

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20030314
Docket: E000580
Registry: Vancouver

Between:

S. J. S.

Plaintiff

And

K. A. S.

Defendant

Before: The Honourable Madam Justice Martinson

Oral Reasons for Judgment

March 14, 2003

Counsel for the Plaintiff

C. Linde

Counsel for the Defendant

D. Batist

Place of Trial/Hearing:

Vancouver, B.C.

INTRODUCTION

[1] This case is about the future of two boys, one who is 8, and the other who is 6.

[2] Their parents have been separated since the fall of 1997, and were divorced some time ago.

[3] Once they decided to separate, they resided together in the family home for a period of time and negotiated a separation agreement that included custodial arrangements. They reached a property settlement, and, as part of that settlement, the mother assumed ownership of the family home.

[4] The father had the children every second weekend from Friday until Sunday at 8:00 p.m.; and every Tuesday and Thursday from 5:30 to 8:00 p.m. At a later point, and at the suggestion of the mother, the father kept the children overnight on Thursday evenings. The parents have shared holidays and birthdays in a manner that has worked out reasonably well.

[5] They communicate often, mostly by email.

[6] This is a situation in which both parents love their children, both know that the children love each of them, and both want very much to do what is in the boys' best interests.

[7] The parents are before the court now because of negative behaviour that both children have exhibited over a long period of time at school, daycare, their mother's home, and sometimes at their father's home. The parents disagree about the extent of the problem, its cause, and what should be done about it.

[8] The mother proposes a sole custody regime in which the children would reside with her and see their father every second weekend. He would have them for a month in the summer (with access to her in the middle weekend). They would share other holidays and special occasions.

[9] The father asks for joint custody. He proposes week on week off as one option, but says there are other options.

[10] The court directed that a custody and access report be prepared. The mother did not think that such a report was necessary, but did not oppose it. The parties agreed that the investigation be conducted by Dr. K. The mother did not want the children to be involved. Initially, Dr. K. thought he would not have to involve them, but later decided he should see them.

[11] Dr. K. did not make a specific recommendation in the report. He, however, leaned towards a shared parenting arrangement with a relatively equal sharing of time.

[12] At the trial, the father testified on his own behalf and called as witnesses his mother and two parents with whom he and the boys have had contact. The mother testified on her own behalf and called as witnesses two people from the children's daycare, as well as her present partner, Mr. R.

[13] With the encouragement of the court, Dr. K. attended the trial and was cross-examined by both parties.

OUTLINE

[14] I am going to give my judgment in the following manner.

[15] First, I will summarize the reasons why each parent thinks that his or her plan will be in the best interests of the children. I will then summarize the legal principles that I am required to apply in reaching my decision.

[16] Finally, I will give my conclusion and the reasons for it.

THE MOTHER'S ARGUMENTS

[17] I turn first to the mother's arguments.

[18] The mother believes that, over the past five years, the children have been exhibiting a pattern of misbehaviour after weekends and other extended time spent with their father that

has negatively impacted their lives at her home, at school, and at daycare. She wants to provide them with the structure and consistency that they require. She does not want them to be "ping-ponged" back and forth from one parent to the other.

[19] The negative behaviour has included, from her perspective, very significant acting out at school and daycare, including hitting other kids, mooning, and generally being extremely disruptive. The behaviour has been reported by teachers, other parents, and the principal.

[20] When she has them at home after a visit with their father, the children are very hyper. She testified that they are very moody and negative, in the sense that they say they cannot do something that she knows they can do. They are often very tired. If she says they cannot do something, like go to a friend's house, there is a temper tantrum. The children are not supportive of each other. They tend to jump on each other and playfight in a way that goes too far. They throw things and bang on the walls. There are problems at mealtimes, as they often speak with their mouth full, laugh and spit food. They also will not stay at the table, but get up and run around during a meal. Swearing has also been a problem. She agreed that some of the behaviour, like the oldest child's kicking, was done out of frustration.

[21] It can, she says, take well into the following week, and sometimes into her weekend, before they calm down. Then the process starts all over again.

