
CANADA / JUDGMENT

Podolsky v. Kursar

2010 BCSC 1940

COURT

Supreme Court of British Columbia

DECIDED

22 December 2010

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2010 BCSC 1940 Podolsky v. Kursar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Podolsky v. Kursar,

2010 BCSC 1940

Date: 20101222

Docket: E100662

Registry: Vancouver

Between:

Kathleen Dawn Podolsky

Plaintiff

And:

Alexander Robert Kursar also known as Robert Kursar

Defendant

Before: The Honourable Mr. Justice Johnston

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. S. Silber

G. Gordon

Counsel for the Defendant:

C. Linde

Place and Date of Hearing:

Vancouver, B.C.

December 15 and 16, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 22, 2010

- [1] Each party brings applications before the court. Some of those applications have been adjourned to the case management judge. For convenience and for clarity I will refer to the parties as "the father" and "the mother" in these reasons.
- [2] The father applies for an increase in his access to his son who is almost three years old. While his motion seeks equal parenting time, and the right of first refusal for parenting time over any baby-sitter or daycare lasting more than two hours, the father's application was argued on the basis of a proposal by which he sought an increase in his access to what he says amounts to about 32 percent of the child's time.
- [3] There is an order in place made March 16, 2010, in the Provincial Court with the consent of the parties that provides that the father have a minimum of one 24-hour period in each seven-day period that is access to his son, and that in addition he have reasonable access beyond that.
- [4] The Provincial Court proceedings were ordered consolidated with these proceedings on June 24, 2010.
- [5] Custody, guardianship, access and child support, as well as some property issues, are all scheduled to be tried over three weeks starting May 2, 2011.
- [6] Counsel for the father framed his present application in terms that would avoid characterizing the application as a variation of the existing order. Mother's counsel says that it is really a variation being sought and that father must show that the current access is unreasonable; then if that hurdle is overcome that there has been a material change in the circumstances of the child, or of the parent's ability to care for the child, and if that hurdle is overcome, that a variation of access is in the best interests of the child.
- [7] The first question is whether the father's application seeks a variation of a term of the March 16, 2010, order. This raises in turn the question whether there is a disagreement, or whether there is access being provided that is reasonable according to the terms of that order. That order reads:

The father shall have reasonable access with the child in addition to the overnight visits.

- [8] It seems to me that I must first consider whether the access that has been exercised, in addition to the overnight visits specified in the consent order, has been reasonable within the meaning of the provision of the order. If I conclude that it has been reasonable, then father must show a material change in circumstances before I can consider whether a variation in the access is in the child's best interests. If I conclude that the access, other than the overnight visits so far, has not been reasonable, I should then consider what level of access is reasonable in the best interests of the child without requiring the father to show a material change in circumstance.
- [9] In considering whether the access, other than overnight visits, has so far been reasonable, can I consider that father is in arrears of child support or that he has allegedly conducted himself in the past so as to raise concerns over whether he will be a positive role model for his son? Certain historical events pointed to by the mother are not really in dispute. These include that there is a judgment against the father in favour of an insurer arising out of a fraudulent claim for payment under a homeowner's policy.
- [10] There has been an application by the father for placement in a course. That application was either forged or misrepresented the father's status in order that he might gain a position in the courts.
- [11] There has been a complaint over the way in which the father responded to the infant child having carried an object out of a retail store without the knowledge of either parent. These matters have been the subject of argument but they are old, that is historical, at least in the case of the insurance judgment or the misrepresentation. Either that or they are equivocal, in the case of the object carried by the child out of the store. And while they are worthy of some consideration, because of their age, or their equivocal nature, I place little weight on them in deciding this application.
- [12] There are other matters, however, that are of more concern; one is father's more recent fraud on a retail store, a case where he misused a receipt in order to return a mattress he had obtained, used in order to obtain, through exchange, a brand new mattress for the child. There is also an allegation that father misrepresented to the lawyer acting for a judgment creditor ("the insurer") that he had relocated to the United States when in fact it is alleged that was not true.
- [13] All of these allegations or assertions, whatever they may be termed, will raise concern that the father's moral compass is off by a few degrees.
- [14] I note the opinion of Dr. Elterman that the father knows what is right, but that is of small comfort if the father has not shown a willingness or ability to show the child what is right.
- [15] In *Bell v. Kirk*, 1986, 3 R.F.L. (3d), the Court of Appeal said, albeit in obiter:

-- it is not amiss, in my opinion, to consider a parent's propensity for honesty or dishonesty and a parent's social responsibility.

