
CANADA / JUDGMENT

S.M.C. v. C.B

2020 BCSC 994

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2020 BCSC 994 S.M.C. v. C.B

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.M.C. v. C.B,

2020 BCSC 994

Date: 20200703

Docket: E182277

Registry: Vancouver

Between:

S.M.C.

Claimant

And

C.B.

Respondent

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Claimant:

M.K. Mand

Counsel for the Respondent:

O. Stoklosa

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 3, 2020

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The Application

- [1] The respondent seeks an order, pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] that a report be prepared by Robert Colby with respect to E.'s needs and views, and with respect to the ability and willingness of each party to satisfy E.'s needs. She proposes that the parties share equally in the cost of the s. 211 report.
- [2] The respondent also seeks an order, pursuant to s. 45 of the FLA, permitting her to arrange counselling for E. with a counsellor of her choice. Alternatively, she suggests that each party provide the other with a list of three counsellors within two days of this order, and within two days thereafter, each party shall select one name from the other party's list and the parties will enroll E. in counselling with one of those counsellors within seven days of this order.
- [3] Finally, the respondent seeks her costs of this application.
- [4] The claimant opposes all of the relief sought by the respondent.

The Relationship Background

- [5] The claimant is 30 years old, and owns and operates a trucking and excavation business in Whistler, BC. The respondent is 35 years old, and she is a full-time student at Capilano University, studying towards a Bachelor of Business Administration degree. She expects to graduate in the summer of 2021. Both parties are, to a greater or lesser extent, financially supported by their families.
- [6] The parties had a short relationship. They began dating in about April 2015 and lived together in Whistler from July 2016 to September 1, 2017. Their daughter E. was born on August 6, 2016, and is nearly four years old.
- [7] The claimant has a ten-year-old son, B., from a previous relationship. B. is in his care 50% of the time.
- [8] After their separation, and until about March 2018, the parties continued to live in Whistler and worked towards reconciling. In March 2018, their efforts at reconciliation ended. The claimant remained in Whistler, and the respondent moved with E. to her parents' home in West Vancouver where she continues to reside. Her fiancé lives with her in her parents' home.
- [9] The sole issue between the parties has been the parenting of E. Parenting issues have been the subject of five court orders.

The Litigation History

- [10] This family proceeding was commenced in August 2018, following a dispute that arose about the respondent's wish to take E. to Europe in September 2018.
- [11] On August 30, 2018, before Master Muir, the parties agreed to an order permitting the respondent to travel to Europe and an interim parenting regime (the "Muir Order"). After specifying certain days on which the claimant was to have parenting time with E., the Muir Order established an ongoing two-week rotating schedule in which the claimant had daytime parenting on Friday in Week 1 and overnight parenting time from Friday to Saturday in Week 2. In total, the Muir Order provided the claimant with three days and one overnight with E. every two weeks. Exchanges were to occur either in Squamish or in Whistler.
- [12] The Muir Order also contained some other more general terms. It provided that:
 - if the respondent planned to visit Whistler on a weekday, she was to endeavour to advise the claimant in advance and the claimant was to have the option of exercising additional daytime parenting time with E.;
 - the claimant would have such further and other parenting time as agreed to by the parties in advance;

