
CANADA / JUDGMENT

K.M.D. v. M.E.W.

2010 BCSC 980

COURT

Supreme Court of British Columbia

DECIDED

13 July 2010

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.M.D. v. M.E.W.,

2010 BCSC 980

Date: 20100713

Docket: E051676

Registry: Vancouver

Between:

K.M.D.

Plaintiff

And

M.E.W.

Defendant

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for Plaintiff:

Steven N. Mansfield

Counsel for Defendant:

Anne Demeulemeester

Place and Date of Hearing:

Vancouver, B.C.

June 28, 2010 and July 6, 2010

Place and Date of Judgment:

Vancouver, B.C.

July 13, 2010

Introduction

- [1] The defendant father seeks a order vacating a consent interim order dated September 23, 2005 that specified terms related to custody, guardianship, and access, and child support regarding the child of the plaintiff and defendant, born August 21, 2003. The defendant seeks interim order that provides for an equal co-parenting regime as more specifically set out below.

Background

- [2] The defendant is 47 years old and the plaintiff mother is 48 years old. The parties have one child together. The parties were never married and they lived together for less than 2 years, from approximately August 2003, a few weeks prior to the child's birth, until January 2005 when the child was about 1 ½ years old.
- [3] The parties entered into the aforesaid interim consent order On September 23, 2005 (the "Interim Order"). The child was then two years old. The Interim Order provides for the plaintiff to have sole custody; the parties to share joint guardianship with the plaintiff having the ability to make decisions in the event that the parties cannot reach agreement; and an access schedule for the defendant.
- [4] The plaintiff has been the primary caregiver for the child since birth. The defendant has had regular access with the child since separation and has been involved in the child's life. He participates with the child in many activities such as ice hockey, road hockey, swimming, tobogganing, camping, and fishing.
- [5] The parties have resided in the same apartment complex in New Westminster and continue to do so. The child's maternal grandparents and the plaintiff's aunt reside in the same complex as well.
- [6] The plaintiff and defendant are both employed. The defendant is self-employed and operates an audio visual equipment business. The plaintiff works full time as a bylaw officer.
- [7] In September 2009, the parties entered into a temporary "without prejudice" parenting schedule pending the completion of a section 15 report by Dr. England (the "Report"). Plaintiff's counsel suggested Dr. England and the defendant agreed.

- [8] The Report was completed in late November, 2009 with follow up letter in December 2009.
- [9] The parties have been unable to agree upon an ongoing parenting schedule since the receipt of the Report.
- [10] The defendant in this application is seeking an order in the terms recommended in the Report - an equal parenting arrangement.
- [11] The child is now almost seven years old and will be commencing grade two this September. I am told that his report card indicates that he is meeting expectations. He is engaged in a various activities such as tae-kwon do, piano, and is in generally good health. Though he has been diagnosed with asthma and headaches.
- [12] Following submissions, I directed counsel to determine an agreeable date for the trial, which counsel advised would take ten days. The trial is now set to commence January 10, 2011.

Interim Order

- [13] The terms of the Interim Order include:

- the plaintiff has sole custody of the child
- the parties are joint guardians of the child's estate
- the plaintiff has the right to make a decision if the parties fail to reach agreement on major issues affecting the child
- the defendant has access each week: Tuesdays from 5 p.m. to 8 p.m.; Thursdays from 5 p.m. to Friday morning; and Sundays from 10 a.m. to Monday morning
- the defendant has the child from between 8 a.m. and 9 a.m. on Christmas Day and is to return the child on Boxing Day by 8 p.m. each alternate year

- [14] The Interim Order also specifies terms for extended weekends, access on father's day, mother's day, and birthdays; and child support amounts payable by the defendant.

Temporary "Without Prejudice" Plan

- [15] When the child was six years old, a temporary "without prejudice" arrangement was agreed between the parties with the assistance of counsel pending the completion of the Report. The terms included the child spending alternate weekends with the defendant (from Friday afternoon to Monday morning) in addition to an overnight on Tuesday nights on the week the defendant has the weekend with the child, and an overnight on Thursday nights on the week the defendant does not have the child staying with him.

