
CANADA / JUDGMENT

Sihota v. Sihota

2008 BCSC 499

COURT

Supreme Court of British Columbia

DECIDED

24 April 2008

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2008 BCSC 499 Sihota v. Sihota

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sihota v. Sihota,

2008 BCSC 499

Date: 20080424

Docket: E025192

Registry: New Westminster

Between:

Preetika Kaur Sihota

Plaintiff

And

Amarjeet Singh Sihota

Defendant

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the plaintiff:

I.G. Gibson

Counsel for defendant:

G.K. Tiwana

Date and Place of Trial/Hearing:

April 15, 2008

New Westminster, B.C.

- [1] The defendant applies for an order that he be granted reasonable access to the child of the marriage, Vikram, born August 15, 1998, in Surrey, British Columbia.
- [2] In conjunction with that order he seeks an order that the plaintiff be required to return the child to Surrey, British Columbia and be prohibited from removing him thereafter from the lower mainland, or changing his principal residence from the lower mainland, without the consent of the defendant or without further order of the court.
- [3] A specific order that is sought is that the plaintiff be prohibited from moving the child to India.
- [4] The authority for these applications is stated to be s. 16 of the Divorce Act, R.S.C. 1985 c. 3, and s. 35 of the Family Relations Act, R.S.B.C. 1996 c. 128.
- [5] The parties were married on March 30, 1997 and separated after eight years of marriage on November 21, 2005. They were divorced by desk order on January 30, 2007.
- [6] The divorce order grants custody and guardianship of the child to the plaintiff.
- [7] There is no provision in the divorce order giving the defendant any rights including access rights.
- [8] As the custody and guardianship of the child was awarded as part of the divorce order, it is the Divorce Act that takes precedence. Whether the Family Relations Act is also engaged is debatable.
- [9] Section 16 of the Divorce Act requires the court to take into consideration on custody and access applications only the best interests of the child as determined by a reference to the condition, means, needs and other circumstances of the child. Section 16(10) requires the court to give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child taking into consideration the willingness of the person seeking custody to facilitate such contact.
- [10] Section 35 of the Family Relations Act also deals with custody and access. Again it also requires a consideration of the best interests of the child.
- [11] The child is presently living in the state of New Jersey and has been since September 2006, according to the plaintiff's evidence. He was sent there by the plaintiff at that time to live with her sister and her sister's family. The plaintiff herself remains living in Surrey, British Columbia.

- [12] With the child living out of the jurisdiction of British Columbia the only sections of the Family Relations Act that could be engaged are ss. 44 and 47.
- [13] Section 44 allows the court to exercise jurisdiction if the child is habitually resident in British Columbia at the commencement of the application or is physically present in British Columbia at the commencement of the application and has a real and substantial connection with British Columbia.
- [14] In the absence of both those requirements s. 47 allows an interim order for access and can order a party to return the child to a place the court considers appropriate.
- [15] The plaintiff says she sent her son to live in New Jersey with her sister for financial reasons and also to distance him from the disputes between her and the defendant. The plaintiff says she only earns \$26,500 annually and is paying off debts incurred during the marriage and has received no child support whatsoever from the defendant.
- [16] The divorce order requires the defendant to pay child support of \$280 per month on a Guidelines income of \$30,000. The defendant says he has always been willing to pay this child support but the plaintiff has told him she does not want it. The plaintiff denies refusing this money.
- [17] The plaintiff proposes to send her son to a boarding school in India where her sister from New Jersey is also sending her own son of the same age. The plaintiff says that her son will be going to a good school in India and that her parents have agreed to pay for it. She says that if her son does not like the school he will be returned to New Jersey.
- [18] The plaintiff says she is quite amenable to giving the defendant access in India at her son's school. She says he visits India often and has family and business interests there so access should be quite available.
- [19] The plaintiff says that her son is quite enthusiastic about going to this school with his cousin in India while the defendant says that his son has told him he does not want to go to India but wants to return to Surrey, British Columbia.
- [20] It appears that the child has been back in Surrey, British Columbia since September 2006 because in August 2007 the defendant was charged with assaulting the plaintiff while he was exercising access to his son at the defendant's sister's place in Surrey, British Columbia. How long his son remained in Surrey after this incident before returning to New Jersey is unstated in the evidence.
- [21] The defendant plead guilty to the assault charge and received a suspended sentence and a nine month probation period on a number of conditions including a no contact order with respect to the plaintiff.

