

CANADA / JUDGMENT

L.P. v. A.E.

2023 BCSC 1306

COURT

Supreme Court of British Columbia

DECIDED

28 July 2023

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2023 BCSC 1306 L.P. v. A.E.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.P. v. A.E.,

2023 BCSC 1306

Date: 20230728

Docket: E213176

Registry: Vancouver

Between:

L.P.

Claimant

And

A.E.

Respondent

- and -

Docket: E222965

Registry: Vancouver

Between:

L.P.

Appellant

And

A.E.

Respondent

Before: The Honourable Justice Basran

On appeal from: Orders of the Provincial Court of British Columbia dated

November 23, 2021 (L.P. v. A.E., 2021 BCPC 281) and

June 29, 2022 (unreported decision, [Registry: omitted for publication],

File No.: 192616)

Reasons for Judgment

The Claimant and the Appellant, appearing in person:

L.P.

Counsel for the Respondent:

J.E. Shragge

Place and Date of Hearing:

Vancouver, B.C.

June 22, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2023

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Overview

- [1] L.P. and A.E. are the parents of E., born February 2019. They are the appellant and respondent in this appeal respectively.
- [2] On November 23, 2021, after a 51-day trial in the Provincial Court, the trial judge awarded A.E. sole guardianship and all parental responsibilities and parenting time of E. His reasons were indexed as 2021 BCPC 281 (the "Trial Reasons"). The trial judge, in his Trial Reasons, also granted L.P. supervised contact time with E. (collectively, the "Trial Order").
- [3] The Trial Order also provided for a "review of child support, contact time and supervision" no earlier than June 6, 2022 (the "Review Hearing").
- [4] The Review Hearing took place on June 21, 2022. The trial judge issued his reasons for judgment on June 29, 2022 (the "Review Reasons"), terminating L.P.'s contact with E. (the "Review Order"). L.P. appeals the Review Order.
- [5] For the reasons that follow, I have concluded that L.P. has failed to identify any reversible error in the reasoning of the trial judge and, therefore, L.P.'s appeal is dismissed with costs to A.E.

Factual Background

Litigation History

- [6] The history of this family law case is lengthy and extensive. In addition to a plethora of proceedings in the Provincial Court, it involves seven separate proceedings in the Supreme Court and two appeals to the Court of Appeal--all commenced by L.P.
- [7] L.P. initiated proceedings in the Provincial Court one week before E.'s birth.
- [8] The trial commenced on November 7, 2019 and concluded after 51 days of hearings, on September 23, 2021. The trial judge summarized L.P.'s litigiousness:
- [7] In these proceedings, L.P. has filed three applications to obtain an order, 19 notices of motion, 18 affidavits, and seven applications under the New Family Law Rules (hereinafter referred to as "L.P. Written Filings"). In addition L.P. has filed two notices of constitutional question, two petitions for judicial review and just prior to the Court resuming operations in July 2020, an application for an urgent hearing. That means from the commencement of these proceedings to final submissions, a period of just over 31 months, L.P. has filed 34 court applications.

- [9] Among other things, L.P. sought to be named as one of E.'s guardians pursuant to s. 39(3)(c) or, alternatively, s. 51 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The trial judge declined to make this order based largely on the history of family violence, including abuse of court processes and "relentless" litigation, inflicted by L.P. on A.E. and E.:
- [75] The hundreds of emails that L.P. sent to A.E. have caused A.E. emotional harm and constitute family violence. As well, the number of Court applications and affidavits that he filed and the numerous breaches of the conduct orders have caused A.E. emotional harm. None of the emails, court applications or conduct breaches were directed at [E.]. However, the stress that this causes A.E. exposes [E.] to family violence which is more likely than not going to harm [E.]'s physical, psychological and emotional safety, security and well-being.
- []
- [96] If there are concerns regarding a guardian's ability to exercise their parental responsibilities, the parental responsibilities can be allocated or re-allocated to the more capable parent so that the child retains the benefit of having the parent remain a significant part of the child's life.
- []
- [98] I also recognize that guardianship has a symbolic status: a guardian is seen as playing a "parental" role in a child's life even if that parent does not exercise parental responsibilities or when the circumstances indicate that it would not be in the child's best interests for that parent to exercise parental responsibilities. L.P. has stressed the importance of the status, however, prior to appointing a parent as a guardian, the Court must be satisfied the appointment is in the child's best interests.
- []
- [101] In this case [E.]'s parents are strangers and months of conflict have turned into years of conflict. As well, there is no prior positive relationship between [E.] and his father.
- [102] For many months, L.P. refused to see [E.] unless his conditions were met. At that point, L.P. had never met [E.] and insisted that he would only see [E.] on his terms.
- [103] This is not to say that the needs and perspectives of L.P. are not to be considered. The needs of a child and the needs of a parent are interconnected.
- [104] That said, the focus is on the needs of a child and the best interests of the child is the only consideration. The needs of a parent can and likely will be secondary to the needs of the child.
- [10] On the issue of contact with E., the trial judge concluded that it was in E.'s best interests to have contact with L.P. The question was whether or not this contact should continue to be supervised.

