

Date: 19970729
Docket: D097081
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

J. [REDACTED] M. [REDACTED]

PETITIONER

AND:

P. [REDACTED] M. [REDACTED]

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE SAUNDERS

Counsel for the Plaintiff:

B.A. Dyer

Counsel for the Defendant:

A.E. Thiele

Date and Place of Hearing:

May 12, 13, 14, 15, 16,
and July 9, 1997
Vancouver, B.C.

[1] These parties came to court in May 1997 to try the many issues then outstanding between them. After nearly four days of trial one of three children of the marriage had a medical problem which caused the trial to be adjourned for the day. This brief respite from the rigours of the courtroom, combined with the well-developed evidentiary base and counsel sensitive to the advantages of resolution by agreement, provided the parties with the opportunity to try, again, to settle all of the issues in the litigation. The trial thus adjourned on May 16, 1997 to allow further discussion.

[2] On July 9, 1997 the parties returned to court with settlement of all issues between them except for three, on which they have asked for final decision based upon the evidence heard.

[3] Clearly the parties and their counsel have made great efforts to settle their litigation, and in resolving so many issues they have moved a significant way to an improved family dynamic. Accordingly, I have granted an order of divorce and a consent order on the settled items, in the terms attached as Schedule 1 to these reasons. I have not included an order for child maintenance as the parties are content to have child maintenance paid under the interim order of Mr. Justice Coultas dated October 21, 1996, with adjustment downward by \$650 when L_____ is sufficiently mature that she no longer meets the

definition of child of the marriage. I am satisfied reasonable arrangements have been made for the children's support.

[4] The three remaining issues are:

1. summer and Christmas access of the respondent to T. [REDACTED] and K. [REDACTED], aged 11 and 4 respectively;
2. the terms of joint guardianship;
3. the status of an existing order restraining Mr. M. [REDACTED] from contact with the eldest child of the marriage, L. [REDACTED], aged nearly 15.

[5] Before I turn to each of these issues I summarize generally the circumstances that impact on these issues.

[6] The parties were married in August 1997. They have three children, L. [REDACTED] aged 14, T. [REDACTED] aged 11 and K. [REDACTED] aged 4. L. [REDACTED] and K. [REDACTED] are busy with normal activities of children their age. T. [REDACTED], with a constellation of difficulties, is a special needs child who has extensive individual programming both at home and school.

[7] Mrs. M. [REDACTED] is now 40 years old. She has been primarily a homemaker throughout the marriage, caring for the home, L. [REDACTED], K. [REDACTED] and T. [REDACTED]. T. [REDACTED] extra needs have occupied a considerable amount of her time and energy, and continue to do

so. Mrs. M. [REDACTED] hopes to complete a degree in education in the next few years, but will be unable to be a full-time student because of her family responsibilities. She now lives in the matrimonial home with the children.

[8] Mr. M. [REDACTED] is now 44 years old, and is a principal in a school in North Vancouver. His income and benefits have been, and still are, the support for the family unit.

[9] The parties separated in early June 1995, in an unpleasant incident which led to a restraining order which initially prohibited Mr. M. [REDACTED] from any contact with Mrs. M. [REDACTED] and the three children, and which was later modified to restrain contact with Mrs. M. [REDACTED] and I. [REDACTED] only. Since the modification Mr. M. [REDACTED] has been having regular access visits with T. [REDACTED] and K. [REDACTED]. He has had no contact with I. [REDACTED] since separation.

[10] The parties agree that Mrs. M. [REDACTED] should have sole custody of the three children, with reasonable access, to be specified, to T. [REDACTED] and K. [REDACTED]. They have agreed on a schedule of access except for summer and Christmas access, which requires the Court's decision.

[11] The parties have agreed that they shall share joint guardianship, but disagree on the extent to which Mr. M. [REDACTED] may participate in consultation on issues. The parties seek an order defining the joint guardianship.

[12] L. has expressed, through her mother, a desire that the present order continue restraining Mr. M. from contacting her, with the intention that she be the person who decides when the first re-contact will be made. Mr. M. has acknowledged the delicacy of his broken relationship with L. and the need for intelligent, caring and non-hasty moves to re-establish contact with her, but has expressed his strong desire to re-engage a father-daughter relationship with L. He asks that the restraining order be dissolved, with the expectation that an opportunity for reconciliation would emerge in its own time.

[13] The many other issues, as earlier stated, have been resolved. During the last day in Court I advised the parties that I would either file written reasons or give oral reasons towards the end of July. On reflection, I consider that the parties have spent as much time as they need to, in Court, and as they have already heard me address some of the issues and will have a sense of the Court's concerns in this matter, need not return again. I did consider that there may be value for L. in hearing the Court address her situation as it is known to the Court, but rather than call the parties to Court for this purpose I have crafted a portion of these reasons with the knowledge that L. may read my remarks to understand the perspective of the decision and the Court's strong concern for her well-being, both long and short term.

