

CANADA / JUDGMENT

Hanna v. Hanna

2001 BCSC 1619

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SUSAN MARY HANNA

PLAINTIFF

AND:

THOMAS JAMES HANNA

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE GRAY

Counsel for the Plaintiff: James A.W. Schuman

Counsel for the Defendant: Patricia M. Bond

Date and Place of Hearing/Trial: November 5, 2001

Vancouver, B.C.

- [1] The parties are the divorced parents of Everett Arthur James Hanna ("Everett") born November 15, 1996. The plaintiff mother, now named Susan Hardman ("Mother"), seeks to change Everett's residence from the Lower Mainland of British Columbia to Memphis, Tennessee in the United States of America.

- [2] The Mother and the defendant Thomas Hanna ("Father") were divorced by Order pronounced May 20, 1998. That Order provided by consent that the parents share joint guardianship and joint custody of Everett. The parents entered into a Separation Agreement dated August 1999, clause 10.5 of which is as follows:

Change of Residence

The spouse with whom Everett may, from time to time, maintain his physical residence will not move Everett's place of residence outside the geographical area of the Lower Mainland without the express written consent of the other spouse (or upon order of the Court). Unless there is such consent (or Court Order), in the event the spouse with whom Everett maintains his physical residence desires to reside outside the geographical areas as specified above, then the physical residence of Everett shall be with the spouse who does not move his or her place of residence from the said geographical area.

- [3] The Separation Agreement was filed in this Court on April 10, 2001 pursuant to s. 122 of the Family Relations Act, R.S.B.C. 1996, c. 128. Accordingly, a provision of the Separation Agreement respecting the custody of or access to Everett by a parent is enforceable as if it were contained in an order made under the Act. The Mother seeks to vary the term respecting Everett's place of residence.
- [4] This application requires me to answer two questions:
1. Has there been a material change in the condition, means, needs or other circumstances of Everett occurring since the making of the Separation Agreement?
 2. If so, is it in the best interests of Everett in all the circumstances, old as well as new, to permit this change in his residence?
- [5] I am satisfied that there has been a material change in Everett's circumstances. The change has arisen because the Mother's new husband Don Hardman ("Stepfather") has moved to Memphis, Tennessee. Accordingly, I will consider whether a change in Everett's residence is in his best interests.

FACTS

Parents, Stepparents and Halfbrother

- [6] Both Everett's Mother and Father are loving, capable and committed parents. Both parents have now remarried. Both of Everett's stepparents have been part of his life since he was under two-years old, and both stepparents have welcomed Everett into their hearts and homes. Both parents began cohabiting with their present spouses in 1998.
- [7] Everett's Father remarried first, in September 1999. Everett's father is employed as a Correctional Officer with the Ministry of the Solicitor General of the Province of British Columbia. He presently works 75% of full-time, on a schedule where he works a 16-hour

shift one day, an 8-hour shift the following day, and has the other four days off. Everett's Father was on leave from work from about December 2000 until late September 2001. Prior to that, the work schedule for Everett's Father varied, but was compressed so that he had long work days and then several days off. For example, for a period, Everett's Father worked two 16-hour days and then had six days off.

- [8] Lorena Hanna is Everett's Stepmother. She is self-employed in a consulting business specializing in database development and training. Most of her work is done from her home office although she also teaches modules and programs at Simon Fraser University.
- [9] Everett's Stepbrother, Jacob Hanna, was born in September 2000 and so is just over one-year old.
- [10] Everett's Father and Stepmother enjoy a comfortable middle-class lifestyle. They own their three bedroom townhouse in North Vancouver. Many children live in the townhouse complex, which offers a playground and outdoor pool. The couple also own two other condominiums (which are rented at rates which cover costs) and three vehicles. Their work schedules enable one or both of them to be at home most of the time.
- [11] Everett's Mother remarried in March 2001. She quit her job effective September 7, 2001 and desires to be a full-time mother. Before quitting, she was employed by Starbucks Coffee Company working Monday-Friday 9 a.m. to 5 p.m.
- [12] Everett's Stepfather is employed by Hoops L.P., which operates the Grizzlies Basketball Team of the National Basketball Association. In the summer just past, the Grizzlies relocated to Memphis, and Everett's Stepfather was promoted from Director of Facility Operations to Senior Director of Operations. In connection with the promotion and move, he received a very substantial salary increase. He considers the position in Memphis to provide a career opportunity that has been a goal for him and of the type that many get only once in their career.
- [13] Everett's Mother and Stepfather do not have any children together. It is not certain whether they will plan to have children, nor when any such children would arrive.
- [14] Everett's Mother and Stepfather also enjoy a comfortable middle-class lifestyle. They hope that the Stepfather's recent salary raise will mean not only that they can choose to have the Mother at home full-time, but also that they can afford a comfortable house in Tennessee, to send Everett to private school, and to pay for travel for Everett and the Mother to Vancouver as needed.
- [15] Until the Stepfather's promotion, he and the Mother were living together in North Vancouver. The townhouse was in the Mother's name and has been sold. They intend to use the proceeds in part for the down payment on a house in Tennessee. Everett's Stepfather is now living in temporary housing in Tennessee, and the Mother is living temporarily with her parents while awaiting this decision.

