
CANADA / JUDGMENT

Birch v. Birch

2008 BCSC 1732

COURT

Supreme Court of British Columbia

DECIDED

7 November 2008

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2008 BCSC 1732 Birch v. Birch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Birch v. Birch,

2008 BCSC 1732

Date: 20081107

Docket: E033699

Registry: Vancouver

Between:

Joy Melinda Birch

Plaintiff

And:

Russell Birch

Defendant

Before: Master Taylor

Oral Reasons for Judgment

In Chambers

November 7, 2008

Counsel for Plaintiff:

M.K. Kinch

Counsel for Defendant:

R.P. Hamilton

Place of Trial/Hearing:

Vancouver, B.C.

- [1] THE COURT: This is an application by the defendant who seeks to vary by eliminating his obligations to face spousal support to the plaintiff in the amount of \$1,000 per month, as ordered by Master Barber on February 1st, 2005. He wishes the order to vary be made retroactive to a date deemed appropriate by the court.
- [2] As I understand the defendant's application he says that his income is not sufficient to support his spousal maintenance order of a thousand dollars per month, plus the child support he pays for his daughter of \$700 per month. The defendant also seeks to vary the order of Master Barber of February 1st, 2005, as it pertains to access to the child of the marriage, Cassandra, who was born December 12th, 2002.
- [3] In his notice of motion the defendant seeks specific times including alternate weekend access and short access periods on Tuesdays and Thursdays of alternate weeks. Lastly, the defendant seeks an order that the net sale proceeds from the sale of 7693 115th Street, Delta BC, be distributed to the parties in such proportion as this court deems appropriate. The net sale proceeds are said to be approximately \$63,950.52 after deducting the defendant's arrears of support obligations. This amount is said to represent the defendant's 14 and a half percent interest in the residence which was jointly owned by him and his siblings.
- [4] The plaintiff opposes all of the defendant's applications. In summary, the plaintiff says the defendant is underreporting his income, especially as he is in the construction, clean-up, and hauling business and now in a cleaning business, all of which are the kinds of businesses which lend themselves to a receipt of cash payments off the books. As well, the plaintiff questions whether or not I have the jurisdiction to make an order for interim distribution of what would be family assets.
- [5] At least two problems exist in relation to the defendant's application for variation of the spousal support obligation. The first is that it is extremely difficult to determine the defendant's income for guideline purposes. And secondly, the court has not been provided with an updated form 89 financial statement by the defendant as required by rule 60D of the rules of court. I will deal with this later in my reasons.
- [6] The parties lived together in a marriage-like relationship which began in November 1994 and continued until September 17th, 2000, at which time the parties were married. The parties ceased to cohabit on August 25th, 2003.
- [7] The plaintiff commenced this action in November 2003. A number of court orders have been made in relation to the parties in this action as follows:

- [8] A, the plaintiff obtained a without-notice order against the defendant on November 19th, 2003, with respect to a safety deposit box.
- [9] B, orders were made on March 12th, 2004, including a section 57 declaration and a restraining order with respect to assets; an order preventing the removal of Cassandra from the greater Vancouver regional district; an order requiring the defendant to pay \$700 per month in interim child support; an order for interim supervised access; an order for random drug tests by the defendant; and disclosure orders related to an upcoming judicial case conference.
- [10] C, a consent restraining order was made against the defendant on February 1st, 2005, with a police assist clause.
- [11] D, a dismissal of the defendant's applications for interim joint custody and interim joint guardianship, an order for interim sole custody to the plaintiff and supervised access to the defendant, and graduated non-supervised access upon conditions, including the completion of an anger management course by the defendant. A finding of an imputed income of \$50,000 per annum to the defendant resulting in an order for spousal support payable by the defendant to the plaintiff in the amount of \$1,000 per month. All of these orders were also made on February 1st, 2005.
- [12] On May 8th, 2007, I had my first contact with the parties and made orders where I dismissed the plaintiff's application that access by the defendant to his daughter be supervised. As well, I adjourned the defendant's application for an increase in access but with liberty to renew the application upon completion of a parenting course and upon meeting with Cassandra's dentist to discuss her dental health. The plaintiff's application to impute income to the defendant in the amount of \$100,000 per annum with the resulting increase in child support was adjourned generally without prejudice to either party and I seized myself of this matter. Certain consent orders were also agreed to by the parties.

Access to Cassandra

- [13] The current access schedule is one in which Cassandra spends some eight hours per week with her father. The defendant sees Cassandra on Tuesdays and Thursdays from 3:30 p.m. to 5:30 p.m. and on Saturdays from 9:00 a.m. to 1:00 p.m. Most if not all of the access is facilitated by Cassandra's maternal grandfather. The access is facilitated in this way as the plaintiff does not want the defendant to know where she lives.
- [14] The defendant has completed a parenting course as I directed and has had a meeting with Cassandra's dentist as I also directed. As well, the defendant is now in a new relationship with Carrie Muirhead and they have recently become the parents of a son who is Cassandra's half brother.

