

CANADA / JUDGMENT

T.N.A.K. v. I.A.K.

2023 BCSC 2549

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DECIDED

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2023 BCSC 2549 T.N.A.K. v. I.A.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.N.A.K. v. I.A.K.,

2023 BCSC 2549

Date: 20231207

Docket: E68736

Registry: New Westminster

Between:

T.N.A.K.

Claimant

And:

I.A.K.

Respondent

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

D.K. Smith

Counsel for the Respondent:

G.S. Dale

Place and Date of Hearing:

New Westminster, B.C.

December 1 and 5, 2023

Place and Date of Judgment:

New Westminster, B.C.

December 7, 2023

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition. Given some of the allegations being raised, I have anonymized the names of the parties.
- [2] There are two cross-applications before the court today. The claimant brings an application for a protection order with a police enforcement clause, and the respondent brings an application for joint parenting, a Christmas parenting schedule, and an order regarding the daycare that the parties' child is to be enrolled in.

Background

- [3] By way of background, the parties are unmarried spouses who began cohabitation in August of 2021 and separated on September 14, 2023. They have one 18-month old child together. Given the child's young age, the claimant has just recently returned to work after taking maternity leave, meaning that she has been the primary caregiver for the child since his birth while the respondent continued to work. There are disagreements between the parties as to the amount of involvement the respondent has had in respect of the child's care since that time.
- [4] In anticipation of her return to work, the parties researched daycares and decided to enroll the child in Smilestones Junior Kindergarten and Daycare ("Smilestones") in Surrey. However, after the separation and the claimant's relocation to her parents' residence in Port Coquitlam, she enrolled the child in a new daycare in Coquitlam.
- [5] The claimant alleges that the relationship between the parties has been acrimonious since she learned she was pregnant, with what is described as an increasing level of animosity directed toward her by the respondent, culminating in physical abuse. In addition to allegations of insults, derogatory statements, and demands of the claimant vacating "his house" with profanities laced therein, particulars of the allegations of incidents of physical violation include a fight at Christmas 2022 culminating in the respondent throwing a mug at the wall, a May 2023 incident where the respondent punched a hole in a closet door, and the event that led to the separation, that being an altercation that started on September 13, 2024

and continued the next day on September 14, 2023 (the "September Incident").

- [6] The specifics given by the claimant in respect of the September Incident are significant and include allegations that the respondent grabbed the claimant by the throat and repeatedly pushed her to the ground while the respondent held the child. After going to work, the police attended at the respondent's workplace and took him into custody. He spent the night in jail. He was released on an undertaking on the usual conditions that one would expect with such incidents. Eventually, after approximately seven weeks, the respondent was able to return to the former family home in South Surrey as the claimant had, by that time, left the residence.
- [7] The police have now apparently indicated that no charges will be laid in respect of the family violence generally, or the September Incident specifically. However, an investigation may be ongoing with respect to the respondent's possession of a handgun found at the former family home at the time of the September Incident. Although the respondent advises the court that he has been informed by the police that no charges will be laid in respect of the hand gun, which he denies was his gun.
- [8] The allegations of family violence are denied almost entirely by the respondent. He does, however, admit that he has used derogatory terms and profanity against the claimant when frustrated.
- [9] Both parties point to discrepancies in the other's evidence which they argue support that the other lacks credibility. For example, the respondent points to various statements made by the claimant that he states were misleading, including in respect of statements made in court specifically regarding the residence at the former family home when she was, in fact, residing at her parents' house as she continues to do as of the time of this hearing.
- [10] The claimant points to videotape evidence of the respondent after the September Incident was over, at which time the respondent continued on with what could be best described as a tirade, which the claimant argues is inconsistent with his evidence or at least the tone of his evidence which minimizes the extent of the September Incident and the nature of the language used by him.
- [11] I will pause to say that in the response materials, the respondent opposed the introduction of the videotape evidence as a surreptitious recording, however in the interests of being pragmatic, decided not to pursue that during the hearing. The respondent did also seek to use the fact that the claimant made such surreptitious recordings as evidence to impeach the claimant's credibility. His argument is that despite the claimant saying that this event was terrorizing, instead of leaving she appears to have pulled out her camera to videotape the respondent's outburst which, in his submission, suggests that she was not as fearful as she indicates.

