
CANADA / JUDGMENT

Knezacky v. Knezacky

2013 BCSC 407

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 407 Knezacky v. Knezacky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Knezacky v. Knezacky,

2013 BCSC 407

Date: 20130312

Docket: 03-3355

Registry: Victoria

Between:

Amanda Jane Knezacky

Claimant

And

David Lawrence Knezacky

Respondent

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Claimant:

Y. Grant

Counsel for the Respondent:

J. Stamm

Place and Date of Hearing:

Victoria, B.C.

November 30, 2012

Place and Date of Judgment:

Victoria, B.C.

March 12, 2013

- [1] In this family law case each party sought a wide range of relief. At its heart, however, the dispute is over access to a 13 year old girl (K.) who has certain physical and developmental challenges.
- [2] In his notice of application, Mr. Knezacky sought orders that:
- (a) a final order made in 2004 granting sole custody of the two children of the marriage to Ms. Knezacky be varied such that sole custody of K. be granted to him, with a police enforcement clause;
 - (b) Ms. Knezacky be found in contempt of court;
 - (c) his FMEP account be credited for sums he has expended to exercise access, which sums total about \$2,400; and
 - (d) child support be reduced to reflect the fact that the parties would each have one child in their custody.
- [3] For her part, Ms. Knezacky sought the following orders:
- (a) a variation of the 2004 order, which granted joint guardianship of K. to the parties, such that Ms. Knezacky would now have sole guardianship;
 - (b) an order restraining Mr. Knezacky from bringing any further orders until he demonstrated compliance with an order of July 31, 2009;
 - (c) increased child support to reflect Mr. Knezacky's recent income;
 - (d) retroactive child support totalling \$7,700;
 - (e) an order that Mr. Knezacky disclose his income tax returns each year;
 - (f) an order that access by Mr. Knezacky to K. be exercised only when supervised by a professional supervisor; and
 - (g) an order that the action be transferred from Victoria to Kelowna for all purposes.

- [4] In addition to the relief sought in her notice of application, during the course of submissions Ms. Knezacky sought an order that Mr. Knezacky be required to contribute to s. 7 special and extraordinary expenses.

I. Background

- [5] The parties were married in February 1992, separated in June 1999 and were divorced by an order made June 18, 2004. They are the parents of two children, C., born in June 1993 and who is now 19 years old, and K., born in September 1999, who is now 13. Though C. has reached the age of majority, she is taking a course of studies at a career college and Ms. Knezacky maintains that she is therefore still a "child of the marriage". C. is estranged from her father and other than monetary orders, no orders are being sought concerning her.
- [6] K. has a condition known as CHARGE syndrome. CHARGE is an acronym that consists of the six common features of the syndrome, which may include vision defects, heart problems, certain other physical defects and developmental delays. It would appear that K. has some or all of the central features of the syndrome and, most significantly for present purposes, is developmentally delayed. A psychologist who tested K. in January 2011, at which time K. had a chronological age of 11 years and four months, reported that K. was functioning at about the level of a 5½ to 6 year old child.

II. litigation history

- [7] This matter has a long and unfortunate litigation history.
- [8] As noted earlier, a divorce order was pronounced on June 18, 2004. All corollary relief went by consent. That relief included an order granting sole custody of the children to Ms. Knezacky, joint guardianship to the parties on the Joyce model, specified access to Mr. Knezacky (weekends, plus telephone access on Tuesdays and Thursdays), child support payable by Mr. Knezacky, and further a term requiring that Ms. Knezacky was to provide 60 days notice of any change in residence outside the Victoria area.
- [9] On June 28, 2006, Mr. Justice N. Smith varied the June 2004 order to provide that Mr. Knezacky have "reasonable supervised access to the children", with access to be daytime only and as agreed between the parties.
- [10] On December 11, 2007, Madam Justice Martinson ordered access by Mr. Knezacky to C. in accordance with C.'s wishes, and access to K. at prescribed times on, primarily, Sundays. In addition, Martinson J. ordered that access be supervised by Deborah Wicks, Mr. Knezacky's partner, or such other person as the parties approved, and that Ms. Wicks not be present at the exchanges.
- [11] Judicial case conferences were held on each of February 26 and April 28, 2008, which made further minor changes to the access orders.