- if the claimant was unable to exercise his scheduled parenting time, the respondent would have the first right of refusal to care for E.; and
 - the claimant's parenting time would increase every six to eight weeks provided that an increase was in E.'s best interests.
- [13] There were two additional parenting orders following the Muir Order. On October 11, 2018, Master Scarth permitted the claimant to travel to Palm Springs with E. over a long weekend in October and, at a November 27, 2018 judicial case conference, the parties agreed to specified parenting time over the Christmas holidays in each year.
- [14] Neither party was content with the Muir Order.
- [15] The respondent objected to the amount of driving required of her to facilitate the claimant's parenting time. She also said that the claimant was breaching the right of first refusal in the Muir Order by leaving E. with his mother, or a day care provider, when he worked during his Friday parenting time. The parties were unable to agree to make up parenting time for a trip the respondent had planned to Ontario.
- [16] The claimant was unhappy because, despite his requests, his parenting time had not increased as contemplated in the Muir Order. He also said that the respondent visited Whistler on weekdays without giving him the option of parenting time with E.
- [17] Both parties engaged in unhelpful behaviour to gather evidence to support their positions. The respondent hired a private investigator to follow the claimant during his parenting time, and the claimant recorded the times that the respondent was in Whistler, including by reference to her financial disclosure.
- [18] The parties filed cross-applications seeking to vary the Muir Order.
- [19] The respondent wished to reduce the claimant's parenting time to one weekday afternoon a week and alternate Saturdays, with the claimant being responsible for all the driving between Whistler and West Vancouver. She also sought an order prohibiting him from leaving E. in the care of any third party for more than 30 minutes during his parenting time and an order permitting her to phone the claimant during his parenting time so that she could speak to E. Finally, she sought an order permitting her to travel with E. in August 2019, without make-up time and, more generally, to permit her to travel with E. on reasonable notice to the claimant.
- [20] The claimant sought a gradual increase of his parenting time, on a progressive basis, until the parties achieved a shared parenting regime. He also sought an order vacating the right of first refusal in the Muir Order or limiting it to situations in which either parent was unable to exercise parenting time for more than ten hours. He was prepared to agree to the respondent's travel to Ontario on conditions, including make-up parenting time.

- [21] The cross-applications were heard by Justice Warren on July 31, 2019. In her oral reasons for judgment, she concluded that there had been a material change in circumstances since the Muir Order and that it was in E.'s best interests to vary the parenting schedule. She was critical of the parties' behaviour in creating an evidentiary record to support their positions, saying it was antithetical to building the kind of cooperative relationship required for the parties to co-parent E.
- [22] After considering E.'s best interests, Justice Warren gradually increased the claimant's parenting time until February 2020, when the parties would be sharing parenting time (the "Warren Order"). Justice Warren was satisfied, on the record before her, that the claimant is an active and involved parent, and E. is a happy, healthy, active child. She accepted, as undisputed, that the claimant actively and successfully parented his son and that E. and B. were close. Justice Warren found that it was in E.'s best interests to encourage her relationship with her step-brother. Justice Warren noted that there would need to be a change to the parenting time when E. started school and urged the parties to obtain an early trial date. She made a number of key findings. In particular, she said:
- [25] It is in [E.'s] best interests that her relationship with [the claimant] be normalized; that is, to the extent possible, their relationship should develop and grow the way that a parent-child relationship would develop and grow in an intact family.
- [26] It is in [E.'s] best interests for her to develop a relationship with her father that includes his involvement in her regular day-to-day routines and her involvement and acceptance of his regular day-to-day routines.
- [23] The parties increased the claimant's parenting time pursuant to the Warren Order. Currently, the claimant has parenting time with E. every Monday and Tuesday; the respondent has parenting time with her every Wednesday and Thursday; and the parties alternate Friday-Sunday.
- [24] The parties then appeared before Justice Skolrood on January 29, 2020. As it relates to parenting, the respondent sought an order permitting her to enroll E. in pre-kindergarten in September 2020, at one of two private schools in West Vancouver, and to vary the parenting schedule accordingly.
- [25] In his reasons released on February 20, 2020, indexed at: S.M.C. v. C.B., 2020 BCSC 226, Justice Skolrood concluded that there had been no change of circumstances warranting a variation of the Warren Order. He said that the issue of E.'s schooling was clearly known to the parties when they appeared before Justice Warren and was touched upon in her reasons. In any event, Justice Skolrood was not satisfied that it was in E.'s best interests to be enrolled in pre-kindergarten in West Vancouver, given the impact her enrollment would have on the parenting schedule: at para. 20.

- [26] The trial of this matter is scheduled for ten days commencing March 1, 2021. The central issue will be where E. primarily resides and attends school. The respondent believes that it is in E.'s best interests to reside in West Vancouver and attend school there. The claimant is seeking an order that E. move to Whistler and attend school there.
- [27] On April 3, 2020, the claimant served the respondent with a notice to mediate. The respondent agreed to mediate without first seeking a s. 211 report, but now says that a s. 211 report is necessary prior to any mediation.

