

CANADA / JUDGMENT

Rienks v Rienks

2006 BCSC 783

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 783 Rienks v. Rienks

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rienks v Rienks,

2006 BCSC 783

Date: 20060516

Docket: E5680

Registry: Chilliwack

Between:

David Gabriel Rienks

Plaintiff

And

Thalea Dawn Rienks

Defendant

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Plaintiff

Paul R. Blessin

Counsel for the Defendant

Appearing on her own behalf

Date and Place of Trial:

May 8,9 and 10, 2006

New Westminster, B.C.

- [1] The plaintiff (father) and the defendant (mother) were married on May 20, 2000, in Chilliwack, British Columbia. They ceased to live together on February 1, 2005. There are two children of the marriage, Noah, born February 11, 2001, now five years old, and Elijah, born May 1, 2003, now three. The plaintiff is 27 years old; the defendant 26.
- [2] The plaintiff seeks a divorce. The defendant is not opposed. I am satisfied the statutory requirements have been met and the divorce order may go.
- [3] In this trial, the father seeks an order for sole custody, but joint guardianship. The mother seeks both joint custody and joint guardianship. The principal issue with respect to the children, however, is the primary place of residence. The mother lives in Langley, the father in Chilliwack. He wishes to relocate to Whitehorse and to take the children with him.
- [4] Also at issue are the division of assets (which consist of the matrimonial home and a van), child maintenance, and arrears of child maintenance.

Place of Residence

- [5] On January 9, 2006, a Master of this Court denied the father's application to move with the children to Whitehorse. That application has been renewed at this trial. The present arrangement is that the children reside primarily with the father in Chilliwack. Pursuant to the Master's order, the defendant was to have reasonable access.
- [6] The parties agreed, although the mother did so reluctantly, that the mother would have access every second Thursday at midday until Saturday at midday. This arrangement was consistent with the mother's work schedule. She works in the security division of a casino in Langley. Her days off are Thursday and Friday, and she does not work on Saturday until 3:00 p.m. However, the mother was clear in her evidence that she was unhappy with this arrangement and has, ever since the Master's order, wanted the children to have more access to her.
- [7] The mother was the primary caregiver of the children until the time of separation. Both parties described her as a "stay at home mom". When unhappiness arose in the marriage, the parties discussed the father moving out of the matrimonial home. In the end he declined to do so and as a result the mother left. It was her evidence that she did not wish to leave the children, but in the circumstances she believed she had no choice.

- [8] In the beginning, she kept the matrimonial vehicle, a van, and was able to commute regularly from her new residence in Langley to Chilliwack to exercise access. However, approximately seven months after the separation, the mother commenced a relationship with another person. It was her evidence that from that time on the father ceased to cooperate on matters of access. Nevertheless, the parties were able to agree to the above described access arrangements after the Master's order of January 9, 2006.
- [9] There was considerable evidence called concerning the attributes of the father as a parent. I am satisfied that he is a caring parent and that there is no reason why the children should not reside with him. The mother called less evidence in this regard. However, on the basis of her testimony, and on the lack of any evidence from the plaintiff persuasively challenging her capability as a parent, I am satisfied that she too is a competent, loving parent and that it would be equally appropriate for the children to reside with her.
- [10] The most troubling evidence that might cast doubt on this conclusion came from the mother of the defendant who was called as a witness by the plaintiff. It was her testimony that in May 2003, after the birth of the second child, the mother exhibited signs of post-partum depression. The witness said that her daughter appeared tired, if not exhausted, caring for the children. Although there is a history of animosity between the witness and her daughter, I find this was the principal reason the witness has concluded that it is in the best interests of the children that they reside with the father.
- [11] I reject this theory. Aside from the questionable conclusion that the way to deal with post-partum depression is to remove children from their mother rather than to obtain medical treatment for her, I doubt this opinion is admissible. There is no medical evidence in this case that the defendant was suffering post-partum depression. If there were any substance to this idea, it would have been open to the plaintiff to call the defendant's physician or attending obstetrician. He did not do so.
- [12] In her testimony, the defendant described the after effects of the difficult birth of her second child. She testified she suffered physically, and that she experienced what she called "baby blues". But she testified that within a matter of months she was over this hurdle, and that she has not had difficulty caring for the children since. I accept her testimony.
- [13] At the heart of the father's application to move the children to Whitehorse is his desire to embark upon a university program leading to a teaching degree. He says that it is in the best interests of the children that he become a teacher. This would provide him with a stable income and a holiday schedule consistent with that of the children as they progress through their school life.
- [14] There is also an economic advantage to the father pursuing his studies in Whitehorse. The evidence discloses tuition fees are less, and the program is a four year program rather than the five year program which he testified is generally the norm in British Columbia.

