
CANADA / JUDGMENT

R.A.G. v. T.A.I.D.

2022 BCSC 380

COURT

Supreme Court of British Columbia

DECIDED

18 February 2022

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2022 BCSC 380 R.A.G. v. T.A.I.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.A.G. v. T.A.I.D.,

2022 BCSC 380

Date: 20220218

Docket: E104666

Registry: Victoria

Between:

R.A.G.

Claimant

And

T.A.I.D.

Respondent

Before: The Honourable Madam Justice Hardwick

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

J.S. Monier-Williams

Counsel for the Respondent:

J.A.C. Stewart

Place and Date of Trial/Hearing:

Duncan, B.C.

February 18, 2022

Place and Date of Judgment:

Duncan, B.C.

February 18, 2022

- [1] THE COURT: These are my oral reasons for judgment in respect of the notice of application of the claimant, R.A.G., filed December 17, 2021. The notice of application seeks both substantive and procedural orders. The substantive relief pertains to a variation of the parenting schedule for the child as defined by the Family Law Act, J.A.G., born in 2007.
- [2] Upon application of counsel for the respondent at the outset of the hearing today, I have adjourned the substantive portions of the notice of application, namely paragraph 3(b) of the notice of application, on the basis that the respondent's father very recently passed away and she is out of the country attending to matters arising from same.
- [3] Given the number of times that this particular issue has been before the court and its significance to the parties, I considered it appropriate that the respondent, T.A.I.D., have the opportunity to be present in court when that application is heard on its merits, and her inability to attend today is reasonable. I thus order that said portion of the notice of application shall be reset to a date agreeable to counsel for the parties at their earliest convenience to avoid further delay.
- [4] I did, however, order that the hearing of the procedural relief as sought in the notice of application should proceed as there is some urgency to those issues, and I did not consider the respondent's personal attendance, given that she has capable counsel, to be necessary for addressing those matters.
- [5] For the same reasons, I am giving oral reasons for judgment today from the bench and I reserve my right to edit those reasons for grammar, but will not change the substance of them in the event that a transcript is ordered.
- [6] The procedural relief as set out in paragraphs 1, 2, and 3(a) of R.A.G.'s notice of application is to vary the September 12, 2019 order of Madam Justice Power and the December 6, 2019 order of Mr. Justice Punnett. In broad terms, the relief sought is to vary the order that a s. 211 assessment be conducted by Dr. Ashley Heiner, to provide that a s. 202 views of the child report be prepared instead, and that the parties equally share costs of same. Or, in the alternative, that a s. 211 assessment be prepared by an expert other than Dr. Heiner, and that the parties share the costs of that assessment at first instance.

- [7] There are ancillary orders as to the provision of information to a s. 211 assessor which may need to be varied, based upon my ultimate conclusions regarding the primary procedural relief sought.
- [8] I pause to say that I do appreciate that the relief sought in the notice of application is more specific than stated. I have generalized it, based upon what I understand to be the key issues, again for the purpose of these oral reasons for judgment.
- [9] This is a high-conflict family law matter. This is apparent from the fact that the primary affidavit of R.A.G. in support of this application is his affidavit number 27, and the fact that one of the affidavits relied upon by T.A.I.D., namely her affidavit number 15, is some 417 pages including exhibits.
- [10] The court's immediate conclusion upon a review of the materials was that this matter must be set for a trial as the perpetuation of this serial exchange of affidavits at interim hearings is not in J.A.G.'s best interests.
- [11] Fortunately, counsel for the parties have already addressed this concern, and I was advised that a trial date of September 19, 2022 has been secured, and I am advised that a notice of trial confirming this will be filed shortly. This, I am also advised, is a date convenient to both counsel.
- [12] I am considering the relief sought today, having close regard to the fact that this trial date has been set and it is important to move matters along in a way that does not jeopardize that trial date, while still being mindful of the court's concerns to keep the best interests of J.A.G. as the overarching concern.
- [13] Given the fact that the parties are well aware of the facts, both contested and uncontested, in this matter, and that this is an application at this point for interim procedural relief, I am going to only briefly summarize the facts.
- [14] The parties were involved in a relatively brief marriage-like relationship which ended for the final time in November of 2010. At that point in time, J.A.G. was not quite 3 years of age. Proceedings were started very shortly thereafter on November 17, 2010. As indicated, the only child born of the relationship is J.A.G. who was born in 2007 and is now 14 years of age and is in Grade 9. J.A.G. resides in Victoria and has so since November of 2010.
- [15] There have been various court orders made. I am not summarizing all of them, but note that Mr. Justice Metzger made a trilogy of orders starting on November 19, 2010 dealing with interim parenting arrangements for J.A.G. Mr. Justice Johnston made a comprehensive order by consent on May 31, 2013, which sets out the parenting plan for J.A.G. The most salient terms of that order that we are concerned with today was that J.A.G. was ordered, by consent, to reside primarily with T.A.I.D. and R.A.G. would have alternating weekend parenting time and shared holidays.

