

CANADA / JUDGMENT

# K.A. v. C.S.C.

2024 BCSC 642

## COURT

Supreme Court of British Columbia

## DECIDED

19 April 2024

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2024 BCSC 642 K.A. v. C.S.C. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: K.A. v. C.S.C., 2024 BCSC 642 Date: 20240419 Docket: E245003 Registry: Victoria Between: K.A. Claimant And C.S.C. and A.W. Respondents Before: Associate Judge Harper Reasons for Judgment Counsel for the Claimant: R. Yavari Counsel for the Respondent, C.S.C.: J.S.C. Faber Places and Dates of Hearing: Vancouver, B.C. December 13, 2023 Victoria, B.C. February 27, 2024 Place and Date of Judgment: Victoria, B.C. April 19, 2024 TABLE OF CONTENTS Introduction.. 3 Legal Framework.. 4 Analysis. 6 The Current Arrangement 8 What is the Status Quo?. 9 Interim Order Pending What Event?. 11 Seek a s. 211 Report 12 A Short Trial 12 Conduct Examinations for Discovery. 12 An Order for Counselling. 12 A Further Judicial Case Conference. 13 A Case Planning Conference. 13 Issue a Notice to Mediate. 13 Decision.. 13 Costs. 14

## Introduction

- [1] In this family law case, the respondent mother, C.S.C., seeks an order varying an existing informal parenting time schedule.
- [2] C.S.C., age 29, and the claimant father, K.A., age 32, are the parents of a daughter, W., born September 8, 2019. C.S.C. is also the mother of a son from a previous relationship, A., born September 4, 2017. The parties agree that K.A. stands in the place of a parent to A.
- [3] The parties started living together in July 2018, married in July 2019, and separated in February 2021 (K.A. says the separation date is December 2020, but nothing turns on that disagreement for the purposes of this application).
- [4] Since separation, the informal parenting time arrangement has been that W. spends each weekend with K.A. from Thursday at about 4 p.m. to Sunday until about 4 p.m. C.S.C. seeks an order reducing K.A.'s parenting time with W. to every second weekend from Friday at 4 p.m. to Sunday at 10 a.m. C.S.C. has followed the correct procedure in that she continues to adhere to the informal parenting schedule rather than unilaterally suspending parenting time and forcing K.A. to apply.

- [5] For the first 18 months or so following separation, A. accompanied W. on most weekends. However, C.S.C. has become concerned about A. spending time with K.A. Since September, 2022, A. has spent progressively less and less time with K.A. Currently, A. spends very little time with K.A.
- [6] An order was made at a judicial case conference on August 22, 2023 granting leave to add A.'s biological father, A.W., as a respondent to this action. K.A. filed an amended notice of family claim on October 16, 2023, naming A.W. as a respondent. K.A. has not yet taken any steps to seek parenting time with A. A.W. is entitled to notice if K.A. seeks an order for parenting time with A.
- [7] In her notice of application, C.S.C. sought two orders that were made by consent on the first day of the hearing. These are:
3. Pursuant to s. 222 of the Family Law Act, an order that [K.A.] will have no contact with [C.S.C.'s] partner, [C.S.], or [C.S.C.'s] brother, [C.C.], or [C.S.C.'s] mother, [T.C.], unless there is an urgent matter in relation to [W.] or another urgent matter requiring contact.
  4. Pursuant to s. 225 of the Family Law Act, an order that [K.A.] will not contact or communicate with [C.S.C.], either directly or indirectly, except as follows:
    - a) Through text message or email;
    - b) Only in order to arrange parenting time or to discuss important parenting matters.
- [8] On the first day of the hearing, K.A. also consented to an order transferring the court file from the Vancouver Registry to the Victoria Registry. The second day of the hearing occurred in Victoria.

## Legal Framework

- [9] C.S.C. seeks interim orders pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA], and not the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). No authority was cited for excluding the Divorce Act.
- [10] In her notice of application, Part 3: Legal Basis, C.S.C. cites Rule 1-3 which provides: Object
- (1) The object of these Supreme Court Family Rules is to
    - (a) help parties resolve the legal issues in a family law case fairly and in a way that will
      - (i) take into account the impact that the conduct of the family law case may have on a child, and
      - (ii) minimize conflict and promote cooperation between the parties, and
    - (b) secure the just, speedy and inexpensive determination of every family law case on its merits.
- Proportionality