The Basis for the Current Application

- [28] The respondent says that E. has not responded well to increased parenting time with her father and is reluctant to go to her father's home. The respondent also says that there was an incident, which she alleges amounts to family violence, involving E. and B. She relies on both of these concerns in support of the orders for a s. 211 report and counselling for E.
- [29] The claimant disputes that E. is reluctant to spend parenting time with him and denies that any family violence occurred.

The Applicable Law

- [30] There is very little dispute about the applicable law. Whether to order a s. 211 report is a discretionary decision of the court. Section 211(1) of the FLA provides:

211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:

- (a) the needs of a child in relation to a family law dispute;
- (b) the views of a child in relation to a family law dispute;
- (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

- [31] In *R.E.Q. v. G.J.K.*, 2015 BCSC 1786, Justice Fleming summarized the applicable principles when determining whether to order a s. 211 report:

- [32] Section 211 replaces s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"). The thrust of the cases under the FRA required the court to take a broad and generous approach to applications for s. 15 assessments. A low threshold was imposed because such assessments were regarded as invariably providing a valuable source of information for a court faced with the onerous task of making fundamentally important decisions about the welfare of a child: see, for example, *Gupta v. Gupta*, 2001 BCSC 649, *Smith v. Smith*, 2014 BCSC 61, and *Marsden v. Bercovitz* (3 October 2012), New Westminster E039404 (B.C.S.C.).

- [33] The rationale for the approach was explained by Justice Bernard in *Marsden* as follows:

- [17] ...To the extent that there is an intrusion into the lives of the parties and the child, such is in my view far outweighed by the probative value of the evidence to issues which are of great significance to all concerned.
- [18] Basing decisions about matters of custody and access upon the evidence of two often antagonistic parents is, at best, very challenging. It is most certainly not desirable if it can be avoided. Section 15 reports introduce much needed elements of neutrality and objectivity into an emotionally-charged arena fraught with witness bias. Not surprisingly, parents fighting over custody and access are rarely, if ever, able to testify objectively about what is in their child's best interests. It is, perhaps, too much to ask. A s. 15 report is the answer.
- [34] Since the enactment of the FLA, the courts have found the principles that governed s. 15 applications remain unchanged and continue to apply to the ordering s. 211 reports: see for example *K.B. v. J.B.*, 2015 BCSC 704.
- [32] I agree that the threshold for ordering a s. 211 report is low. I also accept that a s. 211 report has heightened importance in a proceeding in which family violence is alleged so that the trial judge is in a better position to assess all of the factors under ss. 37-38 of the FLA.
- [33] However, ordering a s. 211 report continues to be an exercise of discretion. It should not be ordered if the purpose is shown to be an attempt to create parenting controversies where none exist or the process is found to be contrary to a child's best interests.
- [34] On the facts in this case, I conclude that a s. 211 report should not be ordered. In my view, it would be unduly intrusive in E.'s life and is not warranted on the evidence before me. For the same reasons, I conclude that counselling is also not in E.'s best interests, taking into account all of the considerations set out in s. 37(2) of the FLA. As I have said, E. is a happy, healthy child. She is too young for her views to be considered. She has strong relationships with all of the adults in her life and with her step-brother, B. Her need for stability will not be best served by disrupting her parenting arrangements and focusing on concerns raised by the respondent without any objective evidence to support them.

The Evidence Relied on by the Respondent in Support of Her Applications

- [35] In part, the respondent relies on what she describes is the claimant's pattern of violent behaviour in his relationship with her, or which she observed in his interactions with others. The claimant disputes the respondent's description of his behaviour. With respect to one of the interactions that did not involve the respondent, her description is also disputed by the party who was involved.
- [36] I have separately, and as a whole, considered each one of the alleged violent incidents relied on by the respondent. I have not detailed all of them in these reasons as I was not persuaded that there are family violence concerns.

