
CANADA / JUDGMENT

von Doehren v. Binette

2012 BCSC 705

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Supreme Court of British Columbia

DECIDED

20 April 2012

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2012 BCSC 705 von Doehren v. Binette

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

von Doehren v. Binette,

2012 BCSC 705

Date: 20120420

Docket: E101852

Registry: Vancouver

Between:

Dwayne Udo Ernst von Doehren

Claimant

And:

Michelle Lynn Binette

Respondent

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

B.L. Gabriel

Counsel for the Respondent:

M.V. Weremchuk

Place and Date of Hearing:

Vancouver, B.C.

April 19, 2012

Place and Date of Judgment:

Vancouver, B.C.

April 20, 2012

- [1] THE COURT: The claimant, Dwayne Udo Ernst von Doehren, applies to vary the parenting time provisions of the interim consent order of Master Taylor pronounced in these proceedings on February 7, 2011. The respondent, Michelle Lynn Binette, has brought a cross-application for an order for interim sole custody of the parties' four-year-old child.
- [2] The claimant and the respondent are each 38 years old. They commenced a relationship in January 2007, which came to an end in April of 2010. The claimant and the respondent have never resided together. The parties have one child together, Jacob Jaden Udo Jean-Marc Binette von Doehren, born January 26, 2008, who is now four years old.
- [3] The claimant and the respondent have joint guardianship of Jacob. The respondent has the primary residence and care of Jacob and has been his primary caregiver since his birth.
- [4] Mr. von Doehren is a mill maintenance foreman employed by the North American Tungsten Corporation. He earns an annual income of \$95,000 and pays child support to the respondent in the Guidelines amount. Mr. von Doehren's employment requires him to work three weeks on at a mill located in Tungsten in the Northwest Territories. With three weeks off, he is able to return to the Lower Mainland where he lives in a two-bedroom condominium located in Burnaby. The claimant commenced employment in his current position in the Northwest Territories in October of 2010.
- [5] The respondent resides in Vancouver. She cares for a two-and-a-half-year-old girl. In addition, the respondent owns a business called Go Dance, which provides employment for her 17-year-old daughter, and also operates a dog rescue facility from her home. Ms. Binette's daughter and her mother reside with her and Jacob.
- [6] The claimant commenced this action by writ of summons and statement of claim issued on May 31, 2010. By his statement of claim, the plaintiff sought guardianship, joint custody, and reasonable access to Jacob. By her statement of defence and counterclaim filed June 23, 2010, the respondent sought orders for joint guardianship on terms that she provide the primary residence for Jacob, sole custody, with reasonable supervised access to the claimant, and child support.

- [7] At the judicial case conference held on September 21, 2010, Madam Justice Bruce pronounced an interim consent order providing that the claimant and the respondent would have joint guardianship of Jacob. That order provides that the respondent has the primary responsibility for the day-to-day care of Jacob. The respondent has the obligation to advise the claimant of any matters of a significant nature affecting Jacob, and to discuss with him any significant decisions which have to be made concerning the child, including significant decisions concerning his health, education, religious instruction, and general welfare.
- [8] The claimant has a reciprocal obligation to discuss those issues with the respondent. In the event that the parties cannot reach agreement with respect to any major decision, despite their best efforts, the respondent has the right to make such decisions. The respondent is not obliged to consult with the claimant before making emergency decisions relating to Jacob's health. The claimant has the right under s. 32 of the Family Relations Act, R.S.B.C. 1996, c. 128, to seek a review of any decision which he considers contrary to the best interests of Jacob.
- [9] The interim consent order of September 21, 2010, also provides that the child's primary residence shall be with the respondent.
- [10] The consent order of September 21, 2010, established a schedule for the claimant's afternoon and evening parenting time with Jacob during the weeks the claimant was not working.
- [11] Finally, paragraph 6 of the consent order of September 21, 2010, provides that during the weeks the claimant is working, the respondent will facilitate webcam communication between the claimant and the child at least twice a week.
- [12] At a second judicial case conference held on February 7, 2011, Master Taylor pronounced an interim consent order which varied the previous access schedule and provided as follows:
- During the weeks the Claimant is not working, the Claimant shall have parenting time with Jacob as follows:
- (a) Every Tuesday and Thursday from 1:00 p.m. to 6:00 p.m. at the Claimant's residence;
 - (b) Every Sunday from 11:00 a.m. to 6:30 p.m. at the Claimant's residence.
- [13] The claimant now seeks a variation that would provide him with overnight access during at least two out of the three weeks when he is in the Lower Mainland, from Friday noon to Monday morning. During the week the claimant does not have overnight access, he proposes that he have parenting time with Jacob on the present schedule of Tuesdays, Thursdays, and Sundays.
- [14] The claimant also applied for an order that during July and August of each year, the regular parenting schedule would be suspended and the claimant would have access for a two-week block during those months.

