
CANADA / JUDGMENT

E.P. v. H.W.

2013 BCSC 325

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Supreme Court of British Columbia

DECIDED

1 March 2013

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2013 BCSC 325 E.P. v. H.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.P. v. H.W.,

2013 BCSC 325

Date: 20130301

Docket: 97148

Registry: Kelowna

Between:

E.P.

Claimant

And

H.W., W.W. Co. Ltd.,

S.P.L.C., A.W. and I.W.

Respondent

Before: Master McDiarmid

Reasons for Judgment

E.P. appeared on her own behalf (via teleconference)

Counsel for the Respondent, H.W. (via teleconference):

L.S. Smith

H.W. (via teleconference)

Place and Date of Hearing:

Kelowna, B.C.

February 4, 2013

Place and Date of Judgment:

Kelowna, B.C.

March 1, 2013

- [1] This is an application by H.W. for six orders relating to A. A. is the son of the claimant and the applicant, H.W. He presently resides with the claimant at what was the former matrimonial home in Sandon, British Columbia. He is 15 years of age.
- [2] The orders sought are as follows:
1. An order directing that A. ... be assessed by a qualified educational psychologist or person with similar qualifications and that the psychologist or assessor make recommendations to the parties and to the Court as to what steps, if any, need to be taken with respect to the education of A.
 2. An order that the psychologist or assessor be selected by the parties by mutual agreement. Failing that agreement, the parties are to each submit up to three names, along with qualifications, to the Court and the Court will select the psychologist or assessor. The psychologist or assessor is to be selected by the parties or appointed by the Court by March 31, 2013.
 3. An order that the psychologist's or assessor's report be provided to the Court and the parties by May 31, 2013.
 4. An order that the parties are to share the cost of the assessment.
 5. An order that the parties are to agree on a plan for A.'s education and report that plan in writing through their counsel to the Court by July 31, 2013.
 6. An order that failing an agreement by the parties, they are to appear before the Court by August 15, 2013 for the purpose of having the Court direct a plan.
- [3] This family law claim was commenced on June 6, 2011 in the Salmon Arm (Revelstoke) registry. It was transferred to the Nelson registry on October 17, 2011. Nelson is the closest registry to the former matrimonial home in Sandon, a small community located approximately 10 kilometres east of New Denver in the west Kootenays.
- [4] The matter was initially scheduled to proceed to trial on August 13, 2012 for five days at the Kelowna Law Courts.

- [5] This litigation has been acrimonious. On May 28, 2012, a contentious hearing took place before Mr. Justice McEwan. The respondents sought a contempt finding against the claimant. McEwan J. made no finding of contempt, but did grant some of the relief sought by the respondents.
- [6] On June 26, 2012, I conducted a judicial case conference. At that time, as a consequence of the apparent acrimony and also the apparent complexity, after canvassing matters with the parties' counsel and obtaining their agreement as to the appropriateness of so doing, I seized myself of all interlocutory applications save and except for settlement of the order made by McEwan J. on May 28, 2012. Shortly after that, the claimant commenced representing herself.
- [7] On the morning of February 4, 2013, I received the claimant's filed two-page response, filed that day, together with an unfiled copy of an affidavit sworn by the claimant in New Denver on February 4, 2013. The claimant's affidavit contains 24 paragraphs. Attached to it were eight exhibits.
- [8] H.W.'s application came on for hearing before me by telephone conference in the afternoon of February 4, 2013. The applicant, his counsel and the claimant all attended the hearing by telephone.
- [9] The copy of the claimant's affidavit provided to me was sworn before a commissioner, Carol Gordon, in New Denver. None of the copies of the exhibits provided to me were properly sworn. Prior to Mr. Smith, counsel for H.W., commencing his submissions, I asked whether there were any issues with respect to proper swearing of the affidavit and was advised by Mr. Smith that there were no issues. I gathered that the copy provided to Mr. Smith contained the exhibits, properly sworn.
- [10] Subrules 10-6(8) and (8.1) of the Supreme Court Family Rules [Family Rules] set out the procedure required to be followed in responding to an application. A response and any affidavit material must be filed and served within five business days after service of the notice of application. Exhibit 1 to E.P.'s affidavit confirms that by the morning of January 24, 2013, she had received the application. Response materials should have been filed and served by Thursday, January 31, 2013.
- [11] Subrules 10-6(12) and (13) make it clear that all materials need to be provided one full business day before the date set for hearing. Rule 10-6(13) of the Family Rules states:
- Unless all parties consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (6), (8) and (12).
- [12] I inquired of Mr. Smith, on behalf of his client, whether there were any issues with respect to late delivery of the claimant's materials. He advised that there were no issues by which I take it he consented to me reviewing the materials provided by the claimant.
- [13] The factual basis for the orders sought is set out in the notice of application as follows:

