
CANADA / JUDGMENT

L.P.O. v. A.R.B.

2020 BCSC 1415

COURT

Supreme Court of British Columbia

DECIDED

14 August 2020

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2020 BCSC 1415 L.P.O. v. A.R.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.P.O. v. A.R.B.,

2020 BCSC 1415

Date: 20200814

Docket: E191922

Registry: Vancouver

Between:

L.P.O.

Claimant

And

A.R.B.

Respondent

Before: Master Vos

Oral Reasons for Judgment

In Chambers

(Hearing proceeded via teleconference)

Counsel for the Claimant:

J. Dubas

Counsel for Respondent:

O. Stoklosa

Place and Date of Hearing:

Vancouver, B.C.

August 12, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 14, 2020

- [1] THE COURT: The respondent, A.R.B., applies for orders relating to her parenting time with the parties' children. The claimant, L.P.O., opposes all of the orders sought by the respondent.
- [2] This decision is being delivered as oral reasons soon after the application was heard, as the dispute between the parties requires a timely resolution. If the oral reasons are transcribed, I may edit them to include references to background information and to clarify the decision for readers. The result and the core analysis will not change.

Background

- [3] The parties lived in a marriage-like relationship for about three-and-a-half years, from early 2012 to June 19, 2015. They have lived separate and apart since June 19, 2015.
- [4] There are two children from the parties' relationship, a seven-year old son, R., and a six-year old daughter, J. (the "Children"). For the last year, they have primarily resided with the claimant. The school they attend is in Vancouver.
- [5] The claimant is 32 years old. He is employed as a warehouse worker. He resides in Vancouver. He has indicated that his residence is a two-minute drive from the school the Children attend.
- [6] The respondent is 30 years old. She was a stay-at-home mother from the time she was pregnant with the parties' first child until the parties separated. After the separation, she took a dental administration course. She completed the program in May 2019. She then worked at a dental clinic for a few months. In September 2019, she obtained her current employment as a full-time receptionist at a law firm. She resides in Surrey with her current partner, E.D.S.
- [7] This case is scheduled to proceed to a five-day trial commencing on May 10, 2021, a bit less than nine months from now.

The Applications

- [8] The respondent's applications are presented in her notice of application filed July 30, 2020. The applications at Part 1, para. 1 seek orders that would vary an interim order made by Justice Skolrood at a Judicial Case Conference ("JCC") conducted on July 23, 2019. The orders sought would essentially create a completely new parenting arrangement for the Children. The primary residence of the Children would flip from the claimant's residence to the respondent's residence. The claimant would have parenting time on weekends. The Children would move from the school they have attended in Vancouver to a school in Surrey.
- [9] At Part 1, para. 2, the respondent seeks alternate orders. The alternate orders would change the July 23, 2019 JCC order by vacating the requirement that the respondent's parenting time be supervised by her mother and would provide the respondent with unsupervised parenting time with the children from Friday afternoon to Sunday evening, three out of every four weekends. The respondent also seeks an order that the parties equally share the driving between their residences in Surrey and Vancouver when exchanging the Children for parenting time.

Analysis

- [10] Justice Skolrood's July 23, 2019 order was a consent order. It provided:
1. Until further order of this Honourable Court commencing Saturday July 27, 2019 the Respondent will have interim supervised parenting time to the parties two children, namely [R.] born [date omitted] and [J.] born [date omitted], (hereinafter the "Children") with this parenting time occurring every Saturday and Sunday from 10:00 a.m. to 5:00 p.m., each week with the Respondent's mother [G.N.], supervising this parenting time of the Respondent.
 2. As a term of the Respondent having interim parenting time as outlined in paragraph 1, only the Respondent and [G.N.] will be present with the Children during the parenting time of the Respondent, and [G.N.] will be the only person to transport the Children to and from the Respondent's access.
 3. As a term of the Respondent having the interim parenting time as outlined in paragraph 1, no one shall physically discipline the Children.
 4. Until further Order of this Honourable Court, or written agreement of the parties through counsel, except as outlined in paragraph 1, at all other times the Children will be in the interim care and control of the Claimant and this shall be his interim parenting time with the Children.
- [11] Orders concerning parenting responsibilities and other matters are set out at paras. 6-8 of the July 23, 2019 order.
- [12] The orders were made on a without prejudice basis. Para. 5 states:

