

CANADA / JUDGMENT

Federation v. Babini

2009 BCSC 1534

COURT

Supreme Court of British Columbia

DECIDED

10 November 2009

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2009 BCSC 1534 Federation v. Babini

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Federation v. Babini,

2009 BCSC 1534

Date: 20091110

Docket: E072954

Registry: Vancouver

Between:

Ramona Federation

Plaintiff

And

Marco Giovanni Babini also known as Marco Babini

Defendant

Before: The Honourable Mr. Justice Cole

Reasons for Judgment

Counsel for Plaintiff:

P. Daltrop

Counsel for the Defendant:

A. Laing

Place and Date of Hearing:

Vancouver, B.C.

October 16, 2009

Place and Date of Judgment:

Vancouver, B.C.

November 10, 2009

- [1] The defendant father applies for an order that he have interim joint guardianship of the children Francesco Marco Xavier Babini, born March 21, 2001, Tatiana Ramona Babini, born August 21, 2002, and Tristano Cristo Babini, born December 25, 1995, and as an incident to that guardianship:
- (a) be permitted to enrol the children Francesco Marco Xavier Babini, and Tatiana Ramona Babini in Gordon Elementary School or such other elementary school on the West Side of Vancouver that he may determine;
 - (b) be permitted to enrol Tristano Cristo Babini at Kitsilano Secondary School or such other secondary school on the West Side of Vancouver that he may determine;
 - (c) the plaintiff be responsible for having the children attend the respective schools in which they are enrolled during the school year; and
 - (d) an order for costs.
- [2] In addition to these three children, there are two other children, Lorenzo Allesandro Babini, born April 18, 1989 and Stefano Michele Babini, born March 27, 1991. Both Lorenzo and Stefano have graduated from high school. Lorenzo with honours, who is currently attending Langer College, and Stefano graduated with honours through the Vancouver Learning Network.
- [3] The parties separated in September 2005. There was a brief reconciliation in March of 2006 and since then the proceedings have been acrimonious. The three older children do not have a relationship with their father but the defendant does see the two younger children pursuant to an order of this Court.
- [4] The plaintiff is a qualified teacher and has home-schooled the children. The defendant, however, in July of 2007, notified the plaintiff about his concern that the children were not performing academically up to their expected level. The defendant sought to have the children, more particularly Stefano and Tristano tested by Dr. John Carter, a psychologist and adjunct professor of educational counselling and psychology and special education at UBC. The plaintiff dismissed the defendant's concern and he brought an application to court to have the four youngest children tested by Dr. Carter and to have Dr. Carter administer the Weschler Individual Achievement Test ("WIAT"). Master Taylor, on March 6, 2009, ordered

that the children be tested by Dr. Carter. That decision was appealed and Justice Walker dismissed the appeal on May 8, 2009.

- [5] The plaintiff has not arranged for the children to attend with Dr. Carter. It was only when the defendant had the two youngest children during access visits that they were tested by Dr. Carter in July 2009. The two other children have still not been tested.
- [6] Dr. Carter's report has been filed and his assessment summary for Francesco states as follows:

Francesco is an 8-year-old child who completed the WIAT-II (Canadian Edition) test.

The test scores in this assessment indicate that there are a number of academic areas where Francesco is currently functioning below age and grade level expectations in comparison to other children in his age group.

Specifically, Francesco's reading skills are problematic. Both sight word and phonetic decoding skills are well below age and grade level expectations. This is compounded with a weakness in reading comprehension skills. Francesco has difficulties with both literal and inferential reading comprehension.

Francesco's oral reading shows fluency problems. Francesco's speech shows articulation problems. This may be an area where consultation with a Speech and Language pathologist may prove productive.

While attempting the reading comprehension test, Francesco commented, "I don't know how to read. I wish I did".

Francesco's written language abilities fall below age and grade level expectations. He has difficulties with spelling and written language composition skills. He needs to develop a firm foundation in sound/symbol relationships in written language compositions.

On the Numerical Operations test (mathematics calculations), Francesco's test score falls in the average range and is age and grade appropriate. On the other hand, the Mathematics Reasoning test score is significantly lower falling in the Borderline range.

