
CANADA / JUDGMENT

K.D. v. J.S.

2010 BCSC 1160

COURT

Supreme Court of British Columbia

DECIDED

18 June 2010

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2010 BCSC 1160 K.D. v. J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.D. v. J.S.,

2010 BCSC 1160

Date: 20100618

Docket: E073682

Registry: Vancouver

Between:

K.D.

Plaintiff

And:

J.S.

Defendant

Before: The Honourable Mr. Justice Savage

Oral Reasons for Judgment

Acting on her own behalf:

K.D.

Acting on his own behalf:

J.S.

Place and Date of Trial:

Vancouver, B.C.

June 14-16, 2010

Place and Date of Judgment:

Vancouver, B.C.

June 18, 2010

I. Introduction

- [1] This is a trial of custody and access and guardianship issues by two self-represented litigants. The plaintiff, K.D., seeks sole custody, joint guardianship, and primary residence for the child T.M.S. ("T.S."), born January 3, 2004. K.D. and T.S.'s father, J.S., cohabited from August 2001 until separation March 1, 2007.
- [2] Madam Justice Grey dealt with child and spousal support, in an earlier decision, severing the issues of custody, access, and guardianship.
- [3] At the commencement of trial J.S. sought an adjournment. He said he was not prepared for trial. Trial, however, had been scheduled for some time. His application for an adjournment was denied. Like K.D. he seeks sole custody, joint guardianship, and primary residence.
- [4] Both parties argued that an inability to communicate should lead to the court ruling that sole custody was the appropriate order. Both parties, however, were prepared to agree to relatively generous access regimes.
- [5] J.S. effectively seeks continuation of the status quo, with one significant twist, a change in school. K.D., realizing that the present regime places a difficult commuting burden on J.S., proposes a regime that would largely give him weekend access only.
- [6] Both parties engaged in making unnecessary recriminations against the other during submissions. J.S. did not suggest that K.D. was an unsuitable parent or unloving parent. He criticized some of her decisions and her dealings with him. K.D. did not suggest that J.S. was an unsuitable or unloving parent. She criticized some of his decisions and his dealings with her.

II. Issues

- [7] The parties raised various issues, which I will deal with, which they thought significant, including: (1) abusive language and bullying by J.S.; (2) childcare arrangements; (3) improper vehicle seating; (4) T.S.'s separation anxiety; (5) T.S.'s dental care and treatment; (6) T.S.'s insect bites; (7) J.S.'s use of marijuana; (8) T.S.'s weight; (9) K.D.'s choice of residence; (10) Choice of school for T.S.; and (11) Financial Irresponsibility.

III. Discussion

A. Abusive Language and Bullying

- [8] K.D. introduced in evidence copies of emails in which J.S. used abusive and profane language. There is no excuse for such language and J.S. acknowledged this and gave, I would say, a qualified apology of sorts during submissions. As I say, this is completely inappropriate. There is, however, no evidence of any violence in the relationship.
- [9] As explanation, J.S. introduced a series of emails dealing with his request for a full day with T.S. during last year's Christmas break. Under the access schedule in place, J.S. would pick up T.S. after school or daycare at 3:00 p.m. So, he explains, he sought to pick up T.S. during the holiday break in the morning on that day so he could go skiing.
- [10] At that time the parties had financial issues which were later resolved by the decision of Madam Justice Grey. To some degree she sought to use the financial issues to bargain during the exchange. After making repeated requests that went nowhere, J.S. used unnecessary profanity. K.D. says she was waiting to learn from her mother about her mother's own schedule. She also says she requested J.S.'s schedule in November, but J.S. said the schedule over Christmas is not finalized until more senior people on the seniority list make their work elections.
- [11] I would characterize the emails as showing K.D. either not answering, or unnecessarily delaying responding to a reasonable request. J.S.'s profanity is a reaction to that. It was unjustified but K.D.'s response or lack of response to his request was also unjustified and triggered his response.

