

CANADA / JUDGMENT

L.G.B. v. R.A.B.

2020 BCSC 97

COURT

Supreme Court of British Columbia

DECIDED

27 January 2020

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2020 BCSC 97 L.G.B. v. R.A.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.G.B. v. R.A.B.,

2020 BCSC 97

Date: 20200127

Docket: E47602

Registry: New Westminster

Between:

L.G.B.

Claimant

And

R.A.B.

Respondent

Before: The Honourable K.W. Ball

Reasons for Judgment

The Claimant, Appearing in Person:

L.G.B.

The Respondent, Appearing in Person:

R.A.B.

Place and Date of Trial/Hearing:

New Westminster, B.C.

May 1, 2019

Place and Date of Judgment:

New Westminster, B.C.

January 27, 2020

Introduction

[1] These reasons respond to applications by both parties. The claimant, L.G.B., seeks an order to compel the restoration of a shared parenting arrangement provided in the order of the Honourable Mr. Justice Saunders dated October 9, 2015 (the "Order"). The respondent, R.A.B., seeks an order for the sole custody of the children of the marriage, effectively bringing an end to the shared parenting arrangement.

Contents of Affidavit

- [2] The contents of the affidavits of L.G.B. are largely inadmissible, as they contain a large number of letters written by L.G.B. which are headed by the phrase "without prejudice". These documents discuss problems between the parties and propose or demand solutions to those problems. The parties were not represented by counsel before this Court, and it is appreciated that the contents of an affidavit may not be prepared in the same form as a document prepared by legal counsel. Nevertheless, the rules of evidence continue to apply.
- [3] In addition, statements in affidavits are required by Rule 10-4 of the Supreme Court Family Rules, B.C. Reg. 169/2009 to be firsthand statements of fact known to the witness. A letter written by an affiant and then attached as an exhibit does not become a firsthand statement of fact when it contains complaints, second hand information or argument.
- [4] This Court is unable to treat such documents as evidence in this application.

Background

- [5] The parties were married on June 4, 2005, and were divorced effective November 9, 2015. There are two children of the marriage: M.A.B., born in 2004; and J.J.B., born in 2006. This Court has chosen to use initials to designate the parties and the children to protect the privacy of the children. No disrespect is intended by the use of initials.
- [6] In the Order, Saunders J. designated the parties as joint guardians of the children under the Family Law Act, S.B.C. 2011, c. 25 [FLA], and a shared parenting plan was ordered by the court. The difficulty which arises is that, at present, neither child will attend for parenting time with L.G.B.

- [7] M.A.B. is now 15 years old and J.J.B. is 13 years old. As a result of physical contact between L.G.B. and M.A.B. in September of 2014, the Ministry of Children and Family Development (the "Ministry") was called into the situation by R.A.B. After an investigation by the Ministry, L.G.B. was directed to live away from the family home and to reside elsewhere. From September 30, 2014 up to and including May 13, 2015, L.G.B. was permitted to have parenting time, supervised by R.A.B. and a friend of L.G.B., but no overnight visits were permitted.
- [8] In May of 2015, following a family mediation, the parties agreed that L.G.B. would have one overnight parenting time visit per week for each child. In June of 2015, the shared parenting arrangement was agreed to by the parties and shortly thereafter the same arrangement became a term of the Order.
- [9] M.A.B. was eventually diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and Obsessive Compulsive Disorder ("OCD"). By December of 2016, M.A.B. was continuing to meet expectations for a Grade 7 student at his school. His mental health quickly deteriorated towards the end of 2016, when he spent hours staring at objects. In January of 2017, M.A.B. began making noises, screaming, staring at the ceiling for long periods of time, and washing his hands more than fifty times a day, leaving the skin on his hands red and raw.
- [10] On February 10, 2017, R.A.B., concerned about the deteriorating behaviour of M.A.B., arranged a meeting with a family doctor to obtain a referral to a specialist pediatrician. The appointment with the specialist pediatrician was scheduled for February 15, 2017.
- [11] Also on February 10, 2017, R.A.B. received an email from Jim Joly, the counsellor at M.A.B.'s school. The email sent by the counsellor requested that a meeting be arranged with the counsellor and the parents of M.A.B. to "discuss the possibility of [M.A.B.] getting direct therapy for the OCD, which is flaring up hugely at school lately".
- [12] In preparation for the appointment with the specialist, M.A.B.'s teacher provided a description of the OCD symptoms displayed by M.A.B. which had developed since the 2016 Christmas break, including: repeated/excessive hand washing; refusing to touch worksheets, writing tools or scientific equipment including iPads because such items were "dirty"; and refusing to eat foods that might have been touched by another person.
- [13] When R.A.B. and M.A.B. arrived at the office of the specialist pediatrician on February 15, 2017, they were told that the appointment for M.A.B. had been cancelled by L.G.B.
- [14] On February 18, 2017, M.A.B. was taken to the emergency room at British Columbia Children's Hospital due to the worsening of his OCD symptoms. He was referred to the Children's Hospital OCD clinic, which at the time had a wait list of about five months. In the interim, he was referred to LINK, an interim mental health acute care follow up service.
- [15] On February 22, 2017, M.A.B. obtained an appointment with a pediatric specialist as a result of the previous cancellation. At that appointment, Dr. Chan forwarded a referral to the OCD clinic at the Children's Hospital with a request to expedite a clinical appointment. The