1. The Claimant, E.P. (the "Claimant") and the Respondent, H.W. ("H") have two children together, E.P., age 19 and A., age 15.
 2. A. is functionally illiterate and urgently needs help with his education. Hal, has made numerous attempts to obtain assistance for A. in terms of educational planning. These efforts have been resisted by the Claimant.
 3. A. would benefit from any psychologist's educational assessment in terms of creating the best educational plan for A. going forward.
 4. The Claimant has steadfastly refused an assessment for A. except for circumstances where she was using the likelihood of an assessment as a negotiating point in the broader conflict involving the family and business disputes.
 5. Hal requested an educational assessment at the Judicial Case Conference before Master McDiarmid in June 2012 and he was encouraged to communicate directly with the Claimant in this regard, which has proved ineffective.
- [14] The applicant relies on the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] including in particular, s. 15, which gives the court authority to direct an investigation into a family matter by an expert, and Part 2 and in particular s. 24(1)(d). Section 24(1) states in part "a court must give paramount consideration to the best interests of the child". Section 24(1)(d) sets out that in assessing the best interests of the child, I must consider and give emphasis to, inter alia, education and training for the child. Rule 1-3 of the Family Rules, dealing with the object of the rules, re-emphasizes that the best interests of the child are of paramount importance.
- [15] In her response, the claimant sets out the following:
1. An order that the request for an educational/psychological assessment be denied as unnecessary and contrary to the best interests and emotional welfare of the child.
 2. An order that any costs associated with an assessment, if ordered, be borne by the applicant.
 3. An order that, in the absence of child support as is currently the case and has been since separation, the applicant be required to contribute towards the child's needs.
 4. An order that the court approve the education plan prepared and submitted by the child for his education through to graduation.
- [16] She then sets out in the factual basis the following:
9. At no time has the claimant used agreement, or lack thereof, to testing as a "bargaining chip." The issue, repeatedly raised by Claimant, of continued lack of child support, is totally separate from the issue of testing in Claimant's mind.
- [17] In his affidavit sworn January 15, 2013 and filed January 21, 2013 (the "respondent's affidavit"), he deposes in paragraphs 3 and 4 as follows:

3. There have been several attempts to have the Claimant consent to an educational assessment for A. and she has refused to do so. We have had numerous discussions in the context of settlement negotiations with respect to our overall dispute involving the Respondent Companies and the issue of distribution of assets where the Claimant has offered to arrange for an educational assessment for A. as a bargaining chip in those negotiations. I believe that A.'s educational assessment is a standalone issue and should not be dealt with in the context of our overall business and family law dispute.
 4. During our Judicial Case Conference on June 26, 2012, I requested that the issue of A.'s education be brought to the forefront and that he be tested so that we could more effectively determine his educational needs. Master McDiarmid agreed that educational testing would be good but did not make it an order at the Judicial Case Conference. However, he did request that I write a letter to the Claimant seeking an educational assessment for A.
- [18] During submissions, I asked whether the letter referred to in paragraph 4 was sent. No such letter was attached to any material provided by the respondent.
- [19] In her affidavit, at paragraph 12, the claimant deposes:
12. Appended hereto (Exhibit "5") is the correspondence which I received from the Respondent since June 2012. You will note that there is relatively little correspondence but that such as there is is voluminous, threatening and abusive to me personally, and it is exclusively to do with the Respondent's business issues other than one short sentence (Page 40 of Exhibit 5) out of a 6-page letter of October 7, 2012 which I have marked for ease of reference).
- [20] The reference is to page 5 of a six-page letter written by the applicant to the claimant on October 7, 2012. A relevant portion of that page reads as follows:

Your settlement offer at this point will have to address at least the following points:

...

8. Allow me to supervise the remainder of A.'s education.
- [21] In paragraphs 5 through 16 of his affidavit, the applicant sets out a series of telephone discussions with the following people:
- a. Jeff Jones, School Superintendent for School District No. 8 (Kootenay Lake);
 - b. "Katie" at the Ministry of Children and Families in Nakusp;
 - c. Ben Eaton, Assistant Superintendent of the Nelson School District;
 - d. Joanne Ellis, Coordinator of Social Services Society, Slocan B.C.;
 - e. Heather Dehnel, School District No. 8;
 - f. Nelson Advocacy Center;

- g. Claudia Roche, Ministry of Education in Victoria; and
- h. telephone discussions with the South Design School.

