
CANADA / JUDGMENT

S.T. v. J.T.

2011 BCSC 1272

COURT

Supreme Court of British Columbia

DECIDED

5 August 2011

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2011 BCSC 1272 S.T. v. J.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.T. v. J.T.,

2011 BCSC 1272

Date: 20110805

Docket: E111404

Registry: Vancouver

Between:

S. T.

Claimant

And

J. T. and B. T. and S. S. T.

Respondents

Before: The Honourable Madam Justice Dardi

Oral Reasons for Judgment

Counsel for the Claimant:

R. Henderson

Counsel for the Respondent

J. T.:

N. L. Charlton and

C. M. Chamberlain (Articling Student)

Place and Date of Hearing:

Vancouver, B.C.

August 3 and 4, 2011

Place and Date of Judgment:

Vancouver, B.C.

August 5, 2011

INTRODUCTION

- [1] I have before me in this family law proceeding competing applications brought by the claimant S.T. and the respondent J.T.
- [2] I will briefly set out the background and the position of the parties, and will refer to the legal principles I must apply. I will then address each issue on the merits.

BACKGROUND

- [3] The parties were married on June 23, 2007. They are both 31 years old.
- [4] The parties separated on December 12, 2010 and reconciled on December 31, 2010. The parties separated permanently on April 28, 2011.
- [5] The parties have one child of the relationship, A., born August 25, 2008.
- [6] The father J.T. is currently self-employed as a pharmacist, and the mother S.T. is a homemaker and the primary caregiver for A.
- [7] The father resides in Richmond in the former matrimonial home.
- [8] The mother moved to Surrey in May 2011.
- [9] The parties attended a hearing on July 12, 2011, before Master Taylor with respect to the issue of the parenting schedule. Master Taylor ordered the following schedule for the father:
 - (a) every other week Monday at 7:00 p.m. to Thursday at 7:00 p.m.; and
 - (b) every alternate weekend from Friday at 5:00 p.m. to Sunday at 5:00 p.m.
- [10] The trial in this matter is scheduled for September 2012.

POSITIONS OF THE PARTIES

- [11] The father applies for an interim order for joint custody and guardianship, and for the appointment of a parenting coordinator.
- [12] The mother opposes an interim order for joint custody and seeks an order that a report, pursuant to s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], be prepared. Her overarching submission is that it is not appropriate to make any interim orders for guardianship and custody until a s. 15 report is completed. She also seeks an order that the parties have a right of first refusal for providing care to A. She has consented to the appointment of a parenting coordinator.

ISSUES

- [13] The questions on these applications therefore are as follows:
- (a) Should this Court make a determination with respect to an interim order for joint custody and guardianship at this time and, if so, is such an order appropriate?
 - (b) Should this Court order a s. 15 report and, if so, how should the fees for this s. 15 report be borne?
 - (c) Should the Court order that the parties have a right of first refusal for the care of A.?
- [14] I will address each issue in turn.
- [15] Before turning to the analysis of the issues, I note that these interim applications were heard over two days and voluminous affidavits were tendered, including affidavits of the parties' friends and family. There were comprehensive written submissions submitted by each party.
- [16] The evidence was extensively reviewed in counsel's submissions, and I need not repeat that now.
- [17] On these interim applications, I emphasize that I cannot resolve the conflicts on the affidavits and I am not making any findings of fact.
- [18] However, I must assess on an interim basis whether the evidence demonstrates that it would be in A.'s best interests to grant the orders sought.

INTERIM JOINT GUARDIANSHIP

Legal Framework

- [19] The paramount consideration for this Court is the welfare and best interests of A. In this case, her best interests must be found within the practical context of the reality of her parents' lives and circumstances: *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 46.

- [20] Section 16 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and s. 24 of the FRA set out the statutory framework which guide the courts' determination of what is in the best interests of a child.
- [21] The Divorce Act mandates that in making an order, this Court shall take into consideration only the best interests of the child as determined by reference to conditions, means, needs, and other circumstances of the child: s. 16(8). The Court shall give effect to the principle that the child should have as much contact with each parent as is consistent with the child's best interests and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact: s. 16(10).
- [22] The Court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent to the child: s. 16(9).
- [23] In British Columbia, s. 24 of the FRA provides guidance as to the factors to be taken into account in assessing the best interests of the child. They include:
- (a) the health and emotional well being of the child, including any special needs for care and treatment;
 - (b) if appropriate, the views of the child;
 - (c) the love, affection and similar ties that exist between the child and other persons;
 - (d) education and training for the child; and
 - (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.
- [24] Sections 24(3) and (4) authorize the Court to consider the conduct of the parents but only insofar as it "substantially affect[s]" one of the factors set out in ss. 24(1): *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014 at paras. 9 and 32.
- [25] Each child is entitled to individual justice and the Court must undertake the best-interests analysis free of any legal or factual presumptions: *Robinson v. Filyk*, 1996 BCCA 733 at para. 22.

