IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Beckley* v. *Lang,* 2003 YKSC 73

Date: December 19, 2003
Docket No.: S.C. No. 01-B0057
Registry: Whitehorse

Between:

MICHELLE ANN BECKLEY

Plaintiff

And:

HECTOR IAN LANG

Defendant

Appearances:
Mr. Malcolm Campbell — Counsel for the Plaintiff
Ms. Christina Sutherland — Counsel for the Defendant

Before: Mr. Justice L.F. Gower

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the father principally to vary the access term of an interim order made October 23, 2001 by Madam Justice Kenny ("the Kenny Order"). That order granted interim joint custody of the child, who is now over 2 ½ years old, to both the mother and father, with primary residence being granted to the mother. The mother was also authorized to permanently remove the child from the Yukon for education or employment purposes. The father was granted "reasonable and generous access to the Child as agreed upon between the Parties."

[2] The Kenny Order was a consent order and it does not appear from the file that there were any disputes between the parties at the time that order was granted. The father did not file any affidavit material in response to the mother's application and he consented to the Kenny Order on his own behalf.

[3] The father now applies for an order that the residence of the child be shared equally between the mother and the father. In the alternative, he asks for the court's recommendation that a Custody and Access Report be prepared, and that the matter be adjourned to a hearing with oral evidence. In her oral submissions, counsel for the father also asked the court to impose a "parallel parenting" regime, as referred to in the cases of *Varro* v. *Grossman*, [2003] S.J. No. 567 and *Broder* v. *Broder,* [1998], A.J. No. 1046. In the alternative, counsel for the father asked for an interim order for specified access similar to the access which was being exercised by the father over the spring and summer months of 2003. Finally she asked that I order the matter be set down for trial within four weeks of the Custody and Access Report being filed with the court.

[4] Counsel for the mother opposes this application on the basis that there has been no material change in circumstances and argues that the changes sought cannot be ordered until there is a trial of the issues.

CASE LAW

[5] Counsel for the mother provided the case of *R.E.W.* v. *R.E.W.,* [2003] B.C.J. No. 29, which quoted the Supreme Court of Canada case of *Gordon* v. *Goertz,* [1996] 2 S.C.R. 27, where Madam Justice McLachlin, as she then was, spoke about what was required to establish a material change in the circumstances of the child to support a variation application. She is quoted as follows, at para 14 of *R.E.W.*:

> 12. What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: Watson v. Watson (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: MacCallum v. MacCallum (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J.G. McLeod, Child Custody Law and Practice (1992), at p. 11-5.
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> 13. It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[6] Counsel for the father referred to the case of *Hama* v. *Werbes,* [1999] B.C.J. No. 596. There the British Columbia Supreme Court said at para 2, with respect to variations of interim orders:

> Interim proceedings are summary in their nature and provide a rough justice at best. Interim proceedings cannot be bogged down and traditionally have never been bogged down with the merits of the case.
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> The litigation process in this province is generally designed to resolve, at a *trial*, disputes between parties who are not otherwise able to resolve them. Family law disputes too often get bogged down on interim applications. Time and money that could be better used for other purposes, are spent dealing with them. Interim applications can also "add fuel to the fire" in acrimonious disputes. This can be particularly detrimental to any children who are involved in the dispute.
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> …

> If trial judges are not to get bogged down on interim applications, they certainly should not get bogged down on applications to vary interim orders. Therefore, interim orders, once made, should only be varied when there is a compelling change of circumstances, such that one or both parties would be seriously prejudiced by waiting until trial. (emphasis already added)

[7] Counsel for the father also referred to the *Varro* case, *supra*. That case was also an application to vary the access provisions of a consent judgment. It is not clear whether the judgment was interim or final. Nevertheless, the court said at para. 29:

> It is clear that variation is warranted as there has been a material change of circumstances as a result of the inability of the parties to work out a parenting arrangement in the best interests of their children.