- [11] The trial judge found that L.P.'s future contact with E. should be supervised because he was not satisfied that L.P. had demonstrated the parenting skills required for unsupervised time:
- [112] Factors commonly considered by the Court in determining whether to order supervised parenting or contact time are the following:
1. long term harassment and harmful behaviour towards the custodial parent causing that parent and the child stress and or fear,
 2. history of violence; unpredictable uncontrollable behaviour; alcohol and drug abuse which has been witnessed by the child or presents a risk to the child's safety and well-being,
 3. extreme parental alienation which has resulted in changes of custody and at times no access orders to the former custodial parent,
 4. on-going severe denigration of the other parent,
 5. lack of relationship or attachment between the non-custodial parent and child,
 6. neglect or abuse to a child on the access visit,
 7. older children's wishes and preferences to terminate parenting time.
- [113] In this case there has been long term harassment of A.E. by L.P. There has been unpredictable and uncontrollable behaviour by L.P. as evidenced by his breaches of the conduct orders and the imposition of a protection order. On the totality of the evidence, I am not satisfied L.P. has demonstrated the level of parenting skills required for unsupervised time. Accordingly, [E.]'s time with his father shall be supervised.
- [12] The trial judge further concluded that based on "how long [E.]'s time with his father has been supervised and the limited time [E.] has with his father", there would be a review of the contact order at a Review Hearing to be held no earlier than June 6, 2022: Trial Reasons at para. 210.
- [13] The trial judge indicated that the purpose of the Review Hearing was to determine whether "supervision should continue, and what contact, if any, is appropriate", having regard to the following factors:
- a) whether there is any expert evidence respecting L.P.'s parenting capacity;
 - b) counselling reports;
 - c) reports from the contact supervisor(s);
 - d) recognition of and responsiveness to E.'s ages and stages of development;
 - e) the conduct of any further litigation; and
 - f) compliance with court orders.

See: Trial Reasons at para. 211.

[14] The Trial Judge set out what L.P. would have to do to obtain less restrictive and more extensive contact time with E.:

[213] []. The point to be emphasized is L.P. continues to focus on his wants and needs. L.P. needs counselling and guidance to assist him with navigating the complex situation he finds himself in. He needs to develop a child centric approach that puts [E.]'s needs before his own needs:

[15] The trial judge further directed that L.P. was not required to show a material change in circumstances at the Review Hearing.

Post-Trial Litigation

[16] The Trial Reasons were issued on November 23, 2021. On November 8, 2023, approximately two weeks before the Trial Reasons were issued, L.P. filed for judicial review of the Trial Order.

[17] Next, between December 9, 2021 and March 10, 2022, L.P. filed seven applications for case management orders in the Provincial Court.

[18] On March 11, 2022, the Regional Administrative Judge, on his own motion, made the equivalent of a vexatious litigant order against L.P.:

No further applications for case management orders are to be accepted by the Registry from L.P. prior to his June 2022 review date. The registry and judicial case manager is [sic] directed not to schedule his Constitutional Questions Act matter so long as it is a matter before the Supreme Court. It predates the application in the Provincial Court.

[19] On May 20, 2022, Justice McDonald presided over the judicial review application. In reasons for judgment issued on May 25, 2022, she dismissed the proceedings as an abuse of process and ordered costs against L.P.: [L.P.] v. [A.E.], 2022 BCSC 883.

The Review Hearing

[20] On June 21, 2022, the trial judge conducted the Review Hearing. On June 29, 2022, he issued reasons for judgment terminating L.P.'s contact with E. In so deciding, the trial judge considered the six factors he had set out at para. 211 of the Trial Reasons. He observed that L.P.:

- a) had not obtained counselling or provided evidence corroborating his placement on a waiting list, and his "failure to address this need in a timely way shows a lack of insight into the complex situation he has created" (Review Reasons at para. 11); and
- b) has essentially been declared a vexatious litigant by [the] Regional Administrative Judge" and proceeded with the judicial review despite it being devoid of merit (Review Reasons para. 15).

