

CANADA / JUDGMENT

Ellis v. Alvarez

2023 BCSC 544

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Supreme Court of British Columbia

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2023 BCSC 544 Ellis v. Alvarez

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ellis v. Alvarez,

2023 BCSC 544

Date: 20230301

Docket: E203165

Registry: Vancouver

Between:

Kirstin Zelma Ellis

Claimant

And

Pablo Alvarez

Respondent

Before: The Honourable Justice Branch

On appeal from: An order of the Supreme Court of British Columbia, dated November 1, 2022 (Ellis v. Alvarez, E203165).

Oral Reasons for Judgment

Counsel for Claimant:

A. Huang

The Respondent, appearing in person

Pablo Alvarez

Place and Date of Hearing:

Vancouver, B.C.

February 21, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 1, 2023

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I. INTRODUCTION

- [1] This is an appeal by the claimant from a Master's order made November 1, 2022, addressing parenting time and related issues (the "Order"). Oral reasons were given for the Order that same day (the "Reasons").
- [2] Through the Order, the claimant's parenting time with the parties' children was drastically reduced. She went from having approximately equal parenting time unsupervised, to having only three weekends per month supervised. She was removed from all parental responsibilities relating to the education and health of the children. The claimant was also ordered to produce counselling records from several health care organizations and practitioners.

- [3] A review of the Reasons makes it clear that the core basis for the Order was the concerns raised in a s. 211 report (the "Report") prepared by Dr. Ashley Heiner (the "Report Writer"). This report was prepared pursuant to an order made by Justice Gomery at a Judicial Case Conference dated April 14, 2021. The Report took some time to prepare, and was only provided to the parties on September 8, 2022. The Report is very extensive, but the key findings were as follows:

Parenting behaviours that constitute a risk to the wellbeing of the Minor Children and that are significant enough to cause psychological harm to the Minor Children (therefore they can be identified as parenting deficits or weaknesses) were identified for the Claimant and they are summarized in Section 4.3.2.2.1. Though these parenting deficits are influenced by environmental stressors, they appear for the most part to be generated implicitly (i.e. internally, though not necessarily consciously), and they are related to the Claimant's diagnosis of BPD

The present evaluation has revealed that the Claimant exhibits parenting deficits that are significant enough to cause psychological harm to the Minor Children

- [4] Although the time available to the claimant was short, the claimant was able to prepare an affidavit dated September 21, 2022 in which she responded with a number of concerns about both the facts and opinions set out in the Report.
- [5] The application resulting in the Order was argued on September 23, 2022 and completed on November 1, 2022.
- [6] The importance of the Report to the outcome is illustrated by the fact that the respondent had brought two earlier applications to reduce the claimant's parenting time and responsibilities, both of which were rejected: see the Orders of Master Taylor dated June 28, 2021 and Justice Blok dated January 12, 2022. With the Report, the result changed dramatically.
- [7] The Report relies in large measure on the fact that the claimant suffers from Borderline Personality Disorder, a diagnosis that has been known to the parties since November 2020. The claimant moved out of the family home that same month, although the parties were effectively separated from June 2020.
- [8] There were disputes over parenting time from the claimant's departure from the home forward. However, from June 2021 to the date of the Order, the claimant has had parenting time with the children from Saturday at 5:00 p.m. until Wednesday at 5:00 p.m. For the application before the Master, the claimant put forward affidavit material from other witnesses validating the quality of her parenting over this period.
- [9] Although there was some earlier Ministry of Child and Family Development involvement, there are no present proceedings ongoing.

[10] The parenting time orders made by the Master were all interim and interlocutory, pending the scheduled April 17, 2023 trial date. Following the issuance of the Order, the claimant sought a stay. The Master declined to grant the stay, save in relation to the order requiring production of the counselling records.

