
CANADA / JUDGMENT

K.J.B. v. G.A.B.

2013 BCSC 562

COURT

Supreme Court of British Columbia

DECIDED

2 April 2013

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2013 BCSC 562 K.J.B. v. G.A.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.J.B. v. G.A.B.,

2013 BCSC 562

Date: 20130402

Docket: 48387

Registry: Kamloops

Between:

K.J.B.

Claimant

And

G.A.B.

Respondent

Before: The Honourable Mr. Justice K. Ball

Reasons for Judgment

Counsel for the Claimant:

K.P. Jensen, as Agent for

E.D. McBain

Counsel for the Respondent:

C.J. Oien

Place and Date of Hearing:

Kamloops, B.C.

March 18, 2013

Place and Date of Judgment:

Kamloops, B.C.

April 2, 2013

Introduction

- [1] As frequently occurs, children do not respond well following the separation of their parents due to matrimonial difficulties. In the case at bar, there have been unhappy struggles and conflicts over the division of parenting time with the three children. The three children of this marriage are K.L.B., 14, born October 24, 1998, J.D.B., 9, born July 2, 2003, and C.S.B., 7, born August 2, 2005. All three children love their parents and each of the parents love all three of their children. The parties were married on September 2, 1995 and separated on October 24, 2009.
- [2] The parties both brought an application before this Court to vary the interim order pronounced by the Honourable Mr. Justice Pearlman made after a hearing on Friday, July 27, 2012. A trial of this action is scheduled for July 2013 in Kamloops, B.C.
- [3] For the purposes of these reasons, only the two younger children will be the subject of an order, as the parties are agreed that K.L.B. has chosen to live with her father on a full-time basis.
- [4] The applicant filed an application seeking the following orders:
1. The order of the Honourable Mr. Justice Pearlman dated July 27, 2012 be varied insofar as week-on week-off custody of the children are concerned and to provide that the parties shall have custody of the children on a week-on week-off basis, with the transfer of the children to occur on Fridays after school;
 2. A section 15 custody and access report be prepared; and
 3. An order that any peace officer having jurisdiction in the Province of British Columbia who on reasonable and probable grounds believes that the respondent is in breach of the terms of this order immediately arrest the defendant and bring him before this court on the next court day following the arrest to be dealt with on an inquiry to determine if he has committed a breach of this order or is in contempt of court.
- [5] The respondent applies for the following order:

1. That paragraphs 4 and 5 of the order of Justice Pearlman dated July 27, 2012 shall be vacated and replaced with the following:
 - a. The children [K.L.B.] born October 24, 1998 and [J.D.B.] born July 2, 2003 will reside primarily with the respondent and the claimant will have [K.L.B.] and [J.D.B.] as follows:
 - i. Every second weekend from Friday after school to Sunday at 4:00 pm commencing January 25, 2013,
 - ii. Summer school vacation schedule is as otherwise set out in the order of July 27, 2012, except that [K.L.B.] and [J.D.B.] will reside primarily with the respondent and the claimant and the respondent will each have a two week holiday with the children as set out in paragraph 4(d) of the July 27, 2012 of the order, and
 - ii. As otherwise set out in this order.
 - b. The claimant will pick the children up from school on school days, unless the children are being picked up by the respondent or some other person designated by the respondent. The respondent will give the claimant reasonable notice of his intentions to pick up the children himself or by his designate.
 - c. The respondent or some other person designated by the respondent will pick the children up from the claimant's home after the respondent finished work on school days and Sundays at 4:00 pm.
2. The parties will have the children attend counselling with a counselor who will not be asked to write court reports or give evidence at any hearing or trial. The claimant will be at liberty to attend counseling with the children depending on the recommendations of the counselor. Counseling for the children, if free counseling is not available, will be paid equally by the parties. Counseling for the claimant and the children together will be paid for by the claimant.
3. [C.S.B.] born August 2, 2005 shall reside with the parties on a week on week off basis.
4. Spring breaks shall be shared equally between the parties.
5. The Easter weekend shall be from Thursday prior to Easter Sunday to Tuesday morning following Easter Sunday, at which time the children shall be returned to school. The respondent shall have the children for Easter 2013 and every odd numbered year thereafter and the claimant shall have the children from Easter 2014 and every even numbered year thereafter.
6. The summer break is to be shared equally between the parties with each parent to have a 2 week holiday with the children.

- a. The claimant is to have first choice of holidays in 2013 and shall advise the respondent by April 30, 2013 in writing as to the dates that she wants the children for summer holidays. The respondent shall advise the claimant in writing no later than May 15, 2013 of his two week holiday with the children.
- b. If the parties are unable to resolve matters regarding the children in a final way prior to summer 2014, the respondent will have first choice of holidays in the same terms as subparagraph a.
- 7. When the respondent is dropping the children off at the claimant's home, the claimant shall text the respondent to let him know that she is home.
- [6] The order sought by the respondent mirrors a draft order which is attached as "Exhibit A" to the 5th Affidavit of the respondent sworn March 11, 2013. That draft order was alleged to reflect an agreement reached by the parties on January 14, 2013. While it is clear on all of the material filed that a meeting was held between the parties and their counsel on that date for the purpose of settling differences between the parties, no final agreement was reached. I am confident that had an agreement been reached, the counsel involved at that meeting would have memorialized the agreement in writing. There would be no contest before this Court about the content or extent of any agreement. As this document does not reflect an agreement between the parties and is a document created in a "without prejudice" setting, that is, the parties were negotiating a settlement, the document is not properly before the Court.
- [7] I have read with care and concern the contents of the ten affidavits filed by the parties. Rule 10-4(12) of the Supreme Court Family Rules (effective as of March 18, 2013) specifies: "Subject to subrule (13), an affidavit must state only what a person swearing or affirming would be permitted to state in evidence at trial."
- [8] Subrule (13) allows for statements on information and belief where the source of the information is given and the affidavit does not seek a final order, or a change, suspension or termination of a final order, or otherwise by leave of the Court. Subrule (13) is not a licence to include inadmissible statements such as hearsay, speculation or statements of opinion including legal opinions or conclusions of law, particularly by those not qualified in any expert capacity.
- [9] While similar problems appear in affidavits for both parties, a particularly glaring example is contained in the affidavit of G.A.B. sworn May 8, 2012 at para. 30. There these words appear: "In the winter of 2011, while the children were playing out in the snow, I have a conversation with my next door neighbor, C...". There follows a supposed recitation of a conversation between "C" and K.J.B. allegedly containing a request to "make up stories" for the apparent purpose of deceiving or misleading the Court.

