IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *T.J.G. v. A.D.G.,*
2017 BCSC 1511

Date: 20170601
Docket: E152376
Registry: Vancouver

Between:

T.J.G.

Claimant

And

A.D.G.

Respondent

Before: The Honourable Madam Justice Young

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:	B. Gabriel
Counsel for the Respondent:	G. Ahluwalia
Place and Date of Hearing:	Vancouver, B.C. June 1, 2017
Place and Date of Judgment:	Vancouver, B.C. June 1, 2017

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[1] **THE COURT:** Before me today are two applications. The respondent mother has brought an application for an order that a Hear the Child Report be completed pursuant to the *Family Law Act*, S.B.C. 2011, c. 25 ("*FLA*"). She does not specify whether the application has been brought under s. 211, s. 202 or s. 224(1)(b) of the *FLA*. An order could be made under any of those sections in my view.

[2] Also, there is an application brought by the claimant father for orders dealing with the allocation of specific parenting responsibilities, the pickup and drop-off times for the children, communications issues between the parties, conduct orders between the parties, holiday parenting time, the definition of s. 7 expenses, and the exchange of financial information for ongoing child support review.

[3] What is not applied for is a variation of the current parenting schedule.

Overlapping Jurisdiction

[4] The first application in the claimant father's notice of application is for an order that this proceeding be consolidated with the Provincial Court Action F6590. The only proceeding in Provincial Court is the filing of a written agreement made under the *FLA* dealing with guardianship, parenting time, and child support. The agreement was filed in Provincial Court on January 27, 2015. No further steps were taken in Provincial Court to enforce or vary that agreement. By virtue of s. 44(3) of the *FLA,* that agreement became enforceable under the *FLA* once it was filed in Provincial Court as if it were an order of the Provincial Court.

[5] Section 194 of the *FLA* deals with overlapping court jurisdictions if proceedings are started in both courts. Section 194(2) says:

> … the making of an order in one court does not prevent the application for an order in the other court, unless the relief that is the subject of the application to the court has already been granted or refused by the first court.

[6] Section 194(3)(c) says the court may consolidate proceedings started in one court with the other court, and that is what was applied for here.

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[7] A consent order to consolidate proceedings was granted at the judicial case conference. The case of *C.R.J. v. L.S.J.,* 2013 BCSC 1781, which I referred to earlier this morning, cautions that the exercise of the Supreme Court's discretion to hear matters or consolidate proceedings must be limited to the language of s. 194(2) of the *FLA*, which I just referred to. I am going to repeat it here:

> The marking of an order by one court does not prevent the application for an order in the other court, unless the relief that is the subject of the application in the other court has already been granted or refused by the first court.

[8] That begs the question whether the mere filing of an agreement in a court means that the Provincial Court has granted or refused an order.

[9] I suspect that it does, but I will invite further submissions on that point, if necessary. If the answer is yes, then this Court has no jurisdiction to review those agreements that are already made in the agreement filed in the Provincial Court. The parties cannot consent to give the Court jurisdiction if it does not have it.

[10] I have reviewed the agreement in some detail over the lunch hour, to see if relief that is being sought here today was already granted in Provincial Court.

[11] The agreement does acknowledge the parties are each guardians of the children and I do not think that is disputed here in any event. The agreement does address parenting responsibilities. It itemizes them and it says that the parties are to share those responsibilities equally. The agreement says that the parties share parenting time, but it provides no specifics of how the parenting time is to be divided. It does provide one uninterrupted 10-day parenting time period for each parent during the calendar year, and it addresses basic child support and provides that the parties will annually review basic child support.

[12] I find that the agreement does not address many of the items that are set out in the claimant father's notice of application.

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Decision on the Jurisdictional and Procedural Issues

[13] First of all, the *FLA* intended to introduce a new approach to family law and dispute resolution. The emphasis is on resolution, and I am referring to s. 199, which provides the court with some guidelines. It says the court must ensure that a proceeding under the *FLA* be conducted with as little delay and formality as possible, in a manner that strives to minimize conflict and, if appropriate, promote cooperation between the parties.

