
CANADA / JUDGMENT

M.J.B. v. S.A.A.

2003 BCSC 286

COURT

Supreme Court of British Columbia

DECIDED

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Citation:	M.J.B. v. S.A.A.
Date:	20030224 2003 BCSC 286
Docket:	E010385 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	M.J.B. Plaintiff
AND:	S.A.A. Defendant

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE R.R. HOLMES

Counsel for the Plaintiff:

Shannon Aldinger

Counsel for the Defendant:

Michael J. Hambrook

Date and Place of Trial:

October 21-24, 27 & 28, 2002

Vancouver, BC

- [1] The plaintiff seeks a divorce, custody of the child of the marriage, A.S.A. ["A.S.A."], restricted and limited access by the defendant to the child, child maintenance, and a compensation order in respect of certain assets.

HISTORY

- [2] The plaintiff is a 34 year old citizen of Spain who resides in Canada with landed immigrant status. The defendant is 46 and a Canadian citizen. He fled Iran and immigrated to Canada as a refugee in 1983 and became a citizen in 1986.
- [3] The parties first met in 1994 when both of them attended a wedding in the City of Los Angeles. As the plaintiff lived in Spain and the defendant in Canada, they did not spend much time together prior to their marriage. They did maintain communication however and the defendant travelled to Spain to visit the plaintiff.
- [4] The plaintiff immigrated to Canada in April 1996 and the parties married May 19 of that year in St. Albert, Alberta. The plaintiff subsequently became a landed immigrant in February 1997.
- [5] The parties' son, A.S.A., was born [], 1997. A.S.A. is a special needs child who has developmental speech comprehension and articulation difficulties. When A.S.A. was psychologically tested in March 2002, he ranked in the low average range for age-rated cognitive intellectual ability; his fine motor copying and visual-motor integration skills were noted as delayed by approximately 1.5 years and his adaptive skills showed significant delay akin to a mildly handicapped status.
- [6] The plaintiff described A.S.A. as a very active child. The testing psychologist found that an "assessment of his behaviour suggested clinical range concerns regarding attentional difficulties, and subclinical but elevated, concerns surrounding aggressive behaviour". He was said to meet the current diagnostic criteria for Attention Deficit Hyperactivity Disorder (ADHD).
- [7] A.S.A. is visited once a week by a speech therapist, and once every two weeks by an occupational therapist for treatment of his impairments.
- [8] The parties moved to Port Coquitlam, British Columbia, in August 1998. Their final separation was December 27, 2000 and since then they have lived apart.
- [9] There was conflict early in the marriage. The plaintiff's evidence is that within six months, the defendant became abusive verbally and physically and her evidence was rife with examples.

- [10] The plaintiff alleges the defendant was derogatory of her cultural background and critical of her skills and interests. She testified he was rude, vulgar, argumentative and insensitive. She testified about a number of occasions when he pushed and slapped her, dragged her by the hair, and threw objects at her.
- [11] She testified to one occasion when he forced her from their apartment in Alberta, lightly clothed, onto the street in bitterly low winter temperatures.
- [12] The abuse continued during her pregnancy and increased following the birth of A.S.A.. She testified the defendant was constantly critical of her as a wife, mother, and homemaker. The plaintiff at times would take A.S.A. and flee their home to escape the defendant's abuse.
- [13] She said the defendant would create noise, and use lights to keep the plaintiff from obtaining rest. It is her evidence that he interfered with her ability to study when she attended school for six months in an effort to obtain pre-requisites to study for a nursing diploma. The plaintiff further testified that her concern over the defendant's lack of proper care for A.S.A. also led her to stop her education program.
- [14] The plaintiff testified that the defendant's attitude towards her following the birth of A.S.A. was that she was now unnecessary, that "he had what he wanted", and he wished to be rid of her. He wanted his son A.S.A. and she should go. She alleges he threatened several times to kill her and made stabbing motions as if using a knife. He told her that he would take A.S.A. from her and go to Iran, or that he would take him into the United States.
- [15] The defendant's conduct, in the plaintiff's view, appeared centered on a need to control and dominate her.
- [16] There is some corroborative evidence in support of the plaintiff's general allegations of abuse from several sources, which include: her sister who visited their home, reports in the clinical records of her family doctor after November 1998, and Mrs. V., a neighbour who was also threatened by the defendant.
- [17] The defendant denies the allegations of verbal and physical abuse, that he threatened the plaintiff's life or that he would take A.S.A. from her and go to Iran. Apart from some minor accidental physical contact that occurred during arguments, he denies striking her.
- [18] There is too much evidence in support of the plaintiff's allegations to dismiss them on the basis of the defendant's general denial. It cannot be easily explained how the defendant was twice arrested on complaint of the plaintiff for assault and threats to her life and that he entered into Peace Bonds on each occasion. He has twice attended classes on violence against women and anger management.
- [19] The plaintiff may have elaborated her testimony to some degree, but I prefer her evidence generally to that of the defendant, whose explanations I found implausible and his general manner, evasive.