- [16] Father points to some problems on mother's side, including that she is prone to exaggeration, or appears prone to attempts to manipulate in order to achieve some advantage in this litigation.
- [17] Examples include mother's allegations that father was involved in an assaultive road rage incident or that he was involved in criminal activity because he drove a truck in the United States. Or that father had friends involved in a criminal activity when examination reveals that father's friend or acquaintance may have employed someone accused of a crime.
- [18] There is also alleged that father did not contribute to shared living expenses, then admitted that in fact he had.
- [19] Mother claims some basis for these statements, at least some of them, and denies that she has overstated or exaggerated as claimed.
- [20] Applications such as this application for increased access are not the ideal venue to make important determinations as to the moral fibre of either parent, or about their testimonial honesty or accuracy. They are not particularly appropriate venues to determine, to put it more bluntly, which parent has thrown the most mud at the other parent most effectively.
- [21] I turn to consider whether the current level of access is reasonable.
- [22] It is not clear that I should factor in, to any substantial degree, father's disregard for previous orders of the court. While that may be an important factor to consider, in many applications, when an application such as this one which brings to the fore the primary consideration of the best interests of the child, it seems to me father's willingness to disregard court orders ought to take a far secondary position in my consideration.
- [23] Father's willingness to disregard court orders is, however, a factor to be considered as part of the overall consideration of father's willingness or ability to provide a proper role model for his son.
- [24] On balance, I think I should consider father's non-compliance with court orders, but to ascribe to that factor little weight.
- [25] The father relies on the opinions of Dr. Krywaniuk, a psychologist. Those opinions may be of assistance to the trial judge who will be able to assign the appropriate weight to be given to Dr. Krywaniuk's opinions based on the proof of the facts or assumptions on which the opinions are based. Notably, Dr. Krywaniuk was asked to assume before separation the father was the primary care provider, a fact that is very much in dispute.
- [26] I have considered Dr. Krywaniuk's answers to the questions put to him in deciding reasonableness of the current access arrangements.

- [27] Mother's position is that "reasonable" means that overnight access must be exercised at an apartment that she has inspected and approved, and specifically that father should not take the child to the child's grandparent's home for an overnight visit because the grandparent's home, in her view, is too crowded for the child to have suitable sleeping arrangements. I mention this specifically because it is an example of mother's overreaching in her attempt to dictate to the father how he parents the child during his access time.
- [28] I have referred to some of the evidence to which I was taken during the hearing, but not all of it. One of the reasons I reserved was so that I could review all of the evidence, and I have done so.
- [29] On all of the evidence I conclude that the current access regime is reasonable within the terms of the order reached by consent for the following reasons: one, it was reached by agreement between the parties; two, it is a temporary state of affairs pending a trial which will be heard in five month's time; three, the child has settled into a routine of daycare and access visits. And I say that recognizing that a child this young can develop a routine much quicker than an older child and that this routine has developed since the order in the spring of 2010. I also recognize that a child this young is more adaptable and can more easily adjust to changes in routine so long as those changes do not come too quickly.
- [30] I also do not think that the arguments that the current access schedule is unreasonable are sufficient to overcome the preference for stability and the status quo pending trial. The current access arrangements have not been shown, at least to my satisfaction, to prejudice the father's ability to put his best foot forward in the section 15 report preparation process. If there is a problem in the preparation of the section 15 report based upon the amount of access father has or has not had with the child, I would expect the author of the report to deal with that problem and the father to have an opportunity to argue that disadvantage at trial, or even before trial, if the problem is sufficiently acute that a fair assessment cannot be made by the author of the section 15 report.
- [31] While one might wonder why mother thinks it is preferable for the child to spend time in daycare than with his father, that is a question best left to the trial judge.
- [32] Finally, I point to the fact that insofar as father argues that it is better for the child to spend time with him than in daycare, the father did consent to a specific term of the order on March 16, 2010, that the child remain in full-time daycare at Star Shine Daycare.
- [33] Having concluded that the current access arrangements have not been shown to be unreasonable, that in fact they are reasonable, father must show a material change in circumstance to warrant a variation of the access provisions in the consent order. I conclude that no material change in circumstances has been shown. Father's work schedule was known when the current arrangement was reached by agreement. Nothing that was not or should not have been in reasonable contemplation of either the parties or a Provincial Court judge at the time the consent order was made has been shown in the evidence.

- [34] Any changes that may have been raised in the evidence are, in my view, inconsequential and relatively insignificant.
- [35] Had I found a material change in circumstance I would not have altered the access schedule.
- [36] Again, the status quo is of some significance. Stability is important for children. I would not have found that it was in the best interests of the child to vary the access schedule if I had reached a point of determining that there had been a material change in circumstance. The father's application to increase his access to his son pending trial is dismissed.
- [37] Mother has applied for sole custody. That application is dismissed. I dismiss it because there is an order in place to which I have referred that has governed child care arrangements for eight months now. The trial is only five months away. I have been shown no reason that would require me to upset the status quo by granting sole custody.
- [38] Mother applies for an order that father contribute to daycare expenses under section 7. She seeks 54 percent of the cost of daycare from father retroactive to February 1, 2010. Father's guideline income is \$77,000. Mother's guideline income is \$60,000. On the basis that father consented to daycare in March of 2010 and that he knew or must have known that daycare would carry a cost, I conclude that the daycare expenses are reasonable and necessary and father is ordered to pay 54 percent of the child care daycare expenses under section 7 retroactive to February 1, 2010.
- [39] Mother asks for an order that father make the child support payments ordered by Mr. Justice Leask November 4, 2010, and that he be ordered to provide post-dated cheques for the child support payments.
- [40] Father has not paid for the month of December. It appears, or so I was told, that instead he registered the order made by Mr. Justice Leask with the Family Maintenance Enforcement Program, apparently in the hope that that program would take priority over his judgment creditor and that his maintenance obligation enforceable by the Family Maintenance Enforcement Program would reduce the amount being garnisheed by the judgment creditor each month.
- [41] No useful purpose is served by one judge ordering a litigant to obey the other already made by the other judge. Father is in breach of the November order. Father's breach will presumably be dealt with when the other applications that were before me but were adjourned to the case management judge, which include applications to hold father in contempt of other orders of the court, are brought before the case management judge.
- [42] In the meantime, however, father's refusal to pay child support pending action by the Family Maintenance Enforcement Program is unsupportable and I order father to provide six cheques payable to mother in the amount of \$720 for child support. Those cheques shall be dated December 1, 2010, January 1, 2011, February 1, 2011, March 1, 2011, April 1, 2011 and May 1, 2011.

