

CANADA / JUDGMENT

Mitchell v. Mitchell

2000 BCSC 551

COURT

Supreme Court of British Columbia

DECIDED

30 March 2000

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Citation:

Mitchell v. Mitchell

Date: 20000330

2000 BCSC 551

Docket:

D11328

Registry: Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRENDA ELFRIEDA MITCHELL
PLAINTIFF

AND:

JAMES DAVID MITCHELL
DEFENDANT

REASONS FOR JUDGMENT

OF

MASTER J. W. HORN

Counsel for the Plaintiff:

David Brown

The Defendant, In Person

Date and Place of Hearing/Trial:

March 9, 2000

Nanaimo, BC

- [1] This was an application by the plaintiff, pursuant to section 15 of the Family Relations Act for the appointment of a person to investigate and report on the issues of custody of and access to a child, Saxe, who is the only natural child of the parties. The question is whether a custody and access report should be ordered pending the application of the plaintiff, (now Brenda Hall) for a variation of an order made by Mr. Justice Hood on the 29th of March, 1999 in which he granted to the parties joint custody of Saxe. The plaintiff now seeks sole custody of Saxe. The defendant James Mitchell opposes the application for variation and also opposes the application for appointment of a person to prepare a custody and access report.
- [2] The order in question was contained in a consent order for divorce and settlement of custody and property issues made on the first day of a trial before Mr. Justice Hood.
- [3] At the time the order was made both parties were living on Gabriola Island and they had, for some time before the order was made, shared custody of Saxe on the basis that he resided for two weeks at a time with each parent. It is clear that the parties intended that this arrangement would continue after the consent order was made.
- [4] Within a month of the order being made, Brenda Mitchell moved, with her daughters by another marriage, to Courtenay, and took up residence with a Mr. Michael Young. The existing arrangements for shared custody of Saxe became impractical. He was due to enter kindergarten in September of 1999. Consequently the parties agreed, between themselves, to a different custodial arrangement and they entered into a written agreement on the 10th of May setting out that arrangement. The agreement was that James Mitchell was to have day to day care of Saxe, that his home would be Saxe's primary residence and that Saxe would be enrolled in kindergarten on Gabriola Island in September 1999. It was agreed that Saxe would have access to his mother in Courtenay at least every second weekend.
- [5] On October 1, James Mitchell filed a motion to vary the order of Mr. Justice Hood to embody that agreement. But that motion was not proceeded with because the divorce order had not been entered. Counsel for James Mitchell had been attempting unsuccessfully to settle the order with counsel for Brenda Hall for many months, and the order was only entered on October 21, 1999. Brenda Hall would not agree to entering an order by consent to vary the order of Mr. Justice Hood to conform to the parties' written agreement. But neither did she reject the proposal.
- [6] Instead, on February 17, 2000 she launched this motion to vary Mr. Justice Hood's order by granting her sole custody.
- [7] So there are two motions pending before the court, one from each party.
- [8] As a Master I have no jurisdiction to grant the substantive relief sought in these motions. I have jurisdiction however to grant the interlocutory relief sought, namely the appointment of a person to conduct an investigation under section 15 of the Family Relations Act. That is the only matter which I shall be addressing. But, in order to address it I must consider all of

the material which was filed in support of and in opposition to the motion of Brenda Mitchell, because it is on the basis of that material that I am urged to order the making of such a report.

- [9] Before a variation of a custody order may be made the applicant must, under section 17(5) of the Divorce Act show that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order. The principles that the court must act upon are set out in paragraph 17(9) of the Divorce Act.
- [10] There has, of course, been a change in circumstances of the child since the making of the order. Saxe no longer lives on the same island as his mother and so the shared custody arrangement, in force at the time that the order was made by Mr. Justice Hood, is no longer practicable. But the parties agreed in May of 1999 as to how this change of circumstances should be accommodated. It was that agreement that created the status quo. Accordingly, it is in my view, also necessary to examine whether there has been a change of circumstance since the making of that agreement. Whether a custody and access report should be ordered, depends on the nature of the allegations made by Brenda Hall in relation to both points of time since when, she says, a change has occurred.
- [11] She alleges a number of matters as constituting such a change.
- [12] She says that the agreement in May 1999 was for a trial period. That is not what the agreement says, and Mr. Mitchell denies that it was for a trial period. Mrs. Mitchell had the assistance of counsel at the time, though whether she availed herself of that assistance she does not say. Her counsel witnessed the agreement.
- [13] She says that she only entered into the agreement because she was concerned about a long drawn out custody battle and so acquiesced to James Mitchell's wishes. Whether either of these allegations are true or not, they do not require an investigation under section 15 since they do not relate to any change in the needs, means or circumstances of the child.
- [14] She says that she has become convinced that Saxe ought not to be separated from his sisters and she says that he misses them and is lonely living with his father.
- [15] She says that Saxe's living conditions are substandard, that his father lives in an uncompleted home and conducts on the premises dangerous activities in the form of a log home building school. That home was the family home for many years before separation. It remained the father's home after separation and during the whole period during which the parties shared custody of Saxe. It is the only home he has ever known. For many years she and the girls resided in that home.
- [16] At all events, whether the home is substandard or dangerous is not a matter that requires an investigation by an expert nor does it, on the face of it, constitute any change in the circumstances existing at the time that the order of Mr. Justice Hood was made.

