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CANADA / JUDGMENT

## L.C.T. v. R.K.

2015 BCSC 303

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COURT

Supreme Court of British Columbia

DECIDED

11 February 2015

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2015 BCSC 303 L.C.T. v. R.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.C.T. v. R.K.,

2015 BCSC 303

Date: 20150211

Docket: E101598

Registry: Vancouver

Between:

L.C.T.

Claimant

And

R.K.

Respondent

Before: The Honourable Madam Justice H. Holmes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

Tracey L. Jackson

Respondent R.K. appearing

on his own behalf:

In Person

Place and Date of Hearing:

Vancouver, B.C.

February 10 and 11, 2015

Place and Date of Judgment:

Vancouver, B.C.

### February 11, 2015

- [1] THE COURT: R.K. seeks orders varying the interim orders concerning his parenting time with the parties' two daughters, one aged nearly eight, the other aged six.
- [2] Since October 2010, R.K.'s parenting time, which is every other Saturday for four hours, has been supervised, and is subject to restrictive terms. R.K. asks that the requirement for supervision and some of the restrictive terms be discontinued pending the trial, which is scheduled for June 8, 2015, for 20 days. He asks that instead parenting time take place in accordance with the recent recommendations of Dr. Michael Elterman in the report he prepared under s. 211 of the Family Law Act.
- [3] Dr. Elterman recommended that R.K. have day-long parenting time every third Saturday, unsupervised, but always in the presence of a trusted adult, a neutral and objective person who would be able to verify what had taken place during the parenting time so as in part to reduce the pressure on the children of questions being asked of them after the parenting visits.
- [4] L.C.T. opposes the proposed changes, and submits that the interim orders should remain in place unchanged until the issues which gave rise to the orders for supervision and the restrictive terms have been resolved after the trial. These issues arise from allegations based mainly, but not entirely, on L.C.T.'s own evidence and that of her mother, Ms. R.T., that the children have disclosed sexual touching by their father and have displayed sexualized behaviour. L.C.T. also alleges controlling and coercive conduct toward her on R.K.'s part, which she submits amounted to abuse during the marriage.
- [5] R.K. lives and works in [name of city redacted], Washington, where he practices as a [profession redacted].
- [6] L.C.T. trained as a [profession redacted] while the parties lived in Oregon. She returned with the children to live full-time in British Columbia in approximately December 2009, and has lived here since in her mother's home in West Vancouver. L.C.T. completed her training in B.C., but has not practiced here.

- [7] The only consideration in this application is that of the children's best interests (s. 37(1) of the FLA). A court order is not in a child's best interest unless the order protects the child's safety, security, and well-being to the greatest extent possible, including through the physical, psychological and emotional aspects of those interests (FLA, s. 37(3)). All of the child's needs and circumstances must be considered in the assessment of his or her best interests, including as they are reflected in the factors set out in s. 37(2) of the FLA.
- [8] In relation to factor (g), which refers to the impact of any family violence on the child's safety, security or well-being, the court will consider the more specific factors concerning family violence set out in s. 38. Family violence includes violence directed toward the child and violence directed toward another family member.
- [9] L.C.T. alleges family violence through sexual touching of the children and inappropriate sexual conduct toward them, and also through the abuse she says R.K. directed toward her, which she submits has indirectly harmed the children. She relies on the opinion of Dr. Shane, who describes symptoms of PTSD on L.C.T.'s part, and notes a reporting of psychological experiences consistent with Battered Woman's Syndrome.
- [10] R.K. strenuously disputes the allegations made against him. In addition to relying on his own evidence about the family background, and the evidence of friends and family members concerning his background, character, and reputation, R.K. relies also on the report of Dr. Elterman I have briefly mentioned, and on the earlier report of Dr. Rebecca England, who concluded that continuing supervision was unnecessary. R.K. notes also that investigations of L.C.T.'s allegations undertaken by the applicable Ministry and by the police concluded without adverse findings or action.
- [11] R.K. submits essentially that Dr. Elterman's recommendations should be immediately put into place because of the adverse effects on his parenting time of the professional supervision and the restrictive conditions. In R.K.'s submission, it is in the children's best interest that his parenting time promote a more natural child-father relationship, and that it take place in a variety of different locations and allow for a variety of different activities. He submits that Dr. Elterman's recommendations would take his parenting time a step in that direction.
- [12] The difficulty for R.K. is that Dr. Elterman's report and recommendations are but one part of the body of evidence to be considered ultimately in the trial.
- [13] It is clear that the parties each have abundant other evidence to tender in the trial on the issue of whether supervision of R.K.'s parenting time is necessary in the best interests of the children. That evidence will include the viva voce evidence of the parties and others who have first-hand observations and experience to report, as well as, I understand, the evidence of other expert witnesses, some of whom will offer different opinions from those given by Dr. Elterman and Dr. England. Also, it is clear that L.C.T. takes considerable issue with the adequacy of Dr. Elterman's approach to his task, and the reliability of his conclusions, and expects to ground her position in part through cross-examination of Dr. Elterman in the

trial.