- [20] I conclude the defendant was on several occasions, physically and mentally abusive toward the plaintiff. I accept that generally he sought to subjugate her to his view of what a wife and mother should be. He controlled her economically and required her to account to him directly and in detail for amounts he advanced to her for even minor purchases.
- [21] The detail of the parties matrimonial incompatibility, cruelty, violence and unhappiness which existed through most of the period of their co-habitation is unnecessary to the claim for divorce. It does however explain and relate to the position of the parties in regard to custody and access of A.S.A., which is the most serious issue of division between them.
- [22] Regrettably, much of the cruelty and violence alleged took place in the presence of A.S.A. and he comprehended at least some of what was occurring and reacted to it. I accept there were occasions when the defendant in fact encouraged A.S.A. to use vulgar and demeaning language to his mother. The plaintiff has had a great deal of fear instilled in her with respect to these custody and access issues as a result of the threats on her life and threats that the defendant will take A.S.A. and return to Iran.
- [23] That places the conduct in issue with its effect on the plaintiff and A.S.A., germane to the custody and access issues.

CUSTODY

- [24] The plaintiff seeks custody of A.S.A.; the defendant seeks joint custody. There is no question that each party loves their son, and that A.S.A. loves each parent. The best interests of A.S.A. will be served by continuing to foster his relationship with both parents.
- [25] I note that A.S.A., because of his diagnosed disabilities, has a need for structure and certainty in his life.
- [26] The parties are unable to communicate directly. They remain hostile and inflexible. They have been unable to arrange access without third party intervention and court direction. Their interaction in the past has led to verbal and physical abuse, fear and intimidation, and even police intervention.
- [27] The plaintiff has been the primary care giver to A.S.A. since birth. She is presently unemployed and available full time in the home. The plaintiff realized A.S.A. needed some help with his speech and other developmental matters and obtained the help he required. She has taken him for testing and treatment. She works with him on exercises assigned by the therapists. She is present when the therapist attends her home.
- [28] The defendant has tended to downplay A.S.A.'s problems or deny they exist. He has not been actively involved in obtaining either assessment or treatment for the child. The defendant needs to become aware of the problems, what A.S.A. requires, and become part of the solution rather than remain in denial.

- [29] I also accept that the evidence discloses the defendant should be more attentive in watching A.S.A. when he is in the defendant's charge. He has "lost" A.S.A. in shopping malls and a park. It is important to watch over A.S.A. because he is apparently very hyper-active, and can disregard instruction and disappear quickly. The phenomena of children becoming temporarily lost on occasion is not uncommon. Its occurrence however should make the responsible parent alert to prevent future occurrence. It is that lesson the defendant appears slow to comprehend.
- [30] In my view, joint custody would be unworkable between the parties and is not in the child's best interest. The plaintiff will have custody of A.S.A., with a liberal degree of access to the defendant. I will leave the parties as joint guardians under the "Master Joyce" form of order. I feel the ability of the defendant to have basic information regarding his son and to feel he has some input into important decisions may be helpful to his relationship with his son and therefore a positive benefit to A.S.A.. The goodwill of the parties will be necessary and in the event joint guardianship becomes an area of conflict or creates turmoil, it may be revisited by the court. The fear expressed by each party that the other may remove the child from Canada is the root of much of the continuing conflict between them. There will be an order that A.S.A. is not to be taken by either party from the Province of British Columbia without the written consent of the other party or by a further order of this court.