- [15] Finally there is the economic and support advantages resulting from his family living in Whitehorse. His parents have a large home well suited to their son and their two grandsons living with them. They are prepared to permit the plaintiff and the children to live with them while he pursues his university studies.
- [16] The question, then, is do the advantages of the father relocating to Whitehorse outweigh the advantages of the children continuing to have the maximum possible time with each of their parents?
- [17] Counsel for the father relies upon *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 134 D.L.R. (4th) 321, [1996] 5 W.W.R. 457, and the factors set out in that case in para. 49 and following.
- [18] Here, consistent with what is said in that case, the Court must inquire into what is in the best interests of the children having regard to all of the relevant circumstances. The Court must consider the relationship between the child and both the custodial and access parent, and be guided by the desirability of maximizing contact between the children and both parents.
- [19] As is noted in *Gordon* in para. 49, the custodial parent's reason for moving is taken into account only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child. Here, counsel for the father says the move is relevant to the father's ability to meet the needs of the children as it is designed to give him a teaching certificate which will enable him to embark upon a career that will provide security for the children.
- [20] I also take into account the disruption to the children consequent upon their removal from the community from which they have lived for the last few years.
- [21] The ultimate question is what is in the best interests of the children in all of the circumstances? The critical circumstance here is the potential to deny the children regular contact with their mother.
- [22] I conclude that it is not in the best interests of the children to deny them that parental contact. I agree it may be in the best interests of the plaintiff that he be permitted to pursue his education in the location where there are financial advantages and he has the support of his family. However, it is not the interest or rights of a parent which is the focus here.
- [23] The evidence discloses that the father could obtain a bachelor of education in the Lower Mainland, but that the cost would be somewhat higher. What is to be balanced here is the burden of extra costs to the father to obtain his teaching certificate against the benefit of the children continuing a close relationship with both parents rather than with one. I conclude the interests of the children in having maximum contact with both parents outweighs the advantages to the plaintiff in moving to Whitehorse.
- [24] I therefore dismiss the father's application for an order that he be permitted to move to Whitehorse with the children.

Custody and Guardianship

[25] As a result of the above, I expect that the parents will be living within reasonable proximity to one another, that is to say, they will both probably be living in the Fraser Valley. As I find both of them are competent parents, and as I note there has been some ability in the past to reach agreements with respect to the children, and finally because I see no significant difference in their attitudes towards parenting, I am satisfied that it is appropriate that there be an order of joint custody and joint guardianship.

Primary Residence

[26] Primary residence of the children has, since February, 2005, been with the father. The January 9, 2006 interim order of the Master confirmed that primary residence. However, given my finding that the plaintiff and the defendant are both competent loving parents, and having denied the plaintiff's application to move the children to Whitehorse, I conclude the children should reside one week with the plaintiff and in the alternate week with the defendant. I will leave it to the parties to agree upon which day is appropriate for the transfer.

Access

[27] Given the week on week off regime, an access order for day to day living is not necessary. However, I take into account the possibility that the father will decide that he will go to Whitehorse despite this decision. In order to avoid a further court appearance, I order in the alternative that should the father move to Whitehorse, the primary residence of the children will be with the mother. In that event, the children will spend one-half of the Christmas holidays with each parent, spring break with the plaintiff, and one-half of the school summer break with each parent.

