

CANADA / JUDGMENT

Clayton v. Clayton

2021 BCSC 525

COURT

Supreme Court of British Columbia

DECIDED

3 March 2021

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2021 BCSC 525 Clayton v. Clayton IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Clayton v. Clayton, 2021 BCSC 525 Date: 20210303 Docket: E142533 Registry: Vancouver Between: Bruce Alexander Clayton Claimant And Nancy Rae Clayton Respondent Before: The Honourable Mr. Justice Macintosh Oral Ruling Re Application to Deliver a Child for Court-Ordered Parental Access In Chambers (via teleconference) Counsel for the Claimant: L.A.L. Chantler Counsel for the Respondent: M. Zimmerman Place and Date of Hearing: Vancouver, B.C. March 3, 2021 Place and Date of Judgment: Vancouver, B.C. March 3, 2021

- [1] THE COURT: In this hearing conducted by telephone based only on affidavit evidence, the Claimant, Mr. Clayton, applies in his notice of application filed February 16, 2021, for an order that the Respondent, Dr. Clayton, immediately deliver to him the couple's 12-year-old son, Kai. The Claytons also have a daughter, Kyra, who is 16.
- [2] From 2013, when I believe the Claytons separated, their parenting time with the children has been shared equally. That arrangement became an order of this Court when the Claytons divorced in 2016. However, last year, Kyra moved to residing full time, or largely full time, with her father, and Dr. Clayton did not oppose that, regarding it as being Kyra's wish to do so at that time.
- [3] Apart from that, the Court order from 2016, reflecting the agreement from 2013, remained in place and was complied with until January 25 of this year, when Kai did not return to his parenting time with his father, as the Court order calls for. There is no application at this stage to vary the 2016 order. As this Court said in *K.R. v. J.W.*, 2016 BCSC 225, at para. 57:
- [57] Parenting time that has been included in an agreement or that has been ordered must be respected. If not appealed or varied, compliance cannot be viewed as optional.
- [4] Dr. Clayton in her email written as recently as February 7, 2021, expressed her agreement that Kai should obey the Court order. I hope that she was sincere in saying that, and that she is mindful of her duty to use all her reasonable efforts to see that the Court order is obeyed. I express that hope because of a concern I formed from seeing some of her texts with her daughter, that Dr. Clayton is conversing with the children in a manner that could alienate them from their father.

- [5] Counsel for Dr. Clayton presented as his primary position, as I understood it, that Kai's expressed reluctance to have parenting time with his father should be given weight to the extent that the 2016 order should no longer be enforced. I cannot accept that submission. Kai is only 12. 12 is old enough that the child can properly be heard from, and his or her views be added to the factual matrix of the case to be considered, but 12 is not so old as to permit the child's views to be determinative or close to being determinative in parenting time disputes.
- [6] The way forward will be to have the parties proceed as soon as possible to obtain a Views of the Child report, which they have both agreed to do. Counsel for Mr. Clayton agrees to Stephanie Fabbro for preparing that report. Counsel for Dr. Clayton is awaiting instructions from his client on that question.
- [7] I am not going the further step requested by counsel for Dr. Clayton of making an order for a children's lawyer under s. 203 of the Family Law Act, S.B.C. 2011, c. 25. I do not find that the statutory conditions for making such an order are present at this stage. In particular, I am not satisfied that it is in this 12-year-old's best interests to "lawyer up," as the saying goes, given the facts of this case.
- [8] When the Views of the Child report is obtained, either side may apply to vary the 2016 parenting time order. In the meantime, both parents will honour their obligations to Kai and to this Court, to do all they reasonably can to obey the existing order, and will refrain from saying or doing anything that may impede or frustrate compliance with that order.
- [9] Mr. Clayton's application sought to add police enforcement as a backup for having the order obeyed. He did not pursue that relief in the hearing, and I would respectfully say he was wise not to do so. I was asked to order counselling for Kai. I refrain from doing that. If the parties are in agreement on that question, of course they may pursue such counselling for Kai, but I am not persuaded from the evidence I have seen at this stage that counselling on a formal basis is in Kai's best interests.
- [10] Mr. Clayton asked for an order of make-up parenting time for the days since January 25, 2021, that he has missed having Kai. I will not make that order. Kai appears, as most 12-year-olds would in these circumstances, to be unsettled and fluctuating in what he should do and wants to do, but he has predominantly indicated reluctance to reside with his father. I am not going to add to his stresses by keeping him with his father more in the short term than the order already provides for going forward.
- [11] The renewal of the existing parenting time order will be implemented sometime within the next eight days as determined by Dr. Clayton. She will give Mr. Clayton as much notice as possible of which day and time she selects for that purpose.
- [12] Time did not permit the further requested orders to be addressed today. Applications for those orders are adjourned, and the costs of today are in the cause. Those are my reasons. Thank you.

- [13] COUNSEL L. CHANTLER: The parties have actually consented to a psychoeducational assessment as well, and I was wondering if Your Lordship would make that part of the order.
- [14] THE COURT: Yes, I would. Stipulate when the order is being drafted that that particular provision is by consent, and we can include that. "Macintosh J."
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