

CANADA / JUDGMENT

P.K.G. v. A.S.G.

2023 BCSC 2276

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Supreme Court of British Columbia

DECIDED

22 December 2023

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2023 BCSC 2276 P.K.G. v. A.S.G.

P.K.GIN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P.K.G. v. A.S.G.,

2023 BCSC 2276

Date: 20231222

Docket: E66654

Registry: New Westminster

Between:

P.K.G. formerly known as P.K.D.

Claimant

And

A.S.G.

Respondent

Corrected Judgment: For publication purposes, these Reasons for Judgment

have been amended throughout to anonymize the parties and others

on February 27, 2024

Before: Master Muir

Reasons for Judgment

Counsel for the Claimant:

A.S. Allidina

Counsel for the Respondent:

S. Brar

Place and Date of Hearing:

New Westminster, B.C.

December 6, 2023

Place and Date of Judgment:

New Westminster, B.C.

December 22, 2023

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I. Introduction

- [1] There were three notices of application before me on this full day hearing.
- [2] At the outset of the hearing, I stood the matter down for a short time for the parties to discuss the relief sought in paras. 1-3 of Part 1 of the claimant's notice of application filed November 23, 2023 (the "claimant's application"), which involved the sale of the former family home.
- [3] The parties advised that they expected they could reach agreement on this issue and, accordingly, paras. 1-3 of the claimant's application were adjourned generally by consent.
- [4] The balance of the applications dealt essentially with parenting time and conditions for parenting time.
- [5] The respondent filed a notice of application September 21, 2023, seeking the imposition of an extensive parenting plan, including parenting time which would have increased to fully shared parenting by December 2023. There were two options proposed, a 5/2/2/5 schedule and a week-on, week-off schedule. In submissions, his counsel advised that what the respondent seeks on this application is implementation of the parenting schedule.
- [6] In support of that application, the respondent filed a further notice of application on November 23, 2023, seeking to vary or set aside the Judicial Case Conference order pronounced by Justice Brongers on August 16, 2023 (the "JCC order"). In particular, the respondent sought to vary para. 4 of that order, which provides:
 - 4. BY CONSENT: On an interim, without prejudice basis, the Respondent shall undergo a hair follicle drug test immediately at the Respondent's expense, and a further hair follicle drug test in three months' time at the Claimant's expense, and the Respondent shall provide the results to the Claimant immediately upon receipt through counsel. The Respondent shall conduct breathalyzer tests at the beginning and end of each parenting visit. If the Respondent is able to provide a clean hair follicle drug test and his breathalyzer tests are negative, his parenting time will proceed. If a hair follicle drug test identifies traces of a controlled substance, and/or the Respondent's breathalyzer tests are positive, his parenting time will not proceed.
- [7] The claimant's application seeks the sale of the former family home, and as noted, those paragraphs of the orders sought are adjourned generally. The balance of the application seeks the following:
 - 4. An Order that the parties follow the following parenting schedule for [the child]:
 - a. The Respondent will have parenting time with [the child] every Tuesday and Wednesday from 3:00 p.m. to 7:00 p.m.;

- b. The Respondent will have parenting time with [the child] every Sunday from 10:00 a.m. to 5:00 p.m. The Respondent will have [the child] call the Claimant during his Sunday parenting time from 3:00 p.m. to 3:20 p.m.;
 - c. The Claimant will have parenting time with [the child] during all other times not provided for; and
 - d. The Claimant will facilitate phone calls between the Respondent and [the child] every Monday and Friday from 6:00 p.m. to 6:20 p.m.
5. An Order that the Respondent Will not consume or be under the influence of alcohol, marijuana, or illicit substances 24 hours before or during his parenting time with [the child]. If it appears that the Respondent has consumed any such substances in contravention of this term, his parenting time shall not proceed.
 6. An Order that the Respondent shall enroll in the Soberlink Alcohol Monitoring program or an alternate breathalyzer testing program, at his sole cost, in order to continue conducting breathalyzer tests and the beginning and end of his parenting time, pursuant to the Order of Justice Brongers made August 16, 2023.
 7. An Order that the Respondent will pick up and drop off [the child] at the Claimant's home for his parenting time so that she is able to observe him completing his breathalyzer tests at the beginning and end of parenting time.
 8. An Order that the Respondent shall attend for a hair follicle drug test forthwith at a drug testing centre selected by the Claimant, as required by paragraph 4 of the Order of Justice Brongers made August 16, 2023.
 9. An Order pursuant to s. 224(1)(b) of the Family Law Act that the Respondent be required to engage in drug and alcohol counselling, and that the Respondent provide the Claimant monthly updates regarding attendance at drug and alcohol counselling.
 10. An Order pursuant to section 222 of the Family Law Act that the Respondent may only communicate with the Claimant through email, and solely for the purpose of arranging parenting time or sharing information related to [the child], unless there is an emergency, when the Respondent may contact the Claimant by text message or phone call.
 11. An Order pursuant to section 222 of the Family Law Act that the Respondent shall not speak negatively about the Claimant, about this family law matter, or other adult issues in front of [the child], and shall ensure that his communication with the Claimant remains civil and polite.
 12. An Order pursuant to section 16.1(2) of the Divorce Act that on an interim, without prejudice basis, the Claimant shall have sole decision-making responsibility for [the child] if the parties are not able to agree on important decisions for [the child].
 13. An Order for special costs, or in the alternative, costs payable forthwith.

