

CANADA / JUDGMENT

H.S.A. v. S.K.A.

2022 BCSC 926

COURT

Supreme Court of British Columbia

DECIDED

4 February 2022

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2022 BCSC 926 H.S.A. v. S.K.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

H.S.A. v. S.K.A.,

2022 BCSC 926

Date: 20220204

Docket: E-200645

Registry: Vancouver

Between:

H.S.A., by his Litigation Guardian, P.K.A.

Claimant

And

S.K.A., also known as S.K.R.

Respondent

- and -

Docket: E-200646

Registry: Vancouver

Between:

J.K.A. and P.S.A. and H.K.A.

Claimants

And

S.K.A., also known as S.K.R.

Respondent

Before: The Honourable Justice Edelmann

Oral Reasons for Judgment

Counsel for Claimants:

S. Stanislaus

J.J.S. Kim

Counsel for Respondent:

G.K. Sohal

Place and Date of Hearing:

Vancouver, B.C.

February 4, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 4, 2022

[1] THE COURT: This is an application by the Respondent for P.K.A. to be removed as litigation guardian for the Claimant, H.S.A., pursuant to Rule 20-3(11) of the Supreme Court Family Rules, B.C. Reg. 169/2009 ["SCFR"].

Legal Framework

[2] The Supreme Court Civil Rules, B.C. Reg. 168/2009 "[SCCR]" and the SCFR are essentially identical with regard to the appointment and removal of litigation guardians. In order to act as a litigation guardian, a person must consent to do so, and the lawyer acting for the party under disability must attest that they know or believe the litigation guardian is someone who has no interest in the proceeding adverse to the party under disability (SCCR Rules 20-2(8)(b) and (9)(c); SCFR Rules 20-3(8)(b) and (9)(c)). If it is in the interest of a party who is under disability, the court may remove, appoint or substitute a litigation guardian (SCCR R. 20-2(11); SCFR R. 20-3(11)).

- [3] Gronnerud (Litigation Guardians of) v. Gronnerud Estate, 2002 SCC 38 [Gronnerud] is the leading case on when a litigation guardian should be removed, based on what is in the "best interests" of the dependent adult. As set out by the Court in Gronnerud, one of the criteria of the "best interests" analysis is that the "evidence must demonstrate that the litigation guardian is [] indifferent as to the outcome of the proceedings" (para.19). At para. 20 the Court expanded on this criterion as follows:
- [20] [] The third criterion, that of "indifference" to the result of the legal proceedings, essentially means that the litigation guardian cannot possess a conflict of interest vis-à-vis the interests of the disabled person. Indifference by a litigation guardian requires that the guardian be capable of providing a neutral, unbiased assessment of the legal situation of the dependent adult and offering an unclouded opinion as to the appropriate course of action. In essence the requirement of indifference on the part of a litigation guardian is a prerequisite for ensuring the protection of the best interests of the dependent adult. A litigation guardian who does not have a personal interest in the outcome of the litigation will be able to keep the best interests of the dependent adult front and centre, while making decisions on his or her behalf. Given the primacy of protecting the best interests of disabled persons, it is appropriate to require such disinterest on the part of a litigation guardian.
- [4] The Court in Gronnerud went on to comment that, while it is sometimes acceptable (and perhaps even desirable) to have a trusted family member with close ties to the dependent adult act as the litigation guardian, there are exceptions -- including when there is a "particularly acrimonious" dispute among family members: para. 21.
- [5] While Gronnerud was decided pursuant to the civil Rules of Court in Saskatchewan, the Court's analysis has been broadly applied in other provinces, including B.C. In Lodge (Guardian ad litem of) v. Lodge, 2003 BCSC 1205 [Lodge] at para. 21, Justice Chamberlist summarized the Supreme Court of Canada's analysis in Gronnerud on the criterion of "indifference," as it relates to what is now SCCR Rules 20-2(8)(b) and (11):
- [21] []
- (a) a litigation guardian will be found to have an "interest in the proceedings" adverse to the person under disability where there is a "high level of conflict", between the proposed litigation guardian and a party in the proceeding;
- (b) a litigation guardian will also have an "interest adverse to the person under disability" in those cases where the litigation guardian stands to benefit, either directly or indirectly by the litigation, even if that benefit has not vested at the time of the appointment. It is sufficient that the potential benefit, realistically assessed, is present.
- [6] While in most cases the conflict is financial, a personal conflict may also be sufficient to justify removal of a litigation guardian: Lodge at paras. 24-25, citing Lee, Re, 2002 BCSC 838 at paras. 88-90. I note that this Court has more recently cited Lodge in applying the analysis in Gronnerud to remove a litigation guardian in Peric v. Peric, 2015 BCSC 1466.