Discussion

- [26] The mother opposes the interim order for joint guardianship sought by the father. She grounds her submission in the parties' problems with communication, and in what she characterizes as the father's questionable parenting capability. She also asserts that because of his career commitments and work schedule the father had limited involvement with A. during the marriage.

- [27] It is in A.'s best interests to have a close and loving relationship with each of her parents. She should have significant contact and a meaningful relationship with both her mother and father. The role of this Court is to find an arrangement that best meets A.'s needs in difficult circumstances: *L.E.G. v. A.G.*, 2002 BCSC 970 at para. 83.
- [28] In assessing A.'s best interests pursuant to s. 24 of the FRA, I accept that both parents love her. Based on the evidence adduced on these interim applications, both parties appear to be committed parents who are capable of discharging their parental responsibilities. A. is too young to provide her views and she is also too young for education to be a major factor in the analysis. Thus, the factors which must be given primary emphasis in this case are A.'s health and emotional wellbeing, and the capacity of each of her parents to exercise custody and guardianship rights.
- [29] It is in A.'s best interests to have parental decisions made by both her parents if they can place her interests ahead of their own. I am satisfied on the evidence that both parents are capable of doing so and that the father, as well as the mother, should have a role in decisions regarding A.
- [30] The evidence also demonstrates that without such an interim order, there is a real risk that the father will not be afforded a reasonable opportunity to participate in parental decision-making. I note that, without prior consultation with the father, the mother moved from Richmond to Surrey, withdrew A. from the activities she was registered in at the Point Grey Community Centre, enrolled her in classes in Surrey and White Rock, and enrolled A. for a 5-day Montessori pre-school in Surrey commencing in September 2011. It is not in A.'s best interest for her mother to make decisions unilaterally, informing her father only after the fact. My concern is that without an order for joint guardianship, the mother will continue to make unilateral decisions concerning A. without consultation with the father.
- [31] While I appreciate that the mother perceives that she is continuing in the role that she assumed during the marriage, the reality of her circumstances have now changed. She must recognize the importance of A.'s father having significant involvement in A.'s life.
- [32] In my view, it would be beneficial for some parameters to be put in place to facilitate the parties' joint decision-making.
- [33] In my assessment of A.'s best interests, I have not overlooked the difficulties her parents have experienced to date with communication.
- [34] The separation was fairly recent and was difficult for all concerned. I have considered the various allegations, including the threatening voicemail left by the father prior to separation, the confrontation which culminated in the final separation, and the exchange of text messages following separation. While the behaviour of both parties at various times was entirely inappropriate, immature and reflected a lack of judgment, I am satisfied that these exchanges were fuelled by emotion in the throes of a clear deterioration in the marital relationship and the inevitable separation. The evidence does not establish that violence or

aggressive behaviour was a concern during the marriage. Nor does the evidence demonstrate sufficient concern that violence or aggressive behaviour will be a continuing problem or that this inappropriate behaviour will likely be repeated.