[8] Counsel for the father also referred to the case of *Meadows* v. *Meadows*, [1991] O.J. No. 2478, where the Ontario Court of Justice said:

> Normally once an interim order has been made on an issue, the court hesitates to make a variation unless it can be established by information filed that a material change has taken place since the time of previous order.
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> …
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> Often the parties have little choice but to come back to motions court to seek a variance of the previous interim order. Even so, this process should only be countenanced if the party seeking the variation can first demonstrate by affidavit or other material that a material change has taken place after the date of the previous order.
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> …
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> Obviously life does not stand still. Children grow older. Their needs change. The work requirements of those who exercise care change. The parties should not have to come back to court when each change takes place. One would expect that in most cases parents would exercise judgment and a degree of flexibility when required.

[9] Finally, counsel for the father referred to *Belisle* v. *Poole,* [1994] O.J. No. 364, another decision of the Ontario Court of Justice. There, the mother had already agreed to change some of the access provisions in a divorce judgment, at the request of the father, but when the father subsequently sought to vary those access provisions, the mother opposed. She contended that there had been no material change in circumstances. The court commented at para 4 of the report:

> Notwithstanding her consent to the variations referred to, the [mother] argues that there has been no “change in the condition, means, needs or other circumstances” which warrants the further variation which is being sought. In my view, this is a contradiction. The appropriateness of making certain amendments was recognized by [the mother] and this was presumably on the basis of a material change of circumstances. It is not reasonable that the appropriate threshold has been met in order to permit some variation but not in relation to the more extensive relief which is been sought by [the father].

MEDIATION

[10] I feel compelled to say that this case seems to cry out for a mediated resolution. Although I will touch upon some of the detailed arguments between the parties about the issue of access, it appears to me to boil down to a dispute over specific access formulas and schedules, as referred to the affidavit material of both parties. The father prefers a schedule of five days, two days, two days and five days, alternating between the parties. Apparently, the mother has been prepared to consider an eight-day, four-day schedule or a ten-day, five-day schedule. Both parties have expressed a willingness to consider mediation and alternative proposals. Therefore, it is puzzling to me why the matter has not proceeded to mediation. Neither parent is alleging that the other would not provide proper care for the child. Litigation is expensive and the result is a solution imposed by a

judge rather than one emanating from the parties themselves. It is perhaps trite to say, in this day and age, that mediation is generally the preferred alternative in conflict between parties who have to continue to relate to one another to some degree or other. Obviously, that is the case between estranged parents of young children.

[11] Although the mother has indicated in court her consent to an order for mediation under s. 42(1) of the *Children's Act*, R.S.Y. 2002, c. 31, the father has not yet confirmed his request to do so. In fairness, the father has expressed a concern about the viability of mediation at this particular point in time, being just before the Christmas holidays. He is apparently concerned that a mediated settlement could not be achieved in sufficient time to allow for specified access over the Christmas holidays and that the longer the current situation continues, the more he is prejudiced.

[12] Even though I am making a decision on this matter on an interim basis, I would nevertheless encourage the parties to reconsider the mediation option before proceeding to a trial of the issues.

POSITIONS OF THE PARTIES

[13] Counsel for the father has framed the issues as follows:

1. Whether there has been a material change in circumstances to justify a variation of the interim order pursuant to s. 34 of the *Children's Act, supra?*
2. Whether such a variation on an interim basis can be done on a basis of affidavit evidence alone?
3. Whether a regime of parallel parenting is appropriate in the circumstances?

[14] With respect to the issue of material change in circumstances, counsel for the father asked me to consider four things:

1. The passage of time since the interim order.
2. The mother's agreement to increase access over the spring and summer months of 2003.
3. The fact that the father is now in a stable relationship and is able to provide an appropriate home for the child.
4. The fact that the relationship between the parties has recently deteriorated to the point where they can barely speak to each other.

[15] Counsel for the mother argues that the passage of time is not a reason to change. For example, the fact the child is now older is not a material change in circumstances, but rather one which was contemplated at the time that the Kenny Order was granted. Further, he says that the mother's willingness to increase access over the spring and summer months of 2003 is also a change which accommodates the increasing age of the child, but not a material change. Similarly, he says this change in access was contemplated by the Kenny Order. He downplays the father's increased commitment to spending time with the child as not being a material change in circumstances, but rather another change which was contemplated under terms of "reasonable and generous access" in the Kenny Order. Finally, he says that the inability of the parties to get along cannot constitute a material change in circumstances. He says that would be a "boot strap" argument, i.e. the father brings the court application, which creates further friction between the parties, and then the father says that since the parties are unable to get along, the court should grant the application.

