
CANADA / JUDGMENT

C.H.D. v. J.C.M.

2011 BCSC 1213

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1213 C.H.D. v. J.C.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.H.D. v. J.C.M.,

2011 BCSC 1213

Date: 20110912

Docket: E070277

Registry: Vancouver

Between:

C.H.D., also known as C.H.M.

Claimant

And

J.C.M.

Respondent

Before: Master MacNaughton

Reasons for Judgment

Counsel for Claimant:

C.R. Lewis

Counsel for Respondent:

J. Dubas

Place and Date of Hearing:

Vancouver, B.C.

August 18, 2011

Place and Date of Judgment:

Vancouver, B.C.

September 12, 2011

Introduction

- [1] C.H.D. and J.C.M. were married on May 31, 2005 after a short period of cohabitation. Their daughter, G.S.M., was born on September 25, 2005. They separated on November 13, 2006 and, apart from a short time in 2009, when they lived together for what may have been a period of reconciliation, they have not lived together since.
- [2] Both C.H.D. and J.C.M. have filed applications seeking custody, guardianship, access, child support and other orders. The parties filed a total of 23 competing affidavits in support of their different positions.

The Background

- [3] J.C.M. is a 33-year old American citizen who moved to British Columbia when he started living with C.H.D., who is 38. Early in their relationship, J.C.M. and C.H.D. learned that C.H.D. was pregnant. As a result of his immigration status, J.C.M. was unable to work in Canada so, shortly after G.S.M. was born, C.H.D. returned to her stable employment as a manager of an art gallery. This decision made economic good sense. The parties agree that, while C.H.D. was at work, J.C.M. was the primary caregiver to their daughter. They disagree about how much involvement J.C.M. had when C.H.D. was at home.
- [4] J.C.M. has had a number of short-term jobs and attended various college programs both here and in the United States. He is currently a full-time student in a sound engineering program and working part-time in furniture retail earning \$12.50 an hour. C.H.D. continues to be employed at the art gallery where she earns a full-time annual salary of \$39,600.
- [5] After the parties separated, G.S.M. remained in C.H.D.'s care. On January 26, 2007, C.H.D. applied for a divorce, custody, guardianship, access, child maintenance, financial disclosure and costs. J.C.M. did not respond to the proceedings, until November 8, 2010, and C.H.D. did not complete the divorce. Between February and June 2007, J.C.M. lived in Korea where he competed in a modelling competition. He then returned to British Columbia. Throughout, C.H.D. has had the continuing support of her parents in caring for G.S.M.

- [6] C.H.D. says that J.C.M. exercised irregular access to G.S.M. Weeks passed when he did not contact G.S.M. or call to see how she was. In the affidavits filed by C.H.D. in support of her application, the affiants say that C.H.D. has accommodated J.C.M.'s requests for visits, driven him to G.S.M.'s activities and invited him to family events. C.H.D. says that J.C.M. regularly kept her, and her parents, waiting at access exchanges and often cancelled access visits resulting in her having to scramble for alternative arrangements.
- [7] J.C.M. denies that his access was irregular and says that he has always wanted more access to G.S.M. but that C.H.D. has put roadblocks in his way. In the affidavits filed by J.C.M. in support of his application, the affiants say that they were aware of J.C.M.'s desire for more access.
- [8] J.C.M. has paid varying amounts of child support for G.S.M. While in Korea, he paid \$500 a month, at other times, he has paid \$200 or \$400 a month.
- [9] After the parties had attended a February 2, 2011 judicial case conference, at which no agreements were reached, they continued their discussions. As a result, J.C.M. agreed to pay monthly child support of \$100. The parties also agreed on a two-week rotating access arrangement. In week one, C.H.D. has G.S.M. from Friday afternoon until 7:00 p.m. and Sunday from 10:00 a.m. to 7:00 p.m. and, in week two from Friday afternoon to Saturday at 7:00 p.m.
- [10] C.H.D. relies on a number of incidents in support of her claim for sole custody and guardianship. For the most part, and with the exception of the two significant incidents set out below, J.C.M. denies the incidents.
- [11] C.H.D. says that J.C.M. was, and continues to be, verbally and emotionally abusive to her and that their discussions of issues relating to G.S.M. are difficult. C.H.D. also says that, while they lived together, J.C.M. had difficulty controlling his temper and was involved in repeated altercations with their friends and neighbours.
- [12] C.H.D. says that J.C.M. encourages G.S.M. to damage her clothing. In particular, encouraging her to roll around in the grass, to dirty her white pants, and scuffing or damaging her "favourite" shoes. J.C.M. denies this allegation.
- [13] C.H.D. also alleges that J.C.M. drove G.S.M., sitting on his girlfriend's mother's lap, without a child car seat. J.C.M. acknowledges that, once, he drove G.S.M. a short distance without a car seat but denies the specific occasion referred to by C.H.D. Both J.C.M.'s girlfriend and her mother also deny that G.S.M. was not secured while travelling in the car with them.
- [14] I turn now to the two incidents which cause C.H.D. more significant concern.

