

CANADA / JUDGMENT

C.D.A. v. P.R.B

2020 BCSC 1337

COURT

Supreme Court of British Columbia

DECIDED

10 September 2020

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2020 BCSC 1337 C.D.A v P.R.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.D.A v P.R.B.,

2020 BCSC 1337

Date: 20200910

Docket: E58702

Registry: New Westminster

Between:

C.D.A

Claimant

And

P.R.B

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Claimant:

E. Chhina

Counsel for Respondent:

M.J. Anderson

Place and Date of Trial/Hearing:

New Westminster, B.C.

August 26, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 10, 2020

- [1] The Claimant and the Respondent lived together from 2012 until the fall of 2019. They have one child--a boy who turned three years old on September 7, 2020. The Respondent mother also has three older children from previous relationships. The parties' child currently lives with the Claimant father pursuant to an interim order that was made subject to review.
- [2] The mother now applies to have primary residence of the child or, alternatively, equal parenting time. The father counters with an application that the mother's parenting time be professionally supervised. He says she has mental health issues that pose a risk to the child's safety and the child expresses anxiety and fear about being with her.
- [3] The parties separated in September, 2019, but continued to live separate and apart under the same roof until November 10, 2019. On that date, the police attended at the parties' home in Chilliwack, resulting in the father leaving the residence with the child and going to live at the home of his parents, where he and the child still live.
- [4] On December 11, 2019, Master Caldwell made an order that the child reside primarily with the father, with the mother to exercise parenting time at a public place for three to four hours each Thursday and Friday and 6 hours on both Saturday and Sunday on alternate weekends.
- [5] It appears that, when the mother exercises parenting time pursuant to that order, the father and/or members of his family frequently remain at the public location to observe. I have no doubt that, as one affidavit states, this creates an "uncomfortable dynamic."
- [6] In his oral reasons for judgment, Master Caldwell referred to medical records showing that the mother has, for most of her life, suffered from anxiety and depression, including suicidal thoughts. She also suffers from an eating disorder. In making the order he did, Master Caldwell said:

My decision, however, is not a final one obviously. This is very early in the game, and this decision would be subject to review once the respondent mother has put together a better pattern and more extensive pattern of counselling and self-awareness with respect to getting out of her very unfortunate mental-health issues, with just counselling or medication or the like.

- [7] He also found that the father "is not above threatening violence" and said: "Neither of these parties is an outstanding example of parenting, unfortunately, but more of it relates to their interpersonal relationship with each other."
- [8] Master Caldwell clearly stated his order was subject to review. On a review of an interim order, unlike an application to vary the order, neither party is required to show a material change in circumstances. However, contrary to the submissions of the mother's counsel, the review application is not entirely a hearing de novo. I should defer to Master Caldwell's findings of fact on the evidence that was before him, but consider that evidence in light of any additional or subsequent evidence that has been put forward.
- [9] On this application, the parties have, between them, filed a total of 31 affidavits of themselves and various friends and relatives, full of allegations, counter-allegations and denials. Only 8 of those affidavits were sworn prior to the hearing before Master Caldwell. It is generally impossible, on an application of this kind, to resolve all of the factual and credibility issues raised by that volume of affidavit evidence.
- [10] As I told counsel during the application, this case cries out for an assessment and report under s. 211 of the Family Law Act, SBC 2011 Chapter 25 ("FLA"). In high conflict cases involving children, the properly qualified and independent author of such a report acts as the "eyes and ears" of the court: C.D.M. v. K.M.A.W., 2019 BCSC 608 at para 32. Among other things, the report provides some independent evidence against which the evidence put forward by the parties can be weighed.
- [11] There was no application before me to order a s. 211 report. Although I have the jurisdiction to order one on my own motion, there was no evidence about the parties' ability to obtain one within a reasonable time. I am therefore reluctant to impose the potential costs on them. But in the absence of such assistance, the only way of potentially resolving many of the factual disputes that have been raised will be a lengthy trial with examination and cross examination of all witnesses by counsel. Aside from the delay that would involve, I doubt either party can afford it.
- [12] For purposes of this application, I have given primary consideration to the mother's clinical records. Those records, most of which predate separation, are the source of all of the evidence about the mother's mental health condition that the father relies on to argue for restrictions on her parenting time. In other words, having had sufficient insight to recognize her need for treatment and having appropriately sought it, the mother now finds the records of that treatment being used against her.
- [13] The mother has been in regular contact with mental health services provided in Chilliwack by Fraser Health Authority. In July 2019, a psychiatrist, Dr. Lilla, recorded a clinical impression of "generalized anxiety disorder" and "major depressive disorder." A counsellor's progress note dated September 17, 2019 (which would have been around the time the parties were separating) quotes her as saying she has "fleeting thoughts of suicide a few times a month." She was assessed on that date as being at low risk for suicide. Those reports would

