
CANADA / JUDGMENT

S.J.Y. v. C.A.Y.

2007 BCSC 1108

COURT

Supreme Court of British Columbia

DECIDED

24 July 2007

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2007 BCSC 1108 S.J.Y. v. C.A.Y.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.J.Y. v. C.A.Y.,

2007 BCSC 1108

Date: 20070724

Docket: E1374

Registry: Chilliwack

Between:

S. J. Y.

Plaintiff

And

C. A. Y.

Defendant

Before: The Honourable Madam Justice Satanove

Reasons for Judgment

Counsel for the Plaintiff:

Deanna R. Klassen

Counsel for the Defendant:

Andrea Fisher-Fleming

Date and Place of Trial:

July 9, 10 and 11, 2007

Chilliwack, B.C.

- [1] This short marriage of seventeen months duration produced a child, B., born January 4, 1999. The plaintiff has three children of a prior marriage, only one of whom still resides with her. The defendant has a son of a prior marriage, D., who lives with his mother in Alberta and of whom the defendant has joint custody. The only issues before me concern B.'s custody, guardianship, access and maintenance. The plaintiff also seeks a divorce.

DIVORCE

- [2] The couple has been separated for seven years. I am satisfied there is no possibility of reconciliation. The plaintiff has been in a new relationship with Drew Miller, construction worker, since shortly after the separation. The defendant's reasons for opposing the divorce at this stage is that the plaintiff should show she intends to abide by any court orders before being allowed to divorce. This objection of the defendant to the decree of divorce is based on the plaintiff's unannounced move from Chilliwack to Williams Lake with Mr. Miller and B.
- [3] The plaintiff was required by interim court order to give ninety days advance notice of any change of residence of B. Unfortunately she did not do so. I cannot condone this breach by the plaintiff, but it was evident that the move was necessary and in the best interest of B. for the following reasons:
1. Mr. Miller who had been supporting the family financially since January 2002, was made redundant by his then employer in April 2006. He was able to find similar employment in Williams Lake;
 2. B.'s asthma was aggravated by the polluted air in the Fraser Valley and has improved significantly in the cleaner air of Williams Lake;
 3. B. suffers from hyperactivity and attention deficit hearing disorder, both of which are being addressed in the small private school which B. attends at Williams Lake;
 4. The plaintiff has extended family in Williams Lake;
 5. In the future, the defendant may be managing a mining claim not far from Williams Lake, in which case he could exercise access to B.
- [4] It is ironic that the defendant relies on the plaintiff's breach of a court order as an obstacle to her quest to create a new life for herself, because the defendant has been in breach of a court order requiring him to pay child support since the time of separation.
- [5] The decree of divorce is granted.

CUSTODY AND GUARDIANSHIP OF B.

- [6] There is no doubt in my mind that joint custody of B. is not a viable option. This couple has a history of violence including a no contact order against the defendant and allegations of physical abuse made by the defendant against the plaintiff. Although they have managed to communicate about B. to some extent through e-mails since 2005, there is such animosity exhibited by the defendant against the plaintiff it would not be appropriate to force the plaintiff to try and reach joint decisions with the defendant.
- [7] In my view, the extent of acrimony on both sides, but particularly emanating from the defendant, would not allow for a smooth joint guardianship arrangement either.
- [8] B. must be placed in the sole custody and guardianship of one of these parents and the evidence is overwhelmingly in favour of granting custody to the plaintiff. She has had de facto and interim custody of B. since the separation in 2000. The defendant does not seek sole custody for himself and does not seriously contest the plaintiff having sole custody, but the defendant does seek joint guardianship.
- [9] My reasons for placing B. in the sole permanent custody of the plaintiff, who shall also have sole guardianship, include the following:
1. The plaintiff has always been the at home parent and primary caregiver for B. B.'s primary residence has always been with the plaintiff.
 2. Since January 2002 the plaintiff has been in a stable relationship with Drew Miller, who supports the plaintiff's family and spends time with B. doing school work, fishing, camping and playing hockey. Mr. Miller struck me as an honest, kind man who was a positive influence on B.
 3. B. has serious medical problems including attention deficit hearing disorder, asthma which is triggered by exertion or environment, and allergies to many foods, dyes and pets. He requires medications and vigilance regarding what he eats. The plaintiff must have the power to make snap emergency decisions on her own.
 4. B. has learning disabilities which are being addressed in a small private school in Williams Lake. The plaintiff and Mr. Miller spend time doing school work with B. and are involved in school functions and activities. There was no evidence from the defendant of any attempt to assist or be involved in B.'s schooling. The plaintiff must be empowered to make appropriate decisions as to B.'s education on her own, if necessary.
 5. B. has a good relationship with brother Z. who is eight years older and lives with the family in Williams Lake. Older sister L. lives nearby with a new baby of her own.
 6. By contrast, the defendant has paid next to no child support despite court order, has been inconsistent in his access, has been unemployed since 2004, has a propensity toward playing with weapons and has demonstrated lack of judgment regarding B. on a number of occasions. It is obvious to me that the defendant could not be the custodial parent, but he loves his son and is entitled to as much access as is reasonably feasible.

