

CANADA / JUDGMENT

E.D.N. v. E.C.N.

2022 BCSC 1546

COURT

Supreme Court of British Columbia

DECIDED

12 August 2022

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2022 BCSC 1546 E.D.N. v. E.C.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.D.N. v. E.C.N.,

2022 BCSC 1546

Date: 20220812

Docket: E44357

Registry: New Westminster

Between:

E.D.N.

Claimant

And

E.C.N.

Respondent

Before: The Honourable Madam Justice E. McDonald

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

J.M. Dreyer

Counsel for the Respondent:

S. Wong

Place and Date of Hearing:

(via videoconference)

New Westminster, B.C.

August 9, 2022

Place and Date of Judgment:

New Westminster, B.C.

August 12, 2022

[1] THE COURT: I am delivering my reasons for judgment in respect of the respondent's July 21, 2022, application orally. Should the parties request a transcript of my reasons, I may edit for style and grammar and to add citations and headings, but the result will not change.

Introduction

[2] This family law litigation was commenced in 2013. The parties have been separated since June 2013, and they have two children together. Their children are now approximately 13 and 11 years old.

[3] In 2013, the court ordered the respondent to pay child and spousal support to the claimant. However, the support has not been paid and there is a substantial arrears balance owing to the claimant.

[4] From 2013 to 2019, the parties were managing to co-parent the children, even though there were ongoing issues surrounding support payments. Importantly, the respondent was exercising regular parenting time with the children until sometime in 2019, when he experienced some mental health challenges.

[5] In early 2020, the claimant applied for and was granted a protection order in respect of the respondent and this protection order is now in place indefinitely. Also in 2020, the respondent was granted supervised parenting time with the children.

[6] While the parties disagree as to the reasons, there is no dispute that the respondent has had minimal parenting time since 2020. To date, no final order has been made in this proceeding.

[7] In June 2021, the claimant amended the notice of family claim to include, for example, a request for a divorce order and she also filed a summary trial application seeking a final order. The respondent opposes the relief sought in the claimant's summary trial application, namely as it relates to parenting issues. The summary trial application was adjourned and it has not at this point been reset for hearing.

- [8] This application requires me to consider whether I ought to order that a report be prepared pursuant to s. 211 of the Family Law Act and that the parties equally share the cost of the report.

The application

- [9] In his notice of application filed on July 21, 2022, the respondent specifically seeks an order pursuant to s. 211 that Dr. Michael Elterman shall conduct an assessment with respect to the parties' children, and include recommendations for parenting arrangements as an update to his previous report dated December 16, 2013.

The position of the parties

- [10] The respondent is concerned that an updated report should be ordered in light of his mental health issues to assess whether he has the ability to meet the needs of the children and in circumstances where the claimant seeks, among other things, to convert the interim supervised parenting time granted to him into a term of the final order.
- [11] The respondent has not filed an application to vary the protection order, nor the parenting time order that has been in effect since 2020. However, it is apparent that the respondent seeks a s. 211 report in part to address the claimant's request for a final order and more specifically her request that the respondent's parenting time be supervised.
- [12] The claimant opposes the application for an updated s. 211 report, and her main concern is that it is principally a delay tactic by the respondent. In her view, such a report is not necessary at this late stage, especially when the respondent has not been exercising parenting time and when he has provided insufficient information regarding the treatment of his mental health problems. She also points out that the respondent currently owes her in excess of \$300,000 in support arrears, and that she cannot afford to pay for half of the cost of a s. 211 report.

Background

- [13] The parties have been separated since 2013 and they have two children who are presently 13 and 11 years old. The children reside primarily with the claimant.
- [14] On February 26, 2020, Justice G.C. Weatherill made an order granting the respondent supervised parenting time with the children for up to six hours every Saturday or Sunday, commencing February 29, 2020, at times agreed upon with the claimant. The parenting time supervisor is the respondent's sister, or another person that is agreed to by the parties.
- [15] Since that order, the respondent has had supervised parenting time with the children twice. The parenting time supervisor was to be Ms. Strus, who is the respondent's sister. The respondent has had supervised parenting time at a restaurant on March 1, 2020, and in April 2020 during a birthday celebration for one of the parties' children.

