

CANADA / JUDGMENT

Larsen v. Pittman

2001 BCSC 192

COURT

Supreme Court of British Columbia

DECIDED

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Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ANGELA MARIE LARSEN
PLAINTIFF

AND:

DARREN PAUL PITTMAN
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE POWERS

(IN CHAMBERS)

Counsel for the Plaintiff E. D. McBain

Counsel for the Defendant R. B. Babki

Date and Place of Hearing: January 23, 2001

Kamloops, BC

- [1] The plaintiff and the defendant are the parents of Talis John Pittman born May 21, 1997. The plaintiff mother commenced these proceedings by writ of summons October 19, 2000 seeking orders for custody, guardianship, maintenance or support for the child and a restraining order and costs, pursuant to the Family Relations Act R.S.B.C. 1996 c. 128. The defendant father opposes that relief and has filed a counter-claim seeking an order for custody and guardianship of the child.
- [2] The issue of interim custody and guardianship and access to the child came before the court on November 14, 2000. The application was heard by a master of the court and an order made. The plaintiff mother appeals that order. The mother alleges that the master erred in not making an interim custody order and in granting an access schedule which resulted in each party having the child one week at a time.
- [3] The master gave oral reasons for judgment on November 14, 2000 and a transcript of those reasons is in the court file.
- [4] The parties agreed during submissions that the master's order which provided the parties not have contact with each other could be varied by consent eliminating that restriction with liberty to the parties to apply. I make that order by consent.
- [5] The plaintiff was concerned that the master's order provided the plaintiff was responsible for medical care of the child except for medical emergencies when the child was with the defendant and that the defendant be responsible for the dental care of the child except for dental emergencies when the child is with the plaintiff. The plaintiff was concerned that this may create difficulties in obtaining medical care for the child. However I am not satisfied that it does create any difficulties. There is no evidence as to how those difficulties might arise and it has not been shown that the master erred in making that order. The plaintiff argued that the order for joint guardianship should be modified arguing that the plaintiff should be the custodial parent and should have the right to make any major decisions regarding the child if the parties are unable to agree, subject to the defendant's right to apply to the court to review that decision. The order presently provides that the parties are to discuss matters of a significant nature effecting the child and that they are obliged to try to reach an agreement with regard to those major decisions. In the event they are unable to reach an agreement they are granted the right to apply under s.32 of the Family Relations Act to seek a review of any decision they consider contrary to the best interests of the child. The plaintiff mother wishes to be able to make the final determination in the event the parties are unable to agree, subject to review by the court. It has not been demonstrated to me that the master erred in making the order in these terms and I am not prepared to change that term of the order.

- [6] The real substance of the appeal turns on whether or not the master should have made an order for interim custody in favour of one party or the other or jointly and whether the access schedule of alternating weeks granted by the master was wrong. The plaintiff says that the standard of review is as follows:

An appeal from the master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the master. In those latter situations, even where the exercise of discretion is involved, the view of the judge appealed to may quite properly be substituted for that of the master.

Abermin Corporation v. Granges Exploration Ltd. et al (1990), 45 B.C.L.R. (2d) 188 (B.C.S.C.)

- [7] The plaintiff says that in matters of interim custody the test has been described by the British Columbia Supreme Court in the decision of Thibeault v. Ravelo, [1999] B.C.J. No. 1457 para. 15:

In my view there can be no absolute rule that Master's decisions on interim custody and access matters are purely interlocutory and should not be interfered with on appeal unless established to be clearly wrong. Interim rulings concerning custody of children or access to children must be examined on a case-by-case basis to determine if the interim ruling will likely have a direct bearing on the disposition of those issues at trial, bearing in mind the specific issues and the length of time the interim ruling will be in place.

- [8] The master's decision to decline to make an order for interim custody on the material before him is not an order that will have a direct bearing on the disposition of the issue of custody at trial and therefore the plaintiff must demonstrate that the master was clearly wrong in declining to make an order for interim custody before an appeal from that decision is allowed. The master dealt with those issues at paragraphs 8 to 17 of the reasons. Essentially the master concluded that the affidavit material was extremely contradictory and failed to focus on the real issue of the relationship between the child and the parents but rather focused on the relationship between the parents. Where the affidavits did address the issue of the time the child had spent with each parent the master was unable to determine on the affidavits what the status quo was other than the fact that the child had been spending time with both parents. The parties could not agree on the extent of time the child has spent with each parent. The best the master could conclude was that the parties had shared the child's time and were working towards equal sharing of time. The master recognized the importance of the status quo on an interim application but concluded at paragraph 17 that he was unable to determine what the status quo was and therefore must make a decision which was arbitrary. However he did indicate that the parties were free to agree to any

changes. The master ordered that the child spend alternating weeks with each parent. The master also indicated it was important that the parties get the matter on for trial to resolve the conflict in the evidence.

- [9] The master was unable to conclude on the evidence who had been the primary care-giver of the child. In this case I am unable to say the master erred in not making a specific interim custody order.
- [10] The mother argues that the order of alternating weeks essentially changed the status quo which involved a sharing of time each week. The real conflict in the evidence between the parties was about how the week was shared. The mother argues that the appropriate order would be that the child remain with her during the week and be with the father on the weekends from Friday evenings until Sunday evenings or from Friday at noon until Sunday evenings if the father is not working Fridays. The father says that the child should be with him from Friday mornings until Monday evenings each week. Essentially four days of the week as opposed to the two or two and a half days that the mother has suggested. The parties do not object to sharing the week.
- [11] I agree with counsel that the order made by the master did not reflect the existing status quo but find that that was all the master was able to do on the material before him. However given the position taken by the parties I am prepared to vary the order without the necessity of finding that the master was clearly wrong. Subject to such changes the parties may agree upon from time to time the child shall reside with the mother from Sunday evening at 7:00 p.m. to Friday morning at 9:00 a.m. The child shall reside with the father from Friday morning at 9:00 a.m. until Sunday evening at 7:00 p.m. In the past the father has had time with the child during the week, occasionally in the evenings or during the day if he was not working and this is something the parties can agree upon.
- [12] The time for the pickup and for the return of the child can be varied by the parties' agreement or on application which can be made before myself or the master. Counsel did not have the opportunity to make submissions on that issue.
- [13] The mother has been the party responsible for arranging for day care in the past and will continue to have that authority. In the event the father is unable to care for the child during the time that he has access or if his spouse is unable to care for the child the father shall use the same day care provider that the mother uses while the child is residing with her. The father will be responsible for the day care costs of the child while the child is residing with him.
- [14] The issue of costs of this appeal was not addressed by the parties but unless the parties wish to argue otherwise I will simply order that each bear their own costs.

"R.E.Powers, J."

The Honourable Mr. Justice R.E. Powers

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