
CANADA / JUDGMENT

M.M.J. v. M.K.1

2005 BCSC 639

COURT

Supreme Court of British Columbia

DECIDED

29 April 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

M.M.J. v. M.K.1,

2005 BCSC 639

Date: 20050429

Docket: E003361

Registry: Vancouver

Between:

M.M.J.

PLAINTIFF

And:

M.K.1

DEFENDANT

Before: The Honourable Madam Justice Morrison

Reasons for Judgment

Counsel for the Plaintiff

Phyllis Kenney

The Defendant

In Person

Date and Place of Trial:

September 20, 21, 22,

23, 24, 2004 and

April 25 and 26, 2005

Vancouver, B.C.

- [1] This dispute is primarily over custody and access of the two children of the marriage, D.M.K., born [], 1995, soon to be ten, and L.N.K., born [], 1999, soon to be six.
- [2] The plaintiff, M.M.J., born [], 1971, is 34; the defendant, M.K.1, born [], 1965, is 40. The wife is originally from Mexico, and the husband is from Iran.
- [3] The parties were living in Toronto at the time they began cohabitation in October, 1993. They were married in Toronto August 4, 1994. The parties separated on July 19, 2000, and a divorce was granted in September, 2004. Although the parties are now divorced, for sake of convenience I will refer to them as husband and wife from time to time.
- [4] The wife seeks joint custody and joint guardianship, and a continuation of an access schedule that results in the children spending approximately equal time with each parent throughout each school week. She also seeks an order that each party claim one child for child tax benefits, that Iranian passports for the children be revoked and/or rescinded, and that each child have their own separate passport. Further, that the children be registered at the same school in North Vancouver and that holidays be split on an equal basis.
- [5] In addition to other orders sought with regard to long weekends, Mother's Day and Father's Day, the wife also asks that the parties share equally section 7 expenses and that the defendant reimburse her for childcare costs at daycare from January 1, 2005. Further, that neither party commit the other to paying an expense for either child without prior agreement.
- [6] Although the parties had few assets at the time of their separation, there were debts. The wife seeks judgment against the defendant in the amount of \$16,500.00 as compensation payable under an agreement dated June 29, 2000.
- [7] An order dispensing with hearing room fees has already been made by me. Finally, the plaintiff asks that I remain seized of this matter.
- [8] The defendant husband seeks sole custody of the children, that he be named the primary caregiver, and that their primary residence be with him. He is content with joint guardianship, but wishes the children to remain in their current schools, D.M.K. at the D.[] School and L.N.K. at the Q.[] School, until he purchases his new permanent home. At that time, he would register both children in the same school, a school closest to his new residence.

- [9] Access proposed by the husband would include every other weekend and in alternate weeks, Wednesday and Thursday overnights for the wife. In week one, the wife would pick the children up after school on Friday and drop them off Monday morning at school. In week two, she would pick the children up Wednesday at 3:00 p.m. from school and drop them off Friday morning at school.
- [10] The parties appear to agree that summer vacation be shared equally, with each parent having two weeks of time with the children, alternating, and that each parent be free to travel across international borders for vacations with the children. Also that other holidays including Christmas would be shared equally, including Spring Break.
- [11] The defendant seeks child support from the plaintiff and an order that the wife be responsible for any debt on her line of credit at the time of separation. Further, that the defendant be responsible for debts on his credit cards at the time of separation, totalling \$20,065.16.
- [12] Finally, the husband suggests each party pay their own costs, that his wife return to him personal photo albums, his Movado watch and stamp collection. The plaintiff would keep the rest of the furniture and items that may be in her possession.
- [13] The parties entered some difficult but sincere settlement discussions at the end of four days of trial in September, 2004. By that time, evidence had been given by the plaintiff, and by her live-in nanny, L.O., who had been the nanny for the children from June, 2002 up until the time of trial. She continued as the nanny until her return to Mexico at the end of 2004.
- [14] C.M., a teacher for D.M.K. had also testified, as had P.Z., a neighbour of the plaintiff; D.M. gave evidence with regard to an email; D.P., a friend of the wife for the last five years testified, as did J.A., a former President of the N.[] who had hired the plaintiff. Finally, Gabriola Hanova, a counselling psychologist testified.
- [15] When the trial resumed this April, some evidence was given by the plaintiff, to update what had occurred since September, 2004, and the defendant gave his evidence.

