
CANADA / JUDGMENT

L. (R.J.) v. P. (A.P.)

2006 BCSC 1429

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 1429 L.(R.J.) v. P.(A.P.)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L. (R.J.) v. P. (A.P.),

2006 BCSC 1429

Date: 20060925

Docket: E040523

Registry: Vancouver

Between:

L. (R. J.)

Plaintiff

And:

P. (A. P.)

Defendant

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

C. Neville

Counsel for the Defendant:

A.E. MacLennan, Q.C.

Date and Place of Trial/Hearing:

20060907

Vancouver, B.C.

- [1] The plaintiff father applies to vary the terms of a consent order granted by Pitfield J. on February 15, 2005. The variation sought relates to the father's access to the child of his marriage to the defendant. The child is now eight years old.
- [2] The order provided that the father and mother were to have joint custody of the child, with mother having day-to-day care of the child and father having access as specified in detail in the order. The order provides that the father is entitled to apply to review access any time after December 16, 2007.
- [3] The father's application to vary is based on an assertion that there has been a material change in the circumstances of the child. The change relied upon is the diagnosis of a learning disability, made following the end of the 2005/2006 school year.
- [4] The first question to be addressed is whether the diagnosis of the learning disability, in all of the circumstances surrounding that diagnosis, constitutes a material change in circumstance so as to warrant an inquiry into change of access. The father argues that the change is material, not only because of the diagnosis itself, but because of the impact of the condition and its diagnosis on the child. The father argues that the consequences of the condition include the risk that the child's self-image will be adversely affected by a sense of failure brought on by withdrawal of the child from the French immersion program that she had been attending up to the end of the 2005/2006 school year. Both parents agreed that the child would be placed in French immersion. The father's background is French Canadian and he is fluently bilingual.
- [5] The affidavit evidence establishes that the parties separated in May 2002, when the child was four years old. The father swears that during the negotiations leading to the consent order of February 15, 2005, he sought greater access to the child, and that he reluctantly agreed to the existing access provisions in order to avoid a trial and in the hope that the mother would concede greater access, perhaps as a result of his reasonable position during the bargaining. The father says that since separation he has consistently sought greater access to the child.
- [6] The father's affidavits establish that the child exhibited some difficulties in reading skills in Grade 1, sufficient that greater parental involvement in reading after school was suggested, and tutoring was arranged beginning September 2005.

- [7] There is some suggestion in the affidavit of the father that in the fall of 2005, as the child was beginning Grade 2, she was showing some physical manifestations consistent with a reluctance to go to school. There was some question in the evidence whether that was because of some interpersonal difficulties the child was having with classmates or whether it was a possible manifestation of continuing or increasing problems from as yet undiagnosed learning disabilities.
- [8] The situation progressed to the point where, in the spring of 2006, the mother was contemplating taking the child out of French immersion before the end of the school year. Assessment was arranged with Dr. Tiedemann, a psychologist, who has given the parents the opinion that the child has significant learning disabilities. At present the child has transferred from French immersion to English language instruction at a different school. The parents agreed to this, the father having agreed on the basis that the consulting expert recommended that it might be easier for the child if she was learning in one language.
- [9] The new school is cooperating in devising a plan of instruction to accommodate the learning disabilities diagnosed.
- [10] The first question to be addressed is whether there has been a material change in the circumstances of this child since the consent order of February 15, 2005. As was said in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at p. 43, paras. 12 and 13:
- 12 ... Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
- 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or 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.
- [11] The parents negotiated their agreement on matters of custody and access within months of the child's entry into Grade 1 and before it should have become apparent that the child was experiencing difficulty in school. This is not so much a case where the condition of the child has changed, as it is a case where the parents' appreciation of the needs of the child have been refined through the experience of the child in the French immersion program, the progress reports received from the school and shared between the parents, and ultimately the assessment and diagnosis of learning disabilities.

- [12] There has therefore been some change. Whether the change is sufficiently material, or representing a distinct departure from what a court could have reasonably anticipated at the time of the consent order, is questionable. The father's affidavit evidence tends to portray the learning disability and the impacts it has had on the self-confidence of the child as quite significant. The mother's affidavit evidence tends to suggest that the child is doing well in spite of the difficulties at school consequent on the learning disability.
- [13] The evidence of Dr. Tiedemann on the point is not available, except as reported by the parents, as Dr. Tiedemann required the parties to enter into a confidentiality agreement which specifically provides:

This assessment is not intended for, and may not be used for, in a court-related purpose (such as medical-legal or custody and access). ... And ... information gathered in the course of the assessment process, and results of the assessment, will be kept strictly confidential. Information will be shared with others only with your written consent.

- [14] In *Bruce v. Bruce* (1997), 26 R.F.L. (4th) 219 (B.C.S.C.), Warren J. had occasion to deal with the difference in wording between the variation proceedings in the Family Relations Act, R.S.B.C. 1996, c. 128, and the equivalent in the Divorce Act, R.S. 1985, c. 3 (2nd Supp.):

10 In the Divorce Act, the court must be satisfied that there has been a change in the condition, means, needs or other circumstances of the child since the making of the last Order [what the majority calls the threshold test] and if there has, then the court should consider only the best interests of the child. ...