- [21] The trial judge next considered E.'s best interests. Based on the evidence from the supervised contact sessions, the trial judge concluded that L.P. did not follow the directions of A.E. regarding the manner in which his contact with E. was to take place. He found that L.P. was determined to do whatever he wanted during his time with E., regardless of what A.E. directed:
- [23] Of greater concern is the following: [A.E.] feels that it is important for [E.]'s development that he learn to engage in group activity. [L.P.] is aware that she expects [E.] to participate in the 10 to 15 minute group activity while he is at Strong Start and that [A.E.] wants to encourage [E.] to participate in group activities. Notwithstanding this, when [E.] is with [L.P.] at Strong Start and says that he doesn't want to play in the group, [L.P.] allows him to go off and play with [L.P.] instead of the group. This sends contradictory messages to [E.] and is contrary to [E.]'s guardian's wishes.
- [24] [L.P.] explained that he believes [E.] is autistic and based on what he has read he believes what he is doing is correct. That may be. However, [E.] is still awaiting an assessment to determine whether or not he is autistic. Moreover, [A.E.] has been assigned all parental responsibilities for [E.]. She is [E.]'s sole care giver. Although I do recognize the role [E.]'s maternal grandparents play in [E.]'s life. [A.E.] is the one who is with [E.] everyday ensuring his needs are met. She must determine what is best for [E.] and the other adults in [E.]'s life must respect those decisions.
- [25] [L.P.] has demonstrated he will not follow those directions. [L.P.] has essentially said that when [E.] is with him, he will decide what is best for [E.]. That is not in [E.]'s best interests.
- [22] Based on L.P.'s unwillingness to cease his ongoing campaign of litigation against A.E., combined with his refusal to follow her directions, the trial judge concluded that L.P. continued contact with E was not in E.'s best interests:
- [26] [L.P.] commenced this litigation prior to [E.]'s birth. The conflict has continued the entirety of [E.]'s life. [E.] is entitled to a childhood free from this extreme conflict. It serves to destabilize [E.]'s primary caregiver. For [E.]'s stability his mother needs stability. All of the adults in [E.]'s life have been subjected to extreme stress. This is more likely than not harming [E.] and is certainly not beneficial to [E.].
- [27] The [c]ourt allocated all parental responsibilities to [A.E.] [L.P.] repeatedly challenges those decisions. The purpose of this review was to allow [L.P.] an opportunity to attend for counseling, demonstrate he could conduct litigation appropriately and reduce conflict by adhering to the determinations made by the [c]ourt. [L.P.] has not done so.
- [28] It is my judgment that it is no longer in [E.]'s best interests to have contact with [L.P.]. Accordingly paragraphs 4 - 6, 21 a) i. and 23 of the order of November 23, 2021 are hereby terminated.

Issue On This Appeal

[23] The issue on this appeal is whether the trial judge erred in law or principle or made a palpable and overriding error of fact in determining that it was not in E.'s best interests for L.P. to have continued contact with him.

Standard of Review

[24] A party may appeal to the Supreme Court of a family law decision of the Provincial Court: s. 233(1) and (3) FLA:

Appeals from Provincial Court orders

233 (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

[]

(3) After hearing the appeal, the Supreme Court may do one or more of the following:

- (a) confirm or set aside the order of the Provincial Court;
- (b) make any order that the Provincial Court could have made;
- (c) direct the Provincial Court to conduct a new hearing.

[25] In *Kane v. Proffitt*, 2018 BCCA 106, Justice D. Smith, writing for the Court of Appeal, held:

[42] The scope of appellate review in family matters is a narrow one; intervention by an appellate court is subject to a high standard of review. The function of appellate review is not to retry the case or to continue the trial at a different stage. Rather, its purpose is to examine the record below to determine if material or reversible error has been demonstrated, including an error of law, an error of principal, an error of fact, or a serious misapprehension of the evidence that could reasonably have affected the result and therefore warrants appellate intervention. [] [Citations omitted.]

[26] Similarly, on *Seibel v. Davis*, 2017 BCSC 847, Justice Butler, as he then was, wrote at para. 21:

[]. Appeal courts should show considerable deference to the trial judge who had the benefit of hearing witnesses.