The Report

[16] Dr. England interviewed each parent, conducted psychological testing of each parent; interviewed the child; observed the interactions of each parent with the child; interviewed collaterals; and reviewed various documents. Her report is detailed.

[17] In her conclusions, Dr. England notes the following:

At the outset it is noted that despite Ms. [D] and Mr. [W] having a long standing difficult relationship their, son [K] impressed as a delightful and personable boy. Both parents clearly have some notable strengths in their parenting from which [the child] is showing clear benefit. At the same time, both parents impressed as being rather emotionally intense, both showed indications of being challenged in terms of maintaining emotional composure, and it is readily apparent that they were entirely unsuited to one another.

[18] She also found the child as "comfortable and confident." She stated that he had no difficulty being left alone with her in each household, and showed no anxiety.

[19] In terms of a parenting plan Dr. England recommends that the child have equal time with each parent. The structure she recommends is as follows:

- a 2-2-5-5 rotation such that each parent will have two fixed days of the week (e.g. Ms. [D] could have Mondays and Tuesdays, and Mr. [W] have Wednesdays and Thursdays) and then the three days of Friday, Saturday and Sunday, are alternated between them. This way, each parent can select any extracurricular activities for [K] without having to come to agreement, and [K] has no more than a five day separation from either parent;
- all transitions occur such that both parents are not in attendance at the same time, as this appears to be a situation which easily triggers some of [K's] problem behaviours. Transitions are suggested to take place around the school day; in the summer, around some structured daytime activity;
- the right of first refusal for the other parent if the custodial parent is not able on a given day is not recommended. This is to provided[K] the opportunity to develop relationships outside of the family;
- special single event days (e.g. Mother's Day, Father's Day) be assigned. Other single event days (e.g. Hallowe'en and [K's] birthday) be alternated, and longer holidays (e.g. Christmas, Spring Break) either divided and shared, or alternated as the parents see fit. In summer, each parent should have two weeks of uninterrupted access.

[20] Dr. England also says that "both parents impress as very capable individuals and that a parallel parenting plan be adopted which will foster [K's] relationship with both parents" and recommends that the parties share joint custody and guardianship over their son.

- [21] Dr. England recommended that both parents fully attend and complete a S.T.E.P. parenting course in order to adopt effective parenting strategies and have as much consistency across households as possible.
- [22] Dr. England specifically recommend against the child attend therapy unless with the consent of both parents and/or upon the recommendation of a neutral party.

Areas of Agreement

- [23] Though there is disagreement over an equal parenting plan, the parties consented during the course of the hearing to several aspects relating to access as follows:
- a) each party will have one week of holiday vacation time with the child in each of the months of July and August. Each party will provide notice to the other of their desired week for each month of summer holiday vacation by May 1st of each year.
 - b) Spring Break is to be divided equally in half in each year.
 - c) the parties will share equally the child's Christmas holiday break each year. The defendant is to have the child from the commencement of the school Christmas holiday period (including the first weekend) for the first half in 2010 and each even numbered year thereafter; and the plaintiff mother is to have the child for the second half each even numbered year. The sharing is to alternate annually. The parties are unable to agree if the exchange date is December 25th or 26th.
 - d) the parties will have the child on his birthday on alternate years from 10 a.m. until 7:30 p.m. The plaintiff will have the child in 2010 and all even numbered years thereafter.
 - e) the child will be with the plaintiff each Mother's Day from 10 a.m. to 5 p.m. and with the defendant each Father's Day from 10 a.m. to 5 p.m.
 - f) the party having the child according to the access schedule will have the child for Easter and Thanksgiving. The parties will refer any inequity that arises from this allocation to the Parenting Coordinator.
 - g) The parties will alternate having the child on Hallowe'en from 4 p.m. to the following 9 a.m. The plaintiff will have the child for Hallowe'en 2010.
 - h) neither party will move the child's residence out of the City of New Westminster or further than 10 km outside the boundaries of New Westminster without further written agreement of the parties or Court Order.
 - i) a Parenting Coordinator will be appointed for no less than 12 months. If both parties wish to terminate the appointment of the Parenting Coordinator they may by jointly giving written notice to the Parenting Coordinator. The role and scope of the Parenting Coordinator are as set out in paras. 9 to 11 of the defendant's notice of motion.