- (2) Securing the just, speedy and inexpensive determination of a family law case on its merits includes, so far as is practicable, conducting the family law case in ways that are proportionate to
- (a) the interests of any child affected,
  - (b) the importance of the issues in dispute, and
  - (c) the complexity of the family law case.
- [11] The statutory basis cited in support of the application is ss. 37(1), (2), and (3); s. 38; and s. 42 of the FLA: Best interests of child 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 child only.
- (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 the person's 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 the person's 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. [ ] Assessing family violence 38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
  - (b) how recently the family violence occurred;
  - (c) the frequency of the family violence;
  - (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
  - (e) whether the family violence was directed toward the child;
  - (f) whether the child was exposed to family violence that was not directed toward the child;
  - (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
  - (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
  - (i) any other relevant matter. [ ] Parenting time 42 (1) For the purposes of this Part, parenting time is the time that a child is with a guardian, as allocated under an agreement or order.
- (2) During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.
- [12] In his application response, K.A. cites not only the FLA, but also the Divorce Act, s. 16.
- [13] Neither counsel made any submissions with respect to which statute applies.
- [14] C.S.C.'s position is that, on a full analysis of the s. 37 factors, the court should conclude that it would be in W.'s best interests to be in C.S.C.'s primary care with more limited time in K.A.'s care.
- [15] K.A. says that the status quo parenting time schedule should be preserved.

## Analysis

- [16] C.S.C. seeks interim orders only. Neither party has any intention to set a trial date. There are no property or debt issues (except a minor issue concerning a \$15,000 debt). There are no support issues. The only stated issue between the parties is parenting time for W. (and, eventually, parenting time for A., if K.A. chooses to apply). Neither party has applied for a s. 211 report. There have been no examinations for discovery.
- [17] C.S.C.'s position is that W. is not doing well in K.A.'s care. The evidence tendered by C.S.C. is meant to illustrate problematic aspects of K.A.'s parenting style and his anger issues. C.S.C. argues that K.A.'s harassment, intimidation, and name-calling fits within the definition of family violence set out in s. 1 of the FLA.

- [18] C.S.C. says that throughout their relationship and after separation, K.A. has had a very short temper and major problems with anger and jealousy. C.S.C. initiated the separation and left the family residence with W. and A. K.A. has sent C.S.C. text messages containing vile insults. He has insulted C.S.C.'s family members which is why the consent order for no contact with the family members was made.
- [19] K.A. took an eight-week course in April and May 2023 through the Victoria Single Parent Resource Centre called "Understanding Anger and Stress". Arguably, this course qualifies as "any steps the person responsible for the family violence has taken to prevent further family violence from occurring" (FLA, s. 38(h)), but there is no evidence before me demonstrating what benefit, if any, K.A. has gained from the course. The only effect the counselling seems to have had is that since early 2023, communications between C.S.C. and K.A. have completely stopped.
- [20] Counsel for K.A. submits that K.A.'s anger and insults were a result of the separation. I do not agree. The text messages indicate a worrying degree of harassment ("evil woman" being a constant refrain). I find that the pattern of name-calling directed both at C.S.C. and her family members constitutes family violence within the meaning of s. 38 and s. 1 of the FLA.
- [21] The fundamental difficulty with the application is that, although I have found that family violence has occurred, C.S.C. seeks an interim order of indefinite duration based on highly conflicting affidavit evidence and based on conduct that has now ceased due to the cessation of communication between the parties. This is not a summary trial. I am unable to make findings of fact on many of the important issues that would inform a full FLA s. 37 analysis as C.S.C. urges. The Current Arrangement
- [22] K.A. works as a plumber. He lives in a guest house on property his parents own. His parents live in the main house. K.A.'s mother, T., is deeply involved in the care of W. and, importantly, is the intermediary between C.S.C. and K.A. The communication between C.S.C. and K.A. is non-existent. All communications between C.S.C. and K.A. go through T., although with the new consent order in place, there may be some email or text communications between the parties. It remains to be seen whether those communications will be productive.
- [23] Since the separation, T. has had a major role in W.'s life. T. takes care of W. during K.A.'s parenting time when K.A. is at work. C.S.C. and T. have an amicable relationship. C.S.C. trusts and respects T. as W.'s grandmother. T. acknowledges K.A.'s anger problems. In a text message to C.S.C., T. says "I've told [K.A.] that if he is feeling like he is losing patience "at all" to bring the kids to me or call me. I'm always available for my grandchildren".
- [24] Although T.'s involvement is helpful, I do not think reliance on T. indefinitely is an enduring solution to K.A.'s emotional volatility and negative attitude towards C.S.C.