B. Child Care Provider

- [12] K.D. also raised as an issue J.S.'s response to her request for information on a childcare provider. K.D. insisted on a criminal record check for the daycare provider who was a family friend of J.S.'s new partner. The daycare provider was an occasional daycare provider, and, explains J.S., did the job for a fee, but did not require a monthly full-time commitment.
- [13] The criminal record check request, says K.D., was precipitated by T.S. saying to her, one day, as they crossed the street, that he did not need to hold his mother's hand. He was "a big boy". This raised concerns, she says, about the daycare provider.
- [14] K.D. continued to insist on this information. J.S.'s new partner accessed a criminal records database which revealed that there was no criminal record. K.D. took the document she received to an RCMP neighbour who told her this was not a proper criminal records check. K.D. then took this to J.S.'s partner's place of business resulting in a disciplinary letter to J.S.'s new partner.

- [15] K.D. uses this evidence as an example of inappropriate conduct on the part of J.S. and his partner. J.S. says this is an example of K.D. inappropriately intruding on his life and making unreasonable demands. While the conduct of J.S. and his partner is not without fault, in my opinion demanding a criminal records check for a casual daycare provider engaged by the other party, in these circumstances, was intrusive, and unnecessary, and K.D.'s course of conduct was designed to cause embarrassment to J.S. and his partner.

C. Vehicle Seat Belt

- [16] K.D. introduced in evidence a photograph of a jump seat she says was improperly used for T.S. The jump seat was in J.S.'s former vehicle. The vehicle has been sold. This would appear no longer to be an issue although it may have been a past issue. Clearly children must use appropriate seating when travelling in either party's vehicle.

D. Separation Anxiety

- [17] K.D. raised as an issue T.S.'s separation anxiety. There were apparently two episodes of this referenced in Marcelle Blancato's report of April 28, 2010. Both occurred in 2009. They were short-lived. Dr. Blancato said that "T.S.'s presentation and therapy at the time did not indicate any issues that required further intervention".
- [18] She also said that during therapy he did not articulate any awareness of parental conflict and that "He was clearly bonded to both parents and the only clear issue displayed during sessions appeared to be related to extended periods of time away from his mother".
- [19] K.D. did not take issue with those statements. J.S. thought that the separation anxiety occurred because T.S. was away from him. He had never experienced such anxiety. The statements are not supported by Dr. Blancato's report, who says this was an issue only in relation to the separation from his mother.

E. Dental Care and Treatment

- [20] T.S. was taken to the dentist by K.D. who was advised that he required treatment. T.S. is on J.S.'s dental plan. K.D. sent an email advising of this on a Friday afternoon, saying that she would go ahead and pay by her credit card for the uncovered portion of the plan early the following week. The amount was in excess of \$1700. J.S. asked for delay to obtain a second opinion.
- [21] He received a second opinion and eventually almost all of the work was covered by his plan, leaving an uncovered portion of only approximately \$175. K.D. says this is also an example of J.S. failing to abide court orders. There was an order that he provide an estimate within an agreed period of time.

- [22] J.S. says this is an example of K.D. unnecessarily creating anxiety in T.S. T.S. presented in such an anxious state with K.D. that a general anaesthetic was included in the plan. J.S. presented T.S. to his dentist and a local oral anaesthetic was used and T.S.'s presentation and treatment was unremarkable.
- [23] K.D. questioned the dosage of oral anaesthetic in her cross-examination of J.S. J.S. questioned K.D. agreeing to an unnecessary general anaesthetic. J.S. says this is an example of K.D.'s financial irresponsibility. K.D. says this is an example of J.S. not obeying court orders.

F. Ty's Insect Bites

- [24] K.D. introduced a photograph of T.S. showing some insect bites on his back. K.D. called these bed bugs. J.S. said that T.S. is inseparable from his dog when at his home. The dog contracted fleas. T.S. was bitten. The problem was discovered and the dog treated.

