
CANADA / JUDGMENT

L.M. v. L.S.

2013 BCSC 796

COURT

Supreme Court of British Columbia

DECIDED

7 May 2013

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2013 BCSC 796 L.M. v. L.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.M. v. L.S.,

2013 BCSC 796

Date: 20130507

Docket: 15861

Registry: Smithers

Between:

L.J.S.M.

Claimant

And

L.T.S.

Respondent

Before: The Honourable Mr. Justice Romilly

Reasons for Judgment

The Claimant:

Appearing In Person

Counsel for the Respondent:

Terry E. Hudson

Place and Date of Trial:

Smithers, B.C.

March 12-15 and 20-21, 2013

Place and Date of Judgment:

Smithers, B.C.

May 7, 2013

Nature of the Proceedings

- [1] This is an application for custody and access of the two children of the marriage: M.M. (born in December 2000) and I.M. (born in November 2005).

Background

- [2] The father claimant was born on August 27, 1962 and the mother respondent was born on January 14, 1966. They were married on March 21, 1998 and separated on November 14, 2010.
- [3] The relationship between the claimant and respondent could best be described as toxic. The hate the parties feel towards each other was evident throughout the trial.
- [4] From the evidence that was adduced at trial, it appears that during the marriage the respondent was always gainfully employed and the claimant was not. As a result, the claimant was a "stay at home dad" for several years and looked after both of the children during the day while the respondent was at work.
- [5] An issue in this case is the potential for risk of a sexual nature from the father towards the children. One reason for this apprehension stems from an incident that occurred when M.M. was young. The respondent claims that one day, when M.M. was three years old, she was told by M.M. that "Daddy put his penis between my legs". After getting an explanation from the claimant, the respondent did not act on M.M.'s statement until seven years later, after the parties separated, when she reported this matter to the RCMP. As a result of that complaint, M.M. was interviewed by the police. After a full investigation of the alleged incident, no charges were laid against the claimant. The claimant says that this action by the respondent was a malicious attempt by her to disparage his reputation.
- [6] The respondent testified that prior to the separation, she was working on the family computer when pornographic material popped up onto the screen. She testified that the claimant was regularly accessing pornography on the family computer. An analysis of the hard drive established that this allegation was true. After the parties separated, the respondent went to the matrimonial home to retrieve some of her belongings when she discovered a drawer with pornographic images. She claims that these were images of underage girls. This material was forwarded to the RCMP by the respondent, but they did

not see fit to lay charges against the claimant. The evidence indicates that the claimant is a frequent user of pornography.

- [7] On November 14, 2010, the claimant made a complaint to the police that he was assaulted by the respondent. As result of that complaint, the respondent was arrested and a peace bond charge was laid. After the Crown heard the respondent's side of the story, however, and observed the bruises on her body, which corroborated her version of events, the peace bond application was stayed. The Crown was satisfied that when the respondent struck the claimant, she was acting in self-defence.
- [8] This is a case where family violence took place in the home in the presence of the children.
- [9] The claimant testified that during the marriage the respondent was a hopeless alcoholic, incapable of caring for their children. Since the separation of the parties, both parties have made statements to each other's employer that could possibly have had the effect of terminating their employment.

Events after this Action was Commenced

- [10] This action was commenced by the claimant who was represented by Mr. Ian Lawson of Smithers. The respondent was represented by Mr. Terrence Hudson of Smithers. Both counsel and the parties appeared before the trial management judge on a number of occasions. The Court ordered that the parties retain a psychologist report to:
 - a. Prepare a Parenting Capacity Report on each parent;
 - b. Conduct a psychological evaluation of each parent; and
 - c. Conduct such collateral investigations as the psychologist deems necessary for the completion of the report.
- [11] Because of the subsequent report made by Dr. Posthuma, it may be prudent to explain that the claimant is himself a practising psychologist and did graduate work in that field.
- [12] The report from Dr. Posthuma did not paint the claimant in a very good light. Overall, he felt the claimant was defensive and unwilling to take responsibility for any of his failings, preferring to blame others. He recommended that the claimant should not put himself in compromising situations with children, for instance, he should avoid sharing a tent, room or bed with a child.
- [13] On seeing the report, the claimant challenged the findings. He claimed that the report was biased. Dr. Posthuma was cross-examined on his report by Mr. Lawson and the claimant subsequently submitted to another report by Dr. Posthuma. In this report, Dr. Posthuma was of the view that the claimant may be at risk to act sexually towards girls. The claimant vehemently denies this opinion of Dr. Posthuma and engaged his own psychologist. He testified, however, that he was unable to present that psychologist's report to the court because the cost was prohibitive.

- [14] The reports from Dr. Posthuma, together with a transcript of his cross-examination on the original report have been marked as an exhibit in these proceedings.

