
CANADA / JUDGMENT

K.K. v. P.P.

2010 BCSC 918

COURT

Supreme Court of British Columbia

DECIDED

29 June 2010

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2010 BCSC 918 K.K. v. P.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.K. v. P.P.,

2010 BCSC 918

Date: 20100629

Docket: E37226

Registry: Nanaimo

Between:

K.K.

Plaintiff

And

P.P.

Defendant

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

The Plaintiff:

In Person

The Defendant:

In Person

Place and Date of Trial:

Nanaimo, B.C.

April 13-16, 2010

Place and Date of Judgment:

Nanaimo, B.C.

June 29, 2010

- [1] P.P. and K.K. had a common law relationship between 1995 and 1999. They have a daughter in 1996, who was three years old when they separated. Shortly after separating, the parents signed an agreement which provided that they would have joint custody and the child would reside with the mother. The agreement provided that the father would have reasonable and generous access, including one weekend per month, alternating Christmas holidays, and one month each summer. Despite the initial agreement, there has been an ongoing dispute between the parents about custody and access, numerous applications, and a trial in 2005. There is considerable animosity between the parents which has been displayed in the presence of the child. At the trial in 2005, the father sought a joint parenting arrangement. After a four-day trial, orders were made providing for joint guardianship and sole custody to the mother, with provisions for access to the father which were similar to those in the agreement. However, access broke down in 2007, and the father did not have access for approximately two years. The father currently has access two days a week.
- [2] In this second trial dealing with custody and access, the father seeks sole custody and guardianship of the daughter, with specified access to the mother. The father takes the position that the change in custody is required because the mother has made access extremely difficult and has alienated the child from him. The mother opposes any change to the current guardianship and custody orders and seeks orders that the father not be allowed to bring any more applications regarding the custody and access of the child without leave of the court. She also seeks orders prohibiting the father from recording access visits with the child, and phone calls with the child and mother. As well, the mother seeks orders that either parent can take the child on vacations outside the jurisdiction, and that the father pay his proportionate share of extraordinary expenses.

Analysis

Whether a change to the current guardianship and custody order should be made?

- [3] There is no doubt on the evidence before me that both parents are devoted parents. However, for the following reasons, I have concluded that it is in the best interests of the child that there be no change to the current custody and access order.

- [4] In making any order for a variation in custody, the paramount consideration is the best interests of the child.
- [5] The relevant provision in determining whether a variation of a custody order is appropriate is s. 24 of the Family Relations Act, R.S.B.C. 1996, c. 128, which provides:
- (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:
- (a) the health and emotional well being of the child including any special needs for care and treatment;
 - (b) if appropriate, the views of the child;
 - (c) the love, affection and similar ties that exist between the child and other persons;
 - (d) education and training for the child;
 - (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.
- (1.1) The references to "other persons" in subsection (1) (c) and to "each person" in subsection (1) (e) include parents, grandparents, other relatives of the child and persons who are not relatives of the child.
- (2) If the guardianship of the estate of a child is at issue, a court must consider as an additional factor the material well being of the child.
- (3) If the conduct of a person does not substantially affect a factor set out in subsection (1) or (2), the court must not consider that conduct in a proceeding respecting an order under this Part.
- (4) If under subsection (3) the conduct of a person may be considered by a court, the court must consider the conduct only to the extent that the conduct affects a factor set out in subsection (1) or (2).
- [6] Each case dealing with custody and access must be determined on its facts. The cases dealing with custody and access indicate that the courts have come to recognize the child's need for the maximum contact with each parent, providing that it is not contrary to the best interests of the child: *Jordan v. Jordan*, 2001 BCSC 1058.
- [7] The question to be determined in deciding whether the custody and access order should be varied is whether it is in the best interests of the child to vary the order to grant the father sole custody and guardianship of the child with specified access to the mother?

