
CANADA / JUDGMENT

Baldus v. Lillow

2020 BCSC 22

COURT

Supreme Court of British Columbia

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2020 BCSC 22 Baldus v. Lillow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Baldus v. Lillow,

2020 BCSC 22

Date: 20200109

Docket: E1956296

Registry: Prince George

Between:

Jesse Daniel Baldus

Claimant

And

Jade Hellen Maria Lillow

Respondent

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Claimant:

J. Reed

Counsel for Respondent:

B. Levine

Place and Date of Hearing:

Prince George, B.C.

December 19, 2019

Place and Date of Judgment:

Prince George, B.C.

January 9, 2020

- [1] This is an application brought by the father (claimant) pursuant to s.68 and s. 69 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") to prevent the mother (respondent) from relocating their three year old child, "M", from MacKenzie to Cache Creek/Clinton. Relocation applications are among the most difficult applications for the court to resolve. Circumstances have arisen where the mother wishes to leave their community, and does not want to leave their son behind. This is not a case where either parent is at fault. They are simply both loving parents who wish to be part of their son's life.
- [2] In January 2019, the parties entered into a separation agreement by which they agreed to equal parenting time with their child. The mother's proposed move would significantly alter this arrangement, particularly in the long term, once the child begins school.
- [3] The mother seeks to move because she is in a new relationship. She is expecting a child in February with her new partner, who lives and works in the Cache Creek/Clinton area. She wishes to live with her new partner so he can co-parent their new child. The mother wants to ensure that M will have the opportunity to grow up with his new sibling.
- [4] The father opposes the move and says the mother's proposal for his access is not workable and will result in a considerable lessening of his time with his son.

Position of the Mother

- [5] The mother seeks the following orders:
- Until September 2021, the parents will share a two week rotating parenting schedule, with an exchange in Quesnel, which is halfway between MacKenzie and Clinton, and about a 3 hour drive for each parent.
 - As of September 2021, when the child starts school, the parents will have to come to an agreement on care arrangements or bring a further application before the court.
 - In the alternative, the mother seeks primary residence of the child with her, with reasonable access for the father.

- [6] The separation agreement between the parties established that each parent is entitled to share custody equally. The parties did not have the benefit of legal advice when drafting the agreement and, based on the affidavit material submitted on this application, I find that when the term "custody" was used by them in the agreement, the intention was to share custody, access and parenting equally.
- [7] The mother has kept track of the hours each parent has had the child since March 2019. She says that from March 2019 to November 2019 she has had care of the child 56% of the time, and the father has had care of the child 28% of the time. The remaining time the child was in the care of a daycare provider. Since November 2019 the mother has been on medical leave and so now cares for their son during the hours he used to be in day care.
- [8] The mother will be on medical leave until her child is born in February and then she will be on maternity leave for one year. She will be able to care for her children personally without accessing daycare until she returns to work.
- [9] The mother has been working up until her medical leave. Her job is with a trucking company called Lucas Holdings, where she has worked for 8 years. The company is owned by cousins of the father, but there is no suggestion that this family relationship has given rise to any difficulties in her employment. The mother acknowledges that her job will be available for her on her return from maternity leave. She has no job lined up in Clinton, although she is of the opinion that her job prospects are good in Clinton and that she can attend school in Kamloops.
- [10] The mother has a medical condition and she says that her condition will be exacerbated by the stress of not living with her new partner. She says that if she has to relocate she will have to be a single parent to two children, and this will be very difficult for her.
- [11] The mother's new partner has a good job and roots in Clinton/Cache Creek area. His family has met the child and are supportive of their new relationship. I have no doubt this is the case. The mother's parents live in MacKenzie, although they state they are planning to move to Kamloops.
- [12] The mother wishes to start her new life in Clinton, with her new partner and his family.

Position of the Father

- [13] The father does not disagree that the child has spent more hours in the care of the mother. However, he says this is primarily because his work begins at 6 am, and he has not been able to get the child into a daycare that opens at 6 am. As a result, the child must sleep at the mother's house on all days the father is at work. This is reflected in the calendar attached to the mother's affidavit, which clearly shows the majority of the nights are spent with the mother.