[22] In paragraph 26 of his affidavit, the applicant deposes:

On January 17 - 19, 2012, I had further telephone discussions with Joanne Ellis, Social Services Society regarding A. She emphasized the need for court orders to protect A. and the importance of E.P. receiving a psychiatric assessment.

[23] In response to this, the claimant deposes as follows:

- 19. I called Joanne Ellis. She stated that she was not a social worker and did not work for Social Services but was working for WE Graham (the school in Slocan) and was a friend of one of the Respondent's associates, Heather Burns. Ms. Ellis stated to me that she could not voice concerns about A. or myself as she had never met either of us at any time. Furthermore, she stated that she was unqualified to make such statements as [the] Respondent mentions in Paragraph 26 of his affidavit as she had never met or spoken to either A. or myself, nor was she dealing with any inter-ministry discussions. She was extremely perturbed and concerned that the Respondent had made these allegations and attributed them to her in his affidavit and expressed a desire to have them expunged from his affidavit.

[24] Exhibit B to the applicant's affidavit is an email string which commences with an email from the claimant to Michael Maser, where the applicant writes:

I am a parent of A. who is enrolled in [your] K-9 program. A. is 14 years old and is functionally illiterate.

I am A.'s father and I have equal guardianship and custody rights as his mother. I need to speak to you as soon as possible regarding his schooling. Please telephone me at ...

[25] The next email, also in exhibit B, is from Michael Maser dated January 24, 2012, where he writes:

H.W.,

I investigated the charge you make about your son A. and I find no basis to support it.

I understand that there is a family legal case pending a court date in early February following from which I expect to be guided via court order. I will have nothing more to say on the matter until receiving such guidance.

[26] On January 23, 2012, the day before he emailed the applicant, Michael Maser wrote a letter: "To whom it may concern", exhibit 4 to the claimant's affidavit, which establishes to my satisfaction the following:

- a. As of the date of the letter, A. was enrolled as a full time student with SelfDesign Learning Community;

- b. SelfDesign Learning Community is a British Columbia based Ministry of Education certified on-line school and has been in existence since 2002;
- c. The author, Mr. Maser, the program director for SelfDesign Learning Community, was aware of the allegations by the applicant that A. was having learning difficulties and alleged to be "functionally illiterate"
- d. Mr. Maser investigated the situation;
- e. It was his view that home-based learners "consistently demonstrate learning achievement that can be and is documented and validated by educational authorities, such as we do in SelfDesign"
- f. As part of the investigation, Mr. Maser conversed via email and/or telephone with the claimant, A.'s learning consultant, Simon Hocking, A.'s personal tutor, River ElMare, and with A., although not apparently with the applicant, H.W.;
- g. Mr. Maser reviewed learning reports filed to SelfDesign on behalf of A. in accordance with SelfDesign's program procedures pertaining to his learning progress in the fall of 2011.

[27] The last two paragraphs of exhibit 4 are as follows:

I wish to confirm that A. is learning adequately for a boy of his age, is receiving competent and qualified guidance in his learning activities and is neither suffering from any learning deficiencies nor disabilities.

I also wish to add that in my conversation with A. of January 19, 2012, he expressed to me an opinion that his father has been openly antagonistic toward him and dismissive of his learning efforts for some time (in the past year, especially) though he felt his father had little or no evidence on which to base his opinion about A.'s leaning as they are no longer in contact. He also expressed a belief that his father is not a positive influence in his learning and is, rather, an impediment to it at this time.

[28] Included in the materials provided by the respondent, were the following documents:

- a) Exhibit 2: which is a three-page graduation plan setting out the courses A. anticipates taking through to his year 2014-15 grade 12 year;
- b) Exhibit 3: which is a review of A.'s progress in the 2011/2012 year prepared by SelfDesign learning consultant, Simon Hocking. This seven-page report makes a number of comments which suggest to me that A. is not functionally illiterate. On the contrary, he appears to be progressing adequately with his education. On the first page of the review, is the comment "He has put together a resume ..." That is not something functionally illiterate people can easily do. There is discussion about A. "learning how to buy and sell on EBay," learning "How to plan a menu using recommended nutritional food groups," making "progress in meeting Language Learning Plan goals" together with specifics. Page 3 contains the comment "A. will continue to develop his writing skills and ability to express himself in writing. His reading

skills continue to advance as he is independently choosing more challenging reading materials to meet his interest and needs." There is a comment about him developing enthusiasm and basic skills in Polish language speaking, including practicing Polish language with the Rosetta Stone Level I Program. There is nothing in the report to corroborate the allegation that he is functionally illiterate in the review and, on the contrary, it confirms the views expressed by Mr. Maser that A. is not functionally illiterate.

