
CANADA / JUDGMENT

M. (J.E.) v. M. (L.J.)

2006 BCSC 579

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 579 M.(J.E.) v. M.(L.J.)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M. (J.E.) v. M. (L.J.),

2006 BCSC 579

Date: 20060412

Docket: 04-3226

Registry: Victoria

Between:

M. (J.E.)

Plaintiff

And

M. (L.J.)

Defendant

Before: The Honourable Mr. Justice E.R.A. Edwards

Reasons for Judgment

Counsel for the Plaintiff:

N. McKay

Counsel for the Defendant:

J.A.C. Stewart

Date and Place of Trial/Hearing:

February 28 - March 3, 2006

Victoria, B.C.

Written Submissions Filed:

March 10 and 14, 2006

- [1] This is a dispute about whether the parties' three children should reside primarily with the defendant ("mother") or plaintiff ("father").
- [2] The parties were married in 1992. It was a rocky marriage. The parties' troubles were exacerbated by the fact the father, now age 37, had a substance abuse problem. They separated initially for a year in 1997 and finally in October 2000.
- [3] The children are a daughter R, born in 1993, and two sons, B born in 2000, and L born in 2001.
- [4] The father testified he has overcome his substance abuse problem as a result of attending a residential treatment program for 49 days in 1998 and 1999. The mother, now age 48, does not accept this.
- [5] Yet the mother consented to a Provincial Court order on June 11, 2002, under which the parties agreed "the Children's time will be split equally between them" and that they both attend "for anger and family violence counselling" and for marriage counselling, as well as "the same parenting courses on different nights".
- [6] Three months later, the mother applied to vary that order so she could move with the children to Fernie, on the basis that she had the prospect of full time employment there, as well as support from her family. The father opposed the application and the mother abandoned it.
- [7] Then in September 2003, the mother moved with the children to Fernie, without notifying the father and without obtaining a variation of the June 11, 2002 order.
- [8] The father applied on October 1, 2003, for an order that the mother return the children to Victoria. The matter was heard on an urgent basis by the Honourable Judge Kay on October 10, 2003, who denied the father's application but acknowledged that "[t]here is going to have to be a further more complete hearing". During the hearing, the mother advised Judge Kay that the father could visit the children in Fernie whenever he wished and that the children could spend the whole of the school holidays with him.
- [9] The mother was not employed full time and was on income assistance after she moved to Fernie.

- [10] The father's access to the children has been severely curtailed since that move. Within three months of Judge Kay's order, the mother effectively ended even telephone access, which the father was unable to exercise from February to August 2004, when it was ordered by Master McCallum. The father saw the children only once in 2004, on the Labour Day long weekend, by obtaining an order from Master McCallum specifying that access.
- [11] On December 9, 2004, the mother, prior to a scheduled trial, agreed to joint custody and guardianship and agreed to facilitate access by the father for half the school holidays. This was reflected in a consent order.
- [12] From May to December 2005, the father brought four separate applications in an effort to exercise access to the children, including one to have the mother found in contempt for failing to comply with the December 9, 2004 consent order.
- [13] On June 16, 2005, Mr. Justice Brine modified the December 9, 2004 order by further specifying the father's access and ordering a Section 15 report to be paid for equally by the parties. No report has been obtained since neither party has the means to bear the cost.
- [14] On July, 25, 2005, Mr. Justice Macaulay found the mother in "wilful disobedience" of the order of June 16, 2005, and therefore in contempt of court. No penalty was imposed. The father's summer access was extended. Costs of \$750 payable forthwith to the father were assessed against the mother, who offered her apologies to the court for "not being more responsible". The costs have not been paid.
- [15] The mother was not responsive to the message Mr. Justice Macaulay sent through his judgment, which was that it was her duty to her children to do her utmost to facilitate maximum contact between the children and their father.
- [16] That is clear from the fact the mother brought the children to Victoria for the trial of this matter but did not disclose this to the father. When he discovered they were with her, he asked for overnight access which the mother denied until it was clear it would be ordered by the court.
- [17] This was the most recent event in the mother's sad history of denying the children their right to have a meaningful relationship with their father.
- [18] In final written submissions the mother's counsel stated that "the only issue in this case is whether the Court accepts [her] assertions that she will facilitate the [father's] relationship with the children." I agree. On the basis of the evidence of her past conduct and current attitude I am unable to accept her assertions in that regard.
- [19] I have concluded from all the evidence that the mother has denied the children this right, not out of genuine concern over the children's well being while they are in the father's care, but rather as a result of her bitter and vengeful attitude toward the father.