Permitting G.S.M. to cut her hair

- [15] In the fall of 2010, during an access visit, J.C.M. permitted G.S.M. to cut her own hair while he videotaped her (the "hair cutting incident").

- [16] At the request of both counsel, I reviewed the video. It shows a happy 5-year old using scissors to cut off large chunks of her waist-length hair, including her bangs, while J.C.M. and his live-in girlfriend watched and encouraged her. At different times in the video, J.C.M. can be heard telling G.S.M. that she needed to be careful not to cut her bangs or hair too short.
- [17] In his first affidavit, J.C.M. says that the scissors G.S.M. used were child-safety scissors with blunt ends. While in the video they did not appear to me to be child-safety scissors, even if they were, it is apparent they were sharp enough to easily cut through G.S.M.'s hair. G.S.M. was not looking in a mirror while she cut her hair and the resulting cut was uneven and her bangs were cut very short on one side.
- [18] C.H.D. says in her affidavit material that G.S.M. did not wish to cut her hair, did not like it after it was cut, and that other children teased her about it.
- [19] The parties had a major disagreement when J.C.M. returned G.S.M. after the hair cutting incident. J.C.M. sent C.H.D. a copy of the video which he entitled "Independence". J.C.M. says that G.S.M. was not upset about her hair until she observed her mother's reaction.

The April 3, 2011 Incident

- [20] On April 3, 2011, J.C.M.'s girlfriend picked up G.S.M. and advised C.H.D. that J.C.M. was "under the weather". G.S.M. did not see J.C.M. until the following weekend. When she came home, G.S.M. told C.H.D. that J.C.M. had bruises on his face and wires on his teeth from falling off a ladder at work. J.C.M. said nothing to C.H.D. about the incident.
- [21] When C.H.D. asked J.C.M. what had happened, and whether he was able to care for G.S.M., J.C.M. provided a doctor's letter which described multiple traumatic fractures but did not explain what had happened. The letter also said that the fractures would not interfere with J.C.M.'s access to G.S.M. C.H.D. was not satisfied with the information she received. On April 29, 2011, J.C.M.'s lawyer advised that J.C.M. had been attacked by three men outside a lounge. C.H.D. subsequently learned, through a BC Online search, that J.C.M. had been charged with assault. J.C.M. does not dispute the incident or that he was charged as a result of it.
- [22] C.H.D. would only agree to J.C.M. continuing to have access to G.S.M. if he would say who was involved, where the incident happened, and agree not to take G.S.M. to the area of the incident where he might encounter the other people involved. J.C.M. did not agree.

The Issues

Are there objectionable materials in the affidavits filed by J.C.M.?

- [23] C.H.D. objects to inadmissible opinion, adjectival or subjective descriptions of reactions, opinions regarding motives, and argument which she says is contained in the affidavits filed by J.C.M. in support of his position. Attached to C.H.D.'s submissions is a list of what she submits are the objectionable portions.
- [24] Having reviewed the affidavits, I agree that there are objectionable portions in some of the affidavits. I have disregarded those portions, particularly where the affiants express opinions about a person's motives or views about how a person should or would react.
- [25] I also note that, to a lesser extent, there are objectionable portions in the affidavits filed by C.H.D. in support of her position. I have also disregarded those portions.