- [12] One incident subsequent to the separation is as of note, as it illustrates the differences in the parties' perception of what could be the same event. On September 28, 2023, the respondent attended at the claimant's mother's house and retrieved a vehicle that the claimant was using but was registered in his name. The evidence of the respondent is that he attended with the police so as not to breach any court orders or conditions and was given the keys by the police, with him assuming that they were given to the police by the claimant. His evidence is that the police inspected the interior of the car before he left with it.
- [13] The claimant describes this as a threatening action with the respondent appearing unannounced, which she says was made to intimidate her, and that personal effects that were in the car, such as a wallet, were stolen by him. It will likely only be with further evidence, such as the police file itself, that the true circumstances of that attendance at the claimant's parents' home will ultimately be resolved.
- [14] There were other examples that each party pointed to which illustrate the lack of credibility or forthrightness in the evidence of the other. In the interests of time I will not detail those, but have considered them.
- [15] Suffice it to say some of the explanations of the respondent seem more likely than that of the claimant, and some of the claimant's seemed more likely than the respondent.

The Law and Analysis

- [16] On an interim application such as this the court is not in a position to resolve credibility disputes as both parties sought to have the court undertake in this application. Those determinations will likely need to be resolved in trial, when a more fulsome assessment of credibility can be undertaken. Rather, the court seeks to achieve a form of rough justice and, when doing so in the context of parenting, does so having regard to s. 37 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") and best interests of the child and, in the context of the protection order being sought, does so in order to prevent family violence that the court finds is likely to occur.
- [17] I will address the applications in the order that they were argued.

The Protection Order

- [18] Section 183 of the FLA governs the granting of a protection order. There is no dispute that the claimant and the child are at-risk family members as defined in the FLA. However, in order to make a protection order, the court must be satisfied that family violence is "likely to occur in the future." In doing so, the court must consider the risk factors set out in s. 184(1). I will address each of those factors in turn.
- (a) any history of family violence by the family member against whom the order is to be made;
- [19] I have detailed the history above and find that there is a history of family violence.

- (b) whether any family violence is repetitive or escalating.
- [20] Based on the evidence as it exists, it appears clear that the conflicts have been escalating. In my view, this is a factor for consideration.
- (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member.
- [21] The nature of the insults and derogatory language used by the respondent, even as admitted by him, shows a pattern of coercive and controlling behaviour.
- [22] While I acknowledge that the respondent indicates that these were in times of frustration or anger as a result of interactions with the claimant during heightened conflicts, they do exist.
- (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate.
- [23] The current status is such that any risk is likely to be reduced given that the parties are no longer living together. However, I do note that there will be continuing stress between the parties due to the ongoing litigation. Some of that can be largely minimized by avoiding interactions with each other, for example, by ensuring that any transitions are done in public places, as has been done since the parties separated.
- (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence.
- [24] The respondent's use of recreational marijuana, although the respondent disputes that it is in any way of a concerning degree, and access to weapons even if they are not his property as he states, is relevant to this factor.
- (f) the at-risk family member's perception of risks to the at-risk family member's own safety and security.
- [25] This is a factor that the court noted in *S.M. v. R.M.*, 2015 BCSC 1344, at para. 52, that the court is obliged to consider. The claimant here has detailed her concerns and based on some of the admitted language used by the respondent, has a perception of risk. Looking at the nature of the communication between the parties there is, objectively, a reasonable foundation for such fear.
- (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.
- [26] No specific argument was made with respect to this factor.

Is a Conduct Order More Appropriate

- [27] Another consideration of the court is whether or not a conduct order may be more appropriate, and sufficient to address any risk, perceived or real, to the applicant.
- [28] The respondent argues that the basic cause of the altercations between the parties has been financial. To paraphrase his position, based on the insults and profanities geared towards the claimant, he argues that they were the result of feeling that he was the only one carrying the financial burden of the household. Certainly, the transcripts and even the transcript of the videotaped evidence suggests that that seems to be the nub of the issue that causes many of the arguments that the parties have.
- [29] Given that the claimant is now back working and that they are no longer living together, the respondent argues that such conflict is unlikely to continue.
- [30] Regardless, the respondent submits that conduct orders are sufficient and address the claimant's concerns, relying on *M.A.G. v. J.L.A.*, 2018 BCPC 206; and *E.L.G. v. J.R.G.*, 2018 BCPC 215 ("E.L.G.") where the Provincial Court specifically considered family violence in the form of ongoing derogatory language and found conduct orders to be sufficient.
- [31] The court made a similar determination in *K.A.L. v. K.J.L.*, 2017 BCSC 651, a further decision relied upon by the respondent. However, I note in *K.A.L.* the court specifically commented at paras. 114 to 116 that one of the reasons for the court's confidence that the parties' conflict was unlikely to lead up to ongoing family violence was that a final order was being made. That was also the case in *S.M. v. R.M.*.
- [32] In contrast, in this case, the litigation is at its infancy. The claimant argues that the separation of family litigation such as this tends to heighten, not lessen, financial stress between parties while it is ongoing. In addition, it is of note that when the claimant was arrested, he did have a handgun in his possession, or at least access to it given that there was at least one gun in the home. While his evidence is that it was not his weapon, it is concerning that he has access to a gun, whether his or not.