- [16] The respondent says he has tried "on several occasions" to exercise parenting time, but he has been "regularly denied by the claimant". On August 19, 2020, the respondent's counsel proposed parenting time with the children on August 27 and September 7, 2020, with supervision by the children's paternal grandparents. The respondent's counsel also provided a letter from the respondent's doctor concerning the respondent's medical condition. The claimant's counsel responded, but there was no explicit response to the respondent's requests, two requests, for parenting time.
- [17] There was a follow-up letter from the respondent's counsel on September 3, 2020, asking about parenting time for the respondent on September 4, 2020. On September 3, 2020, the claimant's counsel responded and advised that there was already birthday party plans in place for September 4, 2020 and that supervision by another family member other than Ms. Strus was not acceptable.
- [18] In September 2020, there were written communications between counsel regarding the protection order, issues of the respondent contacting the claimant contrary to the protection order, and the sufficiency of the medical information disclosed.
- [19] On November 1, 2021, the respondent's counsel wrote to the claimant's counsel advising that the respondent's medical condition had improved, stating that the respondent had not been provided with any parenting time with the children, and requesting telephone or video communication with the boys "according to their wishes". This letter also attached a response to the amended notice of family claim.
- [20] It is not disputed that up until 2021, there were multiple periods when the respondent was hospitalized due to mental health problems. According to the medical records, such as progress notes attached to his affidavit, the plaintiff has been treated for a mood disorder, bipolar disorder, manic with possible psychosis, and he has been prescribed various medications. In the period leading up to 2021, the respondent was also involved in criminal proceedings arising from his communications with the claimant.
- [21] The respondent is trained as a medical doctor and he has worked in family medicine for many years. He has been non-practising for some time and he receives disability benefits. The claimant says that the children miss their father and when the respondent is well, he appears to be a capable and caring parent.
- [22] The respondent agrees that there have been delays caused by his mental health problems and he states his recollection of events during certain periods is not good. However, the respondent denies that he is deliberately delaying matters.
- [23] In response to concerns about gaps in the medical information, the respondent's counsel submitted that the respondent could potentially provide additional medical information. However, as his condition has stabilized and improved, information about his mental health condition at times when he was unwell is not particularly relevant. I note that the most recent medical record in evidence concerning the respondent's mental health condition is

from March 16, 2022, being a clinical note from Dr. Strating, who is the respondent's psychiatrist. The note states that it is not created for medical-legal purposes, and it includes a diagnosis of "Bipolar 1 disorder, most recent episode manic (July 2021)".

- [24] The respondent explains in his affidavit made July 20, 2022, that between the end of 2021 and the spring of 2022, he was in the process of trying to get his health on track and trying to return to work. In other words, he explains that due to his various personal challenges, including periods of deteriorating mental health, he was not focused on the issues in the family law litigation.
- [25] The respondent states in his affidavit made July 20, 2022, that he opposes the ancillary relief sought by the claimant and he intends to seek to vary the protection order and the parenting time arrangements, but he has been unable to do so due to the time that it has taken to get his mental health back on track.
- [26] The respondent submits that there is no requirement for him to disclose medical information in order to access supervised parenting time with the children. In his oral reasons for judgment of February 26, 2020, Weatherill J. stated at para. 6, after granting the respondent liberty to apply to vary or set aside the order, that:

What this means is, so it is clearly understood, it will be up to the respondent to either satisfy the claimant or the court that his medical condition is such that the protection orders and parenting time as varied by me today ought to be set aside or further varied.

Analysis

- [27] Section 211(1) provides the court with discretion to appoint a person to assess, among other things, the needs of a child and the ability and willingness of a party to satisfy the needs of the child. The threshold for appointing a person to perform an assessment under s. 211 is a "relatively low one", citing *C.K.G. v. C.D.G.*, 2015 BCSC 259 at para. 23. Where there is significant acrimony between the parties and if a third party expert opinion could offer significant assistance to the court, the report should be ordered: *Ibid.*
- [28] In deciding whether to order an updated s. 211 report, it will turn on the facts of each case and include consideration of the parties and the welfare of the children. The key consideration is not the interests of the parents, but the interests of the children: citing *A.E.O. v. T.K.O.*, 2011 BCCA 517, sub-name *O. v. O.* (9 September 2011) Vancouver E103098 (B.C.S.C.) (Chambers).
- [29] The court may also take into account the delay that may be occasioned by waiting for the preparation of an expert report and whether the parties will agree to cooperate or pay for the report: *Johnson v. Johnson*, 2019 BCSC 1026.