[22] She says that the evidence as a whole suggests that there has been, and continues to be, significant behavioural problems that must be addressed. She notes that there are constant references in the emails to the children's behaviour. An example is the references to good weeks and bad weeks.

[23] She says that the transition problems have been long lasting. For example, in 1998, a caregiver asked the father to phone before he picked the children up because of their hyper behaviour. There were significant problems with the transfer at her home until March 2002, when she took the initiative and stopped the father from coming into her home. She says that all of this behaviour is serious and goes beyond what one might expect with young boys. She says that it "goes over the line."

[24] As another example, she notes how the youngest child was smacking his dad at a birthday party with a big rubber ball.

[25] The mother is convinced that the cause of the problem is that the children are at their father's home too often. She said, "I don't need a section 15 report to tell me what is

causing this behaviour." She acknowledges that she has made parenting mistakes.

[26] She says that the father has not acknowledged this pattern, in spite of her many efforts to explain it to him. He views her conclusions as being without merit. She says that he responds in a defensive way and minimizes the behavioural concerns. He is sometimes rude. They cannot agree on the best way to resolve the children's behavioural problems. Their parenting styles are very different. As she puts it, when you cannot agree on the problem, it is hard to agree on a solution.

[27] She submits that the evidence relating to the oldest child's field trip in January 2002 is significant in this respect. A daycare worker testified that the behaviour was of considerable concern. She reported it to both parents. The father minimized what was said. He also refused to speak to her about it as the mother suggested. The mother says that this does not bode well for future cooperation.

[28] The mother emphasizes that she has been trying to resolve the problem for the past five years, but sees no signs that they will be able to resolve it. She says efforts at resolution break down despite her best efforts. She points to numerous examples in the emails. She argues that the email

correspondence relating to videos the boys watch at the father's home show that the father's response is defensive and not child focused.

[29] She says that her philosophy with respect to discipline is that one has to be fair, has to have clear expectations, and then accept consequences if those expectations are not met. She took the parenting step program, and that influenced her thinking. She thinks that parenting is all about helping children to become independent and confident members of society.

[30] The mother acknowledges that the children are "clearly bonded with both parents and have forged a strong relationship with both." She says, however, that she has almost always been the one who does the day to day things like making medical appointments and making sure that everything that has to be done for school, daycare, and their extracurricular activities gets done. They count on her for this. She submits that she provides stability and consistency, and that this is what the boys need.

[31] The mother agrees that there have been improvements in the children's behaviour at daycare. She says that this is because of the consistent and stricter disciplinary approach taken at daycare. That approach, she says, is much more

consistent with her parenting style than that of the father. As she puts it, "it worked at daycare and it will work at home." She therefore argues that the improvements in behaviour really support her view that she can, and should, provide the same kind of consistency at home.

[32] She disagrees with the suggestion that the father will become a "weekend" dad. As noted, she says a strong bond has been formed (e.g., they view his residence as a home) and that this relationship will not change just because the amount of time spent with the father is reduced.

[33] The mother emphasizes that it is not her intention to eliminate the father from the children's lives. As she puts it, she is motivated by what she deems to be in the children's best interests. She notes that, in the past, she has encouraged more time with their father. Her plan, she says, will allow her to effectively parent the children. That is, the children will benefit more by her plan, even though it has the effect of reducing their time with their father. She said that it has to do with relationships and the boys know they can come to her and she will take care of things.

[34] She also says that her proposal is consistent with the role she played with the children up to the time of separation. She says she did the day to day things like

organizing appointments, making sure school projects were done, and trimming their toe nails. She said that they were not equal parents, and should not be, because addressing behavioural issues and discipline is a big part of parenting, and she is willing to do that and he is not.

[35] The mother does, however, have some concerns about the father's motivations. She points to evidence that shows he wanted a particular shared parenting arrangement so that he would not have to pay child support. That plan would have resulted in them spending less time with her and more time in daycare. She also says that he agreed to her proposal on the eve of an interim application, but then withdrew his agreement.

