parent seeking summer parenting time.

- [36] Mr. B. has not provided sufficient information to allow this Court to determine whether the period of parenting time sought over the August 2024 long weekend is in the Child's best interests. The court is only advised that Mr. B. wishes to do something, somewhere in the province with the Child and his family during this period. I decline to order additional parenting time during the August 2024 long weekend.
- [37] I order that the Coval order be varied such that on alternating weeks during the summer months of 2024, commencing on July 9, 2024, Mr. B. will have parenting time from 8:00 am on Tuesday until 4:00 pm on Wednesday. In my view, this provides an incremental change to the current parenting schedule which will not impose undue stress on the Child, but will address the change in circumstances by providing some additional time for the Child to be with her father and paternal grandmother. There is no change ordered to the location of pick ups and drop offs as is currently set out in the Coval order.

(Submissions on Costs)

Costs

- [38] THE COURT: I appreciate that there may have been discussions, perhaps one-sided, in an effort to settle this, but the application that was before the court sought a three-week period of parenting time. Mr. B. didn't seek, at least on paper, what counsel for the applicant submitted may be appropriate and what the court ultimately ended up awarding by way of parenting time. I am satisfied that success is divided and that it is appropriate for each of the parties to bear their own costs.

"Mayer J."

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