- [14] However, the father says that he has been actively trying to get his son into a daycare which starts at 6 am, and once he does that he will be able have his son overnight.
- [15] From the time M was born until March 2019, he lived in the same house with both his parents. Even after the parents separated in November 2018, they continued to live in the same house with their son until March 2019. After March 2019, the father has had his son Mondays, Wednesdays, and Fridays beginning at 3 pm until bedtime. Every other weekend, the father has M from Friday 3 pm until Sunday. The father is very involved in M's daily life.
- [16] The father grew up in MacKenzie and his family lives there. His parents, brother and nephew are all involved with the child on a regular basis. The father has a good stable job with the City of MacKenzie. While the mother has expressed concerns about the health of MacKenzie in the face of the forestry downturn, the father does not share those concerns. He points to other employment opportunities in the area, abundant recreational activities in the area, and the safety of the community.
- [17] The father expresses concern for the child if he were to be without either parent for two weeks at a time. He says that the child is equally attached to both him and the mother, and is best served by continuing the current shared parenting arrangement.

Analysis

Current parenting arrangements

- [18] I am satisfied that the custody agreement between the parties must govern. While currently the father has not been able to access overnight visits with his son due to his work commitments, he is actively trying to get arrangements in place to implement the equally shared parenting arrangements contemplated in their separation agreement. He did obtain such a position on a partial basis in October 2019, but the mother did not agree and the father had to pass up the opportunity to enrol their son in that daycare. He continues to look for an early day care spot. When the sleeping hours are removed from the tally of hours spent with their son, the parents share care on a substantially equal basis.
- [19] I am satisfied that the intention of the parents when drafting their separation agreement was to share custody and parenting equally, and in the few months since they have been living in separate homes they have made every effort to ensure that M spends as much time as possible with each parent. The ability of the parents to fully implement their intention of equal parenting time has been disrupted by the difficulty in finding appropriate daycare. I am satisfied that the father is conscientiously seeking daycare which will allow him to have his son overnight 50% of the time, and that once this is in place, his hours with M with equal the hours the mother spends with M. Therefore, while the mother has had M for more hours than the father in the period of March to December 2019, in the circumstances this is not sufficient to displace the agreement to share parenting equally.

Applicable provision under the FLA

[20] Because I have found that the parents have substantially equal parenting time, I find that the s. 69(5) of the FLA is the applicable provision on this application. Pursuant to s. 69(5) of the FLA, I must consider the following factors:

- a) that the proposed relocation is made in good faith;
- b) that the mother 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
- c) the best interests of the child.

Is the proposed relocation made in good faith

[21] Pursuant to s. 69(6) I must consider the following factors in determining whether the proposed relocation is done in good faith:

- 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;
- d) any restrictions on relocation contained in a written agreement or an order.

[22] The mother did give notice under s. 66. There is a separation agreement in place which stipulates equal custody.

[23] The reasons for the proposed relocation really relate to the asserted emotional well being of the mother. She is not moving to a new job or to begin a new educational program. I have not been provided with compelling evidence that quality of life for M will be any better in Cache Creek/Clinton than it is in MacKenzie.

[24] I accept that the mother is not making this application to defeat the father's relationship with M, and I accept that she would do all that she could to maintain the child's relationship with his father should I allow the child to relocate.

[25] The mother wants to move to be close to her new partner, and to raise their child together. She is concerned that if she can't move with M to Cache Creek, she will be left as a single mother with two children, alone in MacKenzie. She says she has hopes and dreams for her future, which will be impaired if she cannot leave MacKenzie.

- [26] While I am sympathetic to the mother, I must consider this application in terms of what is best for M. It is not only the emotional well being of the mother that I must consider. I must also consider the emotional well being of M, and how it will impact M to be separated from one of his parents for two weeks at a time and then, when he starts school, to be separated from one parent for the majority of the time.
- [27] On balance, I do not find that the proposal to relocate has been made in bad faith.

