
CANADA / JUDGMENT

Fawcett v. Read

2016 BCSC 310

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Supreme Court of British Columbia

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2016 BCSC 310 Fawcett v. Read

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fawcett v. Read,

2016 BCSC 310

Date: 20160224

Docket: E151972

Registry: Vancouver

Between:

Tyler Vincent Fawcett

Claimant (Respondent)

And

Jamie Renee Read

Respondent (Appellant)

Before: The Honourable Madam Justice Russell

On appeal from: An order of a Master of the British Columbia Supreme Court, dated December 15, 2015 in Fawcett v. Read, 2015 BCSC 2492, E151972.

Reasons for Judgment

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K.F. Nordlinger, Q.C.

S.S. Silber

Place and Date of Hearing:

Vancouver, B.C.

January 26, 2016

Place and Date of Judgment:

Vancouver, B.C.

February 24, 2016

Introduction

- [1] In this family matter, Ms. Read appeals an interim order of a Master which awarded Mr. Fawcett, a former boyfriend, contact with Ms. Read's nine-year-old daughter, A.
- [2] Ms. Read submits that the Master made an error in finding that contact between the claimant (Mr. Fawcett), and A., was in A.'s best interests. This forms the basis of her appeal; more specifically, at para. 11 of the respondent's submissions, she alleges the Master erred in the following respects:
- (i) Finding that [A.]'s relationship with the Claimant can be independent of her mother;
 - (ii) Finding that the decision of *Kalafchi v. Yao*, 2015 BCSC 1152 is distinguishable from the case at bar;
 - (iii) Rejecting the principle in *Chapman v. Chapman*, 1993 CanLii 2598 (and affirmed by the British Columbia Court of Appeal in *N.F. v. H.L.S.*, 1999 BCCA 398) that the custodial parent's decision should be considered and only interfered with if it is in the best interests of the child;
 - (iv) By finding that the conflict that exists between the parties is not so intractable that it would not be in [A.]'s best interests to allow contact;
 - (v) Ignoring the prejudice to the Respondent in having an interim determination on contact when that is the only issue for trial, thus determining for all practical purposes the "ultimate issue";
 - (vi) Misconstruing the evidence of the Respondent as to the reasons for not wishing further contact between the Claimant and [A.].

Background

- [3] The claimant, Mr. Fawcett, is 39 and Ms. Read, the respondent, is 38. The parties have known each other since they were teenagers, and dated once before from 1997 until 2000, when they parted ways. During this time the respondent married and had A. A.'s father died of cancer when A. was two years old.
- [4] In 2010, the claimant and the respondent reconnected and began dating; for the first year of their relationship the claimant lived in Calgary and the two had a long-distance relationship. In 2011, he moved to Vancouver so they could be together. They moved in together in February 2012 and lived together until June 2013, when they separated. Toward the end of their relationship, the respondent became pregnant with Mr. Fawcett's child. He did not wish to have the child. Ultimately, the respondent terminated the pregnancy and the couple separated.
- [5] After the initial separation, the claimant saw A. with the permission of the respondent, however, over time these visits began to decrease.
- [6] In April of 2015, the respondent put an end to the visits because she said she did not want to expose A. to a "tense and sometimes hostile relationship". Since this time the claimant has continued to request contact with A., with no success, and as a result he initiated legal proceedings.
- [7] On December 15, 2015, the Master awarded contact of up to 12 hours per month, on no more than two separate occasions, until further order or agreement. There were to be no overnight visits, and the claimant was to inform the respondent of the activities planned for the visits, and permit her to have input. The Master also permitted the claimant to communicate with A. three times per week by phone or text.