G. Drug Use

- [25] K.D. said both she and J.S. used marijuana before T.S. was born. Since then she has stopped. J.S. continued. He admits to social use once a week. J.S. says he never uses marijuana while with or prior to being with T.S.
- [26] K.D. says a photograph she obtained from Facebook shows J.S. with T.S. while probably on marijuana. Ms. M., J.S.'s partner, says she took the photograph of J.S. and T.S. in the morning while on a camping holiday.
- [27] I accept Ms. M's evidence on this.

H. T.S.'s weight

- [28] K.D. says that things T.S. has said led her to believe that J.S. was criticizing his son for being overweight. She introduced a photograph of T.S. showing what appears to be a normal physique. K.D. says that J.S. was critical of her weight.

I. Choice of Residence/school

- [29] K.D. moved from the family home in Vancouver to Richmond. Since she has moved to Steveston. J.S. moved from the family home at the time of separation to Surrey.
- [30] K.D. prefers a school ten minutes away from her. That would add an extra 20 minutes of driving time for J.S. Currently J.S. commutes from Surrey to Vancouver for his work, then from his work or home to Steveston. He says some days he is involved in a 120 km commute. He has a full-time job, pays child support and pays spousal support.
- [31] K.D. does some work as a consultant. She is seeking full-time work. As a consultant she has no specific hours. She has had some casual work for third parties.

- [32] J.S. works, on the other hand, in a unionized work environment. His shifts are subject to change and decisions made concerning some of his hours are based on seniority.
- [33] J.S. says that K.D. could not have chosen a more difficult place to reside and have T.S. go to school. Under cross-examination K.D. admitted that she had no family, no friends, and no work near her to motivate her to move to the current location. To some degree her move was motivated to get away from J.S. She knows that it will not facilitate access and proposes her arrangement to address that.
- [34] She says that the M.S. Montessori school is far superior to the school J.S. proposes in Surrey, P.C.E. J.S. says that is a good school. In my view, neither party produced convincing evidence of which school was superior.

J. Financial Irresponsibility

- [35] J.S. says K.D. is financially irresponsible. She spent \$18,000 fighting the sale of their former home and thousands more on legal fees. She was prepared to pay an unnecessary amount on dental work when some leg work showed these costs to be unnecessary.
- [36] K.D. says that she was attached to the home and chagrined that it would fetch such a low price. It sold at a trough in the market and they would have been better off delaying the sale or possibly not selling. She acted with respect to the dental work because of her view of its urgency.

IV. Analysis

- [37] The parties presented the evidence they did in an effort to show that the other parent was somewhat unfit. In my view both parents love and care deeply for their son. Neither is perfect, as illustrated by the discussion above but I do not doubt that they both are and will be good parents. They are articulate, intelligent people, with different skills and abilities.
- [38] Regarding K.D.'s proposed access schedule, in my view it would marginalize J.S.'s involvement in T.S.'s life.
- [39] That is not in the best interests of T.S. His father has taught him to ski, to ride a bike, goes camping with him, and wants to be involved in his life. J.S. has embraced a laborious commuting schedule while working full-time to continue the relationship. In the fullness of time he should be involved in extracurricular school activities.
- [40] In my opinion K.D.'s proposed access schedule is not in the best interests of T.S.
- [41] J.S. proposes a continuation of the existing access schedule. It works and he says it is just a continuation of the parenting schedule he and K.D. had while living as man and wife. It also fits with the access schedule of his partner. T.S. is close to his stepsister, so that is a benefit to him.

- [42] The difference is that J.S. proposes that T.S. attend P.C.E. School in September in Surrey. That would change the commuting requirements but the difficulties in that are if K.D. maintains her residence in Steveston. Her tenancy there is month-to-month and she acknowledged that it was not permanent. Because she does not have full-time employment she should be able to accommodate.
- [43] With respect to the relative merits of the schools, in my opinion the best school is less important than allowing T.S. access to both of his parents in a continuing and meaningful way. That is, in my view it is inappropriate to use the selection of a school to deprive a willing and capable parent of appropriate access.

