Citation: S. v. J. Date: 20010705
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Registry: VANCOUVER

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(FAMILY DIVISION)

IN THE MATTER OF
THE *FAMILY RELATIONS ACT*, R.S.B.C. 1996 c. 128

BETWEEN:

S.M.S.

APPLICANT

AND:

B.K.J.

RESPONDENT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE RAE

Counsel for the Applicant: K. RUSS
Counsel for the Respondent: A. THIELE
Place of Hearing: VANCOUVER, B.C.
Date of Hearing: JUNE 4, 7, 2001
Date of Judgment: JULY 5, 2001

[1] Ms. S. applies for an order varying an order of this court made on November 1, 2000 granting sole custody and guardianship of two children to Mr. J. She seeks an order that she be allowed to return to the United States with her two children.

[2] Ms. S. and Mr. J. lived together from 1994 to 1998. Ms. S. had a daughter, Brighton, by another relationship, who was an infant when Ms. S. and Mr. J. met, and Mr. J. is the only father she has ever known. They have a son, Brandon, born in 1996. The relationship was apparently a stormy one and there were a number of separations. The evidence of the parties differs as to the

number and length of the separations, and the reasons for them. Mr. J. was not employed regularly during this time, but he says he did some part time work and admits to occasionally selling marihuana during that time. He says that both he and Ms. S. would smoke marihuana. Ms. S. admits to this, but says he would use it more often, and she would get upset because the children were present. She agrees that he would smoke it on the balcony, but says you could smell it on his clothes. After his son was born, Mr. J. decided to make some changes in his life, and found employment. He has been continuously employed since Brandon was born. He presently operates a tanning salon and spa with his fiancée. They own the business jointly, and live together in a rented house with her daughter and Brighton and Brandon.

[3] Ms. S. admits to being involved in the sex trade industry, but denies that she ever worked as a prostitute or an escort. She says that Mr. J. was happy with her doing this, but Mr. J. says they had many arguments about this and he disapproved of her being involved in this line of work. He says that she stopped briefly after Brandon was born, but went back to it because she felt he was not making enough money.

[4] Around September, 1998, she suddenly left the country and went to Las Vegas, leaving the children with Mr. J. Her reasons for going are vague. She says she went to stay with friends and that she eventually found work there in a mortgage company. Mr. J. believes that she was involved in the sex trade industry in Las Vegas. The children moved back and forth between Ms. S.'s residence in Las Vegas, and Mr. J.'s residence in Vancouver. It appears that they would spend significant amounts of time with each parent, although, again, the evidence is vague and contradictory as to exactly how much time they spent with each parent. In November, 1999, Mr. J. drove down to Las Vegas to visit Brandon on his birthday. He met Ms. S. at a hotel and spent the day with Brandon. She would not tell him where she was staying, but he understands now that she was living in crowded conditions with another family and their children. He says she did not look well, and he suggested that he take the children back to Vancouver with him, as they had previously agreed that they would shortly return to Vancouver anyway. She was not prepared to let him take the children with him to Vancouver at that time. He drove back to Vancouver, and the day after arriving, she telephoned him and told him that she had financial problems, and was having trouble coping, and wanted him to take the children back to Vancouver. He went back down and got them, and returned with them to Vancouver. At that point he refused to return them to her without a court order.

[5] In May, 2000, Ms. S. appeared in this Court seeking an ex-parte custody order. Her application was adjourned and she was directed to serve Mr. J. She did so, and when the parties appeared on May 12th the matter was expedited. Tentative trial dates were set for early August, and the matter was set for Family Case Conference on June 21.

[6] The parties attended a Family Case Conference on June 21, and managed to work out an interim agreement. They agreed that they would share interim joint custody of the two children, and that Brighton would spend the 2000-2001 school year with her mother in Nevada, Las Vegas. The primary residence of Brandon would be with Mr. J. for that period, but they agreed that Ms. S. would have access to Brandon from June 23, 2000 to August 25. She agreed to return Brandon to Mr. J.'s care on August 25, 2000. The agreement also provided for other periods of access to both parents throughout the school year and during school breaks. The parties also agreed that they would appear before Judge Gallagher on or before September 1, 2001 to determine the issue of the following school year. The agreement was drafted into a form of order, and both parties personally signed the order, indicating their consent.