Reasonable arrangements

- [28] The mother proposes that the parents share parenting two weeks on and two weeks off, with an exchange location that would require each parent to drive three hours.
- [29] While this is superficially attractive, I find that it is not reasonable or sustainable.
- [30] With respect to the exchange, I am concerned about requiring a young child to travel 6 hours in a car every 2 weeks. While their son may enjoy car trips he has taken with his mother in the past, it is quite another thing for the child to have to travel 6+ hours every two weeks. The novelty of that kind of travel is likely to wear off quickly. In addition, the travel in the winter can be hazardous in icy and snowy conditions, and that introduces a factor that either may place the child's safety at risk, or may require exchanges to be postponed.
- [31] Further, the rotating schedule will only be effective until the child starts school. The mother proposes to, essentially, defer any assessment on parenting arrangements which will be required once the child starts school. I do not agree that I can make a decision today which will have significant ramifications for the family down the road, without taking into account those future ramifications. I find that I must consider the inevitable outcome, namely that in 1.5 years the parties will have to come to terms with parenting arrangements when their child starts school.
- [32] The mother argues that if I find that it is not appropriate to defer consideration of what will happen once M begins school, then I should award her primary parenting responsibility of M. She argues that she will ensure that the parenting relationship with the father will not be disrupted because the father will have generous access over holidays. When I asked whether she would agree that her relationship with M would not be disrupted should I award primary parenting to the father once M started school, she disagreed and stated that she would only be prepared to have M live with her.
- [33] The difficulty with the mother's proposal is that it will ultimately disrupt the child's relationship with one parent once he starts school. The child will have to live in one place or the other during the school year. Weekend access may not be feasible as the parties will be living 6+ hours apart, which would mean virtually the whole weekend for the child on an access weekend would be spent in the car. Parenting time for the other parent would necessarily be remote and focussed on holiday time only.

- [34] The proposal of the mother to move the child with her to Clinton represents a significant disruption in the parenting arrangements for the father. He is an active parent, involved in his child's life during the week and on weekends. The child's paternal grandparents, uncle and nephew all live in MacKenzie and are active in the child's life. Their relationships with the child will also be disrupted should a relocation be permitted.
- [35] I am not satisfied that the proposal of the mother is reasonable. In the short term, it represents a significant disruption of the current parenting arrangements in place, and places an unfair travel burden on M in the years leading up to his entry into school. In the long term, the disruption of the parenting relationship will be even more severe, as the child will move from equal time with both parents to seeing one parent only on holidays.

Best interests of the child

- [36] The best interests of the child are always at the forefront of the court's considerations in assessing a relocation application: *Hadjioannou v. Hadjioannou*, 2013 BCSC 1682 at para. 13-25. In relation to relocation applications, the factors considered under the FLA or the Divorce Act are similar, and the courts are guided by the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, as cited in *D.M. v. E.M.*, 2014 BCSC 2091 at para. 43 and following. The factors in *Gordon v. Goertz* which have application before me including the following:
- a) the existing custody arrangement and relationship between the child and the custodial parent;
 - b) the existing access arrangement and the relationship between the child and the access parent;
 - c) the desirability of maximizing contact between the child and both parents;
 - d) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - e) disruption to the child of a change in custody; and
 - f) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
- [37] The specific factors under s. 37(2) of the FLA which are relevant on this application include:
- a) the child's health and emotional well-being;
 - b) the nature and strength of the relationships between the child and significant persons in the child's life;
 - c) the history of the child's care;
 - d) the child's need for stability, given the child's age and stage of development;