Analysis

Standard of Review

- [8] At the outset of the hearing, the parties raised the issue as to the standard of review to be applied on an appeal to the Supreme Court from an order of a Master, such as the order which granted Mr. Fawcett contact with A.
- [9] Typically, interim orders of a Master that are truly interlocutory, in that they are temporary and only seek to preserve the status quo until trial, should only be interfered with if they can be found to be "clearly wrong": *Kalafchi v. Yao*, 2015 BCCA 524 at para. 18. However, *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.) mandates a different standard of review in some circumstances, namely those where the interim order is not truly interlocutory because instead of preserving the status quo, it affects the circumstances in such a way that it may impact upon the ultimate issue. In *Kalafchi*, at para. 18, the court affirmed *Abermin*, holding that "an interim order may so affect a child's

circumstances or the nature of a child's relationship with a person that the master's ruling will raise questions vital to the final issue", and where this occurs, the standard of review may be a rehearing.

[10] The principle from *Abermin* is stated as follows:

An appeal from a Master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the Master raises questions which are vital to the final issue in the case, or results in one of those final orders which a Master is permitted to make, a rehearing is the appropriate form of appeal.

[11] I find this test to have been met in the circumstances of this appeal because the Master's order raises questions "vital to the final issue", which is whether contact with the claimant is in A.'s best interests. After hearing submissions by the parties, I find that in the circumstances of this case, where contact with a child by a non-guardian has been awarded before any cross-examination has taken place, before any reports have been obtained, and where such contact could affect the status quo before trial, a rehearing is the proper process by which this appeal should be considered.

The Law

[12] The Family Law Act, S.B.C. 2011, c. 25 [FLA], is the governing legislation in this matter.

[13] The Master set out her view of the parameters of the case at para. 11 of the reasons, which are indexed at 2015 BCSC 2492:

The application is governed by s. 59(2) of the FLA, which provides that the court may make an order granting contact with a child to any person who is not a guardian. In making an order respecting contact with a child, the parties and the court must consider the best interests of the child only (s. 37(1)). The application, therefore, requires consideration [of] the factors set out in s. 37(2) of the FLA. These are the factors to be taken into account in assessing the best interests of the child.

[14] The Master then went on to consider only the factors set out in s. 37(2) when determining the best interests of A., stating unequivocally that s. 41 did not apply when considering the best interests of the child in a s. 59 application for contact. If this were to be done, so says the Master, the legislation would specifically require it.

[15] With respect, I do not agree that the scope of the Master's analysis was sufficient to determine the best interests of A. in the circumstances of this case.

[16] I do of course agree that only the best interests of the child, A., may be considered in determining whether and how much contact should be afforded. But that analysis should be a nuanced and contextual consideration.

[17] Section 59 reads as follows:

- (1) On application, a court may make an order respecting contact with a child, including describing the terms and form of contact:
 - (2) A court may grant contact to any person who is not a guardian, including, without limiting the meaning of "person" in any other provision of this Act or a regulation made under it, to a parent or grandparent.
 - (3) The court may make an order to require the parties to transfer the child under the supervision of, or require contact with the child to be supervised by, another person named in the order if the court is satisfied that supervision is in the best interests of the child.
 - (4) An access order referred to in section 54.2 (2.1) or (3) of the Child, Family and Community Service Act is deemed for the purposes of this Act, to be an order made under subsection (1) of this section for contact with a child.
- [18] The claimant bears the onus of establishing that contact with him is in the best interests of the child: *Kalafchi v. Yao*, 2015 BCSC 1152 at para. 26 [*Kalafchi SC*], *aff'd* 2015 BCCA 524.
- [19] Section 59 does not set out specific criteria on which an order is to be made. Therefore, an order under s. 59 is subject to the general "best interests" factors set out in Part 4 of the FLA, and the analysis which must be undertaken should look at all the circumstances relevant to the child.
- [20] The list of factors set out in s. 37(2) of the FLA provides a basis for analyzing the best interests of A.: *Hansen v. Mantei-Hansen*, 2013 BCSC 876 at paras. 95, 98. However, this list is not exhaustive: *Pozzobon v. Pozzobon*, 2013 BCSC 1226 at para. 30.
- [21] The wording of s. 37(2) makes it clear that the list of enumerated factors is not exhaustive:
- 37(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following . . .
- [emphasis added]
- [22] I find that in addition to the factors enumerated at s. 37(2), Part 4 of the FLA - Care of and Time with Children, which contains ss. 37 to 80, also contains other provisions that are relevant for consideration in the circumstances of this case.
- [23] Specifically, s. 41, which addresses parental responsibilities, sets out a number of responsibilities with respect to a child, which must be exercised in the best interests of the child, as per s. 43.
- [24] Section 40(1) dictates that "only a guardian may have parental responsibilities" and that "each child's guardian may exercise all parental responsibilities with respect to the child" unless, as per s. 40(2), there is an agreement or an order that allocates parental responsibilities differently. In this case, the respondent is the only guardian of A., and there are no agreements or orders in place that have altered her parental responsibilities. As such, the respondent may, as per s. 40(2) "exercise all parental responsibilities with respect to the