[29] In her affidavit, the claimant deposes as follows:

7. In the period since June 2012 the applicant has made contact with the Claimant by email but said emails focus on the business disputes and the applicant uses strong, abusive and controlling language. No request for assessment or other enquiries about the children's educational or social welfare were made to the Claimant.

[30] The documentation before me, and in particular the documentation disclosed by the claimant, at times shows concern by the applicant for his son's well being. Although the claimant deposed that A.'s education was only mentioned once in the context of discussing settlement, that is not accurate. In a letter dated October 30, 2012, the applicant writes in the penultimate paragraphs:

Also, you promised Master [McDiarmid] that you would allow the kids re-connect with me. When is this going to happen? You also promised him that you would assist me to have a proper Ministry of Education assessment done on A. When are you going to honour this promise?

How are the kids? What are they doing? How is A.'s hand? Are the kids involved in any extracurricular activities?

[31] I do not find that the claimant was misleading when, in her submissions, she only referenced the October 7, 2012 letter. Both she and the respondent seem to have forgotten about the inclusion of the applicant's request as contained in his October 30, 2012 letter. As noted in para. 18 above, the applicant did not attach the letter. It is to the claimant's credit that she appears to have disclosed all relevant correspondence.

[32] In paragraph 8 of her response, the claimant deposes:

The Claimant has refused testing on the grounds that it is an unnecessary stress on A. A. has expressed to me a refusal to cooperate and leave home if forced, and, furthermore, on the grounds that it is unnecessary because of the fact that his educational needs and wants are already being addressed.

[33] In her affidavit, at paragraph 10, she deposes:

At the moment we have a 15-year old who is actively participating in his education and is planning on graduating and going on to a trade qualification. I strongly believe, based on comments that A. has made, that if A. continues to be stressed and pushed in this way, he may "vote with his feet" and leave home so he has control over his own life. We will have progressed from having a teenager who is attending to his educational needs to having a teenager who is a

run-away and out on the streets. ... It is based on the need to encourage A. to stay in the system plus his current educational progress, that I am requesting the court to deny testing and allow A. to take control of his education and carry out his education plan as submitted.

- [34] I recognize that part of what is deposed to in paragraph 10 is evidence and part is in effect a submission.
- [35] In support of this application, the applicant relies on the FRA and specifically s. 24(1)(d) which, it is worth restating, makes it mandatory that I give paramount consideration to the best interests of the child, and in assessing his best interests, that I consider in particular education and training.
- [36] In paragraph 3 of his affidavit, the applicant states that the claimant is in effect using the offer to arrange for an educational assessment for A. as a "bargaining chip".
- [37] Both parties in submissions suggest the opposition to their respective positions is manipulative and based on motivations other than the best interests of the child. Both the claimant and the applicant take the position that the actions of each other with respect to A. are in the context of trying to exert control and gain an upper hand in the negotiations over the financial aspects of this litigation.
- [38] From both the evidence and the submissions made to me by and on behalf of the respondent, it is apparent and unfortunate that A. is estranged from his father to a significant degree. In deciding the application before me, which is not an application for access in the way that the term is normally used, I am not required to make a determination as to whether either parent is at fault for this estrangement, nor can I make that determination, based on the material before me. There has been no cross-examination. I heard no viva voce testimony.
- [39] Having considered the submissions and evidence, the basis for the orders sought by the applicant boils down to this: he is of the view that A. is functionally illiterate, and that in order to address that concern there ought to be an educational assessment.
- [40] The evidence is overwhelmingly against the applicant's belief that A. is functionally illiterate;
- [41] The evidence provided by the claimant satisfies me that A. is being adequately schooled and has appropriate plans for continuing his education through to the conclusion of high school.
- [42] That in and of itself does not end the matter. I still must consider whether an educational assessment would be in A.'s best interests. Based on the evidence set out by the claimant and in particular the evidence she recites at paragraph 10 in her affidavit, there is a risk of adverse consequences to A.'s education if an assessment is ordered.

- [43] There is no evidence from any independent party fully apprised of A.'s current situation to the effect that an educational assessment, beyond what is already being done in the context of his attendance at SelfDesign, would be in his best interests.
- [44] The applicant sought six orders; all of them relate to an assessment of A. The orders sought in the application are not in A.'s best interests.
- [45] The application is dismissed with costs to the claimant in any event of the cause, not payable forthwith.

"Master R.W. McDiarmid"

MASTER McDIARMID

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