[14] It also says that if a child may be affected by a proceeding under the *FLA*, the court must consider the impact of the proceeding on the child and encourage the parties to focus on the best interests of the child, including minimizing the effect of conflict between the parties.

[15] I am mindful of those guidelines when I am taking a practical approach to this proceeding as opposed to a technical one. Although it is open to me to decline jurisdiction because there is no underlying pleading, I do not find that that would be in the best interests of these children. These children need the issues between their parents to be resolved quickly and effectively, so for that reason, I will make procedural orders to rectify the underlying technical deficiencies.

[16] First, this matter was brought in an action under the *Divorce Act,* R.S.B.C. 1985, c. 3 (2nd Supp.) where only an order for divorce was sought and no corollary relief was pleaded. That action ceased to exist once the divorce order was granted.

[17] In order to bring the parenting issues properly before the court, the parties need to file a new notice of family claim seeking corollary relief, so my first order will be that the claimant father is to file a notice of family claim within 14 days. The respondent mother will file a response and counterclaim within seven days of receiving the notice of family claim.

[18] I am going to address the issues before me today, but only those ones that are in the notices of application. If the respondent mother wishes to change regular parenting time, she needs to file a notice of application to address that issue

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[19] I find that the issues raised in the two notices of application before me have not been dealt with in the Provincial Court filed agreement, except for the division of parenting responsibility, so for that reason I need to adjourn paragraphs 3 and 4 of the notice of application of the claimant father that was filed March 23, 2017, because those issues are squarely addressed in the Provincial Court order.

[20] And I am not dismissing the application. I will give the claimant father liberty to argue the application with authorities on jurisdictional issues if he chooses at a later date, so it is just adjourned generally.

Hear the Child Report

[21] I will now address the Hear the Child Report. Section 211 of the *FLA* allows the court to appoint a person to assess the needs and views of the child in relation to a family law dispute, and assess the ability and willingness of a party to satisfy those needs. Those assessments are conducted by members of a listed group of professionals and are to include a report from an expert on their findings.

[22] Recently, Mr. Justice G.C. Weatherill questioned whether it would be appropriate to order a Hear the Child Report under s. 211, and that was in *M.P.D. v. C.R.D.*, 2017 BCSC 397. He said given that the Hear the Child Report does not provide an assessment, he questioned whether s. 211 was the appropriate section for those reports.

[23] I find that the Hear the Child Report can be ordered under s. 202 of the *FLA,* which states:

> 202 In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:
>
> (a) admit hearsay evidence it considers reliable of a child who is absent;
>
> (b) give any other direction that it considers appropriate concerning the receipt of a child's evidence.

[24] Section 224(1)(b) of the *FLA* provides jurisdiction to the court to order one or more parties or a child to attending counselling or specified services or programs. An

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interview and Hear the Child Report could be considered a specified service or program.

[25] I will refer to some of the authorities that counsel for the respondent mother presented.

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[26] In *B.J.G. v. D.L.G.*, 2010 YKSC 44, Madam Justice Martinson, who was a justice of this court, now retired, said at paras. 2 and 3:

> [2] … all children in Canada have legal rights to be heard in all matters affecting them, including custody cases. Decisions should be made without ensuring that those legal rights have been considered. These rights are based on the *United Nations Convention on the Rights of the Child*, ("the *Convention*") and Canadian domestic law.
>
> [3] The *Convention*, which was ratified by Canada, …, in 1991, says that children are capable of forming their own views and have the legal right to express those views in all matters affecting them, including judicial proceedings. …

As Master Bouck said in *E.A.B. v. K.J.B.,* 2016 BCSC 1167, the threshold for making an order even under s. 211 is a low one.