- [16] I pause to note that it is important for context that J.A.G. was 6 years of age at the time of the Mr. Justice Johnston order, and that R.A.G. resided in Calgary while, as indicated, J.A.G. and T.A.I.D. lived in Victoria.
- [17] R.A.G. then moved thereafter to North Vancouver and the parenting schedule remained the same. R.A.G. then moved to Victoria, and in 2019 the parenting time schedule was amended somewhat to also include a Wednesday not overnight visit; namely, an after-school visit. That, I understand, remains the schedule at the present date.
- [18] In the summer of 2019, R.A.G. brought on a notice of application for the preparation of a s. 211 report. That application was heard on September 12, 2019 and resulted in the order of Madam Justice Power, which provides that:
1. Pursuant to Rule 13-4 (3) of the Supreme Court Family Rules that Dr. Ashley Heiner, Registered Psychologist, is hereby appointed as a joint expert to provide a report pursuant to section 211 of the Family Law Act to determine parenting time according to
 - a) the needs and best interests of the child in relation to the family law dispute;
 - b) the views of the child in relation to the family law dispute while ensuring that [J.A.G.] is not caught in the middle of the process: and
 - c) the ability and willingness of the parties to the family law dispute to satisfy the needs of the child.
 2. The costs of the 211 report to be prepared by Dr. Ashley Heiner are to be paid initially by the Claimant, with liberty to claim that the costs be apportioned after the report is completed and if the parenting application proceeds.
 3. The materials to go to Dr. Ashley Heiner will include all materials from Dr. Magali Brulot that she views as of assistance to Dr. Heiner, the background from Dr. Ferguson, the decisions of Patricia Lane, the parenting coordinator, all doctors' reports and decisions, all decisions of the Court including the Reasons, school records and any other materials requested by Dr. Heiner.
 4. All materials that go to Dr. Ashley Heiner will go through the offices of counsel for the Respondent.
 5. No materials will be provided to Dr. Heiner that are not agreed to in advance and provided to both parties.
 6. Neither party will be free nor permitted to contact Dr. Heiner unless Dr. Heiner contacts the party and any interference directly or indirectly with Dr. Heiner's task will be considered contempt of this direction.
 7. Each party shall bear their own costs of this application.

- [19] Of note, the preparation of the s. 211 report was initially opposed by T.A.I.D. at that time. Also of significance, one basis for the appointment of Dr. Heiner, was her availability to prepare the report in a timely way. In this regard, I have in the application record the benefit of the reasons for judgment of Madam Justice Power and have reviewed those.
- [20] Turning forward in terms of the chronology, although the Madam Justice Power order was made in September of 2019, there were issues regarding its terms that arose and it was ultimately not entered until December 6, 2019. In the interim, R.A.G. brought another application to change the parenting schedule. I pause to note that I was advised that six such applications have been brought, including the notice of application before the court today.
- [21] I was not able, based on the evidentiary record, to count them all, but it is clear there have been various applications made in this regard and it matters not if it is exactly six. This is clearly a live issue and underscores the reason why this matter needs to go to trial and not to continue with serial interim applications.
- [22] That application brought by R.A.G. resulted in the order of Mr. Justice Punnett made on December 6, 2019. That order provides as follows:
1. The materials that have been produced in accordance with Madam Justice Power's Order made September 12, 2019 are to be forthwith forwarded to Dr. Ashley Heiner;
 2. The Claimant upon receiving any additional materials that he feels are appropriate is to forward them forthwith to counsel for the Respondent, and if there are no difficulties, they are to be forwarded to Dr. Ashley Heiner as well;
 3. The Claimant shall continue to have parenting time with [J.A.G.], until further Order of this Court, or by agreement between the Parties, as follows:
 - a. Wednesdays from after school until 7:30 p.m.
 - b. Every other weekend from the end of school that week until the day before school resumes the following week, at 4:00 p.m., commencing Friday, January 10, 2020;
 4. The Parties will continue to have their regular FaceTime contact with [J.A.G.] when he is not in their care, Wednesdays and Saturdays, until further Order of this Court, or by Agreement between the Parties.
- [23] There is a paragraph 5 that provided for limited parenting time on a non-ongoing basis, as do paragraph 6 and paragraph 7. They are not relevant for today's purposes. Paragraph 8 is salient, it provides that:
8. The parenting time schedule, as set out in this Order, shall remain in place as the status quo until further Order of the Court or agreement of the Parties.
- [24] Paragraph 9 provides:

9. Upon receiving the Section 211 Report, either Party is at liberty to apply to the Court if need be and in any event either Party may apply to the Court, with said application to be made no sooner than May 1, 2020, with said hearing to be set no sooner than June 1, 2020 to address any issues with respect to Summer 2020 parenting time.
- [25] Paragraph 10 is a procedural order which is not relevant to the matters before me today, and paragraph 11 provides that:
11. The issue of Costs of this application is adjourned to the Judge hearing an application after the Section 211 Report is obtained.
- [26] My understanding from the materials is that the parenting schedule as set out in the order of Mr. Justice Punnett made December 6, 2019 still remains.
- [27] Unfortunately, the process of providing the material to Dr. Heiner in accordance with the Madam Justice Power order and the Mr. Justice Punnett order, and the ultimate preparation of the s. 211 assessment was fraught with some difficulty. I will return to my comments on this later. However, the one issue that the parties do agree upon is that Dr. Heiner amended or revised the terms of her agreement with the parties following her appointment in 2019 by adding a testimonial retainer and then further a travel retainer. The result of these amendments was that the cost of the s. 211 assessment grew significantly to approximately \$33,000. It is unclear to me whether or not that includes or excludes tax.
- [28] Ultimately, Dr. Heiner never prepared a s. 211 and R.A.G. says that, due to these circumstances, he does not have the requisite confidence in Dr. Heiner, although he proposed her at first instance and the report was ordered to be prepared on his initiative before Madam Justice Power. He further says, through counsel, that given J.A.G.'s age, a s. 211 report is no longer necessary and that the time involved in having one prepared will further delay matters.
- [29] Counsel for T.A.I.D. rightly points me to the reasons for judgment of Madam Justice Power which clearly paint a picture of J.A.G. being caught in the middle of his high-conflict parents. She further points that simply ascertaining J.A.G.'s views is not sufficient. I note here that I agree that there is more to a s. 211 assessment than just the views of the child. That is particularly true in this case if one looks at the order of Madam Justice Power which specifically addressed the fact that the s. 211 assessor was to consider the needs and the best interests of the child, and also makes specific reference at paragraph 1(b) to ensuring that J.A.G. was not caught in the middle of the process.
- [30] Now, it is trite to cite the proposition that a s. 211 assessment are the "eyes and ears" of the court on difficult family matters. Section 211 assessments play an important role in many such cases, and although they do not bind the court, they are usually of considerable assistance. In that regard, I consider the order of Madam Justice Power to have been very appropriate on the facts of this case in 2019 when J.A.G. was 11, and based on the evidence before her.

- [31] The more challenging issue before me is whether now, in February 2022, when J.A.G. is 14 and a trial of this matter is scheduled for September of 2022, whether that order should be varied.
- [32] I have considerable concern with R.A.G. 's diligence in implementing the order of Madam Justice Power. There was delay in entering the order, and then more importantly there were delays in implementing the order and the Justice Punnett order that followed. I appreciate that R.A.G. was self-represented for a period of time, but still do not find on the evidence before me that this delay was adequately explained. R.A.G. has shown to be capable of bringing multiple applications, as evidenced in the materials before me. This issue could and ultimately should have been brought back before the court before today.
- [33] The evidence is limited on the exact financial circumstances of R.A.G., but it is clear on what I do have before me that R.A.G. has a reliable income, consistently in at least the low six figures, and so even limited retainer legal advice was not outside his means, particularly given that he sought the preparation of the s. 211 at first instance.
- [34] The delay in pursuing the s. 211 assessment after the order of Madam Justice Power contributed to the difficulties with Dr. Heiner, changing the terms of her initial retainer agreement. Due to the passage of time, some increase in Dr. Heiner's fee was not unexpected. However, the additional two retainers sought and not previously contemplated did change the landscape. I am prepared to take judicial notice that \$33,000 for a s. 211 assessment where there is only one child and the travel is only from Vancouver to Victoria does seem on the very high end of the scale and may, if known, have caused Madam Justice Power to make a somewhat different order.
- [35] Again, I pause to say that I do have concerns that an application could have been brought for another s. 211 assessor when the circumstances of Dr. Heiner changed and the retainer requirements became aware, and I consider that there is inadequate evidence before the court today of inquiries as to the availability and cost of other s. 211 assessors other than Dr. England.
- [36] In this regard, I appreciate that although this was not directly stated in submissions, the inquiry of Dr. England was likely because she was an assessor that had been suggested by T.A.I.D. at the time that this issue first came before the court. However, there are many other capable assessors and that information would have been of assistance before the court.

