CANADA / JUDGMENT

Waugh v. Waugh

2015 BCSC 688

COURT
Supreme Court of British Columbia

DECIDED
29 April 2015

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2015 BCSC 688 Waugh v. Waugh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Waugh v. Waugh,

2015 BCSC 688

Date: 20150429

Docket: E112518

Registry: Vancouver

Between:

Alfred Victor Waugh

Claimant

And

Amanda Lee Waugh

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Claimant:

B.J. Ingram

Self-represented litigant

A.L. Waugh

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 2, 2015

Place and Date of Judgment:

Vancouver, B.C.

April 29, 2015

[1] The claimant and the respondent are the divorced parents of six-year-old twin sons. A previous order of this Court provides that the boys are to live nine months of the year with their mother, the respondent, in the state of New York, USA, and three months with their father, the claimant, in Vancouver, BC.

[2] The claimant now applies to reverse those residence arrangements. The respondent, who now lives in New Jersey, has stated she wants to give up custody of the children, but has not co-operated with efforts to facilitate that change.

[3] The respondent was given notice of this application and, on March 24, 2015, Groves J. adjourned the hearing for nine days and gave the respondent leave to attend by telephone. He also gave her leave to deliver unfiled affidavits by email to the claimant's counsel. Supreme Court scheduling sent a copy of Groves J.'s order to the respondent by email and a reply email from her indicates that she received it.

[4] However, the respondent provided no affidavits. On the day of the hearing, repeated calls from the courtroom to the telephone number provided simply went to voicemail. As reluctant as I normally am to hear applications of this kind in the absence of a party, I was satisfied the respondent was aware of the hearing and was given every opportunity to provide evidence and address the court in the most convenient and economical way possible.

[5] The parties were married in November 2004 and separated in July 2011. Prior to separation, the family home had been in Vancouver. On August 23, 2011, Burnyeat J. ordered the return of the children to BC by August 31, 2011. The respondent returned to BC with the children on September 5, 2011.

[6] On February 6, 2012, the first day of a trial before Kloegman J., the parties consented to a final order dealing with custody and guardianship, child and spousal support and division of family assets. Claims for divorce were adjourned to allow for expiry of the one-year period of separation required by s. 8(2) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp,) . A divorce order was pronounced on December 17, 2013.

[7] The February 6, 2012 consent order gave the parties joint custody and joint guardianship of the children, with the respondent having care and control of the children for nine months of the year in New York and the claimant having care and control for three months in Vancouver. Each parent was required, when he or she had the children, to facilitate their contact with the other parent by telephone or Skype at least once a week.

[8] The order also stated that the parties would attorn to the exclusive jurisdiction of this court in matters regarding the children for a 12-month period ending January 31, 2013. A later order extended that exclusive jurisdiction to November 1, 2013 and a further order extended it to July 1, 2014. The parties were required to apply to the court in New York for an order in identical terms regarding custody, guardianship and care and control of the children. That order was made by the Family Court of the State of New York, in and for the County of Rockland, on August 19, 2012.

[9] In June 2013, the respondent applied to the New York court for a variation of the custody order. The court ruled on September 13, 2013 that it did not have jurisdiction, stating:

Even if there was no order from Canada expressly extending its exclusive continuing jurisdiction, this Court would be unable to entertain a custody action until the Canadian Court specifically stated that it no longer had exclusive continuing jurisdiction, or that New York was the more convenient forum.

No such order has been made by this Court.

[10] The respondent has provided evidence of previous failures by the respondent to return the children to Vancouver for times they are to spend with him and repeated failures to make the children available for telephone or Skype contact.

[11] From time to time since at least January 2013, the respondent has demanded that the claimant travel to New York or New Jersey to get the children and take custody, but has refused to document an agreed change. For example, on November 24, 2014, she said in an email to the claimant:

Take your sons, I never want to deal with them or you again-Ever.

[12] The respondent replied that if she was serious about relinquishing custody, a court order would be required. The respondent then emailed a number of individuals including the claimant's counsel and his assistant, her own former BC counsel and a friend of the claimant, saying:

Alfred is unwilling to collect his sons and apply for sole custody. I ask any of you, if you have any redeeming quality whatsoever to encourage Alfred to act and file through BC Courts.