Discussion and Findings

- [24] The plaintiff opposes the implementation of an equal parenting plan; joint custody; joint guardianship with no decision making; a prohibition against counselling or therapy for the child without consent of the other parent or court order; and the exchange at Christmas on Boxing Day as opposed to 11 a.m. on December 25.
- [25] In terms of the Christmas exchange date, the defendant says Boxing Day is more appropriate as he hopes to have the child with him when he is with his family either on Vancouver Island or Banff. In effect, the plaintiff's position would negate the ability of the defendant to attend out of town visitations with his grandparents and extended family for Christmas. In my view, Boxing Day as the exchange date is the more appropriate; subject to the defendant not travelling out of town with the child. In that situation, the child will be exchanged at noon Christmas Day. The defendant is required to provide the plaintiff written notice 14 days in advance of Christmas Day of whether he will be travelling with the child. The same exchange date and notice requirements will apply to the plaintiff.
- [26] The plaintiff's primary objection is to the equal parenting regime. The plaintiff does not accept the recommendations in the Report; even though she agreed to the report begin prepared and recommended Dr. England through counsel. The plaintiff takes exception to the approach taken by Dr. England and certain findings or observations made. The plaintiff complains that Dr. England during her interview dwelled far too much on certain aspects of the plaintiff's past history instead of concerns for the child's anxiety. The plaintiff particularly stresses concerns she has with the child's anxiety and his difficulties with adapting to change and new situations. She relies upon the child having transitioning difficulties particularly in 2005 through to the first half of 2008. Her arguments against the implementation include the observation that the access schedule in the Temporary Plan is working well for the child and that the child has adjusted to it. Moreover, the plaintiff says that the Temporary Plan was implemented only ten months ago. The plaintiff also acknowledges that there are considerable difficulties between the parties in communicating and says the parties need to take steps in advance in dealing with these difficulties before the plan is implemented; to ensure the child is not placed in a difficult situation. The plaintiff while acknowledging that the defendant is a good father and good qualities, she says that he has a controlling nature which places the child under immense pressure. The plaintiff says that all of the issues require the full testing of the issues through the trial process. Moreover, plaintiff's counsel submits that a material change in circumstances must be demonstrated to permit a variation to a consent order, in addition to a finding that such variation is in the best interests of the child. In regard to the best interests of the child, the suggestion that the testing of the plan in advance of trial is not appropriate.
- [27] The plaintiff says that Dr. England has not recognized that the child has serious anxiety problems that arise from change.

- [28] The plaintiff has also obtained a critique of the Report from Dr. Elterman which enumerates several professional criticisms.
- [29] The defendant relies heavily upon the Report and submits that the schedule recommended in it continues the structure of the "Without Prejudice" schedule by continuing to alternate the period from Friday afternoon to Monday morning in each week and continues the current arrangement of both parents having some weekday time including overnights. The defendant submits that the only difference in the current schedule and that recommended in the Report is that the latter schedule provides for one more day and overnight in each week for the child to be with his father. The defendant also references comments that the child wishes to have more time with his father. Dr. England noted this spontaneous statement by the child in her interview with him.
- [30] The defendant also submits that there is strong evidence that supports an equal parenting arrangement and that the certainty that is contained in the recommended schedule will reduce the conflict between the parties in terms of the defendant seeking more time with his son. The defendant argues that by implementing the recommended schedule now, should a trial be necessary, there will be time in advance of the trial to assess how the child fares under the schedule. Moreover, it is argue that if the plan is not now implemented an update to the Report will likely be required for trial.
- [31] The defendant submits that the concerns set out in Dr. Elterman's critique do not raise questions of significance sufficient to deny implementation. It is submitted that the comments are largely to do with individual differences in practice.
- [32] The approach to the issue at hand is set out in s. 24(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 (the statute under which relief is being sought):

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 these rights and duties adequately.

