

CANADA / JUDGMENT

J.S. v. J.D.

2015 BCSC 2228**COURT**

Supreme Court of British Columbia

DECIDED

1 December 2015

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2015 BCSC 2228 J.S. v. J.D. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: J.S. v. J.D., 2015 BCSC 2228 Date: 20151201 Docket: 16914 Registry: Nelson Between: J.S. Petitioner And J.D. Respondent Before: The Honourable Madam Justice B.J. Brown Reasons for Judgment Counsel for the Petitioner: R.G. Stacey Counsel for the Respondent: No appearance Place and Date of Trial/Hearing: Nelson, B.C. October 7, 2015 Place and Date of Judgment: Nelson, B.C. December 1, 2015

- [1] These are family proceedings.
- [2] The parties started living together in a marriage-like relationship in September 1999. They separated February 4, 2009. They have two children, M. who was born December 2001 and E. who was born October 2004.
- [3] The issues in this action are 1) relocation of the children to Nelson; 2) child support; 3) division of property.
- [4] I will deal with each of the issues in turn. Relocation of the Children
- [5] While the parties lived together, they lived at the matrimonial home in Crawford Bay, British Columbia. After the parties separated J.D. continued to live in the family residence. J.S. rented a home in Crawford Bay, a town on the East Shore of Kootenay Lake with a population of approximately 1,200 people. The children lived on a week on week off basis with each of their parents.
- [6] On October 9, 2014, J.S. gave notice to J.D. pursuant to s. 66 of the Family Law Act, S.B.C. 2011, c. 25 ["FLA"] that she intended to relocate with the parties two children to Nelson, British Columbia effective January 1, 2015. The relocation occurred in the summer of 2015. Since starting school in September 2015 the children have not continued with the week on week off schedule.
- [7] J.D. did not attend at the trial and did not respond to the Notice of Relocation.
- [8] J.S. testified that she believed that a relocation was for the benefit of the children in that it would permit her to avail herself of educational opportunities and to improve her employability and income. It would also provide the children with the greater range of educational and extracurricular activities available in a less isolated community, as

Crawford Bay has one school which covers K to Grade 12 and has approximately 70 students. Relocation is necessary to take advantage of these opportunities because in order to attend school in Nelson otherwise the children would have to be driven approximately 35 minutes to a ferry terminal to catch the 7:10 a.m. ferry, take an approximately 90 minute ferry trip, and then take a school bus from the ferry terminal to Nelson.

- [9] Section 69 of the FLA provides: 69 (1) In this section, "relocating guardian" means a guardian who plans to relocate a child.
- (2) On application by a guardian, a court may make an order permitting or prohibiting the relocation of a child by the relocating guardian.
- (3) Despite section 37 (1) [best interests of child], the court, in making an order under this section, must consider, in addition to the factors set out in section 37 (2), the factors set out in subsection (4) (a) of this section.
- (4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,
- (a) the relocating guardian must satisfy the court that
- (i) the proposed relocation is made in good faith, and (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and
- (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise.
- (5) If an application is made under this section and the relocating guardian and another guardian have substantially equal parenting time with the child, the relocating guardian must satisfy the court
- (a) of the factors described in subsection (4) (a), and
- (b) that the relocation is in the best interests of the child.
- (6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following:
- (a) the reasons for the proposed relocation;
- (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
- (c) whether notice was given under section 66 [notice of relocation];