1. Summer and Holiday Access

[14] Mr. M█████ seeks further access this summer as follows:

- T█████ and K█████ together from 5:30 p.m. July 31 to 7:00 p.m. on August 4, 1997;
- T█████ alone from 5:45 p.m. August 7 to 7:00 p.m. August 10, 1997;
- K█████ alone from 5:45 p.m. August 11, 1997 to 7:00 p.m. August 14, 1997;
- T█████ and K█████ together from 5:45 p.m. August 22, 1997 to 7:00 p.m. August 23, 1997; and
- August 30, 1997 from 10:00 a.m. to 7:00 p.m.

He seeks both separate time and time with both children together, contending that access time with one child for a few nights and days will permit him to engage in activities with that child which cannot be pursued with both children, such as camping, or bike riding with K█████ or enhanced swimming with T█████.

[15] Mrs. M█████ does not wish the children to have separate overnight visits with Mr. M█████. She is of the view that family cohesion will be diminished by such an arrangement, and she points out that joint access time provides her with the only relief from responsibility for the youngest two children. For the summer of 1997, including July, Mrs. M█████ has proposed three blocks of four consecutive nights and five days,

over weekends, that is, Thursday to Monday, so as not to interfere too much with the children's weekly activities, with additional weekend access if desired.

[16] In early July I provided for a short overnight visit with Mr. M. [REDACTED] for each of K. [REDACTED] and T. [REDACTED], adjacent to a joint visit. Thus at this time K. [REDACTED] and T. [REDACTED] have each experienced a separate overnight visit with Mr. M. [REDACTED].

[17] While it is the parents who contest access arrangements, it is the children for whom the Court must be concerned. The Court, in such matters, acts only in the child's best interests as it sees them.

[18] The proposal for separate access for T. [REDACTED] and K. [REDACTED], for a limited time in the summer, is, in my view, not unreasonable and may well work to the advantage of each child in providing individualized attention by the non-custodial parent. This is particularly so where, as here, the preponderance of time spent by the non-custodial parent with the children will be time spent with both children.

[19] In my view, the best interests of the children, which includes establishing a strong personal relationship with their father if possible, will be served by providing, for the summer of 1997, a block of time for each of K. [REDACTED] and T. [REDACTED] to be alone in their father's care. Given T. [REDACTED]'s summer schedule, I

consider this can best be accomplished by the scheduled proposed by Mr. M. [REDACTED], and I so order.

[20] The same issue is presented for the summer of 1998 and subsequent years. Mrs. M. [REDACTED] proposes three periods of joint access, five consecutive nights and six days. Mr. M. [REDACTED] seeks a block of seven nights together, and a block of five nights with each child, with other joint weekend access.

[21] Again, in my view, the concept of individual time in the summer is a concept which will permit the non-custodial parent to plan activities particularly appropriate to one child, and is likely to benefit the child, especially where the preponderance of access time for a child over the year is joint access.

[22] Given the relative youth of K. [REDACTED] and T. [REDACTED]'s limitations, it may be that at least for another year, their periods of access should be relatively close so that they may know that they have been treated alike. Accordingly, Mr. M. [REDACTED] shall have three periods of extended access to the children in the summer of 1998, a block of five consecutive nights access to T. [REDACTED], followed the next day with a period of five consecutive nights with K. [REDACTED], and one period of seven consecutive nights with both T. [REDACTED] and K. [REDACTED]. It is likely that the parties will be able to make the best schedule for such visits, but to avoid further litigation, I order that failing agreement the access with T. [REDACTED] shall commence at 5:45

p.m. July 9, 1998 and end at 7:00 p.m. July 14, 1998; the access with K. shall commence at 5:45 p.m. July 15, 1998 and end at 7:00 p.m. July 20, 1998, and the extended period of joint access shall commence at 5:45 p.m. July 31, 1998 and end at 7:00 p.m. August 7, 1998. In addition, Mr. M. shall have at least two additional weekends of joint access, from 5:45 p.m. on the Friday to 7:00 p.m. on the Sunday, between the close of school in June and the commencement of school in September.

[23] Access in subsequent summers shall follow the same general pattern, with liberty to either party to apply for a variance to address the then needs or best interests of the children. In referring to this opportunity to apply for variance, the Court does not expect the parties will need to do so, for as the access arrangements are implemented and the children mature, it is likely the best solutions to summer access will be evident to the parties.

[24] Christmas access is also an issue. The parties agree that Mrs. M. shall always have the children on Christmas eve until 2:00 p.m. Christmas day. Mr. M. seeks two nights joint access and one night and day separate access for T. and K.. Mrs. M. proposes that Mr. M. have the children together for four nights and five days.