5. The orders outlined in paragraphs 1 to 4 of this order are made without prejudice to any interim or final application made in these proceedings.
- [13] Paragraph 10 provided that if the case had not proceeded to trial before June 30, 2020, either party could apply to review the orders at paras. 4-8, that application would proceed on a without prejudice basis, and " any such application will be dealt with as if the terms of this order had not been made".
- [14] Counsel for the respondent submits that this court may reconsider the without prejudice matters incorporated in the consent order made on July 23, 2019. She refers to D.P.G. v. V.M.G., 2015 BCSC 1038 where the court said:
- [37] In my view, the proper interpretation to put on the phrase "without prejudice" in the December 14, 2014 consent order is that its terms, and the parties' agreement to them, are not to be taken as the parties' once and forever commitment to them. The terms of the order are not to be used as either a sword or a shield in later litigation on the same issues. As one of my colleagues has helpfully put it: a without prejudice JCC order is no more than a Band-Aid provision. The parties are free to argue for a different result on a different day without being hampered by earlier agreements made extemporaneously and for purposes of expediency.
- [15] I agree with this submission. It is open for this court to fully reconsider the orders set out at paras. 1-4 of the July 23, 2019 order.
- [16] When the parties separated, they initially had a co-parenting arrangement. The respondent describes the initial post-separation period in Part 2 of her notice of application:
14. Following the parties' separation in June 2015, the Children resided with the Respondent in Surrey and the Claimant, who lives in Vancouver, exercised parenting time on the weekends.
15. The Respondent started dating her current partner E.D.S. in May 2016. In August 2016, they moved into a three-bedroom suite at E.D.S.' parents' house. The Children had their own bedroom.
16. The Claimant resides at his parents' 4-bedroom house in Vancouver. The Claimant's parents, his sister, two cousins who are in their 30s and his aunt all live in that house.
17. In the initial years, the parties were able to co-parent. The Respondent recognized and told the Claimant that, as much as he had hurt her during their relationship, it was important to show the Children that they have two parents who love them.
- [17] In or about early 2019, a tip from an unidentified person triggered an investigation by the Ministry of Children and Family Development (MCFD) for possible concerns that the Children may have needed protection. The JCC proceeded on July 23, 2019, before the MCFD completed its investigation. The respondent agreed to limited supervised parenting time at the JCC. The respondent has not provided evidence to explain why she agreed to the limited supervised parenting time order, which was a significant change from the parenting

arrangement at that time. The respondent's counsel for this application was not her lawyer at the JCC, but suggested circumstances that might have impacted that decision. At the time of the JCC, the respondent knew she was under investigation by the MCFD. In addition, the respondent may not have had an opportunity to fully consider the situation. She has indicated that the JCC came on very quickly and states that she did not even have an opportunity to file pleadings. This is so. The notice of family claim was filed July 17, 2019. The JCC proceeded just four business days later. The response to family claim was filed August 8, 2019.

- [18] The MCFD investigation concluded with a finding that the Children were not in need of protection from the respondent. At Exhibit "G" of the respondent's second affidavit, made July 29, 2020, is a copy of a letter from Kim Tran, the practitioner who conducted the investigation for the MCFD, addressed to the respondent, dated August 20, 2019. It states:

Based on the results of my investigation [R.] and [J.] are not in need of protection as reported.

