IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *E.A.B. v. K.J.B.*, 2016 BCSC 1167

Date: 20160624
Docket: E160140
Registry: Victoria

2016 BCSC 1167 (CanLII)

Between:

E.A.B.

Claimant

And:

K.J.B. and
G.A.B. and
J.S.B.

Respondents

Before: Master Bouck

Corrected Judgment: The judgment was corrected on July 7, 2016, by replacing the parties' full names with initials.

Reasons for Judgment

Counsel for the Claimant:	C.D. Starkey
Counsel for the Respondent K.J.B.:	N.W. Lott
Place and Date of Hearing:	Victoria, B.C. June 15, 2016
Place and Date of Judgment:	Victoria, B.C. June 24, 2016

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The Applications

[1] The estranged spouses in this family law proceeding bring cross-applications for orders that are intended to assist the court in determining parenting issues. The claimant wife seeks an order that Dr. Gloria Burima be appointed to prepare a report pursuant to s. 211 of the *Family Law Act,* S.B.C. 2011, c. 25. (the "*FLA*"). The respondent husband, K.J.B., objects to such an assessment and instead asks for an order that the parties obtain a Hear the Child report.

[2] The claimant asked for two other orders. First, an order that K.J.B. submit to an independent medical examination to be conducted by Dr. Burima. During the course of argument, the claimant agreed to adjourn that application generally. Second, the claimant sought disclosure of K.J.B.'s medical records. That order was essentially conceded. The scope of the medical record disclosure will be addressed later in these reasons.

[3] The respondents G.A.B. and J.S.B. are K.J.B.'s parents and named in the proceeding with respect to a family property claim. These respondents took no part in the parties' applications.

[4] For reasons which follow, E.A.B.'s application is allowed. Given that the s. 211 assessment will necessarily include an interview of the child, K.J.B.'s application must be dismissed.

The Evidence

[5] E.A.B. and K.J.B. separated in September 2014 after a 16-year relationship and 10-year marriage. The couple are the parents of T.M.B., who was born on July 18, 2005, and will soon be 11 years old.

[6] There are no orders or written agreements in place with respect to the parenting arrangements or responsibilities. Since their separation, the parties have largely shared the parenting of T.M.B. on a 5 day-5 day, 2 day-2 day schedule. That schedule has been interrupted from time to time due to K.J.B.'s health issues.

[7] During the marriage, both parties were employed as community program managers. E.A.B. is continuing to work in that capacity while K.J.B. is presently off work due to his medical condition. There is no evidence to suggest that K.J.B. is permanently disabled from all forms of employment. Rather, once K.J.B.'s health has stabilized, a return to the workforce is more than likely. The condition presently impacting K.J.B.'s ability to work is fatigue. In addition, having suffered a seizure, K.J.B.'s driving privileges are currently suspended by the Superintendent of Motor Vehicles. K.J.B. anticipates restoration of his driving privileges by the end of this month. K.J.B. has been reassured by his treating physicians that a future seizure is unlikely to happen.

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[8] E.A.B. suggests that ongoing medical conditions have impacted K.J.B.'s capacity to parent T.M.B. Specifically, E.A.B. deposes that since suffering a stroke in April 2014, K.J.B. has struggled with communication, understanding and remembering new information, managing stress and other emotions, and making appropriate decisions. Prior to bringing this application, E.A.B. believed that K.J.B. was living with and dependant on his parents. K.J.B.'s affidavit discloses that he lives on his own but relies on the assistance of his parents for transportation.

[9] K.J.B. acknowledges that past and ongoing health conditions have impacted his ability to work but denies any challenges with parenting T.M.B. Some of the health conditions pre-date the parties' separation, such as a history of depression. That condition arose following a surgery in June 2012, in which K.J.B. received a heart valve replacement. Since that surgery, K.J.B. has experienced cerebrovascular events in April and December 2014, August 2015, and December 2015. The April 2014 event is described by the medical personnel in differing terms but was essentially a stroke. The root cause of the stroke and subsequent events is said to be a bacterial infection in the replacement valve. K.J.B. denies having any cognitive impairment as a result of these events. However, the events have caused K.J.B. to suffer from ongoing fatigue as well as left visual field loss. K.J.B. has been hospitalized several times, including during periods when he would otherwise be parenting T.M.B. K.J.B. has not worked since the April 2014 event.

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[10] Medical reports from K.J.B.'s treating psychiatrist, cardiologist, neuropsychologist and family doctor were presented into evidence. E.A.B. takes exception, and even objection, to the court's reliance on these reports to the extent that the doctors opine on K.J.B.'s capacity or ability to parent. On that issue, none of the physicians give any contra-indications on K.J.B.'s ability to parent T.M.B. from a medical perspective. The treating psychiatrist states that "at no time have I had any concern for [K.J.B.'s] judgment and choices, be it for himself or his son." Nonetheless, K.J.B.'s treating psychologist acknowledges that she is not qualified to provide a "formal" parenting assessment.