Conclusion

- [33] While I am encouraged by the fact that the respondent has complied with the conditions imposed by him in the criminal proceedings and do believe that he will abide by any court order made, in considering the evidence objectively, including with a full context and explanations given by the respondent, I am satisfied that the incidents that have been described, including the September Incident, are ones of family violence even if I accept the respondent's version of events.

- [34] Looking at the entirety of the evidence, I am satisfied that there is a reasonable basis for the claimant to fear that family violence is likely to occur given the tendency for the conflicts to occur as a result of sudden angry outbursts at times of stress. It is likely that such times will occur in the future given the ongoing litigation.
- [35] As such, I make the orders as set out in paras. 1 and 2 of the notice of application filed November 8, 2023. However, I do so with the words "and school and daycare of" the child to be deleted from paragraph 1(b) and 2 and the first instance of the child's name in paragraph 1(c) to be deleted.
- [36] I am not satisfied that there is a risk to the child. While the child was witness to some of the altercations and some of the things said to the child by the respondent in the heat of the moment were derogatory to the claimant, I am satisfied that the risk of future family violence involving the child can be addressed with a conduct order. Accordingly, I also make the following conduct orders:
- a) The parties will:
 - 1) put the best interests of the child before their own interests.
 - 2) encourage the child to have a good relationship with the other parent and speak to the child about the other parent and that parent's partner in a positive and respectful manner.
 - 3) make a real effort to maintain polite and respectful communication with each other, refraining from any negative or hostile criticism, communication, or argument in front of the child.
 - b) The respondent will not claim, criticize, or disparage the claimant to the child.

Parenting

- [37] Turning, then, to parenting.
- [38] Currently the respondent is exercising supervised parenting from 5:00 to 7:30 p.m. on Tuesdays and Thursdays, with a longer time block on Saturday. The exchanges occur in public with the supervisor. It took some time for the respondent to get to this parenting schedule, as the Ministry of Child and Family Development ("MCFD") was originally involved, although has now closed their file. In addition, the respondent points to correspondence between the parties and counsel which he characterizes as being indicative of denial of parenting time by the claimant.
- [39] Roadblocks appear to have been put in place from time to time with each blaming the other for them, but with many of the issues arising from the logistics of arranging supervisors.
- [40] The respondent argues that he agreed to the supervision unilaterally imposed by the claimant so that he could have some parenting, rather than none. However, he denies that it is in any way necessary. In addition, he is having difficulty finding supervisors.

[41] The court has noted in various decisions that the establishment of supervised parenting is akin to no parenting at all given the conditions under which it occurs.

[42] In support of an equal parenting regime, the respondent relies upon *Walker v. Maxwell*, 2014 BCSC 2357, at paras. 62 to 83, where the court commented upon the social science evidence that supported the benefit of having both parents involved in the up bringing of children. At para. 80, the court summarized the findings as follows:

[80] For example, in the Kelly articles referred to above and, indeed, in a more recent presentation entitled "Parenting After Separation: Addressing Controversies in a Shifting Landscape" made by her on September 29, 2014 at a conference in Vancouver, BC, one can extract the following propositions which may arguably have great relevance to the present case:

- quality of parenting has emerged as a central variable and major predictor of child outcomes;
- independent of the positive outcomes of secure attachments with mothers, secure attachments with fathers are associated with later positive measures of self-esteem, self-regulation and compliance, social competence and peer relationships, cognitive and verbal skills, IQ, and emotional and behavioral adjustment;
- young children with involved fathers are more likely to be more sociable as infants, have a greater capacity for empathy, have better peer relationships and fewer behavioral problems;
- as children with involved fathers grow older they are more likely to solve problems better, have higher educational achievement and more satisfying adult relationships, and cope and adapt better to difficult life situations;
- early attachment formation with the involvement of both parents will usually best address the developmental needs of young children of separated parents; and
- the differences between fathers and mothers should not be exaggerated - both parents make independent and overlapping contributions to the child's development.

