

CANADA / JUDGMENT

S.T.C. v. D.J.B.

2020 BCSC 103

COURT

Supreme Court of British Columbia

DECIDED

27 January 2020

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2020 BCSC 103 S.T.C. v. D.J.B. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: S.T.C. v. D.J.B., 2020 BCSC 103 Date: 20200127 Docket: E181408 Registry: Vancouver Between: S.T.C. also known as S.T.B. Claimant And D.J.B. Respondent Before: The Honourable Madam Justice Jackson Reasons for Judgment Counsel for the Claimant: G. C. Laschuk Appearing on his own behalf: D.J.B. Place and Date of Hearing: Vancouver, B.C. January 21, 2020 Place and Date of Judgment: Vancouver, B.C. January 27, 2020

Introduction

- [1] I published written reasons in this family matter on November 15, 2019, indexed as S.T.C. v. D.J.B., 2019 BCSC 1967 (the "Trial Reasons"). All terms used in the Trial Reasons have the same meaning in these reasons.
- [2] No formal order has been entered pursuant to the Trial Reasons.
- [3] On this application, the Claimant seeks the following orders:
- a) clarification of my order with respect to child support;
 - b) an order re-opening the trial to prove certain facts that have come to light since the trial regarding:
 - i. the views of S.M.B. on parenting arrangements; and ii. the sale price of the Family Residence; and
 - c) a stay of the order made in the Trial Reasons.
- [4] The Claimant was represented by counsel at the hearing, and attended the hearing with the parties' daughter, S.M.B. The Respondent was self-represented.
- [5] These reasons are brief due to the advice of Claimant's counsel that the deadline to file appeal materials is quickly approaching and that there is consequently some urgency.
- Evidence

- [6] The only evidence before me on the application was the Claimant's affidavit. While I have highlighted some of the evidence below, I have considered the entirety of the Claimant's affidavit.
- [7] The Respondent did not file an application response or a responding affidavit; however, he indicated he opposed to the orders sought. I permitted the Respondent to present oral submissions at the hearing. Where his submissions were in the nature of evidence, I have not considered that evidence.
- [8] According to the Claimant, both before and during the trial she had informal discussions with S.M.B. about parenting arrangements during which S.M.B. "always told me she wanted her home base to be with me." According to the Claimant, she was surprised to see that S.M.B. had not conveyed the same message to Dr. Elterman. The Claimant deposes that during the trial she "instructed my counsel to concede" that S.M.B.'s views were those represented in the Elterman Report, prepared pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA").
- [9] The Claimant presented the Trial Reasons to the Children without the Respondent's involvement. Based on the evidence, that does not appear to have been a joint decision made by the parties. The Claimant described her presentation of the Trial Reasons to the Children as being that: "The judge has made some recommendations about parenting and she suggested living 50% of the time with your dad, and 50% with me." According to the Claimant, the Children were upset by this information.
- [10] According to the Claimant, after being advised of the trial outcome S.M.B. disclosed to the Claimant that Dr. Elterman did not create an environment that facilitated S.M.B.'s ability to honestly share her views, and that she did not feel she could trust him with her true feelings.
- Clarification on Child Support

Legal Framework

- [11] The Claimant seeks clarification of three child support issues pursuant to Rule 15-1(18) of the Supreme Court Family Rules (the "Rules"):
- Does the Respondent owe child support for December 2019, and if so, is the amount \$756 or \$1,086?
 - For February to December 2019, did the Respondent owe \$756 or \$1,086 for child support?
 - Does the Claimant owe child support for January 2020?

Analysis

- [12] As noted in the Trial Reasons, a consent order was entered on February 5, 2019, for ongoing child support payable by the Respondent to the Claimant, in the amount of \$756 per month commencing February 1, 2019: Trial Reasons at para. 16.