What interim custody and guardianship orders are in G.S.M.'s best interests?

- [26] C.H.D. seeks interim sole custody and guardianship of G.S.M. J.C.M. submits that both custody and guardianship should be joint, or, in the alternative, that no interim custody and guardianship orders should be made, and the status quo be allowed to continue.
- [27] The parties agree that custody, guardianship and access are to be determined by assessing G.S.M.'s best interests and also agree about the applicable factors a court should consider when determining those interests. They disagree as to how those factors should be resolved in this case.
- [28] As outlined in s. 24(1) of the Family Relations Act, R.S.B.C. 1996, c. 128, the factors to be considered in determining G.S.M.'s best interests include :
- a) her health and emotional well-being including any special needs for care and treatment;
 - b) if appropriate, her views;
 - c) the love, affection and similar ties that exist between her and other persons;
 - d) her education and training; and
 - e) the capacity of both C.H.D. and J.C.M. to adequately exercise guardianship, custody and access rights and duties.
- [29] Sections 24(3) and (4) of the Family Relations Act permit the court to consider parents' conduct only to the extent it "substantially" affects one of the factors set out in subsection 24(1): *Van de Perre v. Edwards* [2001] 2 S.C.R. 1014, paras. 9 and 32.
- [30] In this case, G.S.M. does not have any special needs which have to be considered. She is also too young to consider her views although I note that, in the video of the hair cutting incident, G.S.M. appeared happy and comfortable with J.C.M. and his girlfriend. C.H.D. does not dispute that G.S.M. loves her father, wants to see him, and is happy to go with him for access visits. There is also no doubt that G.S.M. is loved by, and loves, her mother and her maternal grandparents. G.S.M. will be in school on a full-time basis in September. Both of her parents live near to her school.

- [31] The key factors in this case are G.S.M.'s emotional well-being and C.H.D.'s and J.C.M.'s parenting and guardianship capacity.
- [32] Both parties have filed a number of authorities upon which they rely to support their respective positions with respect to custody, guardianship, and access. Because of the highly-context specific nature of an inquiry into a child's best interests, those cases are helpful only to the extent that they articulate the applicable principles.
- [33] Although the courts have moved beyond a view that joint custody and guardianship cannot succeed where there are communication and cooperation difficulties between parents, such difficulties may continue to be relevant in assessing a child's best interests.
- [34] C.H.D. relies on the additional considerations set out by Justice Joyce in *Jordan v. Jordan*, 2001 BCSC 365, para. 21, which refine the factors to be addressed when considering the potential impact on a child's best interests of parents' inability to communicate and co-operate. Applied to this case, these include: the ability of each parent to make proper decisions for G.S.M.; the extent to which the parties' parenting styles differ and result in the potential for disagreement, and the impact any such disagreement may have on G.S.M.; and the nature of C.H.D.'s and J.C.M.'s historic disagreements and the extent to which they relate to access, which may be resolved by court order, or to child rearing which might continue to arise.
- [35] Both parties refer in their affidavits to a number of incidents in which communication difficulties between them are apparent. C.H.D. refers to the difficulty surrounding her request to take G.S.M. to Saskatchewan to attend her grandfather's birthday party. J.C.M. initially refused and C.H.D. describes him as angry and intimidating. J.C.M. subsequently consented.
- [36] C.H.D. also describes J.C.M. as physically intimidating when she was upset over the hair cutting incident. C.H.D. also says that J.C.M. does not communicate with her about issues relating to G.S.M. For example, she says that if J.C.M. believed that G.S.M.'s clothing is too "fancy" for play, he should discuss that with C.H.D. rather than encouraging G.S.M. to dirty or damage her clothes. J.C.M. also describes communication difficulties in his material, in particular, he is concerned that C.H.D. does not respond to him.
- [37] After considering Justice Joyce's additional factors, I have concluded that the communication difficulties described by the parties do not rise to the level of acrimony which would impact G.S.M.'s best interests and do not justify a sole custody and guardianship order in favour of C.H.D. While J.C.M. has demonstrated a level of immaturity in his communication with C.H.D., which has resulted in some conflict, I am persuaded that that immaturity has improved, and will continue to do so, as the parties are required to deal with a joint custody and guardianship regime. While I accept that the parties have different parenting styles, I am satisfied that G.S.M. may benefit from those differences and that they do not have to result in disagreements between her parents.