II. ANALYSIS

A. Standard of Review

[11] A purely interlocutory decision of a master is a true appeal and a master's decision is not to be interfered with unless it is clearly wrong. If a master's decision relates to a question of law, is a final order, or is a ruling that raises questions vital to the final issue in the case, the appeal is a hearing de novo whereby the judge hearing the appeal may substitute his or her own view for that of the master: *Armstrong v. Kotanko*, 2021 BCSC 1229 at para. 13; *Kondori v. New Country Appliances Inc.*, 2017 BCCA 164 at paras. 16-19; aff'g the test established in *Abermin Corp. v. Granges Exploration Ltd.*, 45 B.C.L.R. (2d) 188, 1990 CanLII 1352 (S.C.).

[12] The claimant agrees that it is the "clearly wrong" test that is applicable here.

B. Bases for the Appeal

[13] The claimant raises the following concerns regarding the Master's decision:

- a) The Report was not delivered in a timely fashion.
- b) The Report was challenged by the claimant on many grounds. The claimant says that in light of her challenges, the court should have either allowed a cross-examination of the Report Writer before hearing the application, or deferred the matter to trial in order to allow a full consideration of her proposed challenges to the Report. (I note that at the hearing before the Master, the claimant proposed the latter alternative only.)
- c) The Master ordered production of sensitive counselling records without at least providing for a relevance review by the organizations or claimant's counsel.

C. Service Issue

[14] Under s. 211 of the Family Law Act, S.B.C. 2011, c. 25, the court may request assistance from an expert:

Orders respecting reports

211(1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:

- (a) the needs of a child in relation to a family law dispute;
- (b) the views of a child in relation to a family law dispute;
- (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

- (2) A person appointed under subsection (1)
- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
- (b) unless each party consents, must not have had any previous connection with the parties.
- (3) An application under this section may be made without notice to any other person.
- (4) A person who carries out an assessment under this section must
- (a) prepare a report respecting the results of the assessment,
- (b) unless the court orders otherwise, give a copy of the report to each party, and
- (c) give a copy of the report to the court.
- (5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

[15] Rule 13-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 discusses the service requirements applicable to the use of s. 211 Reports at trial, and confirms the right of either party to require that any report writer attend at trial for cross-examination:

Rule 13-1 -- Court Ordered Reports under Section 211 of the Family Law Act

Report must include address for service

- (1) If, under section 211 of the Family Law Act, the court appoints a person to conduct an assessment, that person must
- (a) include in the report required under section 211 (4) of that Act an address for service at which a notice under subrule (2) may be served, and
- (b) unless the court otherwise orders, file a copy of the report and serve a filed copy of the report on all parties at least 42 days before the scheduled trial date.

Permission required to call person who prepares court-ordered report

(2) A party who wishes to cross-examine at trial the person who prepared a report referred to in subrule (1) must, at least 28 days before the scheduled trial date, serve on the person and all parties, by ordinary service, a notice in Form F43.

[16] The claimant argues that the Report was not served 42 days prior to the hearing of the application before the Master and hence should not have been considered. I disagree. Rule 13-1 does not expressly address the use of s. 211 reports on interlocutory applications. It refers only to their use at trial. In *L.S. v. G.S.*, 2015 BCSC 377, the court held as follows:

[17] First of all, I agree that Rule 13-6 applies only to the use of expert evidence at trial, and that the disclosure requirements under subrule (8) are not the ones that I should be considering in this application.

[18] I also agree that it is appropriate in certain circumstances to rely on expert evidence in interlocutory proceedings, particularly in family law, where a final order can be varied by a chambers application and there are numerous issues relating to the best interests of the children on which expert evidence could be helpful.

[19] However, despite the absence of a specific rule governing the use of expert evidence in chambers matters, a court should still ensure that there is fair notice to the other side of the factual underpinnings of any expert opinion. What should be avoided however, is bogging down a hearing that is meant to be a more efficient and timely process than a trial in unhelpful procedural requirements.

[Emphasis added.]