ACCESS

- [31] The defendant should have liberal access to foster his relationship with his son and to encourage and strengthen a permanent bond. The background of abuse, hostility, and distrust between the parties resulted in access being specified and regulated by court order. The access currently is on Sunday from 12:30 p.m. to 7:00 p.m. and is supervised. The supervisor picks A.S.A. up at the plaintiff's church and returns him to her home.
- [32] The plaintiff seeks continuation of this restricted and limited access until the defendant complies with a series of inquiries, irrevocable directions, and applications to Immigration Canada and the Republic of Iran Embassy. The purpose is to verify the defendant does not have a Canadian passport; that he will apply for one in his name and surrender it to counsel; that the Iranian Embassy supply copies of the most recent passport or identity document issued the defendant; and an irrevocable direction to the Iranian Embassy that A.S.A. not be included on any passport issued to the defendant and that they acknowledge acceptance of that direction by the defendant.
- [33] I can understand the concern of the plaintiff that was fostered by the defendant's threats that he would take A.S.A. and go to Iran. His purpose was to frighten and control the plaintiff and he must bear the consequence of such conduct. In my view however, it was bravado and bluster on his part. He has no intention of going to Iran. He fled Iran in 1983 because of religious persecution of members of the Bahai faith. He came to Canada as a refugee. His life would be in danger if he were to return. He has been in Canada 20 years. His parents live in Alberta. He has siblings in Alberta, the United States and Turkey. He has

no relatives or property in Iran. He has no Iranian passport. The Iranian passport the plaintiff found in his documents which has been of concern to her was the passport he held when he fled Iran in 1983. It expired 20 years ago.

- [34] The defendant, through counsel, did write to Immigration Canada and the Iranian Embassy for verification that he holds no passport. I assume there has either been no reply or a negative one.
- [35] In my view, it should adequately allay the plaintiff's concern that the defendant might kidnap A.S.A. and flee to Iran, if he obtained his Canadian passport and lodged it with his counsel, not to be released without the written consent of the plaintiff or by order of the court.
- [36] The plaintiff's passport is currently held by her counsel on similar terms. I will order that continue. The defendant expresses fear that the plaintiff has no roots in Canada, is not a citizen, and will take A.S.A. and return to Spain.
- [37] I understand A.S.A. has his own passport. If that is so, it should be deposited with plaintiff's counsel and not released without the written consent of both parties or by a court order.
- [38] Until the issue as to the defendant's Canadian passport changes, his access will remain supervised with a third party required for pick-up and drop-off and restricted to Sunday afternoon 12:30 p.m. to 7:00 p.m.
- [39] Access will change if the defendant obtains his Canadian passport and deposits it with his counsel. On the first access visit following notice of the deposit, the access will become unsupervised and the need for third party involvement for pick-up and drop-off will no longer be required.
- [40] Access will be expanded from Sunday at 12:30 p.m. to continue overnight to 9:00 a.m. Monday morning. The defendant on Monday morning will either deliver A.S.A. to his school if he is attending one, or to the plaintiff's home by 9:00 a.m. if he is not.
- [41] The defendant will also be entitled to one further week night access visit if he enrolls A.S.A. in a course or activity and attends with him. At trial, a martial arts course was suggested and seemed agreeable to the parties. For this mid-week access, the defendant will pick up A.S.A. after school if he is attending one, or at the plaintiff's home at 3:30 p.m. if he is not. The defendant will return A.S.A. to school the following morning if he is attending school, or to the plaintiff's home by 9:00 a.m. if he is not.
- [42] The defendant will also have an access visit of one week during school vacation period at Christmas; one week in the month of July, and one week in the month of August. The parties will attempt agreement on these access weeks.

