
CANADA / JUDGMENT

J.S. v. S.S.

2017 BCSC 865

COURT

Supreme Court of British Columbia

DECIDED

23 May 2017

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2017 BCSC 865 J.S. v. S.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.S. v. S.S.,

2017 BCSC 865

Date: 20170523

Docket: E39335

Registry: New Westminster

Between:

J.S.

Claimant

And

S.S.

Respondent

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

(In Chambers)

Counsel for the Claimant:

C. Linde

The Respondent:

Self-Represented

Place and Date of Hearing:

Vancouver, B.C.

May 12, 2017

Place and Date of Judgment:

Vancouver, B.C.

May 23, 2017

Introduction

- [1] By his Notice of Application filed April 20, 2017, J.S., the claimant father, applies for an interim order vacating the supervision order made by the Honourable Mr. Justice Joyce on June 18, 2015. The claimant also applies for an order authorizing the police to enforce his access.
- [2] The claimant, who is now 60 years old, and the respondent, who is 37, began to live together in a marriage-like relationship in or about 2000, married on April 5, 2007, separated on August 1, 2010 and were divorced on December 10, 2012.
- [3] The one child of the marriage, G., was born April 29, 2007 and is now 10 years old.
- [4] Since the commencement of these proceedings in September 2011, the parties have been engaged in a high conflict dispute concerning parenting arrangements for G. On this application, the parties have included over 50 affidavits in their materials. The claimant and the respondent each make multiple allegations and counter-allegations of physical and emotional abuse at the hands of the other.
- [5] The Court first ordered supervised access on December 18, 2014, after G. allegedly disclosed, in September 2014, that she had been sexually touched by her father. For his part, the claimant maintains the respondent fabricated allegations of sexual abuse in order to delay or defeat his efforts to reinstate his parenting time with G. under the consent order of July 27, 2012. By that order, the claimant had overnight parenting time with G. from Friday to Monday in week 1, and from Monday to Tuesday in week 2, with vacations to be shared equally.
- [6] The trial of this proceeding is currently scheduled for two weeks, commencing on July 31, 2017.
- [7] Pending the trial, the claimant seeks to retain the current parenting plan, but without supervision. Under that plan, J.S. has parenting time with G. on Fridays from 4:00 p.m. to 7:00 p.m. and on Saturdays from 10:00 a.m. to 5:00 p.m.

- [8] The respondent maintains there is a continuing risk of harm to the child and submits the Court should maintain the status quo by keeping the supervision order in place until the trial.

Applicable Legal Principles

- [9] Under s. 37 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], in making an order respecting parenting arrangements the court must consider the best interests of the child only. The factors the court must consider in determining the best interests of the child are enumerated in s. 37(2) and include:
- (a) the child's health and emotional well-being;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of any arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members.
- [10] An order is not in the best interests of the child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being: s. 37(3).
- [11] Mr. Justice Joyce's order of June 18, 2015 was an interim order made under the FLA. Interim orders are primarily intended to maintain the status quo and to provide short term solutions until the best interests of the child can be fully determined at trial: *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403 at para. 22.
- [12] Section 216 of the FLA establishes the test for variation of interim orders, including orders concerning parenting: *B.K. v. J.B.*, 2015 BCSC 1481.
- [13] Under s. 216(3), on an application to vary an interim order respecting parenting arrangements, the claimant must satisfy the court that at least one of the following circumstances exists:
- (a) a change in circumstances has occurred since the interim order was made;
 - (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
- [14] Under s. 216(4), the court, in making an order under ss. 3 must take into account all of the following:
- (a) the change in circumstances or the evidence, or both, referred to in subsection (3);

- (b) the length of time that has passed since the interim order was made;
- (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
 - (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
 - (ii) would not necessarily reflect the final arrangement between the parties;
- (d) whether a trial has been scheduled;
- (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

[15] As Madam Justice Holmes explained in B.K. at para. 30, although s. 216(4) does not expressly refer to the child's best interests, they "permeate the analysis" under s. 216. The interim order sought to be varied will have been made, based to the extent practicable, on the child's best interests; "a change of circumstances or new evidence will not be material or sufficient to engage s. 216(3), unless it relates to the child's best interests"; and ss. 216(4) (a) and (e) implicitly require consideration of the child's best interests: B.K. at paras 31-33.

