
CANADA / JUDGMENT

Bailey v. Bailey

2018 BCSC 520

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Supreme Court of British Columbia

DECIDED

3 April 2018

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2018 BCSC 520 Bailey v. Bailey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bailey v. Bailey,

2018 BCSC 520

Date: 20180403

Docket: E13759

Registry: Chilliwack

Between:

Cory Michael Bailey

Claimant

And

Monica Lisa Bailey

Respondent

Before: Master Keighley

Reasons for Judgment

Counsel for the Claimant:

T. Wolf

Counsel for the Respondent:

F. Lepp

Place and Date of Trial/Hearing:

Chilliwack, B.C.

February 13, 2018

New Westminster, B.C.

March 27, 2018

Place and Date of Judgment:

Chilliwack, B.C.

April 3, 2018

The Application

- [1] This is a family law proceeding.
- [2] By application dated November 22, 2017, the respondent seeks an order that she and the children of the marriage, Braden Anthony Bailey born August 10, 2008, ("Braden") and Isabella Angela Bailey born December 13, 2011, ("Isabella") be permitted to relocate from Abbotsford, British Columbia to the Lake Country area. The respondent also seeks the costs of the application.
- [3] On completion of submissions, I advised counsel that I would be resolving this application on the terms set out in paragraphs 53 and 54. My reasons follow.

Existing Orders

- [4] Three orders have been pronounced in this proceeding to date. On December 1, 2016, the Honourable Mr. Justice Grist made an order in the following terms:
1. Cory Michael Bailey's Guideline Income is imputed at \$100,000.00;
 2. Monica Lisa Bailey's Guideline Income is \$4,550.00;
 3. Cory Michael Bailey will, commencing October 1, 2016 and continuing on the 1st day of each month, pay to Monica Lisa Bailey as interim child maintenance the sum of \$1,478.00 being the Guideline amount for two children under the Federal Child Support Guidelines;
 4. Commencing October 1, 2016, the parties will share the cost of Section 7 special and extraordinary expenses for the Children in proportion to their respective incomes. Based on the current Guideline Incomes, Cory Michael Bailey's proportionate share is 80% and Monica Lisa Bailey's proportionate share is 20%;
 5. The following are classified as Section 7 expenses:
 - a. Hockey;

- b. Gymnastics; and
- c. Private school;
- 6. Cory Michael Bailey will, commencing October 1, 2016, and continuing on the 1st day of each month, pay to Monica Lisa Bailey as interim spousal support, the sum of \$1,350.00 based on the mid-range SSAG calculation;
- 7. Cory Michael Bailey shall be credited a total of \$2,361.58 with that sum being applied to the retroactive amount owing for interim child maintenance, interim spousal support as well as Cory Michael Bailey's proportionate share of Section 7 expenses;
- 8. Cory Michael Bailey will, commencing December 1, 2016 pay the arrears for interim child maintenance, interim spousal support and Cory Bailey's proportionate share of Section 7 expenses for the months of October and November 2016 over the next four months incremental (25% for each of the months of December 2016, January 2017, February 2017 and March 2017);
- 9. The minimum payments required each month on the Bank of Montreal Master Card No. 5191-3300-0906-8653 and MBNA MasterCard No. 5234-6574-2893-6813 in respect of the debt as of September 30, 2016, will be shared equally between the parties (the "Minimum Payment");
- 10. Cory Michael Bailey will be at liberty to negotiate the cheque in his hands in the amount of \$10,330.32 as he sees fit after satisfying the December 1, 2016 payment for interim child and interim spousal support and Cory Bailey's proportionate share of Section 7 expenses and the additional 25% of the arrears for October and November, 2016 for interim child maintenance, interim spousal support and Cory Michael Bailey's proportionate share Section 7 expenses;
- 11. Interim maintenance is reviewable after six months is reviewable after six months, being after May 1, 2017; and
- 12. Costs in the cause.

[5] On December 21, 2016, I pronounced a "Without Notice" order on the following terms:

THIS COURT ORDERS that

- 1. Christmas Parenting Time for 2016 shall be as follows:
 - a. The Claimant shall have the children from Thursday, December 22, 2016 at 12:00 noon until Christmas Day at 10:00 a.m.;
 - b. The Respondent shall pick up the children from the Claimant's residence on Christmas Day at 10:00 a.m.;

2. The Respondent shall have leave to enter this Order in the New Westminster Registry of the Supreme Court of British Columbia;
3. The Claimant shall pay to the Respondent costs in the amount of \$500 payable forthwith in any event of the cause.