- [19] The respondent has addressed the claimant's allegations that she may have physically disciplined the Children or restricted the food provided to them. In her second affidavit she deposes:
67. I do not hit or abuse or physically discipline the Children in any way. If the Children are misbehaving, I talk to them. I kneel down to their level and we discuss what they did wrong and they typically understand. If they need time to calm down, I send them to their room so they can calm down and think about what they did.
69. When [R.] is experiencing anxiety, I typically give him a few minutes to calm down on his own. I then offer him a snack such as a cheese string and he comes out of his room and we talk about how he is feeling.
70. I have never seen E.D.S. hit or abuse or physically discipline the Children in any way and I don't believe he ever would. When the Children lived with us, they grew to love E.D.S. I have never seen him anything but patient and gentle with the children.
71. I do not restrict my Children from eating in any way. The Children are constantly eating. When they primarily resided with me, we had family meals together. The kitchen was stocked with healthy treats and snacks for them, and I gave them sweets once in a while. They are both healthy weights for their ages and sizes: my son [R.] is 45 pounds and almost 8 years old. My daughter [J.] is 43 pounds and 6 years old.
- [20] The respondent has provided an affidavit from her present partner, E.D.S. In his first affidavit, made July 2, 2020, he deposes:

6. A.R.B. is a good mom to her Children. She is so patient with them. When they acted out, she would stay calm and talk to them about what had happened. She would kneel down to their level, sit them down and calm them down. If they needed time on their own to calm down, she gave them that time. She said to them we don't want to get mad, let's talk about what happened.
7. For example, I recall one occasion when [R.] got very excited and shook the television. A.R.B. told him not to do that and that was it - he stopped his behaviour.
8. I learned from A.R.B. how to speak to the Children and calm them down and I adopted her approach.
- ...
10. The Children call me [reference omitted]. I have a strong bond with both Children, and miss them since I haven't been able to see them for over a year due to the court order.
- [21] The respondent has also provided affidavits from her mother and sister-in-law, M.H. They indicate that the respondent is a good mother and does not hit, abuse or physically discipline the children.
- [22] Section 37(1) of the Family Law Act, S.B.C. 2011, c. 25, mandates that when making an order regarding parenting arrangements, the court must consider only the best interests of the child.
- [23] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the Supreme Court of Canada said:
 1. All decisions as to custody and access must be made in the best interests of children, assessed from a child-centred perspective. The Divorce Act makes it clear that the best interests of the child are the only consideration to be taken into account in making orders concerning children. The objective of promoting maximum contact with the non-custodial parent, inasmuch as it is consistent with such interests, is an important consideration.
- [24] *C.T.H. v. C.H.H.*, 2018 BCSC 189 at paras. 38-44, sets out the principles to be applied. At para. 41, the court notes that the primary purpose of interim orders in family proceedings is to preserve the status quo. This accords with common sense that it is usually preferable to establish routines for children caught in the aftermath of the breakdown of their parents' relationship.
- [25] As noted in *Poole v. Poole*, 1999 BCCA 203 at para. 25, the party seeking to alter a child's status quo has the onus to show that the status quo is unsatisfactory, is not in the best interests of the child, and therefore should be changed.
- [26] In their application materials, the parties present unpleasant comments about each other. The claimant alleges the respondent physically disciplined the Children. He says that the respondent sent a text message to him to the effect that she believes it is within her right as a parent to strike the Children. The claimant's lawyer is not able to produce a copy of this text

message. He says he lost access to it when his office upgraded its computer software. Presumably, the claimant himself is also not able to produce a copy of this correspondence. The respondent denies that she sent any such message. As indicated earlier, the respondent has deposed that she has not hit, abused or physically disciplined the Children. The claimant has produced a picture he says shows the parties' daughter with a swollen lip, which he alleges may have occurred because the respondent struck her daughter. The version of the picture in the application materials is of poor quality and cannot be said to show any injury or indication of violence. If the child did in fact have a swollen lip, which is not apparent from the picture in the materials, the respondent denies it was due to anything she did. She denies striking her daughter. On the other hand, the respondent alleges that the claimant had anger control problems and was violent towards her and the Children while the parties resided together (respondent's notice of application filed July 30, 2020, Part 2, para. 10). The respondent alleges that the Children have told her on a number of occasions that the claimant told them to tell the MCFD representative, Ms. Tran, that the respondent hit them (notice of application, Part 2, para. 43).