- [22] The plaintiff says that during the marriage the defendant was a heavy drinker and in fact was hospitalized for alcoholism. According to her evidence he was verbally and physically abusive to her during the marriage until finally she could not put up with it any longer. Following separation at a time when both her son and the defendant were in India, she says that the defendant kidnapped their son for a time but eventually was forced to return him. Thereafter she says the defendant has threatened her.
- [23] The defendant denies that he kidnapped his son in India and says that he had his son for about a month-and-one-half there by consent.
- [24] He says he is employed full time as a cabinetmaker making \$29,120 annually and that if the plaintiff cannot care for their son he is ready, willing and able to take full custody himself.
- [25] The defendant opposes his son moving to India to go to school as he says that he wants him to grow up in Canada with the benefits that Canada can provide.
- [26] The defendant says that he no longer drinks and that while he had a drinking problem in the past he attributes that to concerns about his marriage breakdown. He says that he has taken alcoholic counselling and he agrees to supervised access with his son if that is necessary.
- [27] He expresses love for his son and wants a relationship with him.
- [28] Contrary to the defendant's deposed evidence in his affidavit of February 25, 2008 that he does not drink and has turned every facet of his life completely around, the plaintiff deposes that on February 28th the defendant showed up at her place of work contrary to the restraining order and was drunk and seeking reconciliation with her.
- [29] In a subsequent affidavit of March 7, 2008 the defendant denies that he contacted the plaintiff or spoke to her on February 28, 2008.
- [30] An affidavit of a co-worker of the plaintiff supports her allegation that the defendant was at the plaintiff's place of work on February 28, 2008. In addition, the plaintiff says she recorded their conversation at her work that day on her cell phone and produces a transcript that indicates the defendant saying he wanted her back in his life and would do anything and he was not fighting for his son but was fighting for her because he cannot live without her.
- [31] The plaintiff alleges the defendant is only interested in the return of his son in an effort to get her to continue to reconcile with him and has even tried to enlist the support of the child in this effort. The defendant denies he has tried to enlist the support of his son. In fact he says he is not interested in reconciliation with the plaintiff.
- [32] The plaintiff alleges that the defendant has threatened in the past to kidnap and murder her. The defendant denies this.
- [33] The defendant alleges that at some point in the past the plaintiff threatened suicide. The plaintiff denies this.

Analysis

- [34] As matters now stand the plaintiff has the only guardianship and custody rights and has a right to have her son live in New Jersey or go to school in India.
- [35] The defendant does not apply for any guardianship rights. He does not apply for any custody rights as he knows it is premature for such an application on his behalf.
- [36] There is very little reliable information on the best interests of the child except for cross allegations of the parties in their affidavits. I do accept the plaintiff's evidence however, backed by her co-worker's affidavit and the plaintiff's cell phone recording as transcribed, that the defendant still has a drinking problem and was still seeking reconciliation as recently as February 28, 2008.
- [37] The child has been out of the lower mainland living in New Jersey for over one-and-one-half years now since September 2006. The defendant did not oppose sole custody and guardianship to the plaintiff and does not appear to have opposed his son's move to New Jersey before he was made aware of the intention of the plaintiff to have their son go to school in India.
- [38] I am not prepared to order access for the defendant in British Columbia and thereby require the plaintiff to bring the child back here. I am not satisfied that is in the best interests of the child at this time. Circumstances may change in the future however. The plaintiff is prepared to give the defendant access rights in India and arrangements for access can be made there. The defendant can also arrange for access when the child returns from India at the end of the school year. If the child does not go to India the defendant can arrange for access in New Jersey or British Columbia wherever the child happens to be.

"Truscott J."

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