child". This of course includes the parental responsibilities set out in s. 41, which follows:

41. For the purposes of this Part, parental responsibilities with respect to a child are as follows:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
- (i) starting, defending, compromising or settling any proceeding relating to the child, and
- (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

[25] Because these parental responsibilities must be exercised in the best interests of the child (as noted above), this provision can be read and considered harmoniously with s. 37. I agree with the respondent's counsel that s. 41 codifies a degree of deference to the guardian's views on issues concerning the child, so long as they are guided by the child's best interests. Thus, I find that s. 37 does not mean that the views of the guardian, as they relate to the enumerated parental responsibilities, are not relevant in considering what may constitute the best interests of the child.

- [26] Indeed, s. 40, when read together with s. 41, gives the guardian the right to do many things, including the following, all of which are relevant in this case: make decisions respecting with whom the child may live and associate with: (s. 41(c)); defend any proceeding relating to the child: (s. 41(k)(i)); and exercise any other responsibilities reasonably necessary to nurture the child's development: (s. 41(l)).
- [27] As permitted by the legislation, the court can of course alter or re-allocate these responsibilities; however, no such order is being sought in this case.
- [28] Deference to the custodial parent's views has also been recognized in case law: see *Chapman v. Chapman*, [1993] B.C.J. No. 316 (S.C.). While *Chapman* does precede the passage of the FLA, it has been cited for several of the principles it enunciates, including giving deference to the custodial parent: *N.F. v. H.L.S.*, [1998] B.C.J. No. 1739, *aff'd* 1999 BCCA 398. In *T.F. v. K.R.C.*, 2010 BCSC 1808, the court in making its finding, said the following at para. 47, after considering *Chapman* and *N.F.*:

I am mindful of the principle that the court should generally accord considerable deference to the wishes of the custodial parent who is charged with the child's long term care.

- [29] I will note that the approach has changed somewhat since the introduction of the FLA, for example *Bruce J. in Kalafchi SC*, at para. 24, does suggest that deference to the custodial parent's decision about contact with a non-guardian may conflict with the emphasis in the FLA on the best interests of the child, but she does state that the other principles established by *Chapman* remain valid and should be applied to applications under s. 59 of the Act. In the final analysis, she ultimately still considers deference to custodial parents to be valid because at para. 25, she finds that the custodial parent is entitled to deference regarding contact pending trial. Therefore, I do not find that this statement means that giving deference to the custodial parent's decision is no longer appropriate.
- [30] Deference to the custodial parent's views is a relevant consideration, subject to any other evidence with respect to the best interests of the child. The custodial parent's views cannot trump the best interests test but may form one component of it.
- [31] Consequently, I find, that in making a decision for contact under s. 59, I must consider the best interests of A. in light of all applicable considerations. Further, given the codified deference owed to guardians under the Act when it comes to parental responsibilities, and given the case law, I find that in this analysis I may consider the reasonable views of the respondent, so long as they are reflective of the best interests of A.
- [32] In *T.F.*, at para. 47, the court ultimately found that the mother's views had more to do with her own feelings than the needs of her son, and that the grandparents had demonstrated significant bonding with the child such that ongoing and regular contact was warranted. I point this out to show that I am mindful of the fact that the respondent's views are not to be taken to be synonymous with the best interests of A., without a full analysis of what is in the best interests of the child in these circumstances.