[16] This last point is an attractive proposition, but one which I am ultimately compelled to reject for reasons which follow.

THE FACTS

[17] As to the facts, there are undoubtedly some areas of dispute. However, the disputed facts are not so significant as to prevent me from deciding this matter on an "interim interim" basis. In other words, to answer the father's second issue, I feel I can decide this application on the basis of affidavit evidence alone.

[18] In reviewing the facts, I was particularly struck by the apparently sudden and significant breakdown, during the late summer or early fall of this year, in the ability of the parties to agree on the terms of reasonable and generous access. What gave rise to this breakdown in communication is not particularly germane. According to the father, it was his expressed proposal to have the child's residence shared on a 50/50 basis. According to the mother, it was her expressed concern that the increased access over the past spring and summer was beginning to negatively affect the child's behaviour. What is germane is that the parties are now at the point where they can barely communicate, if at all.

[19] The father has stated in his affidavit # 2, para 40, that on or after November 13 past the mother did not want him to call her anymore on the telephone. He says he has complied with this request. The mother said in her affidavit #2, at para 49, that she and the father have had several telephone calls since then, but they have rapidly deteriorated into argument.

[20] The Kenny Order states that the father “is granted reasonable and generous access to the Child as agreed upon between the Parties.” The phrase “as agreed upon” could mean:

1. that the court was referring to an existing agreement between the parties;
2. that the order contemplated a future agreement between the parties; or
3. some combination of the two.

In any event, it is a necessary pre-condition for the father to be able to exercise reasonable and generous access that there be some form of agreement between the parties.

[21] At the moment, there appears to be no prospect of agreement between the parties. What is happening is that the mother is, by default, effectively determining the father’s access. The mother speaks in her affidavit material of making proposals, offers and requests to the father respecting access, however the father feels that the mother is dictating the terms of access.

[22] Counsel for the mother said in oral submissions that “she is willing to give him” flexible and increased access. It would be unfair of me to make too fine a point of that phrase, as it did not come from the mother herself, but it is representative of the father’s concern. Indeed, in the mother’s second affidavit, at para 21, she deposed that the father’s abandonment of his plans to move to Vancouver during the latter part of the summer “caused me to reimplement the access schedule that [the child] had become accustomed to prior to the [the father] stating that he was leaving the Yukon.”

[23] And later, in para 37 of the same affidavit, the mother used the following language: “When I reverted to the original access schedule in September, 2003 I offered [the father] that he could take [the child]…”

[24] I was also somewhat disturbed by the mother’s several references in her affidavit material to the past conduct of the father, apparently in an attempt to portray him negatively. I am referring to the mother’s second affidavit, paragraphs 4, 5, 9, 12 and 23.

[25] Pursuant to s. 30(2) of the *Children’s Act, supra,* the past conduct of the father is not relevant to a determination of an application for access to a child, unless the conduct is relevant to the ability of the person to care for the child. I find that these allegations, to the extent they are uncontradicted, are not relevant to the father’s ability to care for the child.

[26] I also find it significant that the father apparently attempted to resolve this dispute over access in two letters to the mother dated September 23 and October 15, 2003. According to the father in his first affidavit at paragraphs 16 and 17, these letters were not responded to by the mother. That was unchallenged by the mother and perhaps is indicative of her attitude toward the father over this conflict.

[27] It appears from the affidavit evidence that the mother did not raise any concerns about the behaviour of the child being adversely affected by the father’s increased access until the father raised his proposal for equally shared residency, or, as the mother put it in her second affidavit “a 50/50 split” on the father’s access (See paragraphs 16 through 19 of the mother’s second affidavit).

[28] It does not appear to be in dispute that the father has, in the last year or so, increased his interest and commitment in becoming a larger part of the child’s life. This

appears to be welcomed by the mother. Indeed, the access recorded by the father in the last 12 to 14 months, approximately, was not seriously disputed by the mother. There was some quibble about whether the father was exercising access on every weekend, however the father clarified that he did not intend to say that he was exercising access on every weekend. Rather, that he had access every second weekend and that in the intervening weeks he would have the child from Wednesday to Friday, with occasional returns being made on a Saturday, in the early afternoon. This would not necessarily conflict with the affidavit evidence of the mother, the mother's mother - Marie Beckley, or John Warder.