ACCESS

- [10] The defendant submits that the access difficulties experienced by him were due to the plaintiff's lack of co-operation. The couple have a long history of access difficulties that it serves no purpose to reiterate. The defendant's conduct has caused the plaintiff to seek supervised access with no overnight access, but I do not think this is a reasonable solution. B. is now eight years old and able to self-monitor his allergies and asthma much better. I am not satisfied from the evidence that unsupervised or overnight access would lead to any risk to B.'s safety.
- [11] The plaintiff's unannounced move from Chilliwack to Williams Lake has created difficulties with regular daytime access. The defendant proposes that he have access for one month in the summer and seven days over alternating Christmases. He would arrange this to correspond with the similar access schedule he has with his son D. For Christmas, his intention is to travel with B. to Edmonton where he will stay with his mother and B. and D., allowing the boys time to spend with their uncle and cousins. The defendant also seeks telephone access once per week.
- [12] The defendant's mother testified that she brought B. out to visit the defendant every summer for one month and the visits always went well. She was on hand to assist the defendant and she would be willing to continue to do so with regard to both boys.
- [13] In my view, it could be a very positive experience for B. to have access to his father, grandmother and half brother along the line proposed by the defendant, and I so order. The defendant shall notify the plaintiff no later than March 31 of each year as to the date of summer access. The costs of such access and the Christmas access shall be borne equally between the parties.
- [14] Paragraphs 6, 7 and 8 of the order of Master Brine (as he then was) dated November 15, 2004 shall stay in effect. In addition, the defendant will sign whatever documents are necessary to allow the plaintiff to obtain a passport for B.

CHILD SUPPORT

- [15] The defendant's attitude towards paying child support reveals that he does not put the interest of B. before his own. He is in arrears of more than \$2,500, refuses to provide any financial information, lives rent free in a house owned by his father and on income received from family members. He spent a long time testifying about a motor vehicle accident in 2001 and the settlement that he is expecting, but appeared very cavalier about why he could not work today in the variety of jobs suggested by his independent work capacity evaluation. Given that the plaintiff is only seeking \$180 per month based on an imputed income of \$20,000 per annum, it seems unreasonable for the defendant to continue to refuse to pay this amount.

[16] I order judgment to the plaintiff in the amount of all arrears of child support to the date of this order, as calculated by Family Maintenance and Enforcement Protection, including interest. A judgment in this amount should allow the plaintiff to attach the ICBC settlement proceedings of the defendant by way of charging order or garnishing order after judgment. In addition, there will be an order that the defendant continue to pay \$180 per month child support.

CONCLUSION

[17] I have granted the plaintiff:

1. a divorce;
2. sole custody and guardianship of B.; and
3. judgment for all arrears of child support owing by the defendant to the date of this order plus pre-judgment interest;

[18] I have granted the defendant access to B. for one month each summer and seven days over alternating Christmases commencing Christmas 2007, and telephone access once per week. The cost of access is to be borne equally between the parties. The defendant is required to sign whatever documentation is required for the plaintiff to obtain a passport for B.

"The Honourable Madam Justice Satanove"

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