

CANADA / JUDGMENT

C.M.E. v. C.A.L.

2002 BCSC 1536

COURT

Supreme Court of British Columbia

DECIDED

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Citation:	C.M.E. v. C.A.L.
Date:	20021104 2002 BCSC 1536
Docket:	E003179 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	C.M.E. PLAINTIFF
AND:	C.A.L. DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COLE

(IN CHAMBERS)

Counsel for Plaintiff

J. Dubas

Counsel for Defendant

D. Poulin

Date and Place of Trial:

October 11, 2002

Vancouver, BC

Introduction:

- [1] This is a summary trial concerning the custody and guardianship of F.M.T.L., born [], 1998.
- [2] The plaintiff mother applies for an order for sole custody and guardianship and the right to remain in Manitoba. The defendant father opposes the plaintiff's application to move to Manitoba and asks for an order for joint custody and joint guardianship with primary residence with him.

Background:

- [3] The plaintiff is 35 years of age, she came to Canada in 1996 from Peru. The defendant is 33 years of age. The parties were married on March 8, 1997. Their daughter was born on [], 1998 and they separated on August 14, 2000. The plaintiff has been the primary caregiver and the defendant has had reasonable and generous access until approximately the April 25, 2002. At that time, there was an altercation between the defendant and the plaintiff's new husband, where the defendant assaulted the plaintiff's husband. The police were contacted but they refused to intervene. The plaintiff had a restraining order preventing her from removing the infant from British Columbia, however, she continued to fear for her safety. She was not receiving help from the police and so she moved to Manitoba.
- [4] Since moving to Manitoba, the defendant has had extremely limited access due to distance and due in part to the fact that the defendant could not locate the plaintiff for some time.
- [5] There are many court orders. On November 7, 2000, a mutual restraining order was issued by consent. That same day, there was issued an order that the infant child reside with the plaintiff with specified access four days of the week and an order that the defendant not consume alcohol or smoke marihuana 24 hours prior to access being exercised.
- [6] On November 30, 2000, Master Tokarek granted an additional consent restraining order against the defendant, an order for sole custody of the infant to the plaintiff, a consent order in respect to access along the lines of the previous order, order for child support in the amount of \$231 per month and a consent order that, save and except for a trip the plaintiff was going to take to Peru from December 16, 2000 to December 31, 2000, neither party would remove the child from the province of British Columbia without prior written consent of the other or further order of the court.
- [7] The plaintiff applied for a divorce on December 18, 2001. That divorce was granted and there was also an order varying Master Tokarek's order of November 30, 2000 to "provide that the plaintiff and the defendant shall have joint guardianship of the infant child, and that the defendant shall have generous and liberal access to the infant."

- [8] After the plaintiff left British Columbia with the infant child and her husband in the latter part of April 2002, she applied in Manitoba for an order for interim custody and a variation of the order of Madam Justice Kirkpatrick of December 18, 2002. Those matters were dealt with on July 31st, when the Queen's Bench of Manitoba ordered that the plaintiff's application for custody be heard in British Columbia. Master Tokarek, on August 8, 2002, ordered that the child be returned to British Columbia to the care of the defendant. That order was stayed by Madam Justice Gill on August 15th and she ordered that the infant child remain in the custody of the plaintiff. There were provisions for access and a requirement that the plaintiff bring the child to British Columbia for the defendant to have access.
- [9] There were 43 affidavits filed, and, as one would expect there is hardly any agreement on any matter. Both counsel indicated their clients wished to have the matter determined by way of summary trial as their clients cannot afford to have the luxury of an ordinary trial.
- [10] The plaintiff alleges many incidences where the defendant was physically violent, verbally abusive, calling her foul and degrading names in front of the child and in public, and paints a picture of the defendant as being a poor provider, who is often unemployed and spends his money on alcohol and marihuana.
- [11] The defendant provides affidavits from many friends of longstanding who portray him as a good father and a clean-living, upstanding citizen. After considering and weighing all the evidence, I prefer the evidence of the plaintiff.
- [12] I find that the defendant has provided contradictory evidence. For example, an incident took place on August 31, 2002. The plaintiff and her brother state that the defendant was angry, picked up a fan and threw it at the wall in a fit of rage. In the defendant's affidavit sworn October 26, 2000 he states:

I picked up the fan because I was planning to take it. I agree that I threw it against the wall.