[36] The mother says that Dr. K.'s report is not of much assistance to the court, as he did not really consider the behavioural issues in making his suggestions. He also seemed to base his suggestions on the assumption that this was a new separation, and that things would settle down once the court proceedings ended.

[37] She says that, because of the children's age, little weight should be placed on evidence that the boys told Dr. K. that they want to spend more time with their father. She submits that responses are situational, as Mr. R. gave

evidence that on one occasion, one of the children did not want to leave Whistler to go with his father. She says that this view is supported by Dr. K.

[38] The mother says that if there is to be a joint parenting regime, she prefers the week on week off alternative.

[39] She told the court that she would be willing to attend counselling to assist them in taking a more consistent parenting approach.

THE FATHER'S ARGUMENTS

[40] The father says he has played a very important role in the boys' lives, and he wants to continue to do so. He does not want to become a "weekend" dad. That is, he thinks it is in their best interests that he share in their day to day lives. This involves sharing their ups and downs. It involves having the regular chance to tuck them into bed. He is adamantly of the view that the strong bond that he has developed would weaken if he only sees the boys in any meaningful way every second weekend.

[41] He agrees that there are some behavioural issues that should be addressed. He acknowledges that when the school, and, in fact, the principal, is involved, it is a matter of some concern. But, he says that there has never been any

suggestion that either boy ever wilfully tried to hurt anyone. In fact, he has heard the opposite from parents and teachers.

[42] He agrees that he has a somewhat different parenting style than the mother. He sees that the children need consequences to steer them in the right direction. However, he focuses more on rewarding positive behaviour than punishing negative behaviour. He says it is an appropriate style and one that is supported by Dr. K. He says it is important that the children are exposed to different parenting styles. He submits they also need the influence of a father, as well as a mother.

[43] He sees the mother's style as being much more rigid, as she is quicker to enact consequences, and the consequences are more severe.

[44] While he agrees that there have been behavioural issues with the boys, he does not agree that they are so significant that they impact negatively on the children's lives. He emphasizes that there is no evidence that his parenting style negatively impacts the boys' lives, or that the children's behaviour negatively impacts their lives.

[45] He says that he does not minimize the children's behaviour, but instead investigates and applies consequences

that he thinks are appropriate. He says that Dr. K. has testified that his is an appropriate parenting approach.

[46] He does say, though, that he has benefited from listening to the evidence presented at trial, and sees the importance of making a greater effort at consistency of parenting approach. He also would like to go to counselling to assist in dealing with the boys' behavioural issues.

[47] The father says that the mother has been unable to look inward and is unreasonably convinced that any behavioural problems are caused because of the time the children spend with him. Then she thinks he acts unreasonably when he is not prepared to acknowledge that he is the cause and that the solution is that he spend less time with the children.

[48] He says that this is best demonstrated by the fact that, some time ago, he gave her Barbara Coloroso's famous parenting book, "Kids are Worth It", yet her evidence was that she had not read it. She did not even think of doing so until someone told her that the book contained something that went against an argument advanced by the father.

[49] He says that there are many explanations as to why the children act out at her home or at school. He says that Dr. K. supports that conclusion. It may, for example, be that

they are acting out, at her home, against her much more strict parenting style.

[50] He emphasizes that the boys say they want to spend more time with him, not less. He notes that Dr. K. also says that both boys told him they wanted to spend more time with their father.

[51] With respect to issues of communication, he says that, overall, they have done a good job of communicating and can continue to do so. He submits that this would be in the best interests of the children. Further, he says he can, and will, improve his communication style as a result of what he has learned during the course of these proceedings.

[52] In cross-examination, the mother was asked what she and the father could do to help the boys if a shared custody regime existed. She said they could talk about consistency of consequences, consistency of manners at meals, expectations with respect to homework, quality of reading materials, and expectations with respect to attitude. He says that her responses show that they could cooperate.

[53] He denies that he is motivated by child support. He says that he wanted to get a house closer to where she lives, as

that would be best for the boys, but that he could not afford to so if he were also paying child support.

[54] The father relies heavily on the s. 15 report and the resulting evidence by Dr. K. at trial, which the father says supports his application for joint custody and shared parenting time.

