
CANADA / JUDGMENT

S.S. v. K.B.

2016 BCSC 773

COURT

Supreme Court of British Columbia

DECIDED

29 April 2016

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2016 BCSC 773 S.S. v. K.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.S. v. K.B.,

2016 BCSC 773

Date: 20160429

Docket: E033564

Registry: New Westminster

Between:

S.S.

Claimant

And

K.B.

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for Claimant:

S.S.

(In Person)

Counsel for Respondent:

G.M. Green

Place and Date of Hearing:

New Westminster, B.C.

January 7, 2016

Place and Date of Judgment:

New Westminster, B.C.

April 29, 2016

Introduction

- [1] This is an application by the respondent seeking an interim order varying the parties' parenting time schedule as set out in the order of Master Tokarek, pronounced January 22, 2010.
- [2] The parties separated approximately six years ago. Pursuant to the order of Master Tokarek, the child, who is nine years of age, is with his father (the respondent) from Sunday at 5:00 p.m. until Tuesday at 6:00 p.m. on week one; and 10:00 a.m. on Saturday until 6:00 p.m. on Tuesday on week two. The rest of the time he is with his mother (the claimant).

Position of the Parties

- [3] The respondent seeks to vary the order of Master Tokarek such that the respondent will have the child from after school on Friday until the end of the school day on Wednesday on week one; and from Sunday at 5:00 p.m. until the end of the school day on Wednesday on week two.
- [4] He submits that since the order of Master Tokarek, there has been a change in circumstances. The child has begun to attend school and, the respondent submits, the claimant has demonstrated an inability and/or an unwillingness to provide the child with structure and routines, appropriate moral education and discipline, activities outside of the school, health care and a healthy diet. The respondent also submits the child has suffered emotional and physical abuse at the hands of the claimant.
- [5] The claimant in this application asserts there should be no change of the parenting schedule on an interim basis. Further, since credibility is a significant issue in this case, the matter should be determined at the trial that is scheduled to proceed in July 2016, when a judge will have an opportunity to see both parties and hear their evidence.

The Evidence

- [6] On this application, the respondent filed five affidavits of his own, as well as two affidavits from his wife and two affidavits from his mother. In addition, as an exhibit to one of his affidavits, the respondent attached a Views of the Child Report prepared by a registered psychologist.
- [7] In response, the claimant has filed two affidavits of her own.
- [8] According to the respondent's evidence, after the order of Master Tokarek, the claimant began behaving in an aggressive manner, including using profanity, throwing items at him, or otherwise attempting to injure him during numerous contentious transfers of the child. His affidavits also detail inappropriate e-mails and text messages he apparently received from the claimant in relation to the child, and conduct he apparently witnessed where the claimant was mistreating the child. She is also apparently delinquent in feeding the child and providing for his care, or getting him to bed or to his activities on time.
- [9] The affidavits from the other individuals, who are closely associated or related to the respondent, relay specific negative interactions they have had with the claimant regarding the child or instances where the child has told them things about his relationship with the claimant.
- [10] The claimant generally denies all of the above mentioned allegations in her own affidavits. She responds to specific paragraphs from those affidavits, offering her own explanations of the events in question. She also makes allegations about the respondent's abusive and harassing behaviour, including text messages and e-mails he sent her.
- [11] A continuing dissertation on the conflicts between the affidavits of these parties would not be a helpful exercise, other than to say that the conflicts are clear and appear throughout the materials filed. Where conflicts of this sort appear, matters are often inappropriate to deal with on these types of applications.

Analysis

- [12] The order putting in place the parenting schedule at issue in this case was expressly made on an interim basis. Courts are reluctant to grant applications to vary interim orders, which are summary in nature and provide rough justice. The rationale for this hesitancy was discussed by Madam Justice Martinson in *Hama v. Werbes* (1999), 66 B.C.L.R. (3d) 120 (S.C.), as follows:

- [8] The litigation process in this province is generally designed to resolve, at a trial, disputes between parties who are not otherwise able to resolve them. Family law disputes too often get bogged down on interim applications. Time and money that could be better used for other purposes, are spent dealing with them. Interim applications can also "add fuel to the fire" in acrimonious disputes. This can be particularly detrimental to any children who are involved in the dispute.
- [9] Day to day matters, such as who has the children when, and how living expenses will be paid, do need to be resolved on an interim basis.
- [10] Steps must also be taken to preserve the parties' legal interests until the trial. Various orders and injunctions are available for this purpose. In the family law context, s. 67 of the Family Relations Act is one remedy that serves this purpose.
- [11] These are, however, short term solutions, needed to provide a bridge between the filing of the claim and the trial.
- [12] If trial judges are not to get bogged down on interim applications, they certainly should not get bogged down on applications to vary interim orders. Therefore, interim orders, once made, should only be varied when there is a compelling change of circumstances, such that one or both parties would be seriously prejudiced by waiting until trial.
- [13] The court's ability to vary an interim order such as the one at issue here is now set out in s. 216 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the relevant portions of which read:
- (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).
- [14] These provisions were at issue in *B.K. v. J.B.*, 2015 BCSC 1481, wherein the husband sought a variation of an interim parenting order concerning the parties' son. Madam Justice Holmes held, at paras. 28-34, that on an application to vary an interim parenting order under s. 216(3) of the FLA, the court starts with the assumption that the interim order reflected the child's best interests insofar as they could be determined at the time of the previous order. Accordingly, the court's focus is on whether there has been a change in circumstances or new evidence since that order. If so, then the court will go on to consider the factors set out in s. 216(4). A change in circumstances or new evidence will not be sufficient to engage s. 216(3) unless it relates to the child's best interests: *B.K.* at para. 32.
- [15] The threshold consideration is therefore whether there has been a change in circumstances or evidence of a substantial nature has become available since the interim order of Master Tokarek.
- [16] On the state of the evidence, it is not possible to conclude that a change in circumstances has occurred since the interim order was made. The conflicts between the affidavits of the parties are simply too numerous and too fundamental for this Court to draw the necessary conclusions from them. There are untested allegations of conduct related to the child's health and emotional well-being, his need for stability, the ability of the parents to provide for his emotional and physical well-being, family violence, and the ability of the parties to effectively cooperate on issues affecting the child: see FLA, s. 37(2). Many of those allegations cut both ways, albeit the most serious allegations concern conduct of the claimant, and essentially all of them are wholly denied.
- [17] Nonetheless, the Court is now in possession of a Views of the Child Report, which was not available at the time the interim order was made. While the "substantial nature" of this evidence may be in dispute, I prefer to deal with that issue under the first factor set out in s. 216(4)(a). Therefore, in my view, this initial threshold has been met.
- [18] In terms of the substance of the Views of the Child Report, it is beneficial as a "transmission of the child's voice through an objective, third party", as the author notes. It expresses the position that the child would prefer to spend additional time with his father, the respondent, which is worthy of consideration and bears upon the best interests of the child: see FLA, s. 37(2)(b). However, it is also noted to be a "limited report based on limited information". The author was not in possession of information regarding the involvement of the Ministry of Children and Family Development, and he could not make specific guardianship or parenting time recommendations. It would be inappropriate to place too much stock in the report at this time, before the evidence of both parties has been heard and assessed, particularly given the author's discussion of the fact that there are competing explanations for the child's views, all of which seem to be present to some degree: alienation, affiliation, and estrangement. The trial judge will be in the best position to weigh these competing

explanations and determine what weight to ultimately accord the child's views.

- [19] The length of time since the order has been made obviously favours variance. As mentioned, interim orders are summary in nature and are designed to provide short term solutions until a trial on the merits can occur. Here, the interim order has been in place for much longer than such orders are generally intended, approximately six years at this point.
- [20] It is not possible to determine, based on the material provided, the purpose and intention of the interim order. There is no indication of any time period during which the interim order was to operate, no time for review of the order was set, and there is no indication that it was made on a "without prejudice" basis, unlike the child support order.
- [21] A trial of this matter has been scheduled and is set to proceed in July 2016, during which the issues can be canvassed on the basis of a complete evidentiary record containing the testimony of the parties and the credibility assessments of the trial judge.
- [22] The potential adverse effects arising from either making or declining to make an order varying the interim order, I regard as a neutral factor in this case. This harkens back to the conflicts in the evidentiary record adduced on this application. If the respondent's allegations are correct, there will perhaps be adverse effects as a result of maintaining the status quo until trial; on the other hand, there will perhaps be adverse effects as a result of disrupting the status quo if the claimant's allegations are correct. Essentially all of these allegations are disputed by the impugned party. It would be inappropriate to significantly change the parenting arrangement in circumstances where there are such issues and where there is a possibility of yet another change to those arrangements because of the upcoming trial. The upcoming trial is the proper forum for resolving these conflicts.

Conclusion

- [23] Based on a consideration of all of the factors set out in s. 216(4) of the FLA, I am not satisfied that the interim order of Master Tokarek should be varied at this time. Accordingly, the application to vary the order of Master Tokarek is dismissed. The issue of costs in relation to this application may also be dealt with by the judge in the upcoming trial.

"Ball J."

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