[27] Under the best interests of the children, s. 37 of the *FLA* says that when the court is making an order under Part 4 respecting guardianship, parenting arrangements or contact with the child, the parties and the court must consider the best interests of the child only. The *FLA* gives guidance to what circumstances may be considered. The second enumerated consideration is the child's views, unless it would be inappropriate to consider them.

The Facts Of This Case

[28] Despite the procedural problems, it is clear to me that there is a family law dispute affecting parenting arrangement and contact with two young children aged 10 and 12. For four years now they have been living in a shared parenting arrangement, where they spend four days with one parent and four days with the other.

[29] The claimant father is a firefighter and works four-days-on and four-days-off. The first two days are day shifts ending at 6:00 p.m. The second two days are evening shifts commencing at 6:00 p.m. and ending at 8:00 a.m. If he were to have the children in his care during his work days, he would have minimal contact with them.

[30] The respondent mother works at an office job and has regular working hours from 8:30 a.m. to 4:30 p.m., Monday to Friday. Often, her parenting time falls on her work days on the current schedule and gives her minimal downtime with the children.

[31] The parties have always organized their parenting arrangements around the claimant father's schedule. Both parties are re-partnered now.

[32] The children have been in counselling since the breakdown of their parents' marriage to assist them with their emotional difficulties surrounding the separation.

[33] Although the parties are, as I have noted before, extremely polite in their correspondence, they are driving each other to distraction with extensive emails. At one point, out of frustration, the claimant father refused to accept any communication from the respondent mother about issues affecting the children and insisted that all future communication go through counsel. This is a completely unworkable solution, although I do have some sympathy for the claimant father because the parties were exchanging pages and pages of detailed correspondence.

[34] The children have been living in the middle of this tense situation now for too long. They appear to be coping quite well. I am not hearing they are having difficulty in school. They are involved in sports, but I am advised they are complaining to their mother about the parenting time arrangement. The claimant father denies this and says they are perfectly content with the current parenting time arrangement.

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The Claimant Father's Position

[35] The claimant father objects to the Hear the Child Report because he thinks there is no underlying application to change parenting time and because such an investigation would be intrusive and unsettling for the children. He is also concerned that the children have been coached by their mother.

The Respondent Mother's Position

[36] The respondent mother says the children frequently speak to her about their dissatisfaction with the current parenting time arrangement. The current arrangement limits her weekend time with the children.

Ruling

[37] Although I do not have the application before me to change the regular parenting time, I anticipate that application will be filed or was filed during today's lunch break. I do, however, have an application dealing with many parenting issues and it is clear to me that there is an ongoing parenting dispute.

[38] I see no reason to deny the children an opportunity to have their voices heard in this family law dispute. At age 10 and 12, they are about to enter their teenage years, when they will be more insistent on having their views heard and respected. There is no justification in my mind to require a s. 211 assessment by a psychologist or a counsellor. Although the children are stressed by their parents' separation, they appear to be coping fairly well and have no mental health issues. At this stage, it is my view that it is time to give these children a voice in the family law proceeding which is affecting their day-to-day lives. It is a precedent that should be set now, before they enter into their teenage years and may become more defiant if their voices are not heard. It is my view that it is in the children's best interests to be heard.

[39] There is a disagreement as to who should conduct this interview and I am going to leave that to counsel to sort out. I will just say this. The interview will be

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conducted by a member of the Hear the Child roster to be consented to by the parties and the cost will be equally divided.

[40] If you have any difficulty selecting someone then you have liberty to apply back before me and I can assist you in the selection, but again, at this stage, I see no necessity in having an assessment, merely a report of what the children were saying and I am relying on s. 202(b) of the *FLA* just to adduce evidence from the children using this method.

[41] That concludes this Ruling, and now I understand that you were negotiating during the lunch break and that there may be some consent orders that you wish to speak to.

[42] MS. GABRIEL: Yes. My Lady.

[SUBMISSIONS ON CONSENT ORDERS]

"Young J."

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