[29] There is no preponderance of evidence either way as to whether the increased access by the father over the late spring and summer months was detrimental to the child. The same can be said for the relative decrease (the mother says slight decrease) in access from September to date. The mother and father have conflicting views on the point. This supports the need for a Custody and Access Report for the long-term arrangements respecting the child.

[30] It is significant that the child has apparently begun to bond with the father's new common-law spouse. According to the father's first affidavit, paragraph 27, the child now calls the father's common-law spouse "Mama Lala", a name which the child chose herself. This circumstance is not challenged by the mother.

[31] It is also significant that the new home of the father and the home of the mother are in the same neighbourhood, approximately two blocks from each other (See the father's first affidavit, paragraph 20).

CONCLUSION

[32] In considering what is in the best interests of the child, I must, pursuant to s. 30(1) of the *Children's Act, supra,* take into account all the needs and circumstances of the child, including, in this case:

(a) the bonding, love, affection and emotional ties between the child and each parent and the members of each parent's family;

(b) the ability and willingness of each parent to care for and meet the child's needs;

(c) the permanence and stability of each parent's family unit; and

(d) the effect of restricting access by the father.

[33] In my view, the father would be prejudiced by being limited to the decreased access currently being permitted by the mother until the trial of these issues. I'm advised the trial is likely to be no sooner than 5 or 6 months from now. Also, during that intervening period, the father has no security that the current access may not be reduced even further, again by default, if he and the mother are unable to agree and the mother's position prevails.

[34] Returning to the language used by Madam Justice McLachlin in *Gordon* v. *Goertz,* in my view the Kenny Order might have been different had the current circumstances existed then. It simply seems illogical to me to presume that the Kenny Order, which was a consent order, would have been made in the present circumstances. Currently, the parties strongly disagree about what constitutes reasonable and generous access and, to make matters worse, are virtually unable to communicate about the subject. Further, the father's ability to meet the present needs of the child have changed

over the last year or so, both in terms of his level of interest and commitment, and in terms of his more stable family and home situation. This has apparently materially affected the child, particularly in her relationship with the father's common-law spouse. The current breakdown in the relationship between the mother and father was arguably not foreseen by the court at the time of the Kenny Order and, in my view, has materially affected the ability of both parents to meet the needs of the child.

[35] I conclude from the affidavit evidence that it would be in the best interests of the child to continue to have access to the father similar to that which was being exercised over the late spring and summer of this year. Until a Custody and Access Report is prepared it would be premature to make any decisions about shared residency or, indeed, about a parallel parenting regime.

[36] Accordingly, I request that the Director of Family and Children's Services undertake an investigation and prepare a Custody and Access Report, pursuant to s. 43(1) of the *Children's Act, supra*. In addition, I make the following order:

1. The Kenny Order will be varied as follows:

    (a) That the father is granted access to the child on the following basis:

        (i) Every second week, from 10 a.m. Friday until the following Monday at 12 noon, commencing Friday, December 19, 2003.

        (ii) During the week of December 22, 2003 only, from 2 p.m. Christmas day until 2 p.m. on Boxing Day, with access pick-up and drop off to be facilitated by Marie J. Beckley, or such other person as the parties may agree upon.

(iii) In the intervening weeks, where weekend access is not being exercised pursuant to para (i), from 12 noon on Wednesday until 10 a.m. the immediately following Friday.

(iv) The child's day care will be used by the parties for the purposes of dropping off and picking the child, to facilitate this access.

(v) This access schedule will apply through the Christmas holidays 2003, unless otherwise agreed in writing by the parties.

(b) Neither party is permitted to relocate from the Yukon Territory with the child until further order of this Court or upon receiving the written consent of the other party.

2. That this matter be set for a trial of the issues within four weeks of the Custody and Access Report being filed with the Court, the Court calendar permitting. Should the Director be unwilling or unable to prepare the requested Custody and Access Report, the parties may return to the Court for further direction.

[37] There will be no order for costs on this application.

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GOWER J.