- [15] There have been no allegations made about Mr. Birch being an unfit father. And there certainly has been a change in circumstances since the parties were last before the court. Not only does Cassandra now have a half brother, but now there will be some supervision of Mr. Birch's access to Cassandra now that he and Ms. Muirhead are living in a marriage-like relationship.
- [16] Cassandra will be six years of age in slightly over one month from today. It's time that she had overnight visits with her father. It has been urged upon me by plaintiff's counsel that increases in access by Mr. Birch to Cassandra be increased in a measured way. I was also urged to impose a number of conditions upon Mr. Birch when exercising access to Cassandra. I will give consideration to some of the suggested conditions but not all of them.
- [17] It has been submitted that the court should proceed with caution in increasing the defendant's access due to his evidence that he is having emotional difficulties. As I see it, part of the emotional difficulties Mr. Birch has been experiencing has been related to not being able to spend time with Cassandra. I would expect that after increasing the access between father and daughter that both will benefit emotionally.
- [18] Accordingly, I make the following orders with respect to the defendant exercising access to Cassandra:
1. Commencing tomorrow, Saturday, November 8th, 2008, Mr. Birch shall exercise access to Cassandra from 10:00 a.m. to 7:00 p.m. for that day;
 2. Commencing Thursday, November 13th, 2008, until Tuesday, January 6th, 2009, Mr. Birch shall have access to Cassandra on Tuesdays and Thursdays from 4:00 p.m. to 7:30 p.m. during which time Cassandra will have dinner at Mr. Birch's residence;
- (I have left out for the moment Tuesday, November 11th, as it is a statutory holiday.)
3. Commencing Saturday, November 15th, 2008, and every second Saturday thereafter, until further order of the court or agreement between the parties, Mr. Birch shall have overnight access to Cassandra from noon on Saturday until noon on Sunday. A quick look at the calendar will disclose that Cassandra will be spending her birthday evening at her father's residence;
 4. Commencing Friday, January 9th, 2009, Mr. Birch shall have access to Cassandra from Friday 5:00 p.m. until Sunday at 3:00 p.m. This access shall be every second weekend until further order of the court or agreement between the parties;
 5. During the week that ends on a weekend when Mr. Birch does not have access to Cassandra he shall have access to her on Tuesday and Thursday from 4:00 p.m. to 7:30 p.m.;
 6. As one of the Thursdays in December 2008 is the 25th of December, Cassandra's access to her father that day will commence at 12:30 p.m. and continue to 7:30 p.m. that day;

7. At any time during her access visits with the defendant Cassandra may have a telephone conversation with her mother to be facilitated by Mr. Dutton, Cassandra's maternal grandfather. Although by the time Cassandra is seven years of age she should have her mother's telephone number and be able to call her mother directly;
 8. All of the activities in which Cassandra is presently enrolled will continue such that if they fall on any of the defendant's access times the defendant will be responsible for taking Cassandra to those activities. For that purpose the plaintiff will provide a schedule of Cassandra's activities to the defendant so that he will have no doubt as to which activities he is responsible for ensuring Cassandra's attendance;
 9. In the event the defendant is unable to attend to pick up Cassandra for an access visit due only to a job or business commitment which has taken longer than originally planned the defendant is to advise Mr. Dutton that Ms. Muirhead will attend in his place to pick up Cassandra;
 10. In the unlikely event that for whatever reason the defendant is unable to exercise access to Cassandra for more than two hours of a scheduled access visit then the plaintiff should have the opportunity to have Cassandra returned to her and that access visit by the defendant will be forfeited.
- [19] It should also go without saying that neither party shall discuss with Cassandra anything to do with this litigation and both parties should do whatever possible to avoid discussing the litigation with other people in Cassandra's presence. Both parties have liberty to apply if there is a change in circumstances such that a child psychologist recommends a change in the access schedule or if the parties agree to changing the access schedule.

The Variation Application by the Defendant

- [20] Given the nature of the defendant's financial records the court is put in the position of making a guess about the defendant's income. This is especially difficult when the defendant has not even sworn as to what his income is in the form 89 financial statement. As well, it would have been helpful had the defendant's answers to interrogatories been more in keeping with the spirit of full and frank disclosure rather than being cute with his answers. Accordingly, the court declines to make any order regarding variation of spousal support payable by the defendant to the plaintiff. In the result, I am once again adjourning the defendant's application for the purpose of allowing him to provide the court with further evidence of his earnings together with a sworn form 89 financial statement which should state his income. This time the matter is adjourned only until January 16th, 2009. Should the defendant fail to bring this matter on for hearing by that date then this application to vary is dismissed.
- [21] I also decline at this time to make any orders pertaining to monies held in trust for the same reasons. It might be helpful for the defendant or his counsel to provide a spreadsheet which shows the proposed allocation of the funds in trust including how it is proposed that the

plaintiff would be protected by relying on other funds in trust from the sale of the former matrimonial home. As well, it would be appreciated if I was to receive some case authority from the defendant which says I am allowed to do what it is the defendant has requested I do. I will remain seized of this matter only until 4:00 p.m. on Friday January 16th, 2009, at the latest or earlier should the defendant's adjourned application be heard sooner than January 16th, 2009.

THE COURT: Do the parties of counsel have any proposal for access on Tuesday, November 11th?

MS. KINCH: If I could just have a moment. My client advises that she had a plan to go swimming with Cassandra at 4:00 that day. The usual access I think is 5:30 to 7:30 that day so she wouldn't have been back in time. What we propose instead is to have the defendant have Cassandra from 12:00 until 3:00 that day and have her back so that she can then go to swimming at 4:00.

MR. HAMILTON: That's fine.

THE COURT: All right. So the defendant shall have access to Cassandra on Tuesday, November 11th, 2008, between the hours of 12:00 and 3:00 p.m.

"Master Taylor"

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