Everett and Parental Contact

- [16] Everett is an active and happy little boy with a broad range of interests and activities. He has just celebrated his fifth birthday. He is presently enrolled in French Immersion kindergarten five days a week, 2 1/2 hours a day.
- [17] Everett's parents separated when Everett was about three-months old. Since that time, Everett has spent very roughly the same amount of time with each of his parents.
- [18] For a period, Everett spent more nights at the home of his Mother and Stepfather than at the home of his Father and Stepmother, but during that period he spent a substantial amount of time in the days with his Father. The work schedules of Everett's Father and Stepmother permitted Everett to spend many weekdays with his Father and Stepmother while his Mother and Stepfather were working.
- [19] Most recently, Everett has been on a schedule of spending three days and nights at one parent's home and the next three days and nights at the other parent's home. Both of Everett's parents have heard Everett say that he is lucky to have four parents, and the Father recalls Everett saying, not surprisingly, that he wishes all four lived at the same house.

Everett's Extended Family

- [20] In addition to having excellent parents and stepparents, Everett has the good fortune of significant and loving contact with his extended family.
- [21] Everett's paternal grandparents live in Victoria, B.C., and he and his Father visit them in Victoria every month or so for a couple of nights. When there, they often see Everett's aunt (his Father's sister) and her son, Everett's eight-year old cousin, as well. In addition, Everett's paternal grandparents visit the Lower Mainland every two to eight weeks, staying at the home of Everett's Father and Stepmother. Recently, Everett's paternal grandparents have visited every couple of weeks. Everett also enjoys sleep-overs with his eight-year old cousin. Everett also has contact with his Stepmother's sister.
- [22] Everett's maternal grandparents live in West Vancouver, B.C. Everett and his Mother lived with Everett's maternal grandparents for several months when Everett was an infant, and Everett continues to have a strong relationship with them. Everett also has contact with two aunts, two uncles, and four cousins on his Mother's side.
- [23] Everett's Stepfather has now relocated to Memphis. A number of other people employed in connection with the Grizzlies have moved from the Lower Mainland to Memphis, and it is likely that Everett's Stepfather and Mother will have a network of friends there.
- [24] Neither Everett's Mother nor his Stepfather has extended family in the Memphis area, but some of his Stepfather's family is within driving distance. The mother of Everett's Stepfather lives in Baton Rouge, Louisiana, which is about a five-hour drive from the Memphis area. The father of Everett's Stepfather lives in San Antonio, Texas, about an 11-hour drive from

the Memphis area. Everett's Stepfather's sister and brother-in-law live in Dallas, Texas, about a seven-hour drive from the Memphis area. Everett has visited with his Stepfather's mother and vacationed with his Stepfather's father, sister and paternal grandparents.

Plans for Tennessee

- [25] Everett's Mother and Stepfather want to make a home in Germantown, a Memphis suburb. Germantown appears to be a thriving Tennessee community, which, while different in many ways from the Lower Mainland, is a reasonable place to raise children.
- [26] Everett's Mother and Stepfather believe that their newly-increased prosperity will enable Everett to have both a stay-at-home mother and the opportunity in time to attend a Germantown private school known as St. George's Day School. While Everett's Father is sceptical about whether the Stepfather's salary will stretch as far as suggested, those objectives can probably be achieved so long as the Mother and Stepfather are sufficiently modest in their housing choice.
- [27] However, there are two important considerations relating to Everett's schooling in Germantown. The first is that in the state of Tennessee, qualification for kindergarten depends on reaching the age of five by the end of September. Since Everett's birthday is in November, under the Tennessee system, he would be one of the oldest rather than the youngest in his peer group in school.
- [28] The second consideration is that, even though Everett is old enough to attend junior kindergarten at St. George's Day School, a space is not available at present. Accordingly, Everett's Mother and Stepfather propose to enrol Everett in a pre-school program at a church in Germantown. That program runs three half-days a week. They hope that there would be a place for Everett next September in the senior kindergarten class at St. George's Day School. If so, Everett would have primarily (and perhaps exclusively) new classmates, but would be with peers in the sense that the children would not have reached the age of six by the end of September.
- [29] It appears that French Immersion instruction is not available at either the church preschool or at St. George's Day School, although St. George's Day School provides some foreign language teaching. Its program includes two 20-minute sessions a week in Spanish for senior kindergarten through sixth grade.
- [30] There are currently no direct flights from Memphis to Vancouver, and the trip requires one full day of travel. While not always accomplished easily, the parents have been able to arrange their schedules and Everett's to ensure that Everett has significant contact with both of his parents. The parents are now entirely at odds concerning whether it is in Everett's best interest to move with his Mother and Stepfather to Tennessee, or to stay in the Lower Mainland.

