
CANADA / JUDGMENT

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

2020 BCSC 226

COURT

Supreme Court of British Columbia

DECIDED

20 February 2020

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2020 BCSC 226 S.M.C. v. C.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2020 BCSC 226

Date: 20200220

Docket: E182277

Registry: Vancouver

Between:

S.M.C.

Claimant

And

C.B.

Respondent

Before: The Honourable Mr. Justice Skolrood

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.

January 29, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2020

Introduction

- [1] This is an application by the respondent for an order that she be at liberty to enroll the parties' child in pre-kindergarten for the school year commencing September 2020 at either Collingwood School or Mulgrave School in West Vancouver and that the existing parenting schedule, established pursuant to the order of Madam Justice Warren dated July 31, 2019 (the "Warren Order"), be varied to reflect the proposed school arrangement. The respondent also seeks orders for production of certain specified categories of documents.
- [2] The respondent opposes the application.
- [3] At the centre of the parties' dispute is their child "E.", who was born in August 2016, and is currently three years old.

Background

- [4] The background is set out in the reasons for judgment of Justice Warren that resulted in the Warren Order and I will not review that background in detail here. However, it is useful to note the basic facts of the parties' relationship as described by Justice Warren at paras. 4-5:
- [4] The parties had a short relationship. They started dating in about April 2015 and were expecting [E.] by late 2015. They lived together in Whistler for just over one year from July 2016 until September 2017. [E.] was born [in August 2016].
- [5] The parties separated in September 2017. Both continued to live in Whistler and, until about March 2018, they continued to work towards reconciling. However, their separation became permanent in March 2018 and, at that time, [the respondent] moved with [E.] to her parents' home in West Vancouver.
- [5] The central issue before Justice Warren concerned parenting time and arrangements for E. Previously, the parties had entered into a consent order before Master Muir on August 30, 2018 (the "Consent Order") that established interim parenting arrangements. However, the parties encountered difficulties with the established schedule and both sought to vary that interim order before Justice Warren. Essentially, the respondent sought to decrease the claimant's parenting time and the claimant sought to increase it.

- [6] Detailed evidence was presented to Justice Warren along with extensive submissions by both parties. Justice Warren ultimately held that there should be equal parenting based on a 2-2-5-5 arrangement, however she also held that there should be a gradual move towards that schedule. The Warren Order established that the equal parenting arrangement would commence in or about February 2020.
- [7] It is worth noting some of Justice Warren's key findings in support of her order:
- [22] I am satisfied that there should be an increase, not a decrease, in [the claimant's] parenting time. I have reached this conclusion because of several factors, the combined effect of which demonstrates that an increase is in [E.'s] best interests. As I have already said, less than a year ago, at the time the Consent Order issued, the parties expressly contemplated that [the claimant's] parenting time would increase. They went so far as to specify that it would do so every six to eight weeks. Of course, that was conditional upon an increase being in [E.'s] best interests, but there is nothing in the record before me that would warrant the conclusion that an increase would not be in her best interests. The inference I draw is that the parties both intended, less than a year ago, that [the claimant's] time would increase. An increase would be consistent with the maximum contact principle and, as I have said, there is nothing in the record that suggests to me that an increase would not be in [E.'s] best interests.
- [25] Even leaving aside the issue of whether [the claimant] breached the Consent Order, it is my view that he ought not to be criticized for spending some time working while exercising his parenting time. 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. This is the way [the respondent's] relationship with [E.] has been permitted to develop and grow. She has been free to attend school, take some trips, and make her own decisions about how [E.] will be cared for when she is not available. She has been able to participate in [E.'s] day-to-day routines. This is normal and good, but it should also be the norm for [the claimant] unless evidence indicates it would not be in [E.'s] best interests.
- [26] It is in [E.'s] best interest 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.
- [8] Justice Warren's observations at para. 29 are particularly note-worthy:

Another factor that I am required to consider under s. 37 is [E.'s] need for stability. As a young child, she has a need for stability, but she appears to be doing well and an increase in [the claimant's] time will not be destabilizing provided it is gradual. The one concern I have about increasing [the claimant's] parenting time relates to the fact that [E.] will be starting kindergarten in two years and may be starting junior kindergarten or pre-school next year. Getting her to school will be difficult if [the claimant] continues to live in Whistler and [the respondent] in West Vancouver. A trial date should be set in this matter so that final orders can be made that reflect

the circumstances of [E.'s] schooling.