- [33] I have no difficulty recognizing the potential problem arising from the application of Chapman on deference to a parent's decision to deny contact, where that decision conflicts with the best interests of the child. Clearly, it must be the case that the child's best interests are not just the paramount, but the only, consideration.

Best Interests of the Child

- [34] The parties have submitted extensive affidavit material accompanied by many exhibits, including texts and emails between Mr. Fawcett and Ms. Read, and between Mr. Fawcett and A.
- [35] It is important to reiterate at this point, that Mr. Fawcett bears the burden of proving that contact is in A.'s best interests.
- [36] After reviewing all the materials, I am not satisfied that Mr. Fawcett has demonstrated that he had a "pseudo-step-parent" relationship with A., such that ongoing contact would be in the best interests of A. I find, as Bruce J. did in Kalafchi SC at para. 16, that the evidence presented does not clearly favour either of the party's positions regarding the relationship between A. and the claimant. While there is evidence to support a positive relationship between A. and Mr. Fawcett, the evidence also raises considerable doubt as to whether an ongoing relationship would be in the best interests of A.
- [37] Mr. Fawcett's case reveals more that this relationship is in his best interests, in that he focused continually on asserting his desire to continue a relationship with A. The evidence shows that he is there for the good times because he has fun with A. Yet during the relationship with Ms. Read, he did not offer any financial support for A.
- [38] The Master focused on the fact that Ms. Read permitted the relationship between Mr. Fawcett and A. to continue immediately following separation, noting that this was significant because it meant Ms. Read considered the relationship to be in the best interests of A.
- [39] I do not wish to undermine the role that Mr. Fawcett played in A.'s life for a period of time, however, circumstances change and separation creates a time of transition whereby people's lives must adjust to reflect new realities. Although Mr. Fawcett and A. had a relationship while he and Ms. Read were together, and immediately after, this does not mean that an ongoing relationship is in the best interests of A. in the long term.
- [40] As a starting point and based on the evidence before me, I will consider the factors in s. 37(2) to assess the best interests of A. in the circumstances of this case.

- [41] Section 37(2)(a): The health and emotional well-being of A. is of the utmost importance, and underlies all considerations. A. is a healthy and well-adjusted child, who did suffer emotionally in the wake of the separation, but who is doing fine in the present. The respondent asserts that A. has come to terms with the end of the relationship between the claimant and the respondent, and that she was fine during the period before the Master's order, when she and the claimant were no longer in contact.
- [42] Section 37(2)(b): The views of the child have not been canvassed appropriately for consideration and as such do not form part of this analysis.
- [43] Section 37(2)(c): Assessing the nature and strength of the relationships between the child and significant persons in the child's life, requires considering the nature and strength of the relationship between A. and Mr. Fawcett. As previously noted, I do not wish to undermine the role that Mr. Fawcett played in A.'s life in the past; it is clear that the two had a positive relationship. However, I do not find that this alone justifies continued contact. The first year of the relationship was conducted long distance, as Mr. Fawcett lived in Calgary. He moved to Vancouver in 2011, and the couple began to cohabit in February of 2012; they broke up in June of 2013. Their time together could not be called a long term relationship.
- [44] The respondent acknowledges that the claimant did help with household chores, the making of lunches and driving A. at times when she needed help; however, as I have noted, the evidence also shows that the claimant did not support A. financially and refused requests to do so.
- [45] I think it relevant here to refer to the burden of proof that Mr. Fawcett bears in this case, and to note that the onus should not be placed upon the respondent to prove that access is against A.'s best interests. As noted by the Court of Appeal in N.F. at para. 10, "it is very difficult to prove that the access would in fact prove to be against the child's best interests." In that case the court went on, at para. 11, to hold that the Provincial Court judge erred by "emphasizing the absence of proven harm."
- [46] The evidence shows that Mr. Fawcett is possessive and at times obsessive about his relationship with A., for his own sake as opposed to A.'s. For example in August of 2013, Mr. Fawcett sent a text to Ms. Read as follows:

This is killing me. You are taking away the one thing that keeps me thinking that nobody truly loves me for who I am Please don't keep us apart I'll do and say whatever you need to hear.

