IN THE SUPREME COURT OF YUKON

Citation: *J.A.C.* v. *V.R.C.*, 2008 YKSC 67

Date: 20080912
S.C. No. 06-D3902
Registry: Whitehorse

Between:

J.A.C.

Petitioner

And

V.R.C.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Debbie Hoffman	Counsel for the Petitioner
Edward Horembala, Q.C.	Counsel for the Respondent
Kathleen M. Kinchen	Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the petitioner father to vary the interim order of Mr. Justice R.J. Haines made on April 12, 2007. That order gave the father and the respondent mother interim joint custody of the children, H., currently 11 years old and entering grade six, and A., who is nine years old and about to enter grade four. Haines J. further ordered that the primary residence of the children would be with the mother and that the respondent would have specified access to the children every other weekend from Friday afternoon until Sunday evening, as well as every second Thursday evening

during the week that he does not have weekend access. The father wants the residential time of the children to be shared between the parties on an equal basis. His initial position is that each parent should have the children for one week, with the switch to be made on Fridays after school. In the alternative, the father would be content with the recommendation in the filed Custody and Access Report that the parenting schedule follow a two week rotation, with the children residing with the mother from Thursday afternoon until Friday morning of the following week, and with the father from Friday afternoon until Thursday morning of the following week, with all transitions to be made at school. This schedule would result in the children spending five school nights with the mother and four school nights with the father in each two week period.

ISSUES

[2] The issues on this application are:

a) Has there been a material change in circumstances to justify a variation of the interim order of Haines J., as required under s. 34 of the *Children's Act*, R.S.Y., 2002, c. 31?

b) If so, what residential schedule is in the best interests of the children?

ANAYLSIS

a) Material Change in Circumstances?

[3] The father's counsel submitted that a number of circumstances have changed since the interim order of Haines J.:

1. A Custody and Access Report has been prepared by Nicole Sheldon, M. Ed. and R. Psych., dated December 31, 2007 and filed January 16, 2008. That report followed the usual extensive review of background materials from the Court file; interviews and psychological testing of the parties and the children; and telephone contacts with significant third parties. The report identified the importance of both parents being as actively involved as possible in the children's lives, with particular emphasis on the parents supporting the educational pursuits of the children. H. is identified as having some short term memory problems and A. has a global language-based learning disability. As the mother has special skills to offer the children in this area, based upon her previous experience and involvement, as well as her current studies to obtain her Bachelor of Education, Ms. Sheldon recommends a schedule which allows the mother more time with the children during the school week than the father, as described above. The father's counsel argues that this is new information which was not before Haines J. and may well have caused him to make a different order than the one he made.

2. As a result of the appointment of a child advocate, the Court now has the benefit of the views and preferences of the children, which information was not available to Haines J. prior to the interim order.
3. The father has developed a greater capacity to meet the children's needs over the last 18 months, since the interim order was made.
4. The existing access order has seriously prejudiced the father since it does not allow him as much contact as is consistent with the best interests of the children, and also restricts his opportunity to travel internationally for business purposes in order to earn a living.

[4] The mother's counsel argued that there has been no material change in circumstances. To the extent that the father now complains that he needs a change in the access schedule for business reasons, there has been no evidence of any negative impact on the father's business as a result of the current access schedule. Further, the mother's counsel suggests that there has been no serious prejudice to the father from the existing schedule, unless the Court presumes that anything less than equal time with the children for both parties is inherently prejudicial. Finally, the mother's counsel invites me to give little weight to the recommendations made in the Custody and Access Report, because it is based on a foundation which is challenged by the mother, namely an assumption that the father has changed, or will change, his ways and now makes the children more of a priority in his life.

[5] I am cognizant of the law in this area. For a change to be sufficient to justify a variation, it must be one which has altered the ability of the parents to meet the children's needs in a fundamental way. The court must also ask itself whether the previous order might have been different had the circumstances which now exist prevailed earlier, and whether or not those circumstances might have been foreseen or reasonably contemplated by the judge who made the previous order: *Rew* v. *Rew*, 2003 BCSC 18, para. 19.