- [30] In the case before me, I was provided with no details as to the availability of Dr. Elterman to conduct the assessment or information concerning the time estimate for the commencement and completion of the proposed report. I also note that the claimant is not prepared to pay for the report, including because she has not received support as ordered by the court and there is a very large arrears balance owing by the respondent.
- [31] I am mindful that the respondent has provided evidence that he has been dealing with significant mental health and other personal issues since at least 2019. He is a father and a medical doctor who, mainly due to mental health issues, has been struggling to co-parent and return to practising in his profession. He is frank with the court that these issues have prevented him from focusing on, among other things, the family law proceedings. He intends to seek to vary the protection order and the parenting time order, but he has not yet done so.
- [32] The respondent's evidence is that the claimant has consistently denied him parenting time. However, by his own evidence, his recollection of events during periods when his mental health was in decline is not good.
- [33] I note that the respondent had parenting time with the children twice in 2020, and on approximately three occasions in the fall of 2020 and late 2021, he made requests somewhat out of the blue for parenting time through his counsel. The claimant says the parenting time could not be arranged, either because of the lack of an acceptable supervisor, because the request was made on short notice, or where there were conflicting plans.
- [34] While I agree that supervised parenting time is not contingent on the respondent providing disclosure of his medical information to the claimant, I accept that since 2020, the claimant has repeatedly raised that she is concerned about having inadequate information about the current status of the respondent's mental health. This is evident in, for example, her counsel's letters asking the respondent's counsel to verify whether he is in hospital.
- [35] While the respondent has been concentrating on the matters he describes, the claimant has, since at least 2020, been attempting to finalize these long outstanding family law proceedings.
- [36] It appears the claimant is not opposed in principle to the respondent having supervised parenting time, as set out in the interim order. However, she points out that he has actually exercised little parenting time and she disagrees that she has prevented the respondent from exercising parenting time. Again, I note the respondent's evidence that up to the spring of 2020, he has been largely focused on getting his mental health on track and trying to return to work.
- [37] In considering this application, I found the decision of Justice Schultes in *R.H.S. v. M.C.*, 2018 BCSC 485 to be of assistance. In that decision at para. 42, Schultes J. discussed a situation where the court's concern was not so much about whether a s. 211 report might be useful, but whether "it is clear enough at this point that a report will actually be required to

address the forthcoming application", which in that case was an application to appoint a parenting coordinator and to increase parenting time to justify the expense and delay that the report will cause. Ultimately Schultes J. declined to grant the order for the preparation of the s. 211 report.

- [38] Here, there is no pending application to vary the parenting time. Rather, the claimant is seeking a final order that incorporates, among other things, the supervised parenting time required by the February 26, 2020, interim order.
- [39] After considering all of the circumstances, I have decided not to order an assessment under s. 211. I have reached this conclusion for reasons that include that I am not satisfied that it is clear enough at this point that the report will be required. I appreciate that the respondent has been grappling with significant personal issues for a number of years. But on the other hand, this family law proceeding has languished for many years, despite the claimant's efforts to move the matter forward.
- [40] During submissions, I heard little concerning the needs of the children and how the report might address their needs or the parties' ability to meet their needs. Rather, it appears to me that the main motivation behind the request for the s. 211 report is the respondent's interest in obtaining evidence that he hopes may assist him with a potential future application to vary supervised parenting time or to resist the claimant's summary trial application. This has contributed to my conclusion that it is not clear enough that the report is required to assist the court at this stage.
- [41] In short, I am not satisfied, in all of the circumstances, that it is appropriate to exercise my discretion to order that a s. 211 report be prepared.

Disposition

- [42] I therefore dismiss the respondent's July 21, 2022, application with costs in any event of the cause.

"E. McDonald J."

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