- [43] I would have added father's percentage of the child care expense, but I could not locate satisfactory evidence of the cost of child care in order to do so.
- [44] If and when father's maintenance obligation, including section 7 expenses if appropriate, begin to be collected by FMEP directly, the mother shall return any unused cheques to father through counsel.
- [45] Mother applied for certified copies of certain records. These include the records of St. Paul's Hospital relating to the admission and treatment of the father on or after August 1, 2009, to date; the records of UBC hospital relating to the admission and treatment of the father on and after August 1, 2009, to date; the City of Vancouver employment records relating to the father covering the period January 1, 2008, to the present; the record of Service Canada, including, but not limited to, his application for employment insurance benefits, including all correspondence to file notes, the records of WorkSafeBC relating to a claim for benefits by the father in or about August 2009.
- [46] Father has produced some documents from each of the records sought. Mother wants the complete files as opposed to the portions already produced. Having listed and produced parts of these files, father is not in a position to argue that the documents are irrelevant.
- [47] The applications set out therefore in paragraphs 6, 7, 8, 9 and 10, the mother's notice of application dated November 22, date stamped November 23, are granted in the terms sought. Mother is to pay the cost of delivery and production of the records obtained and will provide a complete copy to the father through counsel.
- [48] Counsel, there were no submissions, as I recall it, with respect to costs. My inclination, subject to the submissions of counsel, is that father, who was unsuccessful on this application to vary access, should pay the costs of one day of the application and that the costs of the second day should be borne by the parties themselves since there was divided success on the balance.
- [49] Does anyone have a submission to the contrary?

(Submissions)

- [50] I may have considered the order for lump sum costs if this matter was not so close to trial. It does seem to me that father's application, as I earlier indicated, for an increase in access was unsuccessful and that mother ought to be given her costs of that application. And although it may seem somewhat arbitrary, it does seem to me on reflection that the one day was an appropriate estimate of the length of time father's application to vary access required. And so my initial inclination is now confirmed and I order father to pay mother the costs to reflect a one-day chambers application. Those costs will be payable not forthwith, but in any event of the cause, and adjusted or set off or added to the costs that will eventually be ordered as a result of the trial in May of 2011.

- [51] The costs of the second day of hearing will be borne by the parties themselves, that is, there will be no order of costs with respect to day two, the success having been divided sufficiently that costs ought not to be payable.
- [52] MS. SILBER: My Lord, can I just add one more point. You mentioned that you weren't able to determine with any clarity the amount of the child care costs reflecting the 54 percent allocation. I don't think this daycare is disputed by the father or my friend.
- [53] THE COURT: If you can agree on that, and put it in the order, go ahead.
- [54] MR. LINDE: No, I don't agree.
- [55] THE COURT: You are going to have to deal with that one separately. You can set it down, if you feel it more efficient, before me, or you can go back to the trial management judge, the case management judge, on that. I have ordered it payable, it is just a matter of quantification. You can deal with it either, as I say, before me or before the case management judge.
- [56] MS. SILBER: Can we deal with it by way of written submissions.
- [57] THE COURT: Yes.
- [58] MS. SILBER: All right. I think that's preferable because I am especially looking at my submissions here and I have the records in the chambers record to the specific material.
- [59] THE COURT: All right.
- [60] MS. SILBER: Perhaps that's ...
- [61] THE COURT: You can then have your written submission by -- give me a date.
- [62] MS. SILBER: I am actually out of town at the moment, My Lord, so I don't have my work calendar in front of me. But it will be a very simple matter. So why don't we say by the 10th of January.
- [63] MR. LINDE: All right. Those are when submissions will come to me?
- [64] THE COURT: Yes.
- [65] MR. LINDE: And I will have a week after that?
- [66] THE COURT: All right. 17th of January for Mr. Linde and any reply four days after that.
- [67] MS. SILBER: The 21st.
- [68] THE COURT: Yes. If any of these fall on a Saturday or Sunday they just bump down to the next day and I will get at it. All right. I will give you a decision as soon as I can after that.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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Prepared on 27 October 2026 · Esheria