
CANADA / JUDGMENT

Espinoza v. Sutherland

2009 BCSC 1225

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1225 Espinoza v. Sutherland

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Espinoza v. Sutherland,

2009 BCSC 1225

Date: 20090908

Docket: 18661

Registry: Cranbrook

Between:

Gregoria Paniagua Espinoza

Plaintiff

And

Cliff Theyroy Sutherland

Defendant

Before: The Honourable Mr. Justice Brown

Reasons for Judgment

Counsel for Plaintiff:

S. Smail

Counsel for Defendant:

L. Hawkeye

Place and Date of Hearing:

Cranbrook, B.C.

July 14, 2009

Place and Date of Judgment:

Cranbrook, B.C.

September 8, 2009

- [1] The parties between them have had three sets of family proceedings going: one in B.C. Provincial Court; a B.C. Supreme Court divorce and family action (Cranbrook Registry #18661) that was started by the plaintiff; and another action in the Court of Queen's Bench of Alberta, Judicial District of Edmonton, Action 4804 146769, started by the defendant.
- [2] On March 27, 2009, an inter-provincial consent case management order was made. It requires that the parties settle the jurisdictional issues by applying in Cranbrook, B.C. before the presiding justice in chambers, which is how the jurisdictional decisions fell to me. Both parties were represented by counsel at the Cranbrook hearing.
- [3] The only determinative question to be answered now is whether the children of the marriage are more substantially connected with the Province of Alberta or with the Province of British Columbia. Sections 6(1) and (2) of the Divorce Act, R.S., 1985, c. 3 (2nd Supp.) provide for the transfer of divorce and corollary relief proceedings to the province where a child of the marriage is found by the court to be most substantially connected. The answer to that question will then determine the province where the parties will carry on their litigation.

Background

- [4] The parties met in 1998 in Bolivia, the plaintiff wife's home. They cohabited there for a time before returning to Alberta, the defendant husband's home province. They married in Alberta on May 13, 1999.
- [5] Just before the marriage ceremony, the plaintiff wife, 19 at the time, signed a prenuptial agreement giving up any claims to the defendant's assets she might have. After she signed the prenuptial agreement and within hours of marrying, he returned to Kuwait, where he worked for British Petroleum (BP). The plaintiff joined him there three months later. The parties continued to live in Kuwait until their separation in June 2009.

- [6] The defendant earned a large six figure income working for BP in Kuwait. A general residency pattern developed that saw the parties live in Canada for about three months or so each year, never long enough to establish residency for the purposes of the Divorce Act. The parties share practically no common ground over where they and the children of the marriage lived most of their time when in Canada, except to say that some time was spent in B.C., some in Alberta.
- [7] On August 11, 2000 their daughter Jennifer was born, first of the marriage. That same year, construction started on a large resort home in Fernie, B.C., situated on a mountain ski resort property that the defendant purchased before the marriage. It is this Fernie home that the plaintiff says became the family home when they returned to Canada each year, and the place where the three children formed their most substantial connection. The Fernie home became part of a rental pool, rented out when the parties lived and worked in Kuwait and didn't need it. The plaintiff says that she and the defendant intended to live there after the defendant's contract with BP concluded. The defendant says the parties intended to live in Alberta, where they owned a ranch and he could work in the petroleum industry.
- [8] The defendant says that the family lived most of their Canadian time in Barrhead, Alberta, the northern Alberta district where the defendant and his extended family lived. There was no evidence before me though that the defendant had established a residence of his own there before the marriage, setting aside time he lived in the home of his family of origin.
- [9] In 2003 the family was evacuated from Kuwait. They returned there at the end of the Gulf war. Their evidence conflicts as to whether the family lived in Calgary or Fernie during the war; I find they spent time in both places. The Fernie property would be available to them, and it stands to reason they would live there as much as possible.
- [10] It is evident from the affidavits that the marriage was troubled almost from the start. Still, after Jennifer, two more children were born in Kuwait, Jonathan on December 22, 2002 and Julie on February 4, 2006.
- [11] In June 2007 the parties purchased three sections of ranch land in the Barrhead area in order to run cattle -- at least 200 head to start. I say "parties purchased" advisedly, since it is clear that it was the defendant who spearheaded the purchase and arranged the financing, almost entirely supported by the equity available in the Fernie property, now encumbered in order to finance that purchase of Alberta ranch lands. The Fernie property is valued at well over \$2 million.
- [12] Aiming to demonstrate the children's more substantial connection to Alberta, the defendant points to certain documents such as emails, vehicle registration, and an Alberta driver's license (in the plaintiff's name). He says these show that she ran substantial portions of the cattle ranching operations and justify his portrayal of her as an "actual rancher"; and thereby indirectly proving the children's stronger connection to Alberta.