- [35] In summary on the issue of interim joint guardianship, I am satisfied that A.'s best interests are served with an order that parental decision-making be made by both her parents and not by the mother alone. I have concluded that an interim order for joint guardianship will be conducive to the continuation and development of A.'s healthy and meaningful relationship with both her parents. With the assistance of a parenting coordinator and with the parenting schedule in place, the parties should and must work together to resolve their conflicts for the benefit of A.'s emotional health, wellbeing and education. In the result I order that, on an interim basis, the parties have joint guardianship of A.
- [36] However, I am not persuaded that on these interim applications it is necessary or appropriate to make an interim order for joint custody.
- [37] As I stated earlier, the mother has consented to the terms of the appointment of a parenting coordinator. The terms of the interim joint guardianship order and the appointment of the parenting coordinator shall be as follows:
1. An interim order that the mother and the father have joint guardianship of A. Joint Guardianship is to be defined as follows:
 - a. The mother and father are the joint guardians of the estate of A.;
 - b. In the event of the death of either parent, the remaining party will be the sole guardian of A.;
 - c. The mother and father each have the obligation to advise the other parent of any matters of a significant nature affecting A.;
 - d. The mother and father each have the obligation to discuss with the other parent any significant decisions which have to be made concerning A., including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of A.;
 - e. The mother and father each have the obligation to try to reach agreement on major decisions;
 - f. In the event that the mother and father cannot reach agreement with respect to decisions despite their best efforts,
 - i. the parties will consult their parenting coordinator and attempt to mediate the issue with their parenting coordinator, and in the event the parties are unable to mediate an agreement about a decision, the parenting coordinator shall make the decision, provided that it is an issue that the parenting coordinator has jurisdiction over (as defined below), or

- ii. if it is a matter that the parenting coordinator does not have jurisdiction over, the parties agree that they will attend mediation, prior to proceeding to court.
- g. each party shall have the right to obtain information concerning A. directly from third parties, including teachers, counsellors, medical professionals, and third-party caregivers.
2. The parties shall appoint Stephanie Fabbro as a parenting coordinator forthwith of the within Order being made by this Honourable Court, and continuing until the trial of this matter (scheduled for September 2012), with liberty of the trial judge to extend the appointment. If Stephanie Fabbro declines to accept the parties as clients, the parties' respective lawyers will jointly appoint a parenting coordinator on their behalf.
3. The parties shall share the parenting coordinator's fees in proportion to their incomes, although the parenting coordinator has the discretion to allocate fees and disbursements in another manner if the parenting coordinator considers that fair.
4. In the course of the term of the parenting coordinator's appointment, the jurisdiction of the parenting coordinator shall include the following:
- a. Assisting with the implementation, maintenance and monitoring of Court Order, agreement, or written decision concerning A. (the "Parenting Plan");
- b. Settling anticipated or actual conflicts in child scheduling;
- c. Clarifying and resolving different interpretations of or ambiguities in the Parenting Plan, and developing new provisions to address situations that were not anticipated;
- d. Monitoring A.'s adjustment to the Parenting Plan;
- e. Facilitating A.'s relationship with each parent;
- f. Assisting the parents in communicating more effectively with one another;
- g. Facilitating the exchange of information about A. and her routines;
- h. Resolving disputes about the education of A., including but not limited to where A. will attend school;
- i. Resolving disputes about the participation of A. in extracurricular activities and special events;
- j. Resolving disputes about the temporary care of A. by someone other than a parent or a person who has contact under the Parenting Plan;
- k. Resolving disputes about the routine medical, dental or other health care of A.;
- l. Resolving disputes about the discipline of A.;

- m. Resolving disputes about the transportation or exchange of A. between the parents and assisting in developing provisions for the transport of clothing, equipment, toys and personal possessions between the parents' households;
 - n. Resolving disputes about the sharing of parenting time on holidays and special occasions; and
 - o. Subject to the areas the parenting coordinator does not have jurisdiction over, as defined below, any additional services which the parents and the parenting coordinator agree in writing that the parenting coordinator will perform.
5. The parenting coordinator shall not have jurisdiction over the following:
- a. Making substantial changes to the Parenting Plan;
 - b. Creating or changing an obligation to pay basic child support with respect to A.; and
 - c. Making determinations concerning the relocation of A.
6. If either party is dissatisfied with any decision of the parenting coordinator, they may apply within 7 days of receipt of the decision to the Court for a review of that decision, at which time the decision may be affirmed or varied based on a fresh inquiry into the best interests of A.
- [38] I also order that the parties not speak negatively about the other or the other's family with A. or in the presence of A.
- [39] Before turning to the next issue I caution both parties that if a substantial conflict develops it is always open to the Court to vary this order. Upon further application to vary this order or at trial, the party who undermines the success of this arrangement risks the loss of the privilege of being a joint guardian: M.M.A. v. R.K.A., 2003 BCSC 980 at para. 17.

