
CANADA / JUDGMENT

K.F.O. v. C.D.C.D.

2003 BCSC 1745

COURT

Supreme Court of British Columbia

DECIDED

20 November 2003

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2003BCSC1745

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.F.O. v. C.D.C.D.,

2003 BCSC 1745

Date: 20031120

Docket: E022845

Registry: Vancouver

Between:

K.F.O.

Plaintiff

And

C.D.C.D.

Defendant

Before: The Honourable Mr. Justice Ralph

Reasons for Judgment

The plaintiff, K.F.O.

Appearing in Person

The defendant, C.D.C.D.

Appearing in Person

Date and Place of Trial:

July 7-11,

August 25 - 27, and September 5, 2003

Vancouver, B.C.

- [1] Mr. K.F.O. and Ms. C.D.C.D. lived together from January 1997 to July 2002. There is one child of their relationship, V., who is four years old. In addition, Ms. C.D.C.D. is the mother of a child of a former marriage, K., who is eight years old. Both children were cared for by Mr. K.F.O. and Ms. C.D.C.D. during their relationship and Mr. K.F.O. has continued to have regular access to both children since the parties separated. K. has no contact with her biological father and refers to Mr. K.F.O. as "Daddy." This proceeding principally involves the arrangements that need to be made for the care of the children. There is a related issue of spousal support for Ms. C.D.C.D..
- [2] There is some procedural confusion in the manner in which this matter came to trial. Mr. K.F.O. commenced the action on September 6, 2002. At the time, both parties were represented by counsel. A trial was set for January 20, 2003, but on January 16 the parties reached agreement at a settlement conference and consented to an order made by Davies J. that day. The consent order dealt with all of the issues between the parties, including an order that the parties would have joint custody and be joint guardians of the children. It is clear, however, that there continued to be disputes between the parties. Both parties say that the consent order is unsatisfactory, although for different reasons.
- [3] At some point between January 16 and March 28 that is not clear from the evidence, an apparent misunderstanding about the nature of the January 16 order of Davies J. developed and a "trial date" was set for July 7, 2003. On March 28, 2003, Pitfield J. ordered a custody and access report pursuant to s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 121, to be completed prior to the trial.
- [4] When the matter came before me "for trial" on July 7, it was evident from the disputes that had been occurring and the fact that the parties were now unrepresented by counsel, that what was in essence an application to vary the order of Davies J. should proceed as a trial pursuant to Rule 52(11)(d). The matter proceeded on that basis. Evidence was given by the parties, Mr. K.F.O.'s parents, Ms. C.D.C.D.'s mother, the Principal of K.'s school, a daycare supervisor and Ms. LeSurf, the family justice counsellor who prepared the custody and access report.
- [5] The principal elements of the consent order of January 16 provide that:
1. the parties will share joint custody and joint guardianship of the two children;
 2. the children's principal residence is to be with Ms. C.D.C.D.;

3. the children will reside in British Columbia but may be removed by either party for vacation purposes on reasonable notice to the other party;
 4. Mr. K.F.O. will have access on alternate weekends, alternate Wednesdays, half of the summer vacation and school holidays and at other times agreed upon by the parties;
 5. the parent who has the children with him or her at any given time is to facilitate regular telephone access between the children and the other parent;
 6. Mr. K.F.O. is to pay Ms. C.D.C.D. child support of \$500 per month;
 7. Mr. K.F.O. is to pay Ms. C.D.C.D. spousal support of \$1000 per month which may be reviewed when V. starts kindergarten or Ms. C.D.C.D. becomes employed.
- [6] Mr. K.F.O. now seeks orders that:
1. he have sole custody of the children;
 2. the children reside an equal amount of time with each parent;
 3. the children's residence be confined to the lower mainland;
 3. child support be varied accordingly to recognize the shared physical custody;
 4. spousal support be cancelled or reduced;
 5. the telephone access provisions be further defined;
 6. he be awarded costs.
- [7] In addition to opposing the relief sought by Mr. K.F.O., Ms. C.D.C.D. seeks an order that she be permitted to move to Alberta with the children.
- [8] Mr. K.F.O. is 40 years old and Ms. C.D.C.D. is 35. Ms. C.D.C.D. was born in Chile but has resided in Canada since she was a child. She has resided in British Columbia for approximately 10 years and currently resides with the children in rental accommodation in North Burnaby. Before that she resided in Alberta for at least 10 years and maintains close family ties in Alberta.
- [9] Ms. C.D.C.D. has not been employed since 1998, other than for a one month period in 2001. She receives monthly spousal support of \$1000 and child support of \$500 from Mr. K.F.O..
- [10] Mr. K.F.O. is employed as a program supervisor for an agency providing training to assist people seeking employment. He resides at the home of his parents in a relatively large home in Surrey. K. has her own room in the home and V. currently shares a room with Mr. K.F.O., but arrangements are under way to provide a separate room for V..
- [11] While the parties lived together they and the children made vacation trips to Alberta. In the late summer of 2002, after the parties had separated, Ms. C.D.C.D. took the children to Alberta for what Mr. K.F.O. believed to be a vacation. While there she enrolled K. in an Edmonton school. Upon learning that what he thought was a vacation trip had become an