[43] I note, however, that this maximum-contact principle, while a consideration, has recently been noted to not be a paramount consideration in considering parenting orders. Rather, the best interests of the children, as noted in s. 37, is the paramount consideration.

[44] As such, the court must find on the evidence before it that the parenting schedule is in the best interests of the child. That may ultimately be one that has maximum contact between the parents, but that factor does not drive the consideration.

[45] Having regard to the factors set out in s. 37, I note as follows:

A) The child's health and emotional well being.

[46] There is no evidence of note before the court of this particular factor. From all accounts the child appears to be thriving despite the conflict between his parents. Although, unless the parties start to develop better skills in respect of their conflict, may not remain the case.

B) The child's views unless it would be inappropriate to consider them.

[47] Given the child's age, this factor is not relevant.

C) The nature and strength of the relationship between the child and significant persons in the child's life.

[48] The evidence illustrates a relationship with both parents. Despite the disagreement as to the full extent by each, it is clear that both parents have a large and strong family and social network that assists with parenting.

D) The history of the child's care.

[49] While the child's care has historically been carried out by the claimant, that has been due to the fact that she was on maternity leave. Thus, it was to some extent due to situational logistics. Now that she is back to work, her ability to provide childcare is equal to that of the respondent, with both drawing on assistance from their family and friends.

E) The child's need for stability given the child's age and stage of development.

[50] Given the child's age, there is value to ensuring that bonds with both parents are fostered now so those bonds may continue to grow in a healthy way.

F) The ability of each person to exercise their responsibilities.

[51] The allegation by the claimant is that the respondent's use of marijuana interferes with his ability to parent is denied by the respondent. Other allegations are general allegations being made by both parties that point to weaknesses on the other in parenting matters. Assuming the use of marijuana is as described by the respondent, I do not find any of the arguments in this respect to be anything other than what can be described as the typical disagreements as to parenting styles, as opposed to a lack of ability to exercise parenting responsibilities.

G) The impact of any family violence on the child's safety, security, and well being.

[52] There is nothing to suggest that any violence has been specifically directed towards the child. Given the protection order that I have now made, I am satisfied that there will be little likelihood of violence being witnessed by the child, as was the issue prior to separation. The respondent has shown that he abides by court orders.

H) Whether the actions of a person responsible for family violence indicate that the person may be impaired in their ability to care for the child and meet the child's needs.

[53] The general concern as to anger management issues is a legitimate one. However, I am satisfied that risk of those occurring during parenting now that the parties have separated is reduced.

I) The appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child.

[54] No particular emphasis was made to this factor. I do note that transitions have been made without conflict since the parenting has been re-established and having them continue in a public place is likely to prevent any further issues in this respect. However, the presence of supervisors during transitions may be a factor for the lack of conflict.

J) Any similar criminal proceedings relevant to the child's safety, security, well being.

[55] The claimant points to the possibility of charges being laid in respect of the gun charges. However, the evidence in this regard is largely speculative as to the reason the gun was in the home and whether charges will in fact be laid and any likely conviction as a result that would be relevant to this factor. However, as previously noted, the access to a gun is concerning generally.

Conclusion

[56] The parenting schedule being proposed by the respondent is a variation of a 2-2-5 schedule that will allow for equal parenting for both parties. In this respect, both parties work such that their schedules would be similar. Although the claimant does work some of her days from home. When she does do so, she does still take the child to the daycare.

[57] An equal parenting scheduling will be a marked increase from the current parenting.

[58] While I agree with the respondent that the current reduced parenting schedule is not the "status quo," as that term is generally considered in making parenting orders, given the young age of the child where consistency is of some importance, a court must be mindful of the impact that a significant change in parenting may have and whether doing so is in the best interests of the child.

[59] I am satisfied that, until separation, the respondent was actively involved with the child and his care since it was born and is fully capable of parenting. To the extent that there was more involvement by the claimant, that was, as I noted, situational in that she was on maternity leave and, the level of care by the claimant was as much as it could be given his work and age of the child. The claimant is now back to work.

[60] I can see no reason why the parties ought not share equal parenting. I am satisfied that it is in the best interests of the child that parenting be shared between them. As such, I make the order as sought in para. 1 of the notice of application filed November 28, 2023.

