
CANADA / JUDGMENT

J.W.L.P. v. A.J. P.

2019 BCSC 744

COURT

Supreme Court of British Columbia

DECIDED

25 April 2019

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2019 BCSC 744 J.W.L.P. v. A.J.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.W.L.P. v. A.J.P.,

2019 BCSC 744

Date: 20190425

Docket: E170036

Registry: Vancouver

Between:

J.W.L.P.

Claimant

And

A.J.P. also known as A.J.S.

Respondent

Before: Master Cameron

Oral Reasons for Judgment

Counsel for the Claimant:

P. M. Daykin, Q.C.

Counsel for the Respondent:

L.N. MacLean, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

April 16, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 25, 2019

Introduction

- [1] This application was brought by the respondent A.P. to vary the order of Mr. Justice Milman made on October 24, 2017 [2017 BCSC 1898]. The terms of that order that are the subject of this application were made upon the consent of the parties in the context of a high-conflict family law case.
- [2] The variation sought is in relation to paras. 4 and 5 of the order which read as follows:
4. The parties and the children shall attend reunification therapy with Robert Finlay (or such other qualified therapist as the parties may agree upon), as and when directed by the therapist after the first session, to help improve the Claimant's relationship with all of the children, taking AP's and MP's wishes into consideration.
 5. The parties shall attend at parenting counselling, with a counsellor to be agreed by both parties, to allow the parties to improve their communication regarding the children and to improve their abilities to co-parent.
- [3] This family law case is set for trial on August 19, 2019, and there is no longer a consensus between the claimant, J.P., and the respondent, A.P., as to the benefit and utility of the reunification therapy and parenting counselling that commenced in August of 2018.
- [4] The respondent, in her evidence in support of the variation, testifies to what she describes as the negative impact the reunification therapy sessions are having on the parties' nine-year-old daughter, E.P., in the context that her two older siblings, M.P. and A.P., have refused to participate with the rest of the family after the first therapy sessions were held in August and September 2018.
- [5] Ms. P. has testified that E.P. does not like going to the therapy and has shown signs of anxiety, becoming upset and worried.

- [6] The claimant has also expressed some concerns of his own of the course the therapy sessions have taken and their cost, but in his evidence he said, "I believe the program offered by Alyson Jones & Associates is an excellent program, and although it is at times emotionally painful and costly, it is a worthwhile and useful process that I have warmed up to and have faith in. I believe that they can help our family and I wish to see our involvement with the program continue."

Background

- [7] The following pertinent family circumstances are matters of record.
- [8] The claimant was born on February 25, 1972, and is now 45 years of age. The respondent was born on January 19, 1972, and is now 45 years of age.
- [9] The claimant and respondent were married on September 4, 1998, and separated on May 28, 2016, after an 18-year marriage.
- [10] There are three children of the marriage, namely: A.P., born August 3, 2000, who is now 18 years old and attends the University of Victoria; M.P., born April 3, 2003, who is now 15 years old and attends Delta Secondary School and plays competitive hockey; and E.P., born December 11, 2009, who is now nine years old and attends Holly Elementary School and is involved in various after-school activities.
- [11] Of the three children, only E.P. has parenting time with the claimant father. A.P. has refused to have any contact with the claimant since the parties' separation in 2016. M.P. and the claimant enjoyed a good relationship during the parties' marriage and for a short period of time after separation. However, in approximately September 2016, M.P. stopped responding to texts, calls, and emails from the claimant. The claimant has not had any parenting time and only limited contact with M.P. since November 2017.
- [12] From the commencement of these proceedings, both parties recognized the need for professional assistance in the form of counselling or therapy for the children and parents. The parties appeared before Mr. Justice Milman on September 18 and 19, 2017, and the claimant sought a formalized parenting schedule, among other things, and the respondent sought reunification therapy for the parties and the children. Mr. Justice Milman delivered reasons for judgment on October 24, 2017, and for the purposes of this application he made the orders that are sought to be varied by consent. He made a number of other orders that are not in issue on this application.
- [13] Dr. Michael Elterman was jointly retained to prepare a s. 211 report which he completed on April 17, 2018. In his report, Dr. Elterman recommended therapy for all of the children and the parties in order to address individual concerns, as well as the issues arising out of the overall family dynamic.