The Position of the Plaintiff

- [16] The plaintiff continues to have a concern that the husband might take the children to Iran at some time. Iran is not a signatory country to the Hague Convention. Thus she wants restrictions on any Iranian passports, and an order that the husband not take the children to Iran for the next two years. There was an earlier claim that he had threatened to take the children to Iran, and initially the wife sought sole custody and guardianship. She is now content with joint and shared custody and guardianship.

- [17] In June, 2000, the wife alleged threats and sexual assault against the defendant, and on June 17 of that year, the husband was arrested. His trial was to take place in Supreme Court, but the day before the trial, the wife indicated she did not wish to proceed, and charges were apparently dropped. In the meantime, the husband was more than distressed at being arrested and charged.
- [18] In that same month, June, 2000, the wife began counselling with Gabriola Hanova. She also did some counselling in 2001 from February 26 to June, 2001. On February 10, 2001, however, the plaintiff assaulted K.O., whom she accused of having an affair with her husband. Ms. K.O. worked at the North Vancouver Mexican restaurant owned by the parties. On February 12, 2001 the plaintiff was arrested for assaulting K.O., and spent a night in jail. She was later placed on a peace bond. There was some question of breaching the peace bond.
- [19] When the parties separated, the husband had signed a three line agreement dated June 29, 2000 which stated, "I M.K.1 agree to pay line of credit belongs to M.M.J. balance of approximately \$16,500.00 by end of October of 2000". The agreement was handwritten; neither party had counsel, and it was not witnessed. The wife signed her shares in the restaurant over to the husband.
- [20] The plaintiff confirms the defendant made no payments on the line of credit, and she has been solely responsible for it since separation. The balance on the line of credit, taking into account post-separation credits, amounts to \$12,377.82.
- [21] Although the husband subsequently sold his shares in the restaurant to his sister, M.K.2, and his now partner, K.O., the plaintiff contends the defendant still remains the de facto owner of the operation. That he has been pictured in a newspaper article and described as the owner of the restaurant, that he has the use of the company vehicle as his vehicle, that he knows all financial details of the company, and that he has in fact all the benefits of ownership and is in fact the beneficial owner of the restaurant. The plaintiff wishes to have compensation paid to her as promised in June, 2000.
- [22] The parties incorporated their restaurant business in March, 1999. The lease was in the plaintiff's name, as was the line of credit, and shares were issued in the names of both parties.
- [23] The plaintiff now works full time for the N.[] in an administrative/secretary position. Her gross income for 2003 was \$27,651.00 and remains the same. Her hours of work are from 9:00 to 5:00, Monday through Friday. She has considerable flexibility, particularly around the noon hour when she is able to pick up L.N.K., their youngest daughter, from school at 11:30, take her to lunch and then take her to The L.[] daycare in D.[], close to where she lives.
- [24] The daycare arrangements were set up by the wife when the live-in nanny was no longer available, around the beginning of January, 2005.

- [25] The wife proposes that in September, 2005, when L.N.K. begins regular school, that she attend the same school in North Vancouver as D.M.K., the D.[] School. Then both children can go to the same daycare during the times that are necessary when their mother is working. The wife's place of work is an approximate five minute drive away. Her home is also close.
- [26] The wife questions the husband's income. The husband testified that his income in 2001 was nil. In 2002, \$9,680.00; in 2003, his total income was \$11,440.00; in 2004, approximately \$11,000.00, and he estimates his 2005 income will be approximately \$1,400.00 a month for a total of \$16,800.00. The wife suggests that his financial situation has not been put fully and properly before the court, as he has apparently paid off \$20,000.00 in credit card debts, and is now planning to purchase a home in North Vancouver. He is also planning to take a further year at college, upgrading his education.
- [27] In 2004, Mr. Justice Tysoe found the wife's 2003 income from the N.[] was \$27,651.00, and he ordered that she pay child support to the defendant in the amount of \$414.52 per month, commencing April, 2004. There were arrears of child support owing to the plaintiff from the defendant at the time, and Justice Tysoe allowed the plaintiff to offset her obligation for child support to the defendant against his obligation to her to satisfy arrears, thus no payments were made either way.
- [28] The plaintiff argues that without a more complete financial picture of the defendant's finances, there should be no child support payable by either party, except for section 7 expenses.
- [29] Both parties cashed in RRSPs around the time of their separation. Both parties have pensionable earnings under the Canada Pension Plan. The plaintiff argues the defendant has a shareholders loan with the restaurant's corporation known as P.[] Corp in the amount of \$38,854.00.