have been before Master Caldwell in December 2019.

- [14] There is no evidence that the mother has every attempted suicide or been hospitalized for mental health reasons. Since the order of Master Caldwell, she has continued to seek treatment and counselling. On January 9, 2020, Dr. Lilla reported that she was not suicidal. She has continued to attend weekly group therapy sessions with a counsellor.
- [15] Unfortunately, Dr. Lilla left Chilliwack Mental Health Services at some point after writing his January 9, 2020 report and the Respondent says she has not been assigned a new psychiatrist. She attributes the delay to difficulties caused by the COVID-19 pandemic and I have no doubt that is likely to be at least a contributing factor.
- [16] As a result, she has not been able to obtain a full medical legal report from a psychiatrist. While such a report would have been helpful, I do not agree with counsel for the father when she asserts that the onus is on the mother to provide such a report confirming she is capable of parenting. Nothing in Master Caldwell's reasons sets the bar that high. He expected her to continue to address her mental health issues and she has done that.
- [17] The mother suffers from anxiety and depression. Those are conditions that cannot not be minimized, but they are all too common in society and their presence, in itself, cannot be grounds for denying or restricting parenting. Most important, there is nothing in the clinical records to suggest her condition poses a risk to the child.
- [18] An order for supervised access, like termination of access, requires evidence of exceptional circumstances because it is just one small step away from a complete termination of the parent-child relationship. Among the factors that the court must weigh in the context of the child's best interest are the right of a child to know and have a relationship with each parent and the risk of harm. *F.K v. M.K.*, 2010 BCSC 563 at paras 147-149.
- [19] I respectfully adopt the approach of Master Elwood in *M.D.F. v. D.O.T.C.*, 2020 BCSC 522, which involved a parent with more severe depression than the evidence indicates in this case. In *M.D.F.* the father had recently attempted suicide and had been hospitalized. Master Elwood said he was unable to conclude that the father had fully overcome the depression that led to the suicide attempt. However, he said at para 82 that the question was not whether the father was at risk of attempting suicide again, but whether, without supervised parenting time, he posed a risk to the physical, psychological or emotional safety and well-being of the children. The Master concluded:
- [83] It would clearly be emotionally devastating for the children if their father attempted suicide again, much less killed himself. But that risk exists regardless of whether the father's parenting time is supervised. The only potential risk a parenting supervisor could mitigate is a risk the father might attempt suicide in the presence of the children or a risk he might engage in dangerous suicidal behaviour while the children are in his care.