- [14] Following Mr. Justice Milman's order, the parties engaged a team of professionals at Alyson Jones & Associates and began therapy in August of 2018. The parties' contract with Alyson Jones & Associates provides for a two-year engagement through to August of 2020.
- [15] Since the family started therapy, only E.P. has been attending reunification therapy regularly with her parents. E.P. is the only child that continues to enjoy a good relationship with both parents and spends time with both parents. The two older children have had limited or no contact with the claimant and have refused to engage in therapy after each attended one session.
- [16] The therapy team recommends continued therapy for the whole family, especially in light of the issues that have arisen since the last therapy session.
- [17] In total, since August of 2018, the parties and the children have engaged in 34 sessions with Alyson Jones. Sessions occur on average once a week, with some of the initial sessions occurring on the same day.
- [18] Since August of 2018, for a period of approximately six months, the parties have received parenting counselling with respect to their communication and co-parenting abilities as part of the reunification therapy. The parties have made good progress. They were able to amicably and successfully negotiate both Christmas and spring break parenting schedules for E.P., as well as several other smaller changes to her parenting schedule, with the need for minimum involvement from the Alyson Jones team.
- [19] The parties' positive steps in their communication with each other have also been recognized by the Alyson Jones team in session minutes.

The Position of the Parties

- [20] The respondent submits that reunification therapy has not worked in improving the family circumstances and has not had any recognizable benefit in improving the claimant's relationship with A.P. and M.P. She also points to what she sees to be distress caused to E.P., in that since beginning the therapy, E.P. has exhibited increasing signs of anxiety, including being more withdrawn, upset, worried, and showing low self-esteem and self-confidence. The respondent submits that, in considering the best interests of E.P., who is the only child currently participating in the therapy sessions, that the orders made should be varied and that all therapy and counselling for the family should come to an end.
- [21] The claimant opposes the application to vary the order, submitting that there is not a proper foundation in the evidence to demonstrate that there has been either a change in circumstances since the interim order was made and/or evidence of a substantial nature that was not available at the time of the interim order that has now become available. He relies on the opinion and the advice of the therapist, Ms. Jones, who has told the parties it would not be appropriate to abruptly stop the process only a few months into a program that has been designed to run for as long as two years.

[22] The claimant submits that the order was made on the available evidence at the time and with the consent of both parents in what they consider to be the children's best interest. It is submitted that since there was a recommendation from the therapist for continued family therapy and that there has been no recommendation or opinion from Dr. Elterman, who authored the s. 211 report, to consider abandoning the process or limiting it in the best interests of the children, that it would be appropriate to continue the sessions with the goal of eventually persuading the two older children to join in to the sessions.

The Law

[23] This application is governed by s. 37 of the Family Law Act, S.B.C. 2011, c. 25, which reads:

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the [children] . . .

- (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:
 - (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (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 an 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;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

[24] Sections 215 and 216 of the Family Law Act are also pertinent and read as follows:

Changing, suspending or terminating orders generally

215 (1) Subject to this Act, a court on application by a party may change, suspend or terminate an order, if there has been a change in circumstances since the order was made.

- (2) A court may not change, suspend or terminate an order made under Part 5 [Property Division] or 6 [Pension Division] except as provided under those Parts.

...

Court may make interim orders

216 (1) Subject to this Act, if an application is made for an order under this Act, a court may make an interim order for the relief applied for.