- [13] For her part, the plaintiff says that the ranch was only an investment property, never intended by the parties as or ever to become the children's home. As for the extent of her involvement in the ranching operations, she says it was for the purpose of establishing some sufficient bona fide ranching activity on her part in order to justify income splitting and eligibility for certain government grants. Her counsel submits that the defendant has mischaracterized the plaintiff's minimal involvement, saying it is a contrivance unrelated to the question of which province the children are truly more substantially connected to.
- [14] It is clear on the evidence, and I so find, that the family did spend time in both provinces when they came to Canada. It is also evident that the Fernie residence represents the most substantial (potential) family asset, although whether the plaintiff will have any entitlement to it depends on how the prenuptial agreement is dealt with by the courts. In British Columbia, it would be considered ineffective due to the wife's age at the time she signed the agreement. In Alberta, her age would not, unto itself, be a bar to the effectiveness of the agreement.
- [15] In September 2007 the defendant returned to Kuwait, (after the said purchase of the Alberta ranch land sections). The plaintiff remained behind in Alberta, staying until November, when a manager was hired to run the ranch. Then the plaintiff returned to Kuwait to rejoin the family.
- [16] Setting aside for the moment the question of whether the plaintiff was a fully fledged rancher up to that point, upon her return to Kuwait her involvement in ranch activities amounted to little if anything. The defendant himself deposes that he managed the property from Kuwait by email.
- [17] Marital difficulties continued. The plaintiff points to the defendant's alleged abusive behaviour towards her. The defendant makes equally serious allegations against the plaintiff that I will discuss further below. At any rate, on June 29, 2008, soon after the family returned to Fernie, the plaintiff left the defendant, taking the three children with her. The defendant then attended B.C. Provincial Court, where he obtained an ex parte interim order for custody of the children (later amended to allow the mother custody on weekends).
- [18] On July 29, 2008 the matter came before B.C. Provincial Court Judge T. Gove. Upon finding that he was satisfied that the children were more substantially connected to the Province of Alberta and citing s. 46 of the Family Relations Act, [R.S.B.C. 1996] c. 128, he declined to exercise jurisdiction over the children. At the same time, he ordered interim joint custody to the parties with the care of the children shared on an equal basis. He prohibited both parties from removing the children from either province.
- [19] Counsel for the plaintiff submits that this order rested on misleading information the defendant placed before Judge Gove, misleading him about the plaintiff's work involvement in the Alberta cattle operations. Gove J's reasons for declining jurisdiction over the children in British Columbia are brief:

16 The father was educated in Alberta. His family lives in Alberta. He has a home and ranch in Alberta. They were married in Alberta. The mother is a ranch operator in Alberta and at least one of the children is registered for school in Alberta. I am satisfied that the jurisdiction in Canada where the issues of guardianship, custody, access, and maintenance of these children is best determined is in Alberta.

- [20] On the evidence before me, it does not appear to be correct that the defendant had a home in Alberta, at least in the sense conveyed by that paragraph. Further, the earlier school registration had been a temporary one; Jennifer was registered for one month and an out-of-province registration fee had to be paid. Counsel for the plaintiff points out that the Alberta property was purchased barely a year before the date of separation and financed largely through the equity in the Fernie property. She submits that the documentary evidence relied on in Provincial Court to show that Alberta was the proper jurisdiction was misleading and fell far short of establishing the plaintiff as an Alberta rancher. She further submits that the learned judge had little evidence set before him on the subject of the children's connection to Fernie, which on the evidence before me was at least substantial, discernible despite the conflicts in the evidence.
- [21] In his reasons Judge Gove noted that the evidence conflicted over the future residence intentions of the parties. The defendant's contract with BP ended in August but I note that he continues to work for BP in Alberta. As earlier said, the plaintiff testifies that the family intended to remain in Fernie. She says that the BP contract was renewable and that BP work in the Fernie area was available to the defendant. The defendant says the plan was to return to Alberta and live on the ranch lands they had purchased.
- [22] The plaintiff did not appeal Judge Gove's order. In any event, I am satisfied that the evidence placed before him was at best incomplete and deficient and I do not see myself governed by his findings here.