- [14] In all of the circumstances, it is simply not possible or appropriate in this interim application to determine whether L.C.T.'s concerns about risks to the children are well-founded.
- [15] L.C.T. notes that for an interim order to be varied before trial, there should be a compelling change in circumstances, such that one or more of the parties would be seriously prejudiced by waiting until trial. She refers in that regard to *Hama v. Werbes* (1999), 66 B.C.L.R. (3d) 120 (S.C.), although noting also that with the introduction of the FLA there is arguably less concern about prejudice to the parties, because the only consideration is the best interests of the children.
- [16] L.C.T. refers also to the case authorities concerning the purpose of an interim order, which in turn reflect the circumstances in which interim orders are made. In *Hayden v. Stockwood*, 2006 NLUFC 14, the court declined to vary an existing interim parenting order when the trial was three months away, and said the following regarding the relevance of an impending trial date:
- [13] I must initially decide whether I should decline to determine that which Mr. Hayden seeks on an interim basis.
- [14] Although the Ontario Court of Appeal in *Sypher v. Sypher* (1986), 2 R.F.L. (3d) 413 (Ont. C.A.), dealt with a leave to appeal application, the principles set out in that decision, at p. 413, are equally applicable to the case at hand, it states:

"Interim orders are intended to cover a short period of time between the making of the order and trial."

"The purpose is to provide a reasonably acceptable solution to a difficult problem until trial."

"At trial, after a full investigation of the facts, a judge may well come to the conclusion that a substantially different order should be made. This is because the trial judge has the unfettered discretion and his or her judgment will be rendered on a full investigation of the facts."

- [15] As stated by our Court of Appeal in *Pumphrey v. Pumphrey* (1997), 148 Nfld. & P.E.I.R. 340; 464 A.P.R. 340; 29 R.F.L. (4th) 283, at p. 291 [R.F.L.]:

"Once the period for which an interim order is expected to operate is generally determined, it will be in that context that the best interests of the children will fall to be determined on an interim application."

- [17] R.K. submits in response that the circumstances have changed substantially since the original interim order with the simple passage of time. He notes also that the elapsed time since the order, which amounts to approximately four and a half years, belies one of the assumptions underlying the approach courts generally take to interim orders, namely that the duration of those orders will be relatively brief.

- [18] R.K. submits also that to remove the requirement for supervision would effect but modest change, which would essentially replace the professional supervising organization by less formal supervision by a trusted, neutral, and objective adult who would be in a position to report on what had and had not happened during the parenting time. This would in turn, R.K. submits, allow the parenting time to take place in a variety of places, and therefore to be more interesting and enjoyable for the children.
- [19] One difficulty is that nothing in the evidence provides any basis for confidence that the necessary trusted and neutral adult can be identified, or that he or she will be available to assist in the manner contemplated. In response to the Court's question during submissions, R.K. provided the names and brief descriptions of two people, who are residents of the state of Washington, and of a third person, who he did not name but who he described as resident in British Columbia, and he indicated that these people - certainly the two in Washington - had indicated their willingness to assist.
- [20] However, there is no evidence concerning this matter, and, in particular, no assurance from those people themselves that they understand the full extent of the time-consuming and demanding role asked of them. There is also no indication of for how long these people expect to be able to assist, whether only once or twice, or regularly until an order after the trial.
- [21] Furthermore L.C.T. had no notice that R.K. would suggest these individuals, and her preliminary view is that they are not people who can play a neutral role.
- [22] It is clear also that R.K. would have grave reservations about involving any members of the T. family or people close to that family as a trusted adult to serve in the role Dr. Elterman contemplated.
- [23] The evidence and submissions simply do not allow me to conclude that the trusted adult alternative is a viable option for achieving the objectives of the present order for supervision.
- [24] Where the safety of the children is potentially at risk - and I stress the word "potentially", because this is very much in issue between the parties - the court on an interim application should err on the side of caution: *D.G.P. v. S.L.N.*, [1999] B.C.J. No. 291 (P.C.). The proper venue for addressing the veracity of allegations of abuse is the trial, not an interim application: *T.N.S. v. T.J.S.*, [1999] B.C.J. No. 2607 (S.C. Master).
- [25] This is such a case, and in my view the existing orders should remain unvaried.
- [26] In coming to this conclusion I have considered whether some of the restrictive terms should be modified or removed. However, in my view to do so would potentially distract one or both parties from their efforts to allow R.K.'s parenting to achieve greater equilibrium and to create a comfortable environment for parenting time that the children will enjoy with their father.

- [27] The one exception to that comment relates to the issue concerning Skype contact during the parenting time with R.K.'s parents, or perhaps other family members. It appears that there is no issue at all, from L.C.T.'s point of view, about that type of contact being made, and that if there is a problem with it taking place the problem arises from restrictions within the supervising facility.
- [28] Would it help the situation if I were to make some form of order making clear that, from the Court's perspective, that type of Skype contact is acceptable? Or, is it simpler for Ms. Jackson to send a letter advising R.K. or the access facility that there is no concern?
- [29] MS. JACKSON: I think it is better if Your Ladyship makes the order. I have no problem with that and it is in recognition that L.C.T. has no objection to that at all.
- [30] THE COURT: All right. Do you agree with that?
- [31] R.K.: I do.
- [32] THE COURT: All right. So the order reflecting today's proceedings will include an additional term, which will be that by consent - and I take it that it is by consent? - that during his parenting time, R.K. is at liberty to arrange for the children to contact his own family members by Skype or other means of communication from the access facility. Does that do it?
- [33] MS. JACKSON: Yes. Thank you.
- [34] THE COURT: All right. Those are my reasons on the application.

"The Honourable Madam Justice H. Holmes"

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Prepared on 27 October 2026 · Esheria