- [38] I am also not satisfied that J.C.M.'s conduct is such that C.H.D. should have sole custody and guardianship. The cases relied on by C.H.D. all involve conduct which is significantly more negative and potentially detrimental to G.S.M.'s best interests than the conduct relied on here.
- [39] In this case, there has been no physical violence directed at either C.H.D. or G.S.M. While I accept that C.H.D. may have experienced what she sees as verbal and emotional abuse, the examples given, and set out in her affidavit material, are not so extreme as to cause real concern about G.S.M.'s best interests. That is because C.H.D. does not say that the verbal and emotional abuse has been directed at G.S.M. Further, C.H.D. was not so concerned about verbal and emotional abuse that she felt constrained in expressing her dismay over the hair cutting incident or pursuing information about J.C.M.'s injuries in April.
- [40] Both parties have filed extensive affidavits from family, friends, neighbours and colleagues attesting to their observations of the parties both with respect to each other, to G.S.M., and to others. For the most part, the affidavits C.H.D. filed in support of her position, relate to incidents which occurred when the parties were married to each other and date back some years. They describe J.C.M. as volatile, aggressive and controlling.
- [41] On the other hand, and for the most part, the affidavits J.C.M. filed in support of his position, describe more recent interactions with him. They describe J.C.M. as a devoted and involved parent and as calm and not volatile.
- [42] C.H.D. acknowledges that J.C.M. has become more reliable with respect to access in recent months. Further, C.H.D. and her parents have gone to considerable lengths to allow J.C.M. to continue to be involved in G.S.M.'s life. If C.H.D. had significant concerns about J.C.M.'s behaviour, I would not have expected those efforts to have been made.
- [43] I turn now to the two most significant incidents.
- [44] I understand that C.H.D. was upset by the hair cutting incident and why. Counsel for J.C.M. minimized the incident, submitting that G.S.M. was not at risk and that it demonstrated a different, and perhaps more lenient, approach to parenting. J.C.M.'s behaviour is consistent with his view that the hair cutting incident was an important moment in the development of G.S.M.'s independence, which he wanted to encourage. C.H.D. clearly viewed it as irresponsible parenting. In her submissions, she describes it as "self-destructive" behaviour. The truth likely lies somewhere between these two views. However, I conclude that this incident is not so significant that it should result in a sole custody and guardianship order. G.S.M. did not cut herself and her hair eventually grew back. I expect that J.C.M. has learned from C.H.D.'s reaction that he could have handled the whole situation more responsibly and maturely.
- [45] Turning now to the April 3 incident. It is potentially more troubling because it is evidence of behaviour which accords with C.H.D.'s description of J.C.M. as "volatile". However, I have concluded that either considered in isolation or as a part of the overall picture, it should not

result in a sole custody and guardianship order in favour of C.H.D. That is because the assault did not occur when G.S.M. was with J.C.M. In addition, while J.C.M. and his girlfriend acknowledged that alcohol was involved in the incident, there is no suggestion in any of the materials that there is a pattern of alcohol use which might put G.S.M. at risk. C.H.D. says that J.C.M.'s aggressive tendencies may put G.S.M. at risk but gives no recent examples of that happening. J.C.M. demonstrated immaturity in the way he reacted to C.H.D.'s questions about the incident. Had he understood her concerns and been more forthright about it, I suspect that C.H.D.'s concerns would have been allayed much more quickly.

[46] After considering all of the material filed, I conclude that the parties should share joint custody and guardianship of G.S.M. on a Master Joyce model.

Should a primary residence order be made?

[47] The status quo, since the parties separated, is that G.S.M. has primarily resided with C.H.D. C.H.D. has established a stable home and home life for G.S.M. She has enrolled G.S.M. in a neighbourhood school and J.C.M. lives nearby. C.H.D. has been primarily responsible for G.S.M.'s medical and dental care, arranged and paid for a nanny, and has wait-listed her for an after-school day care at her public school.