Orders

- [23] On July 18, 2009 the plaintiff started divorce and ancillary relief proceedings in the Supreme Court of B.C., Cranbrook Registry #18661. Normally this date of commencement could be a significant factor, inasmuch as s. 3(2) of the Divorce Act provides that when both parties start actions the earliest takes precedence. However, matters are not so simple as that, because, as mentioned earlier, neither party could actually satisfy the residency requirements for commencement of a divorce action at the times the parties started up their actions. Further, the date of commencement gives no answer to the governing question before me: which province are the children most substantially connected to?
- [24] On August 20, 2008, the defendant obtained an order that the children be delivered to him on August 21, 2008 in Airdrie, Alberta on the understanding that the B.C. Provincial Court had declined to take jurisdiction over the children.

- [25] On August 27, 2008, the defendant obtained an assist order for apprehension of the children and delivery to the defendant, who was to return with them to his Barrhead residence, a mobile home that he had set up on one of the sections of ranch land.
- [26] On December 19, 2008, the defendant filed an application in the plaintiff's B.C. action seeking a right of possession of the Fernie property and an order that it be placed in the rental pool and sold forthwith. I do not see where that application was ever dealt with.
- [27] On January 22, 2009, the plaintiff, acting on her own behalf, obtained an order providing for further parenting time and an order for collapse of an RRSP in the amount of \$13,000, with the defendant to pay that amount to her on a without prejudice basis.
- [28] On April 3, 2009, the Alberta court ordered the dismissal of another application for exclusive possession of the Fernie property. That court, cognisant of jurisdictional conflicts, then instituted direct judicial communication with the Supreme Court of B.C. in order to make arrangements to deal with the jurisdictional issues. (Seeing that order was handed down on March 27, 2009, before the April 3, 2009 application, I cannot account for the date discrepancy, but nothing turns on that, at least here.)
- [29] In early 2009, the plaintiff moved to Barrhead, Alberta, since then living in with the defendant's elderly father. In her affidavit she alleges that the defendant threatened that she would never see the children again unless she returned to Alberta, and so she felt she had no choice but to do so. Counsel submits that the defendant has been using the children as a pawn in order to force a reconciliation that the plaintiff does not wish.
- [30] She wishes to live in the Fernie home. Her counsel said that she wanted to establish a bed and breakfast in it. But given the defendant's current straitened financial circumstances, the equity tied up and the shortage of capital, this seems to be an impractical expectation right now. In any event, as matters stand, the family find themselves living in the Barrhead area, the plaintiff with the defendant's elderly father, the children with the defendant in the mobile home, with both parents involved in raising the children, who attend school in Barrhead.

Discussion Substantial Connection

- [31] With respect to establishing the children's more substantial connection with Alberta than British Columbia, the defendant points to the large section of land purchased in Alberta and his connections with his extended family there. However, I note that the land was purchased but a year before the date of separation and the evidence before me does not persuade that the plaintiff's involvement rises to the level of establishing her as a rancher involved in the day-to-day operations of the business, with the exception of the roughly three months elapsed between the defendant's return to Kuwait and November 2007, the month that the plaintiff also returned. The evidence does not satisfy either that the children's connections with the defendant's family are such as to warrant given that much weight.

