CANADA / JUDGMENT

R.K.L. v. Z.M.B.

2018 BCSC 2530

COURT
Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.K.L. v. Z.M.B.,

2018 BCSC 2530

Date: 20180619

Docket: E54028

Registry: New Westminster

Between:

R.K.L.

Claimant

And:

Z.M.B.

Respondent

This Judgment has been edited for publishing purposes

Before: The Honourable Madam Justice Morellato

Oral Reasons for Judgment

Counsel for the Claimant:

R.L. Aldana

Counsel for the Respondent:

R. Joubin

Place and Dates of Trial:

New Westminster, B.C.

May 28-31, 2018

June 1, 2018

Place and Date of Judgment:

Vancouver, B.C.

June 19, 2018

I. Introduction

[1] This family matter involves the Mother's efforts to relocate permanently to Ontario with her seven-year-old son ("Child"). The trial was originally set for five days, commencing May 28, 2018. An insufficient amount of time was set for trial and, accordingly, the trial was adjourned after five days and is scheduled to resume again this fall for an additional five days.

[2] On the first day of trial, the respondent ("Mother"), made an application for an order for a second section 211 assessment to be conducted ("Collateral Assessment"). The first section 211 assessment was conducted by Mr. Colby. Mr. Colby submitted a lengthy report to the court, dated May 11, 2018 ("Colby Report" or "Report"). The Colby Report did not include an interview with the Mother's fiancée, K.D., or his children who live in Ontario. The Mother and K.D. are to be married in Ontario on August 30, 2018.

[3] There was clearly a misunderstanding between Mr. Colby and the Mother regarding K.D.'s involvement in the Colby Report's assessment process. Mr. Colby testified he understood, at least prior to trial, that the Mother had chosen not to include her fiancé in the interview and assessment process he was conducting for the Report. However, the Mother testified that she did not choose to exclude K.D. and, further, she did not understand that Mr. Colby was willing to travel to Ontario to interview K.D. Mr. Colby acknowledged both in his Report and during his testimony that his Report was limited in the scope of its recommendations without the benefit of having met and interviewed K.D. I should also note that the Mother does not wish the Collateral Assessment to be undertaken and authored by Mr. Colby. She alleges that Mr. Colby is biased and has been untruthful. The evidence before me does not establish these allegations; however, it is nevertheless clear that the Mother takes exception to Mr. Colby's Report, including various aspects of it. She has lost confidence in Mr. Colby and no longer perceives him as a neutral expert.

[4] In this light, there are a number of issues before me which require direction and management prior to the continuation of the trial. The first is whether the Collateral Assessment ought to be ordered and, if so, who should conduct it. Second, the nature and scope of the Collateral Assessment requires clarification and direction. Third, given the adjournment of the trial, the Father, raises the issue of whether the interim parenting time order made by Master Harper on March 8, 2018 ought to be varied. Fourth, the Mother raises the issue of who should pay for the cost of the Collateral Assessment. She also requests that the Father pay for the cost of transporting their son to and from Ontario this summer and that the parties share the cost of Mr. Colby's attendance at trial. I will deal with each of these issues in their respective order.

Issue 1: Collateral Assessment

[5] On the first issue, the Father takes the position that the Collateral Assessment the Mother now seeks to have done was previously available to her; he alleges she declined the opportunity provided by Mr. Colby and now unfairly blames Mr. Colby for K.D.'s lack of participation in Mr. Colby's assessment. Nonetheless, the Father recognizes that the Court's task of determining the Child's best interests may be assisted with the additional information gathered through the Collateral Assessment. Having considered the matter, I am of the strong view that the best interests of the Child requires that a Collateral Assessment be conducted and provided to the Court. I so order.