- [25] C.S.C. says that while she has followed the informal parenting schedule for W. since separation, she has been very unhappy with the way it has operated. In her evidence, C.S.C. documents K.A.'s shortcomings.
- [26] C.S.C. gives many examples of things that K.A. told the children, A. and W., which they then repeated to C.S.C. For example, that K.A. told A. that he was a "weak son, selfish, and a bad influence on his little sister"; that K.A. told the children that he wished C.S.C. was gone forever; and that K.A. calls C.S.C. "a real jerk". If these things are true, K.A.'s parenting capacity and ability to meet W.'s needs is questionable. C.S.C.'s evidence is corroborated by that of C.S., her new partner, about what he has heard W. and A. say. However, not surprisingly, K.A. refutes all the evidence provided by C.S.C. K.A. has provided many photographs of him with the children and with his extended family. The photographs depict happy family gatherings.
- [27] C.S.C. points to W. being close to school age and that an every-other-weekend schedule would allow her and her blended family time together on weekends. (C.S.C.'s partner, C.S., has a four-year-old son.)
- [28] An important factor for C.S.C. is that she believes W. and A. should spend weekend time together. Because C.S.C. has curtailed A.'s time with K.A., that weekend time could only be when W. is in her care.
- [29] There is currently no co-parenting relationship between the parties. Neither party came to court with any proposal as to how the long-term functioning of the family could be improved. The current arrangement provides for significant parenting time for K.A. On its face, the arrangement should require the parties, in accordance with s. 27(2)(i) of the FLA 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". The parties are not currently cooperating. For example, T. facilitates transfers of the children (now only W.), because K.A. stopped meeting with C.S.C. after C.S.C. moved in with her new partner. The consent order entered into at the December 2023 hearing provides that K.A. will not contact C.S.C. except through text message or email and only in order to arrange parenting time or to discuss important parenting matters. This agreement is a form of co-parenting, but at a very rudimentary level. In oral submissions, counsel for K.A. suggested the parties could use the communication tool Our Family Wizard. That proposal was not formally before the court, but the parties are certainly at liberty to use Our Family Wizard if they agree. What is the Status Quo?
- [30] In this case, there is an informal agreement for parenting time. Section 37(3) of the FLA provides that an agreement 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.

- [31] In *D.L.D. v. R.C.C.*, 2013 BCSC 590, the court made an interim order in the context of a pending custody and access report and trial. "Status quo" is addressed at para. 21: "[ ] such issues as status quo are to be considered in the context of and as one factor in determining what is in the child's best interest and not as a form of trump card which overcomes all else but risk to the child".
- [32] C.S.C. relies on the proposition that there should be no presumption of a status quo as such a presumption detracts from the individual justice to which each child is entitled: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 26. The facts of *Hejzlar* are not at all similar to the facts of the present case. *Hejzlar* was an appeal of a trial decision regarding relocation. The Court of Appeal determined that the legal test to be applied was s. 16 of the Divorce Act. C.S.C. does not rely on s. 16 of the Divorce Act.
- [33] K.A. relies on *D.A.B. v. C.A.S.*, 2020 BCSC 807. That case involved family violence perpetrated by the father. Parenting time was set out in a separation agreement. The court noted that the finding of family violence did not mean the father was unable to care for his children. Reducing parenting time for the father would punish the children for the wrongdoing of the parent: para. 158. D.A.B. does not assist in this case. The facts are distinguishable. D.A.B. was a trial judgment rendered after a nine-day trial, with direct examination and cross-examination. The trial judge had the benefit of a s. 211 report. The trial judge ordered the appointment of a parenting coordinator. The trial judge's reasons cannot be interpreted as an endorsement of the status quo. The court stated: "to be very clear, the claimant's [father's] behaviour must change": para. 158.
- [34] Even if I were to order that the status quo parenting schedule be maintained on an interim basis, it would be status quo pending a particular event, not status quo indefinitely. If the trial of the present case were imminent, or if a s. 211 report were pending, the informal interim parenting time schedule might be left in place even though elements of the status quo are not working in W.'s best interests. For instance, the status quo involves heavy involvement of T., beyond a typical grandparent role; C.S.C. is unwilling to let K.A. know where she lives; C.S.C. does all the driving because of K.A.'s poor driving record; the communication between the parties is poor; there is acrimony between K.A. and C.S.C.'s extended family; the exercise of parental responsibilities does not seem to be joint; and there is no order or agreement regarding parenting time for A. Interim Order Pending What Event?
- [35] Interim orders in family law cases are based on the assumption that the order will only last until trial and that the trial will occur in the near future. The risk of an interim order being "wrong" is attenuated by the knowledge that the order will last only a short time and will be re-examined at trial on a full evidentiary record. In many family law cases, including this one, the assumption that a trial will occur within months of an interim order being made is a fiction. The parties in this case say there will be no trial. The interim order C.S.C. seeks does not address any of the fundamental issues the parties need to resolve as W. moves through her childhood, into adolescence, and beyond. The only order I am able to make is a

"here and now" order that assumes that the parties will go to trial. Given that the parties will not be going to trial anytime soon, if at all, any order I make will, realistically, only see the parties through to September 2024 when W. starts kindergarten.