LEGAL PRINCIPLES

[55] I turn next to the legal principles that apply.

[56] The law is clear in saying that I must make my decision based on the best interests of each boy. Best interests, of course, include many factors, some of which are these: the health and emotional well-being of the children; if appropriate, the views of the children; the love, affection, and similar ties that exist between the children and other persons; education and training for the children; and the capacity of each person to whom guardianship, custody or access rights and duties may be granted, to exercise those rights and duties adequately.

[57] In making my decisions about whether there should be joint custody or whether one or other of their parents should have custody, I am required to apply the law as set by Parliament in the *Divorce Act* and the legal principles that

courts, especially the British Columbia Court of Appeal and the Supreme Court of Canada, have set out.

[58] Section 16 is the part of the *Divorce Act* that deals with custody orders. It gives a judge of the Supreme Court the right to make custody and access orders in a divorce case. It tells me that in making an order, I shall take into consideration only the best interests of the boys as determined by reference to their conditions, means, needs, and other circumstances: s.16(8).

[59] Section 16 tells me that I shall give effect to the principle that they should have as much contact with each of their parents as is consistent with their best interests and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact: s.16(10). This section also tells me that I shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child: s.16(9).

[60] For a long time, there was a debate among judges about when joint custody should be granted and when sole custody should be granted. Some thought that it is in the best interests of the children to have only one parent make the decisions, even though the other has generous access. Some

judges thought that joint custody should only be granted when both parents agree to it.

[61] Others thought that joint custody should be granted even if there was no agreement, as it is in the best interests of the children to cooperate. Some thought there should be a presumption that parents continue to have joint custody after they separate, like they had before they separated, unless it can be shown why there should not be joint custody.

[62] Both the British Columbia Court of Appeal and the Supreme Court of Canada have now provided direction to trial judges in this respect. The Court of Appeal, in *Robinson v. Filyk* (1996), 84 BCAC 290 followed an earlier decision of the Supreme Court of Canada called *Gordon v. Goertz*, [1996] 2 S.C.R. 27. These courts have said that there should be no starting presumption or point of view by judges about what is best for children. What a judge must be concerned about is what arrangement is best for the particular child before the court, given that child's situation and that of the child's parents.

[63] In *Gordon v. Goertz*, the Supreme Court of Canada said (at para. 38) that Parliament did not entrust the court with the best interests of most children; it entrusted the court with

the best interests of the particular child whose custody arrangement fell to be determined.

[64] In *Robinson v. Filyk*, at para. 29, the Court of Appeal said that the only issue is the child's best interests. The child's best interests must be found within the practical context of the reality of the parents' lives and circumstances. The Court said that legal and factual presumptions about what is best for children, like the ones I have referred to above, have no place in an enquiry into the best interests of a child. They detract from the "individual justice to which every child is entitled" (at p. 22).

[65] The British Columbia Court of Appeal has upheld a decision of a trial judge who gave joint custody to parents, even when evidence was that the parents were unable to cooperate and a psychologist believed that joint custody was unworkable, having regard to the history of the relationship between the parties and certain past conduct of the mother: *Carr v. Carr*, 2001 BCCA 415.

DISCUSSION

[66] This is a difficult case. Both parents are concerned and loving parents. They are both bright, well-educated, and have much to offer to their sons.

[67] I am going to start by addressing the question of motive. Each has raised questions about the motive of the other.

[68] The mother is without doubt motivated by what is in the best interests of the children. This is demonstrated by the fact that over the past five years, she has encouraged significant involvement of the father in the boys' lives. She has worked hard to try to solve the problems that have arisen.

[69] This is definitely not a case where the mother is trying to exclude the father so that she and the children can get on with a new life with her new partner. Rather, she is in court now because she genuinely believes that there is a serious problem that must be addressed.

[70] I do not agree with the father that she has ever been motivated by self-interest. The father, for example, suggests that it was somehow inappropriate for the mother to not want the children back on a Friday night after a holiday, instead of the planned upon Saturday. This criticism was unfair to her.