- [9] It is clear that Justice Warren intended that the issue of E.'s school arrangements should be dealt with at trial with a full canvassing of the relevant evidence. Unfortunately, the parties were unable to secure an early trial date and the trial is not scheduled until March 2021.
- [10] Following the Warren Order, the claimant's parenting time has been gradually increasing as contemplated and the parties now have equal parenting time on the 2-2-5-5 schedule set by Justice Warren.
- [11] The second aspect of the respondent's application seeks further document production from the claimant. There is considerable background to that application as well which I will touch on briefly when dealing with the document issues.

School and Parenting Arrangements

- [12] Dealing first with the school and parenting arrangements application, the respondent submits that it is in E.'s best interest that she be enrolled in pre-kindergarten in one of the two mentioned private schools in West Vancouver. She submits that both are top rated schools that will set E. up for educational success going forward. Further, if E. is admitted into pre-kindergarten, that will pave the way for her to continue in kindergarten and on to elementary school. It will also permit her to become socialized with her peers.
- [13] In order to accommodate the proposed school arrangements, the respondent also seeks to vary the existing parenting schedule so that the claimant would have parenting time with E. three out of four weekends plus equal sharing of professional development days and holidays. The respondent argues that this will give the claimant more weekend time with E., which will mean more actual time with E., given that the claimant often has her registered in daycare during his weekday parenting time.
- [14] As indicated, the claimant opposes the application. He and the respondent have different views both on where E. should reside and on her schooling. Justice Warren clearly contemplated that these issues would be addressed at trial. The claimant submits that, by way of this application, the respondent is attempting to establish a status quo that will be very difficult to change at trial. The claimant submits that it is in E.'s best interest, at this age and stage of her life, to maintain the equal parenting schedule established by the Warren Order and that has only recently come into full effect. The claimant acknowledges that there will be an inevitable change once E. starts school, but he submits that need not occur now. On this point, he notes that pre-kindergarten is optional and not part of the formalized school program.
- [15] Both parties cite s. 216 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], that deals with the authority of the court to vary an interim order, such as the Warren Order. Section 216(3) provides that the court may do so where either of the following circumstances exist:

- (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.
- [16] Both parties also cite s. 37(1) of the FLA which, of course, mandates that the best interests of the child is the sole and governing consideration when making any order concerning parenting arrangements. Section 37(2) sets out a number of factors that will inform the analysis of the child's best interests, many of which were considered by Justice Warren in reaching her decision.
- [17] I am not satisfied that there has been a change of circumstances that would support an order varying the Warren Order.
- [18] The change in circumstances that is required by s. 216(3)(a) must be a material change: *B.K. v. J.B.*, 2015 BCSC 1481 at para. 19. In *D.N.L. v. C.N.S.*, 2013 BCSC 858 at para. 25, Justice Pearlman defined a material change in circumstances succinctly as follows:

As the Court explained in *Willick v. Willick*, [1994] 3 S.C.R. 670 at para. 21, a material change in circumstances means "a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation."

- [19] The respondent submits that the material change of circumstances is E.'s impending attendance at pre-kindergarten. I do not agree. The issue of E.'s schooling, while not the central issue before Justice Warren, was clearly known to the parties and was touched upon by Justice Warren in her reasons. The fact that the school question was known to be an issue between the parties did not change Justice Warren's view that equal parenting, at least at present, is in E.'s best interest.
- [20] In any event, I am also not satisfied that it is in E.'s best interest to be enrolled in pre-kindergarten in West Vancouver, given the change to the parenting arrangement that would entail.
- [21] As I have noted, Justice Warren engaged in an analysis of the s. 37 factors and concluded that it was in E.'s best interest to move towards an equal parenting arrangement. Nothing has changed since the hearing before Justice Warren and again, the equal parenting has only just been fully implemented.
- [22] As noted, the respondent submits that her proposed new parenting schedule will not significantly diminish the claimant's parenting time with E. given that he has her registered in daycare for much of the time when she is scheduled to be in his care. Plus, the claimant will have more weekend time with E.
- [23] The claimant acknowledges that E. is registered in daycare, but says that she does not attend all of the time. The registration is to ensure that she can attend when it is needed.