[6] Further, courts should be slow to interfere with any order on interim custody and access, and generally speaking, any substantial change should only made after a trial of the issues: *Eaton* v. *Eaton*, [1987] B.C.J. No. 2217 (C.A.); *Prost* v. *Prost*, [1990] B.C.J. No. 2487 (C.A.); *Newson* v. *Newson,* [1998] B.C.J. No. 2906 (C.A.). Indeed, interim orders should only be varied when there is a compelling change of circumstances, such that one or the other party, or both, would be seriously prejudiced by waiting until trial: *Hama* v. *Werbes*, [1999] B.C.J. No. 596 (S.C.).

[7] I am satisfied that the father has established that there has been a material change in circumstances, for all the reasons stated above. In particular, I note from a cursory review of the chambers record before Haines J. that little or no attention was paid to the father's work schedule at that hearing. As I understand it, the father is the manager of his family's group of companies, which although based in Whitehorse, has expanded significantly over the past 10 or 15 years to include several international undertakings. I gather that one of the principal activities of the group is diamond drilling. I am informed that the companies have interests in China, Mongolia, Guatemala and Ecuador, and that the father is required to travel on a regular basis to those regions for

work purposes. At present, he claims that he is seriously prejudiced by the existing access schedule, as it does not give him more than three clear days between access times, and if he does chose to travel, then he invariably misses opportunities for access.

[8] I was also unable to find anything in the chambers record to indicate that a particular submission was made to Haines J. inviting him to make an order for specified access. Rather, the mother's materials on that application simply referred to "reasonable access" by the father. Further, while I agree with the mother's counsel that there is precious little evidence of the father's business interests being negatively affected by the current access schedule, I am satisfied that I can make a reasonable inference in that regard. I also think that I can take judicial notice of the fact that international travel to such far-flung destinations as central China would probably occupy the better part of two days with the travel alone. Combining that with major time zone changes and the time which may be required for recovery from jet lag, would suggest that a period of about a week would likely be the minimum required for any degree of productivity.

[9] Had the above information been before Haines J., I think it is doubtful he would have ordered the same specified access that he did.

b) What residential schedule would be in the best interests of the children?

[10] The child advocate and the mother's counsel agree that the principal issue affecting the best interests of the children relates to their educational needs. H. is totally blind in one eye from an injury a few years ago and suffers from some short term memory problems, which requires intervention. H. is also involved in a French immersion program, which has been particularly challenging for him in the last year or so and thus

requires extra effort and assistance in reading support in both English and French. The younger child, A., has a global language-based learning disability and has been assigned an individual education program which allows him special time for learning assistance during the school week.

[11] The mother argues that she has been able to provide the children with the necessary assistance with their homework each evening, which in turn prepares them for their performance in school the following day, as she has them in her care every school night, with the exception of every second Monday and Thursday evening, when the children are with the father until about 7:30 p.m. The mother is concerned that the father has not been sufficiently attentive to the educational needs of the children and cites instances where she believes the children's homework has been untouched during the weekends they spend with the father. In particular, she notes that the father has not "signed off" on the children's respective school agendas to confirm that their homework has been done, which is a requirement of each of the schools the children attend.

[12] However, the mother's counsel fairly suggested that, in the alternative to preserving the *status quo* and rejecting the father's application outright, this Court might consider an increase in the number of nightly visits the father has with the children, providing it doesn't interfere with the mother's opportunity to assist the children with their homework. In the further alternative, counsel submitted that I might consider an extra weekend of access each month for the father.

[13] The father argued that he has made a greater effort to assist the children with their educational needs in the last 18 months and notes that most of the complaints made by the mother in this area are historical. While he acknowledges having failed to sign off

his confirmation that the children have completed their homework assignments, he is prepared to have that obligation made a term of the variation order. He says he is also prepared to receive specific input from the mother and/or the children's teachers or school councillors as to how he can better assist the children in tutoring them on their homework assignments.