[71] At the same time, I do not agree with the mother that the father is motivated by child support. Looking at the evidence as a whole, I conclude that his motive was to obtain a more suitable accommodation closer to the school and her home for

the benefit of the boys. He felt he was unable to do this and still pay child support. He was, however, misguided in suggesting that in order to do this, the children should spend more time in daycare.

[72] As I see it, the court is faced with the following situation:

[73] There are two capable, loving parents who, over several years, have worked in what has, in effect, been a shared parenting arrangement. Without the behavioural issues with the children and concerns with the way they have been handled, that shared parenting arrangement would, and should, continue. But, there is negative behaviour by the children that has to be modified.

[74] The focus of the court's analysis must be on the causes of the negative behaviour, the nature of the behaviour, and the kind of solution that will be in the children's best interests.

[75] I turn first to the very important question of what is causing the behaviour. I accept the evidence of the mother that the boys have behaved in the way she describes. I accept that she has consistently had more problems after the children spent time with their father. However, it is not at all

obvious that there is a causal link between the fact that they spend time with their father and the fact that they act out when they are at their mother's, or at school, or daycare.

[76] The mother has been too quick to point the finger at the father. She has not been prepared to explore other explanations. She told the court she did not need a s. 15 report to tell her what is causing their behaviour.

[77] In my view, the behavioural issues are quite complex and there are other explanations that are at least as credible as the one she has seized upon.

[78] I find support for my conclusion in the evidence of Dr. K. He said that if it is true that there is a pattern of increased acting out, there would have to be a determination as to why that is happening. That, he testified, is not a simple matter and one would have to consider all of the dynamics that are at play. They could be rebelling against the mother's more rigid rules. It is possible that something that is going on in the mother's home could be causing the behaviour.

[79] He emphasized that it is difficult to say what factors are influencing the children's bad behaviour. He said that one explanation could be that the mother tends to bring

negative consequences to negative behaviour, while the father's approach is to reward positive behaviour. He said that it was interesting that the oldest child said he behaved better with dad, and had conflict with mom, because there were more rules at mom's home.

[80] I note that there is no other expert evidence suggesting that the behaviour is caused by the children spending too much time with their father.

[81] Nor does the evidence of the daycare workers support the conclusion that there is a causal link. It is true that the evidence of one of the daycare workers does suggest that, at times, misbehaviour more often follow times that the children are with their father. However, that is not evidence that the behaviour is caused by them spending time with their father.

[82] However, even though I have concluded that causation has not been proven, that is not the end of the matter. There are still behavioural issues that have to be addressed, no matter the cause.

[83] It is necessary to examine the extent of the misbehaviour before a suitable solution can be reached. I turn to that issue now. Both children are high energy, active children. They can be hard to control. I have already concluded that

they have exhibited inappropriate behaviour at school, daycare, and, primarily, in their mother's home. The behaviour, at least in the past, was pronounced at transitions, whether it was when the father drops them at their mother's home, or when he picks them up at daycare.

[84] This transition problem is improving. The home drop off behaviour has improved since the mother asked the father not to come into the house. Further, the evidence presented by the daycare workers shows that transition problems are less significant at daycare than they have been in the past.

[85] I also conclude that the father has, from time to time, minimized the negative behaviour of each of the boys. The oldest child's field trip provides a good example of this.

[86] The children have exhibited behaviour that needs to be modified. At the same time, there is no evidence that their behaviour is clinically significant. By that, I mean that there is no evidence to show that there are deep-seated problems that require professional intervention.

[87] While the mother says that a teacher raised significant concerns with her, I did not hear from that teacher. The report card prepared by the teacher does not indicate serious

concerns. I would expect that if there were really serious concerns, it would be indicated.

[88] There is, in fact, no professional evidence to show that this is the kind of behaviour that requires professional intervention.

[89] It is true that Dr. K. did not really focus on the behavioural issues raised by the mother, and I have kept that in mind in assessing the report and his evidence. However, he was advised during his evidence of the concerns of the mother and was not deterred in his opinion that shared parenting offered advantages to these children.