[17] A similarly flexible approach to the service of expert reports on interlocutory applications has been adopted in the broader civil litigation context. In *Mostertman v Abbotsford (City)*, 2022 BCSC 1769, the court stated:

[18] Regardless of whether R. 11-6 applies outside of trials, the common law still applies and the court retains its discretion to control the evidence in interlocutory applications: *West Moberly First Nations v. British Columbia*, 2018 BCSC 730 at para. 192 [West Moberly].

[19] As Justice Abrioux stated in *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 at para. 181:

While the formal requirements of Part 11 of the Supreme Court Civil Rules may only apply to expert evidence at trial, not on interlocutory applications (see *L.S. v. G.S.*, 2015 BCSC 377 at para. 17), it remains a fundamental rule of the common law that no expert opinion evidence can be received in evidence without:

the essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research

[Healey v. Chung, 2015 BCCA 38 at para. 20]

See also: *West Moberly* at paras. 193–194, and *College of Physicians and Surgeons of British Columbia v. Li*, 2018 BCSC 923 at paras. 27-28 [Li].

[20] Similarly, in *Sharp v. Royal Mutual Funds Inc.*, 2019 BCSC 2357 at paras. 48 [Sharp] Justice Francis found:

- [48] While the Dr. Cumming affidavit does not meet the criteria set out in Rule 11-6, Rule 11-6 expressly refers to expert reports to be tendered at trial. At present the Dr. Cumming affidavit is not being tendered for the purposes of trial but for the purposes of a certification application. I therefore find that so long as it meets the common law test for admissibility, which it does, I may consider it.
- [21] Correspondingly, in interlocutory applications the expert evidence must still meet the usual criteria for admissibility: *Ernewien* at para. 31. This includes the criteria set out in *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9; *West Moberly*; *Sharp* at paras. 45, 48; *Li* at paras. 33.
- [22] The common law may also require parties in an interlocutory application to comply with some of the rules codified in Rule 11-6.
- [23] The general principle underlying Rule 11-6 is that the trier of fact and the opposing party should know the basis of an expert's opinion so the opinion can be evaluated: *Mazur v. Lucas*, 2010 BCCA 473 at para. 42.
- [24] Thus, the opposing party should have fair notice of the factual underpinnings of an expert's opinion. However, the court should avoid "bogging down a hearing that is meant to be a more efficient and timely process than a trial in unhelpful procedural requirements": *L.S. v. G.S.*, 2015 BCSC 377 at para. 19.
- [Emphasis added.]
- [18] As such, the question is more an issue of "fair notice" rather than a strict application of Rule 13-1. Given the inherent discretion embedded in the concept of fairness, I cannot say that the Master's decision to consider the Report was clearly wrong, at least from the perspective of the provision of adequate notice. The claimant was able to prepare a responding affidavit in the time available that detailed many objections to the facts and opinions set out in the Report.
- [19] In assessing this question, it should also be noted that the claimant did not raise this service issue at the hearing below. Nor was the service issue raised expressly in their Notice of Appeal. I find that the claimant's own failure to provide adequate notice of this timely service argument prejudiced the respondent, given his inability to gather and present evidence that might have been relevant to the assessment of "fair notice". As such, I find that the claimant is not in a position to raise this new argument on appeal: *Sohal v. Lezama*, 2019 BCSC 1709 at paras. 75-85, *aff'd* 2021 BCCA 40. The question of fair notice is not a pure question of law. Evidence could well have been important. The respondent, however, was unaware of the need to gather such evidence prior to the hearing given the lack of disclosure that such an argument would be advanced.