- [27] The parties are obviously in high conflict. They have chosen to make parenting time one of their battlegrounds. They argue about many matters relating to the Children. The affidavits filed by both parties seem to focus on the disputes between them. Both parties put forward accusations against the other party. Statements in the affidavits concerning the parties' past conduct seem to be presented to impugn the other party's character and, presumably, parenting ability, but many of those statements are disputed or are too ambiguous to support inferences of reliable evidence. As a result, many of those accusations were not helpful in determining the important issues before the court concerning the Children.
- [28] Both parties contend they are loving parents of the Children. They seem to be aware of their duty to protect, to the greatest extent possible, the Children's physical, psychological, and emotional safety, security and well-being.
- [29] There is no convincing evidence that the respondent has harmed the Children. Her evidence indicates she has the wherewithal to provide proper care for the Children.
- [30] The order requiring the respondent's parenting time with the children to be supervised was made by consent at a JCC, while the respondent was under investigation by the MCFD. I am satisfied that the respondent has shown that supervision of her parenting time with the Children is not presently justified. The second term in the July 23, 2019 order will be set aside.
- [31] The orders sought by the respondent at Part 1, para. 1 of her notice of application would result in a very significant change to the parenting arrangements for the Children. It would also result in them leaving the school they have thus far attended and moving to a school in Surrey. Such major changes to the status quo, and the alterations of the Children's routines that would result from those changes, should be made only if the court can determine they are in the best interests of the Children. It is very difficult to make that determination on an

interim application, where the only evidence available to the court is in conflicting affidavits. As indicated in *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403 at para. 22, the purpose of interim orders is to provide short-term solutions until the best interests of the child can be fully canvassed at trial. The materials before the court on this application do not clearly show that the best interests of the Children require the significant changes proposed in the applications set out in Part 1, para. 1 of the notice of application. Those applications therefore are dismissed.

- [32] It is consistent with the best interests of the Children to maintain the framework of the status quo, at least with respect to the school the Children will attend. This would mean that their residence during the week should be the claimant's residence in Vancouver, which is closer to their school than the respondent's residence in Surrey. However, the objective of promoting maximum contact with the non-custodial parent, inasmuch as it is consistent with the best interests of the Children, is an important consideration. The evidence provided by the respondent and her commitment to the well-being of the Children are factors pointing to an increase in her parenting time being in the best interests of the Children. The status quo is unsatisfactory and should be changed, as it severely limits the respondent's time with the Children. The respondent is granted parenting time with the Children as sought in the alternate order, on three out of each four consecutive weekends, from Friday afternoon through to Sunday evening.

Result

- [33] The applications in Part 1 of the respondent's notice of application filed July 30, 2020 will result in the following orders.
- a) The applications in Part 1, para. 1 are dismissed;
 - b) The applications in Part 1, para. 2 are granted, on an interim basis. If the parties cannot agree on the time for the exchange of the Children, the respondent's parenting time will begin either right after her shift of work or right after the Children leave school for the day, whichever is later, and will continue until 7:00 p.m. on Sundays; and
 - c) There will be an order that the exchanges of the Children will take place at the parties' residences, with the party starting parenting time picking up the Children at the other party's residence.
- [34] As these are interim orders, they can be altered by written agreement of the parties or by further court order.
- [35] Are there submissions on costs?
- [SUBMISSIONS RE COSTS]

[36] THE COURT: The respondent was successful on her application, obtaining all the alternate orders she sought. She is awarded costs of the application. Those costs are assessed at \$2,000, pursuant to the schedule in Appendix "B" of the Supreme Court Family Rules, B.C. Reg. 169/2009. The costs are payable by the claimant to the respondent at the conclusion of this litigation.

[DISCUSSION CONCERNING OTHER ISSUES]

[37] THE COURT: The order is effective immediately. It provides that the respondent is to have parenting time with the Children three out of every four consecutive weekends. If the parties cannot agree on which three weekends the respondent will exercise parenting time, the respondent's choice will govern. These reasons are being delivered on a Friday morning. The respondent has indicated she would like to exercise her parenting time this weekend. The claimant opposed. The respondent's choice will apply. The respondent is to have parenting time with the Children this weekend, starting later today (August 14, 2020).

"Master Vos"

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Prepared on 29 October 2026 · Esheria