Discussion and Analysis

- [16] The claimant contends that the s. 211 report completed by Dr. Krywaniuk on May 11, 2016 recommending that he and the respondent have equal parenting time provides new and substantial evidence warranting the termination of the supervision order. Mr. S. also submits that the respondent's credibility has been compromised to the point where the Court may conclude that G. is at no risk of sexual abuse. The claimant says this constitutes a material change of circumstances since Mr. Justice Joyce made the supervision order.
- [17] One of the few uncontested facts in this case is that on June 23, 2014 the conflict between the claimant and the respondent regarding parenting time escalated. The respondent arrived unannounced at the claimant's home, intending to drop off G. there, rather than at the designated drop-off location, a nearby Starbucks. The claimant and the respondent engaged in a bitter argument, which culminated in both calling the police, who attended. The respondent refused to leave the child with the claimant, and departed with her. Police advised Mr. S. they could not compel Ms. S. to leave the child with him without a police enforcement order.
- [18] On June 24, 2014, claimant's counsel provided the respondent with notice of his application for police enforcement of his parenting time under the consent order of July 27, 2012.

- [19] On June 28, 2014, the respondent complained to the police that the claimant had made death threats against her and G. on June 23 and 25, 2014. Ms. S. acknowledges that she did not report the alleged death threats to the police when they interviewed her on June 23. She says she was scared and did not know what to do until she received advice from her lawyer to make the complaint.
- [20] On June 29, 2014, the police arrested the claimant and charged him with uttering threats and the unsafe storage of 12 firearms seized from his residence. The Crown did not proceed with any of the charges against Mr. S. The claimant entered into a peace bond. The police returned his firearms, all of which he has sold.
- [21] From June 29 through October 9, 2014, the claimant had no contact with G.
- [22] On October 9, 2014, the claimant applied to reinstate his parenting time under the consent order of July 27, 2012. The respondent had changed counsel. When her newly retained counsel advised that she was not prepared to argue the application, Mr. Justice Williams adjourned the claimant's application to a new date to be heard no more than two weeks from the date of his order.
- [23] The respondent alleges that on September 17, 2014, G. disclosed to her that the claimant had touched her vagina. Ms. S. says that on October 6, 2014, after she had received advice from a lawyer and a social worker, she reported the alleged sexual touching to the Ministry of Child and Family Development ("the Ministry"), and to the police.
- [24] As a result of a complaint of sexual abuse, the respondent had no parenting time with the child from October 9, 2014 until December 18, 2014, when Mr. Justice Joyce made the first supervision order, which provided Mr. S. with no more than three hours of supervised access, one day per week.
- [25] Both the Ministry and the police conducted investigations. When the police interviewed G., she made no disclosure of sexual touching. The child described her father squeezing her thigh and patting her bottom to wake her up, and said she was wearing pajamas when this occurred. In April, 2015, the Ministry advised the parties that its investigation did not substantiate the allegation of sexual touching and that it was closing its file. The police also closed their file. There was no intervention by the Ministry, and no charge was laid against Mr. S.
- [26] The respondent contends that the Ministry and police investigations were flawed because the investigators failed to interview other witnesses to whom the child disclosed sexual touching. On June 17, 2015, O.B., a counselor and play therapist, swore an affidavit in which she deposed that in October and November, 2014, G. disclosed that her father had touched her vagina, and that she was afraid of him. More recently, by her affidavit sworn June 17, 2016, Ms. P., a friend of the respondent, gave evidence that on May 22, 2016, G. told her the claimant touched her breasts and vagina.

[27] By his order of January 22, 2015, Mr. Justice Joyce suspended all interaction between O.B. and G. pending completion by Dr. Krywaniuk of his s. 211 report. The claimant invites me to infer that the Court, in ordering the suspension of contact between O.B. and the child, completely rejected O.B.'s evidence. The order of January 22, 2015 served to insulate G. from any potential suggestion from her counselor of abuse by her father while Dr. Krywaniuk conducted his interviews and prepared his report. Ultimately, the credibility of O.B., and the weight, if any, to be attached to her evidence will be a matter for the trial judge.

[28] In cases involving allegations of sexual abuse, the court focuses on whether there is any "real risk" to the children, rather than on whether the allegations have been proven: *G.E.C. v. M.B.A.C.*, [1993] B.C.J. No. 1393 at para. 93.

[29] The test, as stated in *J.P. v. B.G.*, 2012 BCSC 938 at para. 24, is:

whether on the whole of the evidence there arises a real risk to the children if access is given without protection against that risk. The degree of risk can only be determined by carefully weighing all the evidence, and that must necessarily involve the credibility of the witnesses and the judge's assessment of the character of the parties.