D. Considering the Contested Aspect of the s. 211 Report

- [20] The claimant says that it was clearly wrong for the Master to have considered and adopted contested aspects of the Report. The claimant's last affidavit filed before the hearing raised a plethora of concerns about the accuracy of the facts set out in the Report, and with the core opinions set out therein. The respondent acknowledges that the claimant took "great issue" with the Report.
- [21] The claimant does not suggest that there must be an absolute ban on the use of contested s. 211 reports on interlocutory applications. Rather, the claimant asserts that the court should generally only rely on uncontested aspects of such reports, absent additional procedural protections to ensure fairness. The claimant concedes for example that there needs to be an exception to any rule if the s. 211 report raises urgent concerns, such as to those relating to the children's safety. The claimant allows that the court may consider the contested aspects of the Report in such situations, but only if the court has at least allowed for the Report to be tested through cross-examination in advance of the hearing.
- [22] There is a line of case law supportive of the claimant's position, a line that was not presented to the Master.
- [23] In *Arulsothynathan v. Ganeshalingam*, 2021 BCSC 946, Justice Forth stated:
- [55] The respondent relies on the recommendations in the s. 211 Report in support of his application for shared parenting time to be carried out in the United States. He submits the s. 211 Report absolves him of "any inappropriate behavior or conduct as alleged by the claimant." A s. 211 report is a recommendation intended to assist the court but is not a binding determination of the matters reported on: *M.D.L. v. P.T.M.*, 2012 BCSC 75 at para. 10. I am not prepared to accept the respondent's submission that the s. 211 Report "absolves" the respondent. That will be a decision of the trial judge.
- [56] The claimant expresses many concerns about the s. 211 Report. The more significant ones are:
- a. Dr. Elterman made several errors of facts and important information was omitted;
 - b. Family violence was not addressed adequately;
 - c. The report was one-sided, it did not include serious thoughts and concerns raised by the claimant, and the claimant was not heard;
 - d. Dr. Elterman did not consider the impact of the proposed arrangement on the claimant's mother who is at very high risk for new and more potentially dangerous variants;
 - e. Failure to address the best interests of the child;
 - f. No analysis on the ability of the parties to co-parent with each other; and
 - g. No other recommendations were made such as counselling.

- [57] The claimant further asserts the recommendations [of the s.211 report] should not be implemented on an interim basis and that she will be seeking a critique report. It is not for me to decide on the admissibility of any critique report but I am not convinced simply because a party says they are going to seek a critique report it should lessen the validity of the s. 211 report already obtained. There is case authority supporting that critique reports are generally not admissible, and cross-examination of the author of a s. 211 report is the preferred method for testing conclusions in that report: *Dimitrijevic v. Pavlovich*, 2016 BCSC 1529 at para. 25, and *A.R. v. A.V.R.*, 2016 BCSC 629 at paras. 5 and 6.
- [58] For the purposes of my assessment, I have relied on the s. 211 Report to provide me with the insight that is not available to me. As noted in many cases, s. 211 reports can act as the "eyes and ears" of the Court and provide information that simply cannot be gleaned from affidavits or even viva voce evidence: *C.D.A. v. P.R.B.*, 2020 BCSC 1337 at para. 10, and *C.D.M. v. K.M.A.W.*, 2019 BCSC 608 at para. 32.
- [59] The views in the s. 211 Report are just one part of the picture that I must try and assemble to ensure that any decision I make is in the best interests of this child. I recognize that the claimant has a number of concerns with respect to the s. 211 Report. Ultimately it is for the trial judge to decide if those concerns have merit and how much weight to place on the s. 211 Report. I rely on the s. 211 Report for Dr. Elterman's observations of the parents and child interacting. I also rely on Dr. Elterman's views on the parents' parenting abilities, and for nothing more
- [Emphasis added.]
- [24] Two decisions of Master Bilawich have recently considered the implications of Forth J.'s approach. In *L.L.N. v. K.N.L.*, 2021 BCSC 1759, Master Bilawich held as follows:
- [42] In *Arulsothynathan v. Ganeshalingam*, 2021 BCSC 946 at paras. 52 to 59, Madam Justice Forth relied upon undisputed portions of a s. 211 Report for the purpose of assessing the best interest of the child for an application to vary an interim parenting time order, even where other aspects of the report were disputed by the mother. She also concluded that preserving the status quo in the interim orders was not in the best interests of the child and ordered a shared parenting regime be implemented.
- [43] The claimant has identified concerns about some aspects of Mr. Finlay's report, but has not taken issue with most aspects of it.
- [25] Similarly, in *R.A.B. v. T.L.B.*, 2022 BCSC 2244, Master Bilawich stated:
- [44] Another consideration is whether it is appropriate to implement recommendations made in a s. 211 report in advance of trial. In *Arulsothynathan v. Ganeshalingam*, 2021 BCSC 946 at paras. 52-59, Justice Forth relied upon undisputed portions of a s. 211 report for the purpose of assessing the best interest of the child for an application to vary an interim parenting order, even where the mother disputed other aspects of the report .