intended permanent move by Ms. C.D.C.D., Mr. K.F.O. obtained an order of a Master of this court on September 18, 2002, declaring British Columbia to be the habitual residence of the children and this court as having jurisdiction to make orders with respect to custody of and access to the children. Ms. C.D.C.D. returned to British Columbia with the children and has continued to reside in British Columbia since then.

- [12] Since the consent order of January 16, 2003, the parties have had a number of disputes associated with the arrangements for Mr. K.F.O. to pick up the children for the times they are to be with him. On February 11, for example, Ms. C.D.C.D. picked up K. from school when that was to have been done by Mr. K.F.O.. At the time of the school break in March there was a dispute about the time when the children were to be with Mr. K.F.O.. Warren J. made an order March 17 that the children would be with Mr. K.F.O. from March 19 to 23. On March 20 it was necessary for Melnick J. to order that Mr. K.F.O.'s access would begin "immediately."
- [13] There have also been difficulties with the facilitation of telephone communication between the children and their parents. There are allegations that on a number of occasions when the children were talking to Mr. K.F.O. or his parents Ms. C.D.C.D. has told the children to hang up the phone after only brief communication.
- [14] There have been other disputes between the parties arising out of the fact that Ms. C.D.C.D. arranged counselling for the children without any consultation or participation by Mr. K.F.O..
- [15] Ms. C.D.C.D. wishes to move to Edmonton with the children. She sought such an order in the counterclaim filed December 9, 2002. The consent order before Davies J. provided, however, that the children must reside in British Columbia and be removed from British Columbia for vacation purposes only on reasonable notice to the other party.
- [16] Ms. C.D.C.D.'s mother and stepfather reside in Edmonton and her uncle is said to have a home in which Ms. C.D.C.D. and the children would reside. Ms. C.D.C.D. says that she and her children need the stability and support which would come from residing where a number of her family members reside. Ms. C.D.C.D. testified that she would seek a "suitable job" in Edmonton and that she may take a course in event planning.
- [17] K. is in grade four. The principal of her school testified that K. seems to be an able child, but that he has had concerns that she lacks discipline. He described in careful language the differences in expectations of K. of some of her teachers over the past 3 years from those of Ms. C.D.C.D.. He stated that he has sat in on some parent teacher interviews with Ms. C.D.C.D. to "moderate" the meeting. He noted what he considered to be a positive change in the past year. He described Mr. K.F.O. as being on more of an "even keel" emotionally than Ms. C.D.C.D..