- [36] If parties wish to use interim orders to resolve long-term parenting issues, they should come to court with a plan. They should consider all the ancillary issues that arise when orders are made concerning very young children, especially where the relationship between the parents is acrimonious. The parties have joint guardianship and need to make parental decisions together. Given the current climate, this is not possible. For example, K.A. unilaterally signed W. up for soccer on Saturdays. Although K.A. says C.S.C. is welcome to attend W.'s soccer games, he has not told her where they are held. Signing a child up for extracurricular activities is a guardianship decision. The exercise of parental responsibilities was not before the court on this application. Therefore, on the soccer issue, the parties are for the time being left to their own devices.
- [37] Without making any orders, I suggest the parties might consider the following options. Seek a s. 211 Report
- [38] This could be a report prepared by a family justice counsellor if paying privately is an insurmountable barrier. It is common knowledge that there is a wait time for a family justice counsellor s. 211 report, but given that W. is so young, the parties might find it useful to have the benefit of a s. 211 report even if the report might take 8 to 12 months to produce. A Short Trial
- [39] Credibility is an important issue in this application. If the issues were narrowly focussed with limited witnesses, the parties ought to be able to conclude a trial in two to three days. The interim application before me consumed one full day. An investment of one or two more days at a trial with oral evidence might be a good option for achieving a durable parenting arrangement (or, at least as durable an arrangement as can be achieved when young children are involved). Conduct Examinations for Discovery
- [40] There is no requirement that an examination for discovery only occur when a trial date is set. If finances permit, a short, narrowly-focussed examination for discovery might yield valuable insight to both parties and their counsel as they consider settlement options or, failing settlement, chambers applications or trial. An Order for Counselling
- [41] The court has the authority under s. 224 of the FLA to refer parties to counselling, with or without their consent. Given the dysfunctional relationship between the parties, co-parenting counselling might be a good option. There is an important caveat however: there must be screening for family violence and a careful assessment made as to whether counselling is appropriate. A Further Judicial Case Conference
- [42] Either party may seek a further judicial case conference. This could be an efficient and cost-effective way to explore settlement options and talk through concerns about the parenting issues. A Case Planning Conference

- [43] A case planning conference could be a useful tool for the parties to make a plan for moving the case forward. The options I have set out above could be discussed at a case planning conference and each party's views could be put forward on the merits of any of the processes available for family law dispute resolution. Issue a Notice to Mediate
- [44] Either party is at liberty to issue a notice to mediate pursuant to the Notice to Mediate (Family) Regulation, B.C. Reg. 296/2007. Even though a mediation costs money, a mediation might be a good use of the parties' financial resources and pay dividends in terms of resolving the myriad issues involved in this case. Decision
- [45] The parties should address long-term issues regarding their parenting arrangements. W. will be starting school shortly. In the meantime, W. should be able to spend some weekend time with A. K.A.'s negative attitude toward C.S.C. needs to be addressed. I have considered K.A.'s conduct pursuant to s. 37(4) of the FLA and conclude that there is an impact of the family violence on W.'s well-being. At the very least, the family violence that is documented in the text messages has impeded the parties' ability to co-parent in any meaningful way and has required T. to assume parental responsibilities that ought to be K.A.'s.
- [46] I make the following orders:
- 1) K.A. will have parenting time with W. three weekends out of four from Friday at 4 p.m. to Sunday at 4 p.m.;
  - 2) Either party may apply to vary this order without the necessity of demonstrating a material change of circumstances at any time after July 31, 2024. The rationale for the timeframe in Order #2 is to give the parties and their counsel time to consider the family law "tools" described in these reasons. It is the court's hope that the parties will avail themselves of some of these tools in order to reach their own agreements about W. without the necessity of returning to court.
- [47] K.A. commenced this proceeding out of the Vancouver Registry. There is no connection to Vancouver apart from K.A.'s counsel. C.S.C.'s counsel was required to travel to Vancouver for the first day of hearing. In my view, K.A. should either have commenced the proceeding out of the Victoria Registry or, upon request of C.S.C., agreed to transfer the proceeding to the Victoria Registry. A transfer of the court file to the Victoria registry was inevitable. Accordingly, I order that:
- 3) K.A. will pay C.S.C. the disbursements she incurred for the first day of hearing, including her counsel's travel and accommodation expenses. Costs
- [48] Neither party has been wholly successful on this application. Accordingly, apart from Order #3, each party will bear their own costs. "Associate Judge Harper"

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