[6] On August 1, 2017, my colleague Master Caldwell made an order on the following terms:

THIS COURT ORDERS that:

1. The Respondent, Monica Lisa Bailey is permitted to take the Children to the Riviera Mayan for the purposes of a vacation leaving Canada on November 2, 2017 and returning to Canada on November 13, 2017;
3. Leave to have this order entered in the New Westminster Registry.

Background

- [7] The parties commenced cohabitation in 2006, married in 2011 and separated September 1, 2016.
- [8] As the above would indicate, there are of two children of the marriage: Braden is now aged nine years and Isabella is now aged six years.
- [9] The claimant is employed as a plant manager operating a gas facility in the Fort St. John area. For some years, he has worked a two week on, two week off rotation and as of the date of this application continues to do so.
- [10] The respondent is qualified as a Licensed Practical Nurse ("LPN") and is presently employed as an LPN in three casual positions.
- [11] With respect to parenting time, the children spend up to six consecutive days per month with the claimant when he is in the Lower Mainland area. At all other times the children live with the respondent. No comprehensive parenting order has been made to date.
- [12] Until recently, the respondent and the children have lived in a home owned by the respondent's parents. This home has now been sold and the respondent says that the new owners will not permit her to continue her tenancy.
- [13] The respondent says that she cannot find suitable accommodation in the Fraser Valley at a comparable cost.
- [14] The respondent filed an Assignment in Bankruptcy on or about December 15, 2017. Details of her filing were not before me. She says, however, that the bankruptcy has made it difficult for her to secure new rental accommodation as homeowners make credit checks.
- [15] As to the basis of this application the respondent says that her parents have now purchased and acreage in Lake Country, British Columbia with the intention of building a home for themselves on this property, as well as purchasing a 1900 square-foot modular home for the

use of the respondent and the children. The respondent says that her parents have agreed to rent the modular home to her for \$1,300 per month with a chance of purchasing the home when she is able to arrange financing, presumably once the residue from the bankruptcy has dissipated.

- [16] The respondent says that her parents are a strong source of support for her and the children, both financially and emotionally. She says that her parents have provided daycare for the children and would continue to provide daycare in the new location. Additionally, the respondent's sister and her husband are moving into a home on the Lake Country property. The respondent says that having her parents, sister and brother-in-law as close neighbours will provide a strong network for herself and the children.
- [17] In terms of her employment, the respondent says that she has been attempting to find a full-time position as an LPN in the Fraser Valley for the past year but has only been able to find three casual jobs, which total a commitment of something close to part-time hours. She says that the Lake Country/Kelowna area has ample work opportunities for a person with her qualifications. She is optimistic that she will be able to find a full-time position. She presently has two commitments with respect to casual positions in the Lake Country/Kelowna area.
- [18] The children presently attend a private Catholic school. The respondent says that if allowed to move to Lake Country the children will be enrolled in Davidson Elementary, a public school which she says offers similar class sizes and more activities and sports than the present school. She says that the children would be able to continue their current activities (gymnastics for both children and hockey for Braden) at a lower expense.
- [19] Braden has been diagnosed with Tourette Syndrome, OCD and ADHD. He is presently on medication to manage his TS and ADHD.
- [20] The respondent suggests that the proposed move to Lake Country offers the children an idyllic situation. They will be living on an acreage with an opportunity to own and enjoy animals, they will be in close proximity to other family members who can assist in child care when the respondent is at work, and with a slower pace of the rural life it might be beneficial to Braden, given his conditions and suitable and lower cost arrangements can be made with respect to the children's recreational activities.
- [21] In terms of ongoing contact with the claimant, the respondent proposes that the claimant would have the children with him every weekend when he is home from Friday beginning at 6:00 pm, with the parties meeting in Merritt, British Columbia, through to Sunday evening at 6:00 pm, with the exchange again occurring in Merritt. She is prepared to consider extended periods including every long weekend when he is available. The respondent also proposes that the claimant have the full two weeks of Spring Break, half of the children's Christmas holidays, alternating every year and two full weeks every time he is home from work over the summer break.