- [43] Failing agreement by the parties in each year prior to May 1, the parties will alternate in choosing the three one-week periods for that year. For the year 2003, it will be the defendant's right to designate in the event the parties do not agree and he will do so in writing delivered to the plaintiff prior to May 15, 2003. Thereafter, the right of designation for failure to agree will alternate in the same fashion and at the same times.
- [44] In regard to the access visits becoming unsupervised and without third party intervention on pick-up and drop-off, the parties need not interact directly. Where pick-up or drop-off are at A.S.A.'s school, there is no need for the plaintiff to be present. For pick-up or drop-off at the plaintiff's residence, the defendant can arrive by car and stop in front of the residence or its parking lot. He will remain in the vehicle. The plaintiff can escort A.S.A. partway to the car and meet him partway when he exits the vehicle coming home.
- [45] The defendant can use a cell phone to call the plaintiff and advise her he is parked outside if that is necessary.
- [46] If the child is being returned to the plaintiff in the evening, the defendant will provide A.S.A. his evening meals before his return. If he is returning the child to school or home following an overnight access visit, he will provide the child with breakfast and if he is being taken to school, his packaged lunch.
- [47] The defendant will be with the child throughout the access visits. In the event he cannot be present for a period of time, he will ensure a responsible adult is present to supervise. In the event the defendant is unable to provide continuous adult supervision, he will return A.S.A. early to the plaintiff's care.
- [48] The prohibition against the defendant making negative comments about the plaintiff, the parties marriage, separation or divorce in the presence of A.S.A. during any access visit is continued.
- [49] The defendant will, in any telephone communication necessary to the access process, be civil and polite.
- [50] The defendant will facilitate any request by the plaintiff to speak with A.S.A. during an access visit.
- [51] The defendant is enjoined from being within a two-block radius of the plaintiff's home except for the express purpose of a scheduled access pick-up or drop-off of A.S.A..
- [52] The defendant is enjoined from direct or indirect contact or communication with the plaintiff except for a purpose directly related to the access visit process.
- [53] The defendant is enjoined from harassing, annoying, molesting or interfering with the plaintiff at any time at any place.

- [54] It is to be understood that the function of the access ordered will require the goodwill and sacrifice of both parties. There must ultimately be flexibility to smooth the rigid access limitations. It is in the best interest of A.S.A. that this occur. Variation applications are both expensive and time consuming. The parties are at liberty to request that access or custody applications be referred to me. They are, however, not required to do so.

CHILD SUPPORT

- [55] The defendant has a sporadic work history and very low tax reported earnings for the past three years. There is a suggestion in the plaintiff's evidence that the defendant has "under the table" income or unreported earnings.
- [56] The defendant has had bank account balances that belie his meagre reported earnings record and has also been found carrying significantly large amounts of cash.
- [57] The defendant is in good health and is presently employed by a moving company on a regular basis with declared income receipts showing earnings of \$750-\$800 a month. His evidence is that he and a partner may simply be given the company by the current owner who does not wish to continue.
- [58] I conclude the defendant is quite capable of maintaining employment at least to minimum wage level. I am also of the view he likely has earned income at or beyond the minimum wage that has been undeclared and unreported. I feel this is an appropriate case to impute income at minimum wage for the purpose of child support in accordance with the Federal Child Support Guidelines. [Chan v. Spencer, [1998] B.C.J. No. 1317 (S.C.)]
- [59] I impute income to the defendant based upon full-time employment at the minimum wage in British Columbia [40 hrs. a week x \$8 per hr. x 48 weeks] of \$15,360.
- [60] The Guideline monthly child maintenance, \$126 per month payable on the first of each month commencing February 1, 2003, is ordered.
- [61] The defendant will also bear the cost of any recreational or sporting programme or activity that A.S.A. is enrolled in relating to the contemplated mid-week overnight access provision.

PROPERTY DIVISION

- [62] The parties established a registered educational savings account for A.S.A.. That account requires the signatures of both parties. The account is thereby protected from unilateral action by either party and no further action is required.
- [63] The plaintiff does seek a compensation order relating to the disposition by the defendant of monies from a joint term deposit of the parties. The specific funds from the payout of the term deposit were transferred to a bank account controlled solely by the defendant, and ultimately at his direction \$35,000 was paid to his brother S.A.. The defendant agreed his savings accumulations in bank accounts were used for the support of the family.

- [64] I find the defendant lacking credibility in regard to all explanations he has in respect of financial matters. He claims to hold money of others for investment; he claims to have held and returned monies on loan. He produces no documentation or evidence in support.
- [65] The defendant testified \$25,000 was given to the plaintiff to buy property in Spain. The plaintiff denies this occurred. The defendant again provides no document, evidence, or corroboration in support. I accept this transaction did not occur.
- [66] I am of the view the defendant was attempting to hide money in light of what he must have realized was impending marriage break-down and likely divorce, maintenance, and property division proceedings.
- [67] Monies from deposit certificates and bank accounts to which the plaintiff had a claim for division as matrimonial assets were improperly alienated by the defendant. I fix the plaintiff's interest at \$15,000 and she is entitled to judgment for that amount.

DIVORCE

- [68] There will be an order of divorce based upon separation in excess of one year.

"R.R. Holmes, J."

The Honourable Mr. Justice R.R. Holmes

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