[7] Ms. S. picked up the children and returned with them to Las Vegas on June 23, 2000. Ms. S. had married a Mr. R. in Las Vegas in February 2000. It is not clear whether Mr. J. was aware of this at the time of the June 21 order. In any event, within a month of her return to Las Vegas, Ms. S. and her new husband moved with the children to Florida. She apparently phoned

Mr. J. and told him of this plan, but did not provide any address or phone number where they could be reached.

[8] On August 25, 2000, Ms. S. filed an application in this court through her counsel, seeking an order to vary the June 21 consent agreement, and asking for sole custody of Brandon. She sought an interim order for custody so that he could remain with her in Florida until there was a full hearing. That matter came before me on August 25, being the date Brandon was to return to Mr. J.'s care. I dismissed the application, directed that Ms. S. return Brandon by August 28, 2000, directed that a peace officer enforce the order if necessary, and lastly directed that Ms. S.'s application come on before the court on October 3.

[9] Brandon was not returned to Mr. J.'s care, and when Ms. S.'s application came before the court on October 3 it was adjourned to November 1, 2000 for a full day hearing. Ms. S. did not appear on October 3, but it appears that her Counsel may have appeared. If he did not appear, he was certainly aware of the date, and the date of the November 1 hearing. Ms. S. did not appear on November 1, but her Counsel did and sought to be removed as Counsel of record. The Court heard brief evidence from Mr. J. and granted him sole custody of both children. Ms. S.'s application was dismissed, and again, the Court directed that a peace officer apprehend the children and bring them to Mr. J.

[10] There was apparently some telephone contact between Mr. J. and Ms. S. in the Fall and Winter of 2000. Mr. J. says he had a phone number that worked occasionally, but more often it would be out of service, or some other person or business would answer the telephone. He was aware that Ms. S.'s mother and stepfather were in the area, and he did locate them by telephone, but says they told him that he had to come and find them. They were unwilling to give him any information as to the whereabouts of Ms. S. He says that she talked to him about coming up in January to deal with the matter, but she never did. She later told him she would come in June, but he did not believe her. He made an attempt to file an application pursuant to the Hague Convention. That took many months, and was apparently not successful. He eventually went down to Florida with his documents and appeared before a Judge there who enforced the order. The children were apprehended in Florida on May 11, 2001 and returned with him to Vancouver where they presently reside. Prior to the return of the children to British Columbia the Florida Courts declined to accept jurisdiction and referred the matter back to British Columbia.

[11] Ms. S. appeared before this Court again on May 23, 2001, again on an ex-parte basis seeking an order varying custody and allowing her to return to the United States with the children. She was again directed to serve Mr. J., and the matter was put over before me for trial.

[12] Ms. S. admits that she was aware of the order she consented to in June, 2000, and that she was aware of my order directing her to return Brandon to British Columbia. She says she was not aware of the November 1, 2000 order granting Mr. J. sole custody. I am, however, satisfied that she was well aware of the fact that there were court proceedings ongoing, she had counsel here in British Columbia, and could easily have made herself aware of that order had she chosen to do so. She says she did not really appreciate the fact that she had agreed to a court order at the case conference, and that she did not have a lawyer there to assist her before she made the agreement with Mr. J. She says she was never happy with this agreement, and that she always wanted to have both of the children with her in the United States on a permanent basis. She understood that court time was available for a trial in early August. I was clearly left with the impression that she felt that this agreement was the fastest and most cost effective way of accomplishing her goal, and that she never intended to return Brandon to British Columbia in August as contemplated by this order. I do not accept that she did not understand this was a court order. She signed the order, and referred to it as an order both in her application and in the affidavit she filed in support of the August 25, 2000 application.