- [20] Although the mother denied it, the evidence establishes she is ill-disposed towards the father in light of the fact he has established a domestic relationship with SH, who the mother once regarded as her "best friend" and close confidant.
- [21] The mother testified she was now in counselling about what she regards as SH's "betrayal" of their relationship, but denied her attitude towards SH affects her ability to deal with the father in regard to the children. I do not accept that denial.
- [22] The mother testified she believed, until she learned of the father's relationship with SH, that the father had agreed that the parties and the children could live together in a big house in Victoria, where she could work in her field of early childhood development operating a day care facility and they would remain a "family unit" "without the marriage".
- [23] In light of the parties' dysfunctional relationship, which the mother acknowledges, and her manifest unwillingness since the parties separated to cooperate with the father to put the children's' right to a relationship with their father uppermost, this "family unit without the marriage" arrangement is preposterous.
- [24] I concur with the conclusion of Mr. Justice Macaulay in his reasons for judgment of July 25, 2005, that the mother has refused to accept the father's relationship with SH. I find it is the mother's desire to keep the children out of the home the father shares with SH which has motivated her to frustrate him in his effort to maintain a meaningful relationship with the children.
- [25] The mother further testified it was "embarrassing and shameful" that the parties were in court in light of her belief both parties should be part of the children's "daily life". This is disingenuous. It was her move to Fernie which ended the approximately equal division of the children's time with each parent and it was her repeated frustration of the father's access since that move which has exacerbated the negative impact of that move on the children's right to a meaningful relationship with him.
- [26] The mother's ostensible reason for her misconduct in this regard is, according to her counsel's written submission, "that she continues to be concerned about the potential for [him] continuing to abuse drugs and alcohol" as a result of "stories she has been told by third parties who were not willing to give evidence in this matter".
- [27] The mother testified she could demonstrate the father had perjured himself in these proceedings when he testified he had overcome his substance abuse problem, but that she chose not to do so because she did not want to create court records of this to which the children would later have access.
- [28] Nevertheless, she called a witness, LZ, who testified she had sold marijuana to the father and drank alcohol with him between 2000 and 2003.

- [29] The father denied using drugs during this period, but was not confronted on cross-examination with the specific allegation he had purchased marijuana from LZ. This and the generality and vagueness of LZ's testimony lead me to give it no weight.
- [30] Even if the father used marijuana at that time, it is irrelevant to the current issue before the court. SH, who is divorced from a substance abuser, testified the father is now abstemious. There is no evidence he is currently a substance abuser or that his substance abuse history presents any current risk to the children.
- [31] The mother's second ostensible reason for her conduct in frustrating the father's access to the children is her expressed concern that he has not "taken steps to deal with anger management, family violence and substance abuse".
- [32] There is no evidence the father has ever been violent towards the children, nor is there any allegation he presents a risk of violence towards them.
- [33] The mother's attempt to characterize the father as a potentially violent substance abuser unfit to care for the children, is belied by her agreement since their separation that he share joint custody and guardianship. Indeed, the children's residence was more or less equally divided between the parties from their separation until she moved to Fernie with the mother's agreement.
- [34] It is further belied by the evidence of SH She and her two children have resided with the father since 2004. SH is self-supporting. It is highly doubtful she would allow her children to reside with the father if he presented any threat to them. It is equally doubtful SH would support his application to have his children, who she knows well as a long time neighbour of the parties, reside in the household too, if the father presented a threat to children.
- [35] The mother sought to explain R's failure to return to Victoria in July 2005 with her father on the basis R refused to do so because she did not want to travel in the same vehicle as SH but wanted her father "all to herself". If true, this suggests R was anxious to renew her relationship with her father which the mother's conduct had effectively undermined. There is no evidence R currently rejects contact with SH.
- [36] The father and SH reside in a house large enough to appropriately accommodate SH's children and the parties' children. According to the father and SH, all the children know one another and get along well.
- [37] I conclude that, in light of the mother's repeated failure to meet her obligation to ensure the children enjoy their right to a meaningful relationship with their father, which continued into the midst of this trial, that right can only be restored if the children are returned to reside with their father in Victoria.
- [38] I find it in the children's best interest that they enjoy that right. Accordingly, I grant the father's application for a variation in the current order of the court and order that the children reside with the father in Victoria.