referral note of Dr. Chan (exhibit "E" to the 2nd affidavit of R.A.B.) contains the following: "[M.A.B.] has ongoing debilitating and escalating OCD symptoms. He is obsessed with cleanliness, washes his hands repeatedly. He also has a large number of compulsive routines, around checking lights, doorsteps....etc. his rituals have escalated to the point he has trouble leaving the house, going to school, or having any meaningful relationship with family and peers. His ADHD is also not treated as [M.A.B.] refused to take any medication".

- [16] On March 1, 2017, R.A.B. arranged to take M.A.B. to the drop-in assessment office of the Ministry to arrange long-term counselling for him. As they were leaving the school, L.G.B. was in the foyer of the school and attempted to prevent R.A.B. from taking M.A.B. to the Ministry office.
- [17] R.A.B. states at para. 19 of his 2nd affidavit that since that time, M.A.B. has increased his episodes of screaming, hiding under the bed and in the closet, wanting to shower, and excessive hand washing.
- [18] On March 21, 2017, R.A.B. received a letter dated March 3, 2017, from the British Columbia Children's Hospital OCD clinic advising that M.A.B.'s referral had been closed "since mother is documented as being opposed". This letter is attached to R.A.B.'s 2nd affidavit as Exhibit "G".
- [19] On March 24, 2017, the parties appeared before Duncan J. on an application to alter the Order and divest all parenting responsibilities from L.G.B. to R.A.B. because of an expressed concern over the deterioration in the mental health of M.A.B. On March 24, 2017, the court ordered, on the basis it was in the best interest of M.A.B., that R.A.B. be the parent responsible for making and attending medical appointments for M.A.B. in relation to OCD "until the full application can be heard" (2017 BCSC 597 at para. 11). Paragraph 10 of those reasons reads:

[R.A.B.]'s affidavit material supports an inference that [M.A.B.] has been experiencing ongoing and worsening distress from his condition and since the parties are unable to agree on a way forward, I find it in the best interests of [M.A.B.] that [R.A.B.] take the lead in that regard.

No further application has been heard by this Court to vary or set aside the order of Duncan J.

- [20] In January of 2019, Dr. M.F. Elterman authored a Views of the Child Report under s. 211 of the FLA. He noted that a Views of the Child Report was agreed to as a result of J.J.B.'s refusal to spend parenting time with his mother since late September 2018, and the parents not agreeing on the explanation for this conduct. Dr. Elterman then stated that the assessment of that explanation was beyond the scope of his assessment and he recommended a full s. 211 report be prepared.

- [21] Dr. Elterman stated that both of J.J.B. and M.A.B. agreed that L.G.B. had made a statement concerning the potential death of R.A.B., who was then undergoing treatment for a cranial tumour. L.G.B. denied making this statement, and Dr. Elterman suggested the situation "requires a more thorough evaluation".
- [22] Dr. Elterman pointed out that the contradictory positions of J.J.B. and M.A.B. concerning the restoration of a shared parenting time arrangement is a situation which also requires further evaluation.
- [23] The situation described by Dr. Elterman changed when on February 4, 2019, M.A.B. gave a statement to the RCMP in the presence of R.A.B. that L.G.B. had punched him in the chest when he was a passenger in a car driven by L.G.B. M.A.B. thereafter refused to spend parenting time with L.G.B.
- [24] It was admitted by L.G.B. in open court that her right hand and her son's chest were in contact in the car, but she said she had only extended her hand in front of her son when she was braking to ensure he was not injured by the braking action of the car.
- [25] The question which arises is whether the conduct of two children, aged 13 and 15, both refusing to spend parenting time with their mother should be considered given the competing applications before the court and, if so, in what manner.
- [26] It must be remembered that the Order dictated a shared parenting regime. That regime has been varied by the order of Duncan J. who considered it was in the best interest of M.A.B. that R.A.B. should be the parent responsible for coordinating the OCD treatment for M.A.B. Given the profoundly serious effect OCD was portrayed as having in M.A.B.'s life, this order was a significant variation of the Order.