- [13] In the plaintiff's affidavit of September 8, 2002, she states:

He then grabbed a large fan which was in the living room and picked it up over his head. He began to aim the fan in my direction and my sister C. pulled me out of the way telling me to take F.M.T.L. to the other room for safety. Just as I was getting pulled away by C., the defendant threw the fan to where I was standing in front of the wall and the fan hit the wall behind me.

- [14] The defendant's reply of September 27, 2002 states:

I deny that these events occurred as the plaintiff states.

- [15] During the marriage, the defendant would frequent the plaintiff's place of employment despite her manager requesting that he not talk to her during working hours. On one occasion while visiting the plaintiff, he raised his voice and made lewd comments regarding her sexual conduct. There were many other allegations of the defendant subjecting the plaintiff to degrading comments, all of which he denies.

- [16] Finally, it is alleged that the defendant assaulted the plaintiff's new husband on April 25th. An independent witness describes the defendant as taking the position of a boxer. That evidence of the independent witness lends credibility to the allegation of assault.
- [17] In the final analysis, I conclude that prior to leaving for Manitoba the defendant stalked the plaintiff, was verbally abusive, and generally made life so intolerable that she felt she had no choice but to leave the province for her own well-being and that of her family. However, these findings do not excuse the plaintiff's conduct in violating the court order that restrained her from leaving the province. She should have immediately applied to set that order aside in British Columbia.
- [18] In terms of the defendant's abuse of alcohol and marihuana, it appears that that conduct is not affecting the defendant's ability to look after his child and he has already consented to an order that he not consume alcohol or drugs 24 hours prior to and during the time that he has access. I see no reason to change that order.
- [19] The infant child seems to be doing well in her new environment. The plaintiff's husband works in his family's restaurant, which he intends to take over, and in which the plaintiff works in two hours at noon. The parties intend to build a new home on property close to their business and I am satisfied that the plaintiff's new husband has a close extended family and that this marriage offers to the plaintiff a stable and secure environment.
- [20] The defendant, although he has had a poor work history and has not been a good provider to this family, now has his own business and is grossing approximately \$30,000 per year.
- [21] The plaintiff's move to Manitoba is a significant change in circumstances which requires an application of the principles in *Gordon v. Goertz*, [1996], 2 S.C.R. 27.
- [22] In respect to the issue of custody and what is in the best interest of the child, considering the principles set forth in the Divorce Act and the Family Relations Act, I am satisfied that both the plaintiff and the defendant have a great deal of love for this infant child, but the fact is that the infant child has always been in the care of her mother and it is admitted by the defendant in a letter of March 5, 2002 that he sent to the plaintiff's solicitor and stated:
- I believe she is doing a wonderful job in nurturing our child.
- [23] I am satisfied it is in the best interest of this child to be with her mother.
- [24] The custodial arrangements prior to the plaintiff leaving for Manitoba provided the defendant had access four days a week. The relationship between the infant child and her father seems to be a good one, but it is obvious that the tension, caused mostly by the defendant, has had have an adverse effect on the infant child.
- [25] If the child is allowed to remain in Manitoba, that will certainly cause difficulties in terms of access, but I am satisfied that because of the plaintiff's ability to help with the access costs that there can be meaningful access between the defendant and the infant.

