
CANADA / JUDGMENT

R.D.N. v. C.M.N.

2003 BCSC 491

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.D.N. v. C.M.N.,

2003 BCSC 491

Date: 20030401

Docket: 5939/32324

Registry: Victoria

Between:

R.D.N.

Plaintiff

And:

C.M.N.

Defendant

Before: The Honourable Madam Justice Quijano

Reasons for Judgment

Counsel for the Plaintiff:

D. L. Anderson

Counsel for the Defendant:

D. E. Davison

Date and Place of Trial/Hearing:

December 10, 2002

Victoria, B.C.

INTRODUCTION

- [1] The petitioner and the respondent are the parents of A.M.N. (A.M.N.), their daughter, who was born [], 1992.
- [2] When the parties separated in December 1996 Ms. C.M.N. agreed that Mr. R.D.N. have sole custody of A.M.N.. By Separation Agreement in July 1997 the parties confirmed that agreement and agreed that Ms. C.M.N. would have reasonable and generous access to A.M.N.. The parties were divorced by a desk order divorce February 19, 1998 which confirmed, by consent, the custody and access agreement. In October 2000 the parties varied the Separation Agreement to provide additional access to Ms. C.M.N..
- [3] While for the first period after separation the contact between A.M.N. and her mother was infrequent, that circumstance changed within the first year and it is apparent that the relationship between A.M.N. and her mother has been and continues to be a strong and healthy one.
- [4] Over the years the parties have worked well together in the interest of A.M.N. and have managed, for the most part, to resolve issues in a mature and sensitive fashion. There is no dispute that each of them loves A.M.N. very much and that each of them is a good parent.
- [5] Mr. R.D.N. has remarried and there are two children of that relationship. Ms. C.M.N. has been in a common-law relationship with Mr. J.C. for the last several years.
- [6] In May of last year Mr. R.D.N. lost his job at Toys 'R' Us in Victoria, where he was in a managerial position. He was out of work for about five months when he received an offer of a job as a manager of a Winners store in Saskatoon. He took the job in September and in October he told the respondent that he would be moving to Saskatoon with his family, including A.M.N.. The respondent objected and brought this application to prevent A.M.N.'s residence from being removed from Victoria.
- [7] Before the matter came on for hearing the parties worked out an agreement, to be incorporated into this court order, by which A.M.N. would move to Saskatoon with her father and the rest of his family, the parties would share joint guardianship and the respondent would have substantial access, the costs of which are to be largely borne by the petitioner. However, three matters remain in dispute:
 - 1. the respondent seeks joint custody of A.M.N.;
 - 2. the arrangements for Christmas day access; and

3. the timing of Spring Break access.

NARRATIVE AND FINDINGS OF FACT

- [8] It is unnecessary to detail the history of the parties' relationship since separation in any more detail than has already been done. To the extent that there are facts of the relationship recited earlier in these reasons, those may be taken to be findings of fact. What follows here is the narrative and findings of fact related to matters which have arisen and remain in issue since the decision was made by Mr. R.D.N. to accept the job offer in Saskatoon.
- [9] In October 2002, without prior notice, Mr. R.D.N. told Ms. C.M.N. that he was moving with his family, including A.M.N., to Saskatoon where he had accepted an offer of employment.
- [10] It is clear that, perhaps with the exception of a relatively short period immediately after separation, Ms. C.M.N. and A.M.N. had and have a close and loving relationship. In the two years or more immediately preceding Mr. R.D.N.'s decision to move to Saskatoon A.M.N. had spent every second weekend with her mother and numerous times in between as well. I have no doubt that A.M.N.'s relationship with her mother is very important to her.
- [11] To his credit Mr. R.D.N. acknowledges the importance of the relationship and has offered generous defined access as well as accepted the responsibility for the bulk of the expenses associated with the access.
- [12] To her credit, after her initial refusal to consider permitting A.M.N. to move to Saskatoon, Ms. C.M.N. was willing and able to consider the situation from the perspective of what was best for A.M.N. and has withdrawn her application to prevent the move.
- [13] Shortly after advising Ms. C.M.N. of his intention, Mr. R.D.N. did move to Saskatoon but his wife and the three children remained in Victoria pending sale of their home here. The home has been sold and, by the time of this application many of the issues between the parties precipitated by the move have, as previously noted, been resolved.
- [14] After Ms. C.M.N. was told of Mr. R.D.N.'s decision to move with A.M.N. to Saskatoon problems arose between the parties in relation to access which had not been evident before. Notwithstanding the emergence of these problems, which I find to have been largely the product of a determination on the part of Ms. C.M.N. to have some additional time with A.M.N. at this difficult time of impending separation, it is to be expected, from the extent of the matters that have been settled between the parties in relation to this application, that once the situation has settled into a routine the parties will not have any significant difficulty in approaching disagreements with respect to A.M.N. as they did in the past: by employing consultation and compromise.