V. Joint Custody or Sole Custody

- [44] Both parties sought sole custody. They did so on the basis that there is an inability to communicate, and conflict when there is communication.
- [45] K.D. has cited a number of cases where sole custody was ordered in the absence of good communications. J.S. asks for sole custody but provided no case authority. Of course, joint custody can be appropriate, even where communication is less than ideal: see P.Y.Y.M. v. D.M., 2003 BCSC 766, [2003] B.C.J. No. 1149 (S.C.).
- [46] In Carr v. Carr, 2001 BCCA 415, [2001] B.C.J. No. 1219 (C.A.), the Court of Appeal considered a husband's argument for sole custody in the absence of evidence of reasonable communications between the parties. There was a section 15 report in evidence recommending against co-parenting although an update report came to an opposite conclusion. The Court dismissed the appeal upholding an order for joint custody.
- [47] In my view the fact that there have been outstanding issues related to the house, to child support and to spousal support, and residual bitterness over the breakup of their relationship have contributed to the difficulty in communication. That said, with these issues behind them, most of the obstacles to appropriate communication should be behind them.
- [48] In my opinion joint custody continues to be appropriate.

VI. Orders

- [49] In the circumstances, then, I make the following orders:
1. The parties shall have joint custody and joint guardianship of the child;
 2. The parties shall be joint guardians of the estate of the child;
 3. In the event of the death of either parent the remaining parent will be the sole guardian of the person of the child;

4. Each parent is responsible for the day to day care of the child when the child is in their custody, and is obliged to advise the other parent of any matters of a significant nature affecting the child;
5. Each parent is obliged to discuss with the other parent any significant decisions to be made concerning the child, including the child's health, except in emergency situations, his education and his general welfare, and each parent is obligated to try to reach agreement with respect to those significant decisions;
6. In the event that the parents cannot reach an agreement with respect to any significant decision concerning the child, either parent shall have the right, under section 32 of the Family Relations Act, to apply to the court for a determination of the issue;
7. Each parent shall have the right to obtain information concerning the child directly from third parties, including teachers, counsellors, medical professionals, third party care givers, and those involved in organized activities in which the child is enrolled;
8. The parties shall provide each other with contact information from all third parties involved in the activities or care of the child;
9. The child shall reside with the mother as follows:
 - From 3:00 p.m. Monday until his return to daycare or school the next morning at 8:00 a.m.;
 - From 3:00 p.m. every Wednesday until his return to daycare the next morning at 8:00 a.m.;
 - On alternate weekends from 3:00 p.m. Friday until his return to daycare and/or school the following Monday morning, save and except when there is a long weekend and then the child will remain with the custodial parent for the entirety of the long weekend, whether the holiday falls on a Friday or a Monday, the child will remain with the custodial parent;
10. The child will reside with the father as follows:
 - From 3:00 p.m. every Tuesday until his return to daycare or school the next morning at 8:00 a.m.;
 - From 3:00 p.m. every Thursday until his return to daycare or school the next morning at 8:00 a.m.;
 - On alternate weekends from 3:00 p.m. Friday until his return to daycare and/or school the following Monday morning, save and except when there is a long weekend and then the child will remain with the custodial parent for the entirety of the long weekend, whether the holiday falls on a Friday or a Monday, the child will remain with the custodial parent;
11. As an exception to the normal schedule, at the option of either parent, on the day of either parents birthday the child will spend the entire day with that parent, if that parent is not the custodial parent on their birthday;