II. Background

- [8] The parties were married on June 12, 2012. There is one child of the marriage, a boy, born August 30, 2018, who is now five years old (the "child").
- [9] The separation date is disputed. The claimant says the parties separated May 12, 2022, but the respondent says the parties separated on October 9, 2022
- [10] After separation, the parties continued to live in the matrimonial home until March 2, 2023, when the claimant relocated with the child to her parents' home.
- [11] There is a five-day trial scheduled for June 3, 2024.
- [12] The respondent is employed as a longshoreman. He does not follow a fixed work schedule. He is required to report and see if he is assigned a work shift. He says that this allows him flexibility in exercising parenting time but says that he requires a fixed parenting schedule so that he can balance his shifts with parenting time.
- [13] The claimant works as a dental hygienist.

III. Positions of the parties

- [14] As is common in family disputes, the evidence of the claimant and the respondent is diametrically opposed.
- [15] The respondent says that before their separation, both parties shared the role of primary caregivers for the child, whereas the claimant asserts that she was always the primary caregiver for the child.
- [16] In her notice of family claim filed on February 2, 2023, the claimant sought professional supervision of the respondent's parenting time.
- [17] The claimant says she has significant concerns regarding the respondent's ability to safely care for the child alone. In particular, she says that the respondent regularly abused alcohol, marijuana, and cocaine during the relationship.
- [18] She notes that he enrolled in a 12-step program in 2018 to deal with his addiction issues but never completed it.
- [19] The claimant brings evidence that the respondent had roadside prohibitions imposed on September 30, 2021 and September 24, 2022. Those resulted in the respondent having to enroll in the Responsible Driver Program.
- [20] In addition, on January 21, 2023, while the child was in the car, the respondent was given a 30-day roadside suspension because a breathalyzer sample was in the "warn" range (blood alcohol concentration between 0.05 and 0.08) and because of the prior prohibitions.

- [21] The claimant also asserts that the respondent continues to abuse marijuana, cocaine, and perhaps other illicit drugs. In support, she provides evidence from her brother, who was a friend of the respondent for a time. His evidence is that the respondent regularly drank to excess, smoked marijuana, and used cocaine. Unfortunately, his evidence is quite dated. Mostly relating to 2018 and before. The most recent evidence from him is that "a few years ago" the respondent and he went to a movie and the respondent had smoked marijuana outside prior to entering the theatre.
- [22] Interestingly, the claimant's brother also deposes that he has often seen the respondent with the child and notes that the child loves the respondent and enjoys his time with him.
- [23] The respondent answers the allegations by stating that his abuse of alcohol, marijuana, and illicit drugs is past history. He says he is a responsible parent who loves his child and would never endanger him. He says he is as able as the claimant to properly care for the child and that he and the child have a close and loving relationship that deserves to be fostered.
- [24] Amongst other things, the respondent points out that he is attending counselling and has completed the parenting after separation course.
- [25] Since the January 2023 prohibition, the respondent has completed the Responsible Driver Program and from May 29 to November 30, 2023, he had an ignition interlock device installed on his vehicle as a result of his taking part in the BC's Ignition Interlock Program.
- [26] His evidence is that these incidents of drinking and driving resulted from a tumultuous time in his life, that he has learned strategies to modify his behaviour and has significantly reduced his alcohol consumption.
- [27] The respondent says he did have a period where he used cocaine for a time, but denies that he has used any cocaine or other illicit substances since 2018. He says he was introduced to cocaine by the claimant's family members.
- [28] His evidence is that he recognized that he needed to change and sought the assistance of his father, who he says is a devout Sikh and a spiritual leader. He says with his father's help, he took concrete steps to ensure that he would not continue using drugs, including attending weekly prayers, maintaining constant communication with his parents and brother, and distancing himself from the claimant's family members who he alleges indulge in heavy alcohol and drug use.
- [29] The respondent also attended treatment for substance abuse in October 2021. He says he did so to appease the claimant, not because he was doing drugs. He says that all tests conducted during his stay were negative and that it was determined that he did not have any addiction issues. Further, he says he has provided various negative drug tests over the years since 2018.