[6] The parties are also in substantial agreement with regard to the question of who should be chosen to conduct the Collateral Assessment. Both parties have proposed that a new assessor be chosen by mutual agreement of the parties. This is a sensible and prudent approach. Counsel for the Mother has proposed several names of potential experts. I direct that counsel for each party discuss the potential list of assessors, including any names which the Father may wish to add to the list, and that one expert be selected that is agreeable to both parties, to conduct the assessment in Ontario. I will refer to this person as the "Ontario Expert".

[7] I understand that the parties have come to an agreement that the Collateral Assessment will not be conducted by Mr. Colby and that his name will not be in on the list of possible assessors developed for the purposes of the Collateral Assessment in Ontario. I also understand that the parties have agreed that the Ontario Expert will undertake the interview process in July. It is imperative that whomever is chosen as the Ontario Expert is able to complete the interview process in July 2018 and provide his or her report by no later than August 17, 2018. The Court will then attempt, with the cooperation of the parties, to set this matter down for the continuation of this trial after the Collateral Assessment is completed. While I understand that this matter has been set down in November 2018, I will work with the parties to see if we can find an earlier date.

Issue 2: Nature and Scope of the Collateral Assessment

[8] This second issue is more contentious. The Mother initially requested an entirely new assessment but now recognizes that this approach would be overly arduous, costly, and would lead to more delay. Her counsel submits, instead, that the Collateral Assessment should consist of no recommendations regarding relocation or parenting arrangements, and that it "focus solely on the benefits, if any, to life in Ontario" for the Child. Counsel for the Mother further submits that the Collateral Assessment include:

(a) a full interview and testing of K.D.;

(b) an observation of the Child in the Ontario family unit;

(c) an interview of the Child;

(d) an interview of the Mother; and

(e) an interview with the classroom teacher at Princess Margaret School in Ontario.

[9] The Mother submits that she would defer to the Court to make its ultimate recommendation using the Collateral Assessment and the Colby Report. Her counsel submits that "When a new report is competing but informative, and includes direct exposure to the parties, the Court has appreciated the competing reports as a means to make a more informative decision": see for example, R.C. v D.F. 2005 BCSC 1149 at para. 193. It is not clear at this juncture whether the Collateral Report and the Colby Report will be "competing" but I recognize this may be a possibility.

[10] The Father has suggested a different approach from that of the Mother. While he also submits that the Collateral Assessment should be prepared without recommendations by the Ontario Expert, he proposes an additional step: that the Collateral Assessment be remitted back to Mr. Colby. The Father recognizes that the Mother has lost faith in Mr. Colby and so he submits that it would be acceptable to have an assessor in Ontario meet with K.D., his children and the Child. However, counsel for the Father argues that "Mr. Colby's already thorough work can be added to with the new information. He would then be in a position to revise or confirm his recommendations in light of the new assessment." Counsel for the Father asserts that it is of little value to the Court to have a Collateral Assessment prepared without referring that assessment back to Mr. Colby for interpretation, in light of the substantial involvement Mr. Colby has had in this matter. Accordingly, the Father submits that the Ontario Expert should be specifically instructed not to make any recommendations given that his or her involvement with the Child and the parties will be limited.

[11] I have reviewed the submissions of both parties and have found merit in each; however, neither is entirely acceptable to the Court. I am of the view that consultation and information sharing between the Ontario Expert and Mr. Colby should occur. This will best facilitate a more informed and complete section 211 assessment for the Court to consider. A more fully informed assessment, most importantly, will be in the Child's best interest.

Further, I am also of the view that the Ontario Expert should be free to conduct the specific interviews he or she believes are necessary and to make whatever assessments and recommendations which, in his or her professional opinion, are warranted and of assistance to the court.

[12] In addition, I am of the view that prior to completing his or her assessment and written report, the Ontario Expert should have access to the Colby Report. Further, both the Ontario Expert and Mr. Colby should have an opportunity to consult with each other. Following this consultation, the Ontario Expert and Mr. Colby may issue joint recommendations for the Court providing they are able to reach a consensus. These recommendations may address and/or supplement those made in the Colby Report, and may address parenting arrangements and the relocation issue. If the Ontario Expert and Mr. Colby are not able to issue joint recommendations, then each is free to render their own separate recommendations. In either case, the Child's best interest must be the guide. Of course, the assessments and recommendations provided to the Court by these experts will be carefully considered and examined. I will determine the issues before me in light of the totality of the evidence tendered at trial, including but not limited to these reports, with the Child's best interest in mind.

