

CANADA / JUDGMENT

Betz v. Joyce

2008 BCSC 1704

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1704 Betz v. Joyce

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Betz v. Joyce,

2008 BCSC 1704

Date: 20081211

Docket: E082715

Registry: Vancouver

Between:

Desiree Arden Betz

Plaintiff

And

Timothy Fitzgerald Joyce

Defendant

Before: Master Taylor

Reasons for Judgment

Counsel for Plaintiff:

S.L. Specht

Counsel for Defendant:

C.R. Neville

Date and Place of Hearing:

December 2, 2008

Vancouver, B.C.

- [1] This is an application by the plaintiff by notice of motion dated October 6, 2008 for an order that the plaintiff maintain the primary residence of the child, Cassandra, and an interim access schedule for the child be set as follows pending further court order or written agreement between the parties:
- (a) the defendant is to have the child from Friday after school to Monday morning every second weekend, with such weekend to be extended in the event of a holiday or professional development day on either day bordering the access weekend;
 - (b) weekday access as agreed between the parties and as suitable to the child's schedule with 48 hours advance notice on both intervening weeks;
 - (c) liberal telephone and email access at all reasonable hours;
 - (d) equal holiday access as agreed between the parties.
- [2] As well, the plaintiff seeks a resultant change in the child support to be paid by the defendant, assuming the defendant's access to his daughter is reduced. The plaintiff also seeks, by the same notice of motion, an order that if the defendant does not provide a response to the plaintiff within 72 hours of her request for same regarding any decisions to be made with respect to the child, the plaintiff shall be at liberty to make the decision and the defendant shall be at liberty to seek a review of such decision pursuant to Section 32 of the Family Relations Act.
- [3] In response, the defendant prepared a notice of motion dated November 25, 2008 which seeks that the court make an order in the terms of the separation agreement executed between the parties on March 3, 2006. At the outset of the hearing, the defendant took the position that the proceedings ought to be adjourned as the trial date in this matter is set for five days to commence April 27, 2009.
- [4] The trial date has been set for some time. I am led to believe that the central issue at the trial is whether the plaintiff, who has recently remarried, should be allowed to move with Cassandra to rural Manitoba where her new husband resides and carries out his business.
- [5] The defendant urged upon me that I should not upset the access arrangement between the parties on this application because such a short time exists between the date of this hearing and the trial date as well as the fact that on an interim application I should not disturb the status quo.

- [6] I determined that I had to hear the whole of the applications before I could consider whether or not to adjourn the matter pending trial, or whether to allow or dismiss one of the notices of motion before me. These are my reasons for coming to the conclusion that the plaintiff's application pursuant to her notice of motion should be adjourned to the trial and that the separation agreement of March 3, 2006 continue to determine the access schedule of the parties with Cassandra.

Factual Background

- [7] The plaintiff and defendant commenced cohabitation in 1991 and married on September 6, 1997. They are the biological parents of Cassandra, born May 13, 2000.
- [8] The parties separated in 2002 and divorced in 2006. Prior to the divorce, the parties entered into a separation agreement dated March 3, 2006, which dealt with all issues arising from their marriage.
- [9] The plaintiff is 42 years of age and currently on maternity leave, having given birth to her second child in October, 2008. When not on maternity leave, the plaintiff is employed as an occupational therapist and earns about \$68,000 per year. Item "L" of the separation agreement under the "whereas" provisions noted the wife to be employed as an Occupational Therapist and that her annual income for 2004 was \$65,000 per annum.
- [10] The defendant is 41 years of age and employed as an art director in the film industry and earns approximately \$114,000 per year. Item "K" of the separation agreement under the "whereas" provisions noted the husband to be employed as an Art Director for various film projects and his annual income for 2004 was approximately \$103,000 per annum.