[22] To compensate to the claimant for "inconvenience" (presumably to defer some of his costs related to driving) the respondent indicates that she is willing to pay him \$200 per month. She indicates that if this arrangement is unacceptable, she is prepared to meet with a mediator and the claimant to work out a more satisfactory arrangement.

Statutory Basis for the Application

[23] The application is brought pursuant to the provisions of the Family Law Act, S.B.C. 2011, c. 25.

Family Law Act

[24] Section 66 of the Family Law Act reads as follows:

66 (1) Subject to subsection (2), a child's guardian who plans to relocate himself or herself or a child, or both, must give to all other guardians and persons having contact with the child at least 60 days' written notice of

- (a) the date of the relocation, and
- (b) the name of the proposed location.

[25] It appears from the evidence before me that the respondent provided the notice contemplated by this section to the claimant on or about November 21, 2017.

[26] Section 68 provides as follows:

68 If a child's guardian gives notice under section 66 [notice of relocation] that the guardian plans to relocate the child, the relocation may occur on or after the date set out in the notice unless another guardian of the child, within 30 days after receiving the notice, files an application for an order to prohibit the relocation.

[27] Section 69 of the Act provides as follows:

69 (1) In this section, "relocating guardian" means a guardian who plans to relocate a child.

- (2) On application by a guardian, a court may make an order permitting or prohibiting the relocation of a child by the relocating guardian.
- (3) Despite section 37 (1) [best interests of child], the court, in making an order under this section, must consider, in addition to the factors set out in section 37 (2), the factors set out in subsection (4) (a) of this section.
- (4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,
 - (a) the relocating guardian must satisfy the court that
 - (i) the proposed relocation is made in good faith, and

- (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and
- (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise.
- (5) If an application is made under this section and the relocating guardian and another guardian have substantially equal parenting time with the child, the relocating guardian must satisfy the court
 - (a) of the factors described in subsection (4) (a), and
 - (b) that the relocation is in the best interests of the child.
- (6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following:
 - (a) the reasons for the proposed relocation;
 - (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
 - (c) whether notice was given under section 66 [notice of relocation];
 - (d) any restrictions on relocation contained in a written agreement or an order.
- (7) In determining whether to make an order under this section, the court must not consider whether a guardian would still relocate if the child's relocation were not permitted.

[28] Section 46 of the Act provides as follows:

46 (1) This section applies if all of the following circumstances exist:

- (a) no written agreement or order respecting parenting arrangements applies in respect of a child;
 - (b) an application is made for an order described in section 45 (1) (a) or (b) [orders respecting parenting arrangements];
 - (c) the child's guardian plans to change the location of that child's residence and the change can reasonably be expected to have a significant impact on that child's relationship with another guardian.
- (2) To determine the parenting arrangements that would be in the best interests of the child in the circumstances set out in subsection (1) of this section, the court

- (a) must consider, in addition to the factors set out in section 37 (2) [best interests of child], the reasons for the change in the location of the child's residence, and
- (b) must not consider whether the guardian who is planning to move would do so without the child.

[29] Section 37 which provides as follows:

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
 - (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

Discussion

[30] It seems appropriate to begin my analysis with the provisions of s. 37(2) insofar as they relate to this family's circumstances.

[31] The following headings are drawn from s. 37(2);

(a) the child's health and emotional well-being

[32] Isabella is quite young and there is really nothing before me in the material to suggest that her health or emotional well-being will be influenced by the proposed move except that she may, in her early, formative, years, be unable to spend as much "quality time" as she is presently able to spend with her father during visits in the Fraser Valley. With respect to Braden, he faces more challenges. There is no medical evidence to this effect but there is a suggestion by the mother that the tranquility of rural life will alleviate the symptoms of his several challenges. His doctor suggests that hospital facilities, should they be required, will be more readily available in the Okanagan than in the Fraser Valley, but there is no suggestion that this has proved problematic to date. Braden, I am satisfied, will also be negatively affected by the reduction in quality time with his father.

(b) the child's views

[33] Both parents have advanced comments from the children in support of their respective positions on the application. I have seen texts from Braden indicating outrage at the prospect of a move and querying, in direct terms, whether the move has anything to do with the respondent's "new boyfriend". These texts were introduced by the mother to suggest that the father has been inappropriately discussing this litigation with Braden, or indeed both children, but they do represent some evidence that Braden might be opposed to the move.