- [84] In my view, it is a large step from the recognized risk of a repeat suicide attempt to a risk that the father would seek to take his life or endanger the safety of his children while they are in his care. That step is too large for me to take on the evidence.
- [20] The case of *G.L. v. R.L.F.*, 2015 BCPC 29, relied upon by the father, is not comparable. That case primarily involved a relocation application by a mother in circumstances where the father was subject to an order for supervised access made four years earlier. That earlier order had been based in part on a finding that the father, unlike the mother in this case, had failed to seek treatment for his anxiety disorder. After denying the relocation application, Judge MacCarthy invited further submissions on the issue of parenting time.
- [21] Nor is this case comparable to *A.B. v. C.D.*, 2015 BCSC 2134. In that case there was evidence of a recent incident in which the father had beaten one of the children, causing welts. The father had also admitted to spanking the child three times. Justice Burke found that the father had since made efforts at managing his emotions, but was resistant to taking a proper anger management course. Although Justice Burke ordered supervised access, she made clear that the order could be varied after the father completed the anger management course.
- [22] The father in this case points to what he says is evidence of physical or emotional danger to the child. He says that anytime the word "mom" is used, the child cries "No mommy stay with daddy, stay with grandma" and sometimes wakes up from nightmares saying the same thing. The father also quotes the child saying "mommy hurt me brother too" (an apparent reference to one of the mother's older children from a previous relationship).
- [23] Those allegations are contained in an affidavit that was sworn December 9, 2019 and was before Master Caldwell. As of the date of that affidavit, the child had not seen his mother since the father and child left the former family home a month earlier.
- [24] In an affidavit sworn July 30, 2020, the father refers again to nightmares, which he says occur after the child has seen his mother and subside when he spends enough time away from her. Allegations about the child's nightmares and stated fear of his mother are supported by affidavits from both of the father's own parents.
- [25] In an affidavit sworn on August 11, 2020, the father says the child has come home from visits with his mother with long scratch marks on his abdomen and saying "Mommy scratched me." The mother denies ever having scratched the child, either intentionally or accidentally and says he has never acted fearful or uncomfortable around her. In fact, she says he usually comes running to her.

- [26] In it is virtually impossible to weigh or fully appreciate the context of hearsay statements from a 2-year old, particularly one who spends most of his time with adults who are clearly hostile to the mother. This is where the court would particularly benefit from the expert assistance of a s. 211 report, but, as said above, I would need more evidence of the parties' ability and willingness to pay for one, or evidence that a publicly funded one could be prepared within a reasonable time.
- [27] On the allegation of scratches, it is difficult to understand how the mother could have harmed the child when all of her time with child has been in public places since the date of Master Caldwell's order of December 11, 2019 and she did not see the child at all for a month preceding that order.
- [28] This child has not had a normal relationship with his mother for almost a third of his life. There is a need for some caution, but on balance and considering the factors set out in s. 37 of the FLA, I find that it is in the best interests of the child to restore his relationship with her so that he can eventually have a stable, loving relationship with both parents. That is unlikely to happen if all her time with the child must be supervised and even less likely to happen if she must continue seeing the child in locations where their interactions are being directly monitored by the father or others close to him.
- [29] In that regard, it is also important for the parties to recognize that they have some 16 years of co-parenting ahead of them. They will eventually need to be able to discuss and look for constructive solutions to problems they identify, rather than simply making accusations against each other in affidavits.
- [30] That said, I have also considered the evidence of the child expressing anxiety about seeing his mother. I find that an immediate move to equal parenting or anything close to it would be too sudden a change and the mother's unsupervised parenting time must be increased gradually.
- [31] I was told that the father works four and a half days a week and, while he is at work, the child is either in day care or is cared for by a family member. I find that some of that care can and should be transferred to the child's own mother.
- [32] I therefore order that, effective immediately, the Respondent mother will have unsupervised parenting time with the child in her own home, or other locations of her choosing, on Monday and Thursday mornings from 9 a.m. to 12 noon. After two weeks, the Monday parenting time will be extended to run from 9 a.m. to 5 p.m. and the Thursday parenting time will be similarly extended after a further two weeks. Beginning Monday, October 19, 2020, the mother will have parenting time from Monday at 9 a.m. to Tuesday at 12 noon and from Thursday at 9 a.m. to Friday at 12 noon.
- [33] Should any of those parenting days conflict with the mother's counselling or therapy sessions, she may designate an alternate weekday to exercise an equal amount of parenting time.

- [34] I was told that the mother works from home and must be alone in her bedroom on a computer. It will be a term of the order that she not engage in any work or work related activities during her parenting time. It will be a further term that she not consume any alcohol or non-prescription drugs for a 24 hour period before her parenting time.
- [35] After November 1, 2020, either party will be at liberty to seek a review of parenting time arrangements without the need to prove a material change of circumstances. Of course, either party is at liberty to apply in the interim if problems arise, but I stress any such application should be brought only in the most urgent circumstances and on very clear evidence. I am not seized of any further applications.
- [36] I make no order of costs on these applications.

"N. Smith, J."

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