- [37] I note that many of the incidents on which the respondent relies are not new. They are alleged to have occurred on unspecified dates, while the parties were in a relationship, or while they were attempting to reconcile. They did not result in an application for a s. 211 report prior to this application. I note that the concerns the respondent raises did not prevent her from consenting to the Muir Order, including to overnight parenting time. The respondent also consented to a gradual increase in the claimant's parenting time.
- [38] Finally, the incidents formed part of the record before Justice Warren, who said in her reasons that there were no family violence concerns and increased the claimant's parenting time over the respondent's objection. I agree with Justice Warren's conclusions and note that her decision was not appealed. Raising the same incidents in this application suggests that the respondent is trying to paint the claimant in a negative light to further her interests. In his responsive materials, the claimant has avoided doing so to the respondent.
- [39] The primary basis for the respondent's applications is an interaction between E. and B. and the respondent's allegation that E. is reluctant to spend parenting time with her father.

The April 2020 Interaction Between E. and B.

- [40] The respondent says that on April 28, 2020, when she picked E. up from the claimant's care, E. was upset. The respondent put E. into her car seat and turned around and asked her if she had a good time. E. said no and seemed annoyed. According to the respondent, E. is usually more talkative when she comes back from parenting time with the claimant.
- [41] On the drive back from Squamish, the respondent's fiancé stopped to run an errand, and the respondent and E. remained in the car. The respondent turned to face E. in the backseat of the car and asked if she was okay. E. said B., "squeezed my neck and I cried and cried and cried". The respondent asked her to show her what happened, and E. put her hand on her own throat, squeezed, and sort of pinched the skin at the front central part of her neck. The respondent asked whether the claimant was there and how he reacted. E. said her father was there and he talked to B. The respondent asked whether B. apologised, and E. said no and that she was very scared.
- [42] The respondent asked E. what they were doing when B. squeezed her neck, and she mistakenly understood that they were sitting together at breakfast. E. clarified and said that "daddy was making breakfast and asked me to get [B.] from his room." When she went into B.'s bedroom, he did not want to come, and he put his hand around her throat and really hurt her. E. demonstrated the motion on her own neck. E. told the respondent that she had "cried and cried and cried" after this happened, and asked to phone her mother but her father said she could not.
- [43] The respondent does not say in her affidavit that there were any marks on E.'s neck.
- [44] Later that evening, E. described what had happened to her grandparents, and demonstrated the choking motion on the respondent's neck.

- [45] The respondent emailed the claimant that evening, explaining what E. had told her, and asking about what occurred. The claimant denied that B. had choked E.
- [46] On May 13, 2020, the respondent emailed the claimant and suggested that the parties enroll E. in counselling. The respondent expressed her concern about statements E. had made over the past couple of months after the claimant's parenting time, such as "daddy is the boss of me" and "daddy says secrets are okay". The respondent also expressed her concern about the physical harm that B. had caused and that E. had told her that her step-brother "bosses" her around.
- [47] The claimant responded on May 19, 2020. He denied telling E. that he is the boss of her, that the topic of secrets had ever come up in his house, that his son tells E. that he is the "boss" of her, or that any physical harm had occurred between the children. The claimant said that it is E. who bosses her brother around, not vice versa.
- [48] The claimant went on in his email to suggest that the parties discuss E.'s statements with a mediator or a parenting coordinator.
- [49] On May 20, 2020, the respondent responded and said that a mediator or a parenting coordinator would be a resource for the parties, not E. She again asked for his agreement to enroll E. in counselling.
- [50] On May 25, 2020, the respondent wrote to the claimant, through counsel, to advise of the incident and that the respondent required a s. 211 report prior to attending mediation. The respondent's counsel also requested the claimant's consent to enrolling E. in counselling.
- [51] The respondent says that E. did not bring the April 2020 incident up again until May 26, 2020, after she picked up E. from parenting time with the claimant. E. told her that she had been telling a "story" when she said B. had squeezed her neck. The respondent asked E. why she would make up that story, and E. said she did not know. When the respondent asked E. if she remembered the story she had told her previously, E. repeated the same story.
- [52] The respondent asked E. if that was what really happened, and she said "yes." E. said that grandma and daddy told her it was just a story and that B. will get into a lot of trouble. She also said that her father told her that "it was unusable anyway."
- [53] The respondent told E. that B. would not get in trouble, as he is learning and making mistakes, but that she needs to tell her mother if she is ever hurt again. E. said, "Daddy says I only have to tell daddy."
- [54] The respondent says that her conversation with E. caused her to be concerned that the claimant is coaching E. to hide family violence.
- [55] On May 27, 2020, the respondent contacted Lindsey Jespersen, a registered clinical counsellor, to book a 30-minute consult for herself and E. on June 5. She forwarded details about the appointment to the claimant.