[27] Here, the onus is on L.P. to show that the trial judge erred in fact or law in concluding that it was not in E.'s best interests for L.P. to continue having contact with him.

Relevant Legal Principles

[28] The best interests of the child is the only consideration in making a contact order:

Best interests of 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.

Positions of the Parties

- [29] L.P. contends that the trial judge was biased and should have recused himself from the Review Hearing. He further asserts that the trial judge failed to properly apply s. 37 of the FLA and that he made palpable and overriding errors of fact in concluding that L.P.'s contact time should cease. L.P. also submits that the trial judge's reasons are inadequate.
- [30] A.E. counters that the trial judge properly instructed himself on the law and made findings of fact they were amply supported by the evidence before him.

Analysis

- [31] L.P. did not bring a recusal application at the Review Hearing. Furthermore, the trial judge had earlier dismissed L.P.'s application for a mistrial and recusal: Trial Reasons at paras. 16 to 19.
- [32] In my view, L.P. is attempting to relitigate the issues decided by the trial judge by asking this Court to reweigh the relevant evidence and substitute its own view.
- [33] I am satisfied that the trial judge properly applied the best interests of the child factors as set out in s. 37(2) of the FLA by noting that his assessment of them remained the same as described in the Trial Reasons:
- [8] The [c]ourt's assessment of the s.37 factors remains the same. Specifically, the [c]ourt is concerned about [L.P.]'s ability to exercise appropriate child care responsibilities.
- []
- [19] In making an order for contact with a child, the court must consider only the best interests of the child. The party seeking contact bears the onus of establishing contact is in the best interests of the child. The best interests of the child test should be "read in harmony" with section 41 parental responsibilities and with a "degree of deference" to a guardian's wishes so long as they are in the best interests of the child. See *L.D.R. v. J.C.L.*, 2020 BCSC 1267 at [para.] 108.
- [34] The trial judge noted that in the seven months since the trial order, L.P. had:
- a) three outstanding appeals;
 - b) been essentially declared a vexatious litigant; and
 - c) lost a judicial review
- [35] The trial judge observed that this ongoing litigation created conflict that "is more likely than not harming [E.] and is certainly not beneficial to [E.]": Review Reasons at para. 26.

- [36] The trial judge emphasized that a significant concern was L.P.'s "refusal to follow [A.E.'s] directions with respect to parenting [E.]". This finding was grounded in the evidence before the trial judge.
- [37] The allegation that the trial judge's reasons are inadequate based on their failure to analyze each of the s. 37(2) factors is without foundation. The trial judge was the case management judge so he was obviously familiar with the details and history of this matter. Furthermore, the Trial Reasons dealt extensively with the s. 37(2) factors which the trial judge specifically adopted in the Review Reasons.
- [38] In my view, the trial judge's reasons are thorough and detailed in analyzing the issue of L.P.'s contact with E. In the Trial Reasons, he set out a clear roadmap of things that L.P. needed to do to facilitate enhanced and potentially unsupervised contact with E. He also clearly telegraphed that the Review Hearing would consider if L.P. ought to continue having any contact with E.
- [39] L.P. failed to follow the trial judge's clear directions and, instead, chose to double down on his history of extensive litigation and ignoring A.E.'s wishes regarding E.'s well being. The trial judge concluded that the relentless manner in which L.P. conducted the ongoing litigation amounted to harassment of A.E.
- [40] The onus was on L.P. to demonstrate that it was in E.'s best interests for contact between them to continue. L.P. abjectly failed to discharge this onus by focusing on his own needs and wishes instead of applying the child centric approach encouraged by the trial judge in the Trial Reasons. L.P. clings to the outdated notion that as E.'s biological parent, he is entitled to have contact with him. This flawed mindset fails to appreciate that E.'s best interests are and should be paramount.
- [41] In summary, the trial judge properly considered L.P.'s ongoing litigation campaign combined with his refusal to respect A.E.'s role as E.'s sole guardian. On this basis, he found that L.P. had failed to "demonstrate he could conduct litigation appropriately and reduce conflict by adhering to the determinations made by the [c]ourt" and, accordingly, determined that L.P.'s continued contact with E. was not in E.'s best interests.
- [42] L.P. has failed to identify any reversible error of law or fact. The findings of the trial judge are supported by the evidence that was before him.

Disposition

- [43] The appeal is dismissed with costs to A.E.

"Basran J."

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