[15] Since Master Taylor made the order of February 7, 2011, Mr. von Doehren has requested overnight access which the respondent has refused. Ms. Binette opposes any variation of the existing access schedule. She maintains that it is not yet in Jacob's best interests to have overnight access with his father.

[16] At paragraph 19 of her affidavit sworn April 3, 2012, the respondent deposes that:

Jacob has shown signs of anxiety, such as nail biting, loss of sleep, [and] . . . temper tantrums . . . [that he] has struck his grandma and sister when his father is in town and they are spending time together. Sometimes he shows signs of regress in his speech and starts babbling like a baby instead of speaking more clearly, as he can do now. All these symptoms subside over the three weeks Dwayne is working out of town, and start again once Jacob and Dwayne are spending time together.

[17] Both parties agree that generally Jacob is a healthy and active four-year-old boy. However, he does have a history of gastroenteritis problems and requires speech therapy. The respondent provided a letter dated March 7, 2012, from her family physician, Dr. Salvino, which states:

On August 31, 2011, I met in my office with Jacob's estranged parents, Michelle and Dwayne regarding some of Jacob's behavioural issues. It appeared to me to be an amicable meeting in which I felt that they were describing symptoms consistent with Jacob's separation anxiety. Both parents were advised of the importance of calmness in voice tone and plenty of advanced warning regarding transition, for example, when it was time to leave one parent's home for the other.

In my capacity as a Family Physician for over twenty years I felt that in this situation forcing an overnight stay might further aggravate Jacob's anxiety. Furthermore, I would anticipate (but not predict with 100% accuracy) that children with separated parents and exhibiting separation anxiety symptoms can be expected to exhibit these symptoms up until the school age, at which time overnight stays would be more readily introduced.

[18] The respondent deposes that there have been times when Jacob has not wanted to go to his father's home. The claimant disputes this and says the child has expressed a desire to stay overnight with him. Mr. von Doehren also says that he has not observed the symptoms of anxious or aggressive behaviour described by Ms. Binette in her affidavits while Jacob has been in his care.

[19] The claimant submits that I should attach little weight to Dr. Salvino's letter, which contains no discussion of the symptoms upon which he based his diagnosis of separation anxiety, and no statement of his qualifications to diagnose a psychiatric condition.

[20] Because, as I will shortly explain, I have concluded that the claimant has not met the test for variation of an interim order, it is unnecessary for me to resolve the dispute between these parties as to whether Jacob suffers from separation anxiety and, if so, whether overnight parenting time with his father would aggravate his anxiety. It is sufficient to observe that there is some evidence from the respondent that Jacob does, on occasion, display aggressive

behaviour and symptoms of anxiety during the three-week blocks of time that his father spends in the Lower Mainland.

- [21] The general practitioner who treats Jacob and who has 20 years' experience as a family physician has diagnosed separation anxiety, although his letter does not set out the facts on which he bases his diagnosis. He suggests that Jacob may not yet be ready for overnight stays with his father. That evidence is disputed by the claimant and has not been subjected to cross-examination. This is an issue which will have to be addressed on the trial of these proceedings.
- [22] At trial, if the respondent seeks to rely on a medical opinion from Dr. Salvino or any other medical practitioner, it will be necessary for her to obtain and file a report that complies with the rules. The claimant will also have the opportunity to test Dr. Salvino's opinion by cross-examination.
- [23] The claimant applies to vary an interim consent order for access pursuant to s. 24 of the Family Relations Act. Section 24(1) provides:

When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

- (a) the health and emotional well being of the child including any special needs for care and treatment;
 - (b) if appropriate, the views of the child;
 - (c) the love, affection and similar ties that exist between the child and other persons;
 - (d) education and training for the child;
 - (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.
- [24] Section 9 of the Family Relations Act permits the court to make interim orders. Section 20 provides that the court may vary or rescind an order made under the Family Relations Act if circumstances have changed since the order was made or last varied.
- [25] The order Mr. von Doehren seeks to vary was made over a year ago. Neither party has set these proceedings down for trial. Counsel advised the court during the hearing that trial dates for a three-day trial are available in October of 2012.
- [26] The question of when interim orders should be varied in family law litigation was addressed by Madam Justice Martinson in *Hama v. Werbes* (1999), 66 B.C.L.R. (3d) 120. Her Ladyship said this beginning at paragraph 8 and continuing to paragraph 12:

- [8] The litigation process in this province is generally designed to resolve, at a trial, disputes between parties who are not otherwise able to resolve them. Family law disputes too often get bogged down on interim applications. Time and money that could be better used for other purposes, are spent dealing with them. Interim applications can also "add fuel to the fire" in acrimonious disputes. This can be particularly detrimental to any children who are involved in the dispute.
- [9] Day to day matters, such as who has the children when, and how living expenses will be paid, do need to be resolved on an interim basis.
- [10] Steps must also be taken to preserve the parties' legal interests until the trial. Various orders and injunctions are available for this purpose. In the family law context, s. 67 of the Family Relations Act is one remedy that serves this purpose.
- [11] These are, however, short term solutions, needed to provide a bridge between the filing of the claim and the trial.
- [12] If trial judges are not to get bogged down on interim applications, they certainly should not get bogged down on applications to vary interim orders. Therefore, interim orders, once made, should only be varied when there is a compelling change of circumstances, such that one or both parties would be seriously prejudiced by waiting until trial.
- [27] In *B.(D.T.) v. M.(T.J.)*, 2006 BCSC 1412, at paragraph 18, Mr. Justice Joyce applied the test of whether there had been a material change of circumstances in considering whether to vary an interim consent order made under the Family Relations Act.
- [28] Whether the test is framed as a compelling change of circumstances or a material change, in my view the claimant has failed to establish any change of circumstances since the interim consent order of February 7, 2011, that would warrant a variation of that interim order.
- [29] The claimant says that more than a year has elapsed since the order without him enjoying overnight access with his son. Mr. von Doehren wants to be involved in all aspects of the care of Jacob. I am satisfied that that is an entirely genuine and heartfelt view on his part. He says that he anticipated that subsequent to the consent order of February 7, 2011, the parties would have agreed on overnight access, but that that has not happened, despite his requests. He submits that the accumulation of time since February 7, 2011, without him having the opportunity to care for his son overnight, constitutes a compelling change of circumstances.
- [30] In *McLelland v. McLelland* (July 29, 1999), Nanaimo 07907 (B.C.S.C.) at paras. 27 and 28, the court held that the mere passage of time was insufficient in itself to constitute a material change of circumstances.

- [31] Here there has been no compelling change of circumstances. The claimant continues to work three weeks on in the Northwest Territories and to spend three weeks off in the Lower Mainland, as he did at the time of the order he seeks to vary. He continues to develop and strengthen his bond with his son through the parenting time he does spend with Jacob during the weeks he is not working.
- [32] As Madam Justice Martinson observed in *Hama v. Werbes* at paragraph 13:
- The remedy is to obtain an early and "final" resolution of the issues in dispute.
- [33] In my view, this matter should be set for trial without further delay. Setting a trial date will, of course, not preclude the parties from pursuing other means of resolution, including mediation or a further judicial settlement conference, should they so choose.
- [34] It is also my view that the dispute with respect to parenting time, and particularly the question of whether or not Jacob suffers from an anxiety condition which calls into question whether, at this stage, Mr. von Doehren should have overnight access, is one involving disputed facts, and one which will only be satisfactorily resolved, if the parties are unable to resolve it by agreement, through a trial.
- [35] Because the claimant has not shown any compelling change of circumstances, his application to vary the interim consent order of Master Taylor of February 7, 2011, is dismissed.
- [36] I turn now to the respondent's application for an interim order for sole custody of Jacob.
- [37] The respondent points out that she provides the primary residence for Jacob, and that she has had Jacob in her care for the majority of time since his birth. She submits that an interim order for sole custody would recognize and give force to the reality of Jacob's situation. Both parties agree that the test on an application of this nature is the best interests of the child, and of course s. 24, as I have already stated, mandates that the court consider the best interests of the child as the paramount consideration.
- [38] With respect to the health and emotional wellbeing of Jacob, the respondent submits that she is the one who takes Jacob to his medical appointments; that although Jacob is an active and normally healthy child, he does have certain problems, including gastroenteritis and a requirement for some speech therapy, that do require a degree of special attention; and that by virtue of the fact that she has had the care of Jacob since his birth, she is the one best positioned to exercise the requisite judgment and bring the necessary experience to bear to ensure that Jacob's medical and emotional needs are met.
- [39] For his part, the claimant says that he is equally committed to his son's well-being, and wants to participate in all aspects of his son's care. The claimant says he has some training in first aid and is capable of meeting his son's medical and emotional needs.