[13] She says she moved to Florida to be close to her mother and stepfather. I find the fact that she moved almost immediately to Florida and withheld her address from Mr. J. to be a move calculated to avoid his finding her and enforcing the order. She admitted in her evidence that she declined to provide an address because she knew he would come and get the children.

[14] She has given evidence that she has a stable living situation in Florida, surrounded by a large extended family, and that the children were very happy with her. She says that Brighton has asthma, and that the climate in British Columbia is not healthy for her. She claims that Mr. J. is somewhat casual about ensuring that the children receive appropriate medical care. I find that the evidence does not support these allegations. She is concerned that he may be smoking marihuana in front of the children. Mr. J. admits to occasionally using marihuana, and that is a concern, but he says he is careful not to use it in front of the children. She claims there were some incidents of violence during the relationship, and that she was the primary caregiver for the children. She says that if she were allowed to return to Florida with the children she would allow Mr. J. frequent access to the children, and that he is welcome to come to Florida at any time to visit with them. She says there are inexpensive airfares available.

[15] Mr. J. denies that he was ever violent with her when they lived together. Ms. R., a family friend, claims that Ms. S. complained to her that Mr. J. had assaulted her, and claims she saw some bruises, but the evidence concerning this is vague and somewhat different than what Ms. S. relates. In any event there is nothing whatever to suggest that there is any violence in his present relationship. He says the children are doing well, considering what has happened in the last few months. His parents and extended family all live in the Vancouver area. They have very modest means, and he says neither he nor his family can afford to travel to Florida to visit the children. There is a suggestion that Mr. J. does not have enough income to support the children. I find that his means are at least equal to those of Ms. S.

[16] I have read the transcript of the proceedings before Judge Auxier on November 1, 2000 at which time she made an order granting Mr. J. sole custody of both children. At that time both of the children were with Ms. S. in Florida and she was in breach of the consent order of Judge Gallagher made June 21, 2000 and my order of August 25, 2000 that Brandon be returned to British Columbia. Although Ms. S. was not present for that hearing, I am satisfied that she knew or had the means to find out and was willfully blind about informing herself of that date. The matter was before the court on her application for exactly the same relief she is seeking today. Her application was dismissed because she did not appear, and after hearing from Mr. J., Judge Auxier was persuaded that it was in the children's best interests that Mr. J. have sole custody of both of them. The facts upon which that order were based are not substantially different than my findings today in terms of the history of this matter.

[17] The Supreme Court of Canada has dealt with the issue of parental mobility in the decision of **Gordon v Goertz**. That decision says that the parent seeking a change in the order must meet the threshold test of demonstrating a material change in the circumstances affecting the child before the court embarks upon a fresh inquiry into what is in the best interests of the child having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

[18] I would have to say that there has been a cataclysmic change of circumstances from what was contemplated in the original consent order of June 21, 2000, and all of the court proceedings and orders made since that consent order have been mostly concerned with the conduct of Ms. S., and have not really addressed the best interests of the children. I find that the applicant has met the threshold test set out in **Gordon v Goertz**.

[19] I am satisfied, on the evidence before me that the children are equally bonded to both parties, and to each other, and that both parties have been the primary caregiver for significant periods of time over the last three years. Mr. J. has been permanently and continuously employed

since 1996 in the Vancouver area and is presently self employed with his partner. Their financial situation appears to be stable.

[20] Ms. S. works part-time as a waitress in Florida, and says that her husband is employed with America On Line. It is not clear what he does there or what his income is. This is the third job she has had since moving to Florida last summer. She moved a number of times while in Las Vegas, and the evidence as to her employment there is vague. I have referred above to what little we know about what she was doing in Las Vegas, but the history that we do have suggests that there was some significant instability in her life at that time. It is difficult from here to make any kind of assessment as to whether she is presently stable and able to provide for the children, although she apparently did manage this while they were in her care in Florida. Both parties have access to and support of extended family in the area they are presently living. The children apparently have a relationship with relatives on both sides of the family. Ms. S. was born in British Columbia, but has dual citizenship, and her mother and stepfather have lived both in British Columbia and Florida. Ms. S. says she has chosen to live in Florida to be close to her family, but agrees that she would have to move to British Columbia if the children were living here. It appears that her mother and stepfather only moved to Florida shortly before Ms. S. went there.