- [15] After concluding that the "threshold" test is the same under either statute, Warren J. considered the circumstances before him which were argued as a material change in circumstances -- a move of the child with the custodial parent to Vancouver Island from the Vancouver area -- and said:
19. ... It is the effect of the move on the child and not the move itself which constitutes a material change in circumstances.
- [16] I assume that this child had the underlying condition or conditions which were subsequently diagnosed as learning disabilities before the parents separated. I accept that the parents only appreciated the existence, nature and extent of the learning disabilities after the separation, as the child settled into school and as assessment of the child's progress in school enabled both teachers and parents to evaluate the child's progress.
- [17] Given what Warren J. said as quoted above, I need not decide for the purpose of this application whether the discovery of a pre-existing condition constitutes a material change in circumstance when that condition may well have existed prior to the previous order of the court but was only discovered after the previous order.

- [18] I say that because in my view it is the impact of that discovery or of the condition discovered, on the condition, means or other circumstances of the child that must be considered in determining whether this is a material change in circumstance.
- [19] I do not see that the evidence before me establishes that the condition or means of the child have changed significantly or materially since the order of February 2005.
- [20] The father argues that the child's needs have changed considerably, as she now requires more involvement from both professionals and parents to help her overcome or to compensate for her learning disabilities.
- [21] Whether this is a change that has altered the child's needs in a fundamental way is not clear.
- [22] I have, in the affidavit of the father, his summary of Dr. Tiedemann's report to the parents, portions of which I reproduce below.
47. A. and I met with Dr. Tiedemann at her office on Saturday, June 24 where Dr. Tiedemann outlined for us her assessment of E. She concluded that E. had above-average abilities in abstract and practical verbal learning and reasoning, flexible thinking and socio-cultural understanding. Dr. Tiedemann assessed E. with an overall above average intelligence range.
48. Dr. Tiedemann confirmed that E.'s listening, comprehension and oral expression skills were advanced, but that E. had areas of weaker development and that cognitively she had slightly immature abilities in spatial analysis, hands-on spatial problem-solving and visual motor integration.
49. Academically, Dr. Tiedemann confirmed E. has immature reading and written expression skills in both English and French as well as weak phonological skills. E.'s skills in mathematics are also immature.
50. Dr. Tiedemann is of the opinion that E. has a severe learning disability. She states that the gap between E.'s estimated learning potential and her weaker academic skills is at least 1.7 standard deviations (26 standard score points) and as much as 3.1 standard deviations (47 points). Dr. Tiedemann concluded that E. is a bright child but meets the clinical diagnostic for reading disorder (a learning disability in reading or "dyslexia") disorder of written expression (a learning disability in writing or "dysgraphia") and mathematics disorder (a learning disability in mathematics or "dyscalculia").
51. Dr. Tiedemann confirmed that E. will require an individual education plan at school to be developed and implemented, in close collaboration with A. and me as E.'s parents, focussing both on ways to support and encourage E.'s strengths and on adaptations and remediation for her disabilities.

52. Dr. Tiedemann said that the type and volume of E.'s assignments and format for her evaluations will need to be tailored to suit her learning needs. Dr. Tiedemann also concluded that E. should not be excluded from enrichment activities or extracurricular participation due to her disabilities. Dr. Tiedemann also said that E. should be supported in understanding her learning profile and developing skills to advocate for her special learning needs.
53. Dr. Tiedemann also stated that those working with E. should be alert to the possibility of anxiety if she feels vulnerable, embarrassed or singled out. She also stated that remedial instruction, support and reading mechanics and comprehension, written expression and mathematics will be required from individuals who are skilled in assisting students with learning disabilities. She recommended a private tutor or a tutoring agency and/or private school or special program for students with learning disabilities. Dr. Tiedemann confirmed that her challenges would exist in both French and English but that it might be easier for E. if she was learning in one language.
- [23] I do not know from the evidence what scale was used when Dr. Tiedemann is reported to have categorized the child's learning disability as severe. Certainly, the father's description of the information given to him by Dr. Tiedemann in paras. 47 through 49 of his affidavit would indicate an otherwise bright child with many above-average abilities, overall above-average intelligence, with slightly immature or immature abilities in spatial analysis, hands-on problem solving, visual motor integration, reading and written expression, mathematics and phonological skills.
- [24] Even assuming that the description given by the father of Dr. Tiedemann's report and opinions to the parents is accurate and complete, I do not agree that this represents such a change as to have altered the child's needs in a fundamental way as set out in the judgment of McLachlin J. in *Gordon v. Goertz*.
- [25] If I were wrong in that, it would seem to me that the needs of the child, as described in the affidavits, are going to be met primarily by those who are trying to meet those needs, and the parents, while they are going to be very important to the way in which the child responds and deals with the learning disabilities, will be supportive or secondary in the efforts to overcome or compensate for those disabilities.
- [26] Had I found the threshold to be met, and I find that it has not, I would not conclude that it is in the child's interest to alter the access schedule. While I accept that a finding that there has been a material change in circumstances starts the parties off with a fresh slate insofar as access is concerned, it would be unrealistic and quite unfair to the child to totally ignore the effect of all of the affidavit evidence, which is that, in spite of the father's understandable desire for more access, the parents have done an admirable and credible job so far in sharing the parenting of this child to the extent set out in the consent order, they have communicated well and cooperated commendably in the interests of the child in her educational, social and family activities.

[27] It seems to me, to put it bluntly, that in or about December 2004, as a result of give and take on both sides, the parents "got it right" with respect to the arrangements for parenting this child, that having reduced their agreement to a consent order, it would not be in the child's interests at this point to alter an access regime that so clearly is working in the child's best interests to date.

[28] For these reasons, the plaintiff's application is dismissed with costs to the defendant.

"R.T.C. Johnston, J."

The Honourable Mr. Justice R.T.C. Johnston

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