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CANADA / JUDGMENT

## N.T.S. v. K.J.B.

2007 BCSC 1895

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COURT

Supreme Court of British Columbia

DECIDED

14 December 2007

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2007 BCSC 1895 N.T.S. v. K.J.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.T.S. v. K.J.B.,

2007 BCSC 1895

Date: 20071214

Docket: E061055

Registry: Vancouver

Between:

N.T.S.

Plaintiff

And:

K.J.B.

Defendant

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

In Chambers

December 14, 2007

Counsel for the Plaintiff

L.T. Murphy

Counsel for the Defendant

D.H. Murray

Place of Trial/Hearing:

Vancouver, B.C.

- [1] THE COURT: The plaintiff and defendant started living together in a common law relationship May 21, 1997. They initially lived in a home in Langley which the defendant had previously purchased and which was solely in his name. He also had a home in Aldergrove that he had previously purchased and which also was solely in his name. That home was initially rented out. The plaintiff made no direct financial contribution towards the acquisition of either home.
- [2] On May 31, 2000, the couple's daughter was born. When the child was about three years old the defendant's former wife was hired to be the child's nanny, and she has been working as the nanny ever since, as both the plaintiff and the defendant work.
- [3] The defendant is a businessman whose average annual income over the last three years is \$155,357. The plaintiff works for a credit union in Vancouver. Her annual salary averaged over the same three-year period is \$26,511.
- [4] In early 2005, the Langley home was sold, and the plaintiff, the defendant and their daughter moved into the Aldergrove home. In June 2005, the defendant also purchased a recreational home in Harrison Lake, which is solely in his name.
- [5] The parties have lived in the Aldergrove home with their daughter since 2005, and all three of them continue to live there, although the plaintiff deposes that they "separated technically" on March 18, 2006. The defendant does not dispute that their relationship as common law spouses has come to an end.
- [6] The plaintiff commenced an action a few months after separation in which she seeks, among other things, an interest based on trust principles in the property that is in the defendant's name, including the Aldergrove home. That matter has been set for trial on two previous occasions, March 26, 2007, and September 24, 2007.
- [7] At a pretrial conference held shortly before the September 24, 2007 trial date, the trial was adjourned because it had become apparent that the five days that were booked was insufficient. A new trial date has now been set for September 15, 2008, for seven days.
- [8] The plaintiff now brings this application for an interim order pending trial. In her notice of motion she seeks the following relief:
- 1) that the plaintiff shall have interim exclusive sole occupancy of the Aldergrove home;
  - 2) that the defendant shall pay the plaintiff interim periodic and/or lump sum support;

- 3) that the plaintiff and defendant shall share joint custody and guardianship of their child;
  - 4) that the defendant shall have reasonable and generous access to the child, including alternating weekends, and the defendant shall provide the plaintiff with 24 hours' notice of any intention not to exercise access.
- [9] The plaintiff's position is that it has become intolerable for the three of them to live in the same house and that she should have exclusive occupancy of the home pending trial.
- [10] She says it makes sense for her to live in the home rather than the defendant for a number of reasons. She says their daughter's school is very close to the Aldergrove home and it would be good for the child's school routine not to be disturbed.
- [11] She says the defendant could move out of the Aldergrove home and live in the Harrison Lake property. She says it would not be practical for her to move to the Harrison Lake property, because that would involve a lengthy commute to her four-day-per-week job in Vancouver.
- [12] With respect to custody and guardianship, the parties are agreed that there should be an interim order for joint custody and guardianship. Neither party alleges that the other is an unsuitable parent, and both are currently involved in their daughter's care, although the plaintiff asserts, and the defendant disagrees, that the plaintiff is the primary caregiver.
- [13] The plaintiff seeks interim spousal support ranging from \$2,776 to \$4,626 per month. In addition to that periodic amount, she also seeks a lump sum payment of \$10,000. She says she is in such need of money that she has had to sell her Mercedes and buy a less expensive car.
- [14] For child support, the plaintiff seeks an order that the defendant pay her either \$1,344 per month or \$1,585 per month, depending on whether the court accepts the defendant's average three-year annual earnings or finds that he is earning a higher amount.
- [15] In addition to that basic support, the plaintiff also seeks an order that the defendant continue to pay for the child's extraordinary expenses, which amount to either \$10,440 or \$17,900, depending on whether the defendant's or the plaintiff's figures are accepted.
- [16] As to access, the plaintiff proposes that there be a rotating two-week schedule. On week 1 the child would be in the care of the plaintiff from Friday after school until Sunday at 6:00 p.m. The defendant would then have the child from Sunday at 6:00 p.m. until the start of school on Wednesday. The plaintiff would then have the child from after school Wednesday until Friday. The second week, the plaintiff's and defendant's time with the child would be reversed.