- [33] It seems that unlike a final order, a material change in circumstances does not have to be demonstrated to justify a variation to an interim custody order: *Javid v. Kurytnik*, 2006 BCCA 565.
- [34] Other considerations regarding the best interests of the child have been expressed in the cases as well. They include the preserving the status quo.
- [35] In my view, the parties have come some distance in increasing access time for the child being with his father. It is obvious that child is considerably older than when the Interim Order was made. With that the role of each parent in the life of the child has evolving as the child has developed. There has been an obvious change in the circumstances by virtue of the child's development from the age of two when the Interim Order was put in place to his present age which is just short of seven.
- [36] A temporary arrangement for greater access to the defendant has been in place since September 2009 which has worked; a return to the access arrangement set out in the Interim Order seems quite remote. Further, the s. 15 Report consented to by both parties and authored by a psychologist recommended by plaintiff's counsel, is detailed and supports an equal parenting regime.
- [37] The evidence supports the view that both are capable and loving parents and that the child is bonded with each parent, though both parents have expressed concerns with the others care of the child. The child enjoys being with each parent. There is evidence that the child suffers from anxiety, it does not emanate from being with either parent. I would note that the child's teacher expressly did not support the child seeing the school counsellor for anxiety and for reasons unknown refused to be interviewed by Dr. England. Dr. England did not detect anxiety in the child. The recommended plan is not a significant departure from the structure that is currently in place and fixes the days the child will be with each parent each week. The equal parenting regime also appears to be consistent with earlier goals held by both the plaintiff and defendant between 2004 and 2005 of moving to such a regime.
- [38] In terms of Dr. Elterman's critique, I agree with the submission of the defendant that the comments are more of a difference in approach. I say this by noting Dr. Elterman's comment that the "key flaw" in the report is that information gathering is contaminated by the practice of giving the Parenting History Survey to the clients to complete at home. I note that this is only one component of a broader series of "in person" meetings, interviews of others, as well as psychological testing.
- [39] While the plaintiff has taken me to cases which state that a "wait and see" approach is not appropriate, I am of the view that each case is dependent upon its own facts. In this case, it seems that the change sought from what is currently in place can be seen as an incremental change that is consistent with the structure that has been put in place and has worked. The child is certainly more mature now than when he demonstrated transition problems. In my view, the implementation of the Plan and the results will be useful in the determination of the live issue at trial should the trial be necessary. The agreement of the parties to the

involvement of a parenting coordinator provides greater confidence in regard to the success of the recommended plan. Should concerns arise from the operation of the Plan, then the matter can be obviously reviewed by the Court.

- [40] I also note that the parties had even set a trial date when this matter had come before me. Counsel advise that the trial is estimated to take ten days. Following submissions, I directed counsel to consult with Court Scheduling to obtain dates. I am told that the earliest date is January 2011. This date is still some relative distance away in the context of this case.
- [41] In all of the circumstances, I find that the best interests of the child will be served by approving the defendant's sought after change as recommended by Dr. England, subject to the areas in which the parties have agreed and further determination at trial should it go ahead.
- [42] The parties are directed to enrol and attend the S.T.E.P. program as recommended by Dr. England.
- [43] The parties are directed to specifically address the retroactive child support issue in light of the defendant's seemingly greater income than known by the plaintiff.
- [44] If the parties are agreeable, I will be prepared to remain involved with this matter.

The Honourable Mr. Justice D. M. Masuhara

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