- e) 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; and
 - f) 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;
- [38] I find that there is no material difference between MacKenzie and Cache Creek/Clinton in terms of economic opportunities for the parents. Both Clinton and Cache Creek are significantly smaller than MacKenzie, and the mother does not have a job lined up in Clinton/Cache Creek. Both parents have jobs in MacKenzie. The mother is not seeking to relocate because she has found a new job which will significantly improve the circumstances of the child. I find the economic factors to be neutral as they relate to the ability of the parents to provide for the child.
- [39] In terms of the child's relationships with his extended family, I find that a relocation to Clinton will significantly disrupt his relationship with his extended family. Now he sees his paternal grandparents every other weekend. He sees his uncle and cousin frequently. Under the mother's proposal, for the first 1.5 years the paternal extended family will likely see M only one weekend a month, as two weekends will be spent travelling to Quesnel to exchange M. Once M starts school, if he lives with his mother the paternal extended family will only see him on holidays. For now, M's maternal grandparents live in MacKenzie. They say they plan to move to Kamloops, but plans can change. For now at least, all of the child's extended family lives in MacKenzie and this weighs in favour of the child remaining in MacKenzie.
- [40] The family of the mother's new partner are accepting of the child and would be close by in Clinton. However, I find this is not a significant factor because they are not the family of the child, and they have not established a relationship with him. I trust that they will welcome the child into their lives, which is commendable, but this cannot be a factor which outweighs the child's existing family relationships.
- [41] The mother has a medical condition which she says will be exacerbated by the stress of being a single parent in MacKenzie should she not be permitted to move to Clinton. I am not satisfied that the mother has established a medical basis for this concern. While I do not dispute her condition, it is not an uncommon condition, and I did not receive any medical evidence that she would be worse off in MacKenzie than in Clinton, or that she would receive better care in Clinton than she would in MacKenzie.
- [42] The mother says her emotional well being will be negatively affected if she has to stay in MacKenzie. I agree that her decision to become involved with a new partner who does not live in the MacKenzie area has created a difficulty for her. However, the relationship of M with his father and extended family predates the mother's new relationship and these relationships will be significantly and negatively affected if M moves from MacKenzie. This is not a case like *D.M. v E.M.*, where the proposed relocation was only from Nanaimo to

Courtney, approximately a one hour drive. In this case, the distance is significant and disruptive to established relationships, as I have already discussed. While the mother's emotional well being is a factor to be considered, it is not the predominant factor.

- [43] There was no evidence before me to suggest that M is unhealthy or unhappy in his present environment. Both parents have cooperated successfully in sharing their parenting of M. The parenting arrangements have provided a stable environment for M, spending every other weekday with each parent, and alternating weekends between them. They are to be commended for their ability to work well together in the best interests of their child.
- [44] I am not concerned that the parents would be unable to communicate appropriately with each other should the mother be permitted to relocate, or should she be required to maintain the child's residence in MacKenzie. In this case, the parents have proven that they can work together cooperatively, and I see no indication that would not continue into the future.

Conclusion

- [45] I find that it is not in the child's best interests to relocate to Clinton. The change to a two week rotating schedule between the parents for the first 1.5 years would represent a significant disruption in the child's relationships with his parents and extended family. M is very young, only three years old, and his relationships with his parents are still in a period of critical development. The parents have not been living separately very long, only 9 months. At this time, a relocation puts the stable development of strong relationships between M and both of his parents at risk, and significantly changes the terms of the agreement reached in November 2018.
- [46] In Hadjioannou, at para. 90, the court found that a relocation was not in the best interests of the children because it would completely change a recently established parenting regime and remove the children from regular contact with their father, the community they knew, and their grandparents and other relatives. I find the same factors are at play in the case before me.
- [47] Further, I am not satisfied that the exchange proposal is reasonable and, in the winter months, I am not satisfied that it will be safe. This schedule risks disrupting the parenting access over the winter months when it may not be safe to travel long distances on the roads.
- [48] In 1.5 years, when the child starts school, he would go from having equal time with both parents, to having primary care with one parent, and holiday time with the other parent. I do not find this to be reasonable or in the child's best interests. Such a change would be a significant departure from established parenting arrangements and would not maximize the child's contact with both parents.
- [49] I find the child's psychological and emotional security and well being are best protected by maintaining equal shared parenting arrangements in MacKenzie.

[50] I allow the father's application and prohibit the relocation of the child from MacKenzie to the Cache Creek/Clinton area.

"Baker J."

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