(c) the nature and strength of the relationships between the child and significant persons

[34] I am satisfied that both children have strong bonds with family members on both sides of the parental divide. The respondent has been at some pains to suggest that the claimant's mother, with whom he shares his home, is a difficult and perhaps unpleasant person and that the children are less close to her than to members of the respondent's own family. The claimant's evidence indicates a contrary view, as one would expect.

(d) the history of the child's care

[35] Historically the children have been cared for by their mother, particularly with the father occupied with work out of town. I am satisfied, however, that the claimant has, when available, made every effort to participate in the children's lives and their care.

(e) the child's need for stability

[36] In this regard I have nothing to add to my comments with respect to the children's health and emotional well-being.

- (f) the ability of each guardian to exercise guardianship responsibilities.
- [37] I am satisfied that both parents are competent, motivated and able to carry out their child-rearing responsibilities.
- (g) the impact of family violence
- (h) actions of persons responsible for family violence
- [38] There is no indication of the material before me that family violence is a factor.
- (i) arrangements requiring cooperation between the parents
- [39] Achieving cooperation between these parents will be a challenge. The respondent presents as willing to discuss, accommodate and mediate. The claimant says that she has sought to disrupt his contact with the children, blocking his phone calls and blocking (I am not sure of the technology involved) access to FaceTime on the children's device or devices. I have the sense that cooperation between these parents will not be as easily achieved as the respondent suggests.
- (j) impact of any civil or criminal proceeding relevant to the child's safety security or well-being
- [40] There are no such proceedings.
- [41] The analysis then shifts to s. 69 which applies where there is no agreement or order or respecting long-term parenting arrangements and where the plans to relocate the children might reasonably be expected to have a significant impact on the child's relationship with the other parent.
- [42] The section goes on to provide in subsection 2, that the court must consider the factors set out in section 37(2), as I have, but must also be satisfied by the terms of subsection 4: that the proposed relocation is sought in good faith and that the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship with the children and the other parent, and others entitled to contact with the children or who play a significant role in the children's lives.
- [43] Section 69(6) provides that in determining whether the proposed relocation is made in good faith, the court must consider all relevant factors including the following (and I will deal with the parties' respective positions with respect to each provision sequentially).
 - a) the reasons for the proposed relocation
- [44] The respondent says that the proposed relocation is driven by economic circumstances, for the most part. She will be unable to find, she says, affordable accommodation in Abbotsford and she hopes to be able to find full-time employment in Lake Country. The claimant says that there is no evidence that the claimant will have any difficulty in finding reasonably priced accommodation in the Fraser Valley. There is no evidence, he says, of any search by her or particular rental opportunities she has pursued without success. He also says that the

respondent should be able to find comparable work in the Fraser Valley to that which she seeks in Lake Country. I note that at least at this point, the respondent's prospects in Lake Country appear to be no better than her present opportunities. At present she is a casual worker and will work as a casual worker in Lake Country for the foreseeable future.

- [45] The claimant says that the main factor driving the respondent's desire to relocate is her relationship with her new boyfriend, who lives in the Kelowna area. The respondent denies any such relationship and says that the referenced individual is simply a friend.
- b) whether the proposed relocation is likely to enhance the general quality of life of the child and if applicable of the relocating guardian, including increasing emotional well-being or financial or educational opportunities.
- [46] I have already referred to the idyllic picture presented by the respondent. The children will enjoy living on a large acreage with family support nearby and more opportunities for recreational activities. The respondent also says that she has better job opportunities available to her but I have already commented on this issue and have a more measured attitude towards her prospects than she does. She says that the children will enjoy more consistent medical care with shorter wait times between appointments and closer proximity to a doctor. I am not satisfied that these are relevant considerations on the basis of the material before me. It seems that the children will receive appropriate medical care whether they move or not. The respondent also says the children will be able to participate in the same activities at a lower cost. This may be of some advantage, but it is a small one. Puzzlingly, the respondent says that the children are young and therefore will suffer less of an impact as a result of the severance of formed connections to the Lower Mainland. She clearly recognizes that the children will suffer some disruption from the severance of social connections at school and in their community. Braden, with his challenges, may be more affected by the disruption of his social fabric than Isabella but I have no hard evidence in that regard.
- [47] Although I have some doubts as to the prime motivation for relocation I am prepared, for the purposes of this application, to say that the application for the proposed relocation is sought in good faith.
- [48] What causes me more concern is the proposal the respondent makes with respect to "reasonable and workable arrangements to preserve the relationship between the child [ren] and others". Although the claimant has expressed the hope that he may be able to relocate to the Lower Mainland in a year or so (and suffer a reduction in income) he seems, for the foreseeable future, to be locked in an arrangement whereby he spends two weeks out of town and two weeks in. Both parties have benefited financially from this regime. Although the claimant seeks additional time with the children, the parties have, in this context, settled on an arrangement which seems to suit their mutual convenience, namely that the children spend at least six consecutive days in their father's care when he is in the Lower Mainland. That means that the father may have the children with him when they are

