
CANADA / JUDGMENT

Findlater v. Naziel

2018 BCSC 2426

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 2426 Findlater v. Naziel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Findlater v. Naziel,

2018 BCSC 2426

Date: 20180515

Docket: E16437

Registry: Smithers

Between:

Scott Jason Findlater

Claimant

And

Reya Marcia Naziel

Respondent

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

Terry E. Hudson

Counsel for the Respondent:

P. Mills, Articled Student

M. Mihalj, Articled Student

Place and Dates of Trial:

Smithers, B.C.

May 8-10, 2018

Place and Date of Judgment:

Smithers, B.C.

May 15, 2018

- [1] The central question is whether Adam, the child of the parties, will attend grade 1 this September in Prince George, living with his mother, or instead in New Hazelton, living with his father. Related to that question is the parenting time with Adam for the other parent, the one Adam is not living with during grade 1. At present, Adam is living with his father in New Hazelton, and attending kindergarten in that area.
- [2] Adam was born on May 24, 2012. He will turn six a little over a week from now.
- [3] The second question is whether Adam's name will be changed from Adam Tyler Scott Naziel, so as to include in some way his father's last name, Findlater.
- [4] A third issue is now gone, by consent. The parties now agree that this file should be sent to the Provincial Court for all further adjudication.
- [5] Ms. Naziel, who is 38, and Mr. Findlater, who is 47, met in the summer of 2011. Ms. Naziel already had a son, who is now 16, and who lives with her today in Prince George. Mr. Findlater already had a daughter, who is now an adult and is not living with him. In 2011, Ms. Naziel had just ended a relationship when she met Mr. Findlater. She and Mr. Findlater then had a very short relationship in the late summer and early fall of 2011. They were living in the Bulkley Valley area at the time.
- [6] After they separated, Ms. Naziel learned that she was pregnant with Adam.
- [7] Mr. Findlater was present for Adam's birth. Afterward, he provided assistance to Ms. Naziel financially and by performing errands to help out after the birth. From June to early August of 2012, he probably visited Adam seven or eight times, although the evidence on that point is unclear. In August, Ms. Naziel told Mr. Findlater she was taking Adam to Edmonton to visit her ailing stepfather, and planning to return in September. That did not happen. Instead, she went to Prince George with Adam, hoping to get money for the trip to Edmonton, but her plans fell through. I recite here paragraphs 12 through 16 and 95 in the comprehensive reasons of Justice Punnett, given in this action on October 2, 2013, and indexed as 2013 BCSC 1812:

- [12] The mother did not contact the father to advise him that she was in Prince George or to tell him that she would not be returning to Moricetown. Her explanation for failing to do so was that she had lost her cell phone. She also testified that the social housing staff, aware of her allegations of violence in the relationship, advised her not to contact the father.
- [13] When the father heard nothing from the mother through the beginning of September 2012 he became concerned. He commenced this action on September 24, 2012. As he had no information respecting her whereabouts, on September 28, 2012 he obtained an order to serve the mother substitutionally by leaving a copy at her former address in Moricetown and notifying her on Facebook that she had been so served. It was not until the mother retained counsel and served him with a response and counterclaim on October 31, 2012 that the father learned of her location.
- [14] The father sought access to his child immediately thereafter. The mother did not accept his proposed plan for access nor did she offer any alternative proposal for access. Efforts to arrange access at a Judicial Case Conference ("JCC") on November 30, 2012 were unsuccessful.
- [15] By the time the matter came to trial on February 13, 2013 the father had not seen his child since August 4, 2012. The mother arrived in court on the first day of trial with the child as she had made no arrangements for his care during the trial. The father then made those arrangements through a local day care. At the mother's request the trial was adjourned at noon on February 15 to permit her to travel to Edmonton to attend her stepfather's funeral. As it turned out she had not made any plans for such travel and as a result did not attend the funeral.
- [16] Prior to that adjournment the issue of interim access was raised. After I indicated that I would order access if the parties did not agree to it the parties were able to come to an agreement and the order then went by consent. The access terms ordered gave the father four days of supervised access in Prince George and three days of access in Smithers during the course of February and March with the mother bringing the child by train to Smithers.
- ...
- [95] The mother's conduct following her decision to stay in Prince George is concerning. While she had a number of excuses for her failure to contact the father, the fact is that she did not persist until contact was made. In my view the efforts made were completely inadequate. I conclude that she in fact preferred that there not be contact with the father.
- [8] Pursuant to his reasons referred to above, Justice Punnett ordered that Mr. Findlater is a guardian of Adam. He also ordered that it was in Adam's best interests for Ms. Naziel to relocate with Adam from the Bulkley Valley area to Prince George. Ms. Naziel was going to pursue education in Prince George, and that was a primary reason she gave for her going there. But the education was not pursued. Mr. Findlater was given modest parenting time with Adam, which he exercised.