- [39] There are matters which were not fully addressed during the course of the trial, which must be addressed so as to give effect to this order. Amongst these are when the order should have effect, how the children's right to maintain a meaningful relationship with the mother will be assured and child support.
- [40] Some of the factors which must be borne in mind in resolving these matters are the following.
- [41] The mother's employment prospects in Fernie have brightened and she has recently accepted a position as a consultant with the East Kootenay Child Resource and Referral Program, which will pay between \$25,000 and \$26,000.
- [42] The mother was non-committal in her testimony about whether she would remain in Fernie if the court ordered that the children reside with the father in Victoria, so it is unclear whether that will indeed be her income for 2006.
- [43] The mother declined to respond to a question about whether she would agree to resume the arrangement of the children residing alternate weeks with each party if she returned to Victoria, but said she would accept it if it were ordered by the court.
- [44] While I have some misgivings about making such an order, in light of what has occurred since the mother moved to Fernie in 2003, I note this arrangement was in place before that move.
- [45] The father, a house painter who earned about \$24,000 in 2005, has literally bankrupted himself paying legal fees and travel expenses in his attempt to maintain contact with the children since the mother moved with them to Fernie in 2003.
- [46] It is quite apparent neither one of the parties can afford the expense of maintaining a long distance relationship with the children, let alone the expense of further litigation to settle the terms of any order the court may make. If the children are to have a meaningful relationship with both parties, this can only occur if both reside in Victoria. However, the court cannot order the mother to reside in Victoria.
- [47] I therefore make the following orders. The children will return to reside with the father in Victoria no later than one week after the end of the current school term. If they have not returned before then, the father is authorized to bring them to Victoria from Fernie and the court order in this regard will contain a police enforcement provision.
- [48] If the mother returns with the children to Victoria, then the children will reside, as they did before the move to Fernie, alternate weeks with the mother and father. If she does not return to Victoria, she is at liberty to apply to the court for specified access if the parties cannot agree.

- [49] The father has paid the mother child maintenance of \$496 monthly since a Provincial Court order to that effect was made in February 2005. I was advised at the outset of the trial there were no significant arrears.
- [50] The mother's counsel acknowledged that the court has concurrent jurisdiction with the Provincial Court over child support but argued the court should make no child support order against the mother. Until the mother decides where she will reside, whether she will take up her new job and how much she may earn are unknown. In the circumstances, a child support order against her seems premature.
- [51] The father's counsel argued that, in light of the mother's conduct and the expense it has caused the father, his support obligation should be terminated. Normally, the misconduct of the payee parent will not disentitle the children to support.
- [52] The mother has not paid the costs ordered payable forthwith by Mr. Justice Macaulay when he found her in contempt. The father is entitled to the costs of the present application. His prospects of recovering any costs from the mother are low.
- [53] The father's obligation to pay child support is not displaced by the mother's failure to pay his costs.
- [54] I order that the father's obligation to pay child support of \$496 per month end with the monthly payment made in the month the children return to reside with him in Victoria and in any event no later than the payment for June 2006.
- [55] The child support obligations of the parties thereafter should be determinable by application of the Child Support Guidelines, depending on the proportion of time the children reside with each party and the parties' respective incomes. Failing agreement, either party is at liberty to apply to court to settle the issue.
- [56] I have attempted with these orders to minimize the likelihood the parties will have to make further applications to court. If counsel cannot agree on the terms of the formal order of the court, they may make further submissions in writing.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

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