- [7] The Claimant's counsel made extensive submissions that I should not follow the approach taken by Judge Chamberlist in *Lodge*. The crux of the submission is that *Gronnerud* was decided under the Saskatchewan Rules of Court which require a litigation guardian to act in the best interests of the person under disability. The rule in B.C. only requires that the person not have an interest adverse to the person under disability.
- [8] I have reviewed the cases provided by counsel and the submissions made. I am not satisfied, however, that I should depart from the approach taken by Chamberlist J. in *Lodge*. Even setting aside the principle in *Hansard Spruce Mills Limited (Re)*, 1954 CanLII 253, (BC SC), I do not find the distinctions being drawn by counsel for the Claimant to be compelling. In my view, read in their entirety, the mechanisms in the SCFR relating to litigation guardians clearly prioritize the interests of the person under disability. Rule 20-3(11) allows this Court to remove or replace a litigation guardian if it is in the interest of a person under disability to do so. While counsel sought to distinguish the words "best interests" used in the Saskatchewan rule considered by the Supreme Court of Canada in *Gronnerud* from "interests", I find it to be a distinction without a difference in this context. I find that the approach taken in *Lodge* is an accurate statement of the law and I see no reason to depart from it.

Background - application to this case

- [9] As in many family law cases, there is an extensive background to the relationships between the parties before the Court. I will limit myself to some of the more pertinent elements.
- [10] The parties met on a matrimonial website around December 2011 and were married in India in March, 2012. The Respondent immigrated to Canada in January 2013 and began residing with the Claimant and his mother, J.K.A.; his father, P.S.A.; his elder sister, H.K.A.; and younger sister, P.K.A., who is the Claimant's litigation guardian in this proceeding.
- [11] There is one child of the relationship, S.S.A., born September 17, 2016.
- [12] The Claimant has a history of mental illness for which there has not been a diagnosis for some years. Starting around May 2017, until December 2017, the Claimant isolated himself in his bedroom and would have contact only with the Respondent and his son. Subsequently he began leaving the room but remained confined to the upstairs of the home. Aside from a handful of occasions, I am told he has not left the family residence since this time, although he is now more comfortable moving around both inside and outside the home, which is located on a rural property. Based on the evidence before me, it would appear that he is unwilling or unable to communicate with anyone outside his family, although I am told he was recently able to attend an appointment with an eye doctor. He has neither attended nor presented any evidence in these proceedings as he has not met with counsel. He did not speak to the psychologist who prepared the s. 211 report in these proceedings despite the psychologist being present in the home for several hours and requests made for him to come out of his room. A series of short video segments of the Claimant engaging with S.S.A.

were provided to the s. 211 author and have been entered into evidence.