Analysis

- [31] It is my role to take an independent view of the options and decide what is in Everett's best interests. It is clear that whether Everett goes or stays, his principal residence will be with a capable and loving parent and stepparent (and in one case his stepbrother), and he will have increased contact with that parent and reduced contact with the other.
- [32] In assessing what is in Everett's best interests, I must consider the factors set out by the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 49. In this case, those factors can be summarized as follows:
- (a) The existing custody and access arrangement is essentially an arrangement of shared custody and access. The relationship between Everett and both of his parents and their respective spouses is excellent;
 - (b) It is desirable to maximize contact between Everett and both parents;
 - (c) Everett is too young to provide his views, but would likely prefer to have both his parents and both his step-parents as accessible as possible;
 - (d) Everett's mother's reasons for moving are not relevant to her ability to meet Everett's needs and therefore they are irrelevant;
 - (e) There will be a disruption to Everett in a change from shared primary residence to sole primary residence, which would occur whether he stays in the Lower Mainland or goes to Memphis; and
 - (f) If Everett moves to Tennessee, he will suffer removal from the extended family of both his mother and father, his school and the community he has come to know.
- [33] The importance of Everett having close contact with his Mother and going to Tennessee must be weighed against the continuance of full contact with his Father, his extended family, and his community. The ultimate question is this: what is in Everett's best interests in all the circumstances, old as well as new?
- [34] I have concluded that it is in Everett's best interests for him to continue to reside in the Lower Mainland. The most significant factor is the amount of contact he is likely to have with both of his parents and his extended family. Another significant factor is the disruption in his schooling, in changed classmates, reduced hours of attendance, and changed language of the classroom.
- [35] In coming to this conclusion, I considered what I anticipate will be Everett's situation if he goes with his Mother and Stepfather to Tennessee, and his likely situation if he stays in the Lower Mainland.

Tennessee

- [36] If Everett goes to Tennessee, he will lose regular contact with much of his extended family, including his half-brother, maternal grandparents, paternal grandparents, and various aunts and cousins. Everett would likely have contact with his Father in both Tennessee and British Columbia. Visits in Tennessee with his Father would likely occur in hotels or other unfamiliar rental accommodation.
- [37] While visiting British Columbia, Everett would likely stay for some periods at the home of his Father, Stepmother and Half-brother, but would likely visit his Mother's extended family as well. However, because of the time involved in travelling from Tennessee, and the school schedule which will be increasingly important in Everett's life, I doubt that those trips will occur more than four times per year.
- [38] Even with trips to British Columbia, Everett is unlikely to have significant contact with his Father's parents and extended family owing to time limitations. If Everett's residence were changed to Tennessee, Everett would likely have periodic visits with the parents and sister and brother-in-law of his Stepfather. However, because those people live from five to 11 driving hours away, Everett is not likely to develop a particularly close relationship with them.
- [39] The proposed Tennessee pre-school and St. George's Day School appear to be good schools, but neither offers French Immersion instruction. If Everett moves to Tennessee this school year, he will be required to adjust not only to a new school but also to a reduced school schedule and instruction entirely in English. Everett presently attends French Immersion pre-school five half-days per week, and the pre-school he would likely attend in Tennessee only involves three half-days per week.
- [40] Next September Everett may be able to go to senior kindergarten at St. George's Day School. If so, he would likely have to adjust to a group of classmates entirely different from his pre-school.

Lower Mainland

- [41] If Everett stays in the Lower Mainland, he will likely have more contact with his Mother will be greater than he will have with his Father if he moves to Tennessee. If Everett stays, he will likely have regular contact with much of his extended family. He will likely have continued contact with his paternal grandparents and maternal grandparents as well as aunts and cousins.
- [42] Assuming Everett's Mother does not return to work, she will likely visit Everett in the Lower Mainland for extended periods. She will likely take Everett to her home in Memphis a few times a year. Her visits with Everett in British Columbia would likely include time in her parents' home, which is a place familiar to Everett.

[43] If Everett stays in the Lower Mainland, his education will continue uninterrupted. He will be able to continue French Immersion kindergarten and progress with his existing classmates throughout his schooling.

CONCLUSION

[44] Accordingly, I dismiss the Plaintiff's application to change Everett's physical residence to Tennessee.

[45] With Everett remaining in the Lower Mainland, it is appropriate for his Mother and Stepfather to have generous and substantial access to Everett when they are in the Lower Mainland and for periods in Tennessee. It is also in Everett's best interests to maintain his close relationship with his maternal grandparents, whether or not his Mother is in the Lower Mainland area.

[46] I will not make an order at this time concerning the scheduling of contact between Everett and his parents, in the hope that such schedule can be negotiated or mediated now that I have refused to change Everett's residence to Tennessee. I will be seized of any application to settle the schedule for custody and access. There will be no order as to costs.

"V. Gray, J."

The Honourable Madam Justice V. Gray

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