[48] I conclude that there is no cogent evidence or compelling reason to change that status quo and that, on an interim basis, G.S.M.'s primary residence should continue to be with C.H.D.

What access order is in G.S.M.'s best interest?

[49] Both parties have proposed different access arrangements in their applications. They agree that, as set out in s. 16(8) of the Divorce Act, R.S.C. 1985, c. 3 and s. 24(1) of the Family Relations Act, in deciding appropriate access, I must give paramount consideration to G.S.M.'s best interests. In addition, the parties do not dispute that so long as it is in a child's best interests, the maximum contact principle set out in s. 16(10) of the Divorce Act should apply.

[50] The current access arrangements, agreed to by the parties following the judicial case conference, provide J.C.M. with access every weekend, with every second weekend including an overnight access visit. C.H.D. submits that this access arrangement will not result in maximum contact with her once G.S.M. attends school on a full-time basis in September. She is concerned that once school starts, G.S.M. will only have a few hours of free time each day after school and free time on the weekends.

[51] C.H.D. currently works from Thursday to Monday from 10:00 a.m. to 6:00 p.m. but has said that she has arranged for weekends off once G.S.M. is in school. She has provided a letter from her employer indicating that she has a flexible schedule. C.H.D. asks the court to take note of J.C.M.'s history of erratic access, and to his behaviour, set out above, when determining appropriate access.

- [52] C.H.D. has proposed that J.C.M. have access to G.S.M. on Mondays and Thursdays from 8:00 a.m. to 7:00 p.m., and alternate weekends from Friday at 3:00 p.m. until Sunday at 7:00 p.m. She submits that her proposal gives J.C.M. about half of G.S.M.'s free time and an opportunity to interact with her at school and on the weekends.
- [53] J.C.M. has proposed that he have access every weekend from Friday, presumably at 3:00 p.m., until Monday at 8:00 a.m. J.C.M. has provided evidence that he goes to school in the morning from Monday to Friday and works Monday through Thursday afternoons. It appears that his work hours have been structured to allow him access to G.S.M. while C.H.D. is at work. I expect that he has some flexibility in the hours that he works.
- [54] C.H.D. submits that if J.C.M.'s proposal were ordered, she would only have time together with G.S.M. after school from Mondays to Thursday.
- [55] The evidence filed by C.H.D. sets out a history of access concerns but a careful review of them reveals that the concerns are historic. In this case, both parties have had something to do with the historic access difficulties. However, both parties have also shown a willingness to be flexible and to facilitate access: J.C.M. has moved his residence to be closer to G.S.M. and lives close to her school, and C.H.D. and her parents have gone to some lengths to ensure that J.C.M. has continued to be involved in various family activities with G.S.M. I also note that when C.H.D. originally filed her claims in this proceeding, she did not seek any significant access restrictions and that she acknowledges that J.C.M. has become more reliable with respect to access.
- [56] I have concluded that, in the circumstances of this case, neither the historic difficulties, nor C.H.D.'s concerns about J.C.M.'s conduct, should detract from the maximum contact principle. I have also taken into account the parties' schedules and have determined that, unless the parties agree otherwise, the following alternate-week interim access arrangements are in G.S.M.'s best interests:

Week 1: J.C.M. shall have access to G.S.M. from Friday, after school until Monday at 8:00 a.m.

Week 2: J.C.M. shall have access to G.S.M. on Monday and Thursday from 8:00 a.m. to 7:00 p.m.

- [57] In addition, to provide certainty, I conclude it is appropriate to deal with other special access days and order that J.C.M. is to have access as follows, unless the parties agree otherwise or until a further Court order:

- i) on his birthday;
- ii) on the Thanksgiving weekend in 2011 and all odd years thereafter;
- iii) for Easter weekend in 2012 and all even years thereafter;
- iv) for the second half of G.S.M.'s Christmas break in 2011 and every odd year thereafter;
- v) for the first half of G.S.M.'s Christmas break in 2012 and every even year thereafter;

- vi) for the first half of G.S.M.'s Spring Break in 2012 and every even year thereafter;
- vii) for the second half of G.S.M.'s Spring Break in 2013 and every odd year thereafter;
- viii) for Halloween in 2012 and every even year thereafter; and
- ix) on G.S.M.'s birthday in 2012 and every even year thereafter.