12. As an exception to the normal schedule, the child will spend the entire day on Mother's day with his mother and the entire day on Father's day with his father;
13. Neither parent will relocate outside the Lower Mainland of British Columbia or more than 45 minutes from the child's daycare or school;
14. If either parent intends to remove the child from the Lower Mainland of British Columbia while the child is with that parent, then that parent will advise the other parent of their intention to do so at least 48 hours before so doing, and will advise the other parent of their intended address and a telephone contact number;
15. Neither parent will remove the child from British Columbia without the written consent of the other parent, such consent not to be unreasonably withheld. In the event of the child's travel with the parent to a foreign country, the consenting parent shall provide the child passport and written proof of their consent in a timely way. If the parent does not consent, the parent shall specify their concerns in writing at the earliest opportunity;
16. As an exception to the normal schedule, each parent will be entitled to spend two weeks of uninterrupted time with the child during summer vacation. For the year 2010, the mother will have two weeks commencing August 22 and August 29, 2010. At her option she may continue to have the last two weeks in August on an ongoing basis. For the year 2010 the father will have two weeks commencing August 8 and August 15, 2010. In subsequent years the parties may specify the weeks they require at least 120 days before the proposed vacation. If there is a conflict in the schedules, for the year 2011 the mother shall have first priority in selecting the weeks. For the year 2012 the father shall have first priority in selecting the weeks. In subsequent years the parties will alternate priority in their selection of holiday summer vacation weeks;
17. As an exception to the normal schedule, each parent will be entitled to equal time with the child during Christmas holidays. The parents will take into consideration the travel times associated with each parent's home and seek to limit the child's travel time. The parents will limit the number of exchanges during the holiday period by allowing consecutive days with each parent to prevent unnecessary travel;
18. As an exception to the normal schedule, each parent will be entitled to equal time with the child during Spring Break and other unspecified holidays. The parents will take into consideration the travel times associated with each parent's home and seek to limit the child's travel time, and equalize their own travel time. The parents will limit the number of exchanges during the holiday period by allowing consecutive days with each parent to prevent unnecessary travel;
19. Neither parent will interfere with the other parent's visitation time unless invited to do so. Neither parent will schedule activities of the child on a day when they do not have custody of the child, unless they have the written consent of the custodial parent;

20. With respect to extracurricular activities, the parents shall consult with each other regarding what they consider to be appropriate extracurricular activities. They will seek to reach agreement on such activities. They will provide all necessary contact information regarding the extracurricular activities they propose to all the other parent in a timely way to allow the other parent to make an informed choice in regards to such activity. In the event of disagreement either party is at liberty to apply to the court to have approved such activity;
21. In regards to pick up and drop off of the child from school or daycare, either parent will have the right to appoint an alternate pick up person or drop off person without having to consult the other parent. Each parent will provide the other with a list of alternate pick up or drop off persons, and, as may be necessary, will supply such list with the school or daycare;
22. In the event that either parent is scheduled to work a shift that does not accommodate picking up the child from daycare before 6:00 p.m., the parties will consult with each other, to facilitate changes in this schedule that may be reasonably required to abide the principles established herein;
23. Outside the child's regular scheduled daycare routine, either parent will have the right to access daycare or childcare services in their own community according to their reasonable requirements, and will have the right to decide what daycare is best for the child, without the consent of the other parent. Each parent shall provide the other with the contact information of the daycare or child services that they use;
24. The parties shall communicate with each other wherever possible by email;
25. The parties shall provide each other current contact information, including email addresses, telephone numbers, including cell phones, and addresses of their residences and places of work;
26. For the school year 2010/2011 the child shall attend school at P.C.E. in Surrey;
27. Each parent shall facilitate the child providing appropriate cards for the other parent on Father's Day, Mother's Day, birthdays, and Christmas. Each parent shall facilitate the child providing gifts to the other parent on birthdays and Christmas;
28. Each parent shall facilitate the child communicating with the other parent during their periods of custody, but such communication should not interfere with the planned activities of the child;
29. Each parent shall facilitate the child communicating with the other parent during Christmas and Spring Break and Summer vacation, during periods of absence of two or more days, except during periods where it is not reasonable possible to do so;
30. Each parent shall encourage the child to respect the other parent and shall not speak ill of the other parent in the presence of the child; and

31. The father shall not use drugs in the presence of the child.

[50] There is no order as to costs.

"The Honourable Mr. Justice Savage"

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