- [17] She says that the defendant is busy running his school and has no time to supervise Saxe and that Saxe is left unsupervised for long periods of time. If that is the situation now it was the situation at the time that the final order was made.
- [18] She says that Saxe is not fed properly and is poorly clothed when he is brought for the exercise of access.
- [19] Brenda Hall, by affidavit, brings forward evidence that her living situation in Courtenay is very suitable for Saxe. That may or may not be in dispute, but it does not constitute a change in circumstances since the agreement was made.
- [20] She also produces sworn affidavits from her two daughters who say that when they were living with James Mitchell he was harsh and angry towards them and that they are afraid of him. If that is so, it does not constitute a change in circumstances, because if true, that circumstance existed when the final order was made and the agreement was made.
- [21] I should say at this point that after I reserved judgment and requested counsel for Brenda Mitchell to determine who might be available to make a custody and access report, and at what price, further affidavits were filed on behalf of Brenda Mitchell. I have not read them. The argument was concluded before me when I adjourned this matter.
- [22] At the hearing I was asked to appoint a psychologist under section 15 to investigate the issues. The person proposed is experienced in the preparation of custody and access reports but I could see no reason for any psychological testing or analysis of either the parents or of Saxe. The parties have been successfully co-parenting Saxe since their separation and the school report cards show that Saxe is a happy and well-adjusted child. I invited counsel for the plaintiff to propose instead a person, not a psychologist, who was experienced in child custody investigations and reports. He has proposed Ms. Donna Brown who is well-known to this court and most suitable for the purpose.
- [23] It seems to me that Brenda Hall is requesting a custody and access report of the broadest kind which would investigate the merits and demerits of each family home and of each parent and sibling to determine what is best for Saxe. But she is proceeding upon the assumption that that question is as open now as it was before the order of Mr. Justice Hood was made, and that is not the case. He awarded joint custody and she has to show that there has been such a change in circumstances that sole custody should now be awarded to her.
- [24] I am very conscious of the fact that I am not to determine the merits of her case. I am also very conscious of the fact that if I decline the invitation to appoint an investigator a judge, who may have to decide this matter upon affidavits, may be deprived of useful information. Nevertheless I do not think it is open to me to order a custody and access report in the wide terms suggested. The issue is not who would be the better custodial parent but whether, due to Brenda Hall's move from Gabriola Island, the regime created by an existing order, or an existing agreement, can be shown not to be in the best interests of the child.

[25] Brenda Hall has alleged that Saxe is neglected and lonely. Those allegations are worthy of investigation and may constitute a change in circumstances. I will make an order for a limited custody and access report to ascertain

- (a) the views of Saxe;
- (b) the suitability of James Mitchell's home;
- (c) whether the child is neglected in the care of his father.

[26] I do not, however, intend to confine the investigator to these three subjects. If other issues arising out of these matters come to the attention of the investigator, which he or she considers are material to this inquiry, they should be investigated and reported upon. But I must make it clear that I am not ordering a home study in relation to James Mitchell or Brenda Hall but only an investigation as to whether the circumstances have changed in relation to Saxe's care by his father, which require a change in custody.

[27] The person suggested is available at a fee which is agreeable to Brenda Hall who proposes to pay the fee up front. She may not wish to order a study with such a limited scope. If so, James Mitchell is at liberty to enter an order based upon this judgment, but only upon undertaking to pay, up front, the investigator's fees.

[28] I will appoint Ms. Donna Brown with the limited mandate set out above, if she is willing to undertake it, and if either party tenders her proper fees in advance.

"Master J. W. Horn"

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