[11] According to Dr. Burima's standard agreement, the following steps will likely be undertaken in the parenting arrangements and responsibilities assessment: interviews with and psychological testing of both parents; interview(s) with T.M.B.; observing T.M.B. in the care of each of his parents; interviews with collateral witnesses; and the review of relevant documents. On the matter of documents, Dr. Burima wishes to review K.J.B.'s medical records dating back to the valve replacement surgery in 2012.

[12] In her initial affidavit, E.A.B. makes somewhat broad and general statements about communication difficulties with K.J.B. over parenting issues. K.J.B. will not agree to her proposal that a parenting coordinator be retained. E.A.B. says that K.J.B. is not making full use of a communication book regarding T.M.B. E.A.B. deposes to "not knowing" whether the stroke or other medical conditions have impacted K.J.B.'s ability or capacity to parent T.M.B.

[13] K.J.B. answers all of these allegations in his evidence and blames E.A.B.'s unwillingness to speak to him as the cause of the communication breakdown.

[14] E.A.B. further alleges that T.M.B.'s emotional well-being has diminished since K.J.B.'s stroke and points to the child's attendance with counsellors as well as some comments made by T.M.B. in which he expresses concern for his father's health.

[15] It is only in her reply evidence that E.A.B. addresses specific incidents which might reflect the impact of K.J.B.'s medical condition on T.M.B. The incidents include two occasions when T.M.B. was required to call an ambulance to attend to K.J.B. From an objective perspective, in none of these instances was T.M.B. placed in any physical danger.

[16] K.J.B. says that T.M.B. is happy, thriving and showing no signs of emotional distress in the current shared parenting arrangement.

[17] Despite an objection raised by the claimant, I allowed into evidence an affidavit of Mr. Lott's legal assistant which exhibits a letter to the parties from the Ministry of Children and Family Development. Because the claimant had no chance to respond to this affidavit prior to the hearing and the exhibited letter is hearsay evidence in any event, I advised the parties that little weight would likely be attached to the content of that letter. The only fact arising from this evidence that has been considered in my deliberations is that the Ministry has conducted an assessment regarding the safety and well-being of T.M.B. and concluded that no action on its part is warranted.

[18] The only evidence offered with respect to the cost of the s. 211 report comes from K.J.B. who is told by his counsel that such reports cost "up to $10,000".

[19] In terms of the Hear the Child report, K.J.B. proposes that the parties choose an interviewer from the Hear the Child Society's roster. No costs estimate is provided for this report. K.J.B.'s counsel suggests that the cost will be much less than $10,000.

[20] These parties' attempts to resolve outstanding issues by alternative dispute resolution have been unsuccessful. A trial date is not yet scheduled.

The Other Relief Sought

[21] As noted, the claimant also sought an order that K.J.B. submit to a medical examination by Dr. Burima "respecting his mental condition". That application is

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brought pursuant to SCFR 9-5(1). When it was suggested by the court that such an examination might be redundant if a s. 211 report was ordered, claimant's counsel agreed to adjourn the relief generally. Without finally deciding the matter, I might suggest that the application is not only redundant given the now ordered s. 211 assessment, but perhaps also misconceived. E.A.B.'s counsel argued in oral submissions that K.J.B. should submit to a *neuropsychological* examination (my emphasis). Dr. Burima does not appear to be qualified to conduct such an examination. Having either read or heard the evidence as well as some of the argument made in support of this particular relief, I will be seized of the application if the matter is re-set for hearing.

[22] Despite opposing the relief in his response, K.J.B. acknowledged in oral argument that E.A.B. should be entitled to disclosure of the various medical records. Those records range from K.J.B.'s MSP and Pharmanet history to several consult reports authored by specialists as well as brain imaging results.

Parties' Positions

[23] E.A.B. submits that the s. 211 report is necessary to understand how K.J.B.'s medical conditions have affected his abilities to exercise parenting responsibilities. She says that a Hear the Child report is simply not sufficient information to address this question.

[24] K.J.B.'s position is that a s. 211 assessment is both unnecessary and prohibitively costly given the parties' financial circumstances. He also submits that such an assessment will be too intrusive, stressful and time-consuming for T.M.B., and thus not in the child's best interests. K.J.B. appears to believe that T.M.B. will be subjected to psychological testing. K.J.B. agrees that T.M.B.'s views on the current and future parenting arrangements ought to be obtained, with the Hear the Child report being the best mechanism available for that purpose.

[25] K.J.B. also says that there is no evidence of any "bad parenting" on his part that would justify a s. 211 assessment.

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Legal Principles

[26] As now enshrined in the *FLA,* a child at the centre of a parenting dispute has a legal right to be heard by the court: *B.J.G. V. D.L.G.,* 2010 YKSC 44. The child's views with respect to parenting issues may be expressed to the court indirectly or directly. One method of receiving those views indirectly is through a Hear the Child report. This type of report does not provide an analysis of the child's views as they might impact parenting arrangements or responsibilities. Nor does the author of the report make any recommendations with respect to parenting of the child.