Issue 3: Interim Parenting Arrangements

[13] The parties are currently operating under a parenting arrangement ordered by Master Harper approximately three months ago. That order provides that the Child is to reside primarily with the Mother and that the Father have parenting time with the Child each weekend from Friday at 4:30 p.m. until Sunday at 4:30 p.m.

[14] Counsel for the Father submits that Master Harper's order was made with the view that this trial was to be completed before the end of the Child's 2017-2018 school year. She acknowledges that while the law is clear that interim orders are not typically varied before a final order is made, she submits that the circumstances in this case necessitate a change. She relies on the recommendation in the Colby Report that the parties share a two-week rotating schedule over the summer holidays. The Father asserts that this is an appropriate order.

[15] The Mother does not oppose an equal parenting arrangement during the months of July and August. It appears she will spend those months with her fiancé in Ontario. In this light, I have no difficulty in revising Master Harper's order for the months of July and August in support of an equal parenting arrangement.

[16] The parties do not quite agree on which weeks the Child should spend in Ontario and British Columbia. The Father recognizes that the Child will need to be in Ontario for the Collateral Assessment involving K.D. and his children. He also recognizes that the Mother and K.D. are being married on August 30, 2018. The Father submits, given these facts, that the Child spend the first two weeks of July with him and the second two weeks of July with the Mother.

He proposes that the parties would then equally divide time with the Child during the month of August, with the Father having parenting time with the Child from July 29 to August 14 and the Mother having parenting time with the Child from the morning of August 15 through to the remainder of the month, including on her wedding day. The Father understands that the Child may need to be in Ontario for a few days outside of his Mother's parenting time for the Collateral Assessment and consents to that exception to his proposed summer parenting time; certainly, if the Ontario Expert requires an accommodation in this regard, this accommodation should be made.

[17] The Mother does not agree with the summer parenting schedule proposed by the Father. She proposes that she have parenting time with the Child in K.D.'s home in Ontario between July 9th to July 30th for three weeks "for the purpose of participating in the collateral assessment and for the Child to be able to see his extended family in Ontario." She proposes that the first week of July continue according to Master Harper's order. She submits that part of the reason for the one week delay is that airplane tickets are far more expensive "in the last minute, and particularly around Canada Day." She also submits that the three week proposal will allow for both a full visit with family in Ontario for the Child and provide the Ontario Expert with a bigger window to conduct his assessment.

[18] The Mother also proposes that for the three weeks from July 30th to August 23rd, the Child be with his father and that from August 23rd to August 30th, the Child be with her to attend her wedding. She submits that she will return to British Columbia "on September 1st or 2nd so to attend the first day of school on September 4th."

[19] The Mother submits that the parenting time schedule after the start of school in September remain the same as that set out in Master Harper's order with the exception that she proposes to meet the Father at a mid-point between Hope and Ladner, specifically Chilliwack or Abbotsford, rather than have the Father be responsible for all pick-ups and drop-offs as he has been the last few months.

[20] The Mother also submits that the best interests of the Child are served by keeping as close as possible to the current parenting arrangements as set out in Master Harper's order while the parties await the outcome of this trial. She submits that this position is supported by case law.