The Position of the Defendant

- [30] The defendant left Iran in 1986 because of the political turmoil in his country at that time. He obtained a Bachelor of Science Degree in 1989 and in 1990 came to Canada as a refugee. He was accepted by Canada as a refugee in 1992.
- [31] He does not intend to make the restaurant his main occupation. He testified he is employed only as a chef now. He has taken one year of a two year course at Capilano College, in 2002, and hopes to take the second year and change occupations.
- [32] In July, 2000 when he was charged with sexual assault and threatening his wife, he was arrested and released on the proviso that he have no contact with his wife. He testified he slept in his restaurant until December of that year. Then, for a lengthy period of time, his wife refused to let him have access to the children.

- [33] He was arrested again in September, 2001, allegedly with regard to threats to a witness. However, those charges did not proceed. The husband is still obviously upset over his arrests. He has very little positive to say about the plaintiff, or her parenting skills.
- [34] On October 12, 2002 his lawyer at the time received a letter from his wife stating the husband could take the children, that she was giving up custody. In June, 2003, the wife wrote another letter, this one directly to the husband, stating that again, he could have custody. Although the wife has resiled completely from that position, the husband points to these letters as an indication that she is unstable, and that in the long run she will be giving up custody of the children anyway. That it is not a question of whether she will do it again, but when.
- [35] He relates that the children were devastated and felt rejected at that time. When the wife tried in the fall of 2003 to regain custody and/or principal residence of the children, she was not successful. Justice Masuhara ordered a section 15 report at that time.
- [36] When asked about his finances, the defendant confirmed he had no debts as of September, 2004 or April, 2005. That K.O. and his sister now own the restaurant and he works 20 hours a week as a chef. The restaurant is open from 5:00 to 10:00 p.m., and he works mainly on weekends.
- [37] The defendant and K.O. intend to buy a home in North Vancouver, but have not looked at any specific homes or put in any offers. He stated they will have help from their families, and expect a monthly mortgage of \$2,000.00 to \$2,500.00 a month, with no down payment needed. He anticipates no change in his income.
- [38] Mr. M.K.1 has no bank accounts, but still has credit cards. He has not disclosed all the financial records that were requested, some of which were ordered by the court. He presently claims both children for child tax credit. He seeks child support from the wife for the children under the Child Support Guidelines, based on the plaintiff's income of \$27,651.00.
- [39] The husband points out that in late February of this year, he had to bring an application to court in order to take the children on a four day vacation to Toronto. He had originally mentioned Disneyland, but then indicated Toronto. The children had no passports at that time. That application came before me, and was granted.
- [40] Mr. M.K.1 points to this as an example of the lack of cooperation that exists between him and the children's mother. He believes that the children are best off with him. That while daycare may be okay, it is not the lifestyle that the children have had. He offers them a home, family and personal protection. He says D.M.K. has special needs that have to be met, and L.N.K. needs special attention as she shows great promise, and he can give the children what they need better than his wife.