- [24] In my view, the respondent's proposed new parenting schedule does represent a reduction in the claimant's parenting time, from essentially equal time to roughly six days per month plus alternate Sundays when she is in ski school. Given Justice Warren's finding that equal parenting time is in E.'s best interest, such a reduction is both significant and unwarranted.
- [25] Further, the fact that E. may spend some time in daycare during the claimant's parenting time is not unusual and, in fact, reflects the normalization that Justice Warren spoke of. The reality is that many parents, particularly in divided families, make use of outside care providers in order to permit them to balance their work and home lives. That is not a reason to reduce their parenting time.
- [26] I would add that parenting time that is restricted to weekends is very different from week-day parenting time. It is very easy for the weekend parent to be seen as the "part time parent" which is the antithesis of what is intended in the equal parenting regime ordered by Justice Warren.
- [27] I have no doubt that the schools proposed by the respondent are good schools, although I put minimal weight on the Fraser Institute rankings. The choice of a particular school for a child is dependant more on the needs and interests of the child than on some artificial rank.
- [28] I also do not doubt that E. would likely enjoy attending either of the schools and would receive some benefit from doing so. However, the fact remains that pre-kindergarten is not required. Further, I am not satisfied that attendance at a private pre-kindergarten is necessary to ensure E.'s future academic success or that a failure to attend will prejudice her future development.
- [29] Certainly, in my view, whatever benefits that may accrue do not overcome the benefits associated with maintaining and growing the child's relationship with the claimant.
- [30] For these reasons, the respondent's application to enrol E. in pre-kindergarten is dismissed. I also decline to make any order with respect to E.'s enrolment in kindergarten, substantially for the same reasons, as well as the fact that kindergarten was not part of the respondent's application. I recognize that this may cause some difficulty with registration deadlines for kindergarten, but the parties will have to resolve those as they see fit.
- [31] I would add that my decision does not preclude the respondent from bringing an application in respect of kindergarten at a later date. The outcome of that application will likely turn on the circumstances existing at the time and how the equal parenting arrangements have worked in the interim period.

Document Production Application

- [32] The respondent seeks production of three categories of documents:
- a) Log books for any commercial vehicles owned or used by the claimant and/or his company, Alpine Works Contracting Ltd ("Alpine Works"), from January 1, 2017 to the present;

- b) Documentary evidence to substantiate the claimant's claims that certain companies, which are listed as associated or related companies to Alpine Works in its tax returns, qualify as such on the basis that the [C.] Family Trust owns the shares of the associated or related companies; and
 - c) The Trust Settlement Agreement and Financial Statements for the past three years for the [C.] Family Trust and any other trusts of which the claimant is a beneficiary.
- [33] The various document requests are all concerned with ascertaining the claimant's income under the Federal Child Support Guidelines, SOR/97-175 [Guidelines], an issue that is in dispute between the parties.
- [34] In the years 2015-2018, the claimant's declared line 150 income was:
- 2015 \$94,419 (including a dividend of \$82,600 from the [C.] Family Trust)
- 2016 \$46,700
- 2017 \$15,000
- 2018 \$15,000
- [35] It is the respondent's submission that the claimant's declared income does not reflect his actual or Guidelines income, particularly given his lifestyle.
- [36] In her application, the respondent describes attempts to get proper financial disclosure dating back to November 2018, and the difficulties she has encountered. It is apparent that the claimant has at times been dilatory in his production, however he has produced a significant amount of financial information to date.
- [37] Returning to the respondent's application, I will deal with each of the three categories identified by the respondent in turn.

Log Books for Alpine Works Commercial Vehicles

- [38] The respondent does not believe that the claimant declares all of the income he earns and she seeks production of the company's vehicle log books to substantiate the scope of work done by the company. She relies on s. 37.18.01 of the Motor Vehicle Act Regulations, B.C. Reg. 26/58 [Regulations], which require drivers of commercial vehicles to maintain a daily log book.
- [39] The claimant deposes that there are no log books and that he falls within the exceptions identified in s. 37.18.01(2) of the Regulations. For her part, the respondent deposes that she remembers seeing the log books when she and the claimant lived together.
- [40] It is difficult to resolve this dispute on the evidence before me. Documents relating to the operations of Alpine Works are producible. What I am prepared to order is production of any log books that do exist for commercial vehicles operated by or on behalf of Alpine Works or, alternatively, in accordance with s. 37.18.01 of the Regulations, all records in the

possession or control of the claimant and/or Alpine Works setting out each driver's hours and recorded activities for the period of January 1, 2017 to the present. If no such records exist, the claimant will produce an explanation of how the use of its commercial vehicles and its drivers' activities are recorded.