SECTION 15 REPORT

- [40] Section 15 of the FRA provides the Court with the authority to direct an investigation into a family matter by a person approved by the Court. The mother forcefully submits that a s. 15 report should be conducted immediately. The father asserts that a s. 15 report is unnecessary and, in any event, premature.
- [41] I have reviewed the authorities provided by both counsel on this issue. The ordering of a report is a matter of discretion for the Court. It emerges from the authorities that it must be approached with caution, ordered only when necessary, and it must be demonstrated to be in the best interests of the child. In this case, although the evidence does not show a demonstrable clinical concern involving A., the mother has expressed concerns that A. has exhibited negative behaviour following parenting time with her father, and that A. is having difficulty with the transition.

- [42] In all the circumstances, I am satisfied that the expert evidence of a neutral third party with specialized training would be of assistance to the Court and the parties in determining the appropriate parenting arrangement.
- [43] However, I agree with the father that the report is premature. In my view, it is important that the new parenting schedule be in place for a reasonable period of time before the assessment is conducted. Moreover, the trial is over a year away. If the report were completed now, it would likely need to be updated before trial.
- [44] I understand the parties have agreed that if the Court ordered such a report, it would be prepared by Dr. Rebecca England.
- [45] In the result, I am ordering an investigation to be conducted by Dr. England pursuant to s. 15 and, unless the parties agree otherwise, the commencement of such investigation is to be conducted no earlier than November 1, 2011.

Section 15 Report Fees

- [46] It is uncontroversial that the mother is currently unable to afford the cost of a s. 15 report, and that the father is able to pay those costs.
- [47] The father's counsel contended that if the Court ordered such a report, he would be prepared to pay those costs up front, but asserts that the costs be shared equally upon the resolution or determination by the Court of the financial issues in the litigation.
- [48] In my view, it is fair and just that the father initially bear the costs of the s. 15 report subject to the final determination of the trial judge as to the appropriate allocation of those costs.

RIGHT OF FIRST REFUSAL

- [49] The mother asserts that it is in A.'s best interest that care be provided by the other parent in priority to a third-party caregiver. The mother therefore seeks an order with respect to a right of first refusal to the effect that when either parent is working or is otherwise engaged for more than two hours, that parent shall advise the other party in advance and the other parent shall be at liberty to provide care for A. in priority to a third-party caregiver.
- [50] The father submits that having a court-ordered right of first refusal is inappropriate and not in A.'s best interests.
- [51] The current parenting schedule provides the father with access on 5 out of 14 nights. As a result of the schedule ordered, A. is in the mother's care for eight consecutive days, and then with the father for two nights, the mother for one night, then with the father for three nights. Both the father and the mother have expressed concern about some of the practicalities of that order. As I indicated during the hearing, there is no application before me to vary Master Taylor's order and I decline to do so.

- [52] During the parenting time ordered by Master Taylor, the father works on Wednesdays from 8:00 a.m. to 1:00 p.m., on Saturdays from 9:00 a.m. to 12:00 p.m., and Sundays from 11:00 a.m. to 1:00 p.m. There is also travel time for his drive into Vancouver from Richmond.
- [53] The mother is a full-time homemaker and she says she has no responsibilities that interfere with her ability to care for A.
- [54] As I have mentioned earlier, it clearly emerges from the authorities that A. has a right to a meaningful relationship with both of her parents. Each parent should be allowed to involve her in different aspects of his or her everyday life. It is also in her best interest to spend time with both her paternal and maternal grandparents, who clearly love her very much.
- [55] I agree that the mother's proposal for parenting time with A. during the father's scheduled parenting time would be unduly disruptive to A.'s schedule with him. A court-ordered right of first refusal for a time period of two hours is not in A.'s best interests and would amount to a significant interference with the father's parenting and other commitments.
- [56] However, I am of the view that if either parent is otherwise engaged for more than four hours, and A.'s grandparents on the respective parent's side are not available to care for her, it would be in A.'s best interests that her other parent has a right of first refusal to care for her.
- [57] Once the parents have operated under the new parenting schedule, it would be preferable that there be some flexibility and cooperation in these arrangements; agreements in this regard could be facilitated with the assistance of the parenting coordinator.
- [58] Finally, I wish to add that I am grateful to counsel for their thorough submissions.

COSTS

- [59] If the parties are unable to agree on costs the mother shall file a written submission by September 9, 2011, and the father is to file a written submission in response by September 16, 2011.

"Dardi J."

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Prepared on 29 October 2026 · Esheria