- [9] A change in parenting arrangements took place on April 20, 2015, pursuant to the order of Justice Crawford, by which Mr. Findlater's parenting time was increased to one week out of every four. Adam was not quite three when that order was made.
- [10] On July 22, 2015, that is about three months after the Crawford order, when Adam was about three years and two months, Justice Punnett varied the parenting time to one-week-on/one-week-off. Justice Kelleher changed that to two-weeks-on/two-weeks-off on March 7, 2016, when Adam was approaching four. Finally, on October 16, 2017, when Adam was about five years and five months, Justice Groves ordered by consent, and on an interim and without prejudice basis, that Adam would reside in Hazelton with Mr. Findlater, and attend a named elementary school for kindergarten. Parenting time was also ordered for Ms. Naziel.
- [11] With that history, I now must decide where Adam resides for grade 1, where he is now with his father in New Hazelton, or in Prince George, with his mother. Both parents love Adam, and are caring of him. Adam, from the available evidence, appears to love both parents.
- [12] I have come to the conclusion that it is best for Adam to remain in Hazelton for grade 1. Each year, Ms. Naziel will have Adam for all of the spring school break and for 60 per cent of the Christmas break, including Christmas Day. She will also have Adam for five of the nine weeks of school summer vacations. Further, she will have the right to parent Adam for two nights during long weekends during the school term, if she can arrange accommodation for herself and Adam with relatives in the Hazelton area, including communities nearby in the Bulkley Valley. She will have to arrange her own transportation to the Hazelton area for any such long weekend visits, and will have to notify Mr. Findlater two weeks in advance of such visits. (Later in these reasons, I will address the travel costs and logistics for the other parenting time I have granted to Ms. Naziel.)
- [13] Both Mr. Findlater and Ms. Naziel have had protracted histories of medical difficulties.
- [14] Mr. Findlater was in an horrendous accident in 2009, when a train collided with a truck in which he was a passenger. He suffered 157 broken bones. It seems miraculous that he survived. He has endured countless surgeries. He suffers pain to this day. Nonetheless, Mr. Findlater presents himself as highly energetic, a description supported by three witnesses called on his behalf, who testified about him as a parent and with regard to his character and habits more generally.
- [15] Mr. Findlater is unable to work because of his injuries. He receives a CPP permanent disability payment of \$1,034 per month, and he receives, at present, a baby allowance for Adam of \$600 per month. From proceeds he received as a result of the 2009 accident, or a later motor vehicle accident in which he was also injured, or both, Mr. Findlater has been able to purchase a house in New Hazelton and fully pay for it. Property taxes there, I was told, are low, but they were not quantified in the evidence. From the photographs in evidence, Mr. Findlater's house is a substantial structure in good condition. Mr. Findlater has furnished it with Adam in mind, and there are play areas and craft areas for Adam, as well as the usual amenities found in a good house.

- [16] From the four witnesses who addressed the matter, Mr. Findlater and the three others I referred to earlier, I am satisfied that he is a devoted father who is able to look after Adam's needs as well as most single parents can. The two women who testified on his behalf may have overstated the case somewhat, because they painted a picture of unqualified perfection in the Findlater house, but I am satisfied that they sincerely believed Mr. Findlater to be an excellent father, and their testimony, although perhaps somewhat overstated, still permitted me to reach the favourable conclusions I have about Mr. Findlater as a parent. Mr. Findlater's male friend who testified was somewhat more temperate in his descriptions, but he, too, was strongly supportive of Mr. Findlater's parenting skills and attitude.
- [17] Counsel for Ms. Naziel, in cross-examining Mr. Findlater, sought to portray him as too strict a father, as someone with a drinking problem, and as someone who administers corporal punishment. I did not find the evidence to support those allegations. No two parents will parent precisely the same way. A parent who is somewhat casual about parenting responsibilities may call another parent too strict, and vice versa. All of Mr. Findlater's parental discipline is within acceptable bounds. He has spanked Adam less than five times by his own evidence, which I accept. He drinks a beer or two most nights. Those facts, standing alone or taken together, do not undermine him as a parent. Adam is in French immersion and is studying the Gitksan language and culture (Ms. Naziel is First Nation, Mr. Findlater is of Scottish heritage). Mr. Findlater has enrolled Adam in an after-school program. Adam's marks from kindergarten need some improvement in grade 1, but there is nothing to suggest that his academic achievement would be better in Prince George. It was put to Mr. Findlater that Adam will suffer from being in Hazelton and New Hazelton because they are considerably smaller than Prince George with fewer amenities. I cannot accept that. The history of this country has often been made by people from the smallest of settlements. Canada's recently retired chief justice grew up in Pincher Creek, Alberta, when it was a very small place. One could argue that the smaller the town, the better a child is cared for, but I do not need to go that far for the analysis here. Adam enjoys fishing and playing outdoors, and can regularly do both in the Hazelton area.
- [18] Ms. Naziel, as I noted earlier, has also had to endure health difficulties. She has suffered from lung problems, including pneumonia, and from potassium deficiencies. Her childbearing has been unusually difficult. She gave birth to a daughter on June 23, 2017, in a new relationship and that birth was difficult for her physically. She testified that, fortunately, she is feeling much better recently.
- [19] Ms. Naziel lives with her 16-year-old son and her newborn daughter in a subsidized townhouse in Prince George. She pays low rent. Her tenancy is month to month. Her landlord has no complaints against her. No photographic or other evidence was tendered to show the conditions there. Unfortunately, there was also no evidence presented concerning Ms. Naziel's financial picture. No financial statement was filed. At present, she is not working and is not studying. No witnesses were called on her behalf to describe her home life or her parenting abilities. As I said before, I am satisfied that Ms. Naziel is a loving