- [32] With respect to 2003, the year the family evacuated Kuwait, the evidence conflicts over where the family lived for that period. The defendant refers to Jennifer's 2006 school registration in Barrhead, but I note that this was for a short period of time; non-resident fees had to be paid and this was occasioned by a later than usual return to Kuwait.
- [33] As for the defendant's characterization of the plaintiff as "a bona fide farmer" who stored winter feed, transported animals, purchased equipment and so on, and activities that he submits the plaintiff used to bolster her application for Canadian citizenship, the plaintiff says that the defendant himself had the major hand in the application. I cannot make a finding on that here. The defendant relies on other documentation as well, such as the plaintiff's holding of a Barrhead library card and so on; but the plaintiff disputes the inferences that the defendant asks me to draw from these documents, pointing out, for example, that she still holds a Fernie library card as well.
- [34] The documents attached to the affidavits obviously do demonstrate that the plaintiff had a connection with Alberta, but are far from conclusive in showing that Alberta is the province where the children of the marriage formed their most substantial connections.
- [35] For her part, the plaintiff deposes that the family returned and remained in Fernie whenever they returned to Canada and only visited Alberta. For the most part, the defendant's family usually travelled from Alberta to Fernie. Logic lends the plaintiff some support, given that the defendant and children now reside in a mobile home on one of the sections of ranch land; and the plaintiff lives with the defendant's elderly father. No other Alberta residence options were demonstrated. It is hard to conceive why they would want to stay anywhere else but in their very substantial Fernie home, with its recreational opportunities, whenever they returned to Canada. The Alberta property was not even purchased until 2007, and I find no evidence that the family had an established residence of their own in Alberta when they returned to Canada.
- [36] Further, the plaintiff offers independent witness evidence, albeit in the form of a letter from Fernie next door neighbours attached to an affidavit, which lends considerable support to the plaintiff's evidence that the family lived mostly in Fernie when they returned to Canada. I also read in an exhibited circular a short story about a mountain peak in the area that had become widely known as Batman Mountain. Apparently it was so named after a young boy, living in the area around the time the family would have been living there, noticed the Batman resemblance and started the new naming tradition. The wife deposes that it was their son that had noticed the resemblance to the Batman figure, pointed it out to others, and so started the Batman naming tradition. She submits that this and the independent evidence of the neighbours shows how closely connected the children were with the Fernie property. As mentioned, counsel for the plaintiff also relies on the fact that the Fernie property is the most substantial potential family asset, financing the purchase of the Alberta lands; but this is at best tangential to the children's connectivity with Fernie.

[37] The parties have not been cross-examined on their affidavits, which are at cross purposes throughout. However, two documents in particular raise noteworthy concerns about the reliability of the defendant's evidence. On July 6, 2008, the defendant sent an email to the plaintiff. Both the tenor and content of the email stands in stark contrast to statements in his July 3, 2008 affidavit, sworn for the Provincial Court hearing.

[38] In his affidavit he alleges, among other things, that the plaintiff suffers from "severe mood swings," becomes "very angry, very aggressive and will use severe physical discipline to children," [on one occasion] "uncontrollably whipping the eldest child with a belt," [her moods extending to the point] where "she will not have anything to do with the children," "will abandon the children so that she can be alone by herself," "is not on any medication and capable of abandoning the children or even becoming violent towards them," "has been diagnosed as being paranoid and suffering from fear for which she is required to take additional medication."

[39] However, in his said email, bearing in mind it was sent three days after swearing his affidavit, he writes her attempting to reconcile, saying to her, among other things:

we can start a new life in Canada with no more work, with no more building farms and houses, no more stretching ourselves to get ahead no more Kuwait or any other overseas job. Work is no longer my first priority. My lifestyle and my family's lifestyle is now my first priority.

We will take out the stress from our lives and remove all commitments other than to ourselves and raising the children.

living in Fernie with us together as a family is my first choice. I will take a leave of absence from BP until they have a job available here with their new project. Or I will just quit and take up odd jobs here that inspire me, sell real estate or something.

... You had asked me what dreams I envisioned for your life, and I said it wasn't college in Calgary but I can envision you actively engaged in the arts community in Fernie and taking courses at the college in Fernie little by little to gain your diplomas and degrees. The community support in Fernie can help you achieve that vision by looking after the children's needs. Calgary is too big, too cold, too expensive and too rude. They require a small town living where it is an easy five minutes to get anywhere.

[Emphasis added.]

[40] How can one reconcile the sworn allegations in the affidavit with the sentiments expressed in the email? The defendant's counsel says that he was simply desperate to reconcile and the email is just a reflection of that sentiment. But that explanation simply begs other self-evident questions.