Francesco can complete math algorithms and basic equations at an age and grade appropriate level. However, he has significant difficulties with mathematics reasoning tasks that involve time concepts, solving money problems, interpreting and reading grade level graphs. These represent areas where remedial assistance may prove helpful in developing Francesco's overall mathematics functioning levels.

- [7] In respect to Tatiana, Dr. Carter's assessment summary is as follows:

Tatiana is a 6-year, 11 months-old child who completed the WIAT-II (Canadian Edition) test.

The test scores in this assessment indicate that there are not any significant areas of academic concern. All of Tatiana's test scores fall in the average range. There are no areas of deficit or difficulty.

- [8] The plaintiff filed a report by Mr. Don McNamee, who has a B.Sc. with Honours and a Masters of Education. Mr. McNamee was of the view that he could not recommend any specific school placement based solely on the information obtained from a singular standardized academic achievement assessment such as the WIAT-II. He states:

In this case, it is not possible [to] accurately determine the best educational placement for Francesco without additional information, which would require supplementary assessment. His current educational program may be the best one for him at this time.

- [9] He continues on by saying that "he may be doing as well as could be expected."
- [10] Dr. Allan Posthuma was retained by the plaintiff and filed a report. He, in addition to having a Ph.D., is a diplomate in clinical and forensic psychology. He interviewed the plaintiff and tested and reviewed the reports of Dr. Paul Thiessen, Dr. Carter's assessments, school reports for all four youngest children, and letters from Vancouver Lawn Tennis Club where the children are actively involved in sports programs.
- [11] Dr. Posthuma was critical of Dr. Carter's methodology and the fact that he relied only on the WIAT-II test, he was of the view that there are other important factors in an educational assessment including measures of intelligence, personality, or emotional functioning and an understanding of the child's learning and developmental background.
- [12] Dr. Posthuma's tests confirmed that Francesco performed poorly in reading and noted that his level of confidence was poor and that he was anxious. Furthermore, his low level in spelling and math were discounted by Dr. Posthuma due to Francesco's anxiety level. He was of the view that Francesco's IQ was in the 22nd percentile.
- [13] Tatiana's scoring was higher than Francesco's but again Dr. Posthuma was of the view that once Tatiana successfully adjusts to the marital difficulties of her parents that both her and her brother will excel in school as had their older siblings.
- [14] Dr. Posthuma was of the view that there was no reason to believe that the children will not be as successful in their schooling as their older siblings who have been home-schooled. He recommends that the children remain in their present academic arrangements until a more comprehensive Section 15 report is completed.
- [15] This trial is set to commence at the end of April of 2010. A Section 15 report has been ordered.

- [16] I am satisfied that the defendant had a valid basis to be concerned about the educational development of his two youngest children. I find no basis at all for him to be concerned about the educational level for Tristano as in my view he is performing well, and in some cases, above his grade level.
- [17] There is hearsay evidence from one of the school teachers/counsellors that if Francesco had been in the public school system, his progress would have been monitored more closely and he would have received specialized assistance.
- [18] It is the duty of this Court to do what is in the best interests of these children. The defendant has not satisfied me that at this stage of their development these children are at risk or there is sufficient concern to disrupt their present educational routine. In may very well be that when all the evidence is heard at the end of the trial, a change in custody and/or guardianship may be appropriate but there is insufficient evidence at this time to order a change in the educational arrangements for these two children. There is insufficient evidence to show that the schools that the defendant proposes to put these children in will be a better educational environment for these children. There is insufficient evidence also as to the cause of why Francesco is performing so poorly. It may be that he is developmentally slow or that he has been most adversely affected because of the separation of his parents or a combination of both those factors.
- [19] What it is the best interests of all these children is to have them properly tested, the Section 15 report concluded, and the trial proceed without any further legal skirmishes. The sooner this trial is concluded the better off these children will be. The defendant's application is dismissed. With respect to costs, I will deal with the matter at the end of the trial.

The Honourable Mr. Justice F. W. Cole

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