- [26] In terms of the plaintiff's reason for moving, I am satisfied that she did not move out of spite. She moved out of fear and she moved to provide a better environment for her daughter.
- [27] In terms of the disruption to the child in the change of custody, requiring the child to move back to British Columbia would, in my view, be unduly disruptive.
- [28] In the final analysis, the issue is what is in the best interest of the child, not the interests and rights of the parents. Here I am satisfied that it is in the best interest of the child that she remains with her mother in Manitoba.
- [29] In respect to sole custody, Mr. Justice Parrett in *Poulin v. Poulin*, [1993] B.C.J. No. 1054 (para. 19):

For joint guardianship and joint custody to work there must be a level of mutual respect and ability to communicate, and the vision to see, independent of their own interests, the best interests of the children.

- [30] Since that decision the courts have moved away from what is often referred to the cautious approach to joint custody. The British Columbia Court of Appeal in *Robinson v. Filyk* (1996), 28 B.C.L.R. (3d) 21 (C.A.), after citing several cases that illustrate the criticism of the cautious approach, said at para. 21:

In these and other cases, trial judges have ordered joint custody, on occasion over the objection of one parent, on occasion where the parents' parenting philosophy differed, if it appeared likely that the parents could co-operate, because a joint custody order would best ensure that the child's need for the love and affection of both parents would be fulfilled.

Conclusion:

- [31] I am satisfied that this is not a case of the parents' parenting philosophies being different or that the plaintiff did not wish to cooperate. I am satisfied that the parties do not have the degree of trust and respect to communicate which is required for an order for joint custody. I, therefore, order that the sole custody be to the plaintiff.
- [32] With respect to the existing order for joint guardianship, that was an order that was made by Madam Justice Kirkpatrick when the plaintiff applied for the divorce. I see no reason to change that order, save and except for the fact that joint guardianship in light of my Reasons for Judgment in respect to custody should be defined as follows:
1. The parents are to be the joint guardians of the estate of the child.
 2. In the event of the death of either parent, the remaining parent will be the sole guardian of the person of that child.

3. Each parent will have the right to obtain information concerning the child directly from third parties, including teachers, counsellors, medical professionals and third party caregivers.
- [33] I set aside the other orders dealing with access. I order that the defendant shall have access in British Columbia for one block of fourteen days in July, and one block of fourteen days in August, with at least a one week period between those two blocks time. Also, the defendant shall have access in British Columbia from the end of school break in Christmas up until noon on December 25th. That will alternate each year with the defendant having access to the infant child at 12:00 noon on December 25, 2003 up until the day before school starts in the following January. The defendant shall also have the infant child during the school/Easter break in each year. The defendant will also have access to his daughter in Manitoba upon giving fourteen days written notice. Finally, because the defendant has not seen his daughter since September of this year, he will have access to the infant child for two weeks in November 2002, either here in British Columbia or Manitoba, upon giving fourteen days' notice in writing.
- [34] With respect to the costs of transportation, the plaintiff has offered to waive child support to help with transportation costs and due to the financial position of the defendant, I order that he be responsible for paying for the transportation of the child from Manitoba to British Columbia and returning. He will be responsible for picking up the child in Manitoba and bringing her to British Columbia. The plaintiff will be responsible for picking up the child in British Columbia and returning her to Manitoba.
- [35] The defendant will provide the plaintiff with a copy of his income tax return on the 1st of June of each year and so long as his line 150 income does not exceed \$30,000, he will not be required to pay support. This assumes, of course, he will exercise the access set out in these Reasons.
- [36] The defendant shall be at liberty to call his daughter between 6:00 and 6:15 p.m. Manitoba time, and Sunday, Tuesday, and Thursday of each week. The plaintiff will make sure that the phone is available to her daughter and to notify the defendant if they will not be at home and provide alternative phone arrangements.
- [37] When the daughter is in British Columbia, the defendant will provide the plaintiff with the phone number where she could be contacted every day. She will stay overnight at the home of the defendant's parents and that arrangement will be reviewed on July 1, 2004.
- [38] I also set aside the order restraining the parties from removing the infant from the province of British Columbia. I order however that the child not be removed from Canada without the written agreement of the parties or court order.
- [39] With respect to costs, it appears to me that success is somewhat divided and I order each party to pay their own.

"F.W. Cole, J."

The Honourable Madam Justice F.W. Cole

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