- [41] The marriage was clearly troubled, and without benefit of cross-examination of the parties, I am reluctant to comment on the claims of abuse advanced by the parties, except to say that considering the affidavits as a whole there is sufficient justification to warrant a concern that the children have become pawns in a conflict centred on the defendant's desire to resume the relationship. I do not find that here, but come to my decision on the question with a mind that receives the defendant's evidence with considerable caution.
- [42] However, the practicalities and realities of the parties' circumstances now cannot be overlooked. Even if more satisfied than not that the children have a more substantial connection with British Columbia than Alberta - based on the fact the children lived more in British Columbia than in Alberta - more than that has to be considered, especially given the boots-on-the-ground financial facts in this case.
- [43] The evidence satisfies that the defendant is currently in straitened financial circumstances. He cannot afford to continue the support of both the mortgage on the Fernie residence and the Alberta ranch land. It will be some time yet before the ranch produces significant net income as it is in a start-up phase. Meanwhile, the Fernie property has not been generating any rental income and the plaintiff refuses to agree to its sale. That bears on the jurisdictional issue to some extent, as explained below.
- [44] Most of the evidence placed before me emphasizes the parents' activities and connections as opposed to the children's, which is where the major focus should be. That said, and while I incline to the conclusion that before the separation the children were somewhat more substantially connected with British Columbia than Alberta, the forum conveniens practicalities and other circumstances present must also be considered. The children now attend school in Alberta. Custody and child's wishes reports likely will be required. These can be most conveniently carried out in Alberta, considering that presently there is no realistic prospect that the plaintiff will be able to move to Fernie, have the children live with her there and financially support them; at least not until spousal support matters are sorted out and the means to pay them become available.
- [45] Further, I note that Alberta physicians and counsellors (paid by B.P.) dealt with various marital issues. The evidence may bear on the question of the children's best interests as far as custody and residence are concerned.
- [46] I am concerned that the plaintiff was unrepresented in the Alberta proceedings and that a power imbalance will prevail if the plaintiff is no longer represented by her current counsel, obviously well versed in the litigation, or at least other able counsel. I understand that arrangements can be made for her current counsel to obtain permission to appear in Alberta; but for interlocutory matters that would be impractical. Some provision would need to be made for the plaintiff's counsel to appear by videoconference on interlocutory matters. Doubtless that can be arranged, as it was in Cranbrook.

- [47] Both parties reside in Barrhead. Court proceedings have been filed in Edmonton and Cranbrook. I note the distance between Cranbrook and Barrhead by car is over ten hours; between Barrhead and Edmonton less than two hours. While the main potential family asset is in British Columbia, in personam orders can be made and the Alberta court can seek whatever assistance might be required of this court to deal with any impediments to dispositive orders for the Fernie residence.
- [48] Counsel for the plaintiff points out that the pre-nuptial agreement would not be enforceable in British Columbia, urging me to take this into consideration. But this is not a justification for finding that the children are more substantially connected to British Columbia, or that thereby it is the most convenient forum for the hearing. The pre-nuptial agreement was made in Alberta. I do note the plaintiff's evidence about the circumstances surrounding the making of the pre-nuptial agreement, and more may come under scrutiny in the Alberta proceedings than just the age of the plaintiff at the time she signed the agreement. In any event, that factor cannot determine which court should assume jurisdiction here.
- [49] Though I have found that it is likely that the children spent more time in British Columbia and that the evidence suggests the parties' intention to settle in Fernie eventually, the much greater ease with which evidence regarding the children's best interests can be received in Alberta, and therefore custody and access decided, must be considered. All considered, I find that the Court of Queen's Bench of Alberta should assume jurisdiction, with the respectful recommendation that should the plaintiff's British Columbia counsel be permitted to appear in Alberta, having satisfied all that is required, she be allowed to appear at interlocutory matters by way of videoconferencing. The plaintiff clearly requires counsel on what is a relatively complex divorce and ancillary relief case.
- [50] In summary, I find that while the children are likely somewhat more substantially connected to the province of British Columbia as measured by time spent before separation, after then taking other significant forum conveniens circumstances into the balance, Alberta is the most convenient forum for hearing of the divorce and ancillary relief. Accordingly, I find that the children are more substantially connected with the province of Alberta and the courts there should assume jurisdiction.
- [51] As far as the pleadings and further proceedings are concerned, the originals of the British Columbia statement of claim and defence, together with all the orders and affidavits filed in the Cranbrook registry, shall be forwarded to the appropriate Registrar of the Court of Queen's Bench in Edmonton, there to be filed or otherwise received according to the practices, rules and specific judicial directions of Court of Queen's Bench of Alberta, Judicial District of Edmonton.
- [52] In this court, the Registrar of the Cranbrook file shall make copies of the pleadings on file, marking them accordingly as true copies of all the originals forwarded to Court of Queen's Bench of Alberta. No further proceedings shall take place in this court with respect to Action 18661 without order.

[53] The procedural orders set out in paragraphs 51 and 52 may be varied in such ways as may be necessary to accord with the rules, practices and further judicial direction of the Court of Queen's Bench.

"N. Brown J."

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