[25] Given the family nature of the Christmas season, I consider that in the near term it is preferable to have the

overnight access with both children. Mr. M. shall have access to T. and K. for four consecutive nights during the Christmas vacation.

[26] However, again considering the individual needs of the children, Mr. M. also shall be entitled to one day of access with each of K. and T. alone.

2. Guardianship

[27] The parties agree that they shall share joint guardianship but have not come to agreement on the extent of the rights which are be encompassed by that term.

[28] Mr. M. seeks an order delineating rights of the non-custodial joint guardian which would require consultation on major issues of care, education and upbringing. He wishes a degree of involvement in the important decisions which must be made in raising the children.

[29] Mrs. M. seeks an order in simple terms that requires information to be provided, but not consultation. She expresses concern that a duty to consult will convey residual authority for Mr. M. and detract from her authority to make key decisions.

[30] Counsel have provided me with model orders and the case authority of **Clarke v. Clarke** (1987), 12 B.C.L.R. (2d) 290 (S.C.) and **Robinson v. Filyk** (1996), 28 B.C.L.R. (3d) 21 (C.A.).

[31] The parties have agreed to sole custody for Mrs. M. [REDACTED]. This necessarily carries with it the responsibility of decision making, where a decision is required. At the same time, I do not understand Mrs. M. [REDACTED] to be opposed to advising Mr. M. [REDACTED] of plans for the children in areas of major consequence. Mr. M. [REDACTED], of course, may have a contribution to make, an approach to the issue or additional information, which will enhance the quality of decision made on behalf of the children. Accordingly, the order for joint guardianship shall include the following features:

- a) Mr. M. [REDACTED] shall be informed of the children's medical and dental practitioners, and be able to contact them to obtain a child's records;
- b) Mr. M. [REDACTED] be informed, in advance, of commencement of a child's regular alternative caregiver;
- c) Mr. M. [REDACTED] shall be informed, in advance, of a child's expected school and school program;
- d) Mr. M. [REDACTED] may make enquiries and be given information by a child's educators, of the child's educational program and progress;

- e) Mr. M. shall be informed, in advance, of events at the children's schools that he may attend;
- f) Mr. M. shall be informed of any significant health issues related to a child, and shall be informed, in advance if possible, of any significant medical treatment for a child;
- g) Mr. M. shall be informed of any significant change in a child's well-being.

3. The Restraining Order

[32] The remaining issue is the status of the restraining order concerning communication with L. .

[33] L. has expressed a wish that contact with her father be at her timing, and I understand she wishes the restraining order to continue for the near term.

[34] The Court is sensitive to the rift between L. and Mr. M., and L.'s hopes in this matter. Given L.'s relative maturity, nearly 15 years old, it is clear that to a significant extent she will determine when and to whom she speaks. Yet all the parties to this action must understand that an order prohibiting any contact between people is given by the Court to address an immediate need, and generally operates as a short-term bandage to provide breathing space,

self-collection room, for the beneficiary of the order. While the Court can, and in some cases does, make an indefinite order, it usually only does this to address a specific need, which I do not find exists at this time in this case. Simply put, the Court considers that a free country is enhanced by as few restrictions on movement and speech as possible; the Court only restricts a party's liberty when other alternatives appear inadequate to the needs of the situation.

[35] In this case Mr. M. has, to his credit, complied with the restraining orders despite his anguish that he described to the Court in being cut-off from contact with all, and then part, of his family. The breathing space has now lasted two years.

[36] In my view a rapprochement between L. and her father over the next several months is desirable. With the good judgment they both will wish to exercise in the interests of their long-term relationship, they both should be able to move to reduce the rift between them. For these reasons, I am not satisfied that continuation of the restraining order is appropriate.

[37] In deciding to cancel the restraining order as it relates to communications with L., I do not expect immediate contact to be made. I expect that both L. and Mr. M. will make wise use of the Conciliation Office of the Law Courts opened to them through these proceedings, and that they both

will move with care and advice in re-establishing communication. They may do this unhampered by a court order.

[38] The parties are at liberty to return before me should clarification of any term be required.

"Mary E. Saunders J."