Legal Framework

- [27] In *R.E.Q. v G.J.K.*, 2016 BCSC 1498 at para. 69, the Honourable Madam Justice Fleming analyzed the facts of that case against the test for a material change in circumstance derived from *Gordon v. Goertz*, [1996] 2 S.C.R. 27. Drawing on *Gordon*, Fleming J. articulated a three prong test for determining whether a material change in circumstance has been established. The test requires:
1. a change in the condition, means, needs or circumstances of the child or in the ability of the parents to meet the needs of the child;
 2. Which materially affects the child; and
 3. Which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
- [28] The court in *S.M.M. v J.P.H.*, 2016 BCCA 284 discussed how a child's newly expressed wishes can constitute a material change in circumstances:

22 While a child's views and wishes are not determinative, courts should give considerable weight to the views of an older child, proportionate to their age and level of maturity: O'Connell v. McIndoe (1998), 56 B.C.L.R. (3d) 292 (C.A.), leave to appeal ref'd (1999), [1998] S.C.C.A. No. 576; T. (T.) v. H. (J.M.), 2014 BCSC 451 at para. 54. A child's newly formed views may constitute a material change in circumstances: Rashtian v. Baraghoush, 2013 BCSC 2023 at paras. 16-17.

Analysis of the Applications

[29] In the case at bar, the claimant seeks to enforce the Order and the respondent, in light of significant changes of circumstances, seeks to divest all parental responsibilities for M.A.B. and J.J.B. to the respondent.

[30] The views of M.A.B. and J.J.B. have been expressed by a steadfast refusal to spend parenting time with L.G.B. There is no suggestion that these views are changeable or temporary. In the second affidavit of R.A.B. filed October 29, 2018 at para. 18, the following appears:

"[M.A.B.] at his worst, prior to the OCD treatment through the program at Children's Hospital, while very sick did comment on self-harm due to his OCD. Since treatment through this specialized program, [M.A.B.] has and continues to thrive. There are none of the behaviours that [L.G.B.] is claiming and certainly not in our home, with our family, or at school. [M.A.B.] will have to continue to manage his OCD for the rest of his life".

The refusal of both M.A.B. and J.J.B. to spend parenting time with L.G.B. for a significant period of time is a compelling factor in assessing the views of these children.

[31] Based on the foregoing, this Court is satisfied that there has been a material change in circumstances, and that in these circumstances, it is in the best interests of M.A.B. and J.J.B. to be placed in the sole custody of R.A.B. This is a change which could not have been foreseen by the judge who made the Order because the OCD experienced by M.A.B. and the responses to that condition had not yet occurred when the Order was made. J.J.B.'s relationship with L.G.B. was continuing when the Order was made, and had not suffered the rupture which has since occurred.

[32] Given the finding of a material change and the shift to a sole custody arrangement in favour of the respondent, it is unnecessary for this Court to contemplate orders for police assistance to force M.A.B. and J.J.B. to spend parenting time with L.G.B. In any event, such an arrangement would not be in the best interests of the children.

[33] As a result, the applications of the claimant contained in the Notice of Application filed October 17, 2018 are dismissed with costs.

[34] The Order made in this action dated October 9, 2015, entitled Order for Divorce is hereby amended as follows:

(1) Paragraph 2 is struck out and replaced with the following: "The respondent shall have sole custody of M.A.B and J.J.B. pursuant to the provisions of the Divorce Act (Canada)"; and

- (2) Paragraphs 4(a) through (h) are struck out and replaced with the following:
4. The respondent shall have sole parenting responsibility as set out in s. 41 of the Family Law Act and the claimant shall have parenting time with M.A.B. and J.J.B. as may be agreed to in writing from time to time with the respondent and M.A.B. or J.J.B., depending on which child or children the parenting time is intended to involve. The respondent shall provide the claimant with monthly reports by e-mail concerning significant medical or dental occurrences or treatment relating to the children as well as timely information concerning educational progress including parent-teacher interviews, copies of report cards or transcripts and public events at the educational institutions attended by the children so long as they or either of them remain "children of the marriage" as defined in the Divorce Act. Copies of report cards or transcripts for the children or either of them shall be provided by the respondent to the claimant within ten days of receipt thereof by the respondent.
- [35] I also make an order for the preparation of a section 211 report to be prepared by a family justice counsellor or by a private section 211 report writer selected by the parties. If the parties select a private section 211 report writer prior to retaining the report writer, they shall agree in writing to payment of the estimated fees for the section 211 report and provide any deposit against the payment of fees required by the report writer. The parties shall pay equally for the section 211 report.
- [36] The respondent is entitled to the costs of this application payable by the claimant as a matter of ordinary difficulty pursuant to Appendix B of the Supreme Court Family Rules forthwith after assessment or as agreed by the parties.

"Ball J."

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Prepared on 27 October 2026 · Esheria