- [18] V. attends daycare on Mondays and Tuesdays on the alternate weeks where he and K. reside with Mr. K.F.O.. K. attended the daycare from September 1999 to June 2000. The daycare supervisor described Mr. K.F.O. as a "very fair and loving" parent who treated both children equally.
- [19] In her custody and access report Ms. LeSurf described her contacts with the children, the parties, Mr. K.F.O.'s parents, the daycare supervisor, the school principal and an employee of the B.[] Club where the children attend on a regular basis. In reporting the results of her investigation Ms. LeSurf framed her comments in relation to the factors set out in s. 24 of the Family Relations Act that must be considered when assessing what is in the best interests of the children.
- [20] Ms. LeSurf observed that both Ms. C.D.C.D. and Mr. K.F.O. "love their children and are able to provide day-to-day care, as evidenced in the current parenting schedule." In discussing the health and emotional well-being of the children Ms. LeSurf describes them as "beautiful, physically healthy children." She also notes:
- C.D.C.D. places considerable pressure on K. to reject K.F.O. as a father figure and she does not recognize the emotional burden this puts on the child.
- [21] In referring to the views of the K., Ms. LeSurf went on to report:
- She is too well acquainted with the issues that have been raised in Court and K. mirrors many of her mother's opinions. K. feels that "being separated is very hard" and states that V. does not understand "what we are going through."
- [22] Ms. LeSurf stated further:
- I observed an affectionate relationship between K. and her dad and paternal grandparents. There is a creek on the property and K. enjoys playing outside with her dad and V. and they had just finished planting flowers when I arrived. Both children seem to respond calmly and positively to the clearly defined expectations for their behaviour. While K. and V. were compliant, they did not demonstrate apprehension or fear of physical discipline as suggested by K. and C.D.C.D..
- [23] In her summary Ms. LeSurf concluded:
- K. and V. will benefit from having a positive, unrestricted relationship with both of their parents. It is not in their best interests to move with their mother to Edmonton as this will greatly limit their contact with their father. Having both parents fully involved in parenting provides balance for the children and could be structured on a weekly rotation.
- [24] One of the concerns expressed by Ms. C.D.C.D. is her claim that Mr. K.F.O. and his parents do not recognize K. as Mr. K.F.O.'s own child in the same way that they view V. and as a result treat K. less favorably than V.. In my view this concern is not borne out by the weight of the evidence. Mr. K.F.O. has played a significant part in K.'s life since she was approximately 3 years old. He has taken an active role in her schooling. He has provided care at home for her and involved her in a range of activities. Mr. K.F.O.'s devotion to K. is supported by the

evidence of the day care supervisor, the school principal, Ms. LeSurf and Mr. K.F.O.'s parents. On my assessment of his evidence Mr. K.F.O. is genuinely attached to K. and sees himself as having the same parental role and responsibility to her as he has to V..

- [25] In their evidence Mr. K.F.O.'s parents described their relationship and their activities with the children in a manner which demonstrated an affection and commitment to both children. The children reside in their home when the children are with Mr. K.F.O.. Ms. LeSurf described in a very positive way her observations of the relationship between the children and Mr. K.F.O.'s parents. On my assessment of the evidence of Mr. and Mrs. C.D.C.D. senior I found them to be interested in and concerned for the welfare of both children.
- [26] On the whole of the evidence I am left with the impression that a critical factor in addressing this concern is the fact that, irrespective of any definition in the Family Relations Act, Ms. C.D.C.D. does not accept the idea that Mr. K.F.O. is a "parent" of K.. It follows that Ms. C.D.C.D. is highly distrustful of Mr. K.F.O.'s continuing role in K.'s life.
- [27] On my assessment of the evidence, it is clear as well that Ms. C.D.C.D. and Mr. K.F.O. have distinctly different views on their approaches to parenting. Mr. K.F.O. seeks to impose more structure and boundaries. Ms. C.D.C.D. sees such an approach as the imposition of unacceptable discipline. She makes a similar judgment of Mr. K.F.O.'s parents' approach to the children.
- [28] There is some evidence that Ms. C.D.C.D. is seeking to manipulate the children's attitude toward Mr. K.F.O.. That concern is expressed by Ms. LeSurf in her report. In her evidence in court Ms. LeSurf stated that in her visit with K., K. made a couple of statements which Ms. LeSurf considered to be "coached."
- [29] It is my opinion from the evidence that Ms. C.D.C.D. has more than one reason for seeking to move to Alberta. I accept that she genuinely believes that she will receive emotional and other support from her family there that will enable her to better care for the children. It is also my view, however, that Ms. C.D.C.D. has concluded that it would be better for the children for Mr. K.F.O. to have less of a role in their lives and that a move to Alberta would achieve that end. She also expresses a fear that Mr. K.F.O.'s purpose is to take the children from her. It is significant that Ms. C.D.C.D. described the determination the court is called upon to make here as deciding "which is the better parent."
- [30] The issues which must be addressed in undertaking an analysis of this case are:
1. Is the matter now before the court an "application to vary" the order of January 16, 2003?
 2. If so is the prerequisite of a "material change in circumstances" present?
 3. If there is a material change in circumstances what order should be made in the best interests of the children?