- [30] The claimant doubts the respondent and believes that he has continued to drink and drive by either having others provide the breathalyzer sample for his ignition system, or that he would just drive other vehicles. The claimant believes that the respondent is somehow getting around the drug tests and is still using drugs.
- [31] All of this resulted in the JCC order, which the respondent now seeks to set aside.
- [32] The JCC order required an immediate hair follicle drug test and an additional test after three months.
- [33] The respondent produced negative hair follicle drug tests dated August 23, 2023 and November 8, 2023. Both were three-month tests. The samples were taken at Vancouver Drug Testing Inc. and appropriate chain of custody and identity precautions appear to have been taken. Both were negative for marijuana, amphetamine/MDA, methamphetamine/MDMA, opiates, cocaine, and phencyclidine.
- [34] In addition, the respondent has generally provided the required breathalyzer tests.
- [35] Regardless, the claimant continues to assert that the respondent is somehow getting around these tests. In support, she says she has heard the respondent and other longshoremen talking about how to get around urine tests and suspects that the respondent is able to subvert the testing process somehow.
- [36] The claimant also says the respondent has not complied with the JCC order, as the second drug test should have been at the end of November and that she was required to pay for it. She had arranged other testing, but that was circumvented by the respondent having the test done early. She suspects he did so intentionally so that he could again provide a false negative test. He refused to take the test she arranged.
- [37] The respondent says that he took the second drug test earlier in November so that the results would be available for the hearing of these applications. He also points out that in addition to the regular breathalyzer tests per the JCC order, he successfully completed the Ignition Interlock Program at the end of November.
- [38] The respondent seeks to have the drug testing and breathalyzer requirements of his parenting time dispensed with.
- [39] The respondent says that he agreed to these conditions on an interim without prejudice basis in the hope that he would get increased parenting time with the parties' child, including overnights. The respondent says that has not happened and that his parenting time is sporadic, limited, and controlled by the claimant.
- [40] The claimant says she has advanced several schedules for parenting, but the parties have not been able to agree. Despite that, she asserts that the respondent does have regular parenting time with the child every Tuesday and Wednesday after school until 7 p.m. and every Sunday from 10 a.m. to 7 p.m. She acknowledges that the child should have a relationship with the respondent and agrees that the respondent was present in the child's

life to a certain degree and that he loves the child and was involved with him. She resists overnights due to her concerns with the respondents' parenting ability.

- [41] As noted, the respondent dismisses her concerns and points out that he has had overnight parenting time with the child on many occasions this year, including as recently as September 9, 2023. He says that the child is perfectly comfortable spending overnights, particularly as the respondent still resides in the former family home and the child therefore sleeps in his old room.
- [42] The evidence of the parties discloses a considerable amount of friction between them and between the respondent and the claimant's parents. Both parties point the finger at the other for these problems.
- [43] The claimant further asserts that as she has been primary caregiver and has arranged all support and care for the child, she should have sole decision-making responsibility for the child. The respondent disputes this and asserts that he was consistently involved with all parenting decisions and care of the child prior to separation, and, to the extent that the claimant will allow it, since. He says he has been and is actively interested and engaged in the child's care and best interests and that parental responsibilities should be shared, disputes resolved through mediation with a family justice counsellor, with either party able to bring a court application should they be unable to resolve matters cooperatively.