SCHEDULE 1

1. That the petitioner shall have sole custody of the three children of the marriage, L [REDACTED] M [REDACTED], born [REDACTED], 1982, T [REDACTED] M [REDACTED], born [REDACTED] 1985 and K [REDACTED] M [REDACTED], born [REDACTED] 1993.
2. That the parties shall have joint guardianship of the children.
3. That the respondent shall have reasonable access to T [REDACTED] and K [REDACTED] M [REDACTED] which access shall include at a minimum, but not be limited to, the following:

Commencing on September 1, 1997 and thereafter:

- (a) On the first Monday of each and every month while the children are in school, commencing at 5:30 p.m. to 7:30 p.m.;
- (b) Every Wednesday of every month save the first Wednesday, when the two children are in school, separate access to T [REDACTED] and K [REDACTED] from 4:30 p.m. to 7:30 p.m., one child each alternate week;

- (c) Every second Friday when the two children are in school, from 5:45 p.m. Friday overnight until 7:00 p.m. on Saturday, commencing September 12, 1997;
- (d) On alternate weekends commencing on September 6, 1997, from 10:00 a.m. to 7:00 p.m. on Saturdays;
- (e) Four hours on each of T. [REDACTED]'s Birthday, K. [REDACTED]'s birthday, the respondent's birthday and Father's Day if not otherwise on an access day;
- (f) The latter half of Spring Break, assuming that whatever access would normally occur on the weekend commencing Spring Break would not occur and the week can be halved at the point mid-week between the Friday that commences Spring Break and the Sunday evening that ends it, commencing at 10:00 a.m. and ending at 7:00 p.m.;
- (g) Thursday evening at 5:30 p.m. until Saturday evening at 7:00 p.m. every Easter weekend;

Provided that access to the two children shall be joint access, if possible, except where specified to be separate.

4. That the respondent pay to the petitioner the sum of \$175 per month for her maintenance on the 1st and 15th day of every month commencing August 1, 1997 and continuing thereafter until

a review date of June 1, 1999 at which date the Court should determine what progress the Petitioner has made towards her stated goal of reaching economic self-sufficiency through completing her Bachelor of Education degree and determine whether spousal maintenance should cease or continue and if continuing, at what date there should be a further review, provided that if the Respondent does not take steps to seek a review on June 1, 1999 or any later date, the spousal maintenance shall continue until a further Court Order.

5. The respondent shall maintain the petitioner and the children as beneficiaries under any medical, extended health and dental coverage as are available to him through his employment as long as either of the petitioner or children are eligible for such coverage and at such time as the petitioner may become ineligible for benefit coverage because of remarriage, he shall give the petitioner 60 days notice of the necessity to purchase benefit coverage for herself.

6. That the respondent shall designate the petitioner irrevocably in writing as beneficiary as to \$350,000 of his life insurance coverage through his employment and shall maintain such life insurance coverage so long as it is available to him through his employment and so long as he shall be legally obligated to pay child maintenance to the petitioner for any of the three infant children.

7. That the family assets shall be divided in the manner set out in the parties' written settlement agreement dated the 9th day of July, 1997 and in particular:

- (a) The petitioner shall receive 65% of the net sales proceeds of the former matrimonial home at [REDACTED], in the Municipality of West Vancouver, British Columbia and the respondent shall receive 35% of the net sales proceeds. The net sales proceeds are to be calculated by deducting the gross sale price of the home, the real estate commission, legal fees with respect to the sale and disbursement of net sales proceeds, usual vendors adjustments on the sale and the amount required to pay out the existing first mortgage immediately prior to the agreed new first mortgage together with the interest penalty.
- (b) The petitioner shall retain absolutely all right, title and interest in the 1994 Dodge Caravan motor vehicle and the First Canadian Funds RRSP No. [REDACTED] [REDACTED] and the Respondent shall retain absolutely all right, title and interest in the 1990 Ford Ranger motor vehicle.

8. That the former matrimonial home shall be listed for sale no later than February 1, 1998 with a completion date no sooner

than July 15, 1998 unless the petitioner agrees to an earlier date for sale.

9. That the parties shall have joint conduct of sale provided that K. F. of Remax shall be given an MLS listing for 90 days and the listing price shall be determined based on Mr. F.'s recommendation with both parties having liberty to apply for any and all directions with respect to sale or for approval of any offers failing agreement.

10. That pursuant to section 66(2) of the ***Family Relations Act***, the petitioner and the children of the marriage shall have exclusive occupancy of the matrimonial home situate at [REDACTED] [REDACTED], West Vancouver, British Columbia until the sale of that home.

11. That the respondent shall do everything necessary to transfer to the petitioner all his right, title and interest in the Canadian Scholarship Trust Plan Agreement No. [REDACTED] pursuant to which he is a subscriber and the nominee is L. M. [REDACTED] provided that the respondent shall not be required to make up any payments in default and provided further that the petitioner shall keep and maintain this plan and any funds therein for the sole benefit of the post-secondary education of the child L. M. [REDACTED] or such M. [REDACTED] children as may access the funds for education and the funds are provided to the Petitioner as trustee of the children.

12. That the respondent shall not molest or harass the petitioner and the respondent shall only telephone K. [REDACTED] and T. [REDACTED] Marshall at the former matrimonial home on non-access days between 7:00 p.m. and 8:00 p.m. in the evening.

13. That the parties bear their own costs with the exception of the hearing room fees of \$1,500 which the parties shall share equally.