- (d) any restrictions on relocation contained in a written agreement or an order.
- (7) In determining whether to make an order under this section, the court must not consider whether a guardian would still relocate if the child's relocation were not permitted.
- [10] I have been provided with the Court of Appeal's decision in *Fotsch v. Begin*, 2015 BCCA 403.
- [11] In that case, as here, the parents had been exercising equal parenting time on a week-on week-off basis. Fotsch outlines that the provisions of s. 69 of the Family Law Act require that the relocating guardian satisfy the Court that 1) the relocation is proposed in good faith; 2) reasonable arrangements have been proposed to preserve the relationship with the child's other guardians and 3) relocation is in the best interests of the child.
- [12] I am satisfied that the relocation is proposed in good faith. I accept the evidence of J.S. as to her reasons for relocating. I am also satisfied that the parenting schedule that is proposed by J.S. is reasonable and workable and will preserve the relationship between the children and J.D. and his mother.
- [13] J.S. proposes that the children will reside with her. J.D. will have parenting time as follows:
1. Every second weekend, with those weekends extended to include long weekends or pro-D days on those weekends that occur when he has parenting time;
 2. His birthday and father's day;
 3. One-half of Christmas, spring break and summer holidays;
 4. Subject to special activities in the summer such as summer camp or pre-arranged holiday trips with either parent. It is proposed that summer time consist of alternate weeks with each parent;
 5. Such other reasonable parenting time as the parties may agree upon reasonable notice;
 6. J.D.'s mother to have access to see the children with reasonable notice.
- [14] J.S. testified that J.D. has a relationship with a woman who lives in Nelson and is frequently in Nelson and she proposes to accommodate his reasonable requests for access around the times he is in the city .
- [15] She also proposes that the parents will share joint guardianship and that she will exercise parental responsibilities set out in s. 41(a) - (l) while J.D. will exercise those set out in s. 41 (i) and (j). She provided me with evidence that she has exercised the parenting responsibilities set out in s. 41 and should continue to do so and I accept her evidence in this regard. I will make the order sought.
- [16] I am satisfied that the move to Nelson and the proposed parenting arrangements are in the best interests of the children, whether addressed as a relocation order or an original order. J.S. has been exercising the parenting responsibilities and will continue to do so. The proposed parenting schedule will permit the children to have frequent contact with their

father. It is a parenting schedule which suits the children`s needs. Travelling to Crawford Bay on a week-on week-off schedule would be very taxing, if not impossible, and would not be in the children`s best interests. Nelson offers the children more opportunities for education and recreational activities and also offers J.S. opportunities to improve her skills so that she is better able to address the children`s best interests. Child Support

Background

- [17] For a period of time after the parties separated J.D. paid child support of \$300 per month. Later he paid child support of \$200 per month. In recent years he has made no payments of child support. He has not produced current financial statements or tax returns despite being order to. I am asked to impute an income of approximately \$50,000 to him based on his income in 2008, before the parties separated. The year 2008 is chosen because J.D.'s income has dropped significantly since that time. In addition, at separation he advised J.S. that he would not pay child support and "would return to growing pot" and would not pay taxes. Discounting this statement somewhat, given that people say things in the heat of separation that they do not intend, it is, nonetheless, noteworthy that J.D. has not produced evidence of his current income despite being ordered to do so. Respondent's Income
- [18] J.D. prepared a financial statement in June 2012 in these proceedings.
- [19] He appended Notices of Assessment for 2008, 2009 and 2010. His line 150 income in 2008 was \$56,852, in 2009 was \$39,811, and in 2010 was \$31,661. I have been provided with a copy of a 2011 tax return summary which indicates that his total income in 2011 was \$27,008.37.
- [20] I agree with the submissions of J.S. that his income has dropped precipitously and without explanation from 2008, the year before they were separated.
- [21] His refusal to produce a current financial statement despite being ordered to do so means that I must impute income to him to determine the appropriate amount of child support payable. Without a reasonable explanation as to the precipitous drop and applying s. 19(1)(f) of the Federal Child Support Guidelines, SOR/97-175 in my view it is reasonable to impute an income of \$50,000 per year to J.D. Child Support Payable
- [22] With an income of \$50,000 per year J.D. is required to pay child support payments of \$758 per month.
- [23] In addition, it is appropriate that he contribute to the children's s. 7 expenses in proportion to his income. His income will be, as I have determined, \$50,000 per year and J.S.'s is \$32,000 per year. J.D. will thus pay 61% of these expenses, and J.S. the remaining 39%. Lump Sum Payment of Child Support
- [24] J.S. asks that I fix a lump sum figure of child support, given J.D.'s professed refusal to pay child support and his refusal to respond to court orders that he produce financial disclosure.