- (2) In making an interim order respecting a family law dispute, the court, to the extent practicable, must make the interim order in accordance with any requirements or conditions of this Act that would apply if the order were not an interim order.
- (3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied 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.
- (4) In making an order under subsection (3), the court 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).
- [25] In *B.K. v. J.B.*, 2015 BCSC 1481, Madam Justice Holmes, as she then was, interpreted these provisions and said, quoting paras. 28 through 34, as follows:
- [28] Where a court is asked to exercise the authority under s. 216(3) by varying (or suspending or terminating) a parenting interim order already made, the court can properly start from the assumption that the interim order reflected the child's best interests insofar as those could be discerned at the time of the previous order. It is for this reason that s. 216(3) and (4) focus the court's attention on whether there is a change or new evidence since the previous order, and, if there is, on the factors in s. 216(4). Those factors relate mainly to the timing of the application to vary in relation to the previous interim order and the trial; the purpose of the interim order; and the potential adverse effects on the parties of varying or not varying the interim order.
- [29] The factors for consideration under s. 216(3) and (4) thus do not expressly include the best interests of the child. Consistently with the long-standing approach, on interim applications, of protecting the status quo and providing short-term solutions until a closer and more complete examination is possible at trial, they require the court to focus on what, if anything, has changed or emerged since the interim order was made, and to consider whether the new facts or evidence warrant a further change over the short-term. In the circumstances to which s. 216(3) and (4) apply, a full assessment of the child's best interests is not usually possible.
- [30] But although the child's best interests are not as such among the s. 216(4) factors, they permeate the analysis under s. 216 in the following ways.
- [31] First, and as I have noted, the interim order sought to be varied will have been made in accordance with the child's best interests to the extent practicable (through the effect of s. 216(2) and s. 37(1)).
- [32] Second, a change in circumstances or new evidence will not be material, or sufficient to engage s. 216(3), unless it relates to the child's best interests. This is because the parenting issue in question will ultimately be determined solely on the basis of the child's best interests.
- [33] Third, some of the s. 216(4) factors implicitly require some consideration of the child's best interests, particularly since, as noted above, the order sought to be varied will have been made with the child's best interests firmly in view. These factors include: "the change in circumstances or the evidence, or both, referred to in subsection (3)" (s. 216(4)(a)); and "any potential adverse effect, on a party or a child of a party, of either making or declining to make an order . . ." (s. 216(4)(e)).

- [34] On the interpretation of s. 216 I have outlined, s. 216(3) creates a threshold for an application to vary an interim order. If there is a material change in circumstances or new evidence of a substantial nature and the threshold is therefore reached, the court will determine the application according to the factors in s. 216(4). The provisions of s. 216 therefore provide the complete basis and framework for an application to vary an interim order.

Analysis

Has there been a change in circumstances since the interim order was made?

- [26] At the time the parties entered into this consent order relating to the reintegration therapy and parenting counselling, the family unit was sadly quite frayed and the claimant only had a continuing relationship with the youngest child. On a positive note, that relationship has continued to flourish. In addition, the parties themselves have benefited from counselling and their level of communication with each other has improved.
- [27] The other element of the family dynamic unfortunately has not changed; that is, the gulf that exists between the claimant and the two older children.
- [28] The only other change in circumstances may be said to be the reaction of E.P. to the therapy she has been part of from August 2018 to January 2019. Over that period of time, the respondent became worried that the sessions were not helping E.P., who is still in the midst of trying to adjust to the separation of her parents.
- [29] On this application, I do not have the benefit of the detailed evidence of the therapists, other than what they are reported to have advised the parties as appears in the affidavit evidence. The therapists do not recommend an end to the program, given it is still early in the two-year process, and there has been a suggestion by them that the frequency and the duration of the sessions may be adjusted to accommodate the concerns expressed by the respondent regarding E.P.
- [30] In my view, recognizing that the trial is on the horizon, being only four months away, and that the therapists have made a proposal that may reduce or eliminate the unhappiness that E.P. may have about the sessions, I cannot conclude the variation of the order sought at this time, is in the best interests of E.P. or the other children.

Is there evidence of a substantial nature that was not available at the time the interim order was made that has become available?

- [31] The respondent points to the fact that Dr. Elterman, in his s. 211 report delivered six months after this order was made, does not expressly recommend reintegration therapy for E.P. He does make that recommendation for M.P. and the claimant. If this report had been available when Mr. Justice Milman heard this application, I cannot conclude that the order would not have been made.

- [32] In fact, bearing in mind that the orders that are sought to be varied were made by consent, the inquiry may be more squarely focused on whether the parties themselves would have abandoned the concept of reintegration therapy.
- [33] Looking at the matter objectively and given the desire of them both to do what they could to repair the relationships between the children and the claimant, I cannot conclude they would have done so.

Conclusion

- [34] For these reasons and also bearing in mind that it will be for the trial judge to make a final determination of the need for continuing counselling and therapy for the family, I will maintain the status quo and I dismiss the application accordingly.
- [35] The costs of the application will be in the cause.

"Master Cameron"

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