
CANADA / JUDGMENT

Colina v. Chan

2011 BCSC 1947

COURT

Supreme Court of British Columbia

DECIDED

11 May 2011

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2011 BCSC 1947 Colina v. Chan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Colina v. Chan,

2011 BCSC 1947

Date: 20110511

Docket: E102281

Registry: Vancouver

Between:

Diego Alejandro Molero Colina

Claimant

And

Winnie Wing Kei Chan

Respondent

Before: The Honourable Justice Gropper

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

I. Turaglio

Counsel for the Respondent:

C. McLeod

Place and Date of Hearing:

Vancouver, B.C.

May 11, 2011

Place and Date of Judgment:

Vancouver, B.C.

May 11, 2011

[1] THE COURT: This is my decision.

Introduction

- [2] This is an application by the claimant father seeking an order for joint custody and joint guardianship of the child of the marriage, Jayden, who is almost two.
- [3] He also seeks an access schedule, including that which would apply on special occasions as defined in paragraph 3 of his notice of application.
- [4] The access which is presently in place was agreed to in the first judicial case conference held within months of Jayden's birth. There was a condition that it was to be reviewed. When the second JCC was held the mother was unwilling to address changes.
- [5] At the outset of this application I advised counsel that I did not consider this as defining the status quo; that there is no status quo that has been ordered by the court.
- [6] The father also seeks a right of first refusal to care for Jayden when he is sick during the mother's access time when she is unavailable to care for Jayden. He seeks as part of the order that there be makeup time provided to the mother to compensate for these periods. He also seeks an order addressing Jayden's invitations to birthday parties during each other's access times and proposes that that, too, be addressed by an order that there be makeup time.
- [7] The mother seeks a designation that her residence is the primary residence and that the terms of joint custody and joint guardianship should be with the Joyce model with the default to her in the event of a disagreement.

Background

- [8] The parties were married in April 2005. They separated in July 2009, about two weeks following Jayden's birth.

- [9] There is a dispute about the circumstances of their separation, and the mother also refers to the father's conduct at and around the time of Jayden's birth. I will address that in the context of my decision, but not review it.
- [10] The only issue remaining between these parties is this matter of access.
- [11] The mother is a teacher. The father is a real estate agent. During the school year the father has greater flexibility in his work hours.

Legal Basis

- [12] Section 16(4) The Divorce Act, R.S.C. 1985, c. 3 (2nd Supp), provides that the court has jurisdiction to order access. Section 16(8) provides that the sole consideration is to be the best interests of the child. Section 16(9) says that the past conduct of the parties is not relevant unless it affects the best interests of the child. Section 16(10) provides that both parents have maximum contact with the child.
- [13] Access is the right of the child, not the parent. It is intended to facilitate a meaningful and continuing relationship between the child and both his parents.
- [14] The parties, according to the affidavits, have disagreed about access issues and a court-ordered access schedule was intended to address that. I will assume that the disagreements will decrease or be eliminated by a set access regime.
- [15] There is no presumption that a mother or a father is a superior parent. Neither is experience with children a factor. There is no special consideration where one parent is involved in an occupation involving children, such as a teacher. Unless there is cogent evidence provided the court assumes the competency of each parent.
- [16] The conduct, as I have stated, of one parent toward the other is irrelevant unless it engages a consideration of the best interests of the child.
- [17] Access addresses parenting. It is not addressing babysitting. There is no notion that one parent parents and the other parent babysits. There is no right of supervision by one party over the other party's parenting.
- [18] Finally, there is nothing exceptional about one or both parties working.

Position of the Parties

- [19] The father says that the proposed schedule provides equal access or close to equal access for Jayden with each of his parents.
- [20] The mother provides what she describes as a "wake period" calculation based on the times she has to spend with Jayden when he is awake according to his current schedule in consideration of her full-time employment. She equates the wake period as the period of quality time.