- [15] It is clear that both of the parties are capable, to a large extent, of approaching decisions involving A.M.N. from the perspective of what is best for A.M.N.. However, because A.M.N. is moving to Saskatoon Ms. C.M.N. considers that it is A.M.N.'s best interest that there be joint custody and guardianship. Mr. R.D.N. resists this on the basis that he has had sole custody since separation and the arrangement has clearly worked well for A.M.N..
- [16] The remaining two issues are with respect to Christmas access and Spring Break access.
- [17] As for the Christmas access, Mr. R.D.N. says that because his job is in the retail sales industry he always has to work right up to Christmas day and then again on Boxing day. As a result he only has Christmas day to spend with his family. Therefore he wants to have A.M.N. with him and the family on Christmas day in every year. Ms. C.M.N. wants to have A.M.N. with her Christmas day in alternate years.
- [18] As for Spring Break, Ms. C.M.N. says that during the spring she gets a one-week holiday when the dental office where she works shuts down and she would like to have access with A.M.N. that week. Unfortunately this week does not necessarily coincide with A.M.N.'s spring break. In the past Ms. C.M.N. says she has taken A.M.N. out of school for the week her office is closed and that A.M.N. brings her books and homework and they do it together. She says A.M.N. has had no trouble getting back into the schoolwork when she has returned. Mr. R.D.N. is concerned that to require A.M.N. to be removed from school for one week each spring while school is in session will not be in her best interest.

ANALYSIS

CUSTODY

- [19] Formally this is an application by Ms. C.M.N. to vary the existing custody order to provide for joint custody with A.M.N.'s residence to be with Mr. R.D.N.. Pursuant to the Divorce Act the burden is on Ms. C.M.N. to establish firstly that there has been a change in the condition, means, needs and circumstances of the child since the Order was made [the threshold test] and, if that burden is met, the court must consider what is in the best interest of the child.
- [20] It is argued on behalf of Ms. C.M.N. that the move to Saskatoon will so significantly affect access, and therefore her relationship with A.M.N., that this satisfies the burden. It is also argued on her behalf that the change from sole to joint custody will be in A.M.N.'s best interest as it will provide for more equality as between the parents. Ms. C.M.N. is concerned that if Mr. R.D.N. remains the sole custodial parent he may exercise his custodial rights and interfere with access.

- [21] On behalf of Mr. R.D.N. it is argued that the threshold test has not been met, primarily because Ms. C.M.N. consented to sole custody when she must have known that it was possible that he might have to move from Victoria and because she has now consented to the move.
- [22] Ms. C.M.N. says that at the time she agreed to sole custody she did not believe that Mr. R.D.N. would move with A.M.N. from Victoria and so she had no concern to provide for such an eventuality. As to Ms. C.M.N.'s agreement to the move, it is clear that in deciding not to oppose the move to Saskatoon she was motivated by a concern for A.M.N.'s best interest.
- [23] In considering applications involving custody of a child the court must look at the whole of the circumstances in order to determine whether the best interest of the child requires the court to consider the application to vary. The court's jurisdiction cannot be limited by factors that fundamentally have little relevance to the question unless the evidence discloses that the parties had addressed their minds to the circumstance now claimed to support a determination that the threshold has been met.
- [24] In *Bruce v. Bruce*, [1997] B.C.J. No. 396, Warren J., dealing with the question as to whether a previous custody order affected the determination as to whether the threshold had been met said, at paragraph 11:

The change, whether the application is under the Divorce Act or the Family Relations Act, must represent a clear or distinct departure from what the court then knew of the circumstances or could reasonably have anticipated when making the order.

- [25] I see no relevant distinction to be made between a court order, a court order by consent and an agreement. In each case the determination as to whether the change constitutes a change in circumstance sufficient to meet the threshold test must be considered in light of what the court or the parties either knew or could reasonably have anticipated when the order or agreement was made.
- [26] On the evidence before me I am satisfied that at no time did Ms. C.M.N. have any information from which she should or could have reasonably anticipated that Mr. R.D.N. would move from Victoria with A.M.N..
- [27] In *Bruce v Bruce*, *supra*, Warren J. said this at paragraph 17:
- In my view, where there are precise terms of access between a child and a parent accompanied by ties of love and affection, a move which significantly alters the access constitutes a material change in circumstances justifying the variation application.
- [28] In this case not only are the existing terms of access precisely defined but as a result of that part of the order here that is going by consent there will be defined joint guardianship provisions which provide Ms. C.M.N. with the right to be consulted about A.M.N.'s educational and health issues and to consult with A.M.N.'s teachers and health professionals.