- [56] On May 28, 2020, the claimant responded to the respondent's emails of May 20 and May 27. He said he did not agree with counselling for E. because he was not concerned about E.'s statements as she told him about things that happened when she was in the respondent's care but he does not raise them with the respondent because he recognizes that she is able to deal with them without his involvement.
- [57] On May 29, 2020, the claimant emailed Ms. Jespersen, advising that he did not consent to counselling.
- [58] In his affidavit, the claimant describes the April 2020 interaction between the children very differently. He says that he and E. were making breakfast together in the kitchen and E. was excited. He sent E. to B.'s room, which is adjacent to the kitchen and shares a wall with it. He could hear E.'s footsteps, B. watching cartoons and E. excitedly telling her brother that breakfast is ready. E. came back, and said that B. was not listening to her; she was disappointed. She did not say that B. had hurt her, and she was not crying.
- [59] The claimant says that he carried E. into B.'s room. The claimant told her to try asking B. again without running or raising her voice. B. was in his room, lying on his stomach under the covers watching a cartoon on his iPad. They told him breakfast was ready, and B. got up right away and went for breakfast. E. and B. sat together and shared breakfast. Both children were happy and, after breakfast, they went about their normal activities.
- [60] The claimant said the exchange was uneventful. E. was not upset or annoyed when she was in his care; she appeared to have had fun but was a bit tired from the day's activities.
- [61] The claimant says that E. never told him that B. put his hands on her neck or hurt her. She was not crying at breakfast or in B.'s room. She has never acted scared of B. The claimant says that when B. and E. have an issue about being bossy, they resolve it with a family discussion. B. ignores E. if she is bossy and trying to get B. to do something she wants to do. He explains to E. that asking someone to do something is preferable to telling them to do it.
- [62] The claimant says that, on several occasions, he asked B. about his interaction with E. When he asked B. whether he tried to hurt E. or put his hands on her neck, B. said that E. came running to get him and was upset when he wanted to continue watching cartoons. She reached out to turn off his iPad, and B. held it with one hand and used the other hand to block E. from it. E. leaned into B's arm, and his arm touched her collar bone/chest area. B. was upset when he specifically asked if he had choked E.
- [63] The claimant said he was very careful in how he asked the children about what happened because he does not want to alienate them from each other or put words in their mouths.
- [64] During his next parenting time, the claimant discussed their April interaction with the children. He says that it was a short discussion; E. did not really want to talk about it, and the children ran off to play on the trampoline.

- [65] Having considered all of the evidence about E. and B.'s interaction in April 2020, I have concluded that it does not amount to family violence. It is, in my view, no more than the normal interaction that occurs between siblings who are more than six years apart in age. They have different interests, and B. is not likely to be as excited about the same activities as E. is. As the claimant puts it, "one minute they might be mildly annoyed with each other and the next minute they are cuddling on the couch." There is photographic evidence of the children enjoying each other's company, in which they demonstrate obvious fondness for one another.
- [66] Squabbles between siblings are normal. This is not a case involving ongoing allegations of aggression between E. and B., and there is nothing in the record to suggest that B. has behavioural or anger management issues. He is described as a kind, gentle boy who is well adapted and well liked by his peers and teachers. He loves both of his sisters. E. and B. get along well together.
- [67] In my view, it would be harmful to the relationship between E. and B., and thus contrary to E.'s best interests, to rely on the children's April 2020 interaction as a basis for ordering a s. 211 report or counselling for E. As I have concluded that the April interaction did not amount to family violence, there is a real concern that unduly focussing on it would do more harm than good to E. and to her relationship with B.