- [10] This is rank double hearsay which could never be admissible. The alleged conversation was not witnessed by G.A.B. The conversation is neither necessary nor inherently reliable. This paragraph should be struck out of the affidavit as it has no evidentiary value at all.
- [11] Legal counsel should exercise their function as gatekeepers of the practices and procedures inherent in the laws of evidence and not permit such material to be included in affidavits to be sworn by their client. G.A.B. cannot possibly have been in a position to swear that any part of the conversation between "C" and K.J.B. actually happened or otherwise to the truth thereof. The use of such a statement does nothing but damage the credibility of the party who swore such an affidavit was true.

DISCUSSION

- [12] K.J.B. works as a care aid and G.A.B. works as a mechanic. Following the separation of the parties, for a period of time, up until March 2010 the three children lived principally with their mother. The parties then entered into a verbal agreement to co-parent the children on a week-on, week-off basis. This arrangement continued with some variations as one or more of the girls would choose to stay at one parent's home and not move in accordance with the agreed schedule.
- [13] The parties seem to have different parenting styles and expectations for the children. This has led in part to the confusion now before the Court. I also note that, with the exception of the eldest child, the younger children are deciding where they will live, and when, resulting in much emotional unhappiness. While this Court has immense respect for the views of children, it is the role of the guardians, the parents of these children, to establish the residence of each child, and the parenting time for each of them. Once the schedule of parenting time is established, then both parents must respect the role of the other parent to arrange the activities which take place in the then "on-time" parent's home, and the "off-time" parent must not attempt to engage with or involve the children in activities or outings not arranged by the "on-time" parent at the particular time. Likewise, the exchange of residences in keeping with the co-parenting schedule is not optional at the whim of a child and must be adhered to by both parents.
- [14] On July 27, 2012, the parties appeared at a hearing before the Honourable Mr. Justice Pearlman. At that time, Pearlman J. ordered the preparation of a "Views of the Child Report" ("the Report") by the Family Justice Centre pursuant to s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 28 and made other orders concerning parenting time or access to the children. I have had the advantage of reading the transcript of the oral delivery of reasons by Pearlman J. I have also read the Report with care.

- [15] This Court does not sit as an appellate court of the July 27, 2012 proceeding. Any historical matter which took place before the Court at that time is not properly before this Court now, as any factual matter raised before Pearlman J. ought to have been placed before his Lordship. Any such issues cannot now be adjudicated by this Court. The proper issue before this Court is whether there has been a change in circumstance which would allow for a variation of the July 27, 2012 order: see s. 216 of the Family Law Act, S.B.C. 2011, c. 25 ("FLA").
- [16] The Report is helpful in that it reinforces the major elements of the decision of Pearlman J., in particular, shared parenting. While the children are not happy with moving from one home to another on a week-on week-off basis according to the Report, given the resources of the parents, changes in housing to make the distance between homes walkable is unlikely a reality.

Conclusions

- [17] Upon a careful review of the prior proceedings and the Report, I am not satisfied that there is a change in circumstance that would compel a change or significant alteration in the order previously made in this file.
- [18] I am satisfied it is in the best interests of the children, J.D.B. and C.S.B., that the parents shall share parenting time and exercise shared parenting responsibilities on a week-on week-off basis consistent with the calendar dates set out in the order of Pearlman J.: see s. 39(1) FLA. For greater certainty, during any week where one parent is exercising parenting time, the other parent shall avoid making any plans or arrangements for activities with the children during that week, which activities are not arranged and agreed to in advance by the other parent. In other words, the parenting time of each parent should be respected and not encroached upon by the other parent. Otherwise, the provisions the Pearlman J. order remain in full force and effect.
- [19] Several times, the need for counselling was stressed for the children and their parents. Counselling for the children is available through their schools, and has been used with some success by K.L.B., as noted in the Report. G.A.B. objected to school counselling on the basis that other school children might learn his children were involved in counselling. He had no financial resources to obtain private counselling. Based on his objection and the lack of financial resources, the children will go without using a positive and available resource of school based counselling. School counsellors are trained to maintain the privacy of the students whom they counsel. It is clearly in the best interests of J.D.B. and C.S.B. to be involved in counselling to deal with family separation issues as provided by their respective schools at the earliest available opportunity.
- [20] I therefore order that G.A.B. not interfere or discourage the children from seeking out counselling services available to them.

"K. Ball, J."

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