Conclusion

- [41] In my view, this is not a situation where either party should have sole custody. They have both shown the ability to "punish" one another when they are in control of the custodial situation. While this may satisfy some of the anger that they feel toward one another, it never benefits the children.
- [42] Both parents have had one another arrested. Both have demonstrated in the past considerable animosity to one another. Out of that anger and animosity, both parents have reacted inappropriately at times, even irrationally. The wife testified to her state of mind in twice writing letters that gave up custody. Letters she deeply regretted later, when the impact of her actions hit home. I am satisfied those letters were the result of a situation out of control, not any true intent.
- [43] The wife has demonstrated a need to manage her anger; the husband has demonstrated a need or desire to control.
- [44] However, both parents have made considerable efforts in the past two years to overcome their problems, and even their differences with one another. The evidence indicates both are loving and capable parents. Each parent brings his or her own personality, character, ethics and parenting skills. They are quite different from one another, and each parent has his or her own strengths. Also, each child is going to reflect their parents.
- [45] It is important that the children be able to spend, as much as possible, equal time with each parent. It is my impression that in some areas, the wife may be the better parent, and in other areas, the husband may be the better parent. That does not mean that either parent should "win" sole custody, but rather that they should continue to share parenting, so that the children are not deprived of either parent. They should continue to have the benefit of both parents.
- [46] This arrangement also gives each parent time to pursue their own work and careers. While Mr. M.K.1 may object to the children spending time in daycare during some hours that the plaintiff is working, the plaintiff may have similar objections, that the children may be spending too much time with Mr. M.K.1's girlfriend, K.O., rather than with their mother.
- [47] It is important that both parties recognize that when the children are with the other parent, it is up to each parent to make their own arrangements for the children, and neither party should interfere with the other. The children have the benefit of two loving parents, albeit with different parenting styles, and two loving, secure and safe homes.
- [48] Ms. M.M.J. has made suitable and safe arrangements for the children at a daycare close to her home and close to D.M.K.'s school, D.[] School. Mr. M.K.1 is in the process of looking for a more permanent residence.

[49] Ms. M.M.J. is more settled in both her home and work situation. In my view, it is appropriate to make an order that beginning in September, 2005, both children shall be registered at D. [] School for the school year commencing September, 2005. First and foremost, that is in the best interests of both children, that they do attend the same school together. And when they are with their mother, they will also be attending the same daycare at the same time, as they are both in the same age range for the daycare, which is age six to twelve.

[50] Mr. M.K.1 may choose to live closer to this school or not. He is in the process of looking for a home to purchase. That choice of where to live will be his. But it would be a benefit for the children and, I suspect, for him also to be as close geographically to the children's school and daycare as possible. In any event, the problem is not great, as both parents live in North Vancouver, and intend to continue to do so.

[51] The access arrangements which the parties worked out with considerable time and effort in late September, 2004 will continue until the end of June, 2005. That arrangement is as follows:

The children shall reside with each party on a rotating schedule ('the schedule') that repeats every 28 days in the following manner:

- a. 3 overnights with the plaintiff, followed by 4 overnights with the defendant, followed by 5 overnights with the plaintiff, followed by 7 overnights with the defendant, followed by 6 overnights with the plaintiff, followed by 3 overnights with the defendant;
- b. The schedule shall then repeat in the same manner during the next 28 day period;
- c. On Sundays when the children are returned to the defendant's residence, the return time is 6:00 p.m.;
- d. When one party shares a weekend with the children, in the event the weekend is a holiday weekend, the weekend shall be extended to include a holiday Monday overnight and the children will be returned to school on the following Tuesday morning.

[52] Summer school vacation will be shared as indicated by both parents, that each parent will have two weeks of time with the children, alternating. The first two week block of time will be shared with the parent having the weekend with the children immediately prior to the commencement of summer vacation. The other parent will then have the next two weeks, and so on.

[53] It is further ordered that each parent is free to travel across international borders with the children for vacation. Each parent will provide the other with an emergency contact number where the children and the travelling parent can be reached. Each parent will arrange regular phone contact between the children and the absent parent, at a minimum of twice a week.