[Emphasis added.]

- [26] There are also earlier decisions suggesting that caution must be exercised before relying on an untested report on an interlocutory application. In *Marsden v. Bercovitz*, 2013 BCSC 1246, Master Caldwell, as he then was, stated:
- [8] The mere production of a custody and access report, while informative, does not constitute, in itself, a material change of circumstances or a compelling reason to significantly vary the existing status quo pending trial. Trial will undoubtedly see cross-examination of the author of the report and may also see the production of a rebuttal report challenging the initial report in whole or in part.
- [27] In *C.S.-L. v. F.S.-L.*, 2015 BCSC 2588, Justice Schultes stated the following in a situation where he was being asked to impose a parenting structure recommended by a s. 211 report on an interlocutory application:
- [42] I have considered whether to impose the parenting structure proposed by Dr. Elterman. While he is an experienced and well-regarded expert witness in family cases, I think his opinion will best be understood and weighed in the context of a complete evidentiary record and the opportunity to challenge or supplement the observations and assumptions on which it is based.
- [28] In *L.D.K. v. M.A.K.*, 2015 BCSC 226 at para. 50, Justice Harvey noted that the facts set out in a s. 211 report are only prima facie evidence of the truth of those facts. As such, the door remains open for either party to establish that the evidence relied upon by a s. 211 report writer is untrue. Notably for the present situation, Harvey J. allowed for viva voce testimony from the s. 211 report writer before relying on the report on the interlocutory application: para. 6.
- [29] Finally, in *Goudie v. Goudie*, [1993] B.C.J. No 1049 (S.C.), the court remarked on the importance of procedural safeguards to ensure that any report is properly tested:
- [33] The safeguards built into the process include the early delivery of the investigation reports, the opportunity to call the investigator to the witness stand and the opportunity to respond to the report generally by other evidence.
- [30] As noted, this line of authority was not put before the Master, making it difficult for him to apply the appropriate principles set out in these authorities. In light of the drastic change made to the status quo by the Order, I conclude that it would not be appropriate to ignore these principles, even if the Master was not given a proper opportunity to consider same. I find that it was clearly wrong not to apply the principles set out above. Specifically, I agree that when a party seeks to rely on a s. 211 report on an interlocutory application, the court should at least consider whether it is appropriate to rely on contested aspects of the report absent additional procedural safeguards. No such consideration occurred here.

[31] The Master heavily relied upon, and adopted, contested aspects of the Report: Reasons at paras. 29-33. The Master concluded:

[33] Given the threat posed to the children, as opined by Dr. Heiner, it is my view that the matter requires immediate consideration and action

[Emphasis added.]

[32] The Master noted there was evidence from other witnesses that was not "in sync" with the Report, but the Master did not seek to reconcile that inconsistency: Reasons, para. 27. The Master simply adopted the findings in the Report: Reasons, para. 31.

[33] I find that given the claimant's stated objections, the court should have at least considered whether a cross-examination of the Report Writer was necessary before relying on contested aspects of the Report. Alternatively, in applying the principles, the Master could have also put the matter over to trial so that any challenges to the Report would be fully considered, particularly as the trial was only 5 months away. Preservation of the status quo pending trial is the preferred course of action unless there are compelling reasons to change the status quo: Marsden at para. 7.

[34] I address the question of remedy in a latter section of this decision.