E.'s Adjustment to the Parenting Schedule in the Warren Order

- [68] The respondent says that each time she takes E. to see her father, E. resists. She says there are occasions on which she has to physically pick her up and force her into the car to go and see her father. The respondent says that E. has repeatedly told her that she does not want to go to her father's house for five nights and that two nights is enough.
- [69] The respondent says that, typically, she tells E. at dinner the day before a parenting exchange that she will be going to her dad's the next day. E. often says "no I don't want to." She always asks how long she is going for and for how many sleeps. When the respondent tells her that she is going for five days, she says "call dada I only wanna go for two." The respondent and her parents make encouraging comments and tell her she will have fun at her dad's place.
- [70] The respondent says that she encourages E. to attend parenting time with her father, but E.'s resistance to seeing her father has only become worse.
- [71] Previously, on the evening of the exchange, the respondent would give E. a bath, put her into her pajamas and give her warm milk in her sippy cup. E. would sleep in the car and wake up when the respondent took her out of her car seat. She clings to the respondent and gives her a big hug and says "mamma I don't want to go." Sometimes she cries.

- [72] In an effort to make exchanges easier, recently, the respondent says that she has changed their routine and keeps E. awake in the car on the way to Squamish. They listen to fun music in the car and sing so that she is in a happier mood. The respondent says her efforts have not made things easier.
- [73] The respondent also says that E. does not allow the claimant to buckle her into her car seat in his car when the respondent is present. She wants the respondent to do it.
- [74] E. tells the respondent that "daddy scares me" and that he yells at her and threatens her with spanking. E. has come back from her dad's house and asked what spanking was. E. says that her father cries a lot and that she can hear him crying in the shower.
- [75] E. tells the respondent that she wants her to call every day. The respondent tries to phone her every couple of days when she is with the claimant, but the claimant does not usually answer her calls. Sometimes, he will text her to say that he will phone her later but does not always follow through.
- [76] Despite the foregoing, the respondent says that she is committed to promoting the development of the relationship between E. and the claimant. She works hard to ensure that E. is not aware of any issues between her parents. The respondent does not speak negatively about her father in front of her. She encourages E. to go to her father's house for his parenting time, and tells her that she will have a good time. The respondent brings a third party for exchanges, and they make small talk with the claimant and avoid any tension.
- [77] The claimant does not agree that E. struggles with five nights in his care. He says that when E. tells him about events while she is in her mother's care, he does not have any concerns and does not probe. On the other hand, the respondent appears to be seeking evidence to confirm her unhappiness with the Warren Order.
- [78] In his correspondence to the respondent, the claimant suggested that the parties discuss E.'s statements with a mediator or a parenting coordinator. The respondent did not agree as she sees the mediator or parenting coordinator as the parties' resource and not E.'s.
- [79] The claimant expresses his concern that the respondent is encouraging E. to be a storyteller and putting her in the middle of her parents. He says that the parties are adjusting to their shared parenting regime.

Conclusion

- [80] In my view, the evidence in this case does not support a need for a s. 211 report or for E. to attend counselling. She is not quite four years old. There is no independent evidence that she is reluctant to spend parenting time with her father. Accepting that the respondent wants to foster E.'s relationship with her father, the focus should be on avoiding any tension at the transfer from one parent to another. The parties and E. require time to normalize the shared parenting regime and some resistance to change is to be expected.

[81] The parties would be best to focus their energy and financial resources on the mediation to which they agreed and, if necessary, the appointment of a parenting coordinator. Repeated court applications, relying on contested evidence, will not advance their co-parenting of E.

"MacNaughton J."

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