- [13] As noted in the Trial Reasons, the Claimant sought retroactive child support from the Respondent for eight months, and only eight months, covering the period from June 1, 2018 through to and including January 2019, being the period from when the Children began living exclusively with the Claimant to the date the Respondent began paying child support pursuant to the consent order. The Claimant did not seek any additional retroactive child support.
- [14] I ordered retroactive child support payable by the Respondent to the Claimant in a lump sum amount of \$8,688, representing \$1,086 per month for the period of June 2018 through to January 2019: Trial Reasons at para. 122. The Respondent's child support obligation set out in the February 5, 2019 consent order, at the amount of \$756, was to continue through to and including December 2019. Beginning January 1, 2020, I ordered the Claimant to begin paying child support to the Respondent in the set off amount of \$449: Trial Reasons at para. 116.
- [15] Therefore, to clarify:
- a) the Respondent was ordered to pay child support in the amount of \$756 for December 2019;
 - b) the Respondent was ordered to pay child support in the amount of \$756 per month for February through to and including December 2019; and
 - c) the Claimant was ordered to pay child support in the amount of \$449 per month commencing January 1, 2020.
- [16] As a side note, the Claimant's application states the parenting change was to occur on January 1, 2020 (Part 3, para. 34), which is incorrect. Re-opening the Trial

Legal Framework

- [17] The Claimant seeks an order re-opening the trial pursuant to R. 14-7(3) of the Rules. As noted at the outset, the order arising from the Trial Decision has not yet been entered.
- [18] The Claimant seeks to re-open the trial to tender evidence with respect to two issues:
- a) the sale price of the Family Residence; and
 - b) the views of S.M.B. on parenting arrangements.
- [19] The proper considerations to apply when determining whether to re-open a trial were discussed by Justice Neilson in *Grewal v. Grewal*, 2016 BCCA 237:
- [71] A judge should address two primary considerations in deciding whether to re-open: first, is it probable that a miscarriage of justice would occur without reopening and, second, would a rehearing probably change the result? In general, a party should not be permitted to re-open if the sole purpose is to re-argue or re-cast its case. Nevertheless, new evidence is not an essential prerequisite to granting an application to re-open. It will always depend on the individual circumstances and the overarching concern of the interests of justice: *B.C. Gas Utility Ltd. v. Alpha Manufacturing Inc.*, [1999] B.C.J. No. 187 (S.C.) at paras. 16-17; *Sykes v.*

Sykes (1995), 6 B.C.L.R. (3d) 296 (C.A.) at para. 10; Moradkhan v. Mofidi, 2013 BCCA 132 at paras. 28-31.

Analysis

Sale Price of the Family Residence

- [20] The Claimant submits the Trial Reasons "would have been different" had I known the actual sale price of the Family Residence, and that that evidence would have enabled me to set out my property rulings with "even greater accuracy".
- [21] It is not unusual for the sale of the family residence to be outstanding at the time final reasons for judgment in a family law case are issued. Evidence of the actual sale price of the Family Residence would not have affected the Trial Reasons in this case.
- [22] At the hearing Claimant's counsel focused his submissions on an argument that the "real impact of the family residence's value may be seen in the context of any pretrial settlement offers made by the claimant that arguably should have been accepted", which might be relevant to the issue of costs. However, the Trial Reasons indicate that if either party wished to make submissions on the issue of costs, they were to advise the court of their intention to do so within 45 days of the date of those reasons. That period of time has elapsed. S.M.B.'s Views on Parenting Time
- [23] The Claimant seeks to elicit further evidence with respect to the views of S.M.B. on parenting time, either through my interviewing her, further expert evidence from Dr. Elterman, or a "hear the child" report prepared by a qualified person pursuant to s. 202 of the FLA.
- [24] While I make no finding with respect to the validity of the concerns expressed by the Claimant about Dr. Elterman's approach, I find those concerns to be inconsistent with the Claimant's suggestion that further evidence from Dr. Elterman should be elicited. Claimant's counsel proposed that the purported problems with the way Dr. Elterman previously interacted with S.M.B. could be cured in any subsequent assessment by way of a direction from the court that he be sensitive to S.M.B.'s need to feel comfortable. I do not feel it is appropriate for me to direct how Dr. Elterman, a licensed clinical psychologist, carry out his professional responsibility within his scope of practice in this case. Further, the report prepared by Dr. Elterman under s. 211 of the FLA is the most complete form of report that can be prepared and provided for the benefit of the court in the context of a family law case. As part of that assessment process S.M.B.'s views on parenting time were elicited.