E. Disclosure of Counselling Records

[35] The Master applied the correct legal principles to the question of the production of the counselling records. I cannot fault the Master's basic decision to require production of those records in light of the obvious relevance created by the Report Writer's opinion that the claimant's mental health was damaging the children's best interests. In light of these concerns, the Report Writer sought a more complete set of the claimant's medical records.

[36] That said, I accept that it was clearly wrong not to place at least some controls on the records review and production. Specifically, the Order should have at least provided for an opportunity for claimant's counsel to review the records for relevance. In other words, given the sensitivity of the counselling records, the court should have at least required that production be in the form of a Halliday order. I find support for this imposition of such a condition in *H.V.G. v. L.E.T.*, 2017 BCSC 791, where the court stated:

[47] The claimant should be able to investigate the extent of Dr. T.'s psychiatric condition and can only do so if records are produced from Dr. K.

[48] That does not mean, however, that all of Dr. K.'s records must be produced. I see no relevance to discussions that Dr. T. and Dr. K. may have had about his family members or relationships, and certainly no disclosure of discussions with counsel is required. What are relevant are Dr. K.'s conclusions, his treatment recommendations, and whether those recommendations were complied with.

- [49] Limiting document production in that manner will protect Dr. T.'s very real interest in confidentiality to the extent possible, while also serving the interests of justice in allowing the claimant to investigate Dr. T.'s condition.
- [50] I also conclude that there is no proven need at present to produce records going back to the inception of the psychiatric relationship some ten years ago.
- [51] The parties separated in June or August of 2015. In my view, production of records for two years prior to separation should be sufficient to give a baseline for an analysis of Dr. T.'s condition.
- [52] Thus, the order will go for production of Dr. K.'s records from June 1, 2013 to present. Those records are to be produced to counsel for the respondents, who may redact them to exclude everything except Dr. K.'s conclusions, recommendations for treatment, and notations about compliance with treatment recommendations.

[Emphasis added.]

- [37] Speaking to the broader policy principles in *A.M. v. Ryan* [1997] 1 S.C.R. 157, Justice McLachlin, as she then was, stated:
- [37] [Where] justice requires that communications be disclosed, the court should consider qualifying the disclosure by imposing limits aimed at permitting the opponent to have the access justice requires while preserving the confidential nature of the documents to the greatest degree possible.

[Emphasis added.]

- [38] I do not see that the Master "considered qualifying the disclosure" here. I find that Halliday order conditions should have been included.

F. Remedy

- [39] I allow the appeal, and set aside the Order, save for:
- a) the Master's dismissal of paragraph 3 of the respondent's application, which was not the subject of an appeal; and
 - b) the counselling record production order, which will simply be amended as provided below.
- [40] In light of the potentially serious concerns raised in the Report, I issue the following orders in order to ensure that the best interests of the children are still properly considered in a timely fashion:
- a) If the respondent intends to renew his application prior to trial, the respondent shall propose two half-day periods across two different weeks during which the Report Writer is able to make herself available for an out-of-court examination.

- b) If the respondent proposes dates, the claimant shall have the right to conduct a half-day examination on either of the dates proposed. The claimant will be deemed to have waived her right to such an examination should she fail to organize an examination in either of the two proposed time periods.
- c) The respondent may then bring this application back on for hearing at least seven days after the earliest of: (1) the date of the examination; or (2) the latter of the two dates provided by the respondent should the claimant waive the right to an examination.
- d) If the respondent does not proceed with this application prior to trial, the consideration of same will be put over to the trial.
- e) As it relates to the counselling records, the Order will be amended to provide that the records will first be produced to counsel for the claimant, who may, within seven days of receipt, redact them to exclude everything except the conclusions, recommendations for treatment, and notations about compliance with treatment recommendations. The records as redacted will be produced to the respondent within 10 days of their receipt by claimant's counsel.

(collectively, the "Fresh Orders")

III. CONCLUSION

[41] The appeal is allowed, subject to the Fresh Orders. Absent a request to make further submissions, the claimant shall have her costs in the cause.

"The Honourable Mr. Justice Branch"

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