- [12] On July 31, 2009, Mr Justice Punnett ordered interim access to K. by Mr. Knezacky on two weekends per month, with access being supervised by Ms. Wicks. Mr. Knezacky was to provide the claimant with five days notice of the weekends he intended to exercise access. In addition, Mr. Knezacky was granted telephone access to K. every Tuesday, with the telephone call to be initiated by K. herself. Punnett J. further ordered that the matter was to be set down for another hearing no later than November 15, 2009 to deal with ongoing access and any required adjustment to child support.
- [13] Neither party set down a further court hearing as required by the terms of the order of Punnett J.
- [14] In late June 2009 Ms. Knezacky moved to Kelowna with the children. She did not provide Mr. Knezacky with advance notice of her change of residence, as was required by the terms of the consent order of June 18, 2004.
- [15] Since July 2009 Mr. Knezacky has seen K. on just three occasions. He deposes that his attempts to exercise further access have been frustrated by the actions of Ms. Knezacky. For her part Ms. Knezacky deposes that Mr. Knezacky's failure to exercise access has left K. feeling "let down" and, as a result, K. has not felt "overly motivated to initiate phone calls with [Mr. Knezacky]".

III. positions of the parties

A. Mr. Knezacky

- [16] Mr. Knezacky submitted that the court should order a s. 15 custody and access report, although not a report that the parties themselves would have to fund. Mr. Knezacky submitted that, pending receipt of a s. 15 custody and access report, he should have access to K. once every two months, in Kelowna, the first three of which to be supervised and, if no problems were encountered, then unsupervised. He submitted that his partner, Ms. Wicks, should be allowed to be present at the access visits.
- [17] He submitted that one-half of his travel costs from Victoria to Kelowna ought to be deducted from the child support he pays, on the basis that the cost of exercising access was a financial hardship for him. He argued as well that he should have access to K. one evening per week by telephone or Skype. Finally he submitted that Ms. Knezacky should be sentenced to a term of "probation" for two or three years for contempt of court, and that the balance of the relief sought ought to be adjourned generally.

B. Ms. Knezacky

- [18] For her part, Ms. Knezacky submitted that the application by Mr. Knezacky for sole custody of K. should be dismissed outright rather than adjourned. Ms. Knezacky reviewed a long history of concerns with Mr. Knezacky's behaviour going back to 1992 when neither of their children were yet born but where there were difficulties with a daughter, A., whom Ms.

Knezacky brought into the relationship. References were made to involvement by the Ministry of Children and Families concerning this child. Ms. Knezacky recounted at some length details concerning the volatile relationship between the parties, much of which predated the divorce order (where corollary relief went by consent) and other orders made in this matter.

- [19] The discord between the parties continued post-separation and their communications concerning the children have been fractious. Added to this is Ms. Knezacky's view that Ms. Wicks is openly hostile to her and has made scenes or uttered hostile comments during some of the interactions.
- [20] For these reasons, Ms. Knezacky submits that any access granted to Mr. Knezacky be professionally supervised and that Ms. Wicks not be involved in any access visits in any way.

IV. Discussion

A. Change of Circumstances

- [21] Ms. Knezacky asserted that there has been no material change of circumstances such that there is no basis for Mr. Knezacky's application for a change of custody. For her own application for a change in guardianship, she grounded "change of circumstances" on the parties' communication difficulties. As I am not inclined to order a change to either in any event, as will be seen below, I need not address the question of a change of circumstances in the context of custody and guardianship. It is, however, still relevant to access. On that issue, it is beyond question that the access arrangements are not working, and so there is a change of circumstances warranting a re-examination of access.