- [47] I think it also important at this point to consider A.'s relationship with her mother, who is of course a significant, if not the most significant person in her life. The respondent is a single, working mother, and her own leisure time with her daughter is limited by the tasks necessary to maintain a home, including by A.'s social, school and extra-curricular activities, by her lessons and sporting activities, and by the time that a 9-year old wants to spend with her contemporaries.

- [48] With the greatest of respect to the Master's decision, it seems contrary to A.'s best interests to further reduce her available time with her mother by a substantial incursion on her weekend time in favour of Mr. Fawcett.
- [49] The Master's finding that he is a significant person in her life is based partly on the extremely affectionate texts between A. and Mr. Fawcett. I find them somewhat discomfiting since in them he refers to her as "beautiful girl", "pretty girl", and "my little girl" and because they include declarations of love.
- [50] It should be noted that since the date of separation, the visits and communication between A. and Mr. Fawcett were decreasing, and had ultimately stopped altogether from April of 2015 until the Master ordered contact in December. It appears as though A. was adjusting well in light of decreased visitation, and even when visitation stopped altogether.
- [51] While there is evidence of emotional upset suffered by A. in the wake of the separation, I find this to be normal given the change in circumstances in the child's life, and there is no evidence before me at this time that A. has suffered beyond what might be reasonably expected when a relationship ends. It should be remembered that Mr. Fawcett is neither a parent, nor a step-parent, but an ex-boyfriend who lived with A. for little over a year. To usurp a deeper, parent-like role is not appropriate, given that there is little evidence that he bore this deeper role during the parties' relationship.
- [52] While s. 37(2)(c) requires assessing the strength of the relationship between A. and Mr. Fawcett, or A. and other significant persons in her life, I think it is telling to consider how the claimant acted toward the end of his relationship with the respondent. Section 37(4) permits the court to consider a person's conduct where it substantially affects a factor set out in s. 37(2). In particular, Mr. Fawcett's reaction to Ms. Read's pregnancy was to send her a letter in which he stated that he had no interest in having a child and that if she continued the pregnancy, Ms. Read could find herself alone with two children and no support. I find this bears on the nature of the relationship that the claimant has with A. because he asserts that he considers A. to be family, and yet he threatened that he was willing to leave A., the respondent and his unborn child without support. This appears to be manipulative and threatening behaviour, and leaves me wary that this could lead to inconsistent involvement in A.'s life.
- [53] Section 37(2)(d): The history of A.'s care is largely dependent on the respondent. While Mr. Fawcett did become part of her life in 2010 when the relationship began between the parties, he was not present in Vancouver until 2011, and only began living with the respondent in 2012. During the time of cohabitation, Mr. Fawcett participated in daily routines and attended A.'s concerts, but there is no question that Ms. Read is A.'s only parent and that she has been responsible for A.'s care since her birth.
- [54] Section 37(2)(e): Assessing A.'s need for stability is important, given her age. While I understand that a relationship exists between A. and Mr. Fawcett, I do not find that stability requires an ongoing relationship between the two. A. and her mother enjoy a loving,

positive relationship that has provided A. with stability and care her entire life. She also has grandparents who love her. Given that the parties were in a relatively short relationship, and that Mr. Fawcett never stepped into the role of a parent or step-parent, I find that his continued efforts to be seen as a parent figure to A. have the potential to complicate things down the road, for example as his new relationship progresses or should Ms. Read form a new relationship. Stability for A. has come from her relationship with her mother for her entire life, and I do not find that ordering contact with an ex-boyfriend who lived with the two for just over a year promotes stability in A.'s life.