- [54] It will be a further order that the defendant will not take the children on a trip to Iran unless the plaintiff agrees in writing, or by court order.
- [55] The parties will agree to provide all necessary documentation to obtain, as soon as possible, individual Canadian passports for each child.
- [56] Any Iranian passports which include the children shall be revoked and rescinded, and the defendant shall not apply for any Iranian passports in the name of the children.
- [57] The interim order of Master Barber of October 13, 2000 restraining either party from taking the children out of the jurisdiction of the Province of British Columbia and restraining the defendant from attending the children's school is rescinded.
- [58] The principal residence of the children shall be the Province of British Columbia and shall not be changed from the Province of British Columbia without further court order or written agreement of the parties.
- [59] Joint guardianship shall be defined to include:
- a. The parties shall consult on all important issues including religion, health including dental and medical issues, and education;
 - b. Each parent will immediately notify the other parent in the event of emergencies and in particular, any attendance at a hospital or emergency clinic as it arises;
 - c. In the event of the death of one parent, the surviving parent shall be sole guardian of the estate and the person of the children;
 - d. this power is subject to review by the Courts upon application by either party pursuant to section 32 of the Family Relations Act.
- [60] The parties will share Christmas school holidays with the children equally. In 2005, the children will be with the plaintiff from Monday, December 19, 2005 at 10:00 a.m. through to Monday morning, December 26, 2005 at 10:00 a.m. From December 26, 2005 at 10:00 a.m. to Monday, January 2, 2006, the children will be with the defendant, after which the regular residential schedule will resume. The children will share December 24 and December 25 with their parents in alternating years. With the plaintiff to have the children on December 24 and 25 in 2005 and each odd numbered year thereafter, and the defendant to have the children for December 24 and 25 in 2006, and each even numbered year thereafter.
- [61] The children will share Spring Break holidays equally with both parents.
- [62] The children will spend Mother's Day with the plaintiff, and Father's Day with the defendant, regardless of the residential schedule, unless the parties agree otherwise in writing.

- [63] Neither party will pay child support under the Child Support Guidelines to the other party. For the purposes of section 7 expenses, I impute income to the defendant equal to what the plaintiff makes. I do this on the basis that the husband's evidence with regard to his assets and debts, earnings and expenses were deficient and lacking in credibility. Therefore, all section 7 expenses will be split equally.
- [64] Neither party will commit the other party to paying an expense for the children under section 7 or any other expense without the other parent's prior agreement in writing. A party who does incur an expense for a child or both children without the other party's prior agreement shall be solely responsible for that expense.
- [65] For the purposes of claiming a dependent, child tax benefits or any other benefits available to parents through the Federal or Provincial Government programs from September 1, 2004, the plaintiff and the defendant shall each claim one child: the plaintiff shall claim L.N.K. and the defendant shall claim D.M.K..
- [66] The plaintiff will return to the defendant his Movado watch. She will also make every effort to search all belongings and boxes to see if the defendant's personal photo albums and collection of stamps can be located, and if so, be returned to the defendant.
- [67] The plaintiff is responsible for any debt on her line of credit at the time of separation. The defendant is responsible for all debts on his credit cards at the time of separation.
- [68] Commencing the beginning of September, 2005, and subject to the holidays and vacations scheduled elsewhere in this order, the children will reside with each parent on the following schedule:
- a. On Monday and Tuesdays of each week, the children will reside with the defendant. He shall be responsible for taking them to school on Wednesday mornings;
 - b. On Wednesday and Thursday of each week, the children will reside with the plaintiff. She shall be responsible for taking them to school on Friday mornings;
 - c. Weekends shall be shared in an alternating manner with each parent so that in week one, commencing Friday September 9th, the children shall be with the plaintiff from Friday after school, returning them to school Monday morning; and
 - d. In week two, commencing Friday September 16th, 2005 the children shall be with the defendant from Friday after school, returning them to school Monday morning; and
 - e. When one party shares a weekend with the children, in the event the weekend is a holiday weekend, the weekend shall be extended to include a holiday Monday overnight and the children will be returned to school on the following Tuesday morning; and
 - f. In the event one parent is unable to take the children on the weekend he or she is scheduled to have the children because of work related commitments, the parties will exchange weekends that they have with the children.

- [69] Both the plaintiff and defendant will ensure that D.M.K. follows a diet that will assist her with her present health problems.
- [70] If either party misses time with the children because of either illness of the parent or illness of one or both children, that party is entitled to make up that time at the earliest possible date. If that time is not made up, then the makeup time shall be taken from the other parent's vacation time during summer vacation.
- [71] I would encourage both parents to have D.M.K. assessed for possible learning disabilities, and to share any costs that may result from such an assessment. I will make no order that there be an assessment, but I will order that if there are costs that follow such an assessment, those will be extraordinary costs pursuant to section 7, and are to be shared equally between the parties.
- [72] All other claims by the plaintiff and the defendant, including all claims with regard to division of family assets and/or spousal support pursuant to Part 5 and 7 of the Family Relations Act are dismissed.
- [73] Each party will pay their own costs.
- [74] I will remain seized of this matter.

"N. Morrison, J."

Madam Justice N. Morrison

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