parent, and I can infer from her demeanour and her testimony overall, that she is a caring parent. That, however, is not enough for allowing the Court to conclude that it would be in Adam's best interests for him to be with her in Prince George and not with Mr. Findlater in Hazelton. Unfortunately, perhaps because of illness, perhaps for other reasons, Ms. Naziel has some history of not being reliable in her planning for herself or for Adam. She found herself unable to register him for school in Prince George, and unable to pursue her own education when she moved to Prince George after the 2013 Punnett order. When she did not go to Alberta in August 2012, she made no contact with Adam's father, Mr. Findlater, for many months, as noted earlier.

- [20] On the other hand, Mr. Findlater has shown himself to be reliable and dependable. He supported Ms. Naziel, and took Adam for an extended period, when she was having difficulty in the birth of her daughter last June. He was supportive also when Adam was born. He has also complied with all of the court orders for parenting time, with only one or two exceptions due to weather.
- [21] I have not referred earlier to accusations Ms. Naziel brought against Mr. Findlater to the RCMP and the Ministry of Child and Family Development ("MCFD") alleging violence against her or Adam, or both of them. None of the accusations were pursued by the authorities, and no step was ever taken by the MCFD to remove Adam from Mr. Findlater's care. The accusations appear on the evidence to have been without foundation. Mr. Findlater had to endure the accusations, and I gather, from the evidence, that he handled himself properly through that process. Frankly, I am not certain how those events should be linked to the parenting assessment. To the extent they may be relevant, they do nothing, in my view, to detract from Mr. Findlater being a capable parent, and do nothing to strengthen Ms. Naziel's case for being a careful and responsible parent. In her testimony at the trial last week, Ms. Naziel said that Mr. Findlater should be further assessed and I inferred she was speaking of a psychological assessment of some sort. No basis was established for the need of a further assessment, and I infer that it was suggested by Ms. Naziel largely as a strategic step against Mr. Findlater in this ongoing parenting dispute.
- [22] The facts I have stated above provide the answers for the applicable tests found in s. 37(2) and (3) of the Family Law Act, S.B.C. 2011, c. 25 (best interests of child). I do not intend to review here the enumerated paragraphs in those subsections, except to a limited extent. Section 37(2)(e) speaks of the child's need for stability, and the evidence demonstrates that the Findlater home in Hazelton probably can offer Adam greater stability. Paragraph (f) addresses the ability of each parent to exercise his or her parenting responsibilities, and Mr. Findlater has shown not only that he is caring of Adam, but also that he is reliable, indeed steadfast.
- [23] I was directed to s. 40(4) of the Family Law Act, which negates presumptions a court might otherwise be inclined to employ in allocating parenting time and responsibilities, and I am confident I have made no such presumptions.