- [55] Section 37(2)(f): It is also important to consider the ability of the claimant to exercise his responsibilities when it comes to A. Given that he is not a parent or guardian, his responsibilities are limited, but there has been cause for concern. On two occasions, when the claimant was permitted visitation with A., he failed to exercise his responsibilities appropriately. In one instance he asked if he could take A. to her singing lesson in preparation for a Christmas concert, but then forgot and was dismissive about it. On another occasion, the claimant failed to bring A. back to Vancouver from a trip to Nanaimo on time, as was the agreement between the parties. While there are many other occasions where the claimant has followed through on his responsibilities, and taken A. on enjoyable outings, I do not find in the circumstances that this factor weighs heavily in support of a non-guardian who is seeking contact, especially in light of the importance of other factors in such a case.
- [56] The remaining s. 37(2) factors do not require consideration in this case as there is no family violence, risks to the safety of A., or any relevant criminal proceedings.
- [57] Overall, there is evidence that points to a positive relationship between A. and the claimant. However, there are also some concerns that stand out, as they relate to the best interests of A. going forward. Further, I do not find that demonstrating the existence of a positive relationship is sufficient to warrant ongoing contact with a child in the wake of a break-up. If this were so, there would be potential for every ex-partner who enjoyed a positive relationship with a child to assert contact rights, and surely this is not in the best interests of a child, without more.
- [58] As noted at the outset, I do find that some deference should be given to the respondent's views, considering ss. 40 and 41, so long as they are exercised in the best interests of the child.
- [59] The respondent has made it clear that she is concerned that the conflict which exists between her and the claimant is impacting negatively on A. For example, she noted a time at one of A.'s concerts where the claimant refused to acknowledge her in front of A. Further, she has asserted at least one instance where instead of communicating with her, the claimant has put A. in the middle by getting her to ask her mother if she could go on a trip with the claimant. In addition, she asserts that she feels uncomfortable with the overly affectionate and possessive texts that the claimant sends A., which continued even after she had requested he stop texting A.

- [60] Given the nature of the claimant's relationship with A., and the fact that he is not a guardian or parent, I find this behaviour concerning. The court in Kalafchi SC, affirmed the principle in Chapman that it is "not in the best interests of a child to be placed into circumstances of real conflict between the custodial parent and a non-parent": Kalafchi SC at para. 21.
- [61] The respondent has also expressed concerns about the claimant's mental stability, and the impact that might have on A. This concern was echoed in affidavits submitted by the respondent's parents.
- [62] It is clear that the respondent loves her daughter, and has her best interests at heart. It is also clear that there is ongoing, and at times significant, conflict between the parties. As a result, there is also conflict in the evidence of this case, and there has been no cross-examination on any of it. Further, there is no s. 211 report from which to gain insight.
- [63] While this is an interim order, I have found that the decision may have significant impact upon the ultimate issue to be determined at trial (as warranted a rehearing on this appeal), that is whether the claimant is entitled to contact with A.
- [64] In making this determination, a key factor will be the status quo regarding the relationships between A. and the claimant, and A. and the respondent, as these relationships inform what is in the best interests of the child. I note the concerns of Bruce J. in Kalafchi SC at para. 13, where it was noted that by ordering contact the Master may have created a new status quo in the relationship by the time of trial. At para. 25, the court ordered that there should be no contact, and that pending trial the "claimant's contact should be at the discretion of the respondent."
- [65] Given the concerns identified, I find that the claimant has not met the burden of establishing that contact is in the best interests of A. Before the Master's order the status quo was that there was no contact between A. and the claimant. In light of my findings in these reasons it is appropriate to maintain the status quo until trial. In the circumstances of this case, it seems somewhat reckless to order otherwise when the best interests of a child are at stake, when there has been no s. 211 report or viva voce evidence, and no opportunity for cross-examination to test credibility, particularly where there are clear conflicts in the affidavits.
- [66] I find that granting Mr. Fawcett the extensive contact ordered in the interim decision of the Master, while altering the status quo, could also remove his incentive to proceed to trial expeditiously. The longer such an interim order stands, the more contact between A. and the claimant becomes the status quo, which may impact the findings at trial.
- [67] For these reasons, I find that in the interim, it has not been demonstrated to me that it is in the best interests of A. to have contact with the claimant. Pending trial, contact will be at the discretion of the respondent.
- [68] The respondent will have her costs.

"Russell J."

The Honourable Madam Justice Russell

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