Analysis

- [21] The evidence that is put before me satisfies me that both parents provide homes, activities, and parenting skills to Jayden which are positive and appropriate.
- [22] I will address the wake period calculation and the mother's assertion that that should guide my analysis.
- [23] The wake period calculation, in my view, does not embrace the principles of the Divorce Act. The court does not divide access in accordance with a prescribed formula or make a specific calculation by the number of hours each parent has to spend with the child. It is not a competition. It cannot be addressed like the court addresses the equal division of property.
- [24] There is no concept of punishing a mother for working or a father for not or the other way around. That is inconsistent with the best interests' test. It can be an advantage to a child that one parent has a more flexible work schedule. It is certainly not a detriment to either parent.
- [25] The wake period calculation relates to Jayden as an almost two-year-old, but he will grow and his schedule will change. The wake period calculation also does not address those periods where the mother is not at work such as summer holidays, Christmas, and spring breaks.
- [26] As I said, the court does not calculate access in accordance with part days or hours, waking time or quality time. The court considers all of the time in which a child spends in each parent's care and assesses what access is appropriate based on the best interests of the child.
- [27] From that perspective, then, I find that the joint custody and joint guardianship sought by the father is appropriate as his proposal for access is reasonable and fair and it is so ordered.
- [28] I will also order that access for special occasions is in accordance with paragraph 3 of the notice of application.
- [29] I will not make any order requiring the parties to live within a 15-minute drive from each other as the father has retreated from that position.
- [30] I will impose the Joyce model but will make no designation of a primary residence or a provision that one party makes a decision in default of an agreement.
- [31] I will include in the model a provision that both parties make their best efforts to resolve matters of access. If they fail to do so, that the matter be referred to a mediator who is jointly agreed to and that the costs of that mediator are split equally and that the parties have a final resort to court.

- [32] I will now address the application regarding the care when Jayden is sick and birthdays, but before I do so I want to make a comment on makeup time. I reject the notion of makeup time. Things change and emergencies occur. Jayden's care is not to be determined by a specific calculation of time.
- [33] Both parties will operate in good faith. If one party misses time for some appropriate reason it will not be required to be made up. The parties can agree to accommodate the time missed, but there will be no calculation of access time missed and no makeup time will be ordered. The same principles apply with regard to the concept of makeup time as I have expressed in regard to the wake period calculation.
- [34] In respect of sick time, if Jayden is sick, his best interests are served if he is in one of his parent's care. If neither is available, other arrangements can be made. If the mother is not available during her period of access the father is the person who will provide the care. As I say, there will be no makeup time required unless the parties specifically agree.
- [35] In respect of birthdays, with the new access schedule that I have ordered, neither party can schedule Jayden to attend an event or an activity, including a birthday party, during the other's access period.
- [36] If a birthday party occurs during the mother's access time, she can determine whether Jayden attends the birthday and take Jayden to it. She can also agree to let the father take Jayden to a birthday party during her access regime if she considers that appropriate.
- [37] On the father's access days, the father has the same responsibility and the same ability to determine whether Jayden will attend the birthday party and whether he will attend with his father or his mother.
- [38] I note that in the very near future Jayden will attend birthday parties without his parents and he will have a view about whether he will attend a birthday party or not. It is an aspect of parenting to determine which parties Jayden attends.
- [39] THE COURT: Those are my rulings. Are there any submissions in respect of costs?

[SUBMISSIONS RE COSTS BY COUNSEL]

- [40] THE COURT: The Court of Appeal recently considered what was conflicting jurisprudence in this court about whether costs should follow the event in the normal course in accordance with the decision in *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180, or whether the notion that both parties are motivated by the best interests of the child and that they should bear their own costs should be the applicable principle in *S.J.C. v. S.-J.C.A.*, 2010 BCCA 31. The Court of Appeal has been very clear that the usual rule applies in family cases unless there are some exceptional circumstances, and that is that costs follow the event. The successful party is entitled to his or her costs.

- [41] I find that the father has been successful in these proceedings and that he is, therefore, entitled to an award of costs.
- [42] I want to note this. Courts assume that parties come to court with a genuine belief that their position is right. That is not just in family cases, but in every other case. The genuine belief theory is not a theory of costs that is applied. It is expected that parties come to court with a genuine belief in their position. Otherwise, coming to court is maintaining a fraudulent position or a dishonest position. While I fully appreciate that each party came to court -- and specifically in this case, the mother came to court with a genuine belief that her position was appropriate and in the best interests of Jayden, but that is not the test.
- [43] The father is entitled to his costs at Scale B.

"Gropper J."

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