- [29] I am satisfied that there is clearly deep love and affection between A.M.N. and her mother and I find that the move to Saskatoon will significantly alter the access and the relationship between Ms. C.M.N. and A.M.N.. Therefore, I am satisfied that the move to Saskatoon is a change in circumstance sufficient to meet the threshold test.
- [30] The next question is whether it is in A.M.N.'s best interest that there be a variation from sole to joint custody, keeping in mind that the parties have agreed that A.M.N. will continue to reside with and be in the day-to-day care and control of her father and that there will be generous defined access, the bulk of the costs of which will be borne by Mr. R.D.N..
- [31] In approaching this question I am mindful that McLachlin, C.J.C., speaking for the court, in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 said at paragraph 17:

The threshold condition of a material change in circumstance satisfied, the court should consider the matter afresh without defaulting to the existing arrangement.

- [32] In *Gordon v. Goertz*, supra, the court was faced with an application to change the actual physical custody of the child, whereas here Ms. C.M.N. does not seek to change the physical custody but only to change the formal custody from sole to joint. This, however, does not change the fact that there is to be no presumption in favour of the existing custodial status.
- [33] Ms. C.M.N. seeks this variation in the belief that joint custody will provide her with additional rights which will ensure that, insofar as possible, Mr. R.D.N. cannot, through the legitimate exercise of his sole custodial rights, act to abridge or otherwise restrict her access with A.M.N. save as provided in the access which has been agreed to or which may be agreed to in the future.
- [34] Mr. R.D.N. resists the change on the basis that it is apparent that the existing custody arrangements have worked well for A.M.N. in the past and there is no reason to think that they will not continue to work well.
- [35] There is no question that the existing arrangements have worked well while the parties and A.M.N. all lived close to one another in Victoria and that A.M.N. is a happy, well-adjusted 11 year old who loves both of her parents very much.
- [36] The question is whether it will be in A.M.N.'s best interest to provide for joint custody now that she will be living so far from her mother.
- [37] In considering the arguments made on behalf of Ms. C.M.N. I cannot find that there is any evidence to support a concern that if Mr. R.D.N. is to have sole custody of A.M.N. he will not abide by the access agreement that has been reached or by any further order of this court in relation to access or other related issues. While it is apparent that Ms. C.M.N. would find a sense of additional comfort and security if the custody were to be joint, the submissions in this regard lead to a concern that a change from sole to joint custody would likely result in a change in the dynamics between the parties in relation to day-to-day matters involving A.M.N. that would not necessarily be in her best interest.

[38] However, taking into consideration the relatively substantial amount of time A.M.N. will be spending with her mother, and the reality that while A.M.N. is with her mother her mother will be responsible for her safety and well-being, I am of the view that this is a situation in which it will be in the child's best interest that Mr. and Ms. C.M.N. have joint custody of A.M.N. limited to the specified access periods that A.M.N. is with her, but when A.M.N. is with her father he will have sole custody.

CHRISTMAS ACCESS

[39] I cannot find that Mr. R.D.N.'s employment responsibilities are so significantly different from those of most people as to justify a particular concern to ensure that he has A.M.N. with him every Christmas day. I am also of the view that it is in A.M.N.'s best interest that she spend the actual Christmas eve and Christmas day with each of her parents in alternate years. Therefore, Ms. C.M.N.'s Christmas access will include Christmas day in alternate years. The Christmas access in 2003 will commence December 24 and on December 26 in 2004, alternating thereafter.

SPRING BREAK

[40] Saskatoon Ms. C.M.N. says that she has taken A.M.N. out of school before for the week that her employer's office is closed in the spring, I am mindful that A.M.N. was younger then and that her educational and extra-curricular demands will be increasing. I am also mindful that the travel demands will take more of a toll on A.M.N.. Therefore I have concluded that it is not in A.M.N.'s best interest to be taken out of school for one week each year at a time when school is in session. The Spring Break provisions for access are to take place during the week of A.M.N.'s school Spring Break.

CONCLUSION

[41] The order that was presented to the court on behalf of Mr. R.D.N. will go in the form submitted, with the necessary changes to paragraphs 1, 3(a)(i) and 3(a)(ii) to reflect the order as to limited joint custody, Christmas access and Spring Break access.

COSTS

[42] I consider that success was divided on this application. Each party will bear their own costs.

"G.M. Quijano, J."

The Honourable Madam Justice G.M. Quijano

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