- [8] The child has lived with the mother since the parties separated in 1999. The mother remarried in 2002, and the child has a step-brother who was born in 2002.
- [9] The father had regular access to the child until November 2007, when she refused to see him anymore. The child did not see her father until 2009 when access was re-established. The child is now 14 years old and sees her father two days a week, on Wednesday for approximately 2½ hours, and on Saturday or Sunday for three hours, usually at the mall or some other public place. The child refuses to see her father at his house.
- [10] The father submits that it is necessary to change the custody and guardianship of the child because the mother has been engaged in alienating the child from him since the parties separated in 1999. He says that matters came to a head in November 2007, when the daughter was 11 years old. Unbeknownst to him, his four adult children by his first wife arranged a birthday party for his sixtieth birthday. His daughter came to the party and had a very good time, according to the father and other witnesses. The next day, he attempted to have access with his daughter, and she refused to see him. The child sent a letter to him setting out a number of complaints about him. The father says there was no basis for the complaints and the inference to be drawn from the circumstances leading up to November 2007 is that the child refused to see him because of her mother's influence.
- [11] The father called a number of witnesses to describe the events at the birthday party. According to the witnesses, the child had a very good time at the birthday party and enjoyed seeing her older step-siblings. The father says that nothing happened at the party that would result in the letter he received from the child after he attempted to exercise access following the party.
- [12] The father asserts it is apparent from the drastic change in the behaviour of the child following the party, that the mother was unhappy with the fact that the child had fun at the birthday party and as a result of the mother's reaction, the child refused to see him again.
- [13] In support of his assertion that the mother has alienated the child from him, the father provided an expert report from a psychologist, Dr. Waterman. In his report, Dr. Waterman sets out the characteristics of parental alienation. Dr. Waterman states in his report that some of the behaviour described by the father could be the result of parental alienation, but then goes on to state:

Whether it is a Parental Alienation situation or not can only be determined with a full and complete assessment by a qualified assessor. Certainly, there are some characteristics that suggest that a Parental Alienation situation may exist but that cannot be confirmed without a full assessment being conducted.

- [14] Dr. Waterman did not meet or interview the mother or the child and only had the father's version of the events leading up to the child's refusal to see the father. Therefore, he was unable to determine whether the behaviour was a result of a parental alienation situation.

- [15] As a result of the ongoing conflict since November 2007, a section 15 report was ordered. Dr. Elterman prepared a report dated September 9, 2007, after interviewing the parents, the child, and a number of other individuals who knew the parties. Included was an interview of the mother's husband with whom the child lives. In September, the child was refusing to see her father. Dr. Elterman recommended that to effect a reconciliation between the father and child, that they start having half day supervised visits or weekly counselling sessions together for two hours each week, for eight weeks.
- [16] As a result of his recommendations, weekly counselling sessions started with Ms. Shelley Langford for the father and child. As well, there was one session where the father and mother attended with Ms. Langford. Apparently, the counselling was not very productive because the child felt the counsellor was siding with her father. Ms. Langford testified at trial that she thought the mother was uncooperative in encouraging a better relationship between the father and the child.
- [17] In my view, it is apparent from the evidence that the behaviour of the father undermined the role Ms. Langford was to play in assisting he and the child to effect a reconciliation. Both before and after the counselling started, the father sent numerous emails to Ms. Langford setting out his view of the history of the relationship. The evidence was that he sent approximately 60 emails to Ms. Langford. The mother sent one email to Ms. Langford, which Ms. Langford then provided to the father. As well, the father provided recordings of his telephone calls and access visits with the child to the counsellor, despite court orders that he cease recording the telephone calls and visits with the child. In the circumstances, it is not surprising that the mother felt that Ms. Langford overstepped her authority during counselling and was not impartial in her approach. As a result of the circumstances in which the counselling occurred, I am of the view that very little weight can be given to Ms. Langford's opinions.
- [18] At the request of the parties, Dr. Elterman wrote a follow-up report on April 4, 2010. In order to prepare the follow-up report, Dr. Elterman again interviewed the parents and the child. As well, he interviewed Ms. Langford. In his report, Dr. Elterman noted that the mother's animosity towards the father has played a role in influencing the child against the father. However, he also noted that the mother's view was that the access visits were becoming more successful. Dr. Elterman recommended that the child continue to reside with the mother and continue to see the father on the current schedule. In his view, as long as the current access is maintained, the relationship between the father and child will be sustained. He recommended that the father and child return to counselling with another counsellor.
- [19] The father complains that the mother will not communicate with him about the child, and therefore he is not informed by her about the child's activities. The evidence at the time of the trial in 2005 was that the father had monitored the mother's computer and was recording the mother and the child on the telephone. Despite orders not to record the telephone calls and not to make any video or sound recordings of access visits, the father continues to do so.