B. Custody and Guardianship

- [22] Mr. Knezacky asked that a s. 15 custody and access report be ordered and said that his application for custody should be adjourned generally. He submitted that the custody dispute was unsuitable for disposition in a summary way due to the conflict in the affidavit evidence and that the s. 15 report might resolve this evidentiary conflict. If it did not resolve it then the issues could be determined by conventional trial.
- [23] I conclude that this suggested procedure is inappropriate in the circumstances of this case. Mr. Knezacky has never: (a) had custody of K.; (b) has seldom, if ever, cared for her overnight (or if he has, it was a very long time ago); (c) has never had to attend to K.'s medical and developmental needs, which are significant; and (d) has had little or no parental relationship with K. since 2009, though on this point I fully appreciate that he maintains this was not his fault. His application for sole custody was essentially based on Ms. Knezacky's obstructive behaviour concerning his access and had little to do with any changed circumstances or the best interests of K generally. In applying for sole custody, given the circumstances, he overshot the mark by a wholly unreasonable margin.

- [24] It is certainly true that there is an obvious conflict in the evidence of the parties about their past character and behaviour, but this does not mean that there must be a trial, nor even that there should be a s. 15 report ordered in this case. On the evidence before me Mr. Knezacky has failed to show that there is a reasonable prospect that he might be awarded custody even if the evidence were resolved in his favour. Ordering a s. 15 report or putting the matter over to trial would merely prolong the inevitable, prolong the uncertainty and put the parties (and, in the case of the s. 15 report, government) to needless time and expense. Accordingly, Mr. Knezacky's applications for sole custody of K and for a s. 15 report are dismissed.
- [25] Ms. Knezacky's application for sole guardianship suffers from the same flaws. She was unable to point to a single incident where there were difficulties with joint decision-making on life, health or other major issues concerning K. Of course, the reason why there is no conflict in decision-making is that Ms. Knezacky has made no attempt to convey information or consult with Mr. Knezacky on these matters. She has equated sole custody with sole guardianship and has withheld important information and made all necessary decisions herself. Her position that Mr. Knezacky should get any needed information directly from doctors, teachers, etc. is a most unsatisfactory response to the legal obligations that she has. She is duty-bound to do better; specifically, she is bound to report on and consult with Mr. Knezacky on all significant life, health or other issues concerning or affecting K. Her application for sole guardianship is dismissed.

C. Contempt

- [26] Mr. Knezacky asks that the Court hold Ms. Knezacky in contempt for failing to abide by the order of Punnett J. by rejecting any of his requests for access that are not made with exactly five days' notice, refusing to provide a telephone number or otherwise blocking telephone access, and in rejecting the presence of Ms. Wicks despite the fact that she is the named supervisor in an order.
- [27] For her part, Ms. Knezacky notes that Mr. Knezacky never provided proof, as required by Punnett J.'s order, that he has been properly informed by a "suitable treating party" of K.'s special needs and appears to understand what he has to do with respect to those needs. Further, her counsel said that Ms. Knezacky has a learning disability and may not have appreciated the duties imposed on her.
- [28] As to the latter point, I cannot help but note that Ms. Knezacky seems to have appreciated well enough any of the court-ordered provisions that were in her favour.
- [29] While I am well-satisfied that Ms. Knezacky has been wilfully obstructive on the matter of facilitating access to K. by Mr. Knezacky, both sides have failed to abide by the terms of orders that have been made. Mr. Knezacky did not provide proof that he had been instructed about K.'s needs, though I do note that he has gathered information and medical reports and seems to have self-educated to some extent. Neither party brought the matter back to court,

despite the term in Punnett J.'s order that a further hearing be held no later than November 15, 2009.

- [30] In these circumstances I am not prepared to make any finding of contempt. That application is dismissed.
- [31] In order to assist in the removal of a potential roadblock to access, I order that a registered nurse is a "suitable treating party" for the purposes of complying with Punnett J.'s order and so it is not essential that Mr. Knezacky get some sort of certification from a pediatrician or other specialist. Community health nurses, for example, provide care to a wide variety of people in the community. If a registered nurse familiar with pediatric home care were to be provided with the important medical information or reports concerning K. I am satisfied that Mr. Knezacky could receive appropriate instruction from that person.