What interim support order should be made?

- [58] C.H.D. asks that income be imputed to J.C.M. and that he be ordered to pay interim child support and his share of special and extraordinary expenses under s. 7 of the Child Support Guidelines based on that imputed income. In addition, C.H.D. asks that J.C.M. be ordered to provide information about changes to his job status or income.
- [59] Under s. 19 of the Child Support Guidelines, the Court may impute income to a spouse in circumstances where it determines that the spouse is intentionally under-employed or unemployed and there are no mitigating circumstances as contemplated in the section. In considering whether to impute income, the following general principles are applicable:
- a) parents who are healthy and can work have a duty to seek employment;
 - b) reasonable income-earning capacity will be based on consideration of a parent's age, education, experience, skills, health and on the job opportunities that are reasonably available;
 - c) limited experience and skills do not justify a failure to pursue employment;
 - d) persistence in un-remunerative employment or unrealistic career aspirations will not be an excuse; and
 - e) self-induced reductions in income will not justify the avoidance of child support obligations.
- [60] J.C.M. is healthy and can and does work. He is currently a full-time student in the Pacific Audio Visual Institute where he is pursuing a career in audio engineering. He will graduate in May 2012. This is not the first post-secondary program in which J.C.M. has been enrolled. In his affidavit, he refers to at least two others. It appears from the evidence that he has not completed any of his programs to date.
- [61] It is also apparent from the evidence that, despite being 33, J.C.M. has not been consistently employed and has not settled on a career. Rather, he has had a series of part and full-time jobs in retail and hospitality and, from time to time, has pursued acting and modelling work. He is currently employed on a part-time basis in a furniture retail store. He is also in receipt of financial assistance for his post-secondary pursuits. During argument, his counsel acknowledged that his bank statements indicate other unexplained deposits into his account.

[62] In all the circumstances, and until he completes his current post-secondary program, I conclude that income should be imputed to J.C.M. by annualizing his current part-time earnings. As a result, I set J.C.M.'s income at \$26,000 for the purposes of the Child Support Guidelines and for the purposes of calculating his proportionate share of any s. 7 special expenses incurred by C.H.D. In particular, J.C.M. is to pay his share of any child care expenses.

Are other interim orders appropriate?

Restraining orders

[63] C.H.D. seeks orders that: J.C.M. be restrained from harassing her; he not enter or attend at her residence except for the purposes of access exchanges; he not remove G.S.M. from British Columbia without her consent or a court order; and for peace officer assistance.

[64] There is no evidence before me that there is a real or apprehended risk of physical harm to C.H.D. or G.S.M. As I have said, the hair cutting incident is evidence of an immature approach to parenting but did not cause any permanent harm to G.S.M. The April 3, 2011 incident, which also demonstrated some immaturity on J.C.M.'s part, did not involve G.S.M. or put her at risk. C.H.D. frankly admits that J.C.M. has never been physically violent towards her or G.S.M. The fact that C.H.D. did not seek restraining orders when she initially filed her claim, despite being aware of some of the conduct issues on which she now relies, and the fact that she has made considerable efforts to ensure that J.C.M. continued to participate in family events, belie the need for restraining orders in this case.

[65] As a result, I conclude that no restraining orders, pursuant to ss. 37, 38 or 126 of the Family Relations Act, are necessary in this case and no peace officer assistance order is required.

Travel Authorization

[66] C.H.D. also seeks authority to travel with G.S.M. and to obtain or renew G.S.M.'s passport without J.C.M.'s consent.

[67] The only problematic travel referred to in the evidence was C.H.D.'s trip to Saskatchewan to a family event. In that case, J.C.M. provided travel permission after considering C.H.D.'s request.

[68] The evidence does not suggest that the order sought by C.H.D. is appropriate in this case. As a result, I think it appropriate that both parents be prohibited from removing G.S.M. from British Columbia, or travelling with G.S.M. outside of the Lower Mainland, without the other's consent or further Court order.

Costs

[69] I did not hear submissions from the parties with respect to costs but note that the parties have had mixed success on their respective applications.

"Master MacNaughton"

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