## Exclusive Occupancy

- [17] The plaintiff submits that there should be an order for exclusive occupancy of the Aldergrove home because it has become intolerable for her to live there with the defendant. The plaintiff has set out in her affidavits why she feels the situation is intolerable. I have read and considered all the points mentioned in her affidavits, although I shall not recite everything she raised.
- [18] Some of her allegations were summarized by her counsel in written argument in this way:
- The parties have continued to reside together in the Aldergrove home since separation, which in recent months has become very difficult and stressful. There have been problems, including one incident where the defendant got angry at the plaintiff in front of the child and threw a water bottle against the wall leaving a dent. Another time, a husband of a woman whom the defendant had been involved arrived at the property wielding a knife. The plaintiff had to call the police, because it was a very frightening situation. Further, the matter which was to have been heard in September of 2007 has been adjourned at the instance of the defendant and will not be heard until September 2008. Two weeks before the original trial date in September 2007, the defendant got angry at the child, who was not paying attention to him, so he ripped the DVD player out of the wall. For the parties to continue to reside in the same home would become increasingly difficult and would not result in a productive environment for the child.
- [19] In his affidavit material, the defendant sheds a different light on things. He says the plaintiff has distorted the facts. For example, he says he did not pull the DVD player out of the wall; rather, he had asked their daughter to try on her new clothes to see if they fit properly, but she would not do as she was told. He said if she did not cooperate, he would unplug the DVD player, which is what he eventually did simply by pulling the jumper cords out of the machine. No damage was done to the DVD player.
- [20] The plaintiff's application for exclusive occupancy is brought pursuant to s. 124 of the Family Relations Act, R.S.B.C. 1996, c. 128. This section applies to both married and common law spouses: *McAra v. Haisch* (1991), 35 R.F.L. (3d) 369 (B.C.S.C.).
- [21] On such an application, the applicant has the burden of establishing that "the shared use of the home is a practical impossibility": *Rinta v. Rinta* (1980), 19 B.C.L.R. 287 (S.C.). If that requirement is met, the applicant must also show that she should be preferred as an occupant on the balance of convenience: *Dennis v. Regehr*, [1996] B.C.J. No. 237 (S.C.); *Winterhalt v. Winterhalt*, 2000 BCSC 244.
- [22] On the first question, it is not enough for the applicant to show incompatibility or that their manner of living together is unpleasant and acrimonious: *Pearson v. Pearson*, [1982] B.C.J. No. 1295 (S.C.).

- [23] One factor that may be considered is whether the history of the legal proceedings shows acquiescence: *Gajowski v. Gajowski* (1982), 28 R.F.L (2d) 194 (B.C.C.A.). In the present case, the parties have been living under the same roof for 21 months since the date of separation. The trial is now a further 9 months away.
- [24] I must also consider what the impact would be on the child's well-being if an order for exclusive occupancy were made: *Wright v. Wright*, [1986] B.C.J. No. 1610 (S.C.). At present, the child lives in the same home with both parents. It is agreed by the parties that they should both continue to share the child's custody and guardianship.
- [25] According to the proposal of the plaintiff, if she were given exclusive occupancy, the child would be moving back and forth between two different homes according to the access schedule. Half the time she would be living in the Aldergrove house near her school, the other half of the time she would be living somewhere else, perhaps Harrison Lake.
- [26] On the conflicting affidavit material before me, I am not satisfied that the plaintiff has satisfied the onus on her to show either that the shared use of the home is a practical impossibility or that she would be the preferred occupant. Her application for exclusive occupancy is dismissed.

### Spousal and Child Support

- [27] The plaintiff seeks an order for spousal and child support. At present the plaintiff is living in the same home as the defendant. He is paying the mortgage, utilities and other associated housing costs. He is paying the cost of the child's nanny and all other extraordinary expenses. So long as the plaintiff continues to reside rent free in the Aldergrove home with the defendant and their child, I cannot see any basis on which to make an order for interim spousal or child support.
- [28] If at some time in the future the plaintiff moves out of the Aldergrove home, it would of course be open to her to bring an application at that time for an interim support order. Her counsel submitted in argument that the plaintiff cannot afford to move until a support order is first in place. On the material before me, I cannot accept that submission. The plaintiff is not unemployed. Although she earns far less than the defendant, she does nevertheless have her own income of \$26,511 per year, and she has not shown that it would be impossible for her to move. Her application for interim spousal and child support is dismissed.

### Custody, Guardianship and Access

- [29] The parties agree that they should share joint custody and guardianship of their child, and an interim order is made to that effect. As they are all living in the same house, there is no need at this time to make any order as to access.

### Costs

[30] The defendant shall have costs of this application on scale B.

(SUBMISSIONS)

[31] THE COURT: Thank you both for your submissions on costs, but I am not persuaded that the order should be any different from what I initially indicated. In my view the most fundamental issue in this application was for exclusive occupancy of the home, and I am satisfied that the defendant should have the costs of this application on scale B.

(SUBMISSIONS)

[32] THE COURT: I think I understand the confusion here. I am not ordering costs forthwith, and I am not ordering costs in any event. The order that is made is pursuant to Rule 57(12)(b):

57(12) Unless the court hearing a motion otherwise orders,

...

(b) the party making a motion that is refused is not entitled to costs as costs in the cause, but the party opposing it is entitled to costs as costs in the cause, ...

So that is the order that I am making, and I hope that satisfies the concern that you had, Ms. Murphy. Is that sufficiently clear?

[33] MS. MURPHY: Well, obviously I am not happy about your decision.

[34] THE COURT: I understand that.

[35] MS. MURPHY: I can't profess to say I am, but I -

[36] THE COURT: With respect to the costs issue, perhaps I caused some confusion in the way that I expressed it, but that is the order.

The Honourable Mr. Justice W. F. Ehrcke

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