Given the ongoing recordings of conversations and the use of those recordings and any emails the mother sends to him for court purposes, it is not surprising that the mother is reluctant to communicate with the father.

- [20] However, as stated by Shabbits J. at the earlier custody and access trial, the issue is not to resolve the ongoing disputes between the parents, but to make provision for the child in the manner that is in her best interests.
- [21] Despite the ongoing conflict between her parents, the child has continued to thrive. She is successful in school and is involved in her community. She is an honour roll student at a French immersion school, and on school council. She plans to attend university. She is apparently very artistic and musical. She dances and takes piano lessons. She received the highest award in Girl Guides, and is now involved in Pathfinders. She has been involved in various community fundraisers and written articles for the local paper. She was one of five students chosen to participate in a leadership conference, and in January 2010 participated in a model United Nations at the University of British Columbia.
- [22] The fact that the father was unaware of the child's activities until the mother testified about them, despite spending two days a week with the child since October 2009 is, in my view, indicative of the father not talking to the child about her activities. As well, the father's statement that he wanted to be informed by the mother and participate in any activities the child is involved in is somewhat unrealistic, given that the child is now 14 and involved in activities in which there is no parental participation or involvement.
- [23] In my view, the whole tenor of the father's testimony was more about a concern for himself than a concern for his child. When it was indicated to him that the child would have felt betrayed by him sharing her letter to him with neighbours and other members of the family, his response was that he was hurt and surprised by the letter. In his evidence and submissions, the father's primary concern seemed to be about the fact he was not being treated well by the child or the mother, as opposed to any concern about the child. It was not until the mother testified that there was any evidence about the child and what she liked to do, or her success in school and extracurricular activities.
- [24] Notwithstanding the ongoing conflict, the mother has indicated that she knows it is in the child's best interests to have a relationship with her father. The mother testified that she is willing to continue to encourage the child to see her father. As well, she has indicated that she is willing to communicate through email twice a month with the father as long as the emails are confidential and not to be used for court purposes. The child is willing to see her father on the current schedule.
- [25] Having considered all of the evidence, I have concluded that it is in the child's best interests to maintain the current custody and guardianship arrangement. The order of Shabbits J. of May 6, 2005, in regard to custody and guardianship will remain in force.

- [26] The current access will continue with the father having access two days a week. The father will have access each weekend on either Saturday or Sunday between 1:00 p.m. and 4:00 p.m., and Wednesday between 5:00 p.m. and 7:30 p.m. at a location to be agreed on.
- [27] I will also reiterate the earlier orders that the father shall not record telephone conversations with either the mother or the child, and shall not make any video or audio recordings of access visits.
- [28] As well, I would recommend the father take a course on parenting teenagers. I am not going to order any further counselling for any of the parties. The counselling that has occurred to date has not been very effective, and the child has expressed the view that she does not wish to attend any more counselling. In my view, further counselling is unlikely to have much positive effect, and the evidence is that the parties cannot afford it.

Should orders be made that either parent can take the child on vacations outside the jurisdiction, and that the father pay his proportionate share of extraordinary expenses?

- [29] An order was made by Shabbits J. in May 2005, that either parent can travel to the United States with the child without the consent of the other parent, on certain conditions. That order remains in effect, and accordingly, there is no need to make an order in that regard.
- [30] I am making an order that the father pay his proportionate share of extraordinary expenses. As I understand the current situation, the father disputes that he should have to pay his proportionate share of orthodontic expenses and music lessons. In my view, those are appropriate section 7 expenses, and the father should pay his proportionate share. The parties shall exchange their income tax returns by June 30 each year in order to determine their share of extraordinary expenses.

Should an order be made prohibiting the father from making any further applications without leave of the court?