[37] Turning to the law, s. 216 of the Family Law Act provides:

216 (1) Subject to this Act, if an application is made for an order under this Act, a court may make an interim order for the relief applied for.

- (2) In making an interim order respecting a family law dispute, the court, to the extent practicable, must make the interim order in accordance with any requirements or conditions of this Act that would apply if the order were not an interim order.
- (3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:
 - (a) a change in circumstances has occurred since the interim order was made;
 - (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
- (4) In making an order under subsection (3), the court must take into account all of the following:
 - (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
 - (b) the length of time that has passed since the interim order was made;
 - (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
 - (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
 - (ii) would not necessarily reflect the final arrangement between the parties;
 - (d) whether a trial has been scheduled;
 - (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).
- [38] The primary section that I am concerned with is s. 216(3)(a), and this relates to a change in circumstance since the interim order was made. The mere passage of time does not constitute a material change of circumstances in all situations. Otherwise an interim parenting order made when a child is 6 could, for example, be subject to variation when they turn 8. I do not consider that to be the intent of s. 216. It is intended to discourage serial interim applications.
- [39] But I do consider this situation to be different. The s. 211 report was ordered to be prepared in September 2019, and the reasons for judgment made clear that part of the reason of appointing Dr. Heiner was that she was available to prepare the report in a timely way. We are now in February of 2022 and, as I have stated, a trial is going to be set for September of 2022. The reality is that a s. 211 report is very unlikely to be completed in that time. I say that with some confidence, even without the benefit of fulsome evidence as to alternate s. 211 reporters being available. Further, although the s. 211 is intended to consider J.A.G.'s best interests, I do not consider the adjournment of this trial and prolonging this matter in J.A.G.'s overall best interests.

- [40] I am mindful that J.A.G. is now 14 and so the concern about a views of the child report further placing him in the middle of the dispute and subjecting him to undue pressure is mitigated from when he was only 11, as he was at the time of the order of Madam Justice Power.
- [41] In these circumstances, and again on the understanding that the parties and counsel will diligently move this matter forward to preserve the September 2022 trial date, I shall make the following orders.
- [42] Paragraph 1(a), the order of the Honourable Madam Justice Power made September 12, 2019, shall be varied such that:
- a) Paragraph 1 be replaced as follows: Pursuant to s. 202 of the Family Law Act, a views of the child report be conducted to determine the views of [J.A.G.] in relation to the family law dispute. This shall be a two-stage report in which [J.A.G.] meets with the assessor on one occasion during the parenting time with [T.A.I.D.] and one occasion during the parenting time with [R.A.G.]. Given that [R.A.G.] only has limited weekday parenting time, [T.A.I.D.] may need to consider giving a single extra afternoon parenting time session to accommodate the schedule of the alternate views of the child report provider, and she is ordered to make her reasonable best efforts to coordinate that with [J.A.G.'s] schedule.
- [43] The costs of the views of the child report are to be borne exclusively by R.A.G. The basis for allocating costs to him is clear at first instance in the order of Madam Justice Power, and I have made my comments as to the concerns about his diligence in pursuing the s. 211 report at first instance.
- [44] There shall be a further order that the retainer by the ultimate views of the child report provider shall be paid by R.A.G. no later than 30 business days after they have accepted the appointment of their role.
- [45] I further order the views of the child report shall be prepared by a member of the British Columbia Hear the Child Roster. If the parties cannot agree upon a views of the child report provider by February 25, 2022, the matter may be brought back before me by videoconference at 9 a.m. on a date to be coordinated with the Supreme Court scheduler promptly thereafter.
- [46] The other terms of the order of Madam Justice Power made September 12, 2019 are vacated with the exception of paragraph 7, which provides that the parties will bear their own costs of that application.
- [47] Paragraph 2 of the notice of application of R.A.G. filed December 17, 2021, shall be dismissed.
- [48] Paragraph 3(a) of the notice of application is also dismissed.

- [49] I shall make a further order that the parties shall promptly complete any intake forms requested by the views of the child report preparer upon receipt.
- [50] With respect to costs, although R.A.G. was substantially successful with respect to the procedural portions of this application, this application, as I have indicated, resulted in considerable part due to the delay in proceeding with the s. 211 assessment at first instance. Accordingly, I order costs of this portion of the December 17, 2021 notice of application to be costs in the cause.

"B. Hardwick J."

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