[90] Having discussed the nature and extent of the children's misbehaviour, I now turn to the question of solutions.

[91] I am unable to agree with the mother that her proposed solution will obviously solve the problem. There is no professional evidence, or for that matter any evidence, to show that it will. It could just as easily make the problem worse.

[92] A significant factor in this case is that both boys have developed a strong bond with their father over the last five years. They view his home as their home. I cannot agree with the mother that, because the bond exists, it will remain at

its present form. It has developed because he has had the opportunity to really share his home with them and to participate in all aspects of their lives.

[93] It would take very compelling circumstances indeed before the court would deny to the children the benefit of their father's contributions.

[94] Dr. K. was effectively cross-examined by counsel for the mother on the question of consistency in approach to discipline. His ultimate conclusion was that there must be some consistency in the way that issues of discipline and behaviour are addressed and values expressed. Otherwise, it causes confusion for the children. I agree with that conclusion.

[95] In my view, the only compelling circumstance would be that the father and the mother are unable to meet their parental obligations to cooperate to achieve the consistency of approach that is required in the best interests of their children. The key question is whether they can work together to provide that consistency. They have had problems in the past, and both have contributed to the problems.

[96] The mother has approached efforts to resolving the problems by assuming that the father caused them and that less

time with the father would solve them. She cannot understand why he questions her analysis of the cause of the problem or the proposed solution. She thinks he is defensive just because he does not agree with her. I think that this approach of assigning blame to the father and then proposing a solution that reduces his time to the children is not a helpful solution.

[97] The father has also contributed to the problem. The emails show that he not only acted defensively, but in doing so, often did not address particular behavioural concerns raised by the mother. That was not helpful.

[98] In the end, both parties spent too much time blaming and defending, and not enough time trying to really get at the root of the problem.

[99] That does not mean, however, that these two talented, bright, well-educated parents cannot do what is in the best interests of the children - to strive to provide the consistency of approach that is required. They have both said that they are prepared to attend counselling. That is to their credit.

[100] I was extremely impressed with the positive response that the mother gave when asked how she could work with the

father if there were a shared parenting arrangement. This tells me that though she has her own view about what is best for her sons, she is prepared to do whatever it takes to find a solution that is best for them.

[101] Because I have concluded that the parents can and will cooperate, I find that there is no compelling evidence that would lead the court to take away from the children the benefits they have received from the shared parenting regime that has been in place for more than five years.

[102] I, therefore, conclude that the parents will have joint custody and guardianship of the children.

[103] I have considered different shared parenting options. I have, in the end, concluded that one week with each parent is the one that is in each child's best interests. Each parent will have open telephone access with the children while they are in the care of the other. This will minimize the transitions. Each, of course, can attend their extracurricular activities.

[104] They will each have four weeks in the summer. The other parent will have access during the middle weekend. They will decide by May 15th of each year who will have the

children when. Father's day will be spent with the father, and Mother's day, with the mother.

[105] The parties will agree with shared equal time at Christmas and Spring Break.

[106] They will celebrate birthdays in the same way as they have done in the past.

[107] The parent with whom the boys are residing will be responsible for making day to day decisions with respect to the children. Major decisions affecting their health, religion, and education shall be made jointly, as in the Joyce model. If there is not an agreement, either party can apply to the court. However, I would strongly recommend that the parents agree to an alternative dispute resolution mechanism.

[108] On the question of counselling for the parents, they are to attend counselling to assist them in dealing with their communication with respect to behavioural issues and their approach to them. If they are unable to agree on a specific counsellor, their lawyers can each send a letter to me making suggestions, and I will pick the person.

CHILD SUPPORT

[109] With respect to child support, I assess the mother's income at \$50,000 per year, and the father's income at \$63,000 per year. I have considered the legal principles set out by the Court of Appeal in *Green v. Green*, [2000] B.C.J. No. 1001. In my opinion, the appropriate approach in this case is the set-off approach. The amount payable for each parent for two children should be determined, and the father should pay the difference.

"Martinson J."

Martinson J.