- [31] I have concluded this is an appropriate case in which to order that the father cannot bring any further applications or actions concerning custody and access without the leave of the court.
- [32] The relevant legislation to be considered in determining whether an order should be made prohibiting the father from bringing any further applications in this proceeding without leave of the court is s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443. Section 18 provides:

If, on application by any person, the court is satisfied that the person has habitually, persistently and without reasonable grounds, instituted a vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person are giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

- [33] The mother points out that the father has served numerous applications following the original trial, relating to such matters as contempt and reopening the trial, all of which required the mother to incur the time and expense of preparation. The mother says that the father has brought approximately 29 applications, and there have been two trials since 2002. The mother says that none of these applications or trials were necessary given the fact that in October 2002 she proposed an agreement which was reasonable.
- [34] The agreement proposed by the mother in October 2002 provided that the child live with the mother, and that the parents would be joint guardians, with an obligation on the mother to inform the father of any significant issues and decisions about the daughter. The proposed agreement gave the father the right to obtain information about the daughter from third parties, such as teachers and medical providers. The proposed access was every second weekend. The father would have half of spring break, a month in the summer, and half of the Christmas holidays.
- [35] That proposal was not accepted. However, in 2003 and 2004, interim consent orders were entered into to the same effect when each party was represented by counsel. Despite the agreements and orders, there has been ongoing litigation which has been very costly. The ongoing costs of the litigation have bankrupted both parents. The father confirmed that he had to declare bankruptcy and was not in a position to pay his proportionate share of extraordinary expenses, including the braces the child needs.
- [36] An order under s. 18 is a drastic measure, and a power to be exercised with great caution: *Re Lang Michener et al. and Fabian et al.* (1987), 59 O.R. (2d) 353, 37 D.L.R. (4th) 685 (H.Ct.); *Komaya v. Leigh*, 2001 BCSC 164; and *Bryfogle v. Williams Lake School District No. 49*, 2007 BCSC 457 (aff'd, 2009 BCCA 256).

[37] As stated in *Koyama* at para. 96:

The principles guiding the exercise of this court's discretion on such an application have been discussed in *Re Lang Michener et al. v. Fabian et al.* (1987), 59 O.R. (2d) 353, 37 D.L.R. (4th) 685, 16 C.P.C. (2d) 93 (H.C.). Henry J. listed these considerations at p. 691:

- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

- (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
 - (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
 - (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
 - (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.
- [38] In this case, I find the father's conduct falls within at least (a), (b) and (c). As I indicated earlier, despite orders not to, the father has persisted in recording the telephone conversations with the child, and video and audio recording the access visits, to be used to further his ongoing desire to have custody of the child. There have now been two trials involving the custody and access of the child. After the first trial, the father brought numerous applications. Despite the mother having been represented by counsel for much of the time, the applications were personally served on her each time, with the child often being present.
- [39] The father's evidence is that he cannot pay for the child's extraordinary expenses, including braces, because of his current financial situation, yet he continues to spend money to file applications and for hearing fees. It is clear from the evidence that it is likely there will be post-secondary expenses for the child in the near future, and the father should to be in a position to assist with the funding of her education, as opposed to using his funds for ongoing litigation.
- [40] In my view, in circumstances where there has been ongoing litigation since 2002, and two trials which have bankrupted the parties, this is an appropriate case in which to grant a s. 18 order. Accordingly, I am ordering that the father not be allowed to bring any more applications or actions concerning custody or access without further order of the court.

Conclusion

[41] I am making the following orders:

- The father's action for sole custody and guardianship is dismissed.
- The custody and guardianship order of May 6, 2005, will remain in force.
- The father will have the following access to the child: Wednesday from 5:00 p.m. to 7:30 p.m.; and on Saturday or Sunday from 1:00 p.m. to 4:00 p.m., at a location to be agreed upon.

- The father will pay his proportionate share of extraordinary expenses, including orthodontic expenses and music lessons, such amount to be paid to the mother within one week of receiving an invoice. The parties will exchange their income tax returns by June 30 each year in order to determine their proportionate share.
- The father is prohibited from bringing any further applications or actions for custody or access of the child without leave of the court.
- The mother is entitled to her costs of the trial.

[42] I will remain seized of this matter for the purposes of settling the order.

"Gerow J."

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