[28] Regardless of whether the father remains in this area, I recognize that the work circumstances of the parents is likely to change, and it is also likely that one or both of their residences will change. This may necessitate a change in the children's living arrangements. I therefore order that the parents will have liberty to vary any aspect of these orders by consent without a further court appearance.

Division of Assets

[29] There are only two family assets. The first is a van purchased by the parties during the marriage. It was not a wise financial decision. It is now valued at some \$8,000.00 and apparently there is close to \$17,000.00 owing on it. The parties agree that it should be sold and the proceeds applied to the outstanding loan. I so order.

- [30] The matrimonial home was purchased by the parties in November, 2003 for \$119,000. The parents of the father provided \$17,000 to cover the down payment and the transfer costs. A mortgage was taken out in the amount of \$102,920.13 at 6.35% interest. According to the mother, the lender required a letter from the parents setting out that the \$17,000.00 was a loan. That letter is not in evidence.
- [31] The plaintiff's mother testified. Her evidence with respect to the \$17,000.00 is less than precise. She says the funds were provided as a loan and not as an investment. Nevertheless, she expects to share in the profit from the sale of the home. It is the submission of the father that the house should be sold and the proceeds divided equally among the four people whose names are on title as tenants-in-common: his mother and father, as well as himself and the defendant.
- [32] The documentary evidence supports this view. I am somewhat uncomfortable in it because it may give the parents of the plaintiff a windfall. I say this because if I accept the plaintiff's mother's evidence that the \$17,000.00 was not an investment, it seems that she and her husband should be repaid, not that they should make a profit.
- [33] Despite this concern, I accept the submission of counsel for the father that the documentary evidence supports the distribution of the proceeds from the sale of the matrimonial home in equal shares to the four parties on title. The house will be sold, the mortgage will be paid off, and the remainder will be divided equally among the four persons named on title.
- [34] I add that the outstanding debt on the van, following upon the application of the proceeds of its sale to that loan, should be paid in equal portions from the shares of the father and mother of these proceeds.

Child Maintenance

- [35] As the children will be with each parent 50% of the time, a child support order is not necessary in this case. The evidence discloses that at present there is not a significant disparity in the parents' incomes. Child support in shared custody situations is determined in accordance with s.9 of the Federal Child Support Guidelines, S.O.R./1997-175. I have considered the factors in ss. (a)-(c) of that provision, and have determined that no child support should be payable at this time. However, should the father decide to move to Whitehorse, he will pay the appropriate Federal Child Support Guidelines amount to the mother commencing on the first day of the month following his moving to Whitehorse.

Arrears

- [36] Since the January 9, 2006 interim order by the Master, the mother has been obligated to pay the father \$288.00 per month child support. She is in arrears \$1,440.00. The father seeks payment of these arrears.

- [37] The mother says that she was unable to pay these because, among other things, of the high access costs involved in her renting a car every other weekend. This came about because the van which was owned by the parties, which she used in the first period after separation, was taken back by the father and she lost its use.
- [38] The father, of course, in the period for which child support was payable had the use of that van. I note the evidence that the costs to the mother for car rental each month were approximately equal to the payment she was to make in child support. Despite the father having the use of the van in this period, the mother is responsible for half of the outstanding debt on the vehicle. To force the mother to pay arrears when I find she has borne exceedingly high access costs for the relevant months as a result of circumstances which benefited the father would, I conclude, be grossly unfair.
- [39] In the circumstances, the arrears are cancelled.

Costs

- [40] There is very little money to go around in the circumstances here. Any order with respect to costs would upset the balance I have attempted to achieve in these reasons. I conclude, therefore, that each party should bear his or her own costs.
- [41] Order accordingly.

"L.P. Williamson, J."

The Honourable Mr. Justice L.P. Williamson

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