D. Access

- [32] I am satisfied that it is in the best interests of K. that she have access visits and other contact with her father. I am persuaded that Mr. Knezacky's proposal for re-establishment of access is a reasonable one and should be implemented once Mr. Knezacky secures the proof that he has been instructed by a suitable professional concerning K.'s needs.
- [33] I conclude that, subject to what I will order below, Ms. Wicks is an appropriate supervisor and may be present during the access visits. I am satisfied that the incidents of conflict referred to were related to hostility between Ms. Knezacky and Ms. Wicks and that the incidents said to show unsuitability of Ms. Wicks around K. were not of significance. I think it prudent, however, to direct that Ms. Wicks not attend at any of the exchanges. In fact, if possible the exchanges should be done without direct contact between Ms. Knezacky, Mr. Knezacky and Ms. Wicks. I leave it to counsel to work out exchange arrangements.
- [34] Accordingly, I order that, once proof has been provided as discussed above, Mr. Knezacky have access to K. for one weekend every two months in Kelowna, from 10:00 a.m. to 7 p.m. on each of the two days, the first three visits to be professionally supervised. In the supervisor's report for the third visit, the supervisor is to address any concerns he or she has about Mr. Knezacky exercising further access without a professional supervisor, but given that he will exercise access together with Ms. Wicks. Should the supervisor have no concerns about future access visits then further access visits shall be exercised by Mr. Knezacky in the presence of Ms. Wicks. I grant liberty to apply on this point as there may be a disagreement as to whether any concerns have, in fact, been raised. Mr. Knezacky shall give at least five days' notice to Ms. Knezacky of the weekends on which he intends to exercise his access, which, to be perfectly clear given the history of this matter, does not mean exactly five days' notice. In any event, the parties should do their utmost to come to an agreement on those weekends.

- [35] I turn to telephone access. Telephone access has not worked. I am not satisfied that it is appropriate that K. be the one to initiate telephone contact with her father, as is required under the terms of the current order. She has a developmental age of perhaps six years and it seems to be asking too much for her to do so. I appreciate that earlier order made this a specific provision but it does not appear that the psychological reports that were before me were available to the Court at that time.
- [36] I conclude that communications by Skype or similar means would be appropriate in this case. These calls will take place on Tuesdays at 7:30 p.m., will be initiated by Mr. Knezacky and should last no longer than 15 minutes. The parties are free to vary those details by consent. Ms. Knezacky is to facilitate that access, a point which I strongly emphasize because it is apparent that Ms. Knezacky assigns no value to K.'s relationship with Mr. Knezacky. However, it is not up to Ms. Knezacky to regulate, much less marginalize, that relationship. K. is entitled to have a relationship with her father and Mr. Knezacky is entitled to have a relationship with K., limited though it may be.

E. Child Support and Access Costs

- [37] Both sides sought a variation in child support. Mr. Knezacky wanted his access costs deducted from his support obligation. Ms. Knezacky wanted support adjusted to reflect Mr. Knezacky's current income and also raised the issue of s. 7 special and extraordinary expenses.
- [38] There are problems and omissions with both applications. Mr. Knezacky did not frame his application in terms of hardship, instead suggesting that access cost credit was granted to him by Mr. Justice Punnett. I do not interpret Punnett J.'s order this way. He may also wish to reflect on the principles expressed in *Kelly v. Kelly*, 2011 BCCA 173. As to Ms. Knezacky's application, there was a dearth of material relating to the older daughter's course of studies and the associated costs, and an omission as well insofar as a claim for s. 7 expenses was not part of her Notice of Application.
- [39] In the circumstances, I adjourn generally the issues of child support and s. 7 expenses.

F. Transfer of File

- [40] The primary basis for Ms. Knezacky's application for the transfer of the file to Kelowna was the location of witnesses in that area. As there is no trial in prospect, this application is dismissed.

V. Conclusion

- [41] In summary:
- a) Mr. Knezacky's applications for sole custody of K., for a s. 15 custody and access report and for a finding of contempt against Ms. Knezacky are dismissed;

- b) Ms. Knezacky's applications for sole guardianship and for the transfer of the file to Kelowna are dismissed;
- c) Access is varied as set out in paragraphs 34 and 36 above;
- d) the order of Punnett J. made July 31, 2009 is varied such that "suitable treating party" shall include a registered nurse;
- e) the applications concerning child support and s. 7 expenses are adjourned generally.

[42] Success has been divided. No costs to either party.

"Blok J."

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