- [24] Section 41 of the Family Law Act addresses parental responsibilities. These reasons largely address s. 41(b), which concerns parental responsibilities respecting where the child will reside. I have ordered that Adam will reside with Mr. Findlater in New Hazelton. If Mr. Findlater wishes to move with Adam out of the Bulkley Valley area, other than to Prince George, he will require Ms. Naziel's consent, or an order of the Provincial Court.
- [25] Section 41(e) of the Family Law Act addresses decisions respecting the child's heritage, including the child's aboriginal identity. I noted earlier that Mr. Findlater has Adam enrolled studying the Gitxsan language and culture. That is to continue as part of my order. Gitxsan is not the language of Ms. Naziel's aboriginal upbringing. Ms. Naziel impressed me as being mindful and respectful of her own aboriginal heritage. The evidence was less than clear, however, that she has immersed Adam in his aboriginal heritage to any great extent to this point. I sincerely hope Ms. Naziel pursues that heritage more fully with Adam in the future, so as to make him conscious and proud of his aboriginal background. The evidence as a whole, however, does not cause me, or permit me, to order a specified division of the parenting responsibilities addressed in s. 41(e), and I do not do so.
- [26] Before turning to the question of Adam's name, I return to the costs and logistics of delivering Adam from Hazelton to Prince George at the times I have given parenting rights to Ms. Naziel, apart from the long weekends during the school year. The practical problem is money. Mr. Findlater does not have much and Ms. Naziel appears to have even less. Mr. Findlater has a vehicle, Ms. Naziel does not. In the result, I am burdening Mr. Findlater with the obligation to get Adam to and from Prince George for the parenting times I have ordered in Prince George for Ms. Naziel.
- [27] I turn now to Adam's name. Ms. Naziel would like to leave it the way it is on the current birth certificate, Adam Tyler Scott Naziel. Mr. Findlater would like his name to be part of Adam's name.
- [28] I have reviewed the Name Act, R.S.B.C. 1996, c. 328, and the Vital Statistics Act, R.S.B.C. 1996, c.479. In my view, sections 4 and 4.1 of the Vital Statistics Act have application. They read as follows:

Name of child

4(1) The surname of a child must be registered as follows:

- (a) if only one parent completes the statement under section 3, the surname must be the one chosen by that parent;
- (b) if more than one parent completes the statement under section 3, the surname must be one chosen by them;
- (c) if more than one parent completes the statement under section 3, but the parents do not agree on the child's surname, the surname must be,

- (i) if the parents have the same surname, the parents' surname, or
- (ii) if the parents have different surnames, a surname consisting of the parents' surnames hyphenated or combined in alphabetical order;
- (d) if a person who is not the child's parent completes the statement under section 3, the surname must be,
 - (i) if the parents have the same surname, the parents' surname,
 - (ii) if the parents have different surnames, a surname consisting of the parents' surnames hyphenated or combined in alphabetical order, or
 - (iii) if only one parent is known, that parent's surname;
- (e) in accordance with an order of the court under section 4.1 (1).
- (2) Despite subsection (1),
 - (a) a surname must not contain more than 2 surnames hyphenated or combined, and
 - (b) if a parent has a hyphenated or combined surname, only one of the names in that surname may be used.
- (3) For the purpose of subsection (1) (c) (ii) and (d) (ii) and if subsection (2) applies, the one name to be used under subsection (2) is the name that alphabetically precedes the other.

Court order respecting child's name

4.1(1) The court may, in an order declaring a child's parentage, make an order

- (a) that the registration of a child's name be changed, or
- (b) if the child's name has not yet been registered, requiring the child's name to be registered as specified in the order.
- (2) If an order under subsection (1) is in respect of a child's surname, the court must order the child's surname to be
 - (a) the surname of a parent, or
 - (b) a surname consisting of the parents' surnames hyphenated or combined in alphabetical order, in which case, section 4 (2) and (3) applies.
- (3) Before making an order under subsection (1), the court must
 - (a) consider the best interests of the child, including the matters set out in section 9 (1) (a), (b) and (c),
 - (b) if the child is at least 7 years of age but less than 12, consider the views of the child, and

- (c) if the child is 12 years of age or older, have the child's written consent to change the child's name.
- (4) If an order is made under subsection (1),
- (a) the registrar general must amend the child's registration of birth in respect of the child's name, consistent with the order of the court, and
- (b) a birth certificate issued after the making of an amendment under paragraph (a) must be prepared as if the child's original birth registration had been made containing the name as amended.
- [29] Section 4.1 includes a reference to s. 9(1)(a), (b), and (c), but those provisions have no application here. Again, in this analysis, it is Adam's best interests which are to govern. Section 4.1 addresses court orders respecting a child's name and I find that it applies. Under 4.1(1), s. 4.1 can apply only if the name order is part of an order declaring a child's parentage. Although Ms. Naziel and Mr. Findlater are stated to be Adam's parents on his birth certificate, and a declaration of parentage was not sought before me, I declare from the evidence at trial that Mr. Findlater is Adam's father, while Ms. Naziel is his mother. In accordance with s. 4.1(1)(a) and (2)(b), I order that Adam's surname will now be Findlater-Naziel. It is in Adam's best interests that his last name include the name of the parent with whom he resides. Because he is not yet six, it will be relatively easy for him to acquire and adjust to his new name.
- [30] Those are my reasons.
- [31] MR. HUDSON: Thank you, My Lord. My Lord, unfortunately because of the nature of my retainer, I am required to ask for costs. I don't expect you to grant them, I am just required to ask.
- [32] THE COURT: Fair enough. The request has been made, and in the circumstances of the case, I make no costs order.

"MACINTOSH J."

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