- [61] As to the holiday time, the respondent proposes to suspend the regular schedule to allow for specific parenting by the respondent from noon on December 24 until noon on December 25, with the claimant then having the child from noon of December 25, until noon on December 26, with the regular schedule then resuming at noon on Boxing Day.
- [62] I note the age of the child at 18 months is not of a sufficient age that they are going to be aware of the usual Christmas traditions, which I assume are in place. As such, the schedule is one being guided more by the parent's interests rather than the child's. Neither party specifically advised or made submissions with respect to their personal plans, other than the usual meals with family. Having regard to that, I am satisfied that this is a reasonable schedule for the holidays and presume that on a go-forward basis, as is usually the case, this schedule will then alternate and be the opposite after 2023, although an order beyond this year is not being sought at this time.
- [63] Given the allegations as to marijuana use, I will also make a conduct order as follows:
- a) The respondent will not consume any marijuana, THC, or controlled substances within the meaning of s. 2 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 except as prescribed by a licensed physician during contact or parenting time.

Daycare

- [64] That leaves us with the final issue, the determination as to the daycare the child ought to attend.
- [65] The respondent notes that the claimant unilaterally changed the child's daycare to one in Coquitlam instead of Smilestones, which was in Surrey and was the one that the parties agreed to and had fully researched. The respondent has tendered evidence as to the analysis that went into selecting Smilestones, including as to the school's philosophy, which is markedly different than that of a Montessori School, which was an option.
- [66] The claimant has not tendered any evidence regarding the new daycare specifically with respect to its philosophy, other than it being more affordable and convenient for her now that she is living with her parents. Although I note that the cost of Smilestones was known when it was selected and agreed to by the parties prior to their separation.
- [67] While I have concern that the consideration made by the claimant was more aligned with her own interests than that of the child, I agree with the claimant that the consideration of the court on this application is not what was in the best interests of the child when that decision was made, but what is in the best interests of the child now.
- [68] The child has formed bonds at that daycare. He is young, and although he has only been there at this point three or four months, such bonds remain important.

- [69] I agree that a change at this point may be detrimental given the other changes that are occurring in his life, including with respect to the increased parenting time. Given that transition to more parenting with the respondent, to the extent other factors can remain consistent, it is my view that it is in the best interests of the child that they remain so.
- [70] On a more technical basis, the claimant argues that the application as framed by the respondent is flawed, in that he relies on s. 222 and 227 of the FLA which addresses conduct orders. As noted in *Reda v. Birch*, 2022 BCCA 60, the choice of schools is a parental decision. While there is more recent authority on this point to support that there may be circumstances in which it is appropriate for the court to decide which the school the child ought to attend, I do not find this to be such a case.
- [71] I agree with the claimant. The court is generally not to micromanage and make decisions as to such parental matters. In any event, I am satisfied for the reasons noted above that it is in the best interests, having regard to consistency, that the child daycare remains as it is as of now. I dismiss the orders sought at para. 3 of the respondent's notice of application.
- [72] The parties did not make submissions as to the location for the parenting exchanges. The notice of application sought that they be at the daycare. Absent somebody suggesting otherwise, I will make the order at para. 4 but with the name of the daycare to be "Jasmine Childcare Centre" and will add "or such other location as the parties may agree."

Conclusion and Orders Made

- [73] In summary, I make the following orders.

Regarding the claimant's notice of application:

- a) Paragraphs 1 and 2 of the notice of application filed November 8, 2023, are granted as sought with the following to be deleted: the words "and school and daycare of" the child from paragraph 1(b) and 2, and the first instance of the child's name in paragraph 1(c).
- b) The parties will:
 - i. put the best interests of the child before their own interests;
 - ii. encourage the child to have a good relationship with the other parent and speak to the child about the other parent and that parent's partner in a positive and respectful manner; and
 - iii. make real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication, or argument in front of the child. The respondent will not blame, criticize, or disparage the claimant to the child.

Regarding the respondent's notice of application:

- c) Paragraphs 1 and 2 of the notice of application filed November 28, 2023, are granted as sought.

- d) The respondent will not consume any marijuana, THC, or controlled substances within the meaning of s. 2 of the Controlled Drugs and Substances Act except as prescribed by a licensed physician during contact or parenting time.
- e) Paragraph 4 of the notice of application filed November 28 is dismissed.
- f) Paragraph 5 of the notice of application filed November 28 is granted, but with the name of the daycare to be "Jasmine Childcare Centre" and the words "or such other location as the parties may agree" inserted.

[74] I will hear quick submissions as to costs.

(SUBMISSIONS ON COSTS)

[75] THE COURT: Given what is really a divided success, I agree with counsel that costs shall be in the cause.

"Associate Judge Robertson"

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