[30] On July 20, 2016, the Honourable Madam Justice Church dismissed the claimant's previous application to vacate the supervision order. In reasons for judgment indexed as *J.S. v. S.S.*, 2016 BCSC 1561, the Court concluded that it was impossible to resolve the conflicts in the affidavit evidence without the benefit of direct and cross-examination. The Court found that Dr. Krywaniuk's s. 211 report provided little assistance in determining the truth of the allegations of family violence made by each party against the other, or the issue of whether or not there remained a risk to G. if the supervision order was varied.

[31] Counsel for Mr. S. argued before Church J., and again on this application, that the respondent's evidence regarding G.'s disclosures is not credible. On both applications, Mr. Linde referred to questions and answers from the respondent's examination for discovery of July 8, 2016, where Ms. S. alleged the claimant had threatened her with death and had sexually assaulted her on various occasions during the marriage. On her discovery, the respondent also asserted, for the first time, that Mr. S. had sexually touched the child repeatedly since the making of the consent order of July 27, 2012. Both before Church J., and on this application, the claimant submitted that the respondent exaggerated her evidence, and that her evidence is unworthy of belief.

[32] At para. 21, of her reasons, Church J. stated:

It is true that Dr. Krywaniuk does appear to provide a fairly positive assessment of Mr. S. in terms of his parenting capacity. While Mr. S. suggests that the allegations of Ms. S. are untrue and are exaggerations, I cannot ignore the fact that there is some evidence before this Court of disclosures by G. in the affidavit of O.B. from June 17, 2015, and the more recent affidavit of July 14, 2016, of Ms. P. That is in addition to the affidavit material of Ms. S.

- [33] The Court concluded that the matter should be set for trial as soon as possible, and that in the interim, it was in the best interests of G. that the supervision order remain in effect. Counsel for the parties set the action for trial commencing January 16, 2017.
- [34] On December 16, 2016, counsel for the respondent applied to adjourn the trial. Counsel for Ms. S. argued that Dr. Krywaniuk's s. 211 report did not adequately address the mother's allegations of sexual abuse of G. by the claimant. Respondent's counsel advised that Ms. S. intended to engage another psychologist, Dr. Peggy Koopman, to perform a further evaluation, to be completed by the end of February 2017. Respondent's counsel advised the Court that Ms. S. would pay Dr. Koopman's retainer by February 1st. The respondent confirmed she could obtain the funds required.
- [35] In those circumstances, the Court adjourned the trial to March 27, 2017. The respondent failed to provide Dr. Koopman's retainer. She contends that she understood the report would not cost more than \$2,500 and that the \$8,000 sought by Dr. Koopman was beyond her means. After the claimant failed to provide the retainer for Dr. Koopman, her then counsel withdrew.
- [36] On February 10, 2017, the respondent delivered a Notice of Intention to Act in Person to claimant's counsel.
- [37] On February 14, 2017, the respondent brought a further application to adjourn the trial and engaged new counsel for that application only. The respondent's adjournment application did not come on for hearing until March 10, 2017, when it was dismissed, with costs to the claimant.
- [38] On March 27, 2017, the trial date, the respondent did not attend. She advised the Court, through the Registry, that she had been injured in a car accident the night before and wished to apply for an adjournment.
- [39] The trial judge, Mr. Justice Saunders, convened court with the respondent on the telephone. Ms. S. advised the Court that the accident had "destroyed the front of my car" and informed the Court that she had hit her head in the crash and had been treated for a concussion in the Port Moody hospital emergency department. During the telephone conference, the claimant requested and the respondent agreed he could attend at the respondent's residence to photograph her vehicle. Mr. S. did so at noon on March 27, 2017. He took two photos of the front of the respondent's vehicle. They depict little damage to the vehicle, other than two cracks in the plastic bumper immediately below the front passenger side headlight and a minor separation along the front bumper cowling where it meets the front passenger side headlight. The respondent has attached two photos of her vehicle to her affidavit number 19, filed April 3, 2017. In those photos, the cracked portion of the front bumper is slightly elevated, and no longer flush with the base of the passenger side front headlight. The gap along the front bumper cowling appears greater than that depicted in the claimant's photographs, even when one allows for the fact that the respondent took her photos much closer to the damage depicted than did the claimant.