- [25] I have been provided with an extract from the Family Law Sourcebook which, citing Myatt v. Myatt (1995) 45 R.F.L. (3d) 45 (B.C.S.C.), refers to the various factors to be considered by the court determining whether it is appropriate to order lump sum child support. Such awards are exceptional and should only be made where there is some special need or specific circumstances which render it appropriate. Animosity between the parties may favour a lump sum award. If the parent is not in a position to pay monthly child support payments, or if his only asset is an interest in the matrimonial home, such an order may be appropriate. If the parent has disobeyed previous support orders and not demonstrated prudent financial management a lump sum support order may be appropriate.
- [26] In this case, in my view it is appropriate to order lump sum child support, to be paid from the proceeds of sale of the real property. Although there was no earlier order to pay child support, J.D.'s obligation to support his children does not depend on a court order, as his earlier payments of child support reflect. His ongoing failure to pay child support, combined with his financial imprudence as reflected in the judgments in favor of CRA, as well as his failure to comply with court orders, satisfy me that a lump sum order is appropriate. Without such an order, it is unlikely that J.D. will pay child support. I order lump sum of \$42,874, which is the present value of five years of child support payments at \$758 per month and does not include his portion of s. 7 expenses, to secure payment of future child support. Property Division Real Property
- [27] There are two pieces of real property, both held in joint title: the former matrimonial home in Crawford Bay and an unimproved property in Balfour. The Balfour property was appraised in January 2013 at \$120,000. BC property assessment notices for that property are as follows: 2011 - \$159,000 2012 - \$145,000 2015 - \$134,000
- [28] The matrimonial home in Crawford Bay was appraised in June 2012 at \$275,000. The BC property assessment notices indicate a value of: 2011 - \$225,200 2012 - \$205,400 2015 - \$198,400
- [29] There is a mortgage registered against the Crawford Bay and Balfour properties with a balance outstanding as of May 2015 of \$89,098.83.
- [30] J.S. seeks partition and sale of the two pieces of property, based on the Partition of Property Act, R.S.B.C. 1996, c. 347. She seeks exclusive conduct of sale with liberty to list the property at usual commission rates, post signs on the property advertising that the property is for sale, and provide access to the property to real estate agents to show the property between 9:00 a.m. and 5:00 p.m., seven days a week. She proposes that the listing be at a minimum price of \$134,000 for the Balfour property and \$200,000 for the Crawford Bay property. As the appraised value on Crawford Bay has always been higher than the assessed value, I think it more prudent to list the Crawford Bay property at a minimum price of \$240,000, with liberty to apply to reduce the listing price if it is not sold. In addition, I will require that the real estate agents provide J.D. with 12 hours' notice of any showing of the property to a proposed purchaser.

- [31] I have been provided with the decision of the British Columbia Court of Appeal in *Harmeling v. Harmeling*, [1978] 5 W.W.R. 688, 90 D.L.R. (3d) 208. There, the majority of the Court of Appeal said "I think that we ought to accept without qualification the general statement that there is a prima facie right of a joint tenant to partition or sale and that the court will compel such partition or sale unless justice requires that such an order should not be made." I am not aware of any reason that the order should not be made in this case and accordingly I will make the order sought.
- [32] With respect to the judgments in favour of Canada Revenue Agency, which were place on title after J.S.'s Certificate of Pending Litigation, those are charged on J.D.'s interest only and will be paid from the funds that he would otherwise receive from the sale of the lands.
- [33] J.S. will have conduct of sale of the properties, with a sale to be subject to court approval or consent of both parties. The mortgage and usual real estate fees and other standard disbursements will be paid from the sale proceeds, as will the lump sum child support ordered above. J.S. will be reimbursed for any mortgage, insurance and tax payments she has made. The balance will be divided equally. J.D.'s tax judgments will be satisfied from his share of the sales proceeds. Miscellaneous Assets
- [34] J.S. submits that she has a claim to assets held in the name of J.D. or his business, East Shore Property Developments Inc., based on a claim in constructive trust. J.S. testified that she made some direct contributions to the business itself as well as indirect contributions through raising the children, maintaining the household, etc. However, she admits that there is limited information before me as to these other assets and she proposes that it would be more appropriate to set off these claims, so that she will retain her pension and the vehicle that she is currently driving, which I understand to be a 2004 Volvo. J.D. would retain the Infinity vehicle, a motorcycle, snowmobile, Ford F550 truck, boom truck, Bobcat snowplough, Bobcat CT322 (track), mini John Deere, large John Deere, John Deer 50D, trailer, shop tools and attachments, snowblades, chains, buckets and pallet forks, 2012 Ford Escape and RRSPs in his name. In his most recent financial statement prepared in June 2012, he estimated the value of his RRSPs at \$27,027.88 and the value of the various vehicles etcetera, including the Volvo, at \$142,000. If the Volvo is deducted at \$14,000, this leaves the chattels valued at \$128,000. J.S.'s pension has a value of \$26,249.56, which makes her proposal generous to J.D. and I am prepared to order that division of chattels.
- [35] J.S. will also receive costs of this action at scale B. "B.J. Brown J."

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