[13] Claimant's counsel told the respondent that he was prepared to assist his client in drafting an affidavit and consent order, but was unwilling to do that work if she was going to change her mind. He suggested that she and the claimant exchange emails to reach agreement on the terms of a new custody order. The respondent replied:

I don't give a damn about your suggestions. Confirm when you will have affidavit & consent order for me to sign.

[14] On November 30, 2014, the claimant sent the respondent a draft affidavit reversing the children's living arrangements. The respondent replied:

Nope. Their (sic) solely yours FOREVER. No visitation/contact with me of any kind with me. It will be as if I dropped dead. Nice try though with such a BS affidavit.

[15] On February 1, 2015, the respondent sent an email to the claimant saying:

I'm unable to care for boys. You have one week to get your sons and return to Canada with them.

[16] On February 6, 2015, the claimant received an email from the New Jersey Division of Child Protection, stating that the Division had entered into a Safety Protection Plan under which the respondent was restrained from having unsupervised conduct with the children. He was subsequently advised that all restraints were lifted on March 2, 2015 "after implementation of intensive in home services."

[17] In her emails to the claimant, the respondent has frequently used insulting language, including derogatory and racist references to the claimant's First Nations ancestry. More disturbing, she appears to have encouraged similar attitudes in their sons. Voice messages left for the Claimant by the children were played in Court. The children can be heard making statements such as "f--- you daddy" and referring to the Claimant as a "scumbag Indian."

[18] While an angry older child or teenager may spontaneously use such language to a parent, I cannot imagine a six-year-old doing so without encouragement and instruction from the other parent.

[19] Although the respondent has stated, perhaps in anger, that she wants nothing more to do with the children, the claimant has not pursued the application for sole custody set out in his notice of application. Instead, he asked only for a variation of the 2012 consent order to provide that the children live nine months a year with him in Vancouver and three months a year with the respondent. The plaintiff recognizes that the he may need to seek assistance of the court in New Jersey.

[20] The consent order did not specify whether the orders relating to the children were made under the Divorce Act or the Family Relations Act, R.S.B.C. 1996, c.128, as repealed by Family Law Act, S.B.C. 2011, c. 25, s. 259 but because a divorce was subsequently pronounced, it must be treated as a final order under the Divorce Act: Yu v. Jordan, 2012 BCCA 367 at paras. 47-57; D.A. v. S.A., 2014 BCSC 1769 at para. 3. Therefore, s. 17(5) of the

Divorce Act applies and the order can only be varied if there has been a change "in the condition, means, needs or other circumstances" of the children and the change is in their best interests.

[21] I am satisfied those requirements are met in this case because there is strong evidence of parental alienation in the children's communication with their father and because the respondent has stated an unwillingness or inability to care for the children.

[22] The order of Kloegman J. pronounced February 6, 2012 is therefore varied so the introductory portion of paragraph 1 will now read:

The claimant and respondent will share joint custody and joint guardianship of the children of the marriage with respondent to have children in her care and control in New York, USA for 3 months of each calendar year and the claimant shall have the children in his care and control in Vancouver, Canada for 9 months of each calendar year on the following terms:

Consequential amendments will be made to the time periods referred to in subparagraphs 1 (d) (e) and (f).

[23] Paragraph 2 of the order is amended to read:

The respondent shall have her three months of care and control per calendar year as follows:

a) 3 one month periods per year being the two months and July and August and the month of December

and the claimant shall have care and control of the children the balance of the calendar year except that the respondent shall be entitled to up to 3, 3 day long weekends per year with the children in Vancouver, upon one full month's notice.

[24] Because the respondent did not attend this hearing, she has the right to apply under R. 10-3(3) of the Supreme Court Family Rules, B.C. Reg. 169/2009 for reconsideration of this order, but will be required to satisfy the court on that application that her failure to attend was not the result of wilful delay or default. Should she choose to bring such an application, she must file and serve a proper notice of motion and affidavits, but will have leave to speak to the matter by telephone if she provides a telephone number at which she can be contacted at the time set for hearing her application.

"N. Smith, J."

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