[14] This last point is a critical one with respect to the probable success of any increase in access (residential time) by the father. As the child advocate has identified, the children have done very well in school up to this point and could continue to do well, providing both parents can work together on this issue. However, that will be a challenge, as the parents have a history of animosity and difficult dealings since their tumultuous separation in December 2006. The mother complains that the father has been uncommunicative and delinquent in keeping her informed of, not only his whereabouts, but also important incidents involving the children. The father claims that the mother's attitude has generally been "hostile" and that this does little to enhance constructive communication.

[15] I note that the mother has raised two other issues in opposition to the father's present application. The first relates to her concerns about the father's appreciation of ensuring the children's safety. This issue is only recently raised by the mother and involves conflicting evidence. Even taking the mother's allegations at face value, given the concession by her counsel that the educational issue is the primary concern on this application, I have given the safety concerns little weight.

[16] The remaining issue raised by the mother involves her concern that the father is insufficiently attentive to prioritizing his time with the children, particularly with regard to

their sporting activities and principally hockey. The mother claims the father has allowed the children to miss hockey practices and games while they have been in his care. She cites one instance where A. did not attend for a particular try out for placement on a "select" hockey team within his league, and was deeply disappointed over the missed opportunity. The father's response was that he didn't encourage A. to attend the try out because A. was not "into" it that particular day and that the children were overcommitted to activities in any event.

[17] I have to concede that, on this last point, I tend to agree with the submissions of the mother's counsel that the father may not have the greatest insight into his role as a parent in such circumstances. While it might not be uncommon for the child to express ambivalence about attending a given sporting activity in the moment, due to whatever distractions are then present, it is often the role of the parent to be more objective, to consider the longer term consequences for the child and, if appropriate, to actively encourage the child to attend, despite their resistance. However, it would be unfair to place too great an emphasis on one such incident in the context of the overall circumstances. Further, as there is also conflicting evidence between the parties on the issue, I do not give it much weight one way or the other in determining the current application.

[18] The father's counsel says that, although the educational concerns are indeed an issue, the primary issue from his perspective is being given the opportunity to spend as much time with the children as is consistent with their best interests, otherwise known as the "maximum contact" principle.

[19] I conclude that the educational issue is the one most likely to directly impact on the best interests of the children, should I increase their time with the father. However, I am also aware that the children should be given the maximum opportunity to have contact with the father in a manner which is consistent with their best interests. Ordinarily this would be on an equal time basis. However, I share the mother's concerns, as reflected in the Custody and Access Report, that, at present, the mother would appear to be better suited to meet the children's educational needs, in terms of their tutoring and, in particular, in terms of the need to advocate for A. and to arrange accommodations for his learning disability. That is not to say that the father cannot or will not learn more about his ability to participate in this regard and explore ways in which he can play a greater role. However, given the communication problems between the parties, I would expect that, at least initially, he may have to pursue that goal by direct communication with the children's teachers and councillors, as opposed to soliciting the assistance of the mother. In the longer term, it would be in the children's best interests if both parents could meet together with a school official to discuss comprehensive educational strategies for each of the children. I would hope that the parents could find a way to utilize the skills discussed in the "For the Sake of the Children" parenting workshops, in order to make that happen.

[20] In the interim, I agree with the suggestion of Ms. Sheldon in the Custody and Access Report that any change to the children's residential schedule should allow them more time with the mother during school nights than with the father.

[21] In moving towards an increase in the father's time with the children, I also take comfort from the comments of Ms. Sheldon in the Custody and Access Report that both

children are “adaptive” and are generally doing very well in their respective schools. In particular, at p. 26 of the Report, Ms. Sheldon noted:

> “According to the school [s], neither child is evidencing any difficulties of an emotional, behavioural, or social nature that would warrant concern. Reports from the children’s schools indicated that each child is doing better this year over last year as they have become more accustomed to their new family situation.”