- [13] On September 29, 2019, the Respondent left the family home with S.S.A.
- [14] This proceeding was commenced on behalf of the Claimant on March 12, 2020 seeking guardianship, shared parenting responsibility and equal parenting time for S.S.A.
- [15] Counsel of record, Fiona Robin, filed a Certificate of Fitness, attesting that the Claimant is mentally incompetent and that she knew or believed P.K.A. had no interests adverse to that of the Claimant. Ms. Robin included a report from Dr. Sloan assessing the Claimant. Dr. Sloan was unable to meet with the Claimant and therefore relied on collateral information provided to him to conclude that the Claimant is incompetent to instruct counsel. P.K.A. also provided a Consent to Act as Litigation Guardian, in which she attested that she had no interests in this proceeding adverse to that of the Claimant.
- [16] In her counter-claim filed on May 6, 2020, the Respondent sought the removal of P.K.A. as litigation guardian. At the time she objected both because P.K.A. was in a conflict because "she stands to gain personally from any parenting time [the Claimant] has" and because it had not been demonstrated that the Claimant had a mental incapacity. Although there were attempts to bring an application to remove P.K.A. as litigation guardian in the initial months of the litigation, the application was never heard and the issue was not raised again until it was raised by the Court after some 18 days of trial.
- [17] As I noted at the time I raised it, it is unfortunate this issue was not dealt with earlier in the proceedings. In retrospect, there were indications early in the trial that P.K.A. had a personal interest in the outcome of the litigation, but the issue was not highlighted to the Court. Upon hearing from the Respondent in her testimony during the last week and a half, it became evident that she has maintained ongoing communication by text message with the Claimant throughout the proceedings and says that she still cares for him. Neither party is seeking a divorce. It was also during the Respondent's evidence that allegations of the level of conflict in the family home prior to her departure with S.S.A. became evident. The Respondent alleges that there was regular conflict between the family members, notably between her and P.K.A. Although they take different views of the source of the conflict in specific incidents that may or may not have taken place, P.K.A.'s evidence confirms that there was conflict between her and the Respondent for some time prior to the separation.
- [18] Subsequently, there have been reports to various agencies and court applications in which P.K.A. and the Respondent have made allegations against each other. There continues to be a high level of distrust between P.K.A. and the Respondent, and both expressed suspicions that at various times the other was seeking to undermine the Claimant's ability to address his mental health issues.

- [19] I have heard evidence from P.K.A. and other family members about the care and interactions with S.S.A. in the family home. All seem to agree that P.K.A. plays the primary role in the interactions with S.S.A. and that she has a very close relationship with him. It is clear to me from her own evidence that she has a significant emotional investment in her relationship with S.S.A. and cares for him deeply.
- [20] On its face, however, there is no request in the context of either claim before me for any contact time for P.K.A. In her descriptions of the litigation in both matters, she regularly refers to "us" or "we" having time with S.S.A., and she was included in the consent order relating to contact time. In her testimony before me, her own perception of the outcome of her brother's claim was that she would play a primary role not only in having contact with S.S.A. but in essentially playing the role of a surrogate parent. She suggested that she could exercise the Claimant's parental responsibilities on his behalf until he is better, although she said that she would do so in communication with the Claimant. While counsel has sought to temper that position in submissions, I accept her testimony as a candid expression of her personal interest and investment in the litigation.
- [21] In no way do I intend this to be a criticism of P.K.A. or her actions to date in this litigation. I accept that she genuinely cares for both her brother and S.S.A. and has sought to further their interests as she sees them. However, I do not accept that she is personally disinterested in the outcome of the litigation. To the contrary, it appears evident that P.K.A. has a personal interest in maintaining or increasing her time with S.S.A. Without making findings on the ultimate issues in this case, I would also note that there is substantial evidence indicating that it is in S.S.A.'s interest for P.K.A. to be a part of his life. In my view, however, it would be in the interests of everyone concerned for P.K.A.'s interests to be clearly delineated from those of the Claimant.
- [22] Therefore, while I accept that removing or substituting a litigation guardian at this late stage in the proceedings is less than ideal, I find that it is in H.S.A.'s interest for someone other than P.K.A. to act as his litigation guardian in this matter.

"Edelmann J."

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