IV. Interim Orders

- [44] I determined that I would have to reserve judgment and provide written reasons on these applications and therefore I made interim orders for parenting time for the respondent.
- [45] On an interim and without prejudice basis, I granted the orders sought in paras. 4, 5, and 6 of the claimant's notice of application filed November 23, 2023. This was on the assumption that the breathalyzer system chosen would monitor who was giving the sample. If that was not the case, then para. 7 was granted on an interim without prejudice basis.
- [46] The parties were to share the cost of the breathalyzer device, with the respondent paying the cost upfront and the claimant contributing half of the cost within two weeks of being provided the receipt. I ordered that this cost would be subject to reapportionment at the trial.

V. Analysis

- [47] Both parties generally agree on the legal analysis required here. Both parties rely on both the Family Law Act, S.B.C. 2011, c. 25 [FLA] and the Divorce Act, R.S.C. 1985, c. 3 [Divorce Act], as amended.

[48] Both statutes require that on an application for parenting orders the only relevant consideration is the best interests of the child. As there is no essential difference between the requirements of the FLA and the Divorce Act, I will consider these applications and orders pursuant to the provisions of the FLA.

[49] Section 37 of the FLA sets out the requirements on a parenting application:

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 the person's 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 the person's 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.

[50] Looking at the specific circumstances of this child, I conclude as follows:

- a) The child's health and emotional well-being

[51] It is generally in the interests of the child's health and emotional well-being for there to be a parenting schedule in place and for the child to have as much contact with the respondent as is consistent with the child's continuing well-being.

- b) The child's views, unless it would be inappropriate to consider them

[52] All of the evidence leads me to conclude that the child has a good and loving relationship with the respondent. Despite evidence that the child on occasion has been reluctant to go with the respondent, I am satisfied that the child both enjoys and wants time with the respondent.

- c) The nature and strength of the relationships between the child and significant persons in the child's life

[53] The child has a strong relationship with the respondent.

- d) The history of the child's care

[54] Although I accept that the claimant was the primary caregiver for the child, I also accept that the respondent had significant involvement with the child's care and wants that to continue.

- e) The child's need for stability, given the child's age and stage of development

[55] Both parties emphasized the need for stability for the child, although they had quite different visions of what that would look like. Primarily, the child needs to maintain a loving relationship with both parents, he needs to be shielded from the conflict between the parties and others, and protected from any potential harm.

- 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 the person's responsibilities

[56] This is the primary concern or focus of the claimant's application. She asserts the respondent cannot be trusted to exercise parental responsibilities without ensuring he refrains from using drugs and alcohol and that overnight parenting in those circumstances is, at best, premature.

- [57] Although the claimant, through counsel, tried to cast doubt on the credibility of the respondent, I am satisfied that the respondent's illicit drug use is a thing of the past. There is no evidence of any ongoing illicit drug use. I am satisfied that the negative hair follicle tests were reliable.
- [58] I conclude that the two drug tests taken satisfy the requirements of the JCC order in that regard and that no further hair follicle testing is necessary. Should circumstances change, there is liberty to apply.
- [59] The evidence of the respondent's alcohol abuse is more concerning. The driving prohibitions are a concern, in and of themselves. That the respondent was driving under the influence of alcohol with the child in the car is a major concern. It shows not just carelessness, but actual disregard for the safety of the child.
- [60] Although I accept that the respondent has seen the error of his ways and has reduced his drinking significantly, the child is still entitled to protection in case the respondent backslides for some reason.
- [61] Subsections 37(g) and (h) of the FLA are not particularly relevant here. Family violence was not pressed as an issue of concern by the claimant.
- 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
- [62] There is evidence of conflict between the parties and between the parties and other family members. I do not think this rises to the level of the parties being unable to cooperate, however. The conflict will hopefully be ameliorated by the orders granted herein.
- [63] Subsection 37(j) has no application here.

VI. Conclusion

- [64] After a review of the factors and evidence regarding the best interests of the child, I have concluded that the child is entitled to more time with the respondent.
- [65] That must be structured in such a way as to preserve the safety and promote the emotional well-being of the child, but I do not agree with the claimant that the respondent is incapable of properly attending to the child's needs. In particular, I do not agree that overnight parenting is in any way a risk to the child.
- [66] With respect to para. 4 of the claimant's application and para. 1 of the respondent's notice of application filed September 21, 2023, in my view, the respondent's parenting time should be increased, as follows:
- a) The interim, without prejudice parenting time set out above will remain in place until December 31, 2023.

b) Commencing January 1, 2024, the respondent will have parenting time with the child as follows:

- i. Every Monday and Wednesday from after school (or 3 p.m.) until 7 p.m., and
- ii. Alternating every other Friday, commencing at 3 p.m. until Sunday at 7 p.m.