- [25] In addition, the Claimant acknowledges that the views of S.M.B. which she now seeks to put forward, were known to the Claimant during the trial. Therefore, it is not new information; it is information that could have been put forward during the trial. As a matter of general practice, I have grave concerns about condoning an approach which would allow a parent to hold information in their back pocket, only to pull it out and seek to rely on it in the event they are unsuccessful in achieving their desired result at trial.
- [26] Further, in the particular circumstances of this case, the evidence which the Claimant seeks to tender would not have altered my decision with respect to parenting time. It may have led me to make an additional order that the parties continue the Children's counselling to facilitate the modification of the Interim Parenting Time Schedule, but my order that parenting time be equally shared by the parents would not have been different.
- [27] For all these reasons I am not prepared to order the re-opening of the trial. Stay of the November 15, 2019, Order

Legal Framework

- [28] In *L.R.N. v. A.A.V.*, 2005 BCSC 649, Justice Martinson discussed the test to apply when assessing a stay of a family law order:
- [29] The questions to be asked are these:
1. Is there a serious issue to be tried?
 2. Would the applicant suffer irreparable harm if the application were refused?
 3. Which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits?
- [30] However, the application of the test should be informed by the nature of the matter before the Court. The fact that the direct rights of a child of the marriage are at stake is a factor to be considered when assessing the balance of convenience.
- [29] Regarding irreparable harm in the context of a parenting time decision, Justice Cromwell in *Minister of Community Services v. B.F.*, 2003 NSCA 125, cited with approval in *A.A. v. S.N.A.*, 2007 BCCA 375 at para. 13, said the following:
- [13] A third clarification is necessary because, unlike *RJR-MacDonald*, this case involves the care and custody of children. It follows that the decision to grant or deny a stay must weigh and give effect to their best interests. In my view, this requirement leads to some modification of the irreparable harm aspect of the test. The primary focus in a case like this should be on the risk of irreparable harm to the children while, of course, taking due account of the rights of the parties. In addition, given the need for stability and finality in child custody matters, there will generally need to be circumstances of a special and persuasive nature, usually connected to the risk of harm to the children, in order to persuade the Court to grant a stay

- [30] The BC FLA requires the court to consider only the best interests of the children when making orders respecting parenting arrangements: FLA, s. 37(1).

Analysis

- [31] I agree with the Claimant there is a serious issue to be tried.
- [32] With respect to irreparable harm, the Claimant argues "there is considerable risk that mental or emotional harm" may come to the Children if a stay is not ordered. However, there is no evidence to support that conclusion. I am not prepared to rely on pure speculation as a basis for establishing irreparable harm. It follows that I find the Claimant has not established the Children would suffer irreparable harm if the stay is refused.
- [33] The Claimant also argues the balance of convenience favours a stay because she holds the primary residence with the Children and the Respondent has not fully exercised his parenting time in the last seven months due to what she describes in her application as "an apparent lack of interest on both the Respondent's and the Children's sides." The Claimant relies on paragraphs 70 and 71 of her affidavit to support that statement; however, in my view that is a skewed interpretation of that evidence. While the Claimant deposes she understands from S.M.B. that "the Respondent sometimes does not enquire about or press to see the Children", that does not necessarily indicate a lack of interest on the Respondent's part.
- [34] Further, implementing the transition of parenting time as ordered in the Trial Reasons is unlikely to adversely impact the Claimant's relationship with the Children. However, deferring that transition equates to prolonging the period of time the Respondent will be prevented from equally parenting the Children. At the hearing the Respondent expressed his interest in trying to make up for the time that was lost when he was prevented from having time alone with the Children and for the time during which his parenting time was restricted and to have a healthy loving relationship with them. In his view the Children have a right to a healthy and loving relationship with both parents, and the Children need to be supported towards that end.
- [35] S.M.B. is 14 and S.B. is 11. The window of opportunity for the court to play a role in facilitating the strengthening of the Children's relationship with their father is narrowing. I find the balance of convenience favours the Respondent.
- [36] I find it is in the best interests of the Children to dismiss the Claimant's application for a stay of my order.

Conclusion

- [37] For the reasons provided I make the following orders under the FLA:
- a) My order regarding child support in the Trial Reasons is as clarified in these reasons.

- b) The Claimant's application for an order re-opening the trial is dismissed.
 - c) The Claimant's application for an order staying the November 15, 2019, order is dismissed.
"Jackson J."
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Prepared on 25 October 2026 · Esheria