Discussion

- [11] It is the negotiated arrangement between the parties regarding access to Cassandra that caused the plaintiff to bring this application. She maintains that the defendant's line of work in the film industry requires him to work approximately 12 hours per day or from approximately 7:00 am to 7:00 pm daily. She deposes in her first affidavit that "the defendant's employment hours were a significant source of dispute during our marriage, particularly after our daughter was born. They continue to be an issue to date."
- [12] Accordingly, the plaintiff seeks to change the parenting schedule set out in the separation agreement because she says it is not working to Cassandra's benefit and the defendant's increasing refusal to cooperate with her is making it very difficult to co-parent with him.
- [13] The defendant takes the position that this is an interim application and as such, the status quo ought not be disturbed pending the upcoming trial. In that regard the defendant also takes the position that there hasn't been a substantial change in circumstances which would trigger such a change in the status quo.

[14] The terms of the separation agreement are extensive. It covers some 28 pages. Clause "N" of the agreement under the Whereas provisions provides that:

the Husband and Wife agree to enter into this Agreement hereinafter set forth as a separation and settlement agreement which said agreement shall not be subject to variation or review whatsoever under the provisions of the FRA (Family Relations Act) and DA (Divorce Act) or any other statute, or at law or in equity.

[15] The custody and access provisions of the agreement of March 3, 2006 were obviously negotiated and agreed to just before Cassandra's sixth birthday. They are sufficiently important to set them out in some detail:

- a. The Husband and Wife will have joint custody of the Child, Cassandra (the "Child").
- b. The Child will reside approximately half of the time with the Wife and half of the time with the Husband in a pattern as follows:
 - i. with the Wife from Tuesday of one week to the Wednesday of the following week and with the Husband from that Wednesday to the following Tuesday and this pattern will repeat.
- c. The parent with whom the Child is residing will be responsible during that period of residency for the pick-up and drop-off of the Child from school to daycare but the Wife if able, will pick up and drop off the Child at school or daycare if the Husband is not able to do so; and the Husband will make arrangements for childcare should the Wife be unable to care for the Child on any given evening of his access week.
- d. In the event a parent is unable to care for the Child during some period of time that the Child is residing with him/her then he/she will give the option to the other parent to care for the Child rather than seek a third party babysitter.
- e. In the event that a parent is unable to care for the Child during some period of time that the Child is residing with him/her then he/she is to give the other parent reasonable notice and each parent will do his/her best to accommodate the other parent.

[16] Other irritants regarding access time with Cassandra exist between the parties. The plaintiff maintains that since she is home on maternity leave she should be able to pick up Cassandra after school rather than have Cassandra wait in after-school care for the defendant to pick her up. The plaintiff is also concerned that should the defendant be later than 6:00 pm to pick up Cassandra from after-school care there is a distinct possibility that social workers would become involved should the defendant be late on a recurring basis when picking up Cassandra.

- [17] The defendant is concerned that the plaintiff is usurping his time with Cassandra because the plaintiff picks up Cassandra right after school, helps her with her homework and feeds her dinner, all to the exclusion of the defendant wishing to perform these parental tasks with Cassandra. He maintains he is entitled to do these things with Cassandra as an equal partner in the co-parenting arrangement.
- [18] As a result of the on-going dispute between the parties regarding the defendant's working hours and the plaintiff's wish to change the access schedule, as well as the plaintiff's wish to move with Cassandra to Manitoba, the parties agreed to a s.15 custody and access report. A report was prepared by Rebecca St. Clere England on May 20, 2008.
- [19] The plaintiff maintains that because the report's author recommends that the current parenting plan change, it is a material change in circumstances such that the court has jurisdiction to alter the status quo. The plaintiff also maintains that now that Cassandra has a new sibling is also a material change. For the reasons set out below, I respectfully disagree with the plaintiff.
- [20] It should also be noted that the report prepared by Dr. England contained some other recommendations, the most important of which was that Cassandra continue to reside in the Lower Mainland and not move to Manitoba. This recommendation was made due to the over-riding concern that such a move would marginalize the defendant as Cassandra's father and would be at too great a cost to the father-daughter relationship.
- [21] The author also suggested that if the defendant could change his employment so that he could be with Cassandra by 5:00 pm every day in which she is in his care, a return to the weekly rotation is recommended.
- [22] In his affidavit material, the defendant deposed to having bargained a new contract of employment in which he negotiated with his employer a 5:30 pm departure from work during the weeks he has Cassandra in his care. While this is not 5 pm as recommended by Dr. England, it is evidence of the defendant's concern about his daughter's welfare. All of which is to say that in my view, the positions of the parties as well as the recommendations of Dr. England are triable issues, and not such that I should be predetermining the issue so soon before trial.
- [23] Preservation of the status quo pending trial is normally considered to be in the best interests of the child unless there is some compelling reason to change the existing situation. See: *Eaton v. Eaton* (1987), 11 R.F.L. (3d) 92 (B.C.C.A.); *Graham v. Dillon* (1985), 47 R.F.L. (2d) 66 (B.C.C.A.); *Leung v. Leung* (1998) 44 R.F.L. (4th) 121 (B.C.C.A.)
- [24] In both *Eaton* and *Graham v. Dillon* where custody was in issue, it is said the status quo should only change when: "very cogent evidence is required, more cogent evidence than would be required for custody after trial."