[21] The last year or so has no doubt been extremely stressful for the children. They have moved from British Columbia to Las Vegas, then to Florida, and back to British Columbia after having been apprehended. This has to have had an impact. Firstly, they have suddenly been denied the company of Mr. J., who is a significant figure in their life, and then they have been moved across the continent at least twice, and most recently out of the care of their mother, who is also a significant figure in their life. All of this is a result of very poor judgment on the part of Ms. S. I do not have the sense that she is the least bit aware of how the decisions she has made might have impacted on the children, nor does she appear to express any concern about this. Due to the recent chaotic changes in the residence of the children, it has been impossible to regularize any kind of access schedule, and regardless of what my decision is, there is one parent who will have problems exercising access because of their financial circumstances. Another change in residence or custody will likely be very traumatic for these children, who have been moved back and forth between these parents apparently since 1998. These children need to have regular contact with both of these parents, and the Court ought to give serious consideration to the issue of which parent is most likely to facilitate access to the other parent.

[22] Mr. J. has asked the Court to make an order that requires Ms. S. to re-locate to British Columbia by September, 2001, and once she has done that she be granted primary residence of the children with both parties sharing joint custody and guardianship. Ms. S. wants sole custody of both children, and she wants to move their residence to Florida.

[23] I find that I have very little sense of what is presently going on in Ms. S.'s life. There appears to have been a great deal of instability and a number of changes of residence and dramatic moves since the separation. She has had a number of jobs since she moved to Florida, and these changes have resulted in a great deal of instability for the children. They have moved back and forth between Mr. J.'s residence and the United States, and much of it appears to be the result of parenting choices that she has made. She has very little credibility with this Court when she promises liberal access and financial assistance to enable Mr. J. to visit the children in Florida. Her past behaviour weights heavily against her in determining whether or not this is a bone fide move to Florida, or whether she sees it as an opportunity to divest herself of any contact at all with Mr. J. so that she can begin a new life with a new partner.

[24] Mr. J. is in a position to provide some stability for these children. He is steadily employed, and his means are modest but adequate. He is prepared in spite of all that has happened, to make efforts to facilitate access. He has adequate parenting skills, and has always been available to care for the children for extended periods, even at short notice, when requested to do so by Ms. S. The children have a bond with both parents, and both parents have been primary

caregivers for extended periods of time over the past few years. On all of the evidence, I am not persuaded that it is either beneficial or necessary for the children to reside in Florida as opposed to Vancouver. For all of these reasons Ms. S.'s application is dismissed.

[25] I have considered Mr. J.'s request for an order of joint custody provided that Ms. S. establishes a residence in British Columbia by September, 2001. I do not think that such an order is workable at this time. Firstly, Ms. S. has not expressed any clear intention to move to British Columbia at this time other than to say that she would have to move here if the children were not allowed to go to Florida with her. I did not interpret that comment to be a firm commitment to changing her residence. In addition, this court has no way to monitor the order or determine in advance what factors would indicate a permanent residence in British Columbia. Such an arrangement is better left to the parties, and if Mr. J. is satisfied that Ms. S. has moved to British Columbia and plans to stay here, and if the parties wish to enter negotiations to change the existing custody arrangements, they can do so at that time. For the moment, this Court should not be entertaining orders based on future events which may or may not come to pass.

[26] Mr. J. will have sole custody of Brighton and Brandon, and Ms. S. will have reasonable access. Neither party will remove the child from the Province of British Columbia without consent in writing of the other party or court order. Both parties will keep the other advised of a current address and phone number.

MARGARET E. RAE

PROVINCIAL COURT JUDGE