[27] In contrast, a report ordered under s. 211 is intended to be a more comprehensive investigation of parenting issues and may include recommendations on the parenting arrangements that will meet and promote the best interests of the child. A s. 211 report is not ordered in every family law proceeding involving children. However, the applicant need only meet a low evidentiary threshold as such assessments are seen as "invariably providing a valuable source of information for a court faced with the onerous task of making fundamentally important decisions about the welfare of the child": *R.E.Q. v. G.J.K.,* 2015 BCSC 1786 at para. 32. The court recognizes that such a report is an intrusion into lives of both the parents and the child. Nonetheless, the probative value to be gained from the report generally outweighs that intrusion. The court has said that, generally speaking, only the cost of such a report will raise a countervailing concern: *Marsden v. Bercovitz* (3 October 2012), New Westminster E039404 (B.C.S.C.). In addition, a s. 211 report should not be ordered if the purpose is shown to be an attempt by one party to create parenting controversies where none exist or the process is found in some way to be contrary to the child's best interests.

Analysis

[28] The parties agree that outside assistance is needed to address parenting arrangements and responsibilities going forward and for the purposes of addressing those issues at trial.

[29] The question to be answered on this application is whether hearing T.M.B.'s views alone will be sufficient, or whether a more comprehensive assessment of T.M.B.'s needs and the ability and willingness of each parent to satisfy those needs is warranted. The claimant seeks to have only K.J.B.'s abilities and willingness to parent T.M.B. assessed. If the report is to be truly impartial and objective, Dr. Burima should be assessing both parents' capacities in that regard. T.M.B. will be interviewed by a third party if either a s. 211 assessment or a Hear the Child report is ordered. Contrary to K.J.B.'s submission, there is nothing in the evidence to suggest that T.M.B. will be subjected to psychological testing as part of the s. 211 assessment.

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[30] The pleadings were not before me on the application. Thus, I am left to speculate on what precise parenting issues are to be decided by the court at trial. It is fair to assume that by pursuing the s. 211 assessment, E.A.B. intends to argue for a parenting arrangement different from the status quo. Presumably, K.J.B. seeks the Hear the Child report to support his position that the shared parenting regime should continue indefinitely.

[31] None of the authorities cited by the parties describe with specificity the evidentiary threshold to be met for the court to order a s. 211 report, other than to say that threshold is low. To the extent that the parties disagree on the impact of K.J.B.'s medical condition on T.M.B.'s emotional well-being, have longstanding communication difficulties that each believe impacts T.M.B.'s best interests to a greater or lesser extent, appear to have different objectives on future parenting arrangements, and have been unable to resolve their differences through alternative dispute resolution, I find that the low threshold has been met. At the very least, this evidence will assist the trial judge in addressing not only the ability of each parent to exercise his or her parenting responsibilities and parenting time, but also the appropriateness of an arrangement that would require the parents to co-operate with each other: *FLA,* ss. 37 (2) (f) and (i). T.M.B.'s views will also be obtained in the assessment: s. 37 (2) (b). While medical opinions can address K.J.B.'s physical and

mental functioning capacity overall, these opinions are not a substitute for a parenting assessment. Even K.J.B.'s treating psychologist agrees with that premise.

[32] The parties' financial circumstances are not addressed in the evidence so it is impossible to consider whether the cost of the report, be it $10,000 or some other amount, is prohibitive. E.A.B. agrees to pay for the report at the first instance, subject to further agreement or court order apportioning that cost. In that regard, E.A.B. takes the risk that she will bear the cost entirely if, for example, the trial judge finds the assessment to be of no utility.

[33] There is no objection raised by K.J.B. with respect to Dr. Burima's qualifications to carry out the s. 211 assessment.

[34] Accordingly, in addition to the relief granted on June 15, 2016, it is ordered that:

1) Dr. Gloria Burima, registered psychologist, of 214 - 2187 Oak Bay Avenue, Victoria, British Columbia is appointed to conduct an assessment, pursuant to section 211 of the *Family Law Act, of:*

a) the needs of the child, T.M.B., born 18/Jul/2005,

b) the views of the child, T.M.B.; and

c) the ability and willingness of each of the claimant and the respondent K.J.B. to satisfy the needs of the child T.M.B.

2) The cost of Dr. Burima's services will be borne by the claimant, subject to final responsibility for this cost being determined at trial or by agreement between the claimant and respondent K.J.B.

3) Either of the claimant or respondent K.J.B. may apply for further directions regarding the conduct of the assessment, as necessary. I will be seized of those further applications, unless the parties otherwise agree.

4) The respondent K.J.B.'s application for an order that a Hear the Child report be obtained is dismissed.

5) The claimant shall receive her costs for both applications in the cause.

"C.P. Bouck"

Master C.P. Bouck

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