- [40] With respect to the love, affection, and other similar ties existing between Jacob and other persons, there are family ties on both sides of this relationship. Jacob clearly has a very close attachment to his mother, he is fond of his sister, and has regular contact with his maternal grandmother. At the same time, he is developing a growing bond with his father, and undoubtedly benefits from the contact he enjoys with his paternal grandparents, who he now sees on Sundays.
- [41] With respect to the capacity of each person to whom custody rights might be granted is concerned, in my view both the claimant and the respondent are equally devoted and equally capable of caring for and nurturing Jacob.
- [42] The respondent submits that at this time an interim order granting her sole custody is in Jacob's best interests, in that it would ensure that she, as the parent who has the child in her care for the majority of time, can deal with any issues relating to his health, his education or welfare, as and when they arise.
- [43] The respondent replies to that submission by pointing out that under the existing joint guardianship order Ms. Binette has the final say on all significant decisions relating to Jacob's health, education, religious upbringing, and general welfare. She is obliged to consult with the claimant before making those decisions, but in the event of disagreement, she retains the right to make the final decision. Of course, with respect to emergency medical decisions, she has the right to make those decisions without prior consultation.
- [44] The claimant also says that he does not wish to be left out of the decision-making process with respect to Jacob's education and wellbeing, and that there is really nothing that would prevent a joint custodial arrangement. Counsel for the claimant emphasizes that it is well-established in this province that there is no presumption that the status quo should be retained.
- [45] Finally, counsel for the complainant submits that the existing joint guardianship order has worked, that there are no insurmountable communication problems between these parties, and that if the court were to make an interim custody order, there is no sound reason why it ought not to be an interim order for joint custody.
- [46] In her reply submission, counsel for the respondent made a submission that the court ought not to make an order for joint custody when there was no application by the claimant for joint custody before the court. Her submission was that the court may only grant or dismiss her application for sole custody.
- [47] Section 35(1) of the Family Relations Act provides that, subject to Part 3, which deals with extra-provincial custody and access orders and has no application here:
- ... a court may, on application, order that one or more persons may exercise custody over a child or have access to the child.

- [48] In *Lukyn v Baynes*, 2008 BCSC 8, at paragraphs 56 to 59, Mr. Justice A.F. Wilson held that the court had no jurisdiction to award access to a person who had not received notice of the application or was not a party to the proceeding. His Lordship accepted the submissions of the successful party that the court could not grant access to a person who had not received notice of the proceeding or had made an application for access. Here, the claimant is of course a party to this proceeding. He has received notice of the respondent's application, and furthermore, in his statement of claim he has made a claim for an order for joint custody.
- [49] In these circumstances, the court has the authority under s. 35(1) of the Family Relations Act to make an order awarding joint custody, if it is persuaded that that order is in the best interests of the child. The court may also decline to make an interim order for custody where that order is unnecessary.
- [50] At present, there is an interim order for joint guardianship in place. The parties have parented Jacob under the terms of that order since September of 2010. That order, as we have seen, also provides that the child's primary residence is with the respondent, and that the respondent has primary responsibility for the day-to-day care of Jacob.
- [51] I am not persuaded that it is in Jacob's best interests to make an interim order for sole custody now, or indeed for joint custody now, that may be varied when the court makes a final order after trial.
- [52] Under the current order, the parties must consult with each other respecting significant decisions. If they are unable to agree, the respondent has the right to make the final decision.
- [53] Jacob is not yet attending school. There is no pressing dispute which would call for decisions to be made about his choice of school or the nature of his education. There is no suggestion that either parent wishes to move with him, either to another location within British Columbia or out of province. The present interim guardianship order serves his best interests by providing for both parents to have an input on significant decisions affecting his welfare, while enabling the parent who has his primary day-to-day care to make final decisions where agreement is not possible.
- [54] Accordingly, the application for the interim order for sole custody is dismissed. Custody, whether sole or joint, should be resolved by setting this action down for trial.
- [55] In the result, both applications are dismissed. Each party will bear their own costs.

"PEARLMAN J."

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