4. Even if there has been no material change in circumstances should there be further definition of any of the provisions in the order of January 16, 2003.

[31] The leading authority governing changes in custody and access orders is *Gordon v. Goertz*, [1996] 2 S.C.R. 27. Although it was a decision arising out of an order under the Divorce Act, R.S.C. 1985, c. 3 (2nd supp.) the principles are applicable to changes of custody and access orders made under the Family Relations Act. (*Bruce v. Bruce* (1997) (B.C.S.C.)), including consent orders (*Nay v. Nay*, 2003 B.C.S.C. 491; *Collins v. Collins*, [1999] B.C.J. No. 319 (S.C.) (Q.L.)).

[32] At ¶ 49 of *Gordon v. Goertz*, McLachlin J. stated:

The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia;
 - (a) the existing arrangement and relationship between the child and the custodial parent;
 - (b) the existing access arrangement and the relationship between the child and the access parent;
 - (c) the desirability of maximizing contact between the child and both parents;
 - (d) the views of the child;
 - (e) the custodial parent's reason for moving,

only in the exceptional case where it is

relevant to that parent's ability to meet the needs of the child;

(f) disruption to the child of a change in

custody;

(g) disruption to the child consequent on

removal from family, schools, and the

community he or she has come to know.

1. Is the matter now before the court an "application to vary" the order of January 16, 2003?

[33] The orders being sought by both parties in this proceeding would change the consent order made by Davies J. on January 16. That order was arrived at in the course of a settlement conference at a time when both parties were represented by counsel. It is also clear from its wording that it was not an interim order. For example, the order addresses access arrangements for holidays well into the future. The scope of the consent order extends to matters which are being raised again in the trial before me.

[34] I recognize that subsequent to the order confusion arose about the need for a "trial." That misunderstanding has caused me concern about the appropriate approach to the application before me. On January 16, however, that confusion does not appear to have yet arisen and the parties consented at that time to an order which covered much of the same ground present in the hearing before me. I therefore conclude that the matter now before the court is an application to vary the order of January 16, 2003.

2. Is the prerequisite of a "material change in circumstances" present?

[35] In *Gordon v. Goertz* the Supreme Court of Canada held that a prerequisite to varying a custody or access order is a material change in the circumstances of the children since the last custody order was made. Although the court was addressing section 17(5) of the Divorce Act, s.20 of the Family Relations Act provides for variation only "if circumstances have changed since the order was made or last varied."

[36] In discussing what suffices to establish a material change in the circumstances of the child, McLachlin J stated at ¶13:

It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

- [37] In her counterclaim in this proceeding, Ms. C.D.C.D. sought an order permitting her to move to Alberta with the children. The order of Davies J. expressly requires that the children not be removed from British Columbia other than for vacation periods. In effect Ms. C.D.C.D.'s desire to move to Alberta was foreseen on January 16, it was addressed and it was not acceded to. I do not think that there has been a material change in the circumstances of the children since that time which can form the basis for revisiting this matter.
- [38] Similarly, the desire of Mr. K.F.O. to have sole custody of the children and to have them reside with him half of their time was foreseen in January 2003. While Mr. K.F.O. may not have contemplated the difficulties he has encountered in exercising his access to the children, I do not think that they are sufficient to alter the arrangements agreed to in the order of January 16.
- [39] As a result, I conclude that the applications of the parties have not demonstrated a material change in circumstances sufficient to alter the custody and access provisions of the order of January 16. Those provisions will, therefore, remain in force.
3. If there is a material change in circumstances what order should be made in the best interests of the children?
- [40] Because I have not found a material change in circumstances this issue is not required to be addressed. In light of the evidence, however, I think some comment should be made. If Ms. C.D.C.D.'s application to permit her to move the children to Alberta were a fresh application I would have declined to make such an order. While, as I have stated above, Ms. C.D.C.D. genuinely believes that she will gain more support from her family in Edmonton, there is also a desire of Ms. C.D.C.D. to reduce significantly Mr. K.F.O.'s participation in the lives of the children, particularly the life of K.. A move to Alberta would contribute to that end to the detriment of the children. The benefits of the move would not in my view outweigh this detrimental effect.
- [41] In addition, there is evidence that Ms. C.D.C.D. is negatively influencing the children's view of Mr. K.F.O.. A reduced opportunity for his regular access to the children would serve to promote the negative influence and to deprive the children of the benefit of the positive contribution Mr. K.F.O. can make to their lives. I accept the opinion of Ms. LeSurf that having both parents fully involved in parenting provides needed balance for the children. I commend to Ms. C.D.C.D. the statement of Ms. LeSurf:

It is difficult to identify why C.D.C.D. feels she needs to reject K.F.O. as a parent to K. and V.. Rather than have the children attend counselling, it may be more beneficial for C.D.C.D. to explore these issues through personal counselling for herself.

- [42] I recognize that Ms. LeSurf has recommended that the residential arrangements for the children be varied so that the children reside alternating weeks at the homes of each parent. I have held, however, that the threshold material change in circumstances required to make such an order has not been crossed. If this were a fresh application I would find that there is

value in the suggested arrangement. Offsetting that value is the impact of a change from the status quo which has existed for the children for quite some time. In addition, there is a need for more consideration of the impact on the children arising from the distance between the homes of the parties and the distance between K.'s school and Mr. K.F.O.'s home.

4. Should there be further definition of any of the provisions of the January 16 order?

[43] Two additional concerns arise out of the order of January 16. The first arises out of the provision that the children may be removed from British Columbia by either party for vacation purposes only on reasonable notice to the other party. Ms. C.D.C.D. was born in Chile and maintains some connections with it. Her mother resides in Edmonton, but owns a former family home in Chile. From time to time there have been expressions by the parties and by Ms. C.D.C.D.'s mother of a desire to visit Chile with the children. When the parties lived together there had been some discussion of a family trip. Mr. K.F.O.'s concern is that Ms. C.D.C.D. might make a permanent move with the children to Chile without his knowledge.

[44] While the provisions of the Canadian Passport Order (SI 81-86) should go some way to allaying Mr. K.F.O.'s concern, I have concluded that there must be an additional order that the children may not be removed from Canada by either party, without the consent of the other party or an order of this court.

[45] The second concern arises out of the provision that:

Both parties shall facilitate regular telephone communication between the children and the other parent while the children are with that parent.

[46] Each party complains about the actions of the other in facilitating such calls. It seems to be a particular irritant between the parties. There are allegations of Ms. C.D.C.D. being heard in the background telling V. to hang up the phone when he is speaking to Mr. K.F.O.. There are allegations that Mr. K.F.O. is discouraging V. from speaking to his mother when V. is with him. On March 17, 2003, Warren J. made an order for the spring school break period that the parties ensure regular phone calls to the parent not having visitation at 7:00 each night with the call lasting not more than one-half hour. There were additional difficulties during the summer vacation period.

[47] There is some evidence that the frequency and the timing of the calls are upsetting to the children. I am not satisfied that daily telephone contact is necessary in the children's interest. One would hope that with the passage of time the parties could work out a pattern acceptable to both of them. There will be an order, however, that unless a written agreement as to times is made by the parties, and except in the case of emergencies, Ms. C.D.C.D. will facilitate telephone communication between the children and Mr. K.F.O. at 7:00 p.m. on Mondays, Thursdays and Saturdays when the children are with her. Mr. K.F.O. will facilitate telephone communication between the children and Ms. C.D.C.D. on Saturdays and

Mondays at 7:00 p.m. when the children are with him. The duration of the telephone calls will not exceed 20 minutes for each child. During vacation times which do not conform to the usual access days, there will be calls every other day at the same time for the same duration facilitated in the same manner.

[48] Mr. K.F.O. seeks a variation in the order that he pay spousal support to Ms. C.D.C.D.. Because the residency and access provisions of the January 16 order have not been varied in the present application, I do not see a basis to vary the spousal support provision and it will remain in place.

[49] Each party seeks costs from the other. In my view the success of the parties is divided. The appropriate costs order, therefore, is that the parties must bear their own costs.

"Bryan F. Ralph, J."

The Honourable Mr. Justice Bryan F. Ralph

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