attending school and that his time with them is not limited to weekends when they are at school. There is presently no prospect of the claimant moving to the Okanagan Valley. He is in another relationship with a young woman who has children of her own and it seems likely that, for the foreseeable future, the claimant will continue to reside in the Fraser Valley. His mother lives in the basement of his home and is available to assist in providing daycare although the respondent expresses some reservations about the claimant's mother and her contact with the children. I am not entirely satisfied that the respondent's attitude is fair in this regard.

- [49] In terms of the suggested alternatives, the respondent is essentially suggesting as an alternative to the present arrangement, that the claimant will a) arrive back in the Lower Mainland from his work on a given Thursday night, b) travel to Merritt in the afternoon of the Friday following to meet the children, weather and traffic permitting at say, 6:00 pm, c) travel back home to the Lower Mainland, perhaps stopping for something to eat, with the children getting to bed by mid evening, d) spending Saturday and Saturday evening with the children, e) spending Sunday morning with the children but, by noon or so, heading out again for Merritt and meeting the respondent in, say, the mid afternoon.
- [50] If the respondent contemplates that he would then have them the following weekend as well he would be obliged to follow the same intensive schedule. His relief, might come in the respondent's offer of two weeks at Spring Break and a full two weeks every time he is home from work over the summer break.
- [51] With respect to the former, the claimant indicates that it is extremely unlikely that he would be able to get the entire Spring Break off work and the proposed summer access while generous, would significantly disrupt the children's schedules, particularly if they are involved in extracurricular activities. He would be more than happy he indicates, to enjoy such extended summer access if the children remained in the Fraser Valley where both parents may get the children to their activities and they may maintain their social connections during the summer while off school.
- [52] At the conclusion of counsels' submissions, I presumed to suggest that members of the Court approached mobility applications with a sort of dread, as whatever the result, dreams are squashed, plans are scuttled, hearts are broken and parenting relationships dislocated, often with permanent effect. Although these applications are often heard on an interim basis, there is really very little "interim" about them. On the basis of affidavit evidence alone, and without a full trial on the issue the court is sometimes asked to consider, in the most extreme examples, a move across the country or even to another country, with little prospect of reversal at some future date.
- [53] This case is not at that end of the spectrum. Lake Country is, according to Google Maps, 344 km or 3 hours and 46 minutes of driving time away from Abbotsford. And yet, as close as it is, a move to Lake Country will fundamentally alter the time the father is able to spend with the children, particularly during the school year (that is, the bulk of the year) when his

parenting time will be limited to weekends and travel-packed weekends at that. Even this "short" move will sever, permanently, in all likelihood, the children's social networks in circumstances where the young boy would seem to be particularly vulnerable to such an impact. And to what end? The mother may be successful in gaining full-time employment, but there is no certainty of that and she and the children will have the benefit of an enhanced relationship with her family, but at the expense of the children's relationship with the father and his family.

[54] As I indicated to counsel, I am not comfortable dealing with this application on an interim basis. It seems to me that the parties' and the children's interests would be best served by having this issue resolved at trial, particularly where a trial on this discrete issue might conceivably be heard before the children return to school in the fall. I am, therefore, adjourning the application to trial.

[55] Both counsel have asked that I order the issue that the parenting issues be severed and dealt with at an expedited trial and I will do so. If the parties wish to deal with the issue of mobility only, they have only to submit a desk order for my signature.

[56] The claimant will have his costs of this application, from the issuance of the Notice of Application, in the cause.

"Master Keighley"

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