[25] Counsel for the defendant made reference to *Gordon v. Goertz*, [1966] 2 S.C.R. 27; S.C.J. No. 52. He submitted that I read into the words of McLachlin, J. (as she then was) at paragraph 13 of that judgment about whether or not the change which is alleged to have occurred was reasonably contemplated by the parties rather than a previous court making an order which is sought to be varied. Paragraph 13 in *Gordon* reads as follow:

If follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or other circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affect the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[26] Defendant's counsel suggests I read the last seven words of the above-cited paragraph as: "the parties who made the separation agreement." He suggests the word change makes it analogous to a judge having made a prior order which establishes the status quo which one party seeks to vary. I agree with this analogy.

[27] The defendant also submits it cannot be said that the parties did not contemplate these occurrences at the time of the negotiation of the separation agreement. According to the affidavit evidence before me, the access arrangement had existed in essentially the same terms for some time before the separation agreement was signed.

[28] The parties negotiated their separation agreement over a number of years using the collaborative law approach. The court should not now become the place where they renegotiate their agreement. This is especially so in light of the whole of the agreement and including, but not limited to paragraph 3(f)(v.) where the parties agreed that before any court action is taken they would "be obligated to first retain the services of a professional mediator to discuss the issue or issues and would attend at least two sessions with her or him". I have not been presented with any evidence which would indicate the parties have followed the agreed-upon formula for settling their disputes before coming to court.

[29] The defendant contends that the plaintiff's application is a veiled attempt to change the status quo to something more beneficial to her mobility application. Accordingly, he submits that to change the status quo at this time would play into her motives. While I do not find one way or another on that issue, I do find that the status quo with minor changes to the existing agreement is better for all parties, including Cassandra, than a wholesale change to it so close to trial.

[30] For the most part, the agreement appears to be working as intended, except for the fact that the defendant objects to Cassandra being picked up after school by the plaintiff, although there is a provision in the agreement where the parties negotiated a sum to be paid to the plaintiff every month in acknowledgment that she would be picking up Cassandra from daycare and caring for her until 7:00 or 7:30 pm on most days when the "child resides with the husband".

[31] I am of the view that everyone's needs could be met if the parties could use the mechanisms provided for in the agreement to resolve the timing issue with regards to the defendant's pick-up time of Cassandra. The biggest obstacle, aside from the plaintiff actually picking up Cassandra in the early afternoon, seems to be the transition of Cassandra at the plaintiff's residence. As a result of this litigation, interpersonal matters between the parties have become heated and positions hardened but that is not a reason not to attempt resolution within the framework of the agreement. In my view none of the plaintiff's concerns form a sufficiently cogent rationale to change the defendant's access schedule to his daughter on this interim application.

Summary

[32] The plaintiff's application, inter alia, to change Cassandra's access schedule and the defendant's application for the court to make an order in the terms of the separation agreement are both adjourned to the trial of this matter or to agreement between the parties by way of a consent order should the parties reach agreement before the trial date.

[33] The plaintiff shall pay the defendant one-half his costs of this application.

"Master G.C. Taylor"

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