[67] In addition, the claimant will facilitate calls between the respondent and the child every Tuesday and Thursday from 6 p.m. to 6:20 p.m. and every Saturday that the respondent does not have parenting time from 6 p.m. to 6:20 p.m.

[68] The respondent will facilitate calls between the claimant and the child on the weekends the respondent has parenting time, Saturday from 6 p.m. to 6:20 p.m.

[69] The parties are free to agree in writing to variations of this parenting time.

[70] This schedule will remain in place until agreement, in writing, or further order. Should the trial of this matter not proceed in June 2024 as contemplated, there is liberty to apply to vary this schedule.

[71] Paragraph 1 of Part 1 of the respondent's application filed November 23, 2023 is allowed as follows:

Paragraph 4 of the JCC order is set aside.

[72] Paragraph 5 of Part 1 of the claimant's application is allowed as follows:

The respondent is not to consume alcohol, marijuana or any illicit substances 12 hours before or during his parenting time.

[73] Paragraph 6 of Part 1 of the claimant's application is allowed as follows:

The respondent will continue enrollment in the Soberlink Alcohol Monitoring program or an alternate breathalyzer testing program and complete alcohol monitoring tests before and after each parenting time session. In addition, the respondent is to complete a test every Saturday that the respondent has parenting time, between 7 p.m. and 8 p.m. or as agreed.

[74] Again, this order is made on the assumption that the monitoring system chosen will ensure that it is the respondent providing the breathalyzer sample. If that is not the case, the respondent is to contact the claimant via electronic/video means such as Facetime to confirm that his alcohol monitoring has been conducted and is negative. Should the test result be positive it is to be rerun. If a second positive occurs, the respondent's parenting time is to cease for that day and unless otherwise agreed the terms of the interim without prejudice order as set out above will resume. Should that occur, there is liberty to apply.

[75] Paragraphs 7 to 9 of Part 1 of the claimant's application are dismissed.

[76] Paragraphs 10 to 11 of Part 1 of the claimant's application and Part C of the respondent's proposed parenting plan are allowed as follows:

- a) Under s. 225 of the FLA, absent emergencies, the parties will communicate with one another only via email and solely for the purpose of arranging parenting time or for sharing information about the child. Other non-emergent communication is to be between counsel or as agreed.
- b) The parties will:
 - (i) put the best interests of the child before their own interests;
 - (ii) encourage the child to have a good relationship with the other parent and speak to the child about the other parent and that parent's partner, if applicable, in a positive and respectful manner; and
 - (iii) make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of the child.
- c) The parties will not:
 - (i) question the child about the other parent or time spent with the other parent beyond simple conversational questions;
 - (ii) discuss with the child any inappropriate adult, court or legal matters; or
 - (iii) blame, criticize or disparage the other parent to the child.
- d) The parties will encourage their respective families to refrain from any negative comments about the other parent and their extended family, and from discussions in front of the child concerning family issues or litigation.

[77] Paragraph 12 of Part 1 of the claimant's application is denied. The parties are both guardians of the child pursuant to the FLA. Parental responsibilities are to be shared in accordance with the Joyce Model, as follows:

The parties will share equally all of the s. 41 parental responsibilities for the child under s. 40(2) of the FLA, pursuant to the Joyce model as follows:

- a) In the event of the death of a guardian, the surviving guardian will be the only guardian of the child;
- b) Each party will have the obligation to advise the other party of any matters of a significant nature affecting the child;
- c) Each party will have the obligation to discuss with the other party any significant decisions that have to be made concerning the child, including significant decisions about the health (except emergency decisions), education, religious instruction and general welfare;
- d) The parties will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;

- e) In the event that the parties cannot reach agreement on a significant decision despite their best efforts, the claimant will be entitled to make those decisions and the respondent will have the right to apply for directions on any decision the respondent considers contrary to the best interests of the child, under s. 49 of the FLA; and,
 - f) Each party will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party care givers.
- [78] During parenting time, the party having parenting time with the child will be responsible for making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.
- [79] All of the other orders sought in the three applications before me are dismissed.

VII. Costs

[80] Given the divided success, each party is to bear their own costs of these applications.

"Master Muir"

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Prepared on 27 October 2026 · Esheria