- [40] The claimant invites the Court to conclude that the respondent forced or jimmied the side bumper cowl away from the frame, and pried up the damaged portion of the front bumper below the headlight in order to manufacture evidence in support of her assertion that she was injured in a significant accident on March 26.
- [41] The Port Moody hospital emergency records make no reference to the respondent having suffered a concussion, nor has Ms. S. produced a note from her physician describing the nature of the injuries she allegedly sustained, despite her assurance to the Court that she would do so.
- [42] The claimant contends the respondent staged the "accident" in order to create an excuse for yet another adjournment of the trial, which was put over to July 31, 2017. Without the benefit of viva voce evidence and cross-examination, it would be unfair to the respondent to draw that inference. However, it is clear from all of the photographic evidence that the respondent was less than candid when she told Saunders J. that the front end of her car was destroyed in the accident. Further, she has adduced no medical evidence to establish she suffered a concussion or other head injury in the accident. I find that, at the very least, the respondent exaggerated both the extent of the damage to her vehicle and any injury she may have sustained in order to obtain the adjournment of the March 27, 2017 trial date.
- [43] The history of the respondent's repeated applications to adjourn both chambers proceedings and the trial is troubling. The child G. finds herself at the center of an acrimonious and protracted dispute between her parents. It is in the child's best interests that her parenting arrangements, and in particular, the role of her father in her care and upbringing, be resolved without further, unnecessary delay. That resolution will require a trial, now set for July 31, 2017. The parties, and particularly the respondent, should proceed with the expectation that the trial will go ahead, as scheduled.
- [44] I have read the report of Dr. Krywaniuk and share the view of Church J. that it is of little assistance to a chambers judge in the assessment of either the conflicting allegations of the parties or the issue of whether G. is at risk if the supervision order is terminated. Dr. Krywaniuk sets out in some detail the allegations each party makes against the other. He observes that Ms. S. appears to have difficulty letting go of the sexual issues raised by G.'s alleged disclosures. He comments that Ms. S. is focused on protecting G. for what she believes to be sexual touching by the claimant. Dr. Krywaniuk also suggests the bond between Ms. S. and the child is excessive and notes that G. sometimes sleeps with her mother. He believes Mr. S. has much to offer the child. However, in his report of his interview with G. he does not inquire into or address the allegation of sexual touching.
- [45] Apart from the evidence of the respondent, I am left with some evidence of G. disclosing sexual touching to O.B. and, more recently, to Ms. P. That evidence, and the parties' conflicting allegations of family violence cannot be assessed without the benefit of examination and cross-examination of the parties and their witnesses at trial.

- [46] The supervision order, as originally made on December 18, 2014 and varied on June 18, 2015, has been in place for almost two and a half years. It was intended to protect the child from any risk of sexual abuse pending completion of Dr. Krywaniuk's report and the trial of this proceeding. The terms of the supervision order were not intended to reflect the final parenting arrangement.
- [47] Since the making of the supervision order, the trial has been scheduled and adjourned twice on the application of the respondent. The trial is now set to commence in just over two months.
- [48] If the terms of supervision of the June 18, 2015 interim order remain in effect, they will continue, pending the trial, to impose some limits on the claimant's capacity to develop a normal relationship with G., without oversight. I also bear in mind that N., the claimant's adult daughter by a previous marriage, has borne much of the burden of supervision since June 18, 2015. She has sworn that as a consequence of devoting most of her weekend time to supervising her father's access to G., her university studies have suffered and she has lost part-time employment. Further, N. deposes that she is no longer able to cope with what she describes as the respondent's aggressive and antagonistic behavior. Whether N. will continue to assist with supervision is in issue.
- [49] However, I have concluded, as did Church J., that given the conflicts in the evidence, this application cannot be determined without a trial. In my view it remains in the best interests of G. that the terms of supervision of the interim order of Mr. Justice Joyce of June 18, 2015 remain in effect pending the trial.
- [50] The order I make is that the terms of supervision of the interim order of Mr. Justice Joyce of June 18, 2015 will remain in effect until 4 PM on July 31, 2017. It will be for the trial judge to determine whether those terms should be extended.
- [51] Access may be supervised by N., the claimant's father, or any responsible adult nominated by the claimant.
- [52] I also order that the trial date of July 31, 2017 is pre-emptory.
- [53] The claimant's application of April 20, 2017, is dismissed.
- [54] Costs of this application will be costs in the cause.

"PEARLMAN J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/17/08/2017BCSC0865.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/j-s-v-s-s-2017-bcsc-865>

Prepared on 28 October 2026 · Esheria