CONCLUSION

[22] I am persuaded that the father’s business interests, and his consequent ability to earn a living, will be seriously prejudiced by the current access schedule if he is required to wait until trial to seek a variation. The parties estimate the trial would not take place until approximately March 2009 at the earliest, which is about seven months away. This is a sufficiently compelling circumstance to justify a variation of the interim order of Haines J., to allow the father more uninterrupted time with the children.

[23] On the other hand, it would seem to be in the children’s best interests to spend the majority of school nights in each two week period with the mother. While it is difficult to make a “causal” inference about the current positive reports on the children from their respective schools, there appears to be at least a correlation between their current progress and the *status quo*. I am reluctant to vary that in any significant way based simply on the father’s expressed intentions that he will do better in the future in assisting the children with their educational needs. As was said in *Tucker* v. *Tucker*, [1994] A.J. No. 89 (Q.B.) by Moore J.:

> “… if all else is equal, it could not be in any child’s best interest to substitute an uncertain situation for a certain one…”

[24] In the result, I am persuaded that the plan proposed by Ms. Sheldon in the Custody and Access Report is a satisfactory compromise. It will provide the father with extended periods of time for business travel, while placing the children with the mother for the majority of school nights in every two week period. While it is less than equal time for the father, it is an improvement over the current situation. Accordingly, I order that para. 3 of the interim order is varied such that the children will reside with each of the parties on a two week rotating schedule. In the first week of the rotation, the children will reside with the mother from Thursday after school until Friday morning of the following week. In the second week, the children will reside with the father from Friday after school until Thursday morning of the following week. All transitions will be made at the school, unless the parties agree otherwise.

[25] This will result in the children spending a total of eight nights with the mother and six nights with the father in each two week rotation. Six of the eight nights the children spend with the mother will be school nights, whereas only four of the six nights the children reside with the father will be school nights.

[26] I note that Ms. Sheldon proposed that on the non-residential week, the other parent would have one child on the Monday night and the other child on the Tuesday night, from after school for overnight care, and that this schedule could be alternated. However, neither counsel made any reference to this recommendation at the hearing. Accordingly, I have assumed it is of no interest to either party. Further, while the father currently has two evenings of access with the children during the period that they reside with the mother, this is precisely one of the reasons he is dissatisfied with the current schedule, as it interferes with his ability to travel for extended periods. Accordingly, I am

not ordering any additional specified access for the father during the time that the children reside with the mother. However, if the parties are able to agree in writing to such additional access, either from time to time or on a regular basis, then it is allowed.

[27] I further order:

1. As recommended by Ms. Sheldon in the Custody and Access Report, each party should have "right of first refusal" when the other is unable to care for the children for any length of time.

2. The parties should make their best efforts to continue to communicate with each other by email and, in particular:

    (a) must advise each other by email of any incidents of importance involving the children during the time that the children reside with that parent. (For greater certainty, I have in mind here the incidents referred to in the materials involving the accident on the quad RV and A.s' burned jacket); and

    (b) each party shall provide the other by email particulars of the times when they are going to be away from Whitehorse or out of the Yukon Territory, including their itinerary and contact information while they are en route.

3. If required by their respective schools, the parent having care of the children shall sign off on all school homework for each of the children.

4. While the children are residing with the father, they are not to be left in the care of either the father's mother, or the father's brother, J. C.

(This is due to concerns raised in the materials and is at the suggestion of the father's counsel.)

5. The varied access schedule will commence on a date agreed to between the parties in writing.

[28] Although the father asked for costs in his notice of motion, neither counsel made any submissions on the point at the hearing. I am therefore reluctant to make order for costs, though I am prepared to hear further from the parties, unless they are able to otherwise agree on the issue.

Gower J.