Associated and Related Companies of Alpine Works

- [41] With respect to the associated and related companies, information has been provided to the respondent indicating the basis for the references to those companies in Alpine Works' income tax returns. Recently, an accountant employed by Alpine Works and other companies controlled by the claimant's mother, provided an affidavit explaining the relationship and providing the central securities register for five of the six remaining active companies.
- [42] Information regarding one of the named companies, Nesters Crossing Holdings Ltd., was not provided. However, based on the evidence, there is no basis to order further production concerning any of these companies as there is no evidence that the claimant has an ownership interest in any of them.

[C.] Family Trust Documents

- [43] The most contentious document issue between the parties concerns trust documents relating to the [C.] Family Trust. This is a family trust controlled by the claimant's mother of which the claimant is a discretionary beneficiary. To date, the claimant has resisted production of any documents relating to the family trust on the basis that they are not within his possession and control and that his mother, as the trustee, refuses to produce the documents. As noted above, the claimant received a dividend from the family trust in 2015, but he says he has receive nothing since.
- [44] In support of her position, the respondent cites *Younger v. Younger*, 2017 BCSC 363, where the court ordered the payor spouse to disclose documents relating to a discretionary trust of which he was a beneficiary.
- [45] It is well established that a beneficiary to a trust has the right to disclosure of all trust documents. In *Lindholm v. Lindholm*, 2000 BCSC 0269, Justice Levine, as she then was, said at para. 29:

It is clear that a beneficiary is entitled to disclosure of all "trust documents". In *Re Ballard Estate* (1994), 20 O.R. [(3d)] 350 at 355-6; , Lederman J. quoted Halsbury's Laws of England, 4th ed., vol. 48, para. 830 (London: Butterworths, 1985) as follows:

Duty to give information to beneficiary. A trustee must furnish to a beneficiary, or to a person authorised by him, on demand, information or the means of obtaining information as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to where it is and full accounts respecting it, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder, or is only an object of a discretionary trust.

[Emphasis in original.]

[46] The Ballard Estate case referred to by Justice Levine is often cited for this proposition. There, Justice Lederman said at 351-52:

Both counsel recognized the principle that communications passing between an executor or trustee and a solicitor are not privileged as against beneficiaries who are claiming under the will or trust. The rationale was set out in the classic statement of Lord Wrenbury in *O'Rourke v. Darbishire*, [1920] A.C. 581 at pp. 626-27, , as follows:

If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own.

[47] It is therefore not open to the claimant to say that he does not have the trust documents and that his mother has refused to produce them. As the cases indicate, they are in fact his documents given his status as a beneficiary.

[48] That is not to say that all of the trust documents are producible to the respondent in this litigation. Documents relating to other beneficiaries or to other holdings of the family trust are not relevant. What is relevant are the terms of the trust as they relate to the claimant and any monies that he has received or is likely to receive in the future from the trust. Accordingly, consistent with what was ordered in *Younger*, I order that the claimant produce all documents relating to his status as a beneficiary under the discretionary trust, including the full terms of the trust, any trust deed, and all records of any money received by him from the trust from July 2016 to date.

Conclusion

[49] In summary, I make the following orders:

- a) The respondent's application to enroll E. in pre-kindergarten and to vary parenting time accordingly is dismissed;

- b) The claimant will produce the following documents:
- i) any log books that exist for commercial vehicles operated by or on behalf of Alpine Works or, alternatively, in accordance with s. 37.18.01 of the Regulations, all records in the possession or control of the claimant and/or Alpine Works setting out each driver's hours and recorded activities for the period of January 1, 2017 to the present. If no such records exist, the claimant will produce an explanation of how the use of its commercial vehicles and its drivers' activities are recorded; and
 - ii) all documents relating to his status as a beneficiary under the discretionary trust, including the full terms of the trust, any trust deed, and all records of any money received by him from the trust from July 2016 to date.
- [50] Success has to some extent been divided in that the respondent was successful on elements of her document production application. However, the issue of E.'s schooling and the proposed variation of the parenting schedule were the main issues between the parties. On those issues, the claimant was successful and is therefore entitled to his costs, payable in any event of the cause.

"Skolrood J."

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