Present Parenting Arrangements and Views of the Child

- [15] Shortly after the separation of the parties, the primary residence of the children was with the respondent but the claimant had reasonable access to the children. This reasonable access was reduced by the trial management judge because of disagreements between the parties on the question of access. Without the consent of the claimant, the respondent moved the children from a school in Telkwa to a school in Smithers. The respondent and the children presently reside in Smithers and the claimant still resides in Telkwa which is located approximately ten kilometres from Smithers.
- [16] The children seem to enjoy having the present parenting arrangement. Their report cards indicate that they are doing very well at school. The claimant complains that he has not had his full weekend of access with his son and that he has not had access to his daughter for many months.
- [17] The claimant opines that the respondent allows the children to do whatever they please. He complains that the respondent allowed M.M. to get a Facebook page when she was too young. The claimant also drew my attention to some of the negative material that he was able to retrieve from Facebook generally. Material, he submits, that could easily be accessed by his daughter.
- [18] Text messages between M.M. and the claimant were introduced into evidence. It was clear from these text messages that M.M. found her father's texts annoying. At times, when her father sent texts to her, she accused her father of "using up her minutes".
- [19] A letter dated March 8, 2013 was introduced into evidence from Joann Lameck, a Counselling Therapist who interviewed M.M. on March 4, 2013. In this letter she states:

I met with [M.M.] with the purpose of establishing which parent she wanted to live with and how often she wanted to visit with the other parent.

[M.M.] clearly expressed that she wanted to live with her mother. When asked if she was willing to have times to visit her dad or do an activity with him [M.M.] was very clear. [M.M.] stated that she did not want to go to her father's house to visit or stay overnight. [M.M.] also stated that she was willing to visit occasionally with her dad but not every weekend and not at his house but more of an activity, i.e. going to lunch with him. When asked how often [M.M.] stated once a month and she wanted it to be her choice and not be forced to visit with him.

I asked [M.M.] her reasons for not wanting to live with her dad or to stay over at his house or see him too often. [M.M.] stated she did not feel comfortable or safe at her father's house. [M.M.] also expressed she did not like how her dad treated her. She felt she had no choices to even have time to herself and he was angry at her over little things and she felt like she was being treated like a small child being yelled at and put down for not doing the things he wanted.

In my assessment of [M.M.] I determined that she was not being coached to say how [she] felt by anyone. [M.M.] is very articulate and clear on how she feels at both her mother's home where she is comfortable and feels her mother allows her to make choices and gives her space and at her father's home where she is uncomfortable and feels anxious with her dad's angry reactions if she does not do what he wants.

[20] The claimant called as a witness, C.W., a long time neighbour of the claimant and respondent, with whom the claimant had a brief romantic relationship in the spring of 2011. She testified that she always found the claimant to be an involved, proud father. She testified that she observed him participating in the children's playtime. She observed that they always had meals together. She testified that he was always patient, consistent and reliable. She testified that the children appeared to be comfortable in his presence.

Divorce

[21] Subject to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), there will be an order that the parties are divorced.

The Law

[22] The following excerpt from J.P. v. B.G., 2012 BCSC 938, is helpful with respect to the factors for consideration:

[17] The best interests of the children are at the forefront of the custody and access disputes. The governing legislation is s. 16 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) ("Divorce Act") and s. 24(1) of the Family Relations Act.

[18] In their pleadings, both parents have brought their claims in respect of guardianship, custody, and access with reference to the Divorce Act and the Family Relations Act.

[19] The Divorce Act does not define or set out the factors involved in determining the best interests of the children. Section 16(8), which concerns custody orders, sets out the factors to be taken into account:

Factors

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

- [20] The best interests of the child are determined from the "child's perspective, and not from the perspective of either parent": *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 69. The child's physical, economic, emotional, psychological, intellectual and moral well-being must be considered: *Gordon* at para. 120.
- [21] According to case law, when dealing with custody and access under the Divorce Act, the best interests of the children are not the paramount consideration, they are the only "relevant issue": *Gordon* at para. 19.
- [23] Mr. Justice Walker goes on to discuss how the best interests of the child were to be considered under the now repealed Family Relations Act, R.S.B.C. 1996, c. 128. The new Family Law Act, S.B.C. 2011, c. 25, says the following about the best interests of the 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 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] The best interests of the child is the only relevant consideration in custody and access disputes: s. 16(8) of the Divorce Act. Section 16(10) of the Divorce Act says:
16. (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.
- [25] As per *Yu v. Jordan*, 2012 BCCA 367, where proceedings are pleaded on the basis of the Divorce Act and the provincial family law legislation, clarity about which statute the relief is granted under is ideal. The order made here regarding custody and access is pursuant to the Divorce Act, and is a final order for corollary relief since I have granted the order for divorce.
- [26] As stated in *K.K.G. v. D.P.S.G.*, 2010 BCSC 1243:
- [86] The general proposition that can be drawn from these cases is that a court considering custody and guardianship issues will be hesitant to make joint custody and joint guardianship orders where there is no effective, constructive or meaningful communication between the parties or at least a reasonable prospect of such communication developing.
- [27] M.M.'s views should be taken into account so long as they are consistent with her best interests, as explained in *R.I.L. v. L.J.L.*, 2013 BCSC 622:
- [24] I will turn now to the matter of D.'s previously expressed wish to reside primarily with her father, as reported in the February 2010 s.15 report, and the fact that her present wishes, at age 13, are a more significant consideration than they were when she was 10. In my view, those facts could constitute a material change of circumstances, as she is very close to the age where the courts frequently accord considerable significance to a child's firmly held wishes regarding the choice of primary residence, provided that the child's reasons for their choice are not inconsistent with their best interests as viewed by the court.
- [28] I have also considered the following principles from *J.P. v. B.G.*:
- [24] Custody and access rights are not dependent on whether any of the competing allegations of sexual and physical abuse and mental incapacity are proven. In *E.J.L. v. B.J.L.* (1983), 54 B.C.L.R. 164, the Court of Appeal said, at 167, that the question is:

... whether on the whole of the evidence there arises a real risk to the children if access is given without protection against that risk. The degree of risk can only be determined by carefully weighing all the evidence, and that must necessarily involve the credibility of the witnesses and the judge's assessment of the character of the parties.

[25] In *G.E.C. v. M.B.A.C.*, [1993] B.C.J. No. 1393, Newbury, J. (as she then was) said, at para. 93, that in cases involving allegations of sexual abuse, the case law is "clear" that the "Court must focus on whether there is any 'real risk' to the children, rather than on whether any particular allegations have been proven".

The allegations of sexual abuse in that case were much more serious than the ones at bar; however, the above principles apply.

[29] Sections 182-187 of the Family Law Act apply to the request for a protection order in these proceedings.

Analysis

[30] All I am concerned with is the best interests of these children. I am not concerned with whether the allegations made on both sides have been proven or not but rather whether there is any real risk to the children. Overall, I found the respondent to be credible. I do not think she poses any risk to her children. The claimant on the other hand, was less honest and forthcoming. He came across as a man who was intelligent and suave, who enjoyed using those characteristics to manipulate others. Although I believe that he loves his children, he poses some risk to them, especially to M.M. due to the indications in the evidence of his sexual proclivities.

[31] I have already alluded to the absolute animosity the parents feel towards each other. Based on the evidence adduced in this case, it would not be in the best interests of the children to appoint the claimant and respondent as joint custodians. In my view, it would be in the best interests of the children for the respondent to have sole custody and guardianship. There is no effective, constructive or meaningful communication between the parties or a reasonable prospect of such communication developing.

[32] In arriving at this decision I have considered the following:

- M.M. and I.M.'s health and emotional well-being;
- M.M.'s views;
- The nature and strength of the relationships between I.M. and M.M. and the claimant and respondent;
- The history of M.M. and I.M.'s care;
- The history of violence between the parents;

· I.M.'s need for stability, given his age and stage of development.

- [33] The claimant shall have some access to his son. He will have access to I.M. every other weekend: from after school on Fridays to noon on Sundays on alternating weeks. He shall also have access to I.M. during half the time of major holidays, including spring break, summer holidays and Christmas. This year the claimant is to have the first half of the summer holiday. Next year, the respondent is to have the first half of I.M.'s summer holiday. The claimant is to have access to I.M. for one-half of the Christmas holidays, with I.M. spending alternate Christmas days with the claimant and respondent. This year, I.M. will spend Christmas day with the claimant. The claimant is also to have access to I.M. on alternate birthdays; the respondent will have him on that day this year.
- [34] M.M. is of an age and maturity level that her views are very important to my determination. The additional factor of the risk her father poses to her leads me to the conclusion that an order for mandated access should not be made. However, she may see him if that is her wish. The claimant will only see M.M. on the conditions mentioned by her to Joann Lameck. That is, if M.M. chooses to see her father, the access should take place outside of the claimant's home; for example, at a restaurant. The claimant shall have reasonable access to M.M. by e-mail or text message. M.M. may choose to call her father but he shall not contact her by telephone.
- [35] In addition, I order that the respondent supply the claimant with the children's report cards within two days of her receipt of these documents. The respondent is to promptly advise the claimant of any illnesses or injuries suffered by the children (other than transient, minor illnesses or injuries, such as a cold or a scraped knee) and advise him of any medical procedures that either M.M. or I.M. have to undergo. The respondent is also to advise the claimant of the dates and times of any parent-teacher conferences. In the event that the respondent plans to take the children on a vacation, she will advise the claimant of the date on which the vacation is to begin and the address of the place where the vacation is to take place 30 days before the vacation begins. The claimant may attend I.M.'s extracurricular activities only if they fall on the days that he has access.
- [36] The claimant indicated to me that he is ready for a new start; he is ready to approach his family with a reconciliatory attitude. I hope that is the case. I encourage the parties to work on communicating with each other (through e-mail or text message as set out below) with respect and courtesy with only the best interests of their children in mind.
- [37] After considering the factors set out in s. 184 of the Family Law Act, particularly (a)-(c), I find that a protection order is necessary in this case. I order that the claimant and respondent are not to attend the residence of the other party and they are not to communicate with each other except by e-mail or text message for the specific purpose of facilitating access as ordered above. This protection order will expire after five years; either party may apply under s. 187 of the Family Law Act to shorten or extend this time period, or otherwise change the order.

[38] The respondent is entitled to her costs in this action.

"Romilly J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/13/07/2013BCSC0796.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/l-m-v-l-s-2013>

Prepared on 26 October 2026 · Esheria