[21] The Father disagrees. He submits that the Mother and the Child should find accommodation in the Richmond, Surrey or Delta area, and that the Child should be registered in a school between the parties' homes. He asserts that the Child does not have a real connection to Hope. He points to the Child's frequent absences from school and Mr. Colby's testimony that those absences may underline that the Child does not have a community connection. The Father also notes that the Mother does not work in Hope, that she has been living in a motel room, and that she will not need to retain her motel room for the summer as she will be living with K.D. He argues that if the Mother is ultimately successful at the conclusion of the trial, the Child will be moved to Ontario sometime in the next school year. If the Father is

successful, the Child will remain in British Columbia and he proposes to share equal parenting with the Mother. The Father submits that, under neither of these scenarios, would it be appropriate for the Child to reside in Hope for his Grade 2 year commencing in September 2018.

[22] Counsel for the Father submits further that the appropriate time to cut the Child's connection with Hope is at the end of this school year in June 2018. Until last summer, the Child had only lived in South Delta. The Mother moved a few times, but all within South Delta (e.g., Tsawwassen and Ladner). However, the Father has resided only in the one home in Ladner that is familiar to the Child. He argues that if the Child were to move to Richmond, Delta or Surrey after the summer, such a move would not be more disruptive to him than returning to Hope after spending the summer in Ontario and Ladner.

[23] The Father adds that if a revised interim parenting plan were to be put in place commencing when school begins in September 2018 and continuing until the completion of the trial, affording the Court time to render its judgment, that parenting plan should: see the Child in his care each Monday and Tuesday, in the Mother's care each Wednesday and Thursday, and the Child alternating between his parents' homes each Friday, Saturday, Sunday. This, says the Father, will afford each parent the opportunity to engage with the Child both during school days and on weekends, and is also consistent with the recommendations in the Colby Report and with Mr. Colby's testimony, that it is not appropriate to limit a parent's time to less than equal time unless there is a specific reason to do so. In this case, argues the Father, Mr. Colby found no reason to limit his time with his son. Finally, on this point, the Father argues that if the Court determines, following the conclusion of this trial, that this is the appropriate parenting arrangement, there will be no further transition for the Child; and if the Court determines that the Mother and the Child can move to Ontario, the Child will have had the benefit of this time with his father before the bond is disrupted by the move.

[24] Again, merit can be found in the submissions of both parties. For the summer months, I am in agreement with the Father' submissions regarding how parenting time ought to be allocated during July and August. Come September, however, I agree with the Mother that Master Harper's order should be reinstituted, providing there is no material change in her residence in Hope.

[25] By way of background, the Mother settled in Hope earlier this year, after being ordered by Mr. Justice Blok to return to British Columbia before December 31, 2017. The Mother and the Child returned to British Columbia mid-January. She did not move back to Ladner where the Father resides and where she resided prior to moving to Ontario in the summer of 2017. Rather, upon her return to British Columbia, the Mother moved to Hope, where her brother lives. She does not live with her brother in Hope but lives there with her mother and the Child. The Child has been attending Silver Creek Elementary School in Hope. While I have sympathy with the length of the commute between Hope and the Father' home in Ladner, I am mindful that the Child suffers from anxiety and that the Mother has attempted to settle him into Hope, and Silver Creek Elementary School, since their arrival back from Ontario

earlier this year. This transition to a new school and city has not been easy for the Child and I am not persuaded that moving the Child again this fall, while this case is proceeding and its outcome remains uncertain, is in his best interest. Specifically, I do not see how instituting more change, in the interim, while even further change may be on its way at the conclusion of this trial, would work to the Child's benefit.

[26] Upon return to British Columbia after her wedding in August, if the Mother intends to move from Hope to another location in British Columbia, other than Richmond, Delta or Surrey, proper notice must be given to the Father as soon as possible; such a move may impact the issue of the proper interim parenting arrangements until completion of this trial.

[27] In any event, the Father will be provided with overnight parenting time with the Child on the Labour Day weekend on terms agreeable to the parties; such terms should accommodate travel arrangements after the wedding as well as the Father' right to weekend parenting time as reflected in Master Harper's order.

Issue 4: Costs

[28] On the issue of costs, the Mother submits she is willing to pay whatever the Legal Services Society provides her, which will be half of all costs relating to Mr. Colby's attendance at trial as well as half of the costs of the Collateral Assessment. She further submits, however, that if the Father is deemed responsible for covering the cost of the Colby Report, she will pay full fees for the Collateral Assessment.

[29] The Mother also submits that the Father should be responsible for the cost of the Child's travel this summer which will include two round-trip flights to Ontario. She asserts that due to her "non-existent income, wedding stresses and finances" she cannot afford the Child's round trip flights at this time but that the Father can support these costs given his income level. She submits that she will take responsibility for her own round trip flights to Ontario.

[30] The Father submits that he has already paid for the preparation and completion of the Colby Report and accepts the Mother's offer to cover the cost of the Collateral Assessment. The parties have reached agreement in this respect. The cost of any further recommendation made by Mr. Colby, either made separately or in conjunction with the Ontario Expert, will be paid by the Father. The cost of any recommendation made by the Ontario Expert, either made separately or in conjunction with Mr. Colby, will be paid by the Mother. The parties are free to alter this direction by agreement in writing.

[31] The issue of how to apportion the cost of Mr. Colby's attendance at trial will be decided at the conclusion of the trial.

[32] Regarding travel costs, in the interim, the Mother will be responsible for the cost of the Child's travel to her wedding in August and the cost of his trip to Ontario in July. The issue of how the Child's travel costs ought to be apportioned or reapportioned will be dealt with after parenting arrangements are finalized at the conclusion of this trial.

II. Disposition

[33] Without limiting or altering the above, my conclusions may be summarized as follows:

(i) A Collateral Assessment will be conducted by an Ontario Expert and that expert will be selected by agreement of the parties. The Collateral Assessment will take place in July during the Mother's parenting time. The Ontario Expert must provide his or her assessment to the Court no later than August 17, 2018.

(ii) Prior to the conclusion of the Collateral Assessment there will be consultation and information sharing between the Ontario Expert and Mr. Colby, as agreed between them. The Ontario Expert will be provided with a copy of the Colby Report.

(iii) Both experts will be provided with these Reasons. Other information may also be provided by the parties to the Ontario Expert and Mr. Colby, provided the parties first agree in writing to the provision of such additional information.

(iv) Following their consultations, the Ontario Expert and Mr. Colby may issue joint recommendations to the Court. These recommendations may address and/or supplement those made in the Colby Report, and may address parenting arrangements and the relocation issue.

(v) If the Ontario Expert and Mr. Colby are not able to issue joint recommendations, then each is free to render their own separate recommendations.

(vi) The parties will share parenting time with the Child equally during July and August 2018. The Child will spend the first two weeks of July with the Father and the second two weeks of July with the Mother. The Father will then have additional parenting time with the Child from July 29 to August 14 and the Mother will have additional parenting time with the Child from the morning of August 15 through to the remainder of August, including on her wedding day. Alterations may be made to this parenting schedule by agreement of the parties in writing, including as necessary to accommodate the Collateral Assessment in July.

(vii) Commencing September 2018 until the conclusion of this trial, the Father will have parenting time with the Child every Friday from 4:30 p.m. to Sunday at 4:30 p.m. The Mother will meet the Father at a mid-point between Hope and Ladner, specifically Chilliwack or Abbotsford. The Father will be provided with overnight parenting days with the Child this coming Labour Day weekend on terms agreeable to the parties; such terms should accommodate travel arrangements after the wedding and the Father' right to weekend parenting time.

(viii) The Father is responsible for the cost of the Colby Report including the cost of any further recommendation made by Mr. Colby, joint or otherwise. The Mother is responsible for the cost of the Collateral Assessment including any recommendations made by the Ontario Expert, joint or otherwise.

(ix) The Mother will be responsible, in the interim, for the cost of the Child's travel to her wedding in August and for the cost of his trip to Ontario in July. The issue of how the Child's travel